

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 405 OF 2024
WITH
INTERIM APPLICATION NO. 15198 OF 2024

Ali Asgar Dekhani

...Appellant

Versus

Rosalina Menezes And Others

...Respondents

Mr. Sanjiv Sawant a/w. Mr. Abhishek Matkar and Mr. Uddhav Katkar,
for Appellant.

Mr. Abhishek R. Avachat a/w. Mr. S.H. Deshpande, for Respondents.

CORAM : M.M. SATHAYE, J.

DATE : 16th DECEMBER, 2024

P.C. :

1. Heard learned counsel for the parties on 06.12.2024. Respondents are served and necessary affidavit of service is filed.

2. This Appeal from Order is filed challenging the Order dated 23.02.2024 passed below Ex. 69 by Civil Judge, Senior Division, Pune in Special Civil Suit No. 100 of 2015. By the said impugned Order, the application filed by the Appellant/Plaintiff under Order 39 Rule 11 of Civil Procedure Code, 1908 ('CPC' for short) for striking out the defence of Respondent Nos. 3 and 4, is rejected.

3. Learned counsel for the Appellant submitted that by Order dated 10.08.2018 passed in the said suit below Ex. 42, the

Respondents were restrained from creating third-party interest and changing nature of the suit property. He pointed out that when the grant of interim injunction was challenged in this Court by Respondents, this Court, by Order dated 16.09.2019 passed in Appeal from Order No.376 of 2019, had ordered that construction of the upper floors as well as its use by Respondents for the purpose of school, shall not entitle them to claim equity and the construction and its use will be subject to the outcome of the suit. He further pointed out that it was also clarified by this Court that the application of the Appellant under Order 39 Rule 11 of CPC (the present application, which was pending before the Trial Court at that time), shall proceed without reference to the Order of the High Court and all contentions of the parties in that behalf were kept open.

4. He submitted that thereafter, the present application Ex.69 was continued.

5. It has come on record under the Court Commissioner's report that when the Commissioner visited the suit property on 26.09.2022, certain permanent construction in the form of cement pavement, shed and side margin area covered with metal squares and steel angles as well as a separate gate constructed for entering the side margin, was found. It is therefore submitted that a clear case for striking out the defence of Respondent Nos. 3 & 4 is made out.

6. Learned counsel for the Respondents, on the other hand, justified the impugned Order by submitting that the learned Trial

Judge has considered the material available on record and has rightly concluded that there is no breach of injunction and therefore, the case for striking out defence is not made out.

7. I have considered the submissions and perused the record. Perusal of the impugned Order shows that the aforesaid Commissioner's report does indicate that the court Commissioner's report was considered. Though the injunction Order was challenged in this Court, and though the Respondents were permitted to construct and use the upper floors for the purpose of school, it was clarified by this Court that the present application Ex. 69 which was pending at that time, under Order 39 Rule 11 of CPC, would be considered without reference to the said Order. In short, the Trial Court was at liberty to consider the case of breach of injunction *qua* striking out the defence on its own merits. In that view of the matter, the aspect of striking out the defence of Respondent Nos. 3 & 4 is required to be considered again in the light of the Commissioner's report and other evidence.

8. On a query from the Court, it is informed that the suit is at the stage of hearing and the evidence of the Appellant/Plaintiff is going on and as such the trial has commenced. In such circumstances, instead of considering the effect of the Commissioner's report as well as other evidence, on the aspect of striking out of the defence, in this Court for the first time, it is appropriate that the Trial Court considers the said aspect along with other issues and the Trial proceeds.

9. Hence, the **Appeal from Order** and pending **interim application**

are disposed of by passing following order.

- (a) The impugned Order is set aside.
- (b) The Trial Court is directed to consider the issue of striking out defence of Respondent Nos. 3 & 4 on the basis of evidence including the Commissioner's report and other evidence that may be led by the Appellant.
- (c) If such an issue is not framed, the Trial Court shall frame the issue regarding striking out the defence of Respondent Nos. 3 & 4. The suit will be decided on merits considering the finding on the said issue, that will be rendered.
- (d) Considering that the suit is of the year 2015 and 9 years have already passed, the learned Judge of Trial Court hearing the suit, is directed to hear the suit as expeditiously as possible.
- (e) The suit will be decided on its own merits, in accordance with law, without being influenced by the observations in this Order.

10. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)