

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.71 OF 2022
WITH
INTERIM APPLICATION 290 OF 2022**

SHIVAJI FAKIRA BHAMBARE } APPELLANT

V/S.

DASHRATH BABURAO NAIK } RESPONDENT

*** * * ***

**Mr. Girish Godoble i/by. Ms. Shruti Tulpule, Advocate for
the appellant.**

Mr. S.M. Sabrad, Advocate for the respondent.

**CORAM : SANDEEP K. SHINDE J.
(through Video Conference)**

RESERVED ON : JANUARY 24th, 2022.

PRONOUNCED ON: JANUARY 31st, 2022.

JUDGMENT :

1. This Appeal under Order XLIII, Rule 1(r) (Bombay Amendment) of the Code of Civil Procedure, 1908 ('CPC' for short) challenges, the order dated 10th December, 2021, by

which the learned District Judge-1, Niphad, District: Nashik, refused to restore the Regular Civil Appeal No.78 of 2012, which was dismissed for committing breach of the Undertaking to the Court, noted in the, order dated 27th April, 2011 passed in the First Appeal No.1638 of 2006.

2 In brief, facts of the case are as under;

Appellant was a defendant in Special Civil Suit No.41 of 2004, instituted by the respondent/plaintiff, seeking decree of specific performance of the contract dated 23rd April, 2004 qua land admeasuring 1H 83R (hereinafter called 'Suit Land'). Suit was decreed on 1st April, 2006. Whereafter, appellant filed First Appeal No.1638 of 2006 before this Court. It was admitted. Pending appeal, respondent/plaintiff, moved Civil Application No.836 of 2011 seeking, order of injunction to restrain the appellant, from creating third party rights in the suit property. On 27th April, 2011, this Court passed the following order:

“ Heard learned counsel for the parties. Learned counsel appearing for the respondents on instructions of the respondents states that the respondents do not intend to create third party rights in respect of the suit property till disposal of the Appeal. He further

submits that permission may be granted to create a charge on the suit property for the purpose of obtaining loan. Such a blanket permission cannot be granted as of today and as and when occasion arises, it will be open for the respondents to apply to the Court for seeking permission to create a charge on the suit property. If such an application is made, it will be considered on its own merits. The statement made by learned counsel for the respondent is accepted. In view of this statement, it is not necessary to grant any relief in this application.

Subject to what is observed above, application is disposed of.”

(emphasis supplied)

Later, due to enhancement in the pecuniary jurisdiction of the District Court, the First Appeal No.1638 of 2006 was transferred and re-numbered as Regular Civil Appeal No.78 of 2012 in District Court at Niphad.

3. In spite of Undertaking to the Court, appellant firstly in January, 2015 got mutated his wife's name, Mrs. Yamunabai Shivaji Bhambare as a co-owner in the revenue records of the suit property vide Mutation Entry No.3488. Whereafter, in breach of Undertaking, appellant permitted Dhanlaxmi Urban Co-operative Credit Society to create a charge on the suit property against the loan of Rs.50,000/- availed by him without permission of the Court. Thus, taking

note of breach of Undertaking dated 27th April, 2021 (as reproduced hereinabove), respondent-plaintiff, moved an application, below Exhibit-48, under Order 39 Rule 11(1) of the CPC, seeking dismissal of Regular Civil Appeal No.78 of 2012. The learned District Judge, Niphad vide order dated 30th January, 2019, allowed the application, below Exhibit-48, and as a consequence, dismissed the Regular Civil Appeal No.78 of 2012.

4. The Order dated 30th January, 2019 was challenged by the appellant-plaintiff, simultaneously in two proceedings; (i) Appeal from Order (St.) No.14411/2019 and another (ii) Second Appeal (St.) No.1862/2019. On 26th November, 2019, following order was passed :

- “1. *Heard learned counsel for the respective parties.*
2. *Admit.*
3. *No interim relief.*
4. *The appellant is at liberty to adopt procedure as contemplated under Sub-Rule 11 of Order 39 of Code of Civil Procedure.”*

. So far as proceedings in the Appeal from Order are

concerned, appellant was granted liberty to adopt proceedings contemplated under Sub-Rule (2) Rule 11 of Order 39 of CPC. Pursuant to the said liberty, appellant moved a Miscellaneous Civil Application No.75/2019 under Order 39 Rule 11(2) of the CPC, seeking restoration of Regular Civil Appeal No.78/2012.

5. Learned District Judge vide impugned order dated 10th December, 2021, rejected the Miscellaneous Civil Application, whereby he declined to restore Regular Civil Appeal. Hence, aggrieved plaintiff, has filed this Appeal from Order.

6. Heard Mr. Godbole, learned Senior Counsel for the appellant and Mr. Sabrad, learned Senior counsel for the respondents.

7. To appreciate the arguments of the respective Counsel, it would be appropriate to re-produce provisions of the Order 43, Rule 11(1) and (2) of the CPC:

“11. Procedure on parties defying orders of Court and committing breach of under-taking to the Court-

(1) Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding, gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such a party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.

(2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court.

Provided that before passing any order under this sub rule notice shall be given to the parties likely to be affected by the order to be passed.”

8. Rule 11 of Order 39, as introduced by the Bombay Amendment, provides for procedure on parties defying orders of the Court and/or committing any breach of the Undertaking to the Court. Mr. Godoble, learned Counsel for the appellant submitted that, sub-rule (2) of Rule 11 of Order 39 of the CPC, empowers the Court to restore the suit or proceedings, if the party that has been responsible for contravention or breach of Undertaking, makes amend for the contravention or breach, to the satisfaction of the Court. Thus, submitted that, if the suit is

dismissed for committing the breach of the Undertaking, yet, if the party responsible, remedied the breach or corrects the mistake, Court is empowered to restore the Suit on such terms and conditions, as it may deem fit to impose. Mr. Godbole, submitted that the appellant has remedied the breach and set right the position and therefore, there was no impediment, to restore the Appeal. In support of these submissions, Mr. Godbole would rely on the registered gift-deed, dated 13th December, 2019 executed by Yamunabai Shivaji Bhambare (wife of the appellant), in favour of appellant, by which she gifted, her interest in the suit property acquired or accrued upon entering her name in the record of rights. Mr. Godbole, therefore submitted, in this manner, mistake has been set right and at the present time, appellant is sole owner of the suit property. Therefore, contention is that, character of the suit property has been restored, as that was, prior to alteration of records of right and in this way suit property has been preserved. In the alternative, Mr. Godbole submitted that, even otherwise suit property being self-acquired property of the appellant, mere revenue entry in the name of his wife as a

co-owner, neither creates nor extinguishes his title to the suit property and therefore appellant has not created third party rights. Mr. Godoble, would also submit that the loan amount of Dhanalaxmi Urban Co-operative Credit Society has been repaid and the charge on the suit property has been deleted. Submission is that, the learned District Judge, while exercising jurisdiction under sub-rule (2) Rule 11 of Order 39 of the CPC, has fully ignored that the appellant has remedied the breach of Undertaking. Nextly, he submitted that, First Appeal being substantive statutory right of the appellant, in consideration of the facts of the case and in the interest of justice, order dated 10th December, 2021 passed in exercise of jurisdiction under sub-rule 2 Rule 11 of Order 39 of CPC be quashed and set aside and Regular Civil Appeal No.78/2012, be restored to file on such terms and conditions, the Court may deem it proper.

9. Mr. Sabrad, learned Counsel for the respondent, justified the impugned order and would submit, that inspite of the Undertaking to this Court, the appellant created rights in his wife's favour deliberately and that too in breach of order

dated 27th April, 2011 passed by this Court. Mr. Sabrad, nextly submitted that, after recording wife's name as a co-owner, charge of Dhanlaxmi Credit Co-operative Society, was permitted to be created on the suit property without court's permission. It was another breach. Mr. Sabrad, therefore submitted, acts and/or omissions of the appellant were willful and in complete disregard to order of and/or Undertaking to the Court. Mr. Sabrad, contended, besides, creating third party rights, the appellant, through his son and daughter, sought their impleadment as party respondents in Regular Civil Appeal No.78/2012. Mr. Sabrad, submitted that, all possible efforts were made by the appellant to frustrate the Decree by one way or another and has not approached the Court with, clean hands and as such the order impugned cannot be faulted with and no interference is called for in the said order.

10. I have carefully considered the submissions of the learned Counsel for the parties and perused the material and the orders passed in various proceedings between the parties at different stages. The fact cannot be ignored that the

possession decree in suit for specific performance of contract, has been passed in favour of respondent-plaintiff in 2006. Whereafter, in First Appeal, order dated 27th April 2011, recorded appellant's Undertaking that, he would neither create third party interest in the property till the disposal of Appeal nor would create, charge on it, without the permission of the Court. In spite of this Undertaking, appellant caused to enter his wife's name in the record of rights, as a co-owner. Application, filed by the appellant in the office of Tahsildar for recording mutation entry, does not disclose his Undertaking to this Court, nor Affidavit filed in support of the application, refers to pending First Appeal proceedings. Although, the entry in the revenue record does not confer title, on whose name appears in the records of rights, yet, act and/or omissions, on the part of the appellant, were in clear breach of Undertaking to this Court, the obvious purpose of which was to frustrate the Decree. Going one step ahead, leave aside breach of Undertaking, it may be noted that, appellant's son and daughter also sought their impleadment in Appeal as necessary parties, claiming undivided share in the suit

property, although evidence shows, it was a self-acquired property of the appellant. The impleadment request was rejected even by this Court in Writ Petitions No.1202/2016 and 1204/2016 filed by appellant's married daughter and son. After which, appellant's son and daughter, sought review of orders passed in the Writ Petitions through the same Advocate who now, represents the appellant. These facts, if taken together, reinforces the conclusion that, appellant's acts/omissions, were not bonafide but willful, deliberate and the plain purpose was to frustrate the Decree.

11. Here the question, falls for consideration, is Whether,
 - (1) appellant has shown sufficient cause for restoring the appeal, AND
 - (2) Gift-Deed dated 13th December 2019, amends or set-right the breach.

Thus, to be understood, that, party that has been responsible to breach has to show, that breach was not deliberate or willful and the circumstances, in which he was compelled to commit breach. Therefore, if the facts of the case indicate that, breach

of Undertaking has been committed, not in compelling circumstances or in the circumstances beyond the reach and although the party responsible for breach, amends the breach, by and that itself, he cannot seek restoration of the suit/proceedings dismissed for committing breach. In essence, the expression “sufficient cause” used in Rule-2 is to be read and understood in the context of the circumstances, in which a breach has been committed. Therefore, if a party commits willful default of the Undertaking, he cannot be permitted to take advantage of his own wrong or else it would frustrate the object of the Rule 11 of Order 39 of Civil Procedure Code.

12. Indisputably, respondent-plaintiff, moved an application below Exhibit-48 under Rule 11(1) of Order 39 on 29th January 2018, seeking dismissal of Appeal for breach of Undertaking. Appellant filed a reply to it, in February, 2018. However, by then, in 2015, appellant had permitted Co-operative Credit Society to create a charge on the suit property, without court permission, as well, had entered his wife’s name as a co-owner in record of rights of the suit land. Be it noted

that, paragraph-3 of the reply, appellant denied the 'Undertaking' and also denied statement made by his Advocate, that appellant would not create third party interest in the suit land. Factually speaking, contents of para-3 of reply, were nothing less then contemptuous, to read as under :

३. अर्ज कलम ३ यातील स्पे.मु.नं ४१/०४ चे निकालावर अपेलट यांनी मा.ना.उच्च न्यायालयात पहिले दि.अपील नं १६३८/२००६ चे दाखल केले ..हे म्हणणे खरे आहे परंतु दिवाणी चौ.अर्ज नं ८३६/२०११ चे संदर्भातील मजकुर खरा नाही व या अपेलट यांना मान्य व कबुल नाही. तसेच मा.ना.उच्च न्यायालयात अपेलट यांचे वकीलांनी स्टेटमेंट दिल्याचा मजकुर खरा नाही तसेच दि. २८/४/२०११ रोजीचे मा.उच्च न्यायालयाचे हुक्मानुसार अपेलट यांना सदर मिळकत कोणासही हस्तांतरीत करण्याचा अधिकार नाही वगैरे मजकुर खरा व बरोबर नसुन या अपेलट यांना मान्य व कबुल नाही.

(emphasized)

Thus, it could be seen from reply that, appellant justified his acts by ignoring and contending that, contents of Undertaking were not true and his Advocate did not gave Undertaking as recorded in order. If that be so, now the appellant cannot argue that, entry in record of rights does not confer title on person whose name has been recorded and further appellant has set-right the mistake. This fact, reflects

on the conduct of the appellant. Additionally, it may stated that, it is only after 29th November, 2019, when this Court declined to stay the execution of the Decree, appellant mend his ways and got executed gift-deed in his favour on 12th December, 2019, followed by an application filed on 19th December, 2019 under sub-rule (2) Rule 11 of Order 39 of CPC, in view of the liberty availed/granted by this Court.

13. The facts aforestated therefore show, the appellant mended his way to remedy the breach of Undertaking, as a last resort, when this Court declined to stay the execution of Decree and refused to restore the Civil Appeal. Therefore, acts/omissions and conduct of the appellant, was, 'relevant fact', under Section 8 of the Evidence Act, as it has influenced 'fact-in-issue' i.e. whether appellant has shown, sufficient cause for restoring the Appeal, that was dismissed for committing breach of Undertaking.

14. The Hon'ble Apex Court in the case of **Babbar Sewing Machine Company Versus. Trilok Nath Mahajan, AIR 1978 SC**

1436 has held that;

“ An order striking out the defence under Order 11 Rule 21 of the Code, should therefore not be made unless there has been obstinacy or contumacy on the part of the defendant or willful attempt to disregard the order of the Court and Rule must be worked with caution and may be made use of as last resort. ””

15. The facts born out of the record, unerringly point to, willful ‘breach of Undertaking by the appellant’. His reply to application (reproduced in para-12) shows, appellant did not intend at all, to mend the breach/mistake. It is clearly evident from the, gift-deed (dated 13th December, 2019) which has been executed, only after this Court, declined to stay the execution of the decree. It was afterthought. Thus, to be held, the breach was “willful” and not committed in compelling circumstances. Obviously, facts of the case do not show ‘sufficient cause’ to restore the Appeal. Therefore, order impugned requires no interference. In the result, Appeal

from Order is dismissed.

16. With disposal of the Appeal from Order, Interim Application No.290/2022 becomes infructuous and does not survive. The same is accordingly disposed of.

17. At the request of the appellant, execution of possession warrant issued in Special Darkhast No.23/2007, pending on the file of Joint Civil Judge Senior Division, Niphad, is stayed for a period of two weeks i.e. upto 14th February, 2022.

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(SANDEEP K. SHINDE, J.)