

CASE NO.:
Appeal (civil) 4730 of 1996

PETITIONER:
Milind Moreshwar Kowley

RESPONDENT:
Manohar Bhaskar Kowley (Dead) by L.Rs.and others

DATE OF JUDGMENT: 12/05/2006

BENCH:
B.P. SINGH & S.B. SINHA

JUDGMENT:
J U D G M E N T

WITH
CIVIL APPEAL NO.4731 OF 1996
Moreshwar Bhaskar Kowley and another
Versus
Manohar Bhaskar Kowley (Dead) by L.Rs.
and others

\005 Appellants

\005 Respondents

B.P. SINGH, J.

These appeals by special leave are directed against the common judgment and order of the High Court of Judicature at Bombay in Civil Appeal Nos. 277 of 1994 and 368 of 1994. By its impugned judgment and order a Division Bench of the High Court affirmed the orders of the learned trial judge on the original side of the High Court dated November 11, 1993 dismissing Notice of Motion Nos.2141 and 2383 of 1988 and 2392 of 1989. The learned Judge, however, allowed Chamber Summons No.294 of 1989 filed by the plaintiff in Suit No.618 of 1967.

In Civil Appeal No. 4730 of 1996 Milind Moreshwar Kowley is the appellant. He is the plaintiff in Suit No.2493 of 1988 and the applicant in Notice of Motion No.2392 of 1989. His appeal before the Division Bench of the High Court was registered as Civil Appeal No.277 of 1994.

The appellants in Civil Appeal No.4731 of 1996 were defendants 1 and 2 in Suit No.618 of 1967, who had filed Notice of Motion Nos.2141 and 2383 of 1988 before the trial court which were dismissed by the common Order of November 11, 1993. Their appeal was registered as Civil Appeal No.368 of 1994. At the threshold, we may notice that the Notice of Motion were taken out for grant of interim orders which were rejected by the trial court and affirmed by the Appellate Bench of the High Court.

The case has a long chequered history and having regard to the manner in which the litigation has been carried on, the High Court appears to be justified in observing that the litigation has been carried on by the members of the family incurring huge expenses only to delay the proceedings and to avoid execution of a consent decree by raising frivolous contentions. We may, however, add that since we are dealing with appeals against orders refusing interim relief, any observation made by us should not be construed as expression of final opinion so as to adversely affect the rights of the parties in the pending litigation.

It is necessary to notice the various proceedings taken in the courts below with a view to appreciate the submissions urged before us.

We may also notice at this stage that the plaintiff in Suit No.2493 of 1988 which was filed by him several years after attaining majority is the son of defendant No.1 in Suit No.618 of 1967 and one of the appellants in Appeal No.368 of 1994. In the aforesaid Suit No.618 of 1967, a consent decree was passed which has given rise to the litigation that followed. We shall first refer to the facts of Suit No.618 of 1967.

One Bhaskar Anant Kowley died in the year 1957 leaving behind four sons and four daughters and his widow. A suit for partition was filed by one of his sons and the defendants in the suit were his three brothers and four married sisters. Bhaskar Kowley left behind five plots in the Town Planning Scheme, Bombay City No.IV (Mahim area). Four of the plots were built upon and were occupied by the members of the Kowley family and their tenants, while one of the plots was vacant and had been reserved for public purpose under the town planning scheme. Many of the shops in the building had been let out to tenants. Since disputes arose between the members of the family, Suit No.618 of 1967 was filed by Manohar Kowley for partition by metes and bounds. In the Suit filed on October 6, 1967, the plaintiff claimed that he as well as his brothers had 99/432 share each in the Suit schedule properties. In the said suit a receiver was appointed on April 6, 1968 who started collecting the rents etc. from the tenants. A preliminary decree of partition dated September 17, 1975 was passed by consent to the effect that the sons had 99/432 share each while the daughters had 9/432 share each. A Commissioner was appointed to ascertain and determine the shares of the parties and to partition the same by metes and bounds. The Commissioner submitted his report on June 29, 1979 to which exceptions were filed by some of the defendants. Ultimately a final decree was passed on February 28, 1980 by consent of parties and the consent terms were signed by all the defendants of the Suit. Two of the brothers namely, Moreswar (father of the plaintiff) in Suit No.2493 of 1988 and Hareshwar represented their branches as Kartas. The consent decree provided that the defendants shall within one month from the date of decree bring offers from intending purchasers for purchase of four plots and the right, title and interest in the 5th plot in one lot on as is where is basis. The offer was to remain open for nine weeks from the date of opening and that the defendants shall hand over vacant possession to the intended purchaser of the structures occupied by them and standing on Final Plot No.982. The offers were to be opened in the presence of the plaintiff and the defendants and their respective advocates. The decree also provided that the plaintiff shall have first right to exercise the option to purchase the said plots on the terms and conditions as set out in the consent terms at the highest price offered by the intending purchasers. The plaintiff was required to exercise his option within four weeks from the opening of the offer and if he decided to exercise his option to purchase the plots he was required to deposit the amount on or before December 31, 1980. In case he did not exercise the option to purchase the plots the defendants shall have the right to exercise the option to purchase the plots.

For one reason or the other, the parties could not take steps pursuant to the consent decree passed in February, 1980. Ultimately, a Chamber Summons was taken out for extension of time which was disposed of on August 13, 1985 when the parties again entered into consent terms providing for variation of the consent decree passed earlier. The variation was only to the extent that both the plaintiff as well as the defendants were at liberty to bring the offers for purchase of the properties on or before September 27, 1985. No further extension was to be granted. The offers received were to be opened by M/s Markand Gandhi & Company, Attorneys, in the presence of the parties and the plaintiff was given the first option to purchase the properties with reference to the highest offer. Accordingly, offers were received and M/s Markand Gandhi and Company determined that the highest offer received was Rs.30,00,000/-. It is not necessary to refer to some other proceedings taken by the plaintiff, but suffice it to say that on November 5, 1985, the plaintiff was given further time to exercise his option. Appeals were preferred against the aforesaid order but were dismissed on January 30, 1986. The plaintiff, however, was given liberty to

exercise option till February 14, 1986 and the sale was to be completed by January 30, 1987. The plaintiff exercised his option on February 13, 1986 and deposited a sum of Rs.3,00,000/- representing 10% of the price on February 20, 1986. Some difficulties arose on account of the fact that some of the defendants were not willing to sign the agreement necessitating extension of time for completion of sale. The executing Court directed that the sale be completed within a period of 9 months from the date of signing of the agreement. The agreements were signed by Moreshwar (father of plaintiff in Suit No.2493 of 1988), his wife and one of his two sons namely, Sanjay on August 15, 1987. He had earlier taken out Notice of Motion on June 10, 1987 seeking modification of consent terms. The plaintiff made a grievance that the defendants were deliberately delaying signing of the agreement and, therefore, the Court should direct the Prothonotary and Senior Master to sign the agreement on behalf of the defaulting defendants in case they did not sign the agreement before August 10, 1987. An order was passed accordingly. Some of the other defendants, however, did not sign the document and ultimately on application of the plaintiff, the Prothonotary and Senior Master was directed to sign the documents by March 22, 1988.

Difficulties then arose on account of the statutory provisions of the Income Tax Act which required that the agreement to sell should be signed not only by the parties to the Suit but also by other members whom the parties represented in the capacity of Karta or Manager. Thus, the authorities required that the plaintiff in Suit No.2493 of 1988 who had become major in the year 1981 should also sign the agreement. The aforesaid Milind Kowley, Plaintiff in Suit No.2493 of 1988 objected to his being compelled to sign the agreement and contended that he was a minor when the consent decree was passed on February 28, 1980. After he attained majority on November 17, 1981, he repudiated the consent decree as not binding on him. A Review Petition filed by him was dismissed and thereafter Prothonotary and Senior Master signed on his behalf as well on March 22, 1988, the Prothonotary and Senior Master was also directed to complete the other formalities required by the Income Tax authorities and after that was done, the Income Tax authorities issued clearance certificate on August 31, 1988 enabling the plaintiff to complete the sale transaction.

Despite all that was done the defendants were not satisfied and they took out Notices of Motion contending that the decree was not executable in view of the fact that the decree holder had committed breach of consent terms. While these proceedings were pending Milind, the son of Moreshwar instituted Suit No.2493 of 1988 on August 16, 1988. He claimed that he was minor when the consent decree was passed on February 28, 1980 which was not binding on him. The signing of the agreement on his behalf by the Prothonotary and Senior Master was also not binding on him. He had attained majority on November 17, 1981 but he could not file the Suit earlier since he was not aware of the pending litigation between his father and uncles and that it was only in August, 1987 that he came to know that his father and his uncles were meeting often in connection with the execution of the consent decree. He could, therefore, file a Suit only in the year 1988. A year after filing of the Suit he sought interim relief restraining the decree holder from seeking execution of the conveyance deed. For this he took out Notice of Motion No. 2392 of 1989.

In this manner, the trial court was seized of three proceedings, namely two Notices of Motion taken out by the father and uncles of Milind (defendants 1 and 2 in the first suit) and the Notice of Motion taken out by Milind, the plaintiff in second Suit No.2493 of 1988. The decree holder also took out Chamber Summons No.294 of 1989 seeking direction to the Prothonotary and Senior Master to execute the conveyance. The trial court by its common order of September 11, 1993 dismissed all the three Notices of Motion and allowed the Chamber Summons taken out by the plaintiff in Suit No.618 of 1967. The trial court held that prima facie, the suit filed by Milind, namely, Suit No.2493 of 1988 was barred by limitation, and perhaps filed at the behest of his father Moreshwar. It also negatived the contention

that the period for completion of the sale deed had expired and, therefore, the consent decree was not executable. It also held that there was no substance in the submission that the provisions of Order 23, Rule 3B of the Code of Civil Procedure were not complied with and, therefore, consent decree was invalid.

Arising out of the common order of the trial court dated September 11, 1993, two appeals were filed before the High Court, namely, Civil Appeal No. 277 of 1994 arising out of Suit No.2493 of 1988 filed by Milind, and Civil Appeal No.368 of 1994 filed by defendants 1 and 2 in Suit No.618 of 1967 namely, the father and uncles of plaintiff Milind in the subsequent Suit. Both the appeals have been dismissed by the High Court and, therefore, these appeals by special leave.

Before advertng to the findings recorded by the trial court and the appellate court, we may notice the prayers made in the Notices of Motion taken out by defendants 1 and 2 in Suit No.618 of 1967. They are substantially in the same terms. The relevant part of the Notice of Motion No.2141 of 1988 reads as follows:-

"(a) That this Hon'ble Court be pleased to grant the Defendant No.2 leave to sell, assign, transfer and otherwise dispose of his entire Undivided share and all the right, title and interest in or to the suit property being more particularly described in paragraphs 1 to 3 to Exhibit 'A' to the Plaint as also described in the schedule hereto as decreed by the preliminary decree dated 17.9.1975; (b) That the Court Receiver, High Court, Bombay appointed as Receiver of the suit property being more particularly described in paragraphs 1 to 3 of Exhibit 'A' to the plaint as also more particularly described in the Schedule hereto the order dated 21.4.1968 passed by this Hon'ble Court be discharged to the extent of the entire undivided share and all right, title and interest of the Defendant No.1 in or to the suit property as aforesaid as decreed by the preliminary decree dated 17.9.1975; (c) That this Hon'ble Court be pleased to place the exceptions dated 21.7.1979 filed by the defendant No.1 to the report of the Commissioner for taking accounts dated 29.6.79, on board for hearing; (d) for costs of this Notice of Motion".

The Notice of Motion taken out by the plaintiff in Suit No.2493 of 1988 is as follows :-

"(a) that this Hon'ble Court be pleased, pending the hearing and final disposal of this suit to temporarily restrain the defendants, their heirs, nominees, servants and agents from in any manner acting upon or under or pursuant to or in furtherance of the agreement for sale (Exhibit 'H' to the Plaintiff). (b) that pending the hearing and final disposal of this suit, this Hon'ble Court be pleased to stay the operation of the consent decree dated 28.2.1980 (Exhibit 'C' to the Plaintiff) and the consent decree dated 13th August, 1985 (Exhibit 'D' to the Plaintiff). (c) that defendant No.19 appointed as Court Receiver in Suit No.618 of 1967 be appointed Receiver of the 99/1728 undivided share of the Plaintiff abovenamed in the property more particularly described in the schedule Exhibit "B" annexed to the Plaintiff. (d) for costs of this Notice of Motion".

It would thus appear that in the Notices of Motion, certain interim

reliefs were asked for, completely giving a go by to the consent decree earlier passed in Suit No.618 of 1967. On the other hand, the plaintiff in Suit No.618 of 1967 took out Chamber Summons, in effect praying for execution of the decree.

We shall first deal with Notice of Motion No.2141 of 1988 in Suit No.618 of 1967. Before the trial court, it was argued on behalf of the defendant No.1 in support of the Notice of Motion taken out by him that the plaintiff had committed breach of the agreement for sale as also the terms of the consent decree, inasmuch as after depositing an amount representing 10% of the sale price, he failed to deposit the balance 90% amounting to Rs.27,000,00/- within the stipulated time or the extended time granted by the Court. Thus, the agreement stood terminated and the decree stood revoked. The parties, therefore, stood relegated to the position they occupied before the consent decree was passed. On the other hand, the plaintiff contended that there was no default committed by him in depositing 90% of the purchase price as alleged. The agreement for sale executed on August 14, 1987 or on March 22, 1988 provided for payment of 90% of the purchase price only at the time of completion of sale. If there was delay, it was on account of the conduct of the defendants who avoided to sign the agreement and raised frivolous objections at every stage. In fact, they were unwilling to complete the sale. Reliance was placed on Clause 3 of the agreement which provided that the balance purchase price was to be paid by the purchasers to the Vendor at the time of completion of sale. The trial court exhaustively considered the material on record and came to conclusion that the defendants were themselves guilty of delaying execution of the agreement of sale while the plaintiff was always ready and willing to make the payment for which he had made necessary arrangements. It, further, noticed that some delay was occasioned on account of the Income Tax authorities insisting on the completion of formalities required for issuance of a No Objection Certificate. This clearance had necessarily to be obtained from the Income Tax authorities, but frivolous objections were raised by the defendants as well as the plaintiff in Suit No.2493 of 1988, who not only refused to sign the agreement but also the requisite forms required by the concerned department. The Trial Judge therefore, held that there was an attempt on the part of the defendants to avoid execution of the sale deed in terms of the consent decree. The payment of the balance amount was to be made simultaneously with the completion of the sale, which could not take place in view of the delaying tactics adopted by the defendants. Having noticed the material on record, the trial court dismissed the Notice of Motion taken out by defendant No.1 in suit No.618 of 1967.

The Division Bench which heard the appeals also considered the material on record and agreed with the finding of the trial court on this issue. It concluded :

"The delay in completing the sale is because of the delaying tactics adopted by the judgment debtor and because of intervention of the statutory provisions which the parties had never contemplated. The decree passed by the Court cannot be defeated by factors which were beyond control of the decree holder".

We have earlier noticed the facts of the case and the proceedings taken by the parties in the two suits. We have also noticed the proceedings taken by the parties. The facts noticed by us, are themselves sufficient to confirm the finding recorded by the High Court. The defendants, as it appears from the material on record, acquired an obstructive attitude. They did not permit the sale to be completed. Some of them refused to sign the agreement which compelled the plaintiff to move the Court for a direction to the Prothonotary and Senior Master to execute the agreement on behalf of the non signing defendants. Frivolous objections were taken by them when it was discovered that a clearance had to be taken from the Income tax Authorities to execute the sale deed, since the value of the property involved

was more than Rs.10,000,00/-. There was refusal even to sign the requisite forms necessary for obtaining the no objection certificate. Apart from lack of co-operation in doing what they were required to do, they also resorted to multifarious proceedings which further withheld the completion of the sale. The courts below have concurrently found that the plaintiff was always ready and willing to deposit the balance amount representing 90% of the purchase price but on account of the practice adopted by some of the defendants he could not do so. The agreement as well as the consent decree provided for deposit of the balance amount on completion of the sale, meaning thereby, that simultaneously with the completion of the sale, and the formalities relating to execution of sale deed, the plaintiff was required to deposit the balance amount. We are informed that the balance was deposited on July 20, 1994 soon after the judgment of the Division Bench impugned in these appeals.

Having considered all aspects of the matter, we find no reason to interfere with the concurrent findings recorded by the trial court as well as the Appellate Bench of the High Court. We, therefore, find no merit in Civil Appeal No.368 of 1994.

We shall not take up for consideration Notice of Motion No.2392 of 1989 filed by plaintiff Milind in Suit No. 2493 of 1988. We may recapitulate some of the facts. The preliminary decree was passed on September 17, 1975 and the final decree followed on February 28, 1980. The decree was varied to some extent on August 13, 1985, though as found by the courts below the variation was only with regard to the mode of sale. In the earlier consent decree only the defendants were required to bring purchasers for the plots in question but under the modified decree as passed on August 13, 1985 even the plaintiff was permitted to bring purchasers apart from the defendants. The rest of the terms and conditions were substantially the same with extension of time granted to complete the formalities.

The plaintiff Milind attained majority on November 17, 1981. He filed a Suit on August 16, 1988 i.e. roughly 7 years after attaining majority. While considering the prayer for grant of interim relief, the Court considered the limitation aspect of the matter, not with a view to pronounce a final verdict on that question, but with a view to considering the justification for passing an interim order as prayed for in the Notice of Motion. The plea of the plaintiff was that he did not know about the pendency of the suit and the passing of the decree in the suit namely, Suit No.618 of 1967. For the first time, he came to know about the passing of the decree some time in August 1987, when he noticed that the defendants were having frequent meetings. The trial court found that this assertion of the plaintiff was belied by the material on record. It has recorded in paragraph 6 of its judgment, several reasons why it was not possible to believe that the plaintiff Milind, who was the son of Moreshwar, defendant No.1 in the earlier suit, was unaware of the passing of the consent decree so that he could not file a suit within the period of limitation prescribed by law, namely three years. In this connection, the learned Judge found that on September 30, 1985 the plaintiff was present before Markand Gandhi, Attorney, when the offers received were considered. He was also present at the meeting before the Court Receiver on December 19, 1986. He also attended the office of the Prothonotary and Senior Master on November 24, 1986, on the request of his father. The plaintiff had himself affirmed affidavits in the suit proceedings averring that he was fully conversant with the facts of the case. He was also present in Court on 15th July, 1987 and 24th July, 1987. All these facts proved that the case pleaded by the plaintiff that he came to know about the passing of the decree sometime in August, 1987 was not true.

The Appellate Bench also agreed with the finding recorded by the Trial court. In particular the appellate court noticed the letter of March 26, 1984 addressed by the plaintiff Milind to the Court Receiver informing the Court Receiver that his father defendant No.1, in the earlier suit, had gone out of town and that one Arvind, occupant of a room in the structure was

indulging in destruction of property and that the Court Receiver should take steps to carry out repair works and prevent further damage. It also noticed the minutes recorded by the Court Receiver on December 13, 1986 of the meeting held in his office in which the plaintiff was present on behalf of his father. It also noticed the affidavit filed by the plaintiff, on behalf of his father, affirmed on March 31, 1987 reiterating and confirming the statements made by his father in the affidavit of the same date. Thus the Court held that right from the year 1984 onwards Milind was fully aware of the decree and, therefore, it was futile to claim that he became aware of the consent decree only in the first week of August, 1987.

Similarly, the trial court considered the objection raised by the plaintiff on the ground of non-compliance of Order 23 Rule 3-B of the Code of Civil Procedure. Two submissions were advanced on behalf of the plaintiff, namely, that the Court had not granted leave to enter into a compromise in the suit which was of a representative character and secondly, that no notice was issued to the plaintiff in the said proceeding. The trial court negatived the contention holding that the suit had been filed for partition of the joint family properties and, therefore, it was not necessary to join the minor sons, who were represented by their respective Kartas. The father of the plaintiff represented him in the suit. The consent decree read as a whole made it clear that the Court which passed the decree was conscious of the fact that the suit was for partition of the joint family properties. The Court also recorded provided that the said sale was for the benefit of minors interested in the property and that the respective fathers of such minors would stand appointed as guardians with power to execute conveyance and to pass valid receipts, and that the share coming to the minors would be deposited with the Accounts Officer of the Court. There was, therefore, substantial compliance of Order 23 Rule 3-B of the Code of Civil Procedure since the Court had taken care of the interest of these minors who were not party to the suit. It was, therefore, apparent that the Court had granted leave under the said Rule. Rejecting the contention that the consent order of August 13, 1985 was a fresh decree passed after the plaintiff had attained majority without hearing him, the trial court held that the decree passed on February 28, 1980 was, in fact, confirmed by the subsequent decree and only the mode of sale was varied by the consent order of August 13, 1985. In any event, Order 23 Rule 3-B was not applicable to execution proceedings and the variation of Order dated August 13, 1985 was, merely, in execution of consent decree dated February 28, 1980. This aspect of the matter, according to the trial court, stood concluded by the order of Suresh, J, in the review petition filed by the plaintiff which was not appealed against. The trial Judge therefore, found no merit in the Notice of Motion taken out by the plaintiff.

The Appellate Court also considered the material on record and came to the same conclusion. It rejected the submission that the consent decree was void as the leave of the Court was not expressly recorded in the proceedings and that such leave could not have been granted without notice to the plaintiff and his brothers who were interested in the properties in suit. It held that it was not correct to say that the leave of the Court was not expressly recorded in the proceedings. The fact that the consent terms were tendered in Court and the Court proceeded to pass decree in accordance with the consent terms was sufficient to hold that the leave of the Court was expressly recorded. It was not necessary to use particular words to record the leave of the Court, and the fact that the Court proceeded to pass the consent decree was sufficient indication that the Court had granted leave. It further held that issuance of notice as contemplated in sub-rule 3-B of Order 23 of Code of Civil Procedure was not mandatory, and in case the Court found that all parties interested in the suit had joined in the consent terms and were fully conscious of consent terms, then issuance of notice was an empty formality. On the facts and circumstances of the case, it was held that the Court was fully satisfied that the two sons of Moreshwar, namely, the plaintiff and his brother were fully conscious of the consent terms. It also noted that it was not the case of the plaintiff that by entering into consent decree his father had affected his interest to his detriment. The complaint

was only about compliance with the procedure envisaged by Rule 3B of Order 23 of the Code of Civil Procedure.

We have been taken through the findings recorded by the trial court as well as by the appellate court. They have recorded concurrent findings while rejecting the Notice of Motion praying for interim relief. It is true that the findings recorded are tentative and only for the purpose of disposal of the Notice of Motion. The plaintiff's suit is pending and the merit of his claim will have to be judged in the Suit on the basis of the evidence on record. However, we do not find that any error has been committed by the High Court in refusing interim relief. The trial court as well as the appellate bench have exhaustively dealt with the submissions urged before them and the material on record and applied their mind to the issues raised before them. They have concurrently found that there was no justification for issuance of an interim order as prayed for in the Notice of Motion. They have not taken into account any extraneous matter, nor do we find any perversity in the appreciation of the material on record. The findings of the Courts below are concurrent and based on the material on record. We have found nothing which can justify our taking a different view. We, therefore, find no justification for interfering with the order passed by the High Court.

In the result, we find no merit in the appeals and they are accordingly, dismissed but without any order as to costs.