IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1762 OF 2015

Shafi Ahmed Ibrahim alias
Shaikh Mohammed Shafi Ibrahim : Petitioner.
Versus
M/s.Golden Palm Infrastructure and ors. : Respondents.

Mr. S C Wakankar for the Petitioner.
Dr. Milind Sathe, Senior Advocate a/w Mr. Mustafa Kachwala a/w Mr. Rakesh Misar a/w Mr. Jayant Pande and Mr. Sameer i/by Kachwala Misar & Co. for the Respondent No.1.
Mr. Manoj Badgujar i/by Mr. A P Kulkarni for the Respondent Nos.2 and 3.

CORAM : R. M. SAVANT, J.
DATE : 29th October 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 03/01/2015 passed by the learned District Judge-9 Pune by which order the Misc. Civil Appeal No. 418 of 2014 filed by the Respondent No.1 herein i.e. the original Defendant No.3 came to be allowed and resultantly the order dated 02/05/2014 passed by the Trial Court i.e. the learned Civil Judge, Junior division (PMC Court), Pune allowing the application (Exhibit 5) in Regular Civil Suit No.2310 of 2013 came to be set aside and in turn the application (Exhibit 5) came to be rejected.

2 It is not necessary to burden this order with unnecessary details having regard to the nature of the directions to be issued. Suffice it would be

to state that the suit in question has been filed by the Plaintiff for declaration and injunction in respect of the suit properties which are mentioned in paragraph 1 of the plaint in clauses (a) to (d) thereof. The suit properties are the plots of land bearing Survey No.66 Hissa No.10, Survey No.66, Hissa No.17, Survey No.66 Hissa No.18 and Survey No.66 Hissa No.10 (old). The cause of action for filing the suit was the sanction of the plans by the Pune Municipal Corporation in respect of the proposal for development submitted by the Respondent No.1. The Petitioner claims the suit properties as being of the joint ownership of the Petitioner and the other co-owners, who it seems are the parties to the partition suit filed by the Petitioner herein.

3 In the instant suit the Petitioner filed an application for injunction for restraining the Defendant No.3 who is the developer from acting upon the permission and putting up the construction and creating third party rights. It seems that the Defendant No.3 did not appear at the trial stage hence the application (Exhibit 5) for temporary injunction was proceeded ex-parte by the Trial Court against the Defendant No.3 and the Trial Court vide its order dated 02/05/2015 allowed the said application and restrained the Defendant No.3 from proceeding with the construction and from creating third party rights.

4 Aggrieved by the said order dated 02/05/2014 passed by the Trial Court, the Defendant No.3 on being served with the copy of the order of

injunction passed by the Trial Court, filed an application for recall of the said order dated 02/05/2014 passed by the Trial Court since the said order was passed exparte, as also filed an Appeal in the District Court being Misc. Civil Appeal No.418 of 2014 . The Trial Court rejected the said application (Exhibit 39) for recall of the order on the ground that an appeal has been filed against the said order dated 25/11/2014.

5 The Lower Appellate Court considered the said Appeal filed by the Defendant No.3 against the order dated 02/05/2014 passed by the Trial Court and by the impugned order dated 03/01/2015 set aside the same. Before the Lower Appellate Court the bar of jurisdiction of the Civil Court to entertain the suit under Section 149 of the Maharashtra Regional Town Planning Act (for short "MRTP Act") was raised on behalf of the Defendant No.3. The said submission found acceptance with the Lower Appellate Court which has opined that having regard to Section 149 of the MRTP Act the maintainability of the suit is itself in question, as the Plaintiff was challenging the order approving the plans submitted and therefore the suit would be covered by the said provision. The Lower Appellate Court observed that since the Plaintiff has sought relief of declaration that the sanction of the layout is illegal, the order sanctioning the said layout and plan is therefore directly under challenge in the suit and therefore the bar of Section 149 of the MRTP would be attracted. The Lower Appellate Court in the said circumstances deemed it appropriate to set

aside the order dated 02/05/2014 passed by the Trial Court granting injunction. As indicated above, the writ jurisdiction of this Court is invoked against the said order dated 03/01/2015 passed by the Lower Appellate Court.

6 On behalf of the Respondent No.1 i.e. the original Defendant No.3 the affidavit of one Abdul Taiyed Kuresh Bahrainwala, who is the partner of the Respondent No.1, has been filed which is dated 14/09/2015. The learned Senior Counsel appearing for the Respondent No.1 draws the attention of this Court to the photographs which show that the construction on the suit properties has progressed substantially inasmuch as on the suit properties a building of Ground + 5 floors is already constructed out of the proposed construction of Ground + 9 floors. In so far as the affidavit filed on behalf of the Respondent No.1 is concerned, in the said affidavit it has been stated that the Defendant No.3 has purchased shares of all the co-owners which are to the extent of 45.5 Ares out of 49 Ares belonging to the Plaintiff and the other co-owners vide the said 4 sale deeds which have been executed by other co-owners excluding the Plaintiff. The learned Senior Counsel for the Respondent No.1 also draws this Court's attention to a table wherein the Plaintiff's share is calculated out of the lands which have been purchased wherein the Plaintiff is the co-purchaser. In the said table in the last column the Plaintiff's share in respect of all the lands in which he is the co-purchaser would be 2.21 Ares according to the Respondent No.1 herein i.e. the original Defendant No.3. The

number of purchasers in respect of each of the lands has been mentioned in 6th column of the table and it is on the said basis that the Plaintiff's share in each of the lands wherein he is the co-purchaser has been calculated. To the said affidavit is also annexed a private plan wherein the land admeasuring 49 Ares is depicted in brown colour and the area of 3.5 Ares which the Respondent No.1 herein i.e. the original Defendant No.3 is willing to keep aside pending the suit is shown by red box. The said red box encompasses within itself a road which is appurtenant to the brown portion. Apart from keeping reserved the said 3.5 Ares of land, the learned Senior Counsel for the Respondent No.1 makes a statement that to further secure the interest of the Plaintiff, pending suit, the Respondent No.1 is ready to keep an amount of Rs.Twenty Eight lakhs by depositing the same in the Trial Court so that in the event the Plaintiff succeeds in the suit and the reliefs are to be modulated the Plaintiff's interest is protected. The said amount is calculated on the basis of the ready reckoner rates for the 2.21 Ares to which the Plaintiff is entitled to according to the Defendant No.3.

7 The learned counsel appearing on behalf of the Petitioner herein i.e. the original Plaintiff Shri Wakankar disputed the entitlement of the Plaintiff to be restricted to 2.21 Ares. It is the case of the Plaintiff that he has contributed 80% of the amount which was expended for purchasing the said 49 Ares of land and is therefore entitled to the share to the extent of 80%. In

my view, it is not necessary for this Court go into the said aspect as the Plaintiff's suit for partition is pending in the Court of Civil Judge, Senior Division Pune being Special Civil Suit No.1184 of 2007. However, at this stage since the Plaintiff has not produced any document, prima facie it cannot be said that the Plaintiff has an undisputed share to the extent of 80% in the lands in question. Since the construction has progressed to the stage which has been referred to herein above viz. the construction of a building having Ground + 5 floors is already put up out of the sanctioned construction of Ground + 9 floors as also considering the fact that very maintainability of the suit is in question having regard to Section 149 of the MRTP Act, in my view, the interest of justice would be served if without interfering with the impugned order the interest of the Plaintiff is protected in the following manner :-

1] The area shown by red box in the private plan annexed to the affidavit of Shri Abdul Taiyed Kuresh Bahrainwala would be kept earmark for the Plaintiff pending suit. The said affidavit and the plan, signed by Advocate Shrif Mustafa Kachwala – the partner of Advocates M/s. Kachwala Misar & Co., is taken on record and marked as “X” for identification.

2] The Respondent No.1 i.e. the original Defendant No.3 would also deposit an amount of Rs.28,00,000/- (Rupees Twenty

Eight Lakhs only) in the Trial Court within six weeks from date. The said amount would be invested by the Trial Court in a fixed deposit of a nationalized bank and would be governed by the final orders that would be passed in the suit by the Trial Court.

3] It is clarified that the instant order would not influence the Court trying the suit filed for partition, and the said suit filed by the Plaintiff would be tried on its own merits and in accordance with law.

4] With the aforesaid directions, the above Writ Petition is disposed of.

[R.M.SAVANT, J]