

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

**APPEAL FROM ORDER NO.260 OF 2015
WITH
CIVIL APPLICATION NO.324 OF 2015**

M/s.East & West Builders & Anr. .. Appellants

Vs.

Mr.Maurice Nicolas Miranda & Ors. .. Respondents

Mr.PK.Dhakephalkar, Sr.Advocate with Mr.S.S.Redekar for the appellants

Mr.J.G.Damani for the respondent nos.1 to 3

Mr.A.K.Nandanwar for the BMC

Mr.Amit Palkar, A.G.P. for the respondent nos.8 and 9

CORAM : K.K.TATED, J.
DATED : 20/04/2015

PC:

- 1 Heard the learned counsel for the parties.
- 2 By consent of both the parties, matter is taken on board for final hearing at the stage of admission itself.
- 3 For the sake of convenience, the nomenclature of the parties as

is stated in the plaint will be referred to hereinafter as the appellants / original defendant nos.1 and 4 and respondent nos.1 to 3 / original plaintiff nos.1 to 3 and respondent nos.4 to 9 / original defendants.

4 The learned counsel for the appellants makes a statement that they are not pressing this Appeal from Order against the respondent nos.4 to 9. He seeks liberty to delete them. Same is granted.

5 This Appeal from Order is preferred by defendant nos.1 and 4 challenging the order dated 27.1.2015 passed by City Civil Court at Dindoshi (Borivali Division), Goregaon, Mumbai in Notice of Motion No.2888 of 2014 in L.C.Suit No.2840 of 2014 directing parties to maintain the position of the suit site as it is, till disposal of Notice of Motion.

Few facts of the matter are as under:

6 Plaintiff filed S.C.Suit No.2840 of 2014 in the Bombay City Civil Court at Bombay for declaration that the conveyance dated 22.2.2007 in favour of defendant nos.1 and 4 is in respect of the suit land as described in Exhibit "A" Schedule of the property as null and void, invalid, inoperative, not subsisting, bad in law and not binding on the plaintiff and registration of the same be cancelled. Following are the prayers in the said suit.

“a) That this Hon'ble Court be pleased to pass the order and decree declaring the purported Conveyance dated 22.02.2007 in respect of the suit land as

described in Exhibit "A" Schedule of property as null and void, invalid, inoperative, not subsisting, bad in law, and being fabricated, bogus, forged and sham documents, not binding upon any of the Plaintiffs or their representatives and all the acts done pursuance to the said purported Deed of Conveyance is to be declared as undone, illegal and liable to be set aside and Defendant Nos.7 & 8 be directed to deregister or cancel the registration of said Conveyance dated 22.02.2007.

b) That this Hon'ble Court be further pleased to pass an order and decree declaring that the plan approved, if any, in respect of the suit land as described in Exhibit "A" Schedule of property and I.O.D. & CC., if any, issued to the Defendant Nos.1 & 2 by the Defendant No.6 shall also be treated as inoperative and all the acts done pursuance thereof shall be treated as illegal and unauthorized and the Defendant No.6 be directed to revoke or suspend the said I.O.D. & C.C., if any.

c) That the Hon'ble Court be pleased to pass order of injunction restraining the Defendant nos.1 & 2 from doing any further construction, no further construction work and/or any other permission granted by Defendant No.6 and all the permission, sanctioned of the plan in respect of the abovesaid suit property or any

part thereof shall be suspended pending the hearing and final disposal of the suit and work in progress be directed to be stopped forthwith.

d) That Hon'ble Court be pleased to declare that Entry made in Property Registered Card is invalid and null and void ab-initio and same does not confer any title in favour of Defendant nos.1 & 2.

e) The Defendant No.1 & 2 shall be restrained by order and injunction of this Hon'ble court from doing any further act of any construction development, renovation, repairs or even to enter into and do any work in respect thereof in respect of the abovesaid suit property or any part thereof.

f) The Hon'ble Court be pleased to appoint Court Receiver as per the provisions of Order XL Rule 1 of the Code of Civil Procedure 1908 with all powers and right envisaged to take charge and control and possession thereof said part of property as described in Schedule being Exhibit "A" to the plaint along with the building which is unauthorisedly under construction in the guise of the I.O.D. alleged to be issued by the Corporation on the basis of such false representation and said land be restored to its origin by directing it to be removed and / or seized by Court Receiver and taken under his custody

till rights of Parties are decided with.

g) That the Defendant Nos.1 & 2 if sold or agreed to sell any of the flats, units or part of the suit property as described in Schedule being Exhibit "A" to the plaint, the said shall also be treated as invalid, bad in law and all such Agreements or transactions between the Defendant Nos.1 & 2 and other prospective purchasers, if any, shall be also treated as null and void, not bonafide and hence not apply upon the Plaintiffs or any person claiming through them and that the Defendant Nos.1 & 2 be directed to submit the list of the persons or prospective purchasers to whom they have sold the property as described in Schedule being Exhibit "A" to the plaint and also to give the accounts of the same to the Court Receiver who shall be permitted to seize and control and seal the said documents in the sealed cover and keep in custody till the disposal of the suit.

h) The Defendant Nos.1 & 2 shall be further restrained by an order and injunction of this Hon'ble Court permanently from creating any third party right, title, interest, lien, mortgage, deal with or encumbrances of whatsoever nature in or above the said flat or in respect of the structure so illegally erected pursuance to the impugned Conveyance and also from parting with possession, inducting third party and/or

assigning any right to the third party without the leave of this Hon'ble Court and without the consent of the Plaintiffs in writing.

i) That the Defendant be further directed by an order and injunction restraining them permanently from parting with possession, dealing with the property, assigning, inducting any third party and / or to do any act, deed or things in respect of the said property as described in Schedule being Exhibit "A" to the plaint including selling, transferring, assigning, creating mortgage, charge over the suit property or any part thereof, alienating, creating any third party right, title, interest of whatsoever, acquire any loan or creating any party encumbrances or third party creating without the leave of the Hon'ble Court and if any transaction carried out, the same shall be made clear about the present litigation pending between the original owners as well as the occupiers i.e. with the Plaintiffs in the purported Agreement, if any, drafted or made by them.

j) That interim and ad interim reliefs in terms of prayer clause (b) to (i) above be granted;

k) That costs of the suit be provided for;

l) That such further and other reliefs as this

Hon'ble Court may deem fit and proper, in the nature and circumstances of the case, be granted.”

7 The plaintiff preferred Notice of Motion No.2888 of 2014 for interim relief restraining defendant nos.1 and 4 from doing any work of construction on the suit property i.e. all that piece and parcel of Agricultural Land bearing survey No.91, Hissa No.3 corresponding CTS No.620 admeasuring about 32 gunthas i.e. 3782 sq.yds, Survey No.92, Hissa No.NIL corresponding CTS No.285 admeasuring 1 acre and 27 gunthas i.e. 7502 sq.yds. and Survey No.93 Hissa No.NIL corresponding CTS No.283 admeasuring about 27 gunthas i.e. 3267 sq.yds. aggregating in all 14,641 sq.yds situate at village Kandivali, Taluka Borivli Bombay Suburban District and also for direction to the defendant no.6 Corporation to issue stop work notice under section 354 of the Mumbai Municipal Corporation Act. The plaintiff claimed following prayers in the Notice of Motion:

“(a) That the Hon'ble Court be pleased to pass order of injunction restraining the Defendant Nos.1 & 2 from doing any work of further construction or work and/or any other permission granted by Defendant No.6 for construction and all the other permission, sanctioned of the plan etc. in respect of the abovesaid suit property or any part thereof shall be suspended pending the hearing and final disposal of the suit and work in progress be directed to be stopped forthwith by issuance of Notice u/s.354A of MMC Act by Defendant

No.6.

(b) The Defendant No.1 & 2 shall be restrained by order and injunction of this Hon'ble court from doing any further act of any construction development, renovation, repairs or even to enter into and do any work in respect thereof in respect of the abovesaid suit property or any part thereof.

(c) The Hon'ble Court be pleased to appoint Court Receiver as per the provisions of Order XL Rule 1 of the Code of Civil Procedure, 1908 with all powers and right envisaged to take charge and control and possession thereof said part of property as described in Schedule being Exhibit "A" to the plaint along with the building which is unauthorizedly under construction in the guise of the I.O.D. alleged to be issued by the Corporation on the basis of such false representation and said land be restored to its origin by directing it to be removed and/or seized by Court Receiver and taken under his custody till rights of Parties are decided with.

(d) That the Defendant Nos.1 & 2 if sold or agreed to sell any of the flats, units or part of the suit property as described in Schedule being Exhibit "A" to the plaint, the same shall also be treated as invalid, bad in law and all such Agreements or transactions between the

Defendant Nos.1 & 2 and other prospective purchasers, if any, shall be also treated as null and void, not bonafide and hence not apply upon the Plaintiffs or any person claiming through them and that the Defendant Nos.1 & 2 be directed to submit the list of the persons or prospective purchasers to whom they have sold the property as described in Schedule being Exhibit "A" to the plaint and also to give the accounts of the same to the Court Receiver who shall be permitted to seize and control and seal the said documents in the sealed cover and keep in custody till the disposal of the suit.

e) The Defendant Nos.1 & 2 shall be further restrained by an order and injunction of this Hon'ble Court from creating any third party right, title, interest, lien, mortgage, deal with or encumbrances of whatsoever nature in or above the said flat or in respect of the structure so illegally erected pursuance to the impugned Conveyance and also from parting with possession, inducting third party and/or assigning any right to the third party without the leave of this Hon'ble Court and without the consent of the Plaintiffs in writing.

f) That the Defendant be further directed by an order and injunction restraining them permanently from parting with possession, dealing with the property,

assigning, inducting any third party and/or to do any act, deed or things in respect of the said property as described in Schedule being Exhibit "A" to the plaint including selling, transferring, assigning, creating mortgage, charge over the suit property or any part thereof, alienating, creating any third party right, title, interest of whatsoever, acquire any loan or creating any party encumbrances or third party creation without the leave of the Hon'ble Court and if any transaction carried out, the same shall be made clear about the present litigation pending between the original owners as well as the occupiers i.e. with the Plaintiffs in the purported Agreement, if any, drafted or made by them.

g) That ad interim reliefs in terms of prayer clauses (a) to (f) above be granted;

h) That costs of the Notice of Motion be provided for;

i) That such further and other reliefs as this Hon'ble Court may deem fit and proper, in the nature and circumstances of the case, be granted."

8 Defendant nos.1 and 4 filed their affidavit in reply and other documents on record to oppose the prayers in the Notice of Motion. Considering the submissions made by the parties, the Trial Court

passed the impugned order dated 27.1.2015 directing parties to maintain status quo till the disposal of the Notice of Motion. Hence, the present Appeal from Order.

9 The learned Senior Counsel for the defendant nos.1 and 4 submits that the impugned order passed by the Trial Court is against justice, equity and good conscience and same is liable to be set aside. He submits that the Trial Court erred in granting the relief to the plaintiff violating the principle of granting temporary injunction under the provisions of Order 39 Rule 1 of the Code of Civil Procedure. He submits that the Trial Court ought to have appreciated that in view of the fact that plaintiffs failed to make out prima facie case, they are not entitled for discretionary relief of injunction. He submits that the Trial Court ought to have held that the plaintiffs have filed the suit only with ulterior motive and mala fide intention to harass and pressurise the defendant nos.1 and 4 to extract and knock out money. He submits that the Trial Court has failed to consider the fact that though the plaintiffs were aware that defendant nos.1 and 4 are in possession of the suit property since 2002, they filed the present suit in the year 2014. Hence, the Trial Court should not have granted interim and or ad-interim relief in favour of plaintiffs on the ground of laches.

10 The learned Senior Counsel for the defendant nos.1 and 4 submits that the plaintiffs nos.2 and 3 along with other parties initially filed S.C.Suit No.351 of 2002 against plaintiff no.1 Maurice Nicholas Miranda as defendant no.3 along with other parties in respect of the same property for declaration that the plaintiff nos.2 and 3 are owners

by adverse possession of the suit lands. He submits that in S.C.Suit No.351 of 2002, the plaintiffs nos.2 and 3 made a statement that they were in exclusive and lawful use, occupation, possession and cultivation of the suit land since their forefathers and therefore, they claimed decree for declaration as a owner on the basis of adverse possession. In that suit the plaintiff nos.2 and 3 showed plaintiff no.1 (in the present proceeding) Mr.Maurice Nicholas Miranda as defendant no.3 as owner of the suit property. He submits that in the cause title of earlier Suit No.351 of 2002 the plaintiff made a party to defendant no.1 through Mr.Anil Agarwal as a constituted attorney of defendant nos.1 to 5 in that suit. He submits that in the earlier suit the plaintiff nos.2 and 3 preferred application for interim relief. That was rejected by the Trial Court on 3.2.2003. He submits that later on, the earlier suit No.351 of 2002 withdrawn by the plaintiff nos.2 and 3 in the month of July, 2013. He submits that in that suit, the plaintiff nos.2 and 3 claimed following prayers:

“(a) for declaration that the plaintiffs are the owners by adverse possession of the suit lands being the agricultural lands bearing s.No.91, Hissa no.3 corresponding CTS No.620 admeasuring about 32 gunthas equivalent to 3237.45 sq.mts. or thereabout, S.No.92 corresponding CTS No.285, admeasuring about 1 Acre 22 gunthas, equivalent to 6272.45 sq.mtrs or thereabout and S.No.93, corresponding CTS No.283 admeasuring about 27 gunthas equivalent to 2731.55 sq.mtrs. or thereabout, all of village Kandivali, Taluka

Borivali, Mumbai Suburban District more specifically shown delineated in green, Red and black coloured boundary lines respectively on the plan annexed hereto as Ex.A, and that consequential changes be directed to be effected in the revenue record in respect thereof.

(b) For perpetual injunction and order of this Hon'ble Court restraining the Defendants 1 to 6, their respective representatives, servants and agents and/or any person or persons claiming through the Defendants from in any manner, disposing the plaintiffs of the suit lands and/or interfering with in any manner whatsoever, the plaintiffs' exclusive, occupation, use and possession of the suit lands, more specifically described in prayer (a) hereinabove or part or portion thereof;

(c) For interim and ad-interim reliefs in terms of prayer (b) hereinabove;

(d) For the costs of this suit;

(e) For such other and further reliefs as the nature and circumstances of the case may require.”

11 The learned Senior Counsel submits that the plaintiff no.1 executed power of attorney dated 4.4.1987 and 22.3.1999 in favour of defendant no.1. Not only that, owner of the suit property handed over

possession to the defendant no.1 on 22.3.1990.

12 The learned Senior Counsel for the defendant nos.1 and 4 submit that even plaintiff nos.2 and 3 executed agreement for sale dated 25.6.1987 in favour of defendant no.1 in respect of the suit property. They also executed power of attorney in favour of defendant no.1. He submits that later on the conveyance dated 22.2.2007 was executed by the owners in favour of defendant nos.1 and 4. He submits that the said conveyance was duly registered.

13 The learned Senior Counsel for the defendant nos.1 and 4 submits that even the property cards were transferred in the name of defendant nos.1 and 4. On the basis of ownership, the defendant nos.1 and 4 submitted their plans to the Corporation and Corporation were sanctioned and issued Commencement Certificate. He submits that they already constructed one building and created third party right, title and interest. He further submits that as on today, the construction of two buildings is going on and to that effect, the Corporation has issued Commencement Certificates. He submits that construction of one building is completed upto 10th floor and another building upto 17th floor. He further submits that they already sold the flats to various persons. He submits that as on today, the defendant nos.1 and 4 are sole owner of the suit lands. He submits that these facts are not considered by the Trial Court and directed both the parties to maintain status quo as on today till the hearing and final disposal of the Notice of Motion. He submits that the Trial Court failed to appreciate that before granting any injunction against the true owner, court has to

consider prima facie case. He submits that in the present proceeding, the suit property stands in the name of defendant nos.1 and 4. They completed construction work of one building and construction work of other two buildings is going on as per sanction plans. He submits that more than 70% work of two buildings is completed. He submits that if at this stage, the work of under construction of two buildings is stayed, defendant nos.1 to 4 will suffer financial loss. He further submits that plaintiffs failed to make out even prima facie case to show that they were in possession of the whole suit property. The construction activities on the suit land and that also completion of one building and another two buildings of 10th and 17th floors itself shows that plaintiffs were not in possession of the suit land. Hence, in the interest of justice, this Honourable Court be pleased to set aside the impugned order dated 27.1.2015 passed by Bombay City Civil Court at Bombay in Notice of Motion No.2888 of 2014.

14 On the other hand the learned counsel for the plaintiff vehemently oppose the present Appeal from Order. He submits that by this Appeal from Order, defendant nos.1 and 4 challenges the ad-interim relief granted by Trial Court. He submits that Notice of Motion is pending for hearing and final disposal on its own merits. He submits that at present, court had directed both the parties to maintain status quo of the suit site as it is, till the disposal of the Notice of Motion. He submits that if the defendant nos.1 and 4 completes the construction of the remaining two buildings and creates third party right, title and interest in the same, then it will be very difficult for the plaintiffs to recover the suit land if they succeed before the Trial Court in S.C.Suit

No.2840 of 2014.

15 The learned Counsel for the plaintiffs submits that the defendant nos.1 and 4 created fabricated documents to grab the plaintiffs' property. He submits that the plaintiffs' never executed any agreement for sale and or power of attorney in favour of defendant nos.1 and 4 in respect of the suit property. He submits that even the conveyance dated 22.2.2007 was not executed by the plaintiff. He submits that bare reading of the conveyance shows that same was executed by Mr.Agarwal as a power of attorney holder of the owner in his own favour of defendant nos.1 and 4.

16 The learned counsel for the plaintiffs submits that as on today also, the 7/12 extract shows that suit property stands in their name as tenants. In support of this contention, he relies on the 7/12 extract in a compilation on page 244, 245 and 246. He further submits that the declaration made by Smt.Manju Gupta, as a proprietress of M/s.East and West Builders is a created document to grab the plaintiffs' property. He further submits that the Writ Petition No.2531 of 2005 in respect of the suit land is pending before this Honourable Court for hearing and final disposal. He submits that in the said Writ Petition, this court (B.H.Marlapalle, J.) by order dated 19.06.2006 granted interim relief restraining parties, not to create third party right, title and interest without leave of this court. He submits that inspite of the said order, plaintiffs created third party right, title and interest in respect of the suit property. He submits that all these facts and documents are considered by the Trial Court in detail and directed both the parties to

maintain status quo till the hearing of the Notice of Motion. He submits that as on today also, the plaintiffs are in possession of the suit property.

17 The learned counsel for the plaintiff submits that in the interest of both the parties, the Trial Court has passed ad-interim relief. Hence, there is no substance in the present Appeal from Order and same be dismissed with costs. He submits that if the ad-interim relief is not continued by this court, the defendant nos.1 and 4 may dis-possess the plaintiffs from the suit premises and in that case, irreparable loss and injury will be caused to the plaintiff's.

18 I have heard both the sides at length. Considering the documents on record, the issue involved in the present Appeal from Order is "whether ad-interim relief granted by Trial Court dated 27.1.2015 directing both the parties to maintain the position of the suit site as it is, till the hearing of Notice of Motion, is wrong and bad in law."

19 In the present proceeding, there is no dispute that as on today, as per the Registered conveyance dated 22.2.2007 the suit property stands in the name of defendant nos.1 and 4. Defendant nos.1 and 4 as owners applied to the Corporation permitting them to carry out construction activities. The plan submitted by defendant nos.1 and 4 was sanctioned by the Corporation. Corporation also issued Commencement Certificate. On the basis of the said Commencement Certificate, defendant nos.1 and 4 completed construction of one

building and handed over possession to the purchasers. The construction of two other buildings has been completed upto 10th and 17th floors. Defendant nos.1 and 4 placed on record the agreement for sale executed by owners / plaintiffs' power of attorney and other documents. It is to be considered whether the injunction can be granted against the true owner during the pendency of the litigation. The Apex Court in the matters of *Premji Ratansey Shah and Ors vs. Union of India (UOI)*¹ and *Mahadeo Savlaram Shelke and Ors. vs. Pune Municipal Corporation and Anr.*² held that the injunction should not be granted against the original owner without considering the title of the property. In the present proceeding, admittedly, as on today the conveyance stands in the name of defendant nos.1 and 4. It is to be noted that in order to obtain order of injunction, party has to show (a) prima facie case to go for the trial (b) balance of convenience in his favour and (c) irreparable loss and injury will be caused to the applicant if injunction is not granted.

20 In the present proceeding, the plaintiffs filed S.C.Suit No.351 of 2002 claiming declaration as owner of the Suit property on the basis of adverse possession. That suit was pending for more than 11 years. In that suit though the plaintiff prayed for ad-interim injunction the same was refused on 3.2.2003. In the present suit, though the plaintiffs made prayer for cancellation of registration of conveyance deed dated 22.2.2007, they had not made any prayer for cancellation of agreement for sale and power of attorney executed by them in favour of defendant nos.1 and 4 though they had knowledge about all these documents.

1 (1994) 5 SCC 547

2 (1995) 3 SCC 33

The documents relied by the plaintiffs i.e. 7/12 extract and other revenue documents do not show that the suit property stands in their name as a owner. In the present suit, they are claiming to be lawful tenant of the agricultural land whereas in earlier suit i.e. S.C.Suit No.351 of 2002 they claimed as a owner on the basis of adverse possession.

21 Considering these facts and as the construction of the two buildings is ready upto 10th and 17th floor, I am of the opinion that the Trial Court erred in coming to the conclusion that defendants to maintain the position of the suit site as it is, till the disposal of the suit. The Trial Court in paragraph 10 of the impugned order recorded that some portion of the land is in possession of the plaintiffs and their tenants and the construction of the building is still going on. Considering these aspects, the possibility cannot be ruled out that the defendants would take law in their hands and dispossess the plaintiffs and their tenants forcibly. It is to be noted that the plaintiffs have not placed on record any map or oral sketch showing which portion of suit property they are occupying as on today. Whereas the defendant nos.1 and 4 placed on record map at page 553 of additional compilation showing the portion which is in possession / occupation / encroachment. Considering these facts and the law declared by the Apex Court as stated hereinabove and also in the matter of *Kashi Math Samsthan and Another vs. shrimad Sudhindra Thirtha Swamy and Another*³, I am of the opinion that the impugned order passed by the Trial Court dated 21.1.2015 in Notice of Motion No.2888 of 2014 requires to be set aside, but at the same time the interest of the

3 (2010) 1 SCC 689

plaintiffs also requires to be protected because the Notice of Motion as well as the suit is pending for final hearing on its own merits. Considering these facts, following order is passed:

(i) Impugned order dated 21.1.2015 passed by Bombay City Civil Court at Bombay in Notice of Motion No.2888 of 2014 in L.C.Suit No.2840 of 2014 is set aside.

(ii) Defendant nos.1 and 4 are restrained by an order of injunction from disturbing the plaintiffs' possession of the suit property as shown in a map/sketch which is annexed on page 553 in additional compilation of documents filed by the defendant nos.1 and 4 till the hearing and final disposal of the suit.

(iii) Defendant nos.1 and 4 is permitted to complete the construction of the two buildings which are under construction.

(iv) Considering the facts and circumstances of the present case, hearing of L.C.Suit No.2840 of 2014 is expedited.

(v) This court expects from the Trial Court to complete the trial of the L.C.Suit No.2840 of 2014 as early as possible but in any case on or before 31.3.2016.

(vi) Notice of Motion No.2888 of 2014 be heard along with Suit.

(vii) Appeal from Order is disposed of accordingly.

(viii) No order as to costs.

(ix) In view thereof, Civil Application does not survive. The same is also dismissed as infructuous.

(K.K.TATED, J.)