

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.363 OF 2015
with
CAA/469/2015

M/s.Sai Enterprises & Ors.

... Appellants

Vs.

Varsha Co-op. Housing Society Ltd. & Ors.

... Respondents

Mr.P.K. Dhakephalkar, Sr.Adv. With Mr.K.S. Dewal i/b J.M. Joshi for the
Appellants

Mr.L.C. Chogle for Respondent Nos.1 to 4

Mr.R.R. Lanjekar for Resp. No.5

Mr.C.S. Jadhav i/b A.R. Pitale for Resp. No.6

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **17th NOVEMBER, 2015**

P.C.:

1. This appeal is directed against the order dated 10.2.2015 passed by the learned 5th Joint Civil Judge, Senior Division, Thane. The appellants are the owners of the land and also developers who are constructing the housing complex on the land. Their partnership firm had earlier entered into an agreement on 27.10.2014 with respondent No.5 who is also a developer and gave some portion of his land for the purposes of development. Respondent No.5 inter alia constructed residential buildings and the said complex is known as Prakruti Park. Respondent Nos.1 to 4 are four cooperative housing societies wherein total 13 buildings are standing on the said project i.e., Prakruti Park. The dispute is in respect of

right of way on a 12' wide road which runs from south to north side where the remaining plot which is owned by the plaintiff, is situate. 40' wide DP road runs east west in southern side where the disputed access road is connected. It is the case of the appellant/original plaintiff that this road was used for ingress and egress by the plaintiffs for the purpose of construction activity on his plot which falls on northern side. However, in the year 2014, the residents from the respondent Nos.1 to 4 societies started obstructing the plaintiffs and their employees or the persons who are residing on the plot owned by the plaintiff. The plaintiff No.1 has already assigned further developmental rights to plaintiff No.2. Therefore, the plaintiffs filed Special Civil Suit No.338 of 2014 for declaration and injunction. The plaintiffs also moved the application under exhibit 5 for interim relief under Order 39 Rule 1 and 2 of the CPC. The said application was rejected and no interim relief was granted in favour of the plaintiff by the learned Judge. Hence this appeal.

2. Mr.Dhakephalkar, the learned Senior Counsel appearing for the appellants, has submitted that the plaintiffs have been using this road since beginning when they executed the agreement on 27.10.2004 with respondent No.5. At that time, it was agreed between the parties that the said road will be made available for the free ingress and egress of the plaintiffs and the defendants also. He relied on the clause No.39 of the

said agreement. He further submitted that the plan of the building was approved by the Corporation on 27.2.2004 i.e., prior to the agreement and the said road is shown in the said approved plans. He further submitted that respondent No.5, the Developer who constructed the society and who is a party to the impugned agreement, is supporting the claim of the plaintiffs. The learned Counsel for respondent No.5 conceded to these submissions.

3. The learned Counsel for Respondent Nos.1 to 4 i.e., the four societies, while opposing this appeal, has argued that the order passed by the learned Civil Judge Senior Division is correct. The plaintiffs in their application claim easementary right of way. However, ownership of the entire land where the buildings of the societies are standing, is not transferred to these societies and, therefore, as on today, the plaintiffs are the owners of the entire plot, which is dominant as well as servient land. He further fully relied on the view taken by the learned Judge that the servient owner cannot claim easementary right from the dominant owner if the dominant and servient owners are one and the same. Thus, the plaintiffs' claim for easementary right cannot stand in law and on that point, he supported the judgment of the trial Court. He further submitted that the plaintiff No.1 has entered into an agreement dated 27.2.2004 with respondent No.5. However, plaintiff No.1 subsequently

assigned the development rights to the plaintiff No.2. However, the agreement between the plaintiff Nos.1 and 2 is not registered agreement and therefore, no such right can be claimed by the plaintiff No.2 through plaintiff No.1. It is further submitted that the suit is not for specific performance and therefore, no relief can be given on the basis of the terms and conditions of the contract especially in clause 39.

4. Perused the impugned order passed by the learned Civil Judge. The learned Judge has given much importance on the point whether the right of the plaintiff is easementary or not. The learned Judge has mentioned about clause 39 of the impugned contract, however, has lost sight that when there is a specific clause on access to the plaintiff No.1 and the contractual right created by the parties by way of agreement is to be given weightage. Moreover, Respondent No.5 is a developer, who constructed 13 buildings in residential complex, namely, Prakruti Park by virtue of the development agreement dated 27.10.2004. The terms and conditions of the impugned contract are binding on the parties, who are claiming through Respondent No.5. Respondent No.5 and the plaintiffs have agreed and in future right of way was given to the plaintiffs is expressly mentioned in clause 39 of the said agreement that there will be free egress and ingress to the plaintiffs and also to the members of the defendant-societies. The defendant-societies have to claim through

defendant No.5 who is supporting the case of the plaintiffs, in terms of clause No.39 of the agreement. Moreover, the plan was approved by the Corporation on 27.2.2004 and it shows a road running north south passes through the plot of the society and further also plot of the plaintiffs.

5. In view of this, prima facie, the plaintiffs are successful in proving their case, so also the balance of convenience is in favour of the plaintiffs. Hence, the order passed by the learned 5th Joint Civil Judge, Senior Division, Thane, is hereby set aside. Appeal is allowed in terms of prayer clause 19 (a), pending the suit.

6. In view of the disposal of the Appeal, Civil Application also stands disposed of.

(MRIDULA BHATKAR, J.)