

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.862 OF 2015
WITH
CIVIL APPLICATION NO.1057 OF 2015
IN
APPEAL FROM ORDER NO.862 OF 2015

Kanti Khimji Haria	...	Appellant/ (Org. Plaintiff)
vs.		
Shri Vijay Anant Patil & Ors.	...	Respondents (Org. Defendants)

...

Mr.Rajiv Narula with Ms.Shweta Doshi i/b Jhangiani Narula & Associate,
for the Appellant.
Mr.Y.S.Jahagirdar, Senior Advocate i/b Mr.A.R.Gole, for the Respondent
no.9.
Mr.Vinit Naik, Senior Advocate i/b Mr.S.D.Patil, for the respondent no.7.
Mr.Vinit Naik, Senior Advocate i/b Ms.Megha L.Keluskar, for the
respondent no.8.
Mr.M.S.Lagu for the respondent no.10.

...

CORAM : MRS.MRIDULA BHATKAR, J.
DATE : 31ST AUGUST, 2015

P.C.:

Admit. Disposed of finally by consent at the stage of admission.

In this appeal order dated 21st April, 2015 passed by Jt.Civil Judge, Senior Division, Thane, rejecting application at Exh.55 filed by the appellant-plaintiff is challenged.

2. The appellant-plaintiff has filed the Special Civil Suit No.286 of 2014 against the defendants for injunction and specific relief. In the

said suit a preliminary issue under section 9A of Civil Procedure Code is framed. During the pendency of the determination of the said issue, application under section 9A read with sub-clause (2) of the Civil Procedure Code for ad-interim injunction was moved at Exh.55 by the appellant-plaintiff. Original defendant no.7 to 9 which are respondent no.7 to 9 are the main contesting parties and defendant no.7 has moved an application challenging the jurisdiction of the Civil Court *inter-alia* preliminary issue under section 9A of the Civil Procedure Code was framed.

3. It is the case of the appellant-plaintiff that he is a purchaser of the suit property which is purchased from respondent no.1 to 6. The suit property land bearing old survey no.459, Hissa no.8, new survey no.133, Hissa no.8, ad-measuring 30R, Prati-9 i.e. equivalent to 3100 Sq. mtrs. situated at Village Navghar, Bhayandar, Tq. & District Thane.

4. The appellant-plaintiff has agreed to purchase the suit property from one Anant Sukur Patil. Anant Sukur Patil has agreed to sale the suit property to the appellant-plaintiff for total consideration of Rs.4,65,000/- out of which appellant-plaintiff has paid an amount of Rs.4,18,500/-. Anant Sukur Patil made irrevocable power of attorney in favour of the appellant-plaintiff and assigned the rights of development to

him. The possession of the said plot was also given to him on 10th August, 1989.

5. Thereafter, the appellant-plaintiff took steps for constructing a wall around the plot (i.e.suit property). The appellant-plaintiff made an application to the Corporation-respondent no.10 seeking permission to construct compound wall and submitted building proposal. However, Anant Sukur Patil the father of the respondent no.1 to 6 had fraudulently entered into the agreement of sale of the said suit property on 15th October, 1995 with respondent no.7 Shyamsunder and a Power of Attorney on 15th October, 1995. Thereafter registered Sale deed on 26th September, 2008 in favour of respondent no.8 being Power of Attorney holder of respondent no.7 was executed and respondent no.7 subsequently sold this property to respondent no.9 through respondent no.8 by registered deed of conveyance dated 12th July, 2011.

6. The learned counsel Mr. Rajiv Narula for the appellant-plaintiff has submitted that the said Power of Attorney dated 18th March, 2004 is fabricated, shown as executed by Smt.Manjula Anant Patil and six others as executants in favour of Shri Shyamsunder Radheyshyam Agarwal-respondent no.7. He pointed out that earlier the name of M/s.K.K.& Sons mentioned in the earlier Power of Attorney dated 11th

August, 1989 which was issued by Anant Sukur Patil in favour of Kanti Khimji Haria Proprietor of M/s.K.K.& Sons is copied down ad-verbatim and on the basis of this bogus Power of Attorney dated 10th May, 2004 a deed of conveyance was executed on 26th September, 2008 by respondent no.7 and subsequently respondent no.9 have acquired the conveyance of suit property from respondent no.7 and this whole transaction is illegal. He submitted that the respondent no.1, 2 & 4 to 6 the heirs of original landlord have filed the Special Civil Suit No.549 of 2011 in the Court of Civil Judge, Senior Division, Thane against respondent no.3, 7, 8, 10 & 12 for declaration and injunction in respect of the suit property. The learned counsel argued that earlier agreement of sale dated 11th August, 1989 is admitted by the respondent no.1 to 6 and they have clearly stated in their Special Civil Suit that they did not sign any document in favour of the respondent no.7. Under these circumstances, the learned trial Judge ought to have appreciated the right, title and interest of the appellant-plaintiff in the suit premises and shall not have rejected the application. The case of the respondents stands on the bogus transactions. The learned counsel for the appellant-plaintiff has submitted that though now building is constructed on the suit land, the appellant-plaintiff has taken quick steps in respect of the suit premises. He submitted that the learned trial Judge has committed an error in rejecting the relief of injunction in favour of the appellant-plaintiff

by accepting that the possessory rights are transferred to the third party in respect of the flats in the building. The learned counsel for the appellant-plaintiff further argued that the learned Judge has committed an error in not looking into the documents i.e. forged Power of Attorney. Therefore, he submitted that the building is standing on the land, the injunction can be granted because it should not become further irreversible.

7. In support of submissions the learned counsel for the appellant-plaintiff relied on following cases:

- (1) Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass¹
- (2) Gangubai Bablya Chaudhary & Ors. Vs. Sitaram Bhalchandra Sukhtankar & Ors.²
- (3) Julien Educational Trust Vs. Sourendra Kumar Roy & Ors.³

8. The learned senior counsel for the respondents no.9 Mr. Jahagirdar and the learned senior counsel for the respondent no.7 Mr. Vinit Naik opposed this appeal. They submitted that the 10 storied building with 91 flats is standing on the suit land. The learned counsel have submitted that the original suit suffers from delay and laches. The appellant-plaintiff is seeking relief of declaration and injunction based on the agreement of sale dated 11th August, 1989. Suit is barred by limitation. The appellant-plaintiff is not in possession of the suit land.

¹ (2004) 8 Supreme Court Cases 488

² (1983) 4 Supreme Court Cases 31

³ (2010) 1 Supreme Court Cases 379

9. It was pointed out that the appellant-plaintiff has moved the application for intervention in the Special Civil Suit no.549 of 2011 filed by respondent no.1, 2 & 4 to 6. The said application was dismissed and against which he filed Writ Petition No.7771 of 2013 which was dismissed on 04th September, 2013. It was submitted by the learned senior counsel that thereafter the present suit was filed on 19th April, 2014 in which preliminary issue of maintainability u/sec. 9A was raised. The application for interim stay under section 9A(3) was filed on 12th December, 2014 by the appellant-plaintiff. The prayer of declaration and injunction is fate-accomplish and the suit filed is speculative and not founded on valid cause of action. The learned senior counsel for the respondent no.9 the Developer has submitted that respondent-Developer has already constructed building of 91 flats out of which he has entered into 49 registered agreement of sale and letters of allotment which was given to the 42 flat purchasers. Thus third party rights are created. Under these circumstances the learned Judge has rightly rejected the application. The learned senior counsel Mr.Naik for the respondent no.7 & 8 drew my attention to the averments made in the plaint in paragraph (18) and submitted that though application was made for construction of compound wall by the appellant-plaintiff, no permission was granted and appellant-plaintiff has stated that adjacent to the suit property he owns

the other property. Thus it shows that though he was aware of the developments and the construction activity going on the suit land, the appellant-plaintiff did not take timely steps to approach the Court. It is further submitted that the agreement of sale has taken place in the year 1989 and thereafter a Power of Attorney was executed by LR's of Anant Sukur Patil in favour of respondent no.7 and the respondents who are original owners of the suit land filed the Special Civil Suit No.549 of 2011. Subsequently they settled the matter with respondent no.9.

10. Perused the Plaint, reply, the impugned Order passed by the learned Judge and the Power of Attorney produced by the parties. The order under challenge is not passed on Exh.5, but in the application taken out for interim relief during the pendency of preliminary issue under section 9A of Civil Procedure Code. The learned counsel for the respondents have stated that evidence of the appellant-plaintiff is also recorded while deciding preliminary issue. The Power of Attorney in respect of respondent no.7 discloses some overwriting in respect of date and name of M/s.K.K.& Sons and it is required to be explained by the respondents. Similarly the appellant-plaintiff needs to explain delay, when appellant-plaintiff claims his right, title and interest in suit property in the year 2014 on the basis of agreement dated 11th August, 1989. The appellant-plaintiff claims possession in the suit property. However, the

construction of the building clearly shows that he was not having possession over the suit property, when he filed the suit. By way of registered sale deed the entire right and title is transferred in favour of respondent no.9. It is true that respondent no.1, 2 & 4 to 6 have filed the Special Civil Suit No.549 of 2011 challenging the status of respondent no.7. However, they have settled the matter with respondent no.9. The appellant-plaintiff had filed intervention application in the said suit, which was dismissed. Thereafter, he filed Writ Petition and subsequently the present suit. The appellant-plaintiff may succeed on merit if Power of Attorney is found forged. However, today considering the fact of delay and laches, so also registered Sale deed stands in favour of the respondent no.9 and five buildings are constructed, I am of the view that case is not made out by the appellant-plaintiff to show balance of convenience or irreparable loss. Hence, no injunction can be granted in favour of the appellant-plaintiff.

11. In the case of ***Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, reported in [(2004) 8 Supreme Court Cases 488]*** the all facts are not discussed by the Hon'ble Supreme Court. In the said case it appears that the respondent wanted to construct and alienate the property and the appellant was the original plaintiff sought injunction against the respondent from alienating the property and putting

construction thereon. The Supreme Court held that unless and until the case of irreparable loss or damages is made out by the party to the suit Court should not permit the nature of the property being changed, which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings.

As the facts of that case and the condition of the property is not discussed and at the end in the said Judgment the Hon'ble Supreme Court has held that since "the facts of this case did not make out any extraordinary ground to permit respondent to put construction and ordered the status-quo. The facts of present case cannot be compared with the facts of that case.

12. In the case of ***Gangubai Bablya Chaudhary & Ors. Vs. Sitaram Bhalchandra Sukhtankar & Ors., reported in [(1983) 4 Supreme Court Cases 31]***, the interim injunction was granted by restraining the respondents from interfering the possession of the land by the appellants and putting up construction. The High Court vacated the interim orders and therefore special leave petitions were filed in that suit. The Hon'ble Supreme Court set-aside the order of the High Court and granted injunction against the respondents from putting construction and by using F.S.I. for the whole land. In the said suit there was a issue of construction by using F.S.I. of the entire land and whether the

respondents were entitled to put up the construction over the entire land. It is not clear whether the building was already constructed or not and whether third party interest was created or not.

13. In the case of ***Julien Educational Trust Vs. Sourendra Kumar Roy & Ors., reported in [(2010) 1 Supreme Court Cases 379]***, the appellant is a Educational Trust and the respondents are the joint owner of land. The appellant purchased the land for extension of school. The High Court allowed the appeal and held that the object of suit is also to be considered for grant of stay and if the suit property is allowed to be commercially exploited by raising multi story structures there upon the object of the suit will be frustrated.

Thus the ratio laid down in all these rulings though binding as a precedent, on facts it is distinguishable, so is not helpful to the appellant-plaintiff.

14. The learned counsel for the appellant-plaintiff have submitted that according to him 28 flats out of 91 flats are sold and therefore remaining flats are not to be sold, by granting injunction in respect of the remaining flats which are to be sold.

15. The counsel for the respondents have opposed the

submissions made by the the learned counsel for the appellant-plaintiff and submitted that out of 91 flats he had entered into 49 flats registered agreement of sale. The L.O.I. is given to 42 flats purchasers. It is to be noted that the appellant-plaintiff is the owner of the adjacent plot to the suit property and therefore it is difficult to believe at this stage that the appellant-plaintiff was not aware when the construction when commenced. The trial Court has considered all these aspects rightly and passed the order. Hence the following order;

- (1) Appeal from order is dismissed.

The transaction in respect of the suit property henceforth is subject to the outcome of the suit.

- (2) The learned trial Court is directed to expedite the suit and dispose of within one year.

16. In view of the dismissal of the Appeal from Order, nothing survive in the Civil Application and the same is disposed of accordingly.

(MRS.MRIDULA BHATKAR, J.)