Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 754 OF 2014
WITH
CIVIL APPLICATION NO. 918 OF 2014 IN A.O. NO. 754 OF 2014

Shree Swaminarayan Sanskruti Seva
Trust & Ors. … Appellants/Applicants
vs.
Parshwa Associates & Ors. … Respondents

Mr. Birendra Saraf, Advocate i/b. Kadam & Co. for the appellants/applicants.
Mr. Ram Upadhyay i/b. Law Competere Consultus, Advocate for the respondents.

CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : 10th September, 2015
PRONOUNCED ON : 16th September, 2015

ORDER

This Appeal from Order is directed against the order dated 25th June, 2014 passed by the Joint Civil Judge Senior Division, Kalyan thereby rejecting the Application under Exhibit 5 to Suit No. 51 of 2014 filed by the plaintiffs/appellants praying that the defendants/respondents be restrained by an order of injunction from creating any third party right in respect of suit property and/or carrying out construction or development activity on the suit property and/or parting with suit property in any manner. The plaintiffs/appellants have filed Suit No. 51 of 2014 against the respondents that Deed of Conveyance dated 15th April, 2013 lodged for registration be declared null and void and not binding on the plaintiffs/appellants. The possession of the suit property is also one of the prayers.

2. The Appellant no. 1 is a registered Charitable Public Trust, others are the trustees of the appellant no. 1. The object of the trust is to impart education to the poor people. The trust is situated at Gujarat. It owns a plots of land situated at Wayle, Birla College Road at Kalyan bearing Survey nos. (i) 77 admeasuring 31100 sq. mtrs. and (ii) 236 admeasuring 4300 sq. mtrs. and thus, total land is of 35400 sq. mtrs. along with structures standing thereon which is referred as suit property. Respondent/Defendant no. 1 is a partnership firm and respondent/ defendant nos. 2 to 8 are partners. The suit property is acquired by the appellant/trust from one Parsee Trust for Rs.41,00,000/-by registered agreement dated 5th June, 1988. However, the appellant/trust paid only 10% of the said amount and as they were unable to raise the balance amount payable to Parsee Trust, they entered into Memorandum of Understanding with one P.R. Patel, who agreed to carry out development of the suit property. The MOU was entered between appellant no. 1 and Mr. P.R. Patel on 18th December, 2002. At the time of execution of the agreement, Mr. P.R. Patel made initial payment of Rs.41,00,000/-. Mr. P.R. Patel however expressed his inability to perform his contractual obligation under the Development Agreement dated 18th December, 2002 and requested to be relieved from his performance. So Mr. P.R. Patel was relieved and he cancelled the said agreement. Thereafter, by an

agreement dated 13th July, 2006 appellant no. 1/trust entered into an agreement of sale with Parsi Trust for revised consideration at Rs.64,00,000/- and in the month of July-August, 2006, respondents approached the appellants and showed their willingness in development and ability to pay and therefore, MOU was entered on 3rd August, 2006 between appellant no.1 and respondents in respect of suit property for the limited purpose, i.e., obtaining permissions from the concerned authorities and for removing objection/reservation and converting it into NA land. Appellant no. 1/trust executed Power of Attorney in favour of respondent no. 8, who had executed MOU dated 3rd August, 2006 with the respondents. This being the property of the trust, the appellants made application seeking permission for sale of the suit property to the Charity Commissioner on 30th December, 2010. The Charity Commissioner issued public notice on 27th September, 2011 inviting tenders for purchasing the land admeasuring 5263 sq. mtrs. and construction thereon admeasuring 8920.16 sq. mtrs and defendants have put up the construction of the residential flats on the land. The respondents also bid in the auction and they being the highest bidder, agreed to pay consideration for Rs.17,81,00,000/- and permission to alienate the property in favour of respondents was granted by the Charity Commissioner by an order dated 4th February, 2013. In between, an application was filed seeking clarification whether the permission granted under section 36 of the Trust Act in respect of alienation of the area of suit property and as per the appellants, by the order dated 21st March, 2013 passed by the Charity Commissioner, it was clarified that permission granted on 4th February, 2013 is only in respect of 5263 sq. mtrs. with construction admeasuring 8920.16 sq. mtrs. standing thereon. It was in month of May, 2013 that the appellants had knowledge that the suit property was conveyed by respondent nos. 4 to 6 representing power of attorney holder of the appellants in favour of their own partnership firm, i.e. respondent no. 1. It is the case of the appellants that the respondents have jointly and severally committed fraud on the appellants by making blatant false statement about the payment of Rs.10,40,29,086/- in the Deed of Conveyance. Thereafter the appellants/plaintiffs filed the suit against the respondents/defendants. However, the relief of injunction was rejected by the trial Court and hence this Appeal.

3. The learned counsel Mr. Saraf for the appellants has submitted that the Charity Commissioner did not give permission for the alienation of the entire plot of 35400 sq. mtrs. land but the permission was only for the portion of land, i.e. 5263 sq. mtrs. along with construction admeasuring about 8920 sq. mtrs. standing thereon. He further submitted that the Deed of Conveyance was executed between the vendors themselves and hence is bogus. He further argued that full consideration amount is not paid by the respondents to the appellant/trust. It was submitted that till today only Rs.3,50,00,000/- are paid and amount of Rs.14,13,00,000/- is

yet to be paid by the respondents. He further submitted that the trial Court has erred in holding that the entire payment is made. The trial Court ought not to have accepted the receipts of the cash payment which is allegedly paid by respondent no. 1. He relied on the auction notice issued by Joint Charity Commissioner. He relied on condition no. 7 of the terms and conditions for filling of tender which states that balance amount to be paid by demand draft or Pay Order only and payment by way of cash or cheque will not be accepted. He submitted that learned trial Judge has erred in holding issues against the plaintiffs and also erred in rejecting the order of injunction against the plaintiffs.

4. The learned counsel Mr. Upadhyay for the respondents in reply has submitted that the Deed of Conveyance or the permission of Charity Commissioner for alienation was for the entire property of 35400 sq. mtrs. He submitted that earlier in 2006 as per the MOU dated 3rd August, 2006 the appellants has agreed to sell the entire plot of land for Rs.4,75,00,000/- and therefore, in the year 2013, the price of the portion of land only, i.e., 5263 sq. mtrs. with structure 8920 sq. mtrs. thereon cannot be Rs.17,81,00,000/-. He submitted that receipt of possession was given in the year 2006 and thereafter the respondents have constructed a residential flats. The flats are already sold. On this point, he relied on the order of Charity Commissioner dated 4th February, 2013 wherein the amount of Rs.17,81,00,000/- is an amount of entire plot and

out of which an amount of Rs.6,72,00,000/- is shown as expenses incurred by the respondent no.1 in constructing the plot and it has lien over the suit property. He further relied on the notice Exhibit M dated 12th December, 2013 issued by the appellants to the respondents and in paragraph 2 of the said notice, the suit property is described as 35400 sq. mtrs. along with structure standing thereon. He submitted that the appellants have in fact sold the entire plot to the respondents and allowed them to construct the building. On the point of conveyance, he submitted that the conveyance is legal and valid. The Power of Attorney was issued in favour of respondent no. 8. On the point of payment, it is submitted that he has paid the entire amount of Rs.17,81,00,000/-, out of which an amount of Rs.6,72,00,000/- is lien on suit property, i.e., expenditure on the construction which is to be adjusted and Rs,7,40,71,000/- is paid in cash and receipts are issued by trustee. The details of cash payment is given as follows:

Amount paid in cash against receipt issued by Trustee as per details given below: Date — Amount 15.04.13 — Rs. 40,71,000/- 06.05.13 — Rs. 50,00,000/- 05.06.13 — Rs.1,50,00,000/- 09.07.13 — Rs. 75,00,000/- 31.07.13 — Rs.1,25,00,000/- 23.08.13 — Rs. 50,00,000/- 19.09.13 — Rs.1,00,00,000/- 15.10.13 — Rs.1,50,00,000/- **Total** — **Rs.7,40,71,000/-**	
Total of Amount Paid	1,78,10,086/-

The learned counsel submitted that the learned trial Court has rightly rejected the Application Exhibit 5, as the trust have suppressed number of facts and filed fraudulent suit against the respondents. The cash paid by the respondents ought to have been invested in the nationalized bank by the trustees and the appellants have not denied the fact of receipt of payment of Rs.7,40,71,000/- in cash from the respondents. He further submitted that the respondent no. 1 is only a highest bidder but earlier by MOU dated 3rd August, 2006 he was in possession of the suit land and the appellants have agreed to sell the land to him subject to permission from the Charity Commissioner.

5. It is a trust land. The MOU dated 3rd August, 2006 is for Rs.64,24,086/-. So also earlier transactions with Mr. Patel, payment made by the present respondents to the trust to satisfy the claim of Mr. Patel is also not denied. It is an admitted fact that respondents have carried out construction admeasuring 8920.16 sq. mtrs. on the land 5263 sq. mtrs. and have incurred an expenditure to the tune of Rs.6,72,00,000/- and respondents have lien on the suit property. It is declared by the Charity Commissioner in his order dated 4th February, 2013 is also not denied. The facts disputed are firstly that whether the entire suit plot, i.e. 35,400 sq. mtrs. was allowed to be alienated or land of 5263 sq. mtrs. with construction admeasuring 8920.16 sq. mtrs. standing thereon was only agreed to be sold and secondly, whether full

consideration was paid or not.

6. I have perused the Application under section 36 of the Bombay Public Trust Act for alienation preferred by the Trust to the Charity Commissioner so also the order dated 4th February, 2013 of the Charity Commissioner and also the explanation given by the Joint Charity Commissioner by the order dated 21st March, 2013. In the Application, the trust has expressed his inability to take care of 35400 sq. mtrs. land as the trust is in Gujarat and the property is situated at Kalyan. In the legal notice dated 12th December, 2013 issued by the trust to the respondents, the property in dispute is mentioned as 35400 sq. mtrs. along with structures standing thereon. An Application was made for clarification of the order of Charity Commissioner by Mr. Manish Bavishi requesting the Charity Commissioner that word “paiki” is to be substituted for word “including” in the description of property. The Charity Commissioner held that everywhere in the original application under section 36 as well as in the facts and reply also, the word “paiki” is used and not the word “including” is used. In the order, the lien of Rs.6,72,00,000/- in respect of structure portion of 8920.16 sq. mtrs. on the land admeasuring 5263 sq.mtrs. is mentioned. Thus, the amount payable for the said land and construction if taken at Rs.6,72,00,000/- then obviously the remaining amount of Rs.11,09,00,086/- (17,81,00,086 – 6,72,00,000), is the consideration of remaining open land. Therefore, the submissions of

learned counsel Mr. Saraf at this stage that the auction was only for portion of 5263 sq. mtrs. are reseated. The Charity Commissioner gave permission for alienation of the entire plot and there was registered conveyance in respect of the said land. *Prima facie* power of Attorney was granted to defendant no. 8.

7. The payment of the entire consideration is another disputed question of fact. The payment of Rs.3,50,00,000/- is admitted by the appellants. The appellants claim that Rs.14,13,00,000/- is still due from the respondents. After going through the details of payment which are given by the respondents, it appears that the payment of Rs,6,72,00,000/- which is mentioned as lien on the suit property is the expenses incurred by the respondents for the construction of the suit property. The amount is to be adjusted against the total consideration. However, the submission of the respondents that an amount of Rs.7,40,71,000/- was paid in cash is disputed by the appellants. The learned Judge of the trial Court has observed in paragraph 19 of the order that the receipts are filed by the defendants on record, however, the appellant/trust did not deny the execution of the receipts of trustees by filing counter affidavit and signatures of trustees are also not denied. However, it is pointed out by the learned counsel for the appellants that there is no pleading in the reply or in the written statement filed by the respondents that the respondents paid an amount of Rs.7,40,71,000/- in cash to the trust and

there is no whisper in respect of issuance of receipts in the pleadings. Under such circumstances, when this fact is not pleaded in the reply/written statement, the question of denial does not arise and to that effect, the reasoning given by the learned Judge of the trial Court that the entire payment was made by the respondents is not correct. Moreover, in the public notice for auction calling tenders, as per condition 7 of the terms and conditions for filing tenders, it was specifically considered that the balance consideration amount was to be paid by Demand Draft or Pay Order only. Further it was specifically mentioned that the payment by way of cheque or cash will not be accepted. This notice was issued by Joint Charity Commissioner while giving permission to alienate the property of the trust. Under such circumstances, it is the duty of respondents to show that they have paid the amount of Rs.7,40,71,000/- either by Pay Order or Demand Draft. If the conditions in the tender notice are not fulfilled as they should be, then it cannot be said *prima facie* that full consideration amount is paid, especially when it is disputed. The Court also has to take into consideration that building consisting of 115 flats is constructed and third party interest is created, under such circumstances, the order of the trial Court in respect of plot of 5263 sq. mtrs. is to be maintained. However, in respect of the remaining open land, the respondents are directed not to create third party interest, not to part with the possession and not to carry out any construction activity on the remaining portion of suit land subject to respondent to deposit 50% of the amount of Rs.7,40,00,000/- with the Charity Commissioner without prejudice and subject to the decision of the suit. It is made clear that the order of injunction against the defendants to continue till they deposit Rs.3,70,00,000/- with the Charity Commissioner. As soon as the said amount is deposited with the Charity Commissioner, injunction on the remaining suit land will stand vacated. The Charity Commissioner shall invest the said amount in the Fixed Deposit.

8. Appeal from Order stands disposed of. Civil Application is also disposed of accordingly.

(MRS.MRIDULA BHATKAR, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/Order.