

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO.129 OF 2014
WITH
CAA/160/2014**

M/s.Darshan Enterprises & anr. ... Appellants

Vs.

M/s.Ravi Development & Ors. ... Respondents

Mr.P.K. Dhakephlakar, Sr.Adv. a/w. Mr.K.S. Deval i/b J.M. Joshi for the
Appellants

Mr.N.V. Walawalkar, Sr.Adv. a/w Mr.S.M. Sabrad i/b A.R. Shaikh for
Respondent No.1

Mr.R.R. Lanjekar for Resp. Nos.18 to 20

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

DATE: **8th DECEMBER, 2015**

P.C.:

1. In this appeal, the appellants, who are defendant Nos.25 and 26 in the Special Civil Suit No.233 of 2013, have challenged the order dated 30.10.2013 passed by the learned C.J.S.D., Thane, thereby directing all the defendants not to alienate the suit property including FSI, TDR or DR, till the decision of the suit. So also, the defendants, their agents, etc. are directed not to make any development or the construction etc. in any type over the suit property till the decision of the suit.

2. The plaintiff is a Developer/Builder, who claimed that many lands situate at village Kavesar Taluka, District Thane, which were originally

owned by Balkishandas Pranjivandas Thanawala and Manubhai Bhagwandas Seth, by agreement of sale in 1960 were transferred to Mr.Edi Martin Alwaris, who alongwith other three partners i.e., Tarachand Jain, Deepchand Jain and Shri Fusalal K. Punamiya, agreed that the suit property was to be put up as a property of the partnership. All the partners agreed that the properties purchased by them as mentioned in the deed of partnership dated 19.5.1969 were put as properties of the partnership and it was agreed that Edi Martin Alwaris will have 50% share, Deepchand and Fusalal for 21% share and Tarachand will have 8% share in the partnership properties. Edi Martin Alwaris died thereafter. So also, the partners Deepchand and Tarachand. So the legal heirs and representatives of all the partners Tarachand, Deepchand and Fusalal, who are the original defendant No.1 and defendant Nos.7 to 16 to the suit, transferred the title and interest aggregating to their 50% share in the suit property in favour of the plaintiff by virtue of deed of confirmation dated 15.7.1995 and also by deed of release dated 10.1.2012 and also by power of attorney dated 22.9.2012 and declaration dated 23.8.1995.

3. It is the case of the plaintiff that in the meanwhile, the legal heirs of Edi Alwaris i.e., the original defendant Nos.17 to 20, had entered into agreement of sale in respect of the entire suit land with defendant No.25 and 26 i.e., Darshan Enterprises and Vijay Gruhnirman Private Ltd. i.e., the present appellants and the entire land was sold by the legal

representatives of Edi Alwaris though they were not entitled to. The plaintiff claimed 50% of the right through the legal representatives of the other three partners and prayed for a declaration and injunction in respect of the suit land.

4. Mr.Dhakephalkar, the learned Senior Counsel, has submitted that the plaintiffs have no right to claim any portion of the land from the suit property. The partnership was on the basis of an unregistered partnership deed, which did not create any right in favour of the partners. There is nothing to show that the partnership was formed and whether the partners have acted upon the agreed terms of the said deed or not? He submitted that if the partnership was in existence, then how the assets of the partnership can be claimed by third party through the legal heirs of the partners. The heirs of the partners cannot get any right in the property without a suit for accounts of the said partnership and dissolution of the said partnership. At the most, they have all undivided right in the partnership. He further argued that there was only agreement of sale in favour of Alwaris when he put the property as a common pool of partnership property. He submitted that the present appellants have entered into an agreement of sale with defendant No.9 Jaqueline Alwaris in respect of her 1/3rd share in the property on 6.11.2003 and thereafter on 22.11.2003, defendant Nos.17 and 18, the remaining heirs viz., Joseph and Maria, the other heirs of A.D. Alwaris, entered into agreement of sale

in favour of Defendant Nos.21 to 23 i.e., Nirmal Punamiya and Hirachand Jain and Bhikamchand Jain who are third parties in respect of their 2/3rd share of property. Thereafter, Hirachand and Bhikamchand gave power of attorney to Suresh Mehta of Darshan Enterprises and Nirmal Punamiya jointly. He submitted that one Urmila C. Desai who is defendant No.20 in the suit, is a daughter of Balkishan Thanawala, who is the original owner of the suit property. Mr.Manubhai Seth did not have any successor. So he gave his share in the property to Balkishan Thanawala and therefore, Urmila Desai became the owner of the entire property, who executed a registered conveyance on 14.8.2012 in favour of the legal representatives of Edi Alwaris i.e., Defendant Nos.17 to 19. Thereafter by registered agreement on the same day, i.e., on 14.8.2012, the development rights were executed by defendant Nos.21 to 23 i.e., Suresh Mehta Jain in favour of appellant No.2 i.e., Vijay Gruhnirman Private Limited about the same property i.e., Survey No.51/2, 53/2, 114/2. He submitted the title in the property and the claim of the plaintiff which is through the legal representatives of the partners has no basis. The terms of the agreement were never acted upon and there is no proof to that effect brought on record. Under such circumstances, no injunction order stopping the development against the appellants should have been passed by the learned Judge. He submitted that the plaintiff has no case of success in future in respect of the suit land and therefore, no injunction ought to have

been granted. Whether the plaintiff is going to succeed with the case or not, it should have properly be ascertained by the trial Court and should have rejected the application for injunction filed by the plaintiff.

5. At the time of hearing the submissions of the both the learned Senior Counsel and before hearing the Senior Counsel for Respondent No.1, consent terms dated 31.7.2015 signed between the plaintiff, original defendant No.25/respondent No.1 in this appeal and the defendants Nos.21, 22 and 23, which was marked at exhibit 159, were produced by the Senior Counsel of respondent No.1 i.e., the plaintiff. I went through those consent terms. These consent terms were executed by the appellants and the respondent No.1 after interim application was decided on 30.10.2013. Thus, during the pendency of this appeal, consent terms were executed by the parties before the trial Court. These consent terms have bearing over the interim order given by the trial Court and the issue before this Court. After going through the consent terms, especially No. (a), it is found that both the parties have different interpretations in respect of waiving of the right by the plaintiff in respect of the entire suit property or in respect of the limited property.

6. Therefore, the parties are hereby directed to approach the trial Court and get it clarified before the trial Court as to whether the plaintiff has relinquished 50% share of the total property, which is claimed to be

property of the partnership. It is agreed by both the parties before this Court that the property which has fallen to the share of the legal representatives of Edi Martin Alwaris. Considering 50% share of Edi Martin Alwaris, the said 50% share of the total property is to be excluded. However, the remaining 50% property which is claimed, if the theory of partnership is accepted, as belonging to the other partners or the legal representatives of the partners namely, Tarachand, Deepchand and Fusalal Punamiya. Out of that whether 50% of that share is waived or or not, is not clear from these terms. As the document is executed before the trial Court, the parties to approach the trial Court and submit fresh consent terms in respect of 25% share or 50% share of the remaining property. Till then, interim order passed by the trial Court to continue. The trial Court after considering the consent terms, shall decide whether fresh consent terms can be asked for. It is at liberty to decide or reject afresh the application under exhibit 5, if filed, by either the parties under Order 39 of the CPC.

7. In view of this, Appeal from order is disposed of with liberty to the parties to file fresh appeal after explanation and the orders passed by the trial Court, if required.

8. Civil Application also stands disposed of.

(MRIDULA BHATKAR, J.)