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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1584 OF 2015

IN

SUIT NO.820 OF 2015

Diljit Singh Chandok	...Applicant
<u>In the matter between</u>	
Diljit Singh Chandok	...Plaintiff
V/s.	
Bakshish Singh Chandok & Ors.	...Defendants

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Mr. A. Y. Sakhare a/w Nikhil Raut a/w Mr. Bharat B. Merchant,
Ishwar Ahuja i/b. Thakordas & Madgavkar for the
Applicant/Plaintiff.

Ms. Mamta Sadh a/w Ms. Manthan Unadkat i/b. Mr. S. G. Lakhani
for Defendant Nos.1 to 3.

Mr. Sanjay Jain a/w Ms. Krishna Raja i/b. M/s. L J Law for
Defendant No4.

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CORAM : A. K. MENON, J.

DATE : 1st October, 2015.

ORAL JUDGMENT

1. The present notice of motion is taken out by the plaintiff
seeking an order of temporary injunction restraining the defendants

from carrying out any construction activity on the suit property whether in compliance with the said I.O.D. and/or Commencement Certificate or otherwise and not to enter upon the suit property for the purpose of carrying out such construction activity and for appointment of Court Receiver in respect of the suit property.

2. The suit is filed, inter alia, seeking a declaration that a power of attorney dated 29th November, 2010 and all documents signed pursuant to the said power of attorney are void, illegal and not binding upon the plaintiff. The suit seeks a further declaration that the Development Agreement dated 25th September, 2014 and the power of attorney of the same date do not and cannot operate in law as a disposition of the interest of the plaintiff in the suit property. The plaintiff has also sought other interim reliefs of protection.

3. The Notice of motion is listed for final disposal. It is the case of the plaintiff that he is a resident of Rajouri Garden, New Delhi. The first defendant is a nephew of the plaintiff, the second defendant is the brother of the plaintiff and the third defendant is sister-in-law of the plaintiff and the widow of late Amarjit Singh. The

fourth defendant is a partnership firm which carries on development of properties. The suit pertains to a dispute as to the development rights granted to defendant no.4 in respect of a plot of land admeasuring 660.5 sq. yards equivalent to 552.2 sq. meters, bearing plot no.12 corresponding C.T.S. no.G/396/10 of Gazdar Private Scheme, Village Bandra (West) and lying and being at D.P. Nagar, North Avenue Road, Santacruz (West) Mumbai-400 054 along with structure standing thereon comprising of ground, three upper floors and two garages.

4. It is the plaintiffs case that the suit property was acquired by late Sujan Singh Chandok in the year 1960. On the demise of Shri Sujan Singh Chandok, the property came to be transferred to the names of the plaintiff Diljit Singh Chandok (1/3rd share), defendant no.1 and 3 (1/3rd share) and defendant no.2 (1/3rd share) and they were thus entitled to 1/3rd undivided share and interest and therefore are jointly entitled to the suit property. It is the plaintiffs case that the defendant nos.1 to 3 have without his consent entered into a development agreement with defendant no.4 in respect of the

suit property and defendant no.4 has entered upon the suit land and demolished the existing building. According to the plaintiff all the aforesaid actions of the defendants are without his consent and illegal. The plaintiff contends that on his behalf defendant no.1 has allegedly executed the development agreement on the basis of a power of attorney allegedly granted by him but which in fact has not been executed by him. A copy of the power of attorney appears at Exhibit 1 of the plaint in the present proceedings. It is the case of the plaintiffs that the power of attorney was never executed by him in favour of defendant no.1 and that signature and the thumb impression of the plaintiff appearing on the power of attorney are forged. Accordingly, the power of attorney did not empower the first defendant to represent the plaintiff in any manner and there was no question of the plaintiff being deemed to have executed the development agreement or any other document pertaining to the suit transaction.

5. It is the plaintiff's case that he was unaware of the fact that the defendant nos.1 to 3 had negotiated defendant no.4 for re-

development of the suit property. He has contended that all documents have been executed behind his back without his knowledge and consent. In support of his contention, Mr. Sakhare the learned Senior Counsel representing the plaintiff contended that perusal of the power of attorney reveals that the same has been executed not before the Sub-Registrar of Assurances but in the presence of a Notary Public. He submitted that the concerned Notary Public was barred from practicing on account of certain complaints filed against him. In this respect, Mr. Sakhare relied upon a letter dated 16th April, 2015 received by the plaintiff, (in response to his letter of request of the same date) issued by the Under Secretary (Legal) to the Government of Maharashtra, Law and Judiciary Department wherein it is stated that the Notary concerned was appointed with effect from 15th May, 1993 for the area of Greater Mumbai and his Certificate of Practice as Notary was valid upto 11th September, 2008. Copies of the Certificate of Practice is also enclosed along with said letter.

6. Perusal of the same reveals that the certificate has been

extended from time to time and was subject to the final validity of 12th March, 2008. However, it transpires that on account of certain complaints filed against the said Notary amongst other persons, the Joint Secretary and Competent Authority after considering the material placed before the Competent Authority and after holding an enquiry in accordance with Rule 13 of the Notaries Rules, 1956 a decision was taken to remove the name of the concerned Notary Public from the Register of Notaries by reason that he was found guilty of professional misconduct resulting in cancellation of his Certificate of Practice. It is therefore contended by Mr. Sakhare for the plaintiff that on the date when the power of attorney is alleged to have been executed before him, the Notary did not have a valid certificate and as such the power of attorney is not executed in the presence of a person authorised to authenticate its execution, it is therefore invalid and is of no legal effect. It is further submitted by learned Senior Counsel on behalf of the plaintiff that in any event the power of attorney is also invalid being in violation of the amended provisions of section 34 of the Bombay Stamp Act which provides that the stamp paper upon which an instrument is written

should be purchased in the name of one of the parties to the instrument. He submitted that by virtue of the amended provisions of section 34, the power of attorney relied upon by the defendants in the present case was clearly invalid since the stamp paper was purchased in the name of Amarjit Singh Chandok. Mr. Amarjit Singh Chandok is the late husband of defendant no.3 and therefore for this reason also Mr. Sakhare submitted that the power of attorney cannot be considered as valid.

7. He relied upon an order of a learned Single Judge of this Court in the case of M/s. KBC Pictures V/s. A. R. Murgadoss & Ors. and submitted that the provisions of the amended section 34 has been duly recognized and given effect to in the said judgment. Since the power of attorney is not validly executed and the fact that the defendant has denied his signature and the thumb impression on the power of attorney, there is no question of defendant no.1 acting upon the said power of attorney. Mr. Sakhare also submitted that the case of the defendants in the affidavit in reply is that the power of attorney had been executed by the plaintiff at the instance of the

defendants and at the defendants' residence when the plaintiff was in Mumbai. This has been specifically denied by the plaintiff in his affidavit in re-joinder.

8. Apart from this even the plaint proceeds on the basis that the power of attorney is false and fabricated and that the signature appearing thereon is not of the plaintiff. The thumb impression has also been denied by the plaintiff. Mr. Sakhare submitted, that in the absence of a valid power of attorney it was not at all possible for the defendant no.4 to obtain development rights in respect of the suit property.

9. The admitted position before this Court today is that the plaintiff is entitled to $1/3^{\text{rd}}$ share in the suit property, $1/3^{\text{rd}}$ vesting jointly in defendant no.1 and 3 and $1/3^{\text{rd}}$ vesting in defendant no.2. In view of this admitted position, the learned counsel for the plaintiff submitted that the development agreement was executed without the authority of the plaintiff. If this contention is to be accepted, Mr. Sakhare submitted, grant of development rights was invalid and

therefore defendant no.4 would not acquire rights in the property not only in respect of the 1/3rd share of the plaintiff but to the entire property since the construction put up on the said property would entail utilization of the rights of the owners i.e. the undivided rights of the parties claiming ownership i.e. plaintiff and defendant no.1 to 3. He accordingly submitted that the entire process of development including the applications made for grant of non-issuance of the intimation of disapproval and commencement certificate stand vitiated. According to him, if the rights of the plaintiff are to be protected the defendant ought not to be permitted to proceed with development activity at site. He also relied upon the correspondence between the parties. According to the plaintiff, he first learnt of the execution of the development agreement sometime in the beginning of March 2015 when he received a copy of the development agreement pursuant to an application made under the Right to Information Act. What the plaintiff sets out in the affidavit in rejoinder is that he received a copy of the development agreement on or about 9th March, 2015 from his Advocates who had procured the same from the office of the Deputy Registrar. The plaintiff submitted

that upon receiving the said copy his Advocates were instructed to address a notice to defendant no.1 which they did on 30th March, 2015 questioning the disposition of the property and reiterating that he had not executed the power of attorney and the same was fabricated in order to usurp the plaintiffs share in the property. A specific allegation has been made that the power of attorney was forged and fabricated and without the knowledge and consent of the plaintiff and behind his back. In the said notice, the plaintiff's advocate has also submitted that the plaintiff had not signed the power of attorney or affixed his thumb impression on the same.

10. Various references have been made to the other documents executed pursuant to the power of attorney including the Memorandum of Understanding and development agreement dated 16th July, 2014 and 25th September, 2014 respectively. It was further contended in the said notice that based on the said power of attorney, no rights could have been created to defendant no.4 and that the execution of the development agreement was illegal. So also the defendants action in obtaining I.O.D. and C.C. also based on

the power of attorney and the development agreement executed in pursuance to such power of attorney were illegal. In view of the fact that the power of attorney itself is forged and fabricated and the defendants were called upon to cease and desist from permitting any further activities on the said plot of land and stop further construction activities as also cease to act upon the I.O.D. and C.C.

11. The plaintiff has also requested the concerned authority of the Municipal Corporation to cancel the I.O.D. and C.C. Mr. Sakhare then pointed out that the legal notice was replied to on 18th April, 2015 wherein first time the defendants contended that the power of attorney was validly executed when the plaintiff visited the residence of the defendant nos.1 to 3. Mr. Sakhare submitted that no specific reference was made as to whose residence the plaintiff had visited. It is further submitted that this allegation of the plaintiff having attended the defendants residence and executing the power of attorney has once again been denied in his affidavit in rejoinder. In reply to the notice, the defendants contended that the plaintiff was all along aware that the property has been proposed for

redevelopment and that he has also given his consent to the first defendant acting for him and executing on his behalf the Memorandum of Understanding dated 16th July, 2014.

12. Similarly according to the defendant nos. 1 to 3 the plaintiff had also authorized the first defendant to execute the development agreement and power of attorney both dated 25th September, 2014 in favour of defendant no.1. Accordingly it is the case of the defendants that the power of attorney was validly executed and the defendant no.1 was empowered to act on the basis of the said power of attorney and execute the development agreement and power of attorney in favour of defendant no.4 thereby creating an interest of the property.

13. It is necessary to make reference to the development agreement executed as also the power of attorney. Perusal of the same reveals that upon development of the property, the defendant no.4 will be entitled to 35% of the constructed area /saleable area and the plaintiff and defendant nos.1 to 3 will jointly be entitled to

65% of the area which is also provided that the defendant shall provide a bank guarantee and indemnify the same against any claims damages or losses. Mr. Sakhare submitted that contents of the development agreement were never discussed with the plaintiff.

According to him the plaintiff is not interested in developing the property, at least not through the defendant no.4. Based on these set of facts Mr. Sakhare submitted that the plaintiff's rights must be protected that the plaintiff is entitled to the reliefs claimed.

14. On behalf of defendant nos.1 to 3, Ms.Sadh, the learned counsel submitted that entire case in the plaint is incorrect. The plaintiff has deliberately not disclosed the date when he learnt of the development rights having been granted to the defendant no.4. According to her, the Memorandum of Understanding was also well within the knowledge of the plaintiff as far as back 16th July, 2014 when the same came to be executed. She submitted that even the copy of the development agreement was available to the plaintiff. Apropos the contention that the power of attorney was not executed, validly executed, she contended that in the normal course if a Notary

had agreed to certify the document as having been executed in his presence there was no reason for the defendant nos.1 to 3 or for that matter the plaintiff to suspect the Notary's action in recording and registering the execution of the power of attorney. In any event, this contention of the plaintiff does not hold good since the denial of the signature and the thumb impression according to her is false.

15. According to the learned counsel, the plaintiff had attended the residence of the defendants and executed the power of attorney in the presence of the Notary and the plaintiff was also identified by an Advocate whose name appears on the Power of Attorney. She further contended that in any event the plaintiff, had suppressed the factual knowledge of the suit transaction and that there was an agreement arrived between the parties viz. Co-owner to develop the property and share in the benefits of redevelopment of the Mumbai property and other properties. Ms. Sadh then contended that the plaintiff was a resident of Delhi and was occupying the premises at Delhi in which the defendant nos.1 to 3 also had a share. According to the learned counsel the plaintiff and

defendant nos.1 to 3 had agreed that both the properties i.e. the one in Mumbai and the one in Delhi would be shared between them and the suit property would initially be subject matter of redevelopment. Accordingly, the development agreement executed which clearly dealt with the share of all the co-owners, the plaintiffs and the defendant nos.1 to 3 as set out above. She supported this by contending that the co-owners i.e each of the defendant nos.1 and 3, defendant no.2 and the plaintiff had an equal $1/3^{\text{rd}}$ share in 65% of the saleable area and that it was a matter of initial adjustment between them as to how the 65% was to be shared amongst them. To a query from the Court as to whether any of these internal arrangements have been recorded in writing, the learned counsel submitted that there was no written record of any of the negotiations interse between plaintiff and defendant nos.1 to 3 or negotiations between the defendant nos.1 to 3 acting for themselves and on behalf of the plaintiff and defendant no.4. According to her, the plaintiff was fully aware of the contents of the development agreement and had accordingly consented to the same by empowering the defendant no.1 by the suit power of attorney.

According to her, therefore, the present notice of motion is liable to be dismissed.

16. Mr. Jain, the learned counsel appearing on behalf of defendant no.4 developer submitted that he should be treated as a bonafide purchaser who entered into the development agreement for valuable consideration and without notice of any dispute in respect of the suit property. His client was unaware about the dispute inter se if any between the plaintiff and the defendant nos.1 to 3. He further submitted that as far as the defendant no.4 is concerned, he had entered into the development agreement on the strength of the representations made by the defendant nos.1 to 3 and after verification of title which included issuance of a public notice in the Free Press Journal, inter alia, on 17th May, 2014 inviting claims and objections if any. According to Mr. Jain therefore, necessary safeguards had been taken by them inter alia, by carrying out a verification of title. To a query from the Court as to whether any attempts were made by the defendant no.4 to meet the plaintiff since he was a 1/3rd owner of the plot in question, the learned

counsel submitted that there were no meetings or communications between defendant no.4 and the plaintiff. Further more, learned counsel also submitted that there was no reason to disbelieve the representation made to the defendant no.4 by the defendant nos.1 to 3 for themselves and on behalf of the plaintiff. According to him defendant no.4 proceeded on the basis that the public notice did not elicit any objections. So also the representation made by the defendant nos.1 to 3 as to the fact that defendant no.1 was duly empowered by the plaintiff to act for him was also not questioned by the defendant no.4.

17. Mr. Jain then submitted that the conduct of the plaintiff must be borne in mind while considering the application for grant of interim relief. According to him his clients obtained the IOD in December 2014 and the Commencement Certificate in February 2015. On seeking the I.O.D. his clients obtained vacant possession from defendant nos.1 to 3 in November 2014 all of which according to him was within the knowledge of plaintiff. He submitted that although defendant no.4 has no personal knowledge of the state of

mind of the plaintiff it can be inferred from the circumstances and the various contentions of the plaintiff that the plaintiff had complete knowledge of the fact about the redevelopment transaction.

18. Firstly he submitted that the plaintiff does not disclosed the date on which he came to learn of the execution of the agreement for redevelopment, secondly, the public notice has not been alluded in the plaint nor has the plaintiff dealt with the aspect of how he reacted to the public notice. He then submitted that defendant no.4 had proceeded on the basis of investigation of title and there is no allegation against the defendant no.4 that the development agreement was unfair in any manner to the plaintiff or any of the defendants. According to him, the plaintiff was always aware of at least the Memorandum of Understanding inasmuch as in the affidavit in re-joinder the plaintiff had listed certain dates and events. Perusal of the same reveals that at item no.13 the plaintiff set out the date when he claims to have received a copy of the development agreement. However, as far as the Memorandum of Understanding is mentioned at item no.7 and the remark against the

said document reads as follows:-

“Not signed by me, but signed by Bakshish”

19. Mr. Jain submitted that if the plaintiff did not have a copy of the Memorandum of Understanding, it was not possible for the plaintiff to state that the Memorandum of Understanding was signed by defendant no.1. This, he contends, is sufficient evidence of the fact that plaintiff was aware of the transaction and that the present suit is nothing but a dishonest attempt on the part of the plaintiff to derail the transaction as an after thought. According to Mr. Jain the defendant no.4 had already created third party rights in favour of certain persons in respect of Apartments 801, 901. However, when asked as to the identity of the third parties Mr. Jain stated that no such particulars were available. Indeed perusal of the affidavit in reply filed on behalf of defendant no.4 dated 6th July, 2015 does not reveal any particulars of the so called third party rights alleged to have been created by the defendants.

20. In his affidavit, in reply on behalf of defendant no.4, the deponent has submitted that defendant no.4 has made huge

investments in the project to the extent of about Rs.2 crores and also acquired TDR for a substantial sum of money. According to him, therefore, he had taken all precautions necessary in obtaining the I.O.D. including issuance of public notice which as stated above did not elicit any objections from any quarter.

21. Mr. Jain, learned counsel for the defendant reiterated that the plaintiff is wrong in his submission that the power of attorney was a forged and fabricated document since according to him the plaintiff was aware of the execution of the Memorandum of Understanding if not the development agreement. Equally he submitted, the plaintiff was aware of the further steps taken by defendant no.4 in obtaining the I.O.D and C.C. and having entered the suit property for the purposes of carrying out. It is further submitted by him that the plaintiff had not dealt with the public notice in the plaint.

22. Mr. Jain submitted that the plaint was completely silent about the public notice and it is only after the affidavit in reply

raised this point that the plaintiff has chosen to offer an explanation in this respect. Mr. Jain therefore, contended that the plaintiff's case ought not to be believed and that the notice of motion is liable to be dismissed.

23. Having considered the contentions of the parties and having perused the pleadings and having heard the counsel at length, I am of the view that the plaintiff had succeeded in making out a strong prima facie case. The execution of the power of attorney is thrown into considerable doubt given fact that the execution thereof is not free from doubt. The question then arises whether the defendants could have acted upon the power of attorney and consequently approached the Municipal Corporation and other authorities to seek necessary permission for development of the suit property. The argument of the defendants that the development agreement presented a "fair deal" for all the parties is of no avail. The question is whether the power of attorney and other documents were validly executed. In this behalf, it is the plaintiff's express case that at no stage he was made aware of the proposal to develop the

property. In support of the contention that the plaintiff was bound by the fair agreement reached for benefit of all parties, it is the contention of the learned counsel for the defendant nos.1 to 3 that the plaintiff was well aware of the contents of the development agreement and also had authorised the defendant no.1 to execute the same by the said power of attorney.

24. According to learned counsel for the Defendants 1 to 3 therefore, the plaintiff has now is attempting to resile from the original transaction which was a consensual deal with the express knowledge and consent of the plaintiff. She also contended that even the bank guarantee provided by defendant no.4 took into consideration the liability of the defendant no.4 to the plaintiff in addition to the other defendants and therefore she submitted that as the power of attorney has validly executed by the plaintiff.

25. I am unable to accept the case of the defendants especially since it is now clear that the defendants have admitted the contents of the development agreement were at no stage discussed with the

plaintiff by defendant no.4. In this day and age when a developer enters into a transaction of this nature, it was but natural for the defendant no.4 to take all precautions and in the process of investigation of title, quite apart from merely relying upon the fact that a public notice did not elicit the objections, the developer would, before launching an investigation into title, have required the presence of all parties in the process of negotiation before execution of the Memorandum of Understanding and any in event before execution of the development agreement. In fact the contention of the defendant no.4 that they had incurred substantial costs cannot come to their assistance inasmuch as in the light of the admission that they had no personal contact with the plaintiff at all, it is evident that not only did the plaintiff and defendant no.4 not meet at any time but as confirmed during agreements by learned counsel for the defendant no.4, the defendant no.4 has not even had a telephonic conversation with the plaintiff. In other words, it appears that defendant no.4 has not made any attempt to even verify the existence of the plaintiff or the correctness of the alleged representation to the defendant no.4 by defendant nos.1 to 3 or such

of them qua the plaintiff's consent to the proposed development. This is in the light of the fact that it is an admitted position that the plaintiff, to the knowledge the defendant no.4, is a co-owner having 1/3rd share in the property, it is difficult to believe that defendant no.4 proceeded merely on the basis of representations made by defendant nos.1 to 3.

26. In the circumstances, I am satisfied that the plaintiff has made out a strong case for grant of reliefs and the balance of convenience is undoubtedly in favour of the plaintiff. Mr. Jain, the learned counsel on behalf of the defendant no.4 submitted that in the event the Court finds in favour of the plaintiff, the Court may only consider whether the relief should be restricted to 65% of the construction given the share of the plaintiff and defendant nos.1 to 3. In other words, defendant no.4 was desirous of continuing with the construction and completing the project keeping aside the share of the defendant nos.1 to 3 and the plaintiff. This in my view is not acceptable. I do not intend to permit construction to proceed and let the defendant sink in more efforts and funds when the co-owners are

not ad-idem interse, apart from the plaintiff and defendant no.4 not having discussed re-development. Such a course of action would entail permitting the defendant no.4 to engage in a potentially fruitless exercise, even assuming third party rights are not created. If I permit third party rights to be created, I would be exposing unsuspecting third parties to the project of entering into agreement to purchase flats/premises where the intending authority of the defendant no.4 is in serious doubt. For the reasons aforesaid, I am of the view that the plaintiff is entitled for protection however, in the instant case in view of the fact that co-ownership of the property is admitted, it would in my view suffice if the defendants are restrained by an injunction from acting upon the Memorandum of Understanding and the Development Agreement, permission obtained thereunder and from carrying on any further construction activity at site. In the circumstances, I pass the following order:-

- (i) Notice of Motion is made absolute in terms of prayer clause (a).
- (ii) It is clarified that defendant no.4 is at liberty to remove all its equipments and personnel from site.

- (iii) Notice of Motion is accordingly disposed of.
- (iv) There will be no orders as to costs.

27. At this stage, learned counsel for defendant nos.1 to 3 and learned counsel for defendant no.4 seeks a stay on the operation of this order. Following the conclusion that I have reached, there is no reason to suspend the operation of this Order. The application for stay is rejected.

(A. K. MENON, J.)