

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 21/2012

- 1] Dr. Meenacshi Philomena Martins e Shukla,
wife of Anurag B. Shukla, aged 51 years,
- 2] Shri Anurag B. Shukla,
major of age, son of Bhanudev Shukla,

Both residents of House No.1017,
Shriwada, Paitona, P.O. Alto-Porvorim,
Bardez, Goa 403 521.

APPELLANTS

Versus

- 1] Dr. Bina Martins,
aged 50 years, wife of late
Shusrut Martins,
r/o House No.91,
'Kranti-Jyoti', Paitona,
Salvador-do-Mundo,
Bardez, Goa.
- 2] Miss Esmina Martins,
d/o Shusrut Martins, aged 12 years,
- 3] Miss Elizabeth Martins,
d/o Shusrut Martins aged 11 years,
- 4] Mr. Nitin Balaji Virjinkar,
Son of Balaji Virjinkar, major of age,
resident of House No.413,
Abe de Faria Marg, Margao, Goa.
Respondent Nos. 2 & 3 residing at
r/o House No.91,
'Kranti-Jyoti', Paitona,
Salvador-do-Mundo,
Bardez, Goa.
both minors,
represented by their Guardian,
their mother Dr. Bina Martins,
the Respondent no.1 herein.

RESPONDENTS

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Shri J.E.Coelho Pereira, Senior Advocate with Shri V. Korgaonkar,
Advocate for the Appellants.
Ms. Asha Desai, Advocate for the respondents no.2 and 3.

**CORAM : NUTAN D.SARDESSAI, J.
RESERVED ON :01/07/2016.
PRONOUNCED ON :22/09/2016**

JUDGMENT:

1] This is an appeal at the instance of the original defendants challenging the order passed by the Senior Civil Judge, Mapusa, pursuant to which he granted the injunction and restrained the defendants from undertaking any construction in the suit plot and creating third party rights therein till further orders. It goes without saying that the respondents no.1 to 3 are the original plaintiffs while the respondent no.4 is the original defendant no.3 who had neither participated in the proceedings before the Trial Court nor in the Appeal.

2] Shri J. Coelho Pereira, learned Senior Advocate came to be heard on behalf of the appellants who submitted that the impugned order did not at all consider the cardinal principles in the grant of injunction namely a prima facie case, irreparable injury and balance of convenience. The learned Trial Judge had not considered the Agreement dated 7.12.1990 entered into between the appellants and the respondent no.1 and her deceased father with the respondent no.4. The learned Trial Court had failed to consider that the application was hit by delay and laches and did not consider the Agreement and the

Declarations in their proper perspective and thereby erred in passing the impugned order as it did. There was no basis to rely in **Jagdish Chander Sachdava Vs. Royal Bombay Yatch Club & Others** [2004 ALLMR 1264] and, therefore, considering the equities, the appellants were entitled to a reversal of the order and a discharge of the injunction granted against her.

3] Ms. A. Desai, learned Advocate for the respondent no.1 submitted at the outset that there was no Sale Deed executed between the plaintiffs and the defendant no.3. No suit was also filed for the specific performance of the Agreement and at the highest what was at large was the Development Agreement. She had adverted to the Declaration which was totally silent qua the plot in respect of which 1/4th share was agreed to be given to the appellants. The Trial Court had rightly dealt with the issue on prima facie considerations and was seized of the fact that what was at large was only the Agreement to develop between the defendants no.1 and 2 and the plaintiffs in respect of the entire property. Even assuming without admitting that the plot was allotted to the defendants no.1 and 2, the plaintiffs had to be compensated being the co-owners. The Declaration dated 30.10.1999 was null and void as the declarant had no right to dispose off and moreover they were not parties to it. There was no basis to justify interference with the impugned

order and hence the appeal had to be dismissed.

4] The respondent no.1 with her minor children had maintained the suit simplicitor for the relief of permanent injunction carving a case that the property bearing Survey no.140/6 originally belonged to her late father-in-law and his wife who had left behind her late husband and the appellants as their heirs. She had married Dr. Martins under the communion of assets who died leaving behind the plaintiff no.1 as his Meira and two daughters. The late father of her husband and of the defendant no.1 had entered into an Agreement with the defendant no.3 for developing the property and an Agreement for Sale was entered into on 7.12.1990 pursuant to which they agreed to sell to the purchaser the plot admeasuring 2127 sq.mts. for the consideration of ₹5,31,750/-. It was also agreed in the said Agreement that the Vendors would give a Power of Attorney to the purchaser i.e. the defendant no.3 for dealing with the entire property for the purpose of development etc. and thereupon he had got the approval for sub-division of the said property which was later approved by the Panchayat.

5] It was also her case that he had developed a part falling in the residential zone. She had executed a Power of Attorney dated 18.3.1992 in favour of the defendant no.3

authorising him to enter into an Agreement of Sale of the subdivided property bearing Survey no.140/6 and receive consideration therefor. Earlier on 4.7.1991 she alongwith her late father-in-law and late husband had signed a Declaration that they had no objection if the share to the extent of $1/4^{\text{th}}$ of the entire consideration was paid by the defendant no.3 to the defendant no.1 and her husband. It was further the case of the respondent no.1-plaintiff that acting on these two documents, the defendant no.3 had agreed to sell and had sold various plots in the subdivided property to different persons. He had executed a Deed of Declaration dated 30.10.1999 with the defendant no.1 by which he declared that one of the plots no.7F with the improvement and development done by him was allotted to the defendants no.1 and 2 in consideration of the amount payable and due to them for the sale of a part of the said property.

6] The plaintiff was not a party to this Declaration made by the defendant no.3 in favour of the defendants no.1 and 2. The plaintiff received a notice from the office of the Deputy Collector pursuant to which she learnt that the defendant no.1 was claiming to be the sole owner of the plot no.7F in the property under Survey no.140/6 pursuant to the Deed of Declaration dated 30.10.1999 and for allotment of a separate survey number. The Power of Attorney executed by her in favour

of the defendant no.3 did not authorise him to make an application for the allotment of any plot in favour of any person. She had acquired right, title and interest in the survey no.140/6 upon her marriage. Though she had executed a Power of Attorney dated 18.3.1992 in favour of the defendant no.3 authorising him to enter into Agreements of Sale or Deeds of Sale and to receive consideration, it was merely an authorisation at her instance and he was not entitled to make any Declaration or allotment of any plot. The defendants no.1 and 2, therefore, could not claim the exclusive ownership of the property bearing the Survey no.140/6 including the plot no.7F. The defendant no.1 had obtained the N.O.C. from the Town & Country Planning Department for carrying out the construction and had applied to the Panchayat for the construction license. On that premise the plaintiff sought for the relief of injunction to restrain the defendants no.1 and 2 and which was granted in her favour.

7] The appellants-defendants denied the case as set out by the plaintiffs and specifically set out a case that after the Agreement entered into by her late father and brother dated 7.12.1990, a Power of Attorney was executed by them in favour of the defendant no.3 on 8.12.1990. She too had executed a Power of Attorney with her husband in favour of her late father and also executed a Power of Attorney in favour of the defendant

no.3 on 1.7.1991. Her father and her brother, both since deceased, and his wife i.e. the plaintiff no.1 had made a Declaration on oath dated 4.7.1991 in which they had clearly stated that they had no objection to the share to the extent of $1/4^{\text{th}}$ of the entire consideration being paid directly to the defendants no.1 and 2 and to sign the necessary Deed of Sale on receipt of their share of consideration. A Declaration was made by the defendant no.3 and her late father on 9.2.1993 whereby the defendant no.3 had paid the sale consideration to the Vendors and the defendant no.3 agreed that the plot no.6 was to be allotted to her late father for the amount of ₹1,68,750/- and the possession was handed over to build a bungalow or convey the plot by way of sale and the balance of ₹1,62,000/- was payable to her late father, late brother and the plaintiff no.1 and ₹1,16,000/- was payable to her and her husband.

8] It was her case in defence further that the plaintiff had suppressed this relevant fact which would demolish her claim and right to the suit property and, therefore, having come to the Court with unclean hands and willfully suppressing the Declaration dated 9.2.1993, she was not entitled to any equitable relief. Not only had the plaintiff no.1 alongwith her late father and late father-in-law executed a Sale Deed of the plot no.5 of the Survey no.140/6 on 9.2.1993 in favour of Shri S. Korgaonkar, a

subsequent third party transfer was made in respect of the said plot to Shri A. Sumthankar on 19.5.2011. The said Declaration which had been suppressed would show that the plaintiff and her late father-in-law had no right in the property bearing the Survey no.140/6 having received the entire consideration which was reiterated in the subsequent Declaration dated 30.10.1999. Her late father, the late husband of the plaintiff no.1 and the plaintiff had sold the developed plot no.6 allotted by virtue of the Deed of Declaration dated 9.2.1993 and were now estopped from taking a stand that the Declaration of the defendant no.3 was invalid and had no value in law for want of any authorisation consequent upon the Power of Attorney executed in his favour.

9] It was the case of the appellants in defence that she had obtained the necessary permission from the Town and Country Planning Department to do the construction in the suit plot no.7F and which was well within the knowledge of the plaintiff no.1 as early as 2010. The plaintiff had failed to stop the grant of license by the Village Panchayat in August 2010 and the application was, therefore, hit by delay and laches. No case whatsoever was made for the grant of injunction nor was the balance of convenience in her favour muchless any irreparable and injury caused to her and therefore, the application was liable for dismissal.

10] The first transaction was the Agreement of Sale dated 7.12.1990 pursuant to which the late father of the appellants, her late brother and she alongwith her husband had entered into an Agreement with the respondent no.4 whereby as owners of the property bearing Survey no.140/6, an area of 2127 sq.mts. was agreed to be sold in favour of the respondent no.4 on payment of the consideration of ₹5,31,750/- and in the manner recorded therein. The Agreement also reflects that the Vendors i.e. the main contesting parties to the dispute including the late husband of the plaintiff were to execute a Power of Attorney in favour of the respondent no.4 and more particularly he was entitled on execution of the said agreement to negotiate, sell the remaining part of the sub-divided plots with the prospective purchasers and the onus was on him to get the necessary clearances from the various Departments. The Deed of Declaration dated 30.10.1999 was between the respondent no.4 and the appellants herein consequent to which he had admitted that he was to pay to the appellants a sum of ₹1,17,062.05 as her share and that he had allotted the plot no.7F in her favour in consideration of the amount payable by him to her and the costs of the development. The respondent no.4 had accordingly allotted the plot no.7F in favour of the appellants and pursuant to which she was entitled to carry out the construction therein.

11] A cursory perusal of the Power of Attorney executed

by her late father and late brother dated 8.12.1990 in favour of the respondent no.4 shows that he was authorised amongst others to enter into an Agreement of Sale or Deed of Sale of the sub-divided plots of the property bearing the Survey no.140/6 and receive consideration thereof though executed before the Notary Public. The Special Power of Attorney dated 1.7.1991 executed by the appellants indicates that they were the joint owners of the property bearing the Survey no.140/6 with her late father and late brother as the co-owners and appointing and constituting her late father as their Attorney pursuant to the Deed dated 10.1.1991. There was another Declaration executed by the late father of the appellant no.1, her late brother and the respondent no.1 dated 4.7.1991 in which they had asserted that they were the co-owners of the property bearing the Survey no.140/6, that they had entered into an Agreement dated 7.12.1990 with the respondent no.4 to sell the said property, that the appellants as the co-owners had expressed that their share of consideration be paid to them directly and to which they had no objection if 1/4th of the entire consideration being paid directly by the respondent no.4 to the appellants and for which they would sign the necessary Deeds.

12] The Sale Deed dated 23.3.1992 was between the late father of the appellant no.1 through his Attorney the respondent

no.4, her late brother and the respondent no.1 apart from the appellants with the respondent no.4 as the confirming party whereby the plot no.1 admeasuring 401 sq.mts. was conveyed in favour of the purchasers for the consideration of ₹1,80,000/-. The Deed of Declaration dated 9.2.1993 between the respondent no.4 on the one hand and the late father of the appellant no.1 on the other reveals that the respondent no.4 had developed the property entrusted to him pursuant to the Agreement of Sale dated 7.12.1990 bearing the Survey no.140/6 which he had developed in an area of 2127 sq.mts. He had paid an amount of ₹5,53,250/- to the late father of the appellant no.1 and who had approached the respondent no.4 for allotting the plot no.6 to him in consideration of the balance amount payable to him. Considering this Declaration too it cannot be heard on behalf of the respondent no.1-plaintiff that the transaction entered into by the late father of the appellant no.1 and her late brother with the respondent no.4 was without any intention to convey interest in the property and when rights were created pursuant to the Declaration dated 7.12.1990.

13] It also does not lie for the respondent no.1-plaintiff to allege that there was no Sale Deed between the plaintiffs and the respondent no.3 or at the highest there was a Development Agreement considering the factual matrix that the third party

rights were created by the respondent no.4 in favour of different parties including the late father of the appellant no.1. i am also unable to subscribe to the contention of Ms. A. Desai, learned Advocate for the respondent no.1 that there was only an agreement to develop between the respondent no.4 and the respondent no.1 with her late husband in respect of the property in which the appellant nos.1 and 2 had no right. For that matter, there was also no basis in her contention that even assuming that the plot was allotted by the respondent no.4 in favour of the appellants the plaintiffs had to be compensated being the co-owner. At the cost of repetition, the respondent no.1 was a signatory to the Declaration dated 9.2.1993 which she had apparently suppressed. Moreover, she had also withheld the information that pursuant to the said Declaration, a Sale Deed was executed in favour of one of the plots in the suit property bearing the Survey no.140/6 in favour of one Shri Korgaonkar and his wife and thereafter there had been subsequent transfers for consideration effected by the respondent no.4.

14] Moreover, on the showing of the respondent no.1 there was no particular dispute that acting on the Document dated 4.7.1991 and the Power of Attorney dated 18.3.1993 executed by the respondent no.1 in favour of the respondent no.4, the respondent no.4 had agreed to sell and or sold various

plots in the subdivided property to different persons. This aspect would also weigh against the case of the plaintiffs that there was only an agreement to develop the property and no further. Ms. A. Desai, learned Advocate for the respondent no.1 may have a point that a Declaration could not pass title but at the same time such a contention cannot stand the test of scrutiny when the respondent no.4 acting on the basis of the Declaration and the Power of Attorney had entered into sale transactions with different persons, passed the consideration to her late father-in-law in favour of the suit property and that he had also allotted a plot to the appellants herein. No question therefore arose considering the factual gamut of any consent being obtained of the respondent no.1.

15] There can be no dispute with the principles culled out in **Jagdish Chander Sachdeva** (supra) reiterating the principles governing the grant of injunction based on a prima facie case, the balance of convenience and the aspect of irreparable injury in case the party applying for the relief of temporary injunction is not secured by such relief. However, at the same time, it was observed that a party who seeks the aid of injunction must show that the act complained of is in violation of his right and whether there is a fair and substantial question to be decided by the parties and there is a bonafide contention between the parties. If

such contentions are available, then the relief needs to be granted. It is then the duty of the Court to consider the material placed before it for granting or refusing to grant injunction and consider the documents, if any, before an order of injunction can be passed.

16] **Anathula Sudhakar V. P. Buchi Reddy (Dead) by Lrs and others** [(2008) 4 SCC 594] held that where the plaintiff's title is under a cloud and he does have possession, the remedy is a suit for declaration and possession with or without consequential injunction. **Lakshmi Alias Bhagyalakshmi and another Vs. E.Jayaram (Dead) by LR.**[(2013)9 SCC 311] was an appeal by leave directed against the order passed by a Single Judge of the Karnataka High Court whereby he had set aside the order of the 7th Additional City Civil Judge, Bangalore and held the respondent- defendant entitled to initiate action for ejectment of the appellants-plaintiff's from the suit property. The plaintiffs who are the appellants had filed a suit for permanent injunction restraining the respondent-defendant from interfering with their peaceful possession and enjoyment of the suit property claiming that the plaintiff no.1 was the absolute owner consisting of building which was purchased from the defendant no.1 for consideration. However the Sale Deed could not be registered as the registration was suspended by the Government and the respondents-defendants could not get the clearance from the

Urban Land Ceiling Authority.

17] In **Lakshmi** (supra), the appellants case was that although the Deed was not registered, the entire sale consideration was paid to the defendant no.1 by the plaintiff, who was put in possession of the suit property and it was leased out in favour of the defendant no.2 who was residing therein since the last 17 years. The plaintiffs case was that there was an attempt by the defendant no.1 to grab the property based on the Gift Deed in favour of the defendant no.2 and precipitating a notice to execute the Sale Deed in favour of the plaintiff no.1 apart from the suit and the application for injunction to restrain the defendants from interfering with their peaceful possession. The respondents-defendants took a plea in defence denying the purchase of the suit property by the plaintiffs from them, that there was a family settlement whereby the property was allotted to the defendants who put construction and let out the same to the plaintiff no.2. The plaintiff no.1 was a stranger and the plaintiff no.2 was a tenant under him.

18] In **Lakshmi** (supra), the learned Additional City Civil Judge on a consideration of the pleadings and the documents allowed the application for injunction restraining the defendants from interfering with the peaceful possession and enjoyment of

the suit property by the plaintiff no.2 till the disposal of the suit and observing that at that stage the plaintiff no.2 was in possession of the property who had filed an affidavit stating that she was a tenant under the plaintiff no.1. The defendants preferred an appeal before the High Court and the learned Single Judge instead of considering the legality and propriety of the injunction granted by the City Civil Judge proceeded to decide the effect of Section 53-A of the Transfer of the Property Act, 1882 and was of the view that though the plaintiff was ready and willing to perform her part of the contract, the fact that a suit for bare injunction was filed without seeking leave under Order II Rule 2 CPC reserving their right to sue for any other relief and in that light the respondent was barred from claiming any relief for specific performance and incidental relief of injunction would be unavailable to the respondents.

19] In **Lakshmi** (supra), the Apex Court held on consideration of the material that the learned Single Judge had completely misconstrued the provisions of Order XXXIX Rules 1 and 2 CPC and committed serious error in deciding the scope of Section 53-A of the Transfer of the Property Act and Order II Rule 2 of CPC and that the order passed by the learned Single Judge could not be sustained in law.

20] From the facts encapsuled and borne out of the records, it is apparent that there was suppression of the material facts by the respondent no.1 and besides there was a delay in moving the Court and seeking the equitable relief of injunction. Besides the nature of the transaction entered into between parties did not justify the case of the respondent no.1 to seek the equitable relief of injunction when it was amply demonstrated from the records that acting on the basis of the declaration and the Power of Attorney, the respondent no.4 had entered into various transactions with different persons and in similar manner had transferred the plot no.7F in favour of the appellant no.1 and who had carried out substantially the construction therein. The learned trial Court therefore could not have proceeded to brush aside the implication of the documents and secure the respondent no.1 plaintiff with the order of injunction as prayed.

21] In the result, therefore, there is every reason to interfere with the impugned order and in view thereof the appeal is allowed and the order granting injunction in favour of the respondent no.1 is quashed and set aside.

NUTAN D.SARDESSAI, J

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