

IN THE HIGH COURT OF BOMBAY AT GOA.**APPEAL FROM ORDER NO. 43 OF 2015**

1. Mr. Conrad D'Sa,
Son of Honorato Augustine D'Sa,
62 years of age,
Retired, and his wife,

2. Mrs. Anita D'Sa,
Daughter of Sacru Menezes,
59 years of age,
Retired,

Both Indian Nationals,
Residing at 14-B, Swagat,
Mahakali Caves Road,
Andheri (E), Mumbai 400093.

3. Mr. Xavier D'Sa,
Son of Honorato Augustine D'Sa,
68 years of age,
Retired and his wife,

4. Mrs. Jane D'Sa,
Daughter of Sebastian Carvalho,
67 years of age,
Retired,

Both Indian Nationals,
Residing at 11, Priti Apartments,
Veera Desai Road, Andheri (W),
Mumbai 400053.

5. Mr. Carlos Anthony D'Sa,
Son of Honorato Augustine D'Sa,
64 years of age,
Retired and his wife,

6. Mrs. Cintia Carvalho,
Daughter of Sebastian Carvalho,
62 years of age, service,

7. Mr. John Bosco D'Sa,
Son of Honorato Augustine D'Sa,
55 years of age, service,
and his wife,

8. Mrs. Melba D'Sa,
Daughter of Pascal D'Souza,

50 years of age, Service,

Both Indian Nationals,
Residing at 2/22, Abdulla Building,
35, Dr. Ambedkar Road, Parel,
Mumbai- 400012.

Appellants no.3 to 8 represented
herein by their duly constituted
Attorney the Appellant no.1
above named.

.....Appellants.

V e r s u s

1. M/s F & C Construction and Estate
Developer, a proprietorship concern,
Duly represented in this act by its
Proprietor, Shri. Francisco Colaco,
Son of Caetano Piedade Colaco,
Businessman, Indian National,
Residing at Reis Magos, Verem,
Bardez-Goa.

2. M/s Grafikon Realty Pvt. Ltd.,
A private limited company
registered under the Indian
Companies Act, 1956, having
its registered office at
G01, Penninsula Apartments,
38 Gidney Park, Pune-411037
Duly represented in this act
by its Director, Shri. Atul Bhagat,
Son of Mahadev G. Bhagat,
60 years of age, married,
Businessman, Indian National,
Residing at 191, M. G. Road,
Camp, Pune- 1.

.... Respondents

Mr. J. E. Coelho Pereira, Senior Advocate with Mr Somnath B. Karpe,
Advocate for the appellants.
Ms. P. Chopdekar, Advocate for the respondent no.1.
Mr. Abhay Neogi and Mr. H. D. Naik, Advocates for the respondent
no.2.

Coram:- NUTAN D. SARDESSAI, J.
Reserved on :- 1st April, 2016.
Pronounced on:-2nd April, 2016.

JUDGMENT

Heard Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the appellants, Ms. P. Chopdekar, learned Counsel appearing for the respondent no.1 and Mr. Abhay Neogi, learned Counsel appearing for the respondent no.2.

2. Admit.

3. Heard forthwith with the consent of the learned counsel appearing for the respective parties.

4. Learned Counsel appearing for the respondents waive notice.

5. Mr. Coelho Pereira, learned Senior Counsel appearing for the appellants, took me through the record and, more particularly, the Development Agreement entered into between the appellants and the respondent no.1 for development of their properties, apart from the irrevocable power of attorney and more particularly the impugned order under challenge in this appeal to press for the grant of stay, pending the hearing of appeal on merits.

6. It was his contention that the learned Trial Court had given a convenient go-by to the cardinal principles governing the grant of temporary injunction and had not considered the ratio laid down by the

Hon'ble Apex Court in the case of ***Dalpat Kumar and another Vs. Prahlad Singh and others, AIR 1993 SC 276.*** Besides there was no privity of contract between the appellants and the respondents no.2. It was his contention that the power of attorney executed in favour of the respondent no.1 was misused by him and that the Memorandum of Understanding was drawn even after the death of his mother.

7. The thrust of his arguments was mainly to canvass that the learned Trial Court has not considered the facets of their case in its totality and had rather laid more importance on the case of the respondents no.2 particularly to the extent of the investments made by them and the hardship and prejudice which would be caused to them while determining the benefit of relief of injunction. It was further his contention that the relevant clauses of the Agreement dated 30.11.2014 were not considered, as also the clauses of irrevocable power of attorney which did not confer any power on the respondent no.1 to enter into any agreement or Memorandum of Understanding. There was an arguable matter and the matter deserved admission, while pressing for the grant of the stay as there was every likelihood of the third party rights being created interregnum.

8. Mr. A. Neogi, learned Counsel appearing for the respondents no. 2 gave a sequence of events and propounded his case

that the suit was filed in the year 2014 in respect of the events which occurred in the year 2004. He primarily relied upon the following judgments in ***Mohd. Mehtab Khan and ors. Vs. Khushnuma Ibrahim and ors., AIR 2013 SC 1099, Mangalam Group Vs. Nandkumar Bhalchandra Bhondve, 2013(1) ABR 331 and Wander Ltd. And Anr. Vs. Antox India P. Ltd., 1990(Supp) SCC 727***, to buttress the proposition culled out in the case of **Wander Ltd.** (supra), that the Court sitting in appeal on principle would not substitute its discretion with that exercised by the learned Trial Court only because a different view is possible in the matter. There can be no dispute with the proposition culled out in the case of **Wander Ltd.** (supra) as also in the cases of **Mohd. Mehtab Khan and others** (supra) and **Mangalam Group**(supra), but these were held while deciding the matters on merits.

9. In the course of arguments, it was fairly conceded by Mr. Abhay Neogi, learned Counsel appearing for the respondents no. 2, on instructions, that the respondent no. 2 would not create any third party right or interest and shall maintain status quo, provided its possession was protected in the meantime pending the hearing and disposal of the suit before the learned Trial Court.

10. Mr. Ceolho Pereira, learned Senior Counsel, however, submits that the appellants did not admit the possession of the respondents no. 2 to the suit properties. However, such a contention

does not merit consideration, inasmuch as, the appellants had entered into an agreement with the respondent no.1 as way back in the year 2004 and it is equally borne out from the record that the respondent no.1 in their turn, taking shelter of the irrevocable power of attorney, had entered into a separate agreement with the respondents no. 2 for the development of a distinct area of the suit properties.

11. Consequently, it is also not particularly in dispute that the respondents no. 2 had to the chagrin of the appellants, had carried out construction of two buildings in the portion of the suit properties and therefore, the objection to their possession is not well founded on behalf of the appellants.

12. There was no submission advanced on behalf of the respondent no.1, whose role, has otherwise been relegated to the background consequent to the transfer of interest into the properties in favour of the respondents no. 2 under the irrevocable power of attorney.

13. Be that as it may, in view of the fair concession of Mr. Neogi, learned Counsel appearing for the respondents no. 2 and considering that the interest of the appellants are adequately protected qua the suit properties, who are otherwise entitled to 12 flats consequent to the Agreement of 2004 entered into with the respondent no.1. Since all the issues have been squarely met, in view

of the fair concession coming forth in the course of arguments, i pass the following order:-

O R D E R

- i. The appeal is allowed. The impugned order dated 14.7.2015 passed by the learned Ad-hoc Senior Civil Judge, Mapusa in Special Civil Suit No.64/2013/A is quashed and set aside.
- ii. The respondents, in particular, are directed to maintain status quo and not to create any third party right or interest in the suit properties pending the hearing and final disposal of the Special Civil Suit No. 64/2013/A.
- iii. Both the learned counsel submit that the matter could be thrashed out by recourse to mediation which could bring an end to the lis between the parties. By consent of the parties, Mr. R. G. Ramani, learned Advocate is appointed as a Mediator to work-out the modalities between the parties.
- iv. Considering that the one of the appellants is a senior citizen, the trial Court is directed to dispose off the Special Civil Suit No.64/2013/A, as expeditiously as possible, as stated to be pending, at the stage of issues.
- v. Appeal stands disposed off accordingly.

NUTAN D. SARDESSAI, J.