

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.227 OF 2016
WITH
CIVIL APPLICATION NO.306 OF 2016

M/s.Serene Developers	...Appellant
V/s.	
Ramchandra S. Mate & Ors.	...Respondents

Mr.A.A. Kumbhakoni, Senior Counsel i/b Ms.Manjiri S. Parasnis for
the Appellant.

Mr.S.S. Kanetkar for the Respondents.

CORAM : R.D. DHANUKA, J.
DATE : 7TH DECEMBER, 2016.

P.C. :-

1. By this appeal from order, the appellant (original defendant no.3) has impugned the order dated 30th November, 2015 passed by the 8th Joint Civil Judge, Senior Division, Pune granting injunction below Exhibit – 5 against the original defendant no.1 and the appellant from selling, alienating or transferring of the suit property and not to cause disturbance to the peaceful enjoyment and vacant possession of the original plaintiffs over the suit property till disposal of the suit. Some of the relevant facts for the purpose of deciding this appeal are as under :

2. The respondent nos.1 to 3 were the original plaintiffs. The respondent nos.4 and 5 were the original defendant nos.1 and 2. The appellant herein was the original defendant no.3.

3. It was the case of the plaintiffs that the plaintiff no.1 was carrying on business of real estate, development and construction of the immovable properties. The defendant no.1 is also dealing in the real estate, development and construction of the properties. The defendant no.3 is the partnership firm dealing in the development and carrying out construction of properties.

4. It was the case of the plaintiffs that the plaintiffs and the defendant nos.1 and 2 entered into a Memorandum of Understanding (MOU) on 14th September, 2006 and agreed to purchase, sell, and to do real estate transactions and develop the properties and carry out constructions in the name of Association i.e. NKG Ram Mate Associates. It was the case of the plaintiffs that under the said MOU, the parties thereto agreed to invest various amounts. According to the plaintiffs, the defendant no.1 had invested less than the amount than what was contemplated under the said MOU. The defendant nos.1 and 2 had some properties described in Annexure – 1 and to the said MOU. It was the case of the plaintiffs that the defendant nos.1 and 2 had agreed to sell those properties to repay the loan. According to the plaintiffs, the loans taken by individual parties were to be treated

as the loans for the said Association.

5. It was alleged in the plaint that the defendant no.1 also had agreed to make the suit property as a security for the repayment of the money owed by him to the plaintiffs. It was alleged that the defendant no.1 had sold part of the suit property described in paragraph 18 of the plaint to the defendant by Sale Deed dated 14th February, 2012 for a consideration of Rs.16,81,23,924/-. It was the case of the plaintiffs that there was a charge on the said property, which was sold by the defendant no.1 to to defendant no.3 and thus the defendant no.3 was joined as parties to the suit. The plaintiffs *inter-alia* prayed for a money decree in the sum of Rs.20,84,87,500/- against the defendant no.1 and sought a declaration that the plaintiffs had a charge over the suit property. The plaintiffs also prayed for sale of the suit property in the event of the defendant no.1 committing a default in paying the amount and for the purpose of enforcing the said charge on the suit property.

6. In the said suit, the defendant no.3 filed a written statement along with supporting affidavit. The plaintiffs filed an application for interim relief (Exhibit – 5) in the said suit. The learned trial Judge passed an order directing the defendant nos.1 and 3 from selling, alienating or transferring the suit property and also directing not to cause any disturbance to the alleged peaceful enjoyment and

vacant possession of the plaintiffs over the suit property during the pendency of the suit.

7. Mr.Kumbhakoni, learned senior counsel for the appellant (original defendant no.3) invited my attention to the averments made in the plaint, prayers in the plaint and also the prayers in the application (Exhibit – 5) filed by the plaintiffs. He submits that admittedly the suit property was already sold by the defendant no.1 in favour of the defendant no.3, much prior to the plaintiffs' filing the suit for money decree and for declaration of the charge. He submits that the plaintiffs themselves have made the averments admitting the sale of the suit property two years prior to the date of filing of the suit. The said sale deed was duly registered. He submits that there was no prayer for possession of the suit property by the plaintiffs. It is submitted that it was also not the case of the plaintiffs that possession of the suit property was allegedly handed over by the defendant nos.1 and 2 to the plaintiffs. He submits that no document was admittedly entered into between the plaintiffs and the defendant nos.1 and 2 thereby creating any charge on the suit property before execution of the Sale Deed by the defendant nos.1 and 2 in favour of the defendant no.2.

8. It is submitted by the learned senior counsel that before entering into the sale transaction with the defendant nos. 1 and 2, the

defendant no.3 had issued a public notice dated 26th January, 2011 in daily newspaper Sakal, Prabhat, Pudhari and Lokmat and Sakal Times and invited objections from the members of public. There was however, no objection raised by the plaintiffs. He submits that defendant no.3 is a *bonafide* purchaser without notice. There was no injunction against the defendant nos.1 and 2 from selling the suit property. He submits that admittedly the defendant no.3 was not a party to the said alleged MOU entered into between the plaintiffs and the defendant nos.1 and 2.

9. It is also submitted by the learned senior counsel for the appellants that though it was not the case of the plaintiffs that they were placed in possession of the suit property, the learned trial Judge in the impugned order has also granted injunction against the defendant no.3 not to cause any disturbance to the alleged peaceful enjoyment and the alleged vacant possession of the plaintiffs over the suit property. He submits that the impugned order is *ex-facie* perverse and contrary to the case and pleadings of the plaintiffs themselves.

10. Mr.Kanetkar, learned counsel appearing for the plaintiffs on the other hand submits that the defendant no.1 had created a charge in respect of the suit property in favour of the plaintiffs. The defendant nos.1 and 2 had entered into the said MOU and had

agreed to sell the suit property to clear the arrears of the bank loan. He submits that the defendant no.3 was fully aware of the transaction between the defendant nos.1 and 2 on one hand and the plaintiffs on the other. He submits that the learned trial Judge thus rightly passed an order of injunction against the defendant no.3 also.

11. It is submitted by the learned counsel that it is correct that it was not the case of the plaintiffs that possession of the suit property was handed over to the plaintiffs by the defendant nos.1 and 2. He could not justify the reliefs granted in prayer (3) thereby directing the defendant nos.1, 3, 3(a) and 3(b), their agents, servants, legal representatives not to cause any disturbance to the alleged peaceful enjoyment and vacant possession of the plaintiffs over the suit property.

12. It is submitted that the defendant no.3 is not a *bonafide* purchaser and thus injunction granted by the learned trial Judge in favour of the plaintiffs is rightly granted and cannot be vacated by this Court. He submits that the plaintiffs have to recover substantial amount from the defendant nos.1 and 2 and if the injunction order is vacated, the plaintiffs will not be able to recover any amount from the defendant nos.1 and 2.

13. Mr.Kumbhakoni, learned senior counsel for the defendant no.3 in rejoinder submits that after entering into a registered sale

deed with the defendant no.1 after making payment of the entire consideration, the defendant no.1 has already started construction on the suit property and has already constructed various buildings on the suit plot. He submits that the entire suit is frivolous and thus the learned trial Judge could not have passed any such order in favour of the plaintiffs and the entire order thus deserves to be set aside.

14. It is not in dispute that the defendant no.3 was not a party to the MOU entered into between the parties. It is also not in dispute that the suit property was already sold by the defendant no.1 in favour of the defendant no.3 much prior to the plaintiffs filing a suit. The plaintiffs themselves have made the averments regarding sale of the suit property by the defendant no.1 in favour of the defendant no.3 and more particularly in paragraph 18 of the plaint.

15. A perusal of the prayers in the plaint clearly indicates that it was not the case of the plaintiffs that any writing was executed between the plaintiffs and the defendant nos.1 and 2 creating any charge in respect of the suit property or that the said writing was registered or that the defendant no.3 was also a party to the said alleged document. It was also not the case of the plaintiffs that the defendant nos.1 and 2 had placed the plaintiffs in possession of the suit property. A perusal of the prayers in the plaint indicates that the plaintiffs had prayed for money decree against the defendant nos.1

and 2 and have also prayed for declaration of the charge in respect of the suit property. The plaintiffs have not challenged the sale deed executed by the defendant nos.1 and 2 in favour of the defendant no.3 admittedly. The plaintiffs have also not prayed for possession of the suit property. Learned counsel for the plaintiffs could not point out any averments in the plaint alleging that possession of the suit property was handed over by the defendant nos.1 and 2 to the plaintiffs under the said MOU alleged to have been executed by and between them.

16. A perusal of the prayers in the application (Exhibit – 5) also clearly indicates that there was no prayer for injunction against any of the defendants from disturbing the alleged possession of the plaintiffs. The defendant no.3 has already carried out substantial development on the suit property. No objection of any nature whatsoever was raised in response to the said public notice. In my *prima-facie* view, the defendant no.3 is a *bonafide* purchaser without notice and that the learned trial Judge thus could not have granted any injunction against the defendant no.3. Though it was not the case of the plaintiffs that they were placed in possession of the suit property, the learned trial Judge has granted injunction against the defendant no.3 from disturbing the alleged possession of the plaintiff. In my view, the impugned order passed by the learned trial Judge

shows perversity and thus deserves to be set aside.

17. I therefore, pass the following order :-

a). The impugned order dated 30th November, 2015 is set aside. Application (Exhibit – 5) in Special Civil Suit No.1405 of 2014 is accordingly dismissed.

b). Appeal From Order No.227 of 2016 is allowed.

c). In view of disposal of the appeal from order, Civil Application No.306 of 2016 does not survive and is accordingly dismissed.

d). No order as to costs.

(R.D. DHANUKA, J.)