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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

CIVIL REVN. APPLICATION NO. 845 OF 2014

Mr. Suryakant Laxman Shinde & Ors. ... Applicants.

V/s.

M/s. Sagar Construction. ... Respondent.

Mr. Shashank Chaudhary i/b. Sachin Masurkar for the Applicants.
Mr. Jaydeep Deo for the Respondent.

CORAM : N.M. Jamdar, J.

25 August, 2016.

Oral Order :-

By this Application the Applicants challenge the order passed by the Civil Judge, Senior Division, Pune disposing of the Special Darkhast No.34 of 2013. The Applicants have filed the suit in respect of development agreement dated 7 April 2007 and power of attorney of the same date.

2. The suit was filed in respect of a property CTS No.55 admeasuring 117.9 sq.mtrs. at Pune. In the suit the Applicants sought following prayers :-

“(a) It be declared that the Development Agreement dated 7 April 2007, registered in the office of the Sub-Registrar Haveli No.11 at Sr. No. 2989 stands terminated;

(b) It be declared that the Power of Attorney dated 7 April 2017, registered in the office of the Sub-Registrar, Haveli No.11 at Sr. No. 2899 stands cancelled, revoked and terminated;

(c) The defendant, his agents, servants or any other person claiming through him, be restrained by permanent injunction from entering upon the suit property, more particularly described in para 1 of the plaint, or to cause any construction activity thereon;

(d) The defendant be restrained by permanent injunction from entering into or transferring or creating any third party interest with any third party on the basis of the Agreement of Development and Power of Attorney, both dated 17th April 2007;

(e) The defendant be restrained by permanent injunction from selling, alienating or transferring in any other manner the construction presently standing on the suit property, more particularly described in para 1 of the plaint, to any third party, either by himself or through his agents or any person claiming through him;

(f) The plaintiffs be awarded costs of the suit;

(g) The Honourable Court may pass such other orders, which are just and equitable in the interest

of justice.”

3. The suit was decreed by the judgment and order dated 18 January 2012 by the learned Small Causes Court Judge/Civil Judge, Pune. The suit was decreed as under :-

“1. The above said claim is being approved partially.

2. The demands regarding to the resolution are being rejected.

3. The Defendants for the permanent stay order are being approved partially and the Defendant is being ordered that as per the agreement at Exh. No. 45 upto giving the possession of two flats to the applicant or upto offering the possession of the two flats in writing the Defendant should not create any third party interest on the suit property mentioned in claim Para No.1 or on the construction on the suit property and also should transfer the property or the flats to any third party by selling or by any other transactions.

4. The above said claim had been approved partially hence both the parties should borne their own expenses.

5. The decree should be prepared as above.”

4. Thereafter, the Applicants moved the Darkhast proceedings in which the Applicants prayed for recovery of possession of two flats in the suit property. The learned Civil Judge

came to the conclusion that decree was not passed directing handing over the possession of two flats to the Applicants and passed the impugned order.

5. The learned Counsel for the Applicants submitted that though it is correct that the decree for possession was not passed neither it was prayed, the executing court should have kept in mind the true purport of the suit and also the circumstances which laid to passing of the order and the executing court, in such circumstances, has ample power to pass appropriate orders which the executing court has failed to do. The learned Counsel for the Applicants relied upon the decision of the Apex Court in the case of *Nagindas Ramdas v/s. Dalpatram Ichharam @ Brijram and Ors.* reported in *1974 SCC (1) 242*. The learned Counsel for the Respondent on the other hand submitted that there is no direction to hand over the possession of the flats and after the suit was partly decreed, no appeal was filed. He submitted that the Respondent has not parted with possession of the two flats. This assertion of the learned Counsel for the Respondent is controverted by the learned Counsel for the Applicants.

6. Firstly it has to be kept in mind that the executing court cannot go beyond the decree. If the prayers in the suit are seen, they relate to cancellation of power of attorney, the development agreement and order of injunction is sought. The suit has been

partly decreed. The learned Civil Judge has only directed that till the decision of two flats as stated in the agreement below Exhibit 45 is not given to the Applicants, the Respondent will not create any third party rights regarding the same. Therefore, if there is any breach of this injunction, the Applicants can always take an appropriate steps against the Respondent for this breach. Once the possession has never been sought in the suit neither there is any specific prayer nor it has been part of the decree, the Applicants cannot use the execution proceedings to forcibly get a relief which was never granted. The Applicants have not filed any Appeal in respect of the part of the decree which has gone against the Applicants nor filed any suit seeking possession. These remedies were open to the Applicants if they were available in law. Since the relief of possession which is sought by the Applicants cannot be given by the executing court, there is no error in the order passed by the learned Civil Judge in declining to execute the decree as sought for by the Applicants.

7. The Civil Revision Application therefore cannot be entertained. It is clarified that if the Applicants take out any substantial proceedings for recovery of possession of these flats, those substantial proceedings will be considered on their own merits. The Civil Revision Application is accordingly rejected.

(N.M. Jamdar, J.)