IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5154 OF 2016

Shri. Pandurang Baliram Bhujbal
And Ors ...Petitioners

Versus

Shri. Navnath Ankush Kalate
And Anr ...Respondents

....

Mr. Drupad S. Patil, Advocate for the Petitioners.
Mr.S.M. Railkar, Advocate for Respondent No.2.

....

CORAM : R. G. KETKAR, J.

DATE : 5th May, 2016

P.C.

1. Heard Mr. Patil, learned Counsel for the petitioners and Mr. Railkar, learned Counsel for respondent No.2.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 17.3.2016 passed by learned Ad-hoc District Judge, Pune in Misc. Civil Appeal No.119 of 2015. By that order, learned District Judge allowed the appeal preferred by the original defendants and quashed and set aside the judgment and order dated 21.1.2015 passed by learned 6th Jt. Civil Judge, Senior

Division, Pune below Exhibit-5 in Special Civil Suit No.55/2014.

3. The petitioners, hereinafter referred to as the 'plaintiffs', have instituted suit *interalia* for cancellation of the registered development agreement and registered power of attorney both dated 16.6.2004 and for declaration that on the basis of these documents, no rights are created in favour of the defendants; for perpetual injunction restraining the defendants from creating third party interest as also from forcibly taking possession from the plaintiffs and also disturbing the possession of the plaintiffs and also from creating third party interest by obtaining loan from the financial institutions.

4. During pendency of the suit, defendant No.1 executed sale deed in favour of defendant No.2 on 30.12.2013. The plaintiffs therefore amended the suit and sought declaration that the sale deed is not binding on them and in pursuance of the alleged sale deed defendant No.2 has not got the possession.

5. During pendency of the suit, the plaintiffs took out application Exhibit-5 seeking temporary injunction restraining the defendants from causing obstruction to the plaintiffs

possession as also taking forcible possession from the plaintiffs as also creating third party interest and carrying on construction on the basis of the development agreement and power of attorney.

6. The defendants filed written statement and also say on 6.7.2014. The plaintiffs also filed application at Exhibit-21 restraining defendant No.2 from causing obstruction to the plaintiffs possession on basis of illegal sale deed dated 30.12.2013 as also from forcibly taking possession and creating third party interest and also obtaining loan from financial institutions on the basis of the sale deed. By order dated 21.1.2015, learned trial Judge allowed the application Exhibit-5 and restrained the defendants from forcibly taking possession or creating third party interest and from obtaining loan from the financial institutions. Aggrieved by that decision, the defendants instituted appeal which is allowed on 17.3.2016. It is against that order, the plaintiffs have instituted the present petition.

7. In support of this petition, Mr. Patil submitted that the plaintiffs are owners of Survey No.158/1 admeasring 3.75 Ares and 159/4 admeasuring 1.75 Ares. On 16.6.2004, registered

development agreement and registered power of attorney was executed in favour of defendant No.1. The plaintiffs being owners were to demarcate the area and hand over possession of the demarcated portion to defendant No.1. The plaintiffs were to obtain NA permission. However, despite executing development agreement on 16.6.2004, no progress has made by defendant No.1. On 7.12.2013, the plaintiffs issued notice terminating the development agreement as also the power of attorney. On 22.12.2013, the plaintiffs issued public notice. Despite that on 30.12.2013, defendant No.1 executed sale deed in favour of defendant No.2. He submitted that the plaintiffs have not handed over possession to defendant No.1. He submitted that after considering the material on record, learned trial Judge allowed the application Exhibit-5. Learned District Judge was not justified in interfering with the discretionary order. He therefore submitted that the petition requires consideration.

8. On the other hand, Mr. Railkar has invited my attention to various clauses in the development agreement dated 16.6.2004. He submitted that though the document is styled as development agreement, perusal of clause-2 shows that

negotiations were held between the plaintiffs and defendant No.1 and the plaintiffs agreed to sell the suit property to defendant No.1. In other words, though this document is styled as development agreement in effect and in substance it is agreement of sale. He submitted that under the development agreement, interest is created in favour of defendant No.1. Defendant No.1 is also put in possession in pursuance of said agreement. He has taken me through the impugned order and submitted that learned District Judge has rightly conferred with the discretion used by the learned trial Judge. He submitted that no case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

10. It is not in dispute that the development agreement and the power of attorney both dated 16.6.2004 are registered instruments. Clause-8 of this development agreement records that the plaintiffs (vendors) have handed over actual and physical possession of the suit property to defendant No.1.

Perusal of various clauses of the agreement shows that the vendors permitted defendant No.1 to carry out construction after obtaining permission from various authorities. The plaintiffs also authorized defendant No.1 to divide the property and also sell the property to third party. Apart from that even clause-14 provided that in case in future there is amendment to the existing Development Control Rules and additional FSI is made available, defendant No.1 will be entitled to such benefits. In other words, *prima facie* interest is created in favour of defendant No.1 by virtue of the development agreement.

11. Apart from that, the present suit is instituted on 6.1.2014. In paragraphs-6 and 8, learned District Judge noted that the plaintiffs had obtained certified copy of the development agreement on 20.11.2006. Thus the plaintiffs have knowledge of contents of the documents since 20.11.2006. That apart, in fact the plaintiffs have executed document. The plaintiffs have knowledge of the development agreement since execution of the document. In paragraph-10, learned District Judge recorded that as per Section 202 of Indian Contract Act, 1872, the power of attorney is executed and it creates interest in favour of

defendant No.1 and, therefore, it has become irrevocable power of attorney. In paragraph-11, learned District Judge noted that trial Court nowhere discussed about the contents of the development agreement and power of attorney as also no where discussed whether any fraud is averred by the plaintiffs in the notice and in the plaint. The plaintiff has also received entire consideration and transferred all his rights and possession to defendant No.1. After considering the material on record and for the reasons recorded by learned District Judge in paragraphs-6 to 8, 10, 11 and 13, I do not find that learned District Judge has committed any error in allowing the appeal.

12. In the case of ***Wander Limited and another Vs. Antox India Private Limited***, ***1990 (Supp.) SCC 727***, the Apex Court in paragraph 14 has observed as under:

> "....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess

> the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

13. Applying the tests laid down in the above decision to the facts of the present case, I am satisfied that learned District Judge has rightly interfered with the exercise of discretion by the learned trial Judge. Learned trial Judge did not properly apply the principles regulating grant or refusal of injunction. Learned trial Judge has exercised the discretion arbitrarily and perversely.

14. In the light of the aforesaid discussion, I do not find any merit in the Petition. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)