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

APPEAL FROM ORDER NO. 133 OF 2015
WITH
CIVIL APPLICATION NO. 170 OF 2015

M/s J. K. Builders & Associates
& Anr. ….. Appellants

Versus

M/s. Ambad Development Company
& Anr. ......Respondents

Mr. Rajendra Pai a/w A. R. Pai and Ms. N. N. Thakkar, I/b Bina Pai, for Appellants/Applicants.
P. S. Dani, Senior Advocate a/w Sham Walve, for Respondent No. 1.

CORAM : N. M. Jamdar J.
Tuesday 26 July, 2016

ORAL ORDER

. The appellants challenge the Judgment and Order passed by the learned Civil Judge, Senior Division, Nashik dated 3 July, 2014 allowing the application filed by the respondents-plaintiffs for temporary injunction and directing the appellants not to create any third party rights in respect of the property admeasuring 2000 sq. mtrs. described in paragraph 8(a) of the Plaint.

2. The respondents (plaintiffs) filed a Special Suit No. 620 of 2013 in the Court of Civil Judge, Senior Division, Nasik. The suit was filed for a declaration that the deeds dated 7 May, 1997, 20 October, 2006, 28 August, 1997, 10 May, 2006, 5 June, 2006 and 14 September, 2010 be declared as canceled and not binding on the respondents. The respondents also sought a relief of injunction to restrain the appellants from proceeding with any construction and to create any third party rights and mandatory injunction for demolition of building constructed on 2000 sq. mtrs. and of a godown.

3. Various particulars in respect of the land and the calculations were given in the plaint. Broadly the relief was in respect of a free-hold land admeasuring 2000 sq. mtrs. and secondly 62050 sq. mtrs. land declared as excess in view of the provisions of Urban Land Ceiling Act, 1976. It was a case of the respondents/plaintiffs that the partnership was not being looked after properly and taking advantage of this position, the appellant proceeded to create various documents in respect of free hold land on the basis of a Power of Attorney which was executed on 10 October, 1995 only for the excess land for the purpose of implementing the scheme. It was the case of the respondents that when there was no authority given to the appellants to deal with the free-hold land, the appellants proceeded to do so.

4. The suit was resisted by the appellants by filing a written statement. The appellants asserted that they were given due authorization by the partnership firm i.e. M/s Ambad Development Company. It was contended that the suit instituted by the respondents/plaintiffs was not maintainable. It was also contended by the appellants that the suit is barred by limitation and the appellants and the respondents/plaintiffs approached the Court at a belated stage.

5. In this suit, an application for temporary injunction was taken out by the respondents/plaintiffs which has been granted by the impugned order.

6. Heard learned Counsel for the parties.

7. Mr. Pai, the learned Counsel for the appellants submitted : The suit is not maintainable in view of bar of Order 30 Rule 1 of the Code of Civil Procedure. The suit has been filed by only one partner and the Partnership Deed which is on record clearly shows that there was more than one partner available when the suit was instituted. The Power of Attorney of 10 October, 1995 coupled with the Power of Attorney dated 5 May, 1997 gave full authority to the appellants to deal with the property. After the Power of Attorney dated 7 May, 1997 was executed, the deeds that have been challenged in the suit are entered into. The suit filed on

11 December, 2013 challenging the deeds of the year 1997 is barred by limitation. He submitted that the Power of Attorney dated 5 May, 1997 need not be registered as the deeds executed pursuant to Power of Attorney of the year 1997 are deemed to be executed by the owner as laid down by the Apex Court in the case of *Suraj Lamp & Industries Private Limited V/s State of Haryana & Anr. 2012 (1) SCC 656*. The learned Civil Judge has not considered the aspect of limitation as well as the bar of Order 30 Rule 1 of the Code of Civil Procedure and has simply deferred the decision which could not have been done. The injunction has been granted on the premise that the land i.e. 2000 sq. mtrs. is an open piece of land. Material was placed on record to demonstrate that substantial construction is carried out which is also reflected in the prayers in the plaint. Third party rights have been created. Registered agreements have been executed, after issuing public notice. At this stage, the grant of injunction without considering an irreparable loss was perverse. The suit is pursued by one partner who joined the firm only in the year 2011 who has sought to undo various things which the partners of M/s Ambad Development Company never took any objection. The construction when it was carried out was with permission of the Municipal Corporation and the subsequent developments regarding permission will not entitle the respondents/plaintiffs to seek an order of injunction.

8. Mr. Dani, the learned Senior Advocate for the respondents on the other hand submitted : The bar of Order 30 Rule 1 of the Code of Civil Procedure is not absolute and it can be cured. The suit is within limitation. The deeds are absolutely without authority. The remaining partners have placed the authorization in favour of the partner who is prosecuting the cause of the Partnership Firm. 2000 sq. mtrs. land which is in question has remained free-hold land after the provisions of the Urban Land Ceiling Act were made applicable. The respondent Partnership Firm continues to remain the owner of the suit land and it is only through well recognized modes ownership can be transferred in favour of the appellants. The Power of Attorney dated 10 October, 1995 does not deal with the free-hold land of 2000 sq. mtrs. When the deeds in question were executed, the appellants have invoked power under the Power of Attorney of 10 October, 1995 by annexing the same to the deeds in question. It is on the Power of Attorney of the year 1995 that stamp duty is paid. This being the position, the question as to whether the Power of Attorney of the year 1997 needs to be registered or otherwise does not arise. Firstly, the appellant executed an agreement to sale in favour of his wife and brother-in-law. Thereafter Confirmation-Deed was executed and thereafter sale-deed was executed in their favour. Subsequent thereto, the brother-in-law gifted the property to the appellants. All this has done on the basis of Power of Attorney of

the year 1995, which granted no such power. Taking advantage of the situation, the appellant has played fraud on the respondent Partnership Firm and therefore no equities can flow to the appellants. Furthermore, the Municipal Corporation has filed an affidavit placing on record that there is no occupation certificate and the permission has lapsed after four years when it was granted in the year 1999. Even as on today, the status of the land is not converted to non-agriculture. This being the position, any third party rights, even assuming to be created are not legal. Therefore, there is no error in exercise of discretion by the learned District Judge.

9. Before considering the rival contentions, one has to keep in mind the scope of Appeal from Order challenging the exercise of discretion. The Apex Court in the case of *Wander Ltd. V/s Antox India (P) Ltd. 1991 (11) PTC 1 (SC)* has laid down the scope of an appeal challenging the discretionary orders of the Trial Court. The scope of such appeal is narrow and is restricted to ascertain whether any perversity or any fundamental error is committed by the Trial Judge in deciding interlocutory application. Merely because another view is possible is not a ground to interfere. Further while deciding application for temporary injunction, the facets that need to be considered are : prima facie case, balance of convenience, irreparable injury. Also material is the conduct of the

parties, since the reliefs sought is an equitable relief. Keeping this in mind, the arguments advanced by Mr. Pai will have to be considered.

10. First submission made by Mr. Pai is based on Order 30 Rule 1 of the Code of Civil Procedure. Mr. Pai argued that the Partnership Deed which is on record clearly indicates that on the date when the suit was instituted through Mr. Bhaskar Patil, there were other partners in the firm. He pointed out that Mr. Gopal Kulkarni is referred in the Partnership Deed as a continuing partner, so also the other partners, therefore the suit is not maintainable. This submissions cannot be accepted. Order 30 Rule 1 of the Code of Civil Procedure lays down that any two or more persons claiming or being liable as partners and carrying on business may sue or sue in the name of the firm. The defect if any can be caved. In the present case, the other partners have given their authorization in favour of Mr. Patil to pursue the suit. Furthermore, this issue can always be considered at the time of hearing of the suit. Therefore, on this ground alone I am not inclined to set-aside the impugned order.

11. The next ground ground urged by Mr. Pai is on the Power of Attorney. This is the central issue in this appeal. Mr. Pai, after arguing for sometime, had to accept that Power of Attorney dated 10 October, 1995 does not contain any reference to the 2000

sq. mtrs. of free-hold land. He however stressed on the Power of Attorney dated 5 May, 1997. According to Mr. Pai, the insistence of the learned Civil Judge for registration of the Power of Attorney dated 5 May, 1997 was unwarranted. He relied on the decision of the Apex Court in the case of *Rajni Tandon V/s Dulal Ranjan Ghosh Dastidar & Anr. (2009) 14 SCC 782*. As regard the decision of *Rajni Tandon case*, it is not applicable to the facts of the present case. In this decision, the factual matrix was that a deed executed by an Agent, representative or assignee who had presented the deed for registration. If it was held that is only in the case where a person assigning the document cannot present the document gives a Power of Attorney to another to present the document that the provisions of Section 33 of the Registration Act are attracted. In the case of *Rajni Tandon*, there was no dispute between the Principal and the Agent. The defence that the Power of Attorney between the Principal and Agent should have been registered, was taken by a third party. In the case at hand to enable the appellants to execute sale-deeds based on the Power of Attorney there had to be a valid document.

12. Mr. Dani pointed out that when the sale-deed by the appellant in favour of his wife and brother-in-law was presented, the appellants annexed the Power of Attorney of the year 1995 to the sale-deed. At that time, the so called unregistered Power of

Attorney of the year 1997 was in existence, however, the appellants choose not to derive any right from the same. Stamp duty was paid on the Power of Attorney of the year 1995. In the written statement also no stand is taken by the appellants that the Power of Attorney of the year 1995 did not give any right to the appellants, but it was a Power of Attorney of the year 1997. The specific stand that was taken was that if the Power of Attorney of the year 1995 that gave power to the appellants to execute the deeds. It is only during the arguments that Mr. Pai had to concede that Power of Attorney of the year 1995 does not deal with 2000 sq. mtrs. land in question. Therefore, having not relied upon Power of Attorney of the year 1997 as a source of Power of Attorney, the issue of registration of Power of Attorney of the year 1997 loses its significance. To my mind, the issue of the registration of the Power of Attorney of the year 1997 is not of much significance as the appellants themselves have invoked the power granted to the appellants under the Power of Attorney of the year 1995.

13. In the present case, the Agreement to Sale, Confirmation Deed and Sale deed were executed by the appellants in favour of his wife and his brother-in-law. The brother-in-law subsequently gifted the property back to the appellants. Though there is no legal bar for executing deeds in favour of close relatives, this conduct assumes importance at the interlocutory stage. The

existence of prima facie case in favour of the respondents that the deeds were fraudulently obtained, based on the non-existence of the Power of Attorney and transaction between the close relations, was rightly considered by the learned Civil Judge. The other issues sought to be raised relating to merits of the suit will be considered at the time of trial.

14. Turning now to the conduct of the parties. As observed above, the appellants on the basis of Power of Attorney of the year 1995 executed the documents in favour of his wife and brother-in-law and the brother-in-law in turn gifted the property to the appellants and therefore the appellant husband and wife sought to appropriate the 2000 sq. mtrs free-hold land. In the plaint, it is asserted that affairs of the firm were not being looked after properly and it is only when Mr. Patil, partner through whom the suit was filed joined, that the state of affairs was noticed. Once it is accepted that Power of Attorney of the year 1995 did not grant any power to the appellants to deal with the free hold land, then the conduct of the appellants to execute the deeds in favour of his wife and brother-in-law can only be termed as surreptitious appropriation of the property. This conduct of the appellants will have to be kept in mind.

15. The next question is the balance of convenience and irreparable loss. It is strenuously contended by Mr. Pai that if the

entire building has come up, third party rights have been created, registered agreements have been executed, public notices were given and the learned Civil Judge has proceeded as if nothing was in existence. He submitted that when the construction has fully come up an injunction at this stage ought not to have been granted It was also contended that one of the prayers in the plaint is for monetary damages.

16. In this regard, the written statement filed by the Municipal Corporation needs to be noticed. The Municipal Corporation has categorically asserted that the building permission which was granted in the year 1999 lapsed within four years and it has not been renewed. It is also asserted that there is no Occupation Certificate. Therefore, so called third party rights are in respect of a construction for which no Occupation Certificate has yet been obtained. These facts be not lost sight of. If that is not enough, even the permission to convert the land to non-agriculture status is pending. Notice is issued to the respondents in the proceedings for converting the land to Non-Agricultural and respondents have filed their reply. This being the position of the suit property, no irreparable loss will be caused, if no third party rights are created. On the other hand, if any third party rights are created in the state of affairs as exists today, it will create various complications and innocent purchasers will suffer. Therefore, the conclusion drawn by

the learned Civil Judge that the property needs to be preserved till the disposal of the suit, cannot be stated to be illegal or perverse.

17. The appellant admittedly annexed the Power of Attorney of the year 1995 while executing the document in favour of his brother -in-law and wife and which Power of Attorney did not give any right to the appellants. What is primarily challenged is the sale deed and for its challenge the suit is within limitation. The grievance made by the learned Counsel for the respondents/plaintiffs that the appellants committed fraud on the partnership firm, cannot be said to be unjustified. Not only this, the brother-in-law of the appellant thereafter gifted the property to the appellants and therefore by way of an elaborate scheme, the appellants sought to deprive the firm of its only free-hold property. The appellants were only given authority to develop the scheme for the excess land. The Power of Attorney of the year 1997 though stated to be executed, was not the basis of which the documents in question were executed. Though elaborate submissions have been made by the learned Counsel for the appellants be justify the conduct of the appellants, prima facie, the conduct of the appellants is of fraudulent nature. No equity is therefore can flow from such conduct of the appellants. In addition, even though the injunction is granted not to create third party rights, it cannot be said that any irreparable loss is caused because as on today even the status of the

land as Non Agricultural has not been established. Even Occupation Certificate to the building is not granted, considering the over all aspects of the matter, I do not find that any error was committed by the learned Civil Judge in allowing the temporary injunction filed by the respondents/plaintiffs. The learned Counsel for the appellants submitted that it should be clarified that the impugned order is only refers to clause 8(a) of the plaint. It is not necessary to give any clarification as I have only confirmed the order passed by the learned Civil Judge in the terms it is granted.

18. The Appeal from Order is dismissed. Civil Application stands disposed of accordingly.

19. The learned Counsel for the appellants seek stay of this order. There cannot be any stay of this order as I have confirmed the order of injunction granted by learned Civil Judge. Request is refused.

20. It is open to the parties to make an application to the learned Civil Judge for expeditious disposal of the suit.

(N. M. Jamdar, J.)