

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (ST) NO.25367 OF 2016
IN
CIVIL APPLICATION (ST) NO.26078 OF 2016.
IN
APPEAL FROM ORDER (ST) NO.25367 OF 2016

Durga Bearing (Mumbai) Pvt. Ltd.	]	
a company registered under Companies Act	]	
having its office at: 32, Corporate Avenue	]	<u>Appellant.</u>
A-wing, 3 rd floor, Mahal Industrial Estate,	]	Original
Andheri (East) Mumbai – 400 093	]	Plaintiff.
through its Director Mr. Deepak Sultania	]	

V/s.

- | | | |
|--|---|--------------------|
| 1. Mrs. Suryakala Prabhulal Shah |] | |
| r/o flat No.6, 6 th floor, Prabhu Vijay |] | |
| Kapole CHS Ltd. JVPD Scheme |] | |
| V. M. Road, Juhu, Vile Parle (West) |] | |
| Mumbai 400 049. |] | |
| |] | |
| 2. Kapole Co-operative Housing Society Limited |] | <u>Respondents</u> |
| Housing Society registered under the provisions |] | Original |
| of Maharashtra Co-operative Societies Act, having |] | Defendants. |
| its office situated at JVPD Scheme |] | |
| V. M. Road, Juhu, Vile Parle (West) |] | |
| Mumbai 400 049. |] | |
| |] | |
| 3. Neeta Vijay Goradia |] | |
| |] | |
| 4. Vijay Nagindas Goradia |] | |
| No.3 & 4 residing at: 401, Kanchan Ganga |] | |
| CHS Ltd. S.V. Road |] | |
| Kandivali (W), Mumbai 400 067 |] | |

Mr. Surel S. Shah, I/by Purav J. Damania, for the Appellant.
 Mr. Sandeep Maurya, I/by Kavita Vishwakarma, for the Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 27TH SEPTEMBER, 2016.

ORAL JUDGMENT :

1. This appeal is preferred by the original plaintiff, challenging the order dated 10th August, 2016, passed by City Civil Court, Dindoshi, Mumbai, in Notice of Motion No.2058 of 2016, in Suit No.1773 of 2016. By the impugned order, the trial Court has refused to grant ad-interim relief and hence being aggrieved, the appellant herein is challenging the same.

2. The main ground on which the trial Court has refused to grant ad-interim relief restraining respondent No.1 from creating third party interest in the suit property, is that the appellant has prima facie failed to prove that he is having 50% share in the suit plot as there was no document to that effect.

3. Secondly trial Court also considered the fact that there was no cause for apprehension on the part of the appellant, that respondent No.1 will dispose of flat No.401 as well as two car parkings bearing Nos.3 & 4 illegally. The trial Court also considered the decision of this Court in **Kachhi Properties, Satara -vs- Ganpatrao Shankarrao Kadam and**

ors¹ and held that as the protection against creation of third party interest is always available under Section 52 of the Transfer of Properties Act, there is no necessity of granting any ad-interim relief of injunction.

4. While challenging this order, the submission of learned counsel for the appellant is that the trial Court has not considered properly the documents which are produced on record by the appellant. Reliance is placed by him on the documents such as original lease deed dated 22.3.1960 executed by Respondent No.2 Kapole Co-operative Housing Society Ltd, in favour of Smt. Kusum Tulsidas Vora. It is submitted that by virtue of assignment deed dated 30.6.1972 Smt. Kusum Vora has assigned these rights to Prabhulal Gulabchand Shah, the husband of respondent No.1. By Agreement of sale dated 4.2.2005 Prabhulal Shah has sold these 50% rights on the plot alongwith Flat No.401 to respondent Nos. 3 and 4. They have then by registered agreement of sale dated 5.5.2014, agreed to sell flat No.401 to appellant with undivided right and the interest in the said plot. The attention of this Court is then drawn to paragraph No.4 of the agreement dated 4.2.2005 and various other paragraphs like paragraph Nos. 5(c) , 6, 9, 14, 19 and even Schedule of the property, to submit that all the averments made in these paragraphs are more than sufficient to prima facie hold that along with flat No.401, the

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appellant was also given 50% right, title and interest in the plot of land.

5. Per contra, learned counsel for respondent No.1 has relied upon paragraph No.3 of the said lease deed itself and also Index II to submit that the property sold to the appellant was only flat No.401 and not 50% right, title and interest in the said plot of land.

6. In my considered opinion, as the entire controversy in this case revolves around the contents of the Agreement to sale dated 4.2.2005, it would necessary to reproduce the relevant paragraphs of the said agreement for ready reference; as under.

“Clause 2 (f) :-

“The Vendor have agreed to sell and the Purchasers have agreed to purchase the flat bearing Flat No.401 on the 4th Floor of the said building known as, “Prabhu Vijay” admeasuring 2553.25 sq. ft (237.20) sq. meter of carpet area (hereinafter called the said Flat together with two car park bearing Nos. 3 & 4 total admeasuring 36 sq. mt. (Built up area) under stilt area and two car/park space bearing No.12 and 13 total admeasuring 36 sq. meters (Built up area) in open space area (herein, “the said car parks”) free from all encumbrances but subject to the terms and conditions contained into the lease dated 30th June, 1972 and the payment of municipal taxes and outgoings etc. for the consideration and on the terms and conditions contained hereinafter appearing”

Clause 4 :-

“The Vendor has agreed to transfer the right, title and interest unto the Purchasers in respect of the said on ownership basis in the said building with creating fifty percent right, title and interest of the said plot of land and the said shares. The Purchasers have agreed to purchase the rights, title and /or interest in respect of the said premises alongwith fifty percent share and interest is created in respect of plot of land and the said shares. It is expressly understood between the Vendor and the Purchasers that the right of ownership is in respect of the said premises along with fifty percent share and interest on the said plot of land and the said shares.”

Clause 5(c):-

“That the said premises is sold to the purchasers on ownership basis in the said building with creating fifty percent interest in land”.

Clause (6) :-

“It is expressly agreed by the vendor that the Purchasers shall be entitled to fifty percent right in respect of the said plot of the Kapol co-operative Housing Society Ltd,. And said share certificate bearing No.45. The Purchasers shall be entitled to use the common facilities such as drainage water connection, electric meter box, lift use of two staircase, landing space, tanks, pumps, motor, compressors, ducts and other equipments provided for common use of the flat holders and shall not have an independent and exclusive right to use the same depriving the rights of the vendor

and other flat holders to use the same in common". The Purchasers shall be lieu to pay the maintenance and taxes, outgoings in respect of his flat and other common amenities and facilities also his proportionate share in the outgoings including assessment to the Vendor. The Purchaser can however be provided with separate electric meter fixed in the common meter box in the name of the Purchasers."

Clause (8) :-

"The Vendor has represented, declared and warranted to the Purchasers that the title of the vendor to the leasehold rights in respect of the said property and the shares pertaining thereof is clear and marketable free from all encumbrances of any nature whatsoever and that there is no outstanding encumbrances, estate or effects by way or lease, lien, charge, inheritances, mortgage or otherwise howsoever and the Vendor are absolutely entitled to the said building, "Prabhu Vijay" standing thereon and the Vendor is not prevented under the Income Tax Act., Gift Tax Act, Estate Duty Act or any other statute or law for the time being in force from dealing with or disposing of the said premises to the Purchasers."

Clause (9):

"That the Vendor has further represented that the right, title and interest of the vendor in the said plot and the shares pertaining thereto and/or in the said premises not the subject matter of any pending litigation, or any attachment, either before or after judgment nor the same is subject to any attachment or prohibitory order issued by any department of the state or central government, other

authorities, courts of law, tribunal or arbitrators whereby the Vendor is prevented or restraint from assigning or transferring the rights of the Vendor in the said premises to the Purchasers as envisaged under this agreement. The Vendor has furnished to be Purchasers the Title certificate issued by Vendors Advocate/Solicitors certifying that the Vendors title to the said plot and building is clean, marketable and free from all encumbrances.

Clause (14) :

“The Vendor and Purchasers shall be entitled to make any additions, raise stories or put up additional structures by the said existing buildings as may be permissible by the Municipal Corporation of Greater Mumbai and other competent authorities in that behalf. The terrace of the said building or buildings including the parapet wall and all benefits in respect of the said buildings shall be subject to the aforesaid rights of the Vendor and Purchaser who shall be entitled to use the said terraces etc. including for display of advertisements and sighboards VSNL Antenna cable Network”

7. The perusal of these paragraphs, especially paragraph 2 (f) and 4 makes it abundantly clear that what is sold to the appellant is only Flat No.401 admeasuring 2553.25 sq. meters. Even perusal of paragraph No.6 of Agreement to Sale, makes it further clear that what was purchased by the appellant is only flat No.401 on the fourth floor of the said building along with car park bearing Nos 3 and 4. This interference can be further confirmed from the schedule of the property attached to the

Agreement to Sale which also goes to show that what was purchased by the appellant and sold by his vendor was only Flat N.401 alongwith car parkings.

8. Now as regards to other averments in paragraphs on which the appellant is relying, it may be true that those averments make out a case of the appellant that he has purchased 50% share and interest in plot of land and the said shares. However, this case of the appellant and the averments in the documents prima facie cannot be accepted for the simple reason that Index II of the said property is produced on record which clearly goes to show that only flat No.401 was purchased and sold and not 50% of share in the said land. Stamp duty is also paid accordingly. Thus, prima facie, at this stage, it cannot be held that the appellant has also purchased 50% of right, title and interest in the plot of land. Moreover, respondent No.1 has also produced on record the copy of the Lease Deed to show that third party interest in said plot of land could not have been created without concurrence of the society. There is no concurrence of the society obtained by the appellant to show that he has acquired 50% of the interest in the said plot of land.

9. In view thereof, in my considered opinion, the trial Court, has rightly refused ad-interim relief to the appellant for restraining respondent

No.1 from creating third party interest in the suit property. The impugned order, passed by the trial Court, therefore, being just, legal and correct, it does not call for any interference.

10. The appeal, therefore, holds no merit and stands dismissed accordingly.

11. However, it is made clear that whatever observations made hereinabove are only for the purpose of deciding this appeal and those observations will not come in the way of the trial Court when deciding the matter on merits.

12. On the request of learned counsel for both parties, trial Court is directed to expedite the hearing on Notice of Motion.

13. In view of disposal of appeal itself, Civil Application (ST) No.26078 of 2016 does not survive and the same is disposed of accordingly.

[DR. SHALINI PHANSALKAR-JOSHI, J.]