

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION (ST.) No. 32631 of 2016
IN
APPEAL FROM ORDER (ST.) NO. 32630 OF 2016

Kanhaiyalal Nathulal Joshi

...Appellant

Versus

Jagdish Harkishan Sharma & Anr.

...Respondents

Mr. Owen Menezes, i/b Mr. R.S. Tripathi, for the Appellant.

Mr. Atul Damle, Senior Advocate, for Respondent No. 1.

Mrs. Madhuri More, for the BMC.

CORAM : G.S. KULKARNI, J.

DATE : 13th December 2016

ORDER :

1. Not on board. Taken on board on a praecipe as moved on behalf of the Appellant.

2. This Appeal is directed against an order dated 9th November 2016 passed by the learned Judge, City Civil Court at Bombay in Notice of Motion No. 3929 of 2016. By the impugned

order, the learned Trial Judge has allowed Notice of Motion No. 3929 of 2016 as taken out on behalf of the Respondent No. 1-Plaintiff. Respondent No. 1 had prayed for the following reliefs in the Notice of Motion :-

- “a. That pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to pass an order of temporary injunction against the Defendant, his servants and agents from in any manner dealing with, disposing of or creating any third party rights or interest or encumbrance on the suit property or any part thereof or allowing any third party to enter upon and remain in or collecting rent from tenants of suit property;*
- b. That pending the hearing and final disposal of the Suit, the Defendant be restrained from in any manner acting upon the suppressed Deed of Assignment and Transfer dated 21st October 2013 executed by the Defendant without the permission of this Hon'ble Court;*
- c. That pending the final hearing and disposal of the present Suit, this Hon'ble Court be pleased to direct the Respondent Corporation to stay the process of the proposal for redevelopment as submitted by the Defendant and/or his representative and/or agent and/or servant under File No. CHE/WSII/0887/P/S/337(NEW) as also stay the effect of I.O.D. issued in favour of Defendant, if any;*
- d. That the Defendant be ordered and directed to deposit the said amount of Rs. 50,00,000/- (Rupees Fifty Lakhs Only) received by it under the suppressed Deed of Assignment and Transfer dated 21st October 2013 executed by the Defendant without the permission of this Hon'ble Court;*
- e. Ad-interim & Interim reliefs in terms of prayer clauses (a) to (d) above;”*

3. The learned Trial Judge considering the above prayer has allowed the Notice of Motion in the following terms :-

“Notice of Motion No. 3929/2016 is allowed and made absolute in following terms.

- (a) The defendant or any person claiming through him, his servants and agents is restrained by way of temporary injunction from dealing with, in any manner and from disposing off or creating any third party rights or interest or encumbrance on the suit property or any part thereof till further orders.*
- (b) The defendant is restrained by way of temporary injunction from in any manner acting upon the Deed of Assignment and Transfer dated 21st October 2013, till further orders.*
- (c) The Mumbai Municipal Corporation shall keep in abeyance the process of the proposal for redevelopment as submitted by the defendant and/or his representative and/or agent and/or servant under File No. CHE/WSII/0887/P/S/337(NEW) and effect of I.O.D. and C.C. issued in favour of Defendant, if any till further orders.*

The plaintiff is directed to maintain status quo in respect of the right, title interest and possession of the suit property till further order.

Costs in cause.

The plaintiff is directed to inform about this order to Mumbai Municipal Corporation and report compliance to this court.”

4. Mr. Menezes, the learned Counsel for the Applicant-Appellant (Defendant No.1) submits that the impugned interlocutory order is required to be stayed pending the hearing of this Appeal. Mr. Menezes submits that Respondent No. 1/Plaintiff, had initially approached this Court with similar prayers before the transfer of the Suit to the City Civil Court in Notice of Motion No. 343 of 2009. This Court by a detailed order dated 8th February 2010 (Mr. Anoop V. Mohta, J.) dismissed the Notice of Motion rejecting the prayers for a temporary injunction. Mr. Menezes has specifically drawn my attention to prayers as made in the said Notice of Motion which was for injunction against the Appellant-Defendant No.1, from in any manner dealing with, disposing of or creating any third party rights or interest or encumbrance on the suit property or any part thereof and/or collecting rent from the tenants of the suit building Sharda Niwas and/or accepting service of tenancy or transfer of tenancy. The second relief was to restrain the Appellant-Defendant No. 1 in any manner from entering upon the suit property or obstruct any authorized representative from developing the suit property and or in any manner in removing the board of Respondent No. 1-Plaintiff displayed upon the suit property. Mr. Menenzes submits that in dismissing the said Notice of Motion, the High Court had made

categorical observations as regards registration of the documents in question namely, deed of conveyance, Power of Attorney and deed of confirmation, as contained in paragraph 8 which reads thus :-

“Once the document is registered. The effect of the registration goes to the root of the matter. Why the document was registered at the late stage, it is again the matter of detail inquiry, but at this stage the effect of registration as goes to the root of the matter in favour of the Defendant. The reason for delay for registration also no way sufficient to overlook the registered documents.”

5. My attention is also drawn to an order 13th July 2010 passed by the Division Bench of this Court on an Appeal which was preferred by Respondent No. 1-Plaintiff, against the above order passed by the learned Single Judge, rejecting the Notice of Motion. The Division Bench permitted Respondent No. 1-Plaintiff to withdraw the Appeal with liberty to take out the Notice of Motion in the Suit after amending the Plaint. Mr. Menezes therefore, submits that this status and circumstances of the temporary injunction having been rejected, was in operation during the pendency of the Suit that is from 2010 till the present fresh Notice of Motion No. 3929 of 2016 came to be filed on behalf of Respondent No. 1-Plaintiff which is after a period of six years. It is submitted that in fact, the prayers in the present Notice of Motion are similar to the prayers made in the

earlier Notice of Motion. It is submitted that the Respondent No.1/Plaintiff is justifying this second Notice of Motion on a purported change of circumstance that the Appellant had entered into a Deed of Assignment as regards the 50 percent right in favour of Vallabhbhai Italia during pendency of the Suit on 21st October 2013. Mr. Menezes submits that this cannot be any change of circumstance to justify a injunctory relief as it was permissible for his clients to assign such interest in this Suit property. He submits that this was a consequence which was permissible, in view of the rejection of the specific prohibitory injunction orders as sought by respondent no.1, by an order dated 8 February 2010, passed by this Court. It is therefore submitted that Respondent No. 1-Plaintiff could not have approached the learned Trial Judge by a fresh Notice of Motion for the same reliefs. Mr. Menezes has drawn my attention to the observations made by the learned Trial Judge in the impugned order, in dealing with the contentions raised by the Appellant-Defendant No. 1 and more particularly, the observations of the learned Trial Judge in paragraphs 16 and 19 of the impugned order. It is submitted that the observations of the learned Trial Judge in paragraph 19 to say that the observations which were made by this Court (Mr. Anoop V. Mohta, J.) in the order dated 8th February

2010, in rejecting the interim reliefs “are otiose”, are totally perverse. It is therefore, urged that the impugned order deserves to be stayed pending the hearing of the Appeal.

6. On the other hand, Mr. Damle, the learned Counsel for Respondent No. 1-Plaintiff submits that the learned Trial Judge is correct in passing the impugned order and granting injunctory reliefs. It is submitted that the changed circumstances, of the Appellant-Defendant No. 1 entering into the Deed of Assignment and Transfer dated 21st October 2013 in favour of Vallabh Italia dealing with 50 percent of the right, title and interest in the suit property are taken into consideration by the learned Trial Judge in passing the impugned order. According to him, the changed circumstances are also the Appellant-Defendant No. 1 approaching the Municipal Corporation for I.O.D. and so as to undertake to development in the suit property. It is submitted that the observations made by the learned Trial Judge in regard to the documents which have not been registered are on the basis of what was noticed by the learned Trial Judge, at the stage of recording of evidence. It is submitted that there was no embargo on the learned Trial Judge to render his *prima facie* independent findings, notwithstanding the observations as made in

this regard by this Court in its order dated 8th February 2010. It is submitted that in any case the learned trial Judge has made *prima facie* observations and there cannot be anything improper for grant of a temporary injunction though earlier such relief was refused. It is submitted that the impugned order would balance the rights of the parties and would prevent undue hardship which would be caused to Respondent No. 1-Plaintiff, if the Suit is decreed in favour of Respondent No. 1-Plaintiff.

7. Having heard the learned Counsel for the Appellant and learned Senior Counsel for Respondent No. 1-Plaintiff, in my opinion, the learned Trial Judge ought not to have granted an injunction in the nature as granted in the impugned order. This is for two fold reasons. Firstly, Respondent No. 1-Plaintiff approached this Court for the same reliefs in 2010. Learned Single Judge of this Court had considered the rival pleas and by an order dated 8th February 2010 had rejected similar prayers and had refused injunctory reliefs. Secondly, the effect of this relief was that the Appellant-Defendant No. 1 could deal with the property and that there could not have been any interference in the rights of the Appellant-Defendant No. 1. The material consequence in law would be when the injunction is

refused and a third party in such a situation intends to deal with the suit property when a Suit is pending, the third party does at his own peril. This is the obvious consequence of the order dated 8 February 2010 passed by this Court. There can be no other reading of the order. However, what is more significant is the observations which were made by the learned Single Judge of this Court in paragraph 8 of order dated 8th February 2010 (supra) as regards the registration of the documents as noted above. In my opinion, the learned Trial Judge in the impugned order which is again an interlocutory order could not have rendered these findings contrary to the findings as arrived by this Court in the first interlocutory/injunction application on the same documents. Admittedly the learned Trial Judge was admittedly considering an interlocutory application. The learned Trial Judge could not have rendered such findings more particularly when the orders rejecting the injunctory reliefs had attained finality, in view of the Division Bench in appeal of the Respondent No.1/Plaintiff permitting the Appeal to be withdrawn.

8. The submission as urged on behalf of Respondent No. 1-Plaintiff that the learned Trial Judge had considered the submissions of the Respondent No. 1-Plaintiff on Section 52 of the Transfer of

Property Act would not also assist Respondent No. 1-Plaintiff, as the consequence of what Section 52 of the Transfer of Property Act entailed was not different when the High Court considered the injunction application (Notice of Motion), and rejected the same, by an order dated 8th February 2010 as also when the said order attained finality by the Respondent No. 1-Plaintiff withdrawing the Appeal against the same.

9. Considering these facts, in my prima facie opinion, the learned Trial Judge has completely overlooked the judicial propriety in passing the impugned order. In my opinion, observation as made in paragraph 19 of the impugned order that the order dated 8th February 2010 passed by this Court is otiose, is totally not acceptable. These orders of the learned Single Judge and the Division Bench were very much part of the record before the Court and it was a judicial obligation of the learned Trial Judge to carefully consider the legal implications of these orders. However, the learned Trial Judge has chosen not to give any importance to these orders, significantly when the order of the learned Single Judge had attained finality, in view of these findings attaining finality in view of the Division Bench permitting withdrawal of the Appeal. All these issues

which were germane in deciding the said second Notice of Motion of Respondent No. 1-Plaintiff, as filed for the same reliefs. In my clear opinion, the learned Trial Judge in granting this Notice of Motion has in fact sub-silento set aside the orders dated 8 February 2010 passed by the learned Single Judge of this Court which had attained finality in view of the orders of the Division Bench. The approach of the learned Trial Judge ought not to have been so casual. The sanctity of judicial orders cannot be obliterated in this manner.

10. The submission on behalf of Respondent No. 1-Plaintiff of changed circumstances, in my opinion, is not acceptable, in view of the clear consequences which were flowing from the rejection of the injunctory prayers as far back in 2010. However, what is more disturbing is that the learned Trial Judge has not even attempted to discuss this factual position and the consequences which would follow in the High Court earlier rejecting the same prayers.

11. In the circumstances, I have no hesitation, but to allow this Civil Application. Accordingly, there shall be a stay to the impugned order dated 9th November 2016 passed by the learned trial Judge in Notice of Motion No. 3929 of 2016 pending the hearing

and final disposal of this Appeal. Ordered accordingly. Civil Application is allowed in above terms. No costs.

[G.S. KULKARNI, J.]