

Mr. A. K. Gavali i/b. Mr. Sachin S. Punde for Petitioners.
Mr. Swapnil Walve for Respondents No.1 and 3.
Mr. A. A. Kumbhakoni, Senior Advocate a/w. Mr. Sham Walve and Mr. S. P. Gorwadkar for Respondent No.11.

ORDER :

Heard Mr. Gavali, learned Counsel for petitioners, Mr. Walve, learned Counsel for respondents No.1 and 3 and Mr. Kumbhakoni, learned Senior Counsel for respondent No.11 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 06.11.2015 passed by the 7th Joint Civil Judge, Senior Division, Pune below exhibit-5 in Special Civil Suit No.1617 of 2014 as also the judgment and order dated 07.12.2015 passed by the learned 13th District Judge, Pune in Miscellaneous Civil Appeal No.455 of 2015. By these orders, the Courts below rejected the application made by the petitioners, hereinafter referred to as plaintiffs, for interim injunction restraining the defendants No.12 to 15 from sanctioning TDR / DRC arising out of property bearing CTS No.1 (old CTS No.232 + 233/A), which is more particularly described in paragraph 1 of the plaint (for short 'suit property'). Plaintiffs also prayed for injunction restraining defendants No.1, 3 and 6 to 11 from erecting construction on the suit property as

well as from alienating the same till final disposal of the Suit. Parties shall hereinafter be referred to as per their status in the trial Court.

3. Mr. Gavali strenuously contended that plaintiffs have instituted Suit inter alia praying for declaration that the Slum Rehabilitation Scheme (SRS) submitted by defendant No.11 for the development of the suit property under the Maharashtra Slum Area (Improvement, Clearance & Redevelopment) Act, 1971 (for short 'Slum Act') is bad in law and may be set aside and quashed; for declaration that the SRS for the development of the suit property sanctioned and approved by defendant No.12-SRA vide Commencement Certificate bearing Outward No.731 dated 18.05.2012 is bad in law and may be set aside and quashed; for declaration that sanction of Transferable Development Rights (TDR) by defendants No.12 and 13, vide Administrative sanction bearing outward No.49/1146/13 dated 18.06.2013 / DRC by defendants No.12 to 14 is bad in law and may be set aside; for declaration that the consequential grant / sanction of DRC by defendants No.14 and 15 vide certificate No.004144 dated 10.07.2013 is bad in law and may be set aside; for declaration that the agreement / transaction dated 18.07.2013 executed by defendant No.11 in favour of defendant No.16 assigning and transferring TDR arising out of the suit property is not binding on plaintiffs' shares thereof and for perpetual injunction.

4. Mr. Gavali submitted that Regular Civil Suit No.665 of 2005 was instituted by defendants No.4 and 5 herein for partition and separate possession. In that Suit, plaintiffs were impleaded as defendants No.4 and 5. Plaintiffs and defendants No.4 and 5 are the daughters, defendant No.3 is the son and defendant No.2 is the wife of defendant No.1. Plaintiffs herein took out applications exhibit-5 and 121 praying for injunction restraining defendants No.1 to 3 and 6 to 11 therein from

alienating, transferring or dealing with or creating third party interest in the property in dispute therein. During the pendency of that Suit, defendant No.11 issued public notice on 24.07.2006. Plaintiffs herein replied on 02.08.2006 enclosing therewith a copy of R.C.S.No.655 of 2005 as also order of status-quo. On the application exhibit-5, status-quo order was passed on 14.08.2006 till the filing of the reply to the application for injunction. He submitted that defendant No.11 were very much aware of pendency of R.C.S.No.655 of 2005 instituted by defendants No.4 and 5 herein as also passing of the order of status-quo. Despite that, defendant No.11 entered into development agreement with defendants No.1 and 6 to 10. He also invited my attention to order dated 13.01.2010 passed by the learned trial Judge below exhibit-276 in Regular Civil Suit No.665 of 2005, and in particular paragraph 3 thereof. In paragraph 3, the contentions advanced by the defendants that they are claiming through defendants No.1, 9 to 11 and 1 and 3 as also the development agreement does not create any right, title and interest were recorded.

5. Mr. Gavali submitted that eventually RCS No.665 of 2005 was decreed by the learned trial Judge on 23.08.2011. The learned trial Judge declared that plaintiffs (defendants No.4 and 5 herein) and defendants No.1 to 5 (plaintiffs herein were defendants No.4 and 5 therein) are entitled to $1/7^{\text{th}}$ share each in the property in dispute therein and that they are entitled to the share in the monetary consideration / income received by defendants No.1 to 3 therein from and out of the property in dispute therein. In other words, he submitted that the rights of the plaintiffs herein in the suit property is crystallized and it is held that they have $1/7^{\text{th}}$ share each in the suit property.

6. Mr. Gavali also relied upon order dated 24.11.2009 passed by this

Court in Writ Petition No.5550 of 2007 and other companion Petitions, and in particular paragraph 12 thereof. In paragraph 12, it was observed that as far as Petition filed by defendants No.4 and 5 (plaintiffs herein), namely Writ Petition No.5940 of 2007 is concerned, they did not apply for interim relief before the trial Court. They also did not challenge the order of the trial Court passed on the application for interim relief. In other words, for the first time, in Writ Petition under Article 227 of the Constitution of India, they prayed for interim order which cannot be granted. Liberty was reserved to them to take out appropriate proceedings before the trial Court. He further submitted that in clause (e) of the operative part of that order, this Court also held that all transactions in respect of the suit property and the development work carried on the suit property shall be subject to the final order which may be passed in the Suit. Mr. Gavali submitted that during the pendency of the Suit instituted by the plaintiffs, defendant No.11 filed application exhibit-56 for rejection of the plaint on the ground that in view of Section 42 of the Slum Act, the Civil Court has no jurisdiction to entertain and try the Suit. By order dated 14.10.2015, the learned trial Judge rejected the application. He submitted that in pursuance of the liberty granted by this Court on 24.11.2009, plaintiffs took out application exhibit-5 in the Suit filed by them for injunction. The learned trial Judge rejected the application on 06.11.2015 and the Appeal preferred by them is also dismissed.

7. Mr. Gavali submitted that the plaintiffs could not press their application for interim relief because of various applications taken out by the defendants. He submitted that as plaintiffs have 1/7th share each in the suit property, the Courts below ought to have protected interest to that extent. He further submitted that the Courts below committed error in rejecting the application on the ground of delay and laches. In that

regard, he submitted that the Commencement Certificate was issued on 18.05.2012 that is to say after decision dated 23.08.2011 in R.C.S.No.665 of 2005. In other words, the Court while deciding R.C.S.No.665 of 2005 was considering the transactions that took place during the pendency or prior to institution of that Suit. As the Commencement Certificate is issued after decision, the Courts below were not justified in rejecting the application on the ground that it suffers from delay and laches. He, therefore, submitted that the impugned orders deserve to be interfered with.

8. On the other hand, Mr. Kumbhakoni supported the impugned orders. He submitted that plaintiffs are defendants No.4 and 5 in R.C.S.No.665 of 2005 instituted by defendants No.4 and 5. Defendants No.4 and 5 who were plaintiffs in R.C.S.No.665 of 2005 took out application for interim relief for protecting their interest. As against this, plaintiffs herein, who are defendants No.4 and 5 in that Suit did not take out any application for protecting their interest. This is more so when Suit is for partition and separate possession. This fact was considered by this Court while deciding Writ Petition No.5550 of 2007 and other companion Petitions. In paragraph 12 of order dated 24.11.2009, this Court gave liberty to the plaintiffs, who were defendants No.4 and 5, to take out appropriate proceedings before the trial Court. Though this liberty was given to them in the year 2009, they did not avail that liberty in the pending Suit being R.C.S.No.665 of 2005 and instituted the present Suit on 31.07.2014. In other words, plaintiffs did not take any steps for more than 5 years for protecting their interest. He further submitted that in fact, plaintiffs herein took out application exhibit-250 in R.C.S.No.665 of 2005 for issuing appropriate directions to defendants No.1 and 3 for depositing 2/7th share in the monetary consideration received to defendants No.1 and 3 as per the workable

arrangements made by the High Court. That application was rejected by the learned trial Judge on 27.01.2010. Plaintiffs did not challenge that order. He further invited my attention to paragraph 16 of the District Court's order wherein the learned District Judge recorded that plaintiffs and defendants No.4 and 5 challenged the Government Notification issued by Slum Rehabilitation Authority on 02.01.2008 before the Tribunal. The said Notification declared the suit property as slum area. The challenge was replied by the Tribunal on 21.10.2008. Aggrieved by that decision, Writ Petition No.2164 of 2009 was instituted in this Court, which was dismissed on 23.06.2010. The Commencement Certificate dated 18.05.2012 was challenged before the High Power Committee. The said application was rejected on 06.10.2012. Against that decision, Writ Petition No.2844 of 2013 was instituted. The said Petition was dismissed on 24.09.2013 by observing that interest of petitioners (plaintiffs herein) have been protected by virtue of the order passed in civil proceedings. Thus, he submitted that in the challenge raised before the Tribunal and this Court, declaring the suit property as slum area was also turned down by various fora. For all these reasons, he submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that defendants No.4 and 5 herein instituted RCS No.665 of 2005 for partition and separate possession. Plaintiffs herein are defendants No.4 and 5 in that Suit. Plaintiffs did not take out any application for interim relief in that Suit. Defendants No.4 and 5 took out application for interim relief in that Suit, which was rejected by the trial Court. Aggrieved by that decision, defendants No.4 and 5 preferred Appeal before the District Court, which was also dismissed.

Aggrieved by these decisions, they preferred Writ Petition No.5927 of 2007. Defendant No.1 and others instituted Writ Petition No.5550 of 2007 and the plaintiffs herein instituted Writ Petition No.5940 of 2007. All these Petitions were disposed of by common judgment and order dated 24.11.2009. In paragraph 12 of that order, it was observed thus,

“12. As far as the Petition filed by fourth and fifth defendants is concerned, the said defendants did not apply for interim relief before the trial court. The said defendants did not challenge the order of the trial court passed on application for interim relief. Therefore, for the first time in the writ petition under Article 227 of the Constitution of India, the said defendants cannot get any relief. It is for them to take out appropriate proceedings before the trial court.”

10. Perusal of the above extracted portion shows that it was noted that as far as the Petition filed by defendants No.4 and 5 (plaintiffs herein) is concerned, they did not apply for interim relief before the trial Court. They also did not challenge the order of the trial Court passed on application for interim relief, and for the first time, they instituted Writ Petition under Article 227 of the Constitution of India. In view thereof, they are not entitled to any relief. It was further observed that it is open for them to take out appropriate proceedings before the trial Court.

11. It is material to note that though this liberty was specifically given to them in November 2009, they did not take out any application in R.C.S.No.665 of 2005. Mr. Gavali submitted that defendant No.11 was not party in that Suit. Nonetheless, as noted in paragraph 16 of the District Court's judgment, plaintiffs challenged the declaration of suit property as slum area as also challenged the the Commencement Certificate dated 18.05.2012 before the High Power Committee. The said challenge was turned down by this Court as well. Even if defendant No.11 was not party in R.C.S.No.665 of 2005, nothing prevented plaintiffs herein to institute Suit in pursuance of liberty granted by this

Court in 2009 immediately thereafter or at any rate, after the Commencement Certificate was issued on 18.05.2012. It is material to note that the only application made by the plaintiffs herein was exhibit-250 in R.C.S.No.665 of 2005 for issuing directions to defendants No.1 and 3 to deposit 2/7th share in the monetary consideration received to them in view of the workable arrangements made by the High Court. The said application was rejected by the trial Court on 27.01.2010. It is not in dispute that plaintiffs did not challenge that order as well.

12. It is not in dispute that the present Suit is instituted on 31.07.2014. While rejecting the application for interim relief, the learned trial Judge, in paragraph 18, observed that plaintiffs herein conceded in earlier Suit namely R.C.S.No.665 of 2005 that the development scheme is in progress. They have also claimed share in monetary consideration received by defendant No.1 from defendant No.11 in the earlier Suit. Demand of money suggests that plaintiffs gave up their challenge to SRS. They were fully aware of DRC / TDR since the date of Development Agreement dated 11.12.2006. The Commencement Certificate was issued on 18.05.2012 and the Suit is instituted in the year 2014. The learned trial Judge, therefore, observed that there is considerable delay in challenging the Commencement Certificate and it is settled law that delay defeats equity. The learned trial Judge also noted that the multi storied building has been erected on the suit property and possession of the same has been handed over to the slum dwellers. The learned trial Judge, therefore, observed that plaintiffs failed to establish a prima facie case.

13. In paragraph 19, the learned trial Judge also noted that if injunction is refused, plaintiffs will not suffer any irreparable loss or injury because their rights in the suit property have been secured in

monetary terms in R.C.S.No.665 of 2005.

14. As far as the order of the District Court is concerned, in paragraph 16, the learned District Judge considered the challenge raised by the plaintiffs to declaration of suit property as slum area as also Commencement Certificate dated 18.05.2012 being turned down by various fora. In paragraph 17, the learned District Judge also noted order dated 27.01.2010 passed below exhibit-250. It was also noted that though the plaintiffs herein filed cross-objections in R.C.S.No.665 of 2005, they did not take out any interim application to protect their interest. No explanation is given by the plaintiffs as to why there is delay in filing the present Suit. The learned District Judge also noted that defendant No.11 has invested huge amount to develop the property. That apart, while dismissing Writ Petition No.5940 of 2007 filed by the plaintiffs herein, on 24.11.2009, this Court in clause (e) of the operative part of the order held that all transactions in respect of the suit property and the development work carried on the suit property shall be subject to the final order which may be passed in the Suit. The said order is not challenged by the plaintiff.

15. Thus, the Courts below, after considering the material on record as also delay in approaching the Court, have declined to grant interim relief. In the case of ***Wander Limited Vs. Antox India Private Limited, 1990 (Supp.) SCC 727***, in paragraph 14, the Apex Court has observed thus,

“ ... 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. 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 the 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. ...”

16. In the case of *Surya Dev Rai Vs. Ram Chander Rai*, (2003) 6 SCC 675, the Apex Court, after exhaustively considering the scope of Petitions under Article 227 of the Constitution of India, have summarized the conclusions in paragraph 38. Conclusions 4, 5, 7 and 8 read thus,

“(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or

early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.”

17. If the tests laid down in the above judgments are applied to the facts of the present case, I do not find that the Courts below committed any error in exercising discretion while deciding the application for injunction. It cannot be said that the discretion exercised by the Courts below is arbitrary, capricious or perverse or that the Courts below ignored the settled principles of law regulating grant or refusal of interlocutory injunction. This Court will not be justified in interfering with the exercise of discretion 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.

18. During the course of hearing this Petition, I have suggested to Mr. Gavali as to whether plaintiffs will be satisfied if defendant No.11 is directed to deposit 2/7th share of the plaintiffs in the monetary consideration received to defendants No.1 and 3 which approximately comes to Rs.50 lacs as per the workable arrangement made by this Court. However, Mr. Gavali, upon taking instructions from petitioners, who are present in the Court, is not agreeable to this suggestion.

19. As noted earlier, plaintiffs did not take out any application in R.C.S.No.665 of 2005 for protecting their interest as also did not institute Suit immediately after grant of liberty by this Court on 24.11.2009. One of the reasons that weighed with the Courts below is the delay in approaching the Court and that in the meantime, the construction was substantially progressed. Apart from that, though plaintiffs took out application exhibit-250 in R.C.S.No.665 of 2005, which was rejected on 27.01.2010, still I was inclined to direct defendant No.11 to deposit Rs.50 lacs as was the direction passed in favour of defendants No.4 and 5. However, plaintiffs are insisting defendant No.11 to deposit their 2/7th share in Rs. 29 crores being 40% of total TDR. Mr. Kumbhakoni is not agreeable to this suggestion.

20. In view thereof and for the reasons stated earlier, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

21. At this stage, Mr. Gavali orally applies for continuation of the ad-interim order granted by the learned District Judge for a period of 4 weeks from today. Mr. Kumbhakoni strongly opposes this application on the ground that though defendant No.11 is ready and willing to deposit Rs.50 lacs even though the application exhibit-250 made by plaintiffs is rejected on 27.01.2010, plaintiffs are adopting unreasonable approach and are interested in litigating.

22. Having regard to the fact that plaintiffs desire to challenge this order in the higher Court as also having further due regard to the fact that during the pendency of the Appeal, order dated 26.11.2015 restraining the defendants No.12 to 15 from sanctioning TDR / DRC was operating and the said order was continued after the dismissal of the

Appeal on 07.12.2015, in my opinion, the interest of justice will be served by continuing the order that is continued even by this Court, for the period of four weeks from today. In view thereof, notwithstanding dismissal of the Petition, ad-interim order granted by the learned District Judge, which was continued by this Court, shall remain in force for the period of four weeks from today. Order accordingly. It is expressly made clear that request for extension of this order shall not be entertained.

(R. G. KETKAR, J.)

Minal Parab