

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.275 OF 2016
IN
NOTICE OF MOTION NO.4367 OF 2009
IN
SUIT NO.2715 OF 2009

Rajendra Sadanand Rasal. .. Appellant

Vs

Naranppa Thenukyya Kotian and Others. .. Respondents

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Shri Girish Godbole along with Ms. Aditi Bhat i/b Shri Yatin R. Shah for the Appellant.

Dr. Birendra Saraf i/b I.C. Legal for the Respondent No.4.

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CORAM : A.S. OKA & A.A.SAYED, JJ

DATED : 30TH JUNE 2016

ORAL JUDGMENT : (PER A.S. OKA, J)

1. Submissions of the learned counsel appearing for the parties were heard on 29th June 2016. The Court had put the parties to the notice that the Appeal will be heard and disposed of finally at the stage of admission.

2. The order impugned in the Letters Patent Appeal is dated 20th December 2014. The Appellant is the original Plaintiff. By the impugned order, the Notice of Motion taken out by the Appellant-

Original Plaintiff for temporary injunction has been dismissed. With a view to appreciate the submissions canvassed across the bar, it will be necessary to make a brief reference to the facts of the case.

3. For the sake of convenience, we are referring to the parties with reference to their status before the learned Single Judge.

4. The Plaintiff is claiming to be a Builder and Developer by profession and is carrying on business as the Sole Proprietor of M/s. Sai Om Developers. The property subject matter of the suit (for short “suit property”) is more particularly described in Exhibit-A to the Plaint which is a land admeasuring 192130 sq. meters at Village Poiser, Taluka – Borivali, Kandivali (East), Mumbai, out of the land bearing Survey No.80 Hissa No.1 corresponding to CTS No. 388/1 to 129 admeasuring about 23066.33 sq. meters.

5. According to the case made out in the Plaint, one Alfred Ernest Rebello and the third Defendant Everest Pascal Rebello, were the co-owners of the suit property. The Defendant Nos.2(a) to 2(f) are the legal representatives of the said Alfred. The said Alfred died on 15th September 2007. In Paragraph 4 of the Plaint, it is stated that out of the land described in Exhibit-A, the suit property is admeasuring about 19968.2 sq. meters as per the Government Gazette and 17768 sq.

meters as per the Property Register Card. The Petitioner relied upon an Agreement for Sale dated 23rd January 1980 executed by Alfred and the third Defendant in favour of one M/s. L.D. Development Corporation, a partnership firm, in respect of the suit property. It is stated that the first Respondent who is now claiming to be the proprietor of the M/s. L.D. Development Corporation, along with his wife were the partners in the said partnership firm. It is claimed that under the said Agreement, the partnership firm was placed in possession of the suit property. It is claimed that the agreed consideration was of Rs.1.75 lakhs out of which, the purchaser (for the sake of convenience “the first Defendant”) paid a sum of Rs.10,000/- each to the said Alfred and the third Defendant.

6. It is pointed out that by a Notification dated 31st August 1977, the said property was declared as a Slum area under Sub-section (1) of Section 4 of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971. It is also pointed out in the plaint that a notice of termination dated 31st December 1984 was issued by the Advocate for the said Alfred to the first Defendant. There is an assertion that after the notice and the subsequent correspondence, the said Alfred agreed not to act upon the termination notice.

7. The Plaintiff relied upon the fact that Alfred and the third Defendant executed a power of attorney in favour of the first Defendant for the purposes of the proceedings under Urban Land (Ceiling and Regulation) Act, 1976. It is alleged that subsequently, there were discussions between the first Defendant and the deceased Alfred and the third Defendant regarding the enhancement of consideration and it was agreed that the consideration of Rs.2,50,00,000/- will be paid by the first Defendant to the co-owners. It is claimed that a sum of Rs.1 lac was paid by the first Defendant to the third Defendant on 4th September 2006. Thereafter, a sum of Rs.5 lacs was paid by the first Defendant to the third Defendant and that the first Defendant also agreed to allot a premises admeasuring 500 sq. ft. to his son-in-law (the alleged Constituted Attorney of the said Alfred). According to the Plaintiff, the first Defendant agreed to allot a premises admeasuring 500 sq. ft. to the son of the third Defendant.

8. The Plaintiff has referred to the public notice dated 30th August 2006 published in relation to the suit property inviting objections to the proposed sale. It is stated that by a letter dated 5th September 2006, the first Defendant raised an objection to the said public notice. It is stated that even the third Defendant had raised an objection to the public notice. It is claimed by the Plaintiff that on

payment of a sum of Rs.20 lacs to the said Alfred on 10th October 2006, the said Alfred executed a power of attorney in his favour.

9. In Paragraph 19 of the Complaint, it is claimed that Alfred agreed to sell his undivided share in the suit property to the Plaintiff for a consideration of Rs.1.25 crores and on the Plaintiff's paying a sum of Rs.20 lacs, Alfred executed a power of attorney dated 10th October 2006 in his favour. Reliance is placed on the Deed of Confirmation dated 10th October 2006 executed by the said Alfred thereby agreeing to sell his share in favour of the Plaintiff. A sum of Rs.20 lacs out of the consideration of Rs.1.25 crores was paid to the said Alfred. Further it is claimed that on 17th October 2006, Alfred executed an Agreement for Sale in favour of the Plaintiff. It is claimed that further amounts of Rs. 5 lacs and Rs.10 lacs were paid by the Plaintiff to the said Alfred on 26th October 2006 and on 5th December 2006 respectively.

10. In Paragraph 23 of the Complaint, it is asserted that the first Defendant continued to be in possession of the suit property. It is alleged that under the Agreement dated 5th April 2008, the Plaintiff agreed to pay a total consideration of Rs.11,25,000/- to the first Defendant who agreed to surrender all his right, title and interest in the suit property which the first Defendant had derived from the said Alfred and the third Defendant. The claim of the Plaintiff is that he paid a

total amount of Rs.5,50,000/- to the first Defendant and agreed to reserve a flat for the first Defendant admeasuring 600 sq. feet built up area in the proposed building to be constructed on the suit property.

11. In Paragraph 28 of the Plaint, it is contended that in or around July 2008, the Plaintiff was approached by the Director of the fourth Defendant Company for settlement of the alleged claim of the Plaintiff. It is alleged that on that date, the Plaintiff became aware for the first time about the alleged Deed of Conveyance dated 31st March 2007 purported to have been executed by the said Alfred thereby selling his share in the suit property in favour of the fourth Defendant Company.

12. The present suit was declared by the Plaintiff on 31st October 2009. There are various prayers made in the suit including a prayer for declaration that the Irrevocable Power of Attorney, the Deed of Confirmation and the Agreement for Sale executed by the deceased Alfred in favour of the Plaintiff are valid and subsisting. A prayer is made for specific performance of the said documents. Another prayer is also for specific performance of the Agreement dated 5th April 2008 executed by the first Defendant in favour of the Plaintiff. There are various other consequential prayers made in the Plaint apart from the prayer made for damages. There is also a challenge to the Sale Deed

dated 31st March 2007 which was executed by the deceased Alfred in favour of the fourth Defendant Company.

13. The prayer made in the Notice of Motion taken out by the Plaintiff was for injunction restraining the Defendants from dealing with or disposing of, or alienating or otherwise transferring the suit property in favour of any third party. Another prayer is for appointment of a Court Receiver.

14. A written statement was filed by the first Defendant whereby he contested the suit filed by the Plaintiff. The contention of the first Defendant seems to be that the Agreement for Sale dated 23rd January 1980, the Agreement for Sale dated 17th October 2006 and the Agreement dated 5th April 2006 are valid and subsisting and binding on all other Defendants except the said Defendant. There is a written statement filed by the fourth Defendant. In the written statement, it is contended that the deceased Alfred executed a Conveyance Deed dated 31st March 2007 in favour of the said Defendant for transferring his 50% share in the suit property. Similarly, the third Defendant executed a Deed of Conveyance dated 18th April 2007 in favour of the fourth Defendant for transferring his 50% share. Various other contentions such as delay and laches on the part of the Plaintiff have been raised in the written statement.

15. The first submission of the learned counsel appearing for the Plaintiff is that the learned Single Judge has referred to the submissions made by the learned counsel, but he has not recorded any findings on the existence of the prima facie case and the other issues which are required to be decided such as irreparable loss and the balance of convenience. He submitted that as no findings have been recorded by the learned Single Judge, an order of remand will have to be passed by this Court. He placed reliance on various decisions of the Apex Court viz. *Shiv Kumar Chadha v. Municipal Corporation of Delhi and Others*¹, *Hindustan Petroleum Corporation Limited v. Sriman Narayan and Another*², *Ajendraprasadji Narendraprasadji Pandey v. Swami K. Narayandasji and Others*³, *Gujarat Bottling Company Limited and Others v. Coca Cola Co. and Others*⁴ and *Colgate Palmolive (India) Ltd. V. Hindustan Lever Ltd.*⁵.

16. The learned counsel appearing for the Plaintiff urged that as no reasons have been recorded by the learned Single Judge and as the three issues which are required to be decided have not been decided, the Appellate Court does not have the advantage of having the findings on the said issues. He submitted that it was not necessary for

1 (1993)3 SCC 161

2 (2002)5 SCC 760

3 (2005)10 SCC 11

4 (1995)5 SCC 545

5 (1999)7 SCC 1

the Plaintiff to have challenged the subsequent conveyances allegedly executed by the deceased Alfred and the third Defendant in favour of the fourth Defendant Company. He urged that the Plaintiff became aware in the July 2008 about the execution of the conveyances. He pointed out that the suit is filed within limitation. He submitted that considering the prima facie evidence of the amounts paid by the Plaintiff under the Agreements dated 7th October 2006 and 5th April 2008, clearly a prima facie case was made out. His submission is that considering the fact that the substantive suit is pending, the suit property ought to have been protected from the alienation during the pendency of the suit. His submission is that a relief of temporary injunction as prayed for in the Notice of Motion ought to have been granted.

17. The learned counsel appearing for the fourth Defendant Company has taken us through some of the paragraphs of the impugned order. He urged that the contention that the learned Single Judge has not recorded the reasons is completely incorrect. He invited our attention to some of the paragraphs of the impugned judgment and order for pointing out that the reasons have been recorded in support of the order. He, therefore, submitted no interference is called for with the discretionary interim order passed by the learned Single Judge.

18. We have given careful consideration to the submissions. In this Letters Patent Appeal, the challenge is to the impugned judgment and order passed by the learned Single Judge declining to grant a discretionary relief of temporary injunction under Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908 (for short “the said Code”). As far as the scope of interference with such orders is concerned, the law is laid down by the Apex Court in its well known decision in the case of *Wander Ltd. and another v. Antox India P Ltd.*⁶. This is a case where a Division Bench of the High Court was dealing with the discretionary order passed by the learned Single Judge. In Paragraph 14 of the said decision, the Apex Court held thus:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, 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 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. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph*, (1960)3 SCR 713 : AIR 1960 SC 1156 (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* (1942 AC 130) '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'.”

The appellate judgment does not seem to defer to this principle.”

(Underline added)

19. The same view is followed by the Apex Court in the case of *Mohd. Mehtab Khan and Others v. Khushnuma Ibrahim Khan and Others*⁷.

20. In the context of the law laid down by the Apex Court as regards the limitation on the power of the Appellate Court while dealing with the discretionary orders, the submissions will have to be considered.

21. We have carefully perused the Complaint and the documents annexed thereto. In Paragraph 28 of the Complaint which is declared on 1st October 2009, the Plaintiff has stated that in July 2008, one of the

⁷ (2013)9 SCC

Directors of the fourth Defendant Company met him for settlement of his alleged claim when the Plaintiff became aware about the execution of the Deed of Conveyance dated 31st March 2007. In fact, a copy of the said Deed of Conveyance is annexed to the Plaint. We have carefully perused the subsequent paragraphs of the Plaint. In Paragraph 33 of the Plaint, it is stated that in or about July 2009, the fourth Defendant put his board on the suit property. There is no explanation forthcoming from the Plaintiff as to why he waited till 1st October 2009 for filing the suit. At this stage, we are not considering the question of bar of limitation. What is material is the delay in filing the suit which is a very relevant consideration for grant of discretionary and equitable relief of temporary injunction.

22. In Paragraph 46 of the Plaint, it is contended that the Plaintiff became aware of the Deed of Conveyance dated 31st March 2007 in July 2007 though in Paragraph 28 of the Plaint, it is stated that he became aware of the said fact in July 2008. The submission of the learned counsel appearing for the Plaintiff is that there is a typographical error in Paragraph 46 of the Plaint. Nevertheless, even without taking into consideration the averments made in Paragraph 46 of the Plaint, there is a delay in filing the suit. The delay in filing the suit was a relevant consideration for grant of discretionary and equitable relief of temporary injunction as prayed for.

23. The Plaintiff is seeking specific performance of the Agreement for Sale dated 17th October 2006 and the Deed of Confirmation dated 10th October 2006. The specific case of the Plaintiff as pleaded in the Complaint is that the Deed of Confirmation dated 10th October 2006 was executed by the deceased Alfred and even the Agreement for Sale dated 17th October 2006 was executed by the deceased Alfred confined to his share. The Plaintiff is relying upon the Agreement dated 5th April 2008 allegedly executed by the first Defendant of surrender of his right, title and interest in favour of the Plaintiff. Apart from the said Agreements, it is not the case of the Plaintiff that there was any Agreement between him and the third Defendant. There is one more material aspect. The Plaintiff is seeking specific performance of the Agreement dated 23rd January 1980 executed by the said Alfred and the third Defendant in favour of M/s. L.D. Corporation (the first Defendant). The averments made in the Complaint show that even according to the case of the Plaintiff, by a notice dated 31st December 1984, the deceased Alfred through his Advocate terminated the Agreement dated 23rd January 1980. Though a case is made out that the deceased and the third Defendant agreed not to act upon the said termination notice and waived the same, there is absolutely no material or even a prima facie material placed on record to show that there was any such waiver on the part of the deceased and the third Defendant.

24. In this context, it will be necessary to make a reference to the impugned judgment and order passed by the learned Single Judge. The learned Single Judge in Paragraph 8 has noted that the fourth Defendant caused a public notice dated 30th August 2006 inviting objections to the proposed conveyances to be executed by the deceased Alfred and the third Defendant in favour of the fourth Defendant. The learned Single Judge in Paragraph 9 has noted that in September 2006, the first Defendant raised an objection to the proposed conveyance. In Paragraph 10, the learned Single Judge has recorded a finding that though the Advocate for the fourth Defendant called upon the first Defendant to produce the documents which were relied upon by the fourth Defendant in support of the objection, no such documents were produced by the first Defendant.

25. Apart from the fact that the said Agreement for Sale dated 23rd January 1980 was not registered, the Purchaser under the said Agreement is M/s. L.D. Development Corporation, a partnership firm. Even according to the case of the Plaintiff, the Agreement dated 5th April 2008 was executed by the first Defendant in his capacity as the sole proprietor of M/s. L.D. Development Corporation. In the Complaint, there is an averment that the first Defendant and his wife were the partners in the firm and on 6th May 1982, there was a surrender or

relinquishment of her rights in the said firm by his wife in favour of the first Defendant. However, we find that no document is placed on record to show the alleged surrender by the wife of the first Defendant. This is relevant in the context of the fact that according to the case of the Plaintiff, the Agreement dated 5th April 2008 was executed by the first Defendant in his capacity as the Proprietor (not as a partner) by which he allegedly agreed to surrender the right, title and interest under the said Agreement of 1980 which was executed in favour of M/s. L.D. Development Corporation, a partnership firm.

26. Thus, when the suit was filed by the Plaintiff in the month of October 2009, there were already Sale Deeds executed by the deceased as well as the third Defendant on 31st March 2007 and 18th April 2007 in favour of the fourth Defendant for sale of their respective 50% shares in the suit property. It is not the case of the Plaintiff that he raised an objection to the advertisement published on behalf of the fourth Defendant Company. According to the case of the Plaintiff, an Agreement was executed on 17th October 2006 in favour of the Plaintiff by the deceased Alfred. The learned Single Judge found that the first Defendant raised an objection to the advertisement. But he failed to produce the documents in support of the objection though called upon by the fourth Defendant to do so. Consideration of all these aspects is reflected from the impugned judgment and order. The learned Single

Judge in some of the paragraphs has recorded the submissions of the learned counsel appearing for the fourth Defendant and in the very paragraphs, he has recorded his prima facie findings. There are findings recorded by the learned Single Judge in paragraphs 9 to 12. The learned Single Judge has also noted that in the year 2010, a Chamber Summons was taken out by the fourth Defendant seeking inspection of the documents from the Plaintiff and notwithstanding the order passed by the Court on 9th March 2012, the inspection was admittedly not given to the fourth Defendant. It is in this context that the learned Single Judge was impressed by the submission that the ad-interim relief was denied on 12th October 2009 and the said order was not challenged.

27. Therefore, in our view, the learned Single Judge has rightly found that a prima facie case was not established by the Plaintiff. Considering the analysis of the material placed on record made by us in the earlier paragraphs, we also find that a prima facie case is not established by the Plaintiff. Therefore, it was not necessary for the learned Single Judge to deal with the other issues regarding irreparable loss and the balance of convenience.

28. Therefore, we find no perversity in the view taken by the learned Single Judge. The ultimate view taken by the learned Single

Judge is certainly a possible view which could have been taken while considering the prayer for grant of discretionary and equitable relief of temporary injunction and appointment of a Court Receiver. Hence, we find no merit in the Appeal and, therefore, the same is dismissed.

(A.A. SAYED, J)

(A.S. OKA, J)