

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

APPEAL (L) NO. 877 OF 2015

IN

NOTICE OF MOTION NO. 1584 OF 2015

IN

SUIT NO. 820 OF 2015

Bakshish Singh Chandhok & Ors.	...Appellants
<i>Versus</i>	
Diljit Singh Chandhok & Anr.	...Respondents

**ALONG WITH
APPEAL NO. 205 OF 2016**

A.P. Properties (Builders)	...Appellant
<i>Versus</i>	
Diljit Singh Chandhok & Ors.	...Respondents

Mr. V.A. Thorat, Senior Advocate, Mr. Chetan Kapadia, a/w Ms. Shruti Maniar, Ms. Simantini Mohite, for the Appellants in APPL/877/15.

Mr. Girish Godbole, a/w Mr. Sanjay Jain, Ms. Renuka Kavedia, i/b LJ Law, for the Appellants in APP/205/16.

Mr. A.Y. Sakhare, Senior Counsel, a/w Mr. Nitin G. Raut, i/b Thakordas Madgavkar & Co., for the Respondent No. 1/Original Plaintiff.

CORAM : A.S. OKA &
A.A. SAYED, JJ.
DATE : 5th July 2016

ORDER :

1. Though the submissions were heard earlier, on few occasions, we adjourned the matter. Considering the fact that some of the parties were close relatives, we granted them opportunity to amicably settle their dispute. However, notwithstanding the repeated adjournments and exchange of drafts, ultimately a settlement could not be arrived at. The impugned order is a discretionary and equitable interim order passed by the learned Single Judge granting temporary injunction restraining the Defendants from carrying out any construction activity on the suit property in which admittedly the Plaintiff has 1/3rd undivided share.

2. Appeal (L) No. 877 of 2015 has been preferred by the 1st, 2nd and 3rd Defendants and the other Appeal bearing No. 205 of 2016 is preferred by the original 4th Defendant.

3. For the sake of convenience, we are making a

reference to the parties as per their status before the learned Single Judge. As stated earlier, the parties are close relatives. The Plaintiff and the 2nd Defendant are the real brothers. The 1st Defendant is the son of late Amarjit Singh (another brother of the Plaintiff who expired on 31st January 2014). The 3rd Defendant is the widow of late Amarjit Singh. The 4th Defendant is a builder and developer appointed in respect of the suit property by the 1st to 3rd Defendants. The suit property is more particularly described in Exh.A to the Plaint which is a Plot of land being Plot No. 12 in a scheme known as Gazdar Private Scheme at Santacruz, Mumbai suburban District. It is not necessary to go into the details as to how the parties derived title as there does not seem to be any dispute between the parties that the Plaintiff, 2nd Defendant and the 1st as well as the 3rd Defendants together are having 1/3rd undivided share each in the suit property.

4. The main dispute in the suit is as regards the genuineness of the Power of Attorney dated 29th November 2010 which was allegedly executed by the Plaintiff appointing

the 1st Defendant as his Constituted Attorney. On the basis of the said Power of Attorney, the 1st Defendant executed a Memorandum of Understanding dated 16th July 2014 and Development Agreement dated 25th September 2014 appointing 4th Defendant as the Developers of the suit property. The 2nd and 3rd Defendants have also executed the said two documents. Moreover, on the basis of alleged Power of Attorney dated 29th November 2010, the 1st Defendant purported to execute a Power of Attorney in favour of the 4th Defendant on 25th September 2014. On the basis of the said Power of Attorney and aforesaid documents, building permissions were obtained by the 4th Defendant. The case made out in the Plaint is that the Power of Attorney dated 29th November 2010 was never executed by him. The declaration claimed is that the said Power of Attorney is illegal and void, which did not confer any authority of the 1st Defendant to execute the Memorandum of Understanding dated 16th July 2014, the Development Agreement dated 25th September 2014 and the Power of Attorney dated 25th September 2014. A declaration is prayed for that the said

Development Agreement and the Power of Attorney did not and cannot operate in law as a disposition of any interest of the Plaintiff in the suit property. There is also a declaration claimed as regards I.O.D and Commencement Certificate issued by the Municipal Corporation claiming that the same are void. Various other consequential reliefs are prayed in the Plaint. A Notice of Motion was taken out by the Plaintiff *inter alia* for temporary injunction restraining the Defendants from carrying out any construction on the suit property and restraining them from entering upon the suit property.

5. By the impugned order, the learned Single Judge has made the Notice of Motion No. 1584 of 2015 in Suit No. 820 of 2015 absolute in terms of prayer clause (a), which reads thus :-

“(a) That pending the hearing and final disposal of the present Suit, the Defendant Nos. 1 to 4 be restrained by a permanent order and injunction of this Hon'ble Court from in any manner dealing with the Suit property including executing or carrying out any construction activity on the Suit

property whether in compliance with the said I.O.D. and/or C.C. or otherwise and not to enter upon the said property for the purposes of carrying out any construction activity or otherwise on the Suit property; and also they be restrained by a permanent order and injunction from creating any third party interest in the Suit property of whatsoever nature and/or entering into any Agreement with any third party whether for sale of any tenements or lease or license thereof or otherwise mortgage or charge or otherwise encumbered the Suit property or any other proposed tenements to be constructed on the Suit property, whereby the interest of the Plaintiff in the Suit property is prejudiced.”

6. Various submissions were canvassed by the learned Counsel appearing for the Appellants in both the Appeals. The first submission is that the suit itself is not maintainable, as there is no prayer for the delivery of possession. It is pointed out

that there is no prayer for partition. Relying upon the decisions of the Apex Court in case of **Shridevi & Anr. Vs. Muralidhar & Anr.**¹ and **M. Gurudas & Ors. Vs. Rasaranjan & Ors.**², it is contended that the learned Single Judge has committed a gross error by not even framing points for determination as regards the irreparable loss and the balance of convenience especially in the light of the fact that when the impugned order was passed, the existing building on the suit property was already demolished and the 4th Defendant had already completed construction upto plinth level and columns of the ground floor were ready. It is pointed out that the suit suffers from the gross delay. It is urged that though the Plaintiff was fully aware of the demolition of the existing building on the suit property, he waited till the construction actually commenced.

7. Our attention is invited to the decision of the Madhya Pradesh High Court in case of **Ramdayal Vs. Manaklal**³ and in particular law laid down by the Full Bench. Our attention is also invited to the decision of the Division Bench of this Court

¹ **(2007)14 SCC 721**

² **(2006) 8 SCC 367**

³ **AIR 1973 MP 222 (FB)**

in case of **Bhau Laxman Dhor Vs. Budha Manku Dhor**⁴.

8. It is pointed out that a co-parcener who has been excluded from Joint Hindu Family may obtain joint possession with the purchaser who has obtained possession of the joint family property. It was submitted that the purchaser in possession need not be ejected in a suit for recovery of possession brought by the excluded co-parcener. As far as the 4th Defendant is concerned, its claim is that it is a bona fide purchaser. Reliance was placed on the Public Notice dated 17th May 2014 published by the Advocate appointed by the 4th Defendant in daily newspapers Free Press Journal and Navshakti published in English and Marathi languages respectively. It was pointed out that as no objection was raised, after investigation of title, 4th Defendant-Developer entered into the Development Agreement. It was pointed out that the Developer had taken the inspection of the Power of Attorney of the Plaintiff on the basis of which the 1st Defendant executed the Memorandum of Understanding and the Development Agreement. Our attention

⁴ **AIR 1926 Bom. 399**

was also invited to the terms and conditions incorporated in the Development Agreement which is the subject matter of challenge in the suit. A contention is raised on the basis of what is provided in the Development Agreement, that even the share of the Plaintiff is taken care of and that even if the scheme of development is implemented by the 4th Defendant, the Plaintiff will not be a sufferer. It is pointed out that a bank guarantee in sum of Rs. 2,50,00,000/- has been furnished by the 4th Defendant for ensuring compliance with the terms and conditions of the Development Agreement. The submission is that preventing ongoing construction will not serve anybody's interest as even the Plaintiff will be a beneficiary if the construction is allowed to be completed.

9. The learned Senior Counsel representing the original Plaintiff supported the impugned order and contended that the documents forming part of the additional compilation tendered by the learned Counsel for the 4th Defendant containing the copies of Public Notices should not be considered as the said documents are not on record of the suit. It is submitted that as

observed by the learned Single Judge, inspection of the documents was not given to the Plaintiff. Moreover, the Public Notices on which reliance is placed were not produced before the learned Single Judge. He has also invited our attention to the specific finding recorded by the learned Single Judge that admittedly the Plaintiff was not even aware of the terms and conditions of the Development Agreement and that the said terms were never discussed with him by anyone.

10. We have carefully considered his submissions. We have perused the impugned order. The learned Single Judge recorded the admitted position that the Plaintiff is entitled to 1/3rd share in the suit property. The second reason given by the learned Single Judge is that there was a serious issue regarding the execution of Power of Attorney, which is purportedly executed before a Notary Public who had ceased to be a Notary Public nearly 20 months before the date of the execution of the alleged Power of Attorney.

11. The learned Single Judge held that the execution of Power of Attorney by the Plaintiff is thrown into considerable

doubt. The learned Single Judge thereafter referred to the admitted position that the contents of the Development Agreement were at no stage discussed with the Plaintiff by the 4th Defendant. The learned Single Judge observed that apart from the fact that the 4th Defendant never had any personal conversation with the Plaintiff, he did not have even a telephonic conversation with the Plaintiff. He observed that no attempt was made by the 4th Defendant even to verify the existence of the Plaintiff or the correctness of the representation made by the 1st Defendant as regards the Power of Attorney allegedly executed by the Plaintiff. He, therefore, proceeded to record that there is a strong *prima facie* case made out by the Plaintiff.

12. As far as an inference in an Appeal against an order granting temporary injunction is concerned, the law is well settled. We may make useful reference to the decision of the Apex Court in case of Wander Ltd. And Anr. vs Antox India P. Ltd.⁵. The said decision was followed by the recent decision in

⁵ 1990 (Supp) SCC 727

the case of Mohd Mehtab Khan & Ors vs Khushnuma Ibrahim Khan & Ors.⁶. The Apex Court held that the Appellate Court should not interfere with the exercise of discretion by the learned Trial Judge unless such exercise was found to be palpably incorrect or untenable. In the case of Wander Limited (Supra) the Apex Court held that an Appeal against an interim order of discretionary nature is said to be an Appeal on principle. It was held that no interference is called for with such discretionary orders unless they are perverse or palpably incorrect. In the light of the law laid down by the Apex Court that the submissions made in this Appeal will have to be appreciated. Firstly, we turn to the Power of Attorney which is the subject matter of challenge in the suit. In fact, the entire controversy revolves around the said Power of Attorney dated 29th November 2010 allegedly executed by the Plaintiff appointing the 1st Defendant as his Constituted Attorney to deal with the suit property. We must note here that the Power of Attorney is allegedly typed on a stamp paper which is purchased in the name of Amarjit Singh Chandok. It is not purchased in the name of either the Plaintiff

⁶ (2013)9 SCC 221

or the 1st Defendant. Therefore, in view of Section 34 of the Maharashtra Stamp Act, 1958, the same will not be admissible in evidence. The address of the Plaintiff is mentioned as C/28, Rajori Garden, New Delhi. It is allegedly executed before one Shri. M.V. Shinde, Advocate and Notary. The seal of the Notary is not appearing on each page. Moreover, the notarial Register Number is not mentioned on the said Power of Attorney. There are other crucial aspects of the Power of Attorney which indeed go to the root of the matter. Shri. M.V. Shinde, before whom the Power of Attorney was allegedly executed and who has put his rubber stamp as a Notary Public was removed as a Notary vide Notification 21st September 2009. The letter dated 16th April 2015 issued by a under Secretary (Legal) of the Government of Maharashtra was placed on record stating that the Certificate of Notary issued to Shri. Shinde was valid only till 11th September 2008 and that his name has been removed by the Notification dated 29th January 2009. As stated earlier, the impugned Power of Attorney is allegedly executed on 29th November 2010. Apart from the hurdle created by Section 34 of the Maharashtra Stamp

Act, as the Power of Attorney is not executed before a Notary Public, the same will not attract the presumption under Section 85 of the Indian Evidence Act, 1872. Moreover, the Plaintiff is relying upon an opinion of an handwriting expert who has opined that the signatures on the alleged Power of Attorney are not of the Plaintiff. He is also relying upon the various admitted signatures placed on record. It is for the aforesaid reasons that in paragraph 23 of the impugned order, the learned Single Judge has held that a strong *prima facie* case is made out by the Plaintiff, as there is a considerable doubt about the execution of said Power of Attorney. There is no reason to disturb the correctness of the said finding as there are several suspicious circumstances associated with the said Power of Attorney. As stated earlier, the Development Agreement which is the subject matter of challenge was purportedly executed on behalf of the Plaintiff by the 1st Defendant on the basis of the impugned Power of Attorney.

13. Without going into the question whether the copies of the Public Notices dated 17th May 2014 were produced on

record before the learned Single Judge, we have referred to the said public notices. The said public notices were purportedly issued by M/s. MDP and Partners, Advocates and Solicitors by stating that they are investigating the title of the Plaintiff and 2nd and 3rd Defendants. The relevant part of the said notice reads thus :-

“PUBLIC NOTICE

Notice is hereby given to public at large that we are investigating the title of our clients 1) Harmohan Singh Chandhok 2) Rabinder Kaur Chandhok and 3) Daljit Singh Chandhok to the property more particularly described in the Schedule hereunder written.

All persons having any claim or demand or right in respect of or against the below mentioned property or any part or portion thereof by way of inheritance, share, sale, transfer, assignment, tenancy, sub-tenancy, lease, license, mortgage, charge, lien, encumbrance, gift, exchange, possession, covenant, easement, development rights, right of way, trust, lis pendens or otherwise howsoever, are hereby required to make the same known in writing with

documentary proof to the undersigned at his office within fourteen (12) days from the date of publication hereof, failing which the claim of such person/s, if any, will be considered as waived and not binding on our clients and the title certificate will be issued accordingly.”

14 . Nothing is placed on record to show that the Plaintiff had engaged the said Advocate. Moreover, the said public notice is published in Free Press Journal published at Mumbai and Daily Navshakti (a Marathi newspaper) published at Mumbai. On the alleged Power of Attorney, the address of the Plaintiff is of New Delhi. Therefore, the Plaintiff could not have noticed the said public notices in Delhi. It is claimed that the 4th Defendant obtained title clearance certificate on the basis of the said public notices. Apart from the fact that there is nothing on record to show that the Plaintiff had authorised M/s. MDP and Partners, Advocates and Solicitors to publish such a public notice, the public notices do not state that there is any intention to execute any Development Agreement in respect of the suit property. It is on the basis of such public notices that so called title clearance

certificate was obtained by the 4th Defendant. In the light of these peculiar facts, we must note the admitted position which is reflected from the impugned order. In paragraph 25, the learned Single Judge has observed that the Defendants have admitted that the contents of the Development Agreement were at no stage discussed by the 4th Defendant with the Plaintiff. There is nothing placed on record to show that even the 1st to 3rd Defendants or any of them discussed contents of the Development Agreement with the Plaintiff before or after its execution. The learned Single Judge has recorded a finding that at no stage there was any personal meeting between the Plaintiff and 4th Defendant. He has recorded a statement made across the bar of the learned Counsel appearing for the 4th Defendant that the said Defendant had never made any telephonic conversation with the Plaintiff on the subject. That is why there is a further finding recorded by the learned Single Judge that the 4th Defendant did not make any attempt to even verify the existence of the Plaintiff or the correctness of the representation made to the said Defendant by the 1st to 3rd Defendants about

the execution of any such Power of Attorney in favour of the 1st Defendant. Thus, the conclusion drawn by the learned Single Judge the correctness of which cannot be disputed at this stage is that the 4th Defendant did not take even an elementary precaution of contacting the Plaintiff for the purposes of verifying whether any such Power of Attorney was executed by him in favour of the 1st Defendant.

15. Therefore, there is a very strong *prima facie* case established by the Plaintiff to show that the 4th Defendant had no authority at all to develop his undivided 1/3rd share in a very valuable suit property. The terms and conditions of the Development Agreement were admittedly not even discussed with the Plaintiff.

16. We may note here that the commencement certificate was granted to the 4th Defendant on 11th February 2015. The suit was lodged on 30th April 2015. Even the aspect of the alleged delay has been taken into consideration by the learned Single Judge by noting that a copy of the Development Agreement became available to the Plaintiff for the first time in

March 2015. Therefore, this is not a case where it can be said that there is any gross delay on the part of the Plaintiff. There is no material placed on record to show that till the date on which the copy of the impugned Development Agreement became available to the Plaintiff, he had knowledge about the contents of the impugned Development Agreement and the execution of the impugned Power of Attorney dated 29th November 2010.

17. Thus, it follows that by no stretch of imagination, the 4th Defendant can be said to be a *bona fide* purchaser. He has taken the risk of acting upon alleged Power of Attorney relied upon by the 1st to 3rd Defendants even without taking elementary precaution of verifying the existence of the Plaintiff and without ascertaining from him, whether he has executed any such Power of Attorney.

18. No reasons are required to be recorded for coming to the conclusion that the Plaintiff will suffer irreparable loss, if the suit property in which he has 1/3rd undivided share is allowed to be developed in this fashion. Though the learned Single Judge may not have framed separate points for determination,

the learned Single Judge in paragraph 25 has also dealt with the argument that the 4th Defendant has incurred substantial expenditure. The learned Single Judge has dealt with the argument of the 4th Defendant that the Plaintiff and 2nd and 3rd Defendants together are entitled to get the 65 percent of the constructed area and therefore, interim relief should be restricted to the said 65 percent area. In paragraph 26, the learned Single Judge after reiterating that the 4th Defendant had never contacted the Plaintiff, has observed that the 4th Defendant cannot be permitted to engage in potentially fruitless exercise. He observed that the unsuspected third parties should not be exposed by allowing the 4th Defendant to execute the Agreements for sale of the premises in the redeveloped property. Therefore, we do not agree with the submission that the issues of irreparable loss and balance of convenience have not been considered by the learned Single Judge. *Prima facie*, the work of development was commenced without the consent of the Plaintiff who has 1/3rd share in the suit property.

19. As far as the issue of maintainability of the suit is

concerned, apart from the fact that the Court can mould the reliefs at the time of final hearing, the Plaintiff can always amend the Plaint.

20. We find that each and every finding recorded by the learned Single Judge can be justified by the material on record. Some of the findings are based on admitted position. Therefore, there is no reason to interfere with the discretionary and equitable interim relief of temporary injunction granted by the learned Single Judge. He has denied the drastic relief of appointment of Court Receiver to the Plaintiff. Hence, we find absolutely no merit in both the Appeals and pass the following order.

- (i) Both the Appeals are dismissed;
- (ii) No order as to costs;
- (iii) All pending Notices of Motion do not survive and the same are disposed of.

21. At this stage, learned Counsel appearing for the Appellants prays for stay of the order. Admittedly, the learned

Single Judge did not stay his own order which is operating till today. Hence, the prayer is rejected.

[A.A. SAYED, J.]

[A.S. OKA, J.]