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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6883 OF 2016

Sujaya Udaysinh Mohite & Ors. .. Petitioners
Vs.
Sunil Nemchand Shah & Anr. .. Respondents

Mr. Pradeep D. Dalvi for the Petitioners.
Mr. S. S. Patwardhan a/w. Mr. Chetan Patil for Respondent Nos.1 & 2.

CORAM : R. G. KETKAR, J.
DATE : 18th JANUARY, 2017.

P. C. :

1. Heard Mr. Dalvi, learned counsel for the petitioners and Mr. S. S. Patwardhan, learned counsel for the respondents, at length.
2. By this petition, under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 05.03.2016 passed by the learned Ad-hoc District Judge-2, Kolhapur in Misc. Civil Appeal No. 145 of 2015. By that order the learned District Judge allowed the appeal preferred by respondents No.1 and 2, hereinafter referred to as the 'plaintiffs', and quashed and set aside the Judgment and order dated 22.04.2015 passed by the learned 11th Joint Civil Judge Junior Division, Kolhapur below Exhibit 5 in Regular Civil Suit No. 223 of 2015. The learned District Judge issued injunction restraining the petitioners, hereinafter referred to as the 'defendants',

from obstructing the plaintiffs' possession over the properties, more particularly, described in para 1 of the plaint, hereinafter referred to as the 'suit property'.

3. The plaintiffs have instituted suit under Sections 36 and 37 of the Specific Relief Act, 1963 against the defendants for perpetual injunction restraining the defendants from causing obstruction to the peaceful possession of the plaintiffs over the suit property. The plaintiffs have contended that in respect of suit property the defendants have entered into a registered development agreement on 31.12.2003 in favour of Mr. Kirit Rasiklal Mehta and Mrs. Pratibha Kirit Mehta. Mr. Kirit Mehta executed a Will on 07.08.2009 in which the benefits under the development agreement are included. The plaintiffs have filed Misc. Application No. 108 of 2014 for obtaining probate and accordingly the probate has been granted. It is the case of the plaintiffs that the defendants have executed a registered General Power of Attorney in favour of Mr. Kirit Mehta. In pursuance thereof, said Mehta had obtained building permission from Kolhapur Municipal Corporation on 12.07.2004. On 27.06.2006 he also obtained part Occupation Certificate. Mr. Kirit Mehta had also paid entire amount of Rs.6 lakhs for developing the suit property. Mr. Kirit Mehta, during his lifetime, was in possession of the suit property and defendants did not cause obstruction to his possession. As per the will and probate, the plaintiffs have rights and possession over the suit property. Plaintiff

No.1 and his son Prasanna are residing in the suit premises. The plaintiffs have approached defendants for further development of the suit property. However, the defendants have issued public notice on 02.02.2015 in daily 'Sakal'. The plaintiffs approached the defendants when the defendants threatened them to dispossess from the suit premises. The plaintiffs have responded to that notice on 04.02.2015 which was replied by the defendants on 21.02.2015. The plaintiffs have also lodged FIR on 25.02.2015 against the defendants. The plaintiffs are claiming their rights and possession on the basis of will executed by Mr. Kirit Mehta. They claimed perpetual injunction against the defendants restraining them from causing obstruction to their possession. During the pendency of the suit, they preferred an application, Exhibit 5 for temporary injunction. The learned Trial Judge rejected the application. Aggrieved by the decision, the plaintiffs preferred an appeal before the learned District Judge. By the impugned order, the learned District Judge allowed the appeal. It is against this order, the defendants have preferred the present petition.

4. In support of this petition, Mr. Dalvi submitted that the learned District Judge was not justified in interfering with the discretionary order passed by the learned Trial Judge. Merely because on the basis of the material on record another view is possible that itself is not a ground to interfere with the discretionary order. He has taken me through the averments made in the plaint, development agreement,

findings recorded by the learned Trial Judge and particularly in paragraphs 9 and 10. He has also invited my attention to the impugned order. He submitted that basically defendants executed development agreement in favour of Mr. Kirit Mehta and Mrs. Pratibha Mehta. They were inducted as licensee in the suit property. They had no interest which could be transferred in favour of the present plaintiffs. Even otherwise, by Will, Mr. Kirit Mehta could not have transferred his interest in favour of the present plaintiffs. In support of this proposition, he relied upon the decision in the case of **Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana & Anr., 2012(1) ALL MR 464 (S.C.)** and in particularly paragraphs 12, 14, 16 and 17 thereof.

5. On the other hand, Mr. Patwardhan supported the impugned order. He submitted that the defendants executed a registered development agreement on 31.12.2003 in favour of Mr. Kirit Mehta and Mrs. Pratibha Mehta. They also executed a registered Power of Attorney in their favour giving development rights as also authority to enter into agreement for sale and sell on ownership basis flats, blocks, shops, garages etc. He has taken me through various clauses of the development agreement to contend that the interest is created in favour of Kirit Mehta and Pratibha Mehta. In other words, the agency is coupled with interest and this interest can be transferred even by Will. He submitted that the decision in **Suraj Lamp & Industries** (supra) was considering the ill-effects of General Power of Attorney

sales or Sale Agreement/General Power of Attorney/Will transfer. In para 19, the Apex Court has observed that the observations made regarding Sale Agreement/General Power of Attorney/Will transactions are not intended to apply to such bonafide/genuine transactions. He submitted that on the basis of Will executed by Kirit Mehta, the plaintiffs have filed probate petition and the Probate Court granted the probate. He has submitted that the learned District Judge has, as a matter of fact, found that the plaintiffs are in possession of the suit property. The plaintiffs cannot be treated as trespassers and, therefore, their possession cannot be disturbed by the defendants without following due process of law.

6. I have considered the rival contentions advanced by the learned counsel for the parties and also perused the material on record. It is not in dispute that the defendants executed registered development agreement in favour of Kirit Mehta and Pratibha Mehta on 31.12.2003. They also executed a registered Power of Attorney in their favour. It has also come on record that in pursuance of the development agreement, Kirit Mehta obtained building permission on 12.07.2004 from Kolhapur Municipal Corporation and further obtained part occupation certificate on 27.06.2006 after paying entire consideration to the tune of Rs.6 lakhs to the defendants. The plaintiffs have specifically come with the case that they are in possession of the suit property. The learned District Judge has

considered these aspects in para 15 to 17 of the impugned order. He further observed that the learned Trial Judge rejected the injunction application on the ground that the plaintiffs are claiming possession as owners of the suit property. The learned District Judge observed that the plaintiffs are not claiming possession as owners. The learned District Judge held that the plaintiffs are in settled and legal possession of the suit property.

7. I have also independently considered the material on record. Perusal of the registered development agreement and in particular various clauses thereof *prima facie* shows that the interest was created in favour of Kirit Mehta and Pratibha Mehta. In that agreement, Kirit Mehta and Pratibha Mehta are shown as developers. The expression 'developers' is defined as under :

“ “DEVELOPERS” which expression shall unless it be repugnant to the context or meaning thereof, **shall mean and include their heirs, executors, administrators** and assigns”

[Emphasis supplied]

8. A perusal of development agreement shows that defendant No.1 herein is described as owner and defendants No.2 & 3 are referred as consenting party. Clause (a) of the recital records that the owner is seized with and possessed and or sufficiently entitled to all that piece and parcel of the land bearing City Survey No.240/A/2 of 'E' ward, Tarabai Park, Kolhapur, Sawant compound, admeasuring 140.52 sq.

mtrs i.e. western one half portion out of 281.04 sq.mtrs, which is from an eastern part of an area admeasuring 2719.95 sq. mtrs as per the property card and more particularly described in the schedule written thereunder.

9. Clause 5 thereof recited that the land owner has handed over and/or transferred the possession of the property alongwith the existing structure on the said property for further construction and/or demantling and further construction of the land of the said property. The land owner has given total possession of the said property to the developers today as a licensee to develop the said property against the aforesaid consideration, which is partly obtained by the land owner.

10. Clause 5 dealt with rights and obligations of the owner. Sub-clause (c) provided that the execution of the Power of Attorney by the owner in favour of the developers **or their nominee** to assure smooth implementation of the terms and provisions of the agreement with a view to enabling the developers to expedite processing and submitting applications, plans, documents, declarations, and/or affidavits etc. which are all aimed at to implement fast and quick the essence of the very agreement. The owner shall not revoke the said Power of Attorney during the subsistence of the agreement.

11. Clause 6(a) enables the developers to develop on his own costs and on consuming FSI admeasuring 105.91 sq. mtrs. made available

upto second floor segment construction i.e. full construction of the first floor, admeasuring 80.876 sq. mtrs. The landlady reserved for herself the right to construct on the second floor and upper floors at he convenient time and also as per availability of the FSI. At present the FSI available is 1:1 only i.e. 140.52 sq. mtrs. The developers are authorized to **construct, use, lease/transfer or sell** an area up to second floor (top of the slab of the first floor) i.e. built up area of the proposed building admeasuring 105.91 out of the 140.52 sq. mtrs. The building structures of the dimensions and of the nature may be decided by the Developers from time to time with alterations and/or additions in the sanctioned plan, as the developers may desire from time to time. [Emphasis supplied]

12. Clause 6(d) enabled the developer to enter into an agreement for sale and to sell (except the property given to the landlady) what is popularly known as on ownership basis (at such prices and on such terms and conditions as the developers may, from time to time, determine at his sole discretion) the flats, blocks, tenements, shops, garages, parking spaces, terrace and such other premises in the building to be constructed by the developers. The property to be developed and as also to sell or agreed to sell, the compounds and areas within the compounds whether built or semi built or open and to receive from such prospective purchasers the consideration money as may be decided by the developers and to provide the same for the

benefit of himself i.e. the developers.

13. Clause 6(e) lays down that the developer have to make all finance in doing the needful for development of said property. Land owner is not at all liable to any financial activities.

14. Clause 6(f) provides that the owner was not required to make any contribution towards the cost of development of the property or costs of construction of the building and structures to be constructed thereon and the owner shall not be entitled to receive or claim any part of the consideration/money which may be collected, received or receivable by the developer from the prospective buyers of the premises to be located in the said property.

15. Clause 6(g) lays down that the developers have the authority to get the said development and/or construction work carried out and/or by means of sub contractors and the developers and/or **nominees of his own choice** or his own cost / or expenses but the overall responsibility of carrying out the development work shall be that of the developers alone. The land owner will not, in any way, be responsible for any type of costs as regards the development of the above mentioned property. [Emphasis supplied]

16. Clause 7(b) lays down that if the developers committed breach of any of the conditions of the agreement, the landlord can terminate

the development agreement on servicing one month's mandatory prior notice calling for compliance, if any.

17. Clauses 7(e), 7(f) and 8 read thus :

- 7e. The Developers shall have an option to from one or more companies, Co-operative Housing Societies, Association of Apartments registered the Ownership Apartment Act. Owners or other Body Corporate in respect of building and structured to be constructed on the said land and the Developers may from different categories of then simultaneously. The Developers shall further be entitled to enrol, as members of the said Companies, Societies or Association or associations or one or more of them. The purchasers, who agreed to purchase or acquire or what is known as popularly ownership basis, the premises or any portion of the premises, to be constructed by the Developers on the said property.
- 7f. The Owner agrees to execute one more Deeds or Conveyance of the land comprising the said property in favour of the said Company or Firm Society or Societies Association or Companies Society or Societies Association or Associations or combination of them as may be formed or registered or permitted by the Developers. All the charges in respect of stamp duty and registration of Sale Deed or other documents shall be borne by the Developers or their Assignees/Buyers of the said land. Landowner will not be responsible for the same.
- 8. The Developers herein are husband and wife respectively, each of them is the only legal heir of the other, hence, in case of the absence of any one of the Developers the survivor will continue as the sole right holder of this agreement."

18. Mr. Dalvi submitted that clause 5 of the agreement provided that the developers are licensees and they have no interest in the suit property. Relying upon clause 8, he submitted that the developers are

husband and wife respectively, each of them, is the only legal heir of the other. In case of absence of any one of the developers, the survivor will continue as a sole right holder of this agreement. Mr. Dalvi submitted that the plaintiffs cannot claim to be legal heir of Kirit Mehta and Pratibha Mehta. I do not find any merit in any of the submissions. Perusal of the clauses of the agreement *prima facie* shows that the agency is coupled with interest. *Prima facie* no material is brought on record by the defendants to show that they have terminated agency of the developers. As noted earlier, the developers have obtained building permission from Kolhapur Municipal Corporation on 12.07.2004 and in fact have obtained part-occupation certificate on 27.06.2006. As far as the contention based on clause 8 is concerned, the definition “developer” includes heirs, executors, administrators and assigns. Section 211 of the Indian Succession Act, 1925 lays down that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purpose, and all the property of the deceased person vests in him as such. In the present case, the probate Court has already determined the validity of the will and granted probate in favour of the plaintiffs. It is in that context the learned District Judge observed in paragraph-16 that the probate is not revoked and the plaintiffs are in settled and legal possession of the suit property. Mr. Dalvi submitted that Mrs. Pratibha Kirit Mehta did not execute any Will. Mr. Patwardhan submitted that Pratibha pre-

deceased Kirit Mehta. Mr.Dalvi did not dispute this fact. For the reasons recorded by the learned District Judge in paragraphs-15 to 17 as also having regard to the various clauses of the development agreement, I do not find that the learned District Judge has committed any error in allowing the appeal.

19. In so far as, the decision relied upon by Mr. Dalvi in the case of **Suraj Lamp & Industries** (supra) is concerned, in paragraph 2 the Apex Court referred to the modus operandi in Sale Agreement/General Power of Attorney/Will transactions and the ill-effects of the transactions based on these instruments. It was further observed that these transactions are evolved with a view to avoiding the payment of stamp duty and registration charges on the deeds of conveyance, to avoiding payment of capital gains on transfers, to investing unaccounted money (black money) and to avoiding payment of unearned increases due to Development Authorities on transfer. In para 19, the Apex Court also made it clear that the observations made regarding sale agreements/General Power of Attorney/Will transactions are not intended to apply to such bonafide/genuine transactions. In the present case probate Court has considered validity of the Will.

20. In the case of In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court

in paragraph 14 has observed as under:

“....., 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. The 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.”

21. Perusal of the trial Court's order shows that the learned trial Judge has exercised the discretion arbitrarily, capriciously and perversely. The learned trial Judge ignored the settled principles regulating grant or refusal of injunction while deciding the application Exhibit-5. As against this, the learned District Judge was fully justified in interfering with the order passed by the trial Court as the learned trial Judge has passed the order without considering the relevant material on record and rather ignoring the material on record. Hence no case is made out for invocation of powers under Article 227 of the

Constitution of India. The petition fails and the same is dismissed. The order passed by the learned District Judge, however, deserves to be modified by issuing injunction restraining the defendants from obstructing the plaintiffs' possession over the suit property till disposal of the suit without following due process.

22. It is made clear that the findings recorded and the observations made herein are *prima facie* and tentative only for the purpose of finding out the correctness of the impugned order. The learned trial Judge will decide the suit on the basis of evidence on record and on its own merits in accordance with law uninfluenced by the observations made herein.

23. At this stage Mr. Dalvi orally applies for continuation of status quo order dated 21.06.2016 passed by this Court for a period of eight weeks from today. By that order, this Court directed both parties to maintain status quo as of that date.

24. By order dated 5.3.2016, the learned District Judge held that the plaintiffs are in settled and legal possession of the suit property. On 21.6.2016 this Court directed both the parties to maintain status quo as on that date. In view of the decision of ***Kishore Kumar Khaitan and another v Praveen Kumar Singh, (2006) 3 SCC 312***, it is necessary to clarify the status quo obtaining as on 21.6.2016. It is, therefore, clarified that the status quo as on 21.6.2016 means that the

plaintiffs are in settled and legal possession of the suit property and at the request of Mr.Dalvi that status quo is continued for a period of eight weeks from today.

25. In view thereof, notwithstanding dismissal of the Writ Petition, status quo granted by this Court on 21.6.2016 shall remain in force for a period of eight weeks from today. Order accordingly.

[R. G. KETKAR, J.]