

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.988 OF 2015
 IN
 APPEAL FROM ORDER NO.743 OF 2015

...
 M/s. Mithila Builders & Developers
 Pvt. Ltd. ... Applicant
 vs.
 Arun Yashwant Patil & Ors. ... Respondents
 ...

Mr. P.K. Dhakephalkar, Senior Advocate a/w Mr. Pranil Sonawane for the Applicants.
 Mr. Y.S. Jahagirdar i/b Mr. Ashutosh Gole for the Respondent Nos.1 to 24.
 Mr.Pankaj Savant for Respondents Nos.25 to 45 (Except Respondent No.38)

...
CORAM : A.A. SAYED, J.

DATED : 26 APRIL 2017

P.C.:

This Civil Application seeks stay of the impugned order dated 10-03-2015 (which is challenged in the Appeal from Order) and to allow the Applicant to continue the work of construction in the suit property pending the Appeal from Order. By the impugned order the original Defendants Nos.1 to 14 have been restrained by the Trial Court in an Application (Exh.5) filed by the Original Plaintiffs from carrying out any construction activity over the suit property till the final disposal of the suit. By a separate order passed today the Appeal from Order has been admitted.

2. The suit is filed by the original Plaintiffs/Respondents Nos. 1 to 24 interalia to declare that the Conveyance Deed dated 02-12-1931 is valid and subsisting and to declare the Sale Deed dated 13-04-1942 (under which the Original Defendant Nos.1 to 13 claim title) as null and void and to declare the original Plaintiffs and original Defendants Nos.16 to 21 as joint owners of the suit property. Declaration is also sought that the building permission granted to the original Defendant No.14 (Applicant herein) by the Defendant No.15-Corporation as illegal and to set aside the same.

3. I had heard learned Senior Counsel for the parties. It is noticed that the suit property was also the subject matter of suit filed earlier being R.C.S. No.1049 of 1995. That suit was filed by some of the original Defendants (Mhatres) against the original Plaintiffs (Patils). The prayers in the said suit were as follows:

“a. It may be declared that the Plaintiffs are the absolute owners of the suit property in view of the registered sale deed dated 13/4/42 in respect of the suit property which was executed in favour of the deceased Dattu Devu Mhatre and under the provisions of Hindu Succession Act the plaintiffs are succeeded him.

b. It be declared that defendants have no right, interest, claim of whatsoever nature upon the suit property.

c. The defendants, their servants, hirelings, etc. restrained from entering into the suit property and or from creating third party interest by executing any document by the order of perpetual injunction of this Hon'ble Court.”

4. The issues framed and answered by the Trial Court in the judgment and order dated 28-7-2003 in the earlier Suit No.1049 of 1993 were recorded as follows:

<u>Issues</u>	Findings
1. Whether the Plaintiffs are the absolute owners of the suit property?	In Negative
2. Whether the Plaintiffs are entitled for perpetual injunction?	In Negative

It is thus seen that some of the original Defendants (Mhatres) had filed the earlier Suit No.1049 of 1993 seeking to declare that they are absolute owners of the suit property relying upon the registered Sale Deed dated 13-04-1942. However, by the judgment and order dated 28-07-2003, that suit has been dismissed with costs. In the said earlier suit, the original Plaintiffs (Patils) had relied upon the Conveyance Deed dated 02-12-1931, which they claim to be a registered document. In the present case the original

Plaintiffs' claim is based on the very Conveyance Deed dated 02-12-1931 and the original Defendant Nos.1 to 3 claim title under the very Sale Deed dated 13-04-1942. The original Defendant Nos.1 to 13 claim that the Conveyance Deed dated 02-12-1932 relied upon by the original Plaintiffs is forged and not registered. Both the said documents viz dated 02-12-1931 and 13-04-1942 have been referred to and relied upon by the parties in the earlier suit. However, as indicated above, the said earlier suit filed by some of the original Defendants was dismissed. The Applicant/Original Defendant No.14 claims to be developing the suit property under Development Agreement dated 09-08-2010 with the original Defendants/Respondents Nos.25 to 37/(Mhatres)

5. Learned Senior Counsel for the Respondent Nos.1 to 24/Original Plaintiff has pointed out that while dismissing the earlier Suit No.1049 of 1995 the Trial Court referred to the cross-examination of the witness on behalf of the Plaintiffs therein (some of the original Defendants herein - Mhatres) and observed in paragraph 5 as follows:

“While facing cross-examination, he has categorically admitted not to have paid khot, which was required to be paid to the extent of 1/3 shares. Despite his claim that the name of Rita, his father's vendor, though appeared in relevant documents the time of purchase of the field by his father, no document in

support is available on record. He has further expressed ignorance about entries of the defendants name in the revenue record. (emphasis supplied)

6. It was admitted by the original Defendants (Mhatres) in the earlier suit filed by them that the Revenue records were in the name of the original Plaintiffs (Patils). Despite having not succeeded in the suit filed by some of the original Defendants Nos. 1 to 13 (Mhatres) and not having been granted the relief of declaring them to be the owners of the suit property or a declaration that the original Plaintiffs (Patils) had no right in the suit property, the original Defendants Nos. 1 to 13 (Mhatres) ventured to enter into a Development Agreement dated 09-08-2010 with the Applicant/Original Defendant No.14 to develop the suit property. It is noticed that the impugned order is challenged only by the Applicant/Original Defendant No.14 and the same has not been challenged by the Original Defendants Nos. 1 to 13 (Mhatres).

7 In light of the above, Trial Court's finding that the Original Plaintiffs had made out a prima facie case for grant of temporary injunction against carrying out construction over the suit property by the original Defendant Nos.1 to 14 and that the factor of balance of convenience and irreparable loss are in favour of the original Plaintiffs, cannot be faulted. The Trial

Court has rightly observed that who amongst the Original Plaintiffs and Original Defendants Nos.1 to 13 has a better title to the suit property would have to be adjudicated in the suit and at this interim stage, without formal evidence, it is not possible to decide as to whether the Conveyance Deed dated 02-12-1931 is not a genuine document and not registered as claimed by the Original Defendants Nos. 1 to 13 since the Original Plaintiffs have based their claim on this document dated 02-12-1931, which they claim to be registered and executed prior in point of time to the Sale Deed dated 13-04-1942 under which the Original Defendants Nos. 1 to 13 claim title.

8. In the case of **Wander Ltd. And Another vs. Antox India P. Ltd., 1990 (Supp) Supreme Court Cases 727**, it has been held by the Supreme Court in para 13 and 14 as under:

“13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged user of the trademark on which the passing off action is founded. We shall deal with these two separately.

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 the court was reasonably possibly 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 Josheph*:

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* '... 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 a individual case'.”

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

9. Having regard to the facts and circumstances of the case, I find that the discretion exercised by the learned Judge of the Trial Court in passing the impugned order cannot be said to be arbitrary or perverse or

against the principles of law and the grant of interim relief of restraining the Original Defendants Nos. 1 to 14 from carrying out construction over the suit property warrants no interference by this Court.

10. The Civil Application is dismissed. No costs.

(A.A. SAYED, J.)