

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

APPEAL FROM ORDER NO. 201 OF 2016
A/W.
CIVIL APPLICATION NO.276 OF 2016
IN
APPEAL FROM ORDER NO. 201 OF 2016

Padibai S. Patil ..Appellant

v/s.

Sharad Motiram Bubera & Ors. ..Respondents

Mr. D.J.Deshmukh for the Appellant
Mr. S.B.Shetye for the Respondent Nos.1 to 7.
Mr.P.G.Dhakephalkar, Sr. Advocate a/w. Mr. Jaydeep Deo for the
Respondent No.8.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 20th JUNE, 2017.**

P.C.

1. Heard. By consent of parties, taken up for final hearing at the stage of admission.
2. The appellant herein has challenged the Order dated 13th October, 2015, whereby the 4th Joint Civil Judge, Senior Division, Thane, dismissed the application for temporary injunction filed by the aforesaid appellant/plaintiff in Civil Suit No.142 of 2015.

3. Brief facts necessary to decide this appeal are as under:

The appellant is the sister of the respondent nos.1 to 3. The appellant (hereinafter referred to as the plaintiff) and the respondent nos.1 to 7 (hereinafter referred to as defendant nos.1 to 7) had entered into a development agreement with the respondent no.8 (hereinafter referred to as defendant no.8) to develop the property the property bearing Gut No.89 situated at Parsik, Kalwa, District Thane. In terms of the said development agreement, the defendant no.8 was required to develop the said property and construct bungalows and flats. The contention of the plaintiff was that she had not relinquished her share at the time of execution of the said development agreement. She has stated that her signature on the said agreement was obtained by the respondents by misrepresentation and fraud, by giving her oral assurance that she would be given four flats towards the share in the property. The plaintiff therefore claims that the development agreement is itself null and void. The plaintiff therefore filed a suit for declaration that the defendant no.8 has no right to carry out construction in the suit property without making proper proportionate allotment of the

property in her favour. The plaintiff herein has also sought a declaration that the development agreement and the Power of Attorney are null and void if she is not compensated proportionately. The plaintiff also sought to restrain the defendants from creating third party right, title and interest in respect of the said property on the basis of development agreement as well as Power of Attorney, which according to the plaintiff are null, invalid and void ab initio. By way of interim relief, the plaintiff sought to restrain the defendant no.8 from creating third party, right title and interest in respect of the property which is subject matter of the development agreement dated 9.5.2006.

4. The defendant nos. 1 to 7 contested the suit mainly on the ground that the property was partitioned during the lifetime of Motiram Bubera, the father of the defendant nos.1 to 3 and 7. The defendants have claimed that the plaintiff and the other sister i.e. defendant no.7 was paid total sum of Rs.1 lakh each by cheque at the time of execution of the said agreement. It is further stated that the plaintiff and the defendant no.7 were further paid Rs.3,50,000/- and again Rs.5 lakhs each at the time of execution of the development

agreement and Power of Attorney. The defendant nos.1 to 7 have claimed that the plaintiff has no right in respect of the land which is sought to be developed.

5. The defendant no.8, who is the developer has claimed that the property which is the subject matter of the development agreement dated 9.5.2006 is already developed. He has stated that in terms of the said development agreement, the plaintiff is not entitled to receive any monetary consideration or flats or bungalows which were to be constructed in terms of the said agreement.

6. After considering the case put forth by the respective parties, the learned Judge, by impugned order dated 13th October, 2015, dismissed the application, mainly on the ground that under the agreement dated 9.2.2006, to which the plaintiff was a party, the defendant no.8 is not liable to pay any monetary consideration or give built up area in the form of flats or bungalow. The learned Judge further held that, in the light of the covenant in the registered document, the contentions as regards oral assurance cannot be considered. The learned Judge held that the plaintiff had failed to make out a prima facie case. The learned Judge further held that

the defendant no.8 has already completed the construction, and the plaintiff had approached the Court about 10 years from the date of the agreement. The learned Judge has held that irreparable loss would be caused to the developer/ defendant no.8 if the relief as sought by the plaintiff was to be granted. The learned Judge, therefore, dismissed the application for temporary injunction.

7. Aggrieved by the said order, the plaintiff has filed this appeal from order.

8. Mr. Deshmukh, the learned counsel for the plaintiff has submitted that a perusal of the development agreement clearly indicates that the plaintiff did not give up her rights in respect of the property which was the subject matter of the said development agreement. He further submitted that at the time of execution of the said agreement the developer as well as the defendant nos.1 to 6 had assured that she would be proportionately compensated. He has submitted that the plaintiff was not paid any compensation at the time of execution of the said development agreement or the Power of Attorney. He has further submitted that the partition deed which is referred to by the defendant nos.1 to 7 in the written statement is not

registered and is forged and fabricated document, and that in the affidavit in rejoinder filed before the trial court, the plaintiff has denied execution of the said partnership deed.

9. The learned Counsel for the plaintiff has drawn my attention to clause (2) of the Development Agreement and has submitted that clause (2) of the agreement indicates that Smt. Sunita Bubera (who is sister-in-law of the plaintiff) and 'others' are entitled for 10 flats with total area of 5500 sq.ft. He claims that the word 'Others' includes plaintiff. He has submitted that irreparable loss would be caused to the plaintiff if the injunction as prayed for is not granted.

10. Mr. Shetye, the learned Counsel for the respondent no.1 to 7 has submitted that the property was already partitioned and that the plaintiff was already paid Rs.1 lakh at the time of execution of the partition deed. He has submitted that though the plaintiff has claimed that the said partition deed is forged and fabricated, she has not challenged the same in the suit. He has further submitted that the plaintiff has not sought any interim relief as against the defendant nos.1 to 6, but the relief is sought only against the defendant no.8. The property is already developed and that the

defendant no.8 has already handed over the flats and bungalows to the defendant nos.1 to 6. He has further submitted that the defendant nos.1 to 6 have already sold the said flats and thus created third party right in respect of the bungalows and flats constructed by the defendant no.8 in terms of the said agreement. He therefore contends that the relief as sought by the plaintiff is not maintainable.

11. Mr. Deo, the learned Counsel for the defendant no.8 has submitted that the development agreement was executed in the year 2006, while the suit is filed in the year 2015 after the construction was completed. He has submitted that the conduct of the plaintiff is nothing, but an arm twisting tactics to extort more money from the developer. He has submitted that the development agreement, which is a registered document does not indicate that the plaintiff was entitled to receive money, flat or bungalow and hence, in terms of Section 90 and 91 of the evidence, the contention of the plaintiff that she was assured by the defendant to give such consideration cannot be accepted. He has submitted that Smt. Sunita Bubera is the sister-in-law of the plaintiff and after her husband's death, their children were also entitled for a share in the property and the word

“Others” mentioned in clause (2) does not include the plaintiff and her sister, but refers to the children of Sunita and Dayanand Bubera. He has submitted that the defendant no.8 has already handed over the possession to the defendant nos.1 to 6 and as such relief is sought by the plaintiff cannot be granted in her favour.

12. I have perused the records and considered the submissions advanced by the learned Counsel for the plaintiff and the learned Counsel for the defendants. It is not in dispute that the plaintiff who is a sister of the defendant nos.1 to 7 was a signatory to the development agreement dated 15th May, 2006. A perusal of clause (6) of the said agreement clearly indicates that the plaintiff and the defendant nos.1 to 7 had permitted the defendant no.8 to develop the said property. The plaintiff and the defendant nos.1 to 7 had also agreed that the defendant no.8 was not liable to pay any consideration other than the constructed premises as specified in the agreement. The agreement further records that the plaintiff, defendant no.7 and their father had agreed that they would not raise any objection and would not cause any obstruction to the development of the said property, and that they would settle their

grievance or dispute, if any, with the defendant nos.1 to 6.

13. The said agreement indicates that in terms of the said agreement, the defendant no.8 was required to hand over to the defendant no.1 a bungalow admeasuring 2200 sq. ft and six flats with total area of 3300 sq.ft., to the defendant no.2. a Bungalow admeasuring 2200 sq.ft. and 5 flats of total admesuring 3300 sq.ft., and to the defendant no.3 a Bungalow admeasuring 2200 sq.ft. and 5 flats total admeasuring 3300 sq.ft., whereas the respondent no.4 and others were entitled for 10 flats of total area admeasuring 5500 sq.ft.

14. It is contended that the word 'others' as against the share of defendant no.5, includes the share of the plaintiff. It is to be noted that Sunita Bubera, the defendant no.5 is the widowed sister-in-law of the plaintiff and the defendant nos.2, 3 and 4. The defendant no.5 and her two minor children, duly represented by the defendant no.5, were parties to the agreement. It is therefore obvious that the term 'others' refers to the children of the defendant no.5 and not to the plaintiff.

15. The said development agreement does not indicate that the plaintiff is entitled for any bungalow or flat or any monetary

consideration. As stated earlier, the plaintiff was admittedly a party to the said document which has been duly registered. Hence, in the light of the provisions of Section 91 and 92 of the Indian Evidence Act, the plea of separate oral agreement cannot be considered, particularly when the written agreement totally rules out such understanding or oral assurance.

16. It is also pertinent to note that the development agreement was executed in the year 2006. Pursuant to the said agreement, the defendant no.8 developer has already developed the property and constructed bungalows and flats and handed over the possession of the same to the defendant nos.1 to 6. The plaintiff has filed suit after a period of 10 years. The conduct of the plaintiff of approaching the Court after such inordinate delay would not justify grant of equitable relief.

17. Under the circumstances, the the learned trial Judge was justified in rejecting the application. The impugned order is neither arbitrary, nor illegal and hence does not warrant any interference. The appeal has no merits and is therefore dismissed.

18. In view of dismissal of the appeal, the civil applications do not

survive and the same are also dismissed.

(ANUJA PRABHUDESSAI, J.)