

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 985 OF 2011
IN
SUIT NO. 718 OF 2011

Hemendra P. Bosmiya **..... Plaintiff**

VERSUS

Bilgu Bihari Yadav & Ors. **..... Defendants**

Mr.Arshil Shah, a/w. Ms.Rima Paradkar, i/b. D.M.Legal Associates for the Plaintiff/Appellant.

Mr.Zal Andhyarujina, a/w. Mr.Samji Joseph, i/b. Mr.K.T.Thomas for the Defendant no.1.

Mr.Pesi Mody, Senior Advocate, a/w. Ms.Kalpana Desai, Ms.Gaurangi Pujara, i/b. Little & Co. for the Defendant nos. 2, 5 and 6.

Mr.A.Daver, i/b. Ms.Pratibha Mehta for the Defendant no.7.

CORAM : R.D. DHANUKA, J.

DATE : 2nd NOVEMBER, 2017

P.C.

By this notice of motion, the applicant (original plaintiff) seeks an appointment of the Court Receiver and also injunction against the defendants for acting upon the Deed of Conveyance dated 21st December, 2009 or any documents executed pursuant thereto or in any manner dealing with, disposing of, creating third party interest or inducting any person or occupants into the said property in any capacity whatsoever and also seeks that the said Deed of Conveyance and the power of attorney if any, executed by the defendant no.1 in favour of the defendant no.2 be impounded.

2. Notice of motion is filed by the plaintiff in a suit inter alia praying for a specific performance of the agreement dated 21st October,2005 and also of the power of attorney dated 13th January,2006 in respect of the suit property described at Ex.A to the plaint and also seeks a declaration that the purported Deed of Conveyance dated 21st December,2009 is illegal, null and void and the same shall be cancelled. In the alternate, the plaintiff also seeks damages in the sum of Rs.115,77,80,000/- from the defendants. Some of the relevant facts for the purpose of deciding this notice of motion are as under :-

3. It is the case of the plaintiff that during the period between 22nd April, 2004 to 20th October,2005, the plaintiff paid a sum of Rs.34,50,501/- to the defendant no.1. The final terms and conditions of the joint venture were negotiated and finalized between the parties. On 30th October,2005, the plaintiff and the defendant no.1 executed an agreement constituting a joint venture in the development of the suit property. The plaintiff claims to have paid further amount of Rs.35,00,000/- as and by way of refundable security deposit to the defendant no.1 and has further alleged to have made payment of Rs.11,00,000/- to the defendant no.1 aggregating to Rs.79,50,501/-. It is the case of the plaintiff that in the month of December 2005, the plaintiff carried out a search for title investigation and also took various steps and mobilized resources for development of the said property and for implementation of the project.

4. On 13th January,2006, the defendant no.1 executed an irrevocable general power of attorney in favour of the plaintiff for development and implementation of the said project of redevelopment.

5. It is the case of the plaintiff that during the period between January 2006 to July 2009, the plaintiff was following up the matter with the defendant no.1. However there was no response from defendant no.1 on account of his old age and he always sought excuse for deferring the matter.

6. It is the case of the plaintiff that during the period between July 2009 to May 2010, the defendant no.1 expressed his inability to settle with the occupants and/or Imla Maliks including one Kalu Yadav who claims right as Imla Malik in respect of certain structures on the suit property. The plaintiff personally initiated negotiations with the occupants allegedly.

7. On 22nd September,2010, the plaintiff issued a notice revoking arbitration clause in the agreement dated 20th October,2005 and called upon the defendant no.1 to specifically perform the suit agreement and to nominate an arbitrator on his behalf. There was no response to the said notice. The plaintiff thereafter filed a petition under section 9 of the Arbitration and Conciliation Act, 1996 in this court. During the course of the said proceedings, the defendant no.1 disclosed that on 21st November,2009, the Deed of Conveyance in respect of the suit property was executed by the defendant no.1 in

favour of the defendant no.2. This court accordingly disposed of the said arbitration petition and directed the plaintiff to file a substantive suit.

8. It is the case of the plaintiff that during the period between November 2010 and February 2011, the plaintiff no.1 investigated in the matter and came to know that the defendant no.2 was set up by the defendant no.7 who was a facilitator and mediator and was aware of the transaction between the plaintiff and the defendant no.1. The said defendant no.7 is a director and major shareholder in the defendant no.2. The said transaction between the defendant no.1 and the defendant no.2 is allegedly a collusive and fraudulent transaction. On 12th February, 2011, the plaintiff filed a police complaint with the concerned Police Station and requested for investigation in the matter.

9. On 3rd March, 2011 the plaintiff lodged this suit *inter alia* praying for various reliefs.

10. Learned counsel for the plaintiff invited my attention to various correspondence annexed to the plaint and pleadings filed by the plaintiff. He placed reliance on various clauses of the development agreement entered into between the plaintiff and the defendant no.1. He submits that under the said development agreement, the plaintiff has already paid and/or deposited a substantial amount to the defendant no.1. In support of this submission, learned counsel placed reliance on the receipts annexed at Exs. B to D. He submits that insofar as receipt annexed at Ex.D is concerned, the said copy is inadvertently annexed

which is photocopy of the Ex.E to the plaint. He also placed reliance on the receipt annexed at page 72 of the plaint in respect of the amount of R.35 lacs deposited by the plaintiff as security.

11. It is submitted by the learned counsel that in the said development agreement, it was clearly provided that the entire land was encroached upon. The defendant no.1 was under an obligation to remove all the tenants, occupants and other parties raising any claim in the suit plot. He placed reliance on clause 7 of the development agreement in support of his submission that the suit property was to be developed by the plaintiff and the defendant no.1 in the joint venture and both the parties had equal rights in the said property along with FSI. He submits that thus a right in the suit property was created in favour of the plaintiff under the said agreement. He submits that the defendant no.1 did not however take any steps to remove the encroachment as well as the tenants because of his old age. The plaintiff has taken various steps to settle the claims of some of the tenants and encroachers and had incurred substantial amount.

12. It is submitted by the learned counsel that for the first time, the defendant no.1 disclosed before this court in the arbitration petition filed by the plaintiff under section 9 of the Arbitration and Conciliation Act, 1996 that the defendant no.1 had executed a Deed of Conveyance in favour of the defendant no.2 on 21st December, 2009 which was fraudulently executed in collusion with the defendant no.2 and defendant no.7 to jeopardize the claim of the plaintiff. He submits that the defendant no.1 did not terminate the said development agreement or

the power of attorney at any point of time.

13. Learned counsel for the plaintiff invited my attention to the averments made in the affidavit in reply filed by the defendant no.1 alleging that the development agreement was orally terminated and that the defendant no.1 had alleged to have returned a sum of Rs.35,00,000/- to the plaintiff. He submits that the defendant no.1 has no proof of any such alleged termination nor any proof of payment of Rs.35,00,000/- alleged to have been returned by the defendant no.1 to the plaintiff. He submits that the defendant no.2 is not a bonafide purchaser. No public notice was given by the defendant no.2 before executing Deed of Conveyance in respect of the suit property with the defendant no.1. He submits that since an interest is created in favour of the plaintiff in the suit property, the suit property is required to be protected. The defendant no.2 though claims to be in possession of the suit property, has not carried out any development thereon till date.

14. Learned counsel for the plaintiff placed reliance on an unreported judgment delivered by Full Bench of Calcutta High Court in CO No.1358 of 2010 in case of **Ashok Kumar Jaiswal vs. Ashim Kumar Kar** and other connected matters and would submit that the development agreement which envisages the developers to have a shares in the building proposed to be constructed in terms of the agreement is not an agreement simplicitor for a sale of immoveable property but creates an interest therein.

15. Learned counsel for the plaintiff submits that the defendant

no.1 had entered into an agreement in respect of the entire suit property. He submits that even if this court comes to the conclusion that the defendant no.1 was himself was not entitled to the entire property or was not the owner of the entire property, the plaintiff can still seek specific performance of such agreement and can seek partition of the property after obtaining a decree.

16. Mr.Andhyarujina, learned counsel for the defendant no.1 invited my attention to various provisions of the development agreement dated 30th October,2005 and also recitals thereto and would submit that it is categorically recorded in the said development agreement that the defendant no.1 had only half share in the suit property. He submits that in the recital however it was made clear that in view of the mutual understanding arrived at between the defendant no.1, his brother Kalu Bihari Yadav and M/s. N.D. Enterprises, each of them had decided to have 1/3rd share in the suit property. He submits that the defendant no.1 has not entered into an agreement with the plaintiff in respect of the entire property nor could enter into the said agreement in respect of the entire suit property as sought to be canvassed by the plaintiff. He submits that by a separate writing executed by the other co-owners or parties claiming through other co-owners M/s. N. D. Enterprises was claiming 1/3rd share in the said property. He submits that admittedly the said Kalu Yadav and M/s. N.D. Enterprises were not parties to the said agreement or even this proceeding.

17. It is submitted by the learned counsel that the defendant

no.1 has already terminated the said development agreement verbally and had also returned a sum of Rs.35,00,000/- to the plaintiff which the plaintiff refused to accept. He submits that the share in the property which the defendant no.1 had been already conveyed in favour of the defendant no.2 in the year 2009 by a Deed of Conveyance duly registered. Defendant no.1 thus ceased to have any interest of any nature whatsoever in the property and thus no specific performance can be granted in respect of the suit property and more particularly against the defendant no.1. He submits that thus no interim relief can be granted by this court in view of the fact that no final relief can be granted by this court in favour of the plaintiff.

18. Learned counsel for the defendant no.1 invited my attention to the clause 6 of the development agreement and would submit that admittedly, there were several tenants of the structures on the suit property. He also placed reliance on the power of attorney dated 13th January, 2006 executed by the defendant no.1 in favour of the plaintiff thereby giving all powers to the plaintiff including power to develop the suit property on behalf of the defendant no.1, to take possession of the said property, to put a board on the site of the suit property, to negotiate and settle with the tenant and occupants in any manner as the plaintiff would deem fit and proper including causing them to vacate their respective premises by providing them with alternate accommodation or resources. He submits that the plaintiff however did not take any steps of whatsoever nature under the said power of attorney at any point of time from the date of execution of the development agreement. He submits that the plaintiff never applied for

stay of the oral termination of the development agreement. The plaintiff has neither made sufficient averments showing his readiness and willingness to comply with his part of the application nor throughout shown any *prima facie* case before this court that he was really going to comply with his part of obligation all throughout at any point of time.

19. Mr.Mody, learned senior counsel for the defendant no.2 submits that his client had entered into three separate Deeds of Conveyance in respect of various undivided share of three parties who were entitled to such share in the suit property i.e. the defendant no.1, his brother Kalu Yadav and M/s. N.D. Enterprises on 18th December, 2009, 27th December,2009 and 27th December,2009 and paid the entire consideration under the said Deeds of Conveyance which were duly registered and stamped.

20. It is submitted that the possession of the entire property was handed over to the defendant no.2 as far back as in the month of December 2009. The defendant no.2 thereafter negotiated with the occupants and more than 60 tenants and settled their claims. There were large number of encroachments including the stables which are already settled by the defendant no.2. He submits that the defendant no.2 has already spent more than Rs.60,00,00,000/- in settling the claims of the tenants, occupants and others on the suit property. The defendant no.2 has been already issued IOD and commencement certificate by the Municipal Corporation. His client has got the property physically vacated from the encroachers, tenants and others. IOD certificate has been issued for construction of two buildings of 26

floors each comprising of 152 flats. The name of the defendant no.2 has been already recorded in the property card and 7/12th extract, excavation of basement is already completed.

21. It is submitted by the learned senior counsel that the plaintiff though filed this notice of motion in the month of February 2011, did not press for any ad-interim relief for last more than 6 years. The suit itself is barred by law of limitation.

22. In support of his submission that the suit itself is barred by law of limitation, learned senior counsel invited my attention to various averments made in the plaint and more particularly in paragraph (9) and also to the notice issued by the plaintiff in the year 2010 contending that the possession of the suit property was required to be handed over by the defendant no.1 to the plaintiff within six months from the date of execution of the development agreement. The defendant no.1 had alleged to have committed breaches of his obligation under the said development agreement within six months from the date of execution of the development agreement. The suit however was filed only in the month of February 2011.

23. Learned senior counsel invited my attention to various powers granted to the plaintiff by the defendant no.1 in the power of attorney dated 13th January, 2006 including power to develop the suit property on behalf of the defendant no.1, to take possession thereof, to put his own board on the site, to negotiate with the tenants, occupants and to cause those tenants, occupants vacated from their respective

premises by offering them alternative accommodation or by providing other resources. He submits that the plaintiff never exercised such powers at any point of time. He submits that the plaintiff thus cannot be allowed to urge that the defendant no.1 had failed to comply with its obligation to handover the vacant possession of the suit property after removing all the tenants, occupants and others from the suit property. He submits that the suit is on the face of it is thus hopelessly barred by law of limitation. It is submitted that the plaintiff admittedly did not enter into any agreement with the other co-owners of the suit property. He submits that the other co-owners of the suit property have sold and conveyed their rights, title and interest in the suit property in favour of the defendant no.2.

24. It is submitted by the learned senior counsel that on one hand, the plaintiff claims right in the suit property and on the other hand has not got the said documents registered and has not paid the requisite amount of stamp duty though the same was the obligation of the plaintiff. He adopts the other arguments advanced by Mr. Andhyarujina, learned counsel for the defendant no.1.

25. Learned senior counsel distinguished the judgment of Calcutta High Court on the ground that the facts before the Calcutta High Court were totally different. The co-owners were parties to the agreement in that matter which is not the situation in this matter.

26. Learned counsel for the plaintiff in rejoinder submits that the development agreement itself recorded that the suit property was

fully encroached upon. The defendants have also admitted this fact. The defendant no.1 however did not take any steps to remove those encroachments and the tenants and did not handover vacant possession of the suit property to the plaintiff. He submits that the plaintiff could have commenced the development on the suit property only after such vacant possession of the suit property would have been handed over by the defendant no.1 to the plaintiff. The cause of action for filing of suit thus did not arise. He submits that no public notice was issued by the defendant no.2 before executing the alleged Deed of Conveyance by the defendant no.1. He submits that the defendant no.7 who was one of the director of the defendant no.2 had retired in the year 2010 and was fully aware of the existing rights of the plaintiff in the suit property and was fully aware of the transaction between the plaintiff and the defendant no.1. In support of this submission, learned counsel invited my attention to the averments made in the sur-rejoinder filed by the defendant no.7.

27. It is submitted by the learned counsel that since the plaintiff has applied for a decree for specific performance, the plaintiff is entitled to place reliance upon the development agreement even though the same is not registered or is not sufficiently stamped. The defendant no.1 has not disputed the execution of the development agreement. He submits that the defendant no.1 has not even *prima facie* proved the alleged termination of the development agreement. The plaintiff is ready and willing to develop the suit land and is entitled to the specific performance of even undivided share which the defendant no.1 admittedly had on the date of execution of the

development agreement. The plaintiff has charge over the suit property. He submits that since the parties were negotiating for the settlement all these years from the date of filing the suit, the plaintiff did not apply for ad-interim relief or did not press for hearing of the notice of motion earlier. He submits that if the suit property is not protected, the rights of the plaintiff in the suit property would be seriously affected.

REASONS AND CONCLUSIONS :-

28. It is not in dispute that the plaintiff has filed a suit inter alia praying for specific performance of the development agreement dated 30th October 2010, for declaration that the Deed of Conveyance dated 21st December 2009 executed by the defendant no.1 in favour of the defendant no.2 is illegal and null and void and is of no effect and for other reliefs. It is also not in dispute that the plaintiff did not apply for any ad-interim relief in the aforesaid notice of motion. The aforesaid notice of motion was on board for ad-interim relief only on 20th April 2011 and 2nd May 2011. The said notice of motion was thereafter on board for hearing and final disposal since 29th November 2011 till date.

29. A perusal of the development agreement entered into between the plaintiff and the defendant no.1 clearly indicates that it was clearly recorded in the agreement that the defendant no.1, his brother Mr.Kalu Bihari Yadav and M/s.N.D. Enterprises had decided the equal share in the said suit property. The defendant no.1 thus did not have exclusive rights in the entire property. The plaintiff

admittedly has not entered into any agreement with Mr.Kalu Bihari Yadav and M/s.N.D. Enterprises who were entitled 1/3rd undivided share in the suit property. On the other hand, the defendant no.1, Mr.Kalu Bihari Yadav and M/s.N.D. Enterprises have already entered into the registered Deed of Conveyance in respect of the entire property with the defendant no.2 on 27th December 2009 and 18th December 2009 respectively.

30. A perusal of the record further indicates that it was the case of the defendant no.1 in the affidavit-in-reply that the development agreement between the plaintiff and the defendant no.1 was already terminated orally. The plaintiff, however, did not challenge any such alleged oral termination of the development agreement. There was no stay of the alleged oral termination against the defendant no.1 obtained by any of the parties.

31. A perusal of the development agreement further indicates that there were several tenants, occupants and various other parties on the suit plot whose claims were required to be settled and various occupants were required to be vacated before commencement of any development on the suit property except filling up and levelling of the suit plot which was to be carried out by the plaintiff. Admittedly, the plaintiff did not carry out any such work on the suit plot.

32. A perusal of the development agreement further indicates that the defendant no.1 had executed power of attorney in favour of the plaintiff on 13th January 2006 in respect of the suit plot thereby

granting various powers including to develop the suit property on behalf of the plaintiff, to take possession of the suit property and to put his own board on the site of the suit property and to apply for and obtain various permission, to negotiate with the tenants, occupants and the other claimants and to settle with them in any manner as the plaintiff may deem fit and proper including by causing them to vacate their respective suit premises and to apply for and obtain IOD, Commencement Certificate, building completion certificate and/or occupation certificate and to make payment of all deposits etc. Though such power of attorney was admittedly executed by the defendant no.1 in favour of the plaintiff, the plaintiff did not exercise any such powers so as to negotiate and settle the claims of the tenants, occupants and other parties, to apply for permission to the Municipal Corporation of the Greater Mumbai and any other power provided in the said power of attorney in favour of the plaintiff.

33. A perusal of the record further indicates that the plaintiff has addressed a letter to the defendant no.1 for the first time on 22nd September 2010 thereby calling upon the defendant no.1 to specifically perform the suit agreement and also simultaneously invoking the arbitration agreement. The plaintiff had also filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 in this Court. The defendant no.1 disclosed in the said proceedings about the execution of the Deed of Conveyance dated 21st December 2009 executed by the defendant no.1 in favour of the defendant no.2. Though the defendant no.2 has been in possession of the suit property since 2009, no ad-interim relief was applied by the plaintiff even

against the defendant no.2.

34. Mr.Mody, learned senior counsel for the defendant no.2 invited my attention to various documents executed between the defendant no.1, his brother Mr.Kalu Bihari Yadav and M/s.N.D. Enterprises duly registered in respect of the entire suit property. He submits that after obtaining possession of the suit property from various parties including the defendant no.1 in the month of December 2009, the defendant no.2 settled the claims with more than 60 tenants and also with various occupants and other parties claiming the alleged rights in the suit property. The defendant no.2 has allegedly spent a sum of Rs.60 crores after execution of the Deed of Conveyance in its favour.

35. The defendant no.2 physically has not vacated the suit property. The Municipal Corporation of Greater Mumbai has already issued IOD, commencement certificate and various other permissions in favour of the defendant no.2 for construction of two buildings consisting of 26 floors and 152 flats therein. The name of the defendant no.2 is already entered into in the property card as well as in the 7/12 extract in respect of the suit property. The excavation of basement is already completed. The plaintiff, on the other hand, could not point out any steps taken by the plaintiff pursuant to the said development agreement dated 30th October 2005. The plaintiff has also not challenged the alleged oral termination of the development agreement by seeking any amendment to the plaint. I am not inclined to accept the submission of the learned counsel for the plaintiff that the

plaintiff did not apply for any ad-interim relief or for hearing of the notice of motion early in view of the alleged on going negotiation between the parties for settlement of the dispute.

36. A perusal of the plaint itself indicates that it is the case of the plaintiff that though the plaintiff was allegedly following up the matter with the defendant no.1 diligently between the period from January 2006 to July 2009, there was no response from the defendant no.1 on account of his old age and that he always allegedly sought excuses for deferring the matter. It was alleged that though the several other assurances alleged to have been given by the defendant no.1, there was no progress in the matter. Even if any excuse was given by the defendant no.1 for deferring the matter, the cause of action will not stop for the purpose of filing a suit. Admittedly, the suit has been lodged by the plaintiff only on 3rd March 2011.

37. A perusal of the averments made in the plaint as well as a letter addressed by the plaintiff to the defendant no.1 clearly indicates that it was the case of the plaintiff that the defendant no.1 under an obligation to hand over possession of the vacant flat to the plaintiff within six months from the date of execution of the development agreement. The said period of six months has admittedly expired on 30th April 2006. The suit was however, lodged on 3rd March 2011. In my prima facie view, the learned senior counsel for the defendant no.2 is right in his submission that the suit is prima facie barred by law of limitation.

38. In so far as the submission of the learned counsel for the plaintiff that there was a charge created in the suit property in view of there being a provision for joint venture between the plaintiff and the defendant no.1 recorded in the development agreement is concerned, in my prima facie view, there is no merit in this submission of the learned counsel for the plaintiff that any charge was created in the suit property. Admittedly, the plaintiff has paid stamp duty only of Rs.100/- on the said development agreement and has not applied for registration of the said document though it was the obligation on the part of the plaintiff.

39. In so far as the issue raised by the plaintiff that though the development agreement was not registered and stamp duty was not paid as required, the document can be relied upon in the suit for specific performance and specific relief can be claimed in respect of such document or not is concerned, I do not propose to go into this issue at this stage and the said issue is kept open.

40. In so far as the judgment delivered by the full bench of the Calcutta High Court in the case of **Ashok Kumar Jaiswal Vs. Ashim Kumar Kar (Supra)** relied upon by the plaintiff is concerned, the facts before the Calcutta High Court were totally different. All the joint owners of the property were parties to the agreement which is not the situation of this case. The said judgment thus would not assist the case of the plaintiff and is clearly distinguishable.

41. A perusal of the development agreement clearly indicates

that the plaintiff was fully aware that the defendant no.1 had claimed only 1/3rd undivided share in the suit property and remaining 2/3rd share belonged to the brother of the defendant no.1 and M/s.N.D. Enterprises. The plaintiff has however claimed the relief of specific performance in respect of the entire property. In my view, even otherwise in view of the subsequent steps already taken by the defendant nos.1 and 2 and in view of the defendant no.1 allegedly having terminated the agreement orally, in my prima facie view, the plaintiff may not be granted a relief for specific performance. Since this Court is of prima facie view that the plaintiff may not be entitled to the specific performance of the suit agreement, no interim relief can be granted in favour of the plaintiff. In my view, no prima facie case is made out by the plaintiff for grant of interim relief. The balance of convenience is in favour of the defendants. If any interim relief is granted in this case, irreparable injury would be caused to the defendants. In my view, the notice of motion is thoroughly misconceived.

42. I, therefore, pass the following order :-

- (i) Notice of motion is dismissed with costs quantified at Rs.50,000/- which shall be paid by the plaintiff to the defendant no.2 within two weeks from the date of this order.

(R.D.DHANUKA, J.)