

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.3136/2016
IN
FIRST APPEAL NO.1166/2016

Elite Builders

... Applicant

V/s.

Shantaram Haribhau Sathe & Ors.

... Respondents

Mr. S. S. Kanetkar for the Applicant

Mr. S. V. Sadavarte for Respondent Nos.1 to 30.

Mr. S. S. Kulkarni for Respondent No.31

**CORAM: K.K. TATED &
S. K. SHINDE, JJ.**

DATED : SEPTEMBER 27, 2018

P.C. :

1 Heard. By this Civil Application, the Applicant Plaintiff seeks injunction against the Respondents from creating any third party right, title and interest in respect of the suit property i.e. land bearing Sy.No.12/1+2+3+4+5/1 (B) situated at Pimple Nilakh, Tq. Haveli, Dist. Pune, during pendency of the First Appeal.

2 In the present proceedings, the Applicant Plaintiff had filed Special Civil Suit No.687/2006 in the court of Civil Judge, Senior Division Pune for declaration and injunction with following prayers:

“(a) It may kindly be declared that the alleged notice dated 02.02.2006 thereby terminating the agreement dated 10.02.2005 through their Advocate, is alleged in the said Notice is null and void and the same is not binding on the Plaintiff.

(b) *It may kindly be further declared that the said agreement still subsists and the Plaintiffs have a legal right on the basis of the said document to carry out the development and construction of ownership flats, sell the same to the prospective purchasers and transfer the title in favour of the prospective flat purchasers or their nominees and take all the necessary steps as per the agreement dated 09.02.2005 and the Power of Attorney dated 09.02.2005.*

(c) *It may kindly be further declared that the Defendants are not entitled to terminate or rescind the said Ratification Agreement dated 10.2.2005 and it may kindly be adjudged that the said agreement still subsists.*

(d) *The Defendants may kindly be restrained by a decree of Permanent Injunction from acting upon the said Notice dated 02.02.2006 and be further restrained by a Decree of Permanent Injunction from obstructing the Plaintiffs from carrying out the development and construction of the said Scheme over the said property and take all the necessary steps as per the Agreement dated 09.02.2005 and be further restrained from disturbing the possession of the Plaintiff in respect of the suit property till the said Scheme is completed and be further restrained from alienating or otherwise transferring the suit property or create any third party interest in respect of the suit property in any manner whatsoever.*

(e) *Temporary injunction in terms of prayer clause (d) as above may kindly be granted in favour of the present Plaintiff for which the Plaintiff has filed a separate Application .*

(f) *Alternatively the Defendants may kindly be directed to pay the damages of Rs.13 crores to the Plaintiff jointly and severally.*

(g) *The Defendants may kindly be directed to pay the future interest at the rate of 18 per cent per annum from the date of filing of the suit till the actual realisation of the amount.*

(h) *In the event of the Hon'ble Court coming to the conclusion that the Plaintiffs are not entitled to carry out the development and*

construction on the basis of the said Agreement, then in addition to the damages claimed as above in paragraph 28(f) the Defendant Nos.1 to 30 may kindly be directed to refund an amount of Rs.65.00 lakhs paid by the Plaintiff to the Defendants as a consideration under the agreement dated 09.02.2005 together with interest @ 15% per annum from the date of termination of the said agreement till the amount is actually realized.

(i) Cost of the present suit may kindly be awarded tot he Plaintiff from the Defendant; and

(j) Any other just and equitable reliefs may kindly be granted in favour of the present Plaintiff, in the interest of justice.”

3 After hearing both sides, the Trial Court framed following issues:

Sr. No.	Issues	Findings
1	Do Defendants prove that, Plaintiff failed and avoided to fulfill the terms and conditions of agreement dated 09.02.2005 and clarification deed ?	In the affirmative
2	Does Plaintiff prove that he was and is ready and willing to perform his part of contract ?	In the negative
3	Whether Plaintiff is entitled for refund of earnest money and damages as prayed ?	Partly in affirmative
4	Whether Plaintiff is entitled for interest as prayed ?	Partly in affirmative
5	Whether Plaintiff is entitled for reliefs of declaration and injunction as prayed ?	In the negative
6	What order and decree ?	As per final order

4 The Trial Court, by its judgment and decree dated 15.12.2015 partly decreed the suit filed by the Applicant Plaintiff directing the

Defendant to pay Rs.65 lacs to the Plaintiff within a month along with interest @ 16% from the date of payment till its realisation. Hence, the Applicant Plaintiff preferred the present appeal.

5 The First Appeal has already been admitted on 26.09.2016 and hearing is expedited.

6 The learned counsel for the Applicant submits that during pendency of the suit before the Trial Court, they made an Application below Exhibit- 5 for injunction restraining the Respondent from creating any third party right, title and interest in respect of the suit property, which was partly allowed by the Civil Judge, Senior Division by order dated 10.10.2007 directing the Respondent Defendant to deposit sum of Rs.65 lacs in the court along with interest @ 9% pa from the date of payment till 31.10.2007. The operative part of the said order reads thus:

ORDER

“1 Application Exh.5 stands rejected subject to condition that the Defendants to deposit Rs.65,00,000/- (Rupees Sixty Five Lakhs only) in the Court along with interest @ 9% p.a. from the date of payment, till 31.10.2007.

2 If the Defendants fail to deposit amount of Rs.65,00,000/- (Rupees Sixty Five Lakhs only) with interest then, further necessary order will be passed later on.”

7 The learned counsel for the Applicant submits that as the Respondent has failed to deposit said amount, the Trial Court has passed the order dated 04.01.2008 and restrained the Respondent from creating third party right, title and interest in respect of the suit

property till further orders. He submits that in the meanwhile the Respondent has made an Application below Exhibit- 31 in Special Civil Suit No.687/2007 for allowing them to deposit the amount as per earlier order dated 10.10.2007, which was rejected by the Trial Court by order dated 11.07.2008. He submits that at the time of rejecting the said Application the Trial Court has observed in paragraph 5 of the said order that earlier the Respondent Defendant made an Application for extension of time to comply with the order for depositing sum of Rs.65 lacs, however, it was not complied with. Paragraph 5 of the said order reads thus:

“5. It appears that the Defendants did not comply the said orders. Therefore, when the Defendants had made Application below Exhibit-29A for granting two months time for depositing of amount, no order appears to have been passed on the said Application and the Application was put on 01.11.2008. Thereafter, the Defendant had taken out another Application below Exhibit- 29 for the same relief for getting time to deposit the amount of Rs.65,00,000/- (Rupees Sixty five lakhs only) for a period of one month. My learned predecessor vide order dated 04.01.2008 after noticing that the Defendant has not deposited the amount in the Court as per the directions of this Court, restrained the Defendant from creating third party interest in the suit property till further order.”

8. The learned counsel for the Applicant submits that thereafter, the Respondent had preferred Appeal from Order No.1282/2012 before this court challenging the order dated 10.10.2007 passed by the Trial Court below Exhibit- 5, which was dismissed by this court by order dated 10.04.2013.

9 The learned counsel for the Applicant submits that in the present proceedings, this court has passed order dated 15.06.2018 and granted

ad-interim relief in terms of prayer clauses (a) and (b) of the Civil Application. Said order is continued till today. He submits that they have good chance of success in the matter. He submits that if third party interest is created by the Defendant in the suit property, nothing will survive in the present proceedings. He submits that as per the development agreement dated 09.02.2005 the Applicant Plaintiff has right to develop the suit property and also dispose of the same. Therefore, in the interest of justice, this Hon'ble Court be pleased to allow the Civil Application.

10 On the other hand, the learned counsel for the Respondent opposed the Civil Application. He submits that the Trial Court has considered the entire evidence on record and held that the Applicant Plaintiff has failed to file a suit for specific performance. Therefore, there is no case for granting ad-interim relief in their favour. The Trial Court has also held that the Plaintiff has failed and neglected to comply with the terms and conditions of the development agreement. He submits that the Trial Court has specifically recorded in paragraph 47 that the Plaintiff has failed to comply with the terms and conditions of the agreement. Moreover, the cheque issued by the Plaintiff towards part performance of Rs.10 lacs was dishonoured, as the payment towards the said cheque was stopped by the Plaintiff. Therefore, there is no question of granting any relief in favour of the Applicant in the present proceedings.

11 The learned counsel for the Respondent further submits that as per sections 14(1)(c) and 34 of the Specific Reliefs Act, 1963, the

Applicants are not entitled to any relief in the suit filed by them. Therefore, there is no question of granting any interim relief.

12 The learned counsel for Respondent No.31, during the course of arguments makes a statement that Respondent No.31 is ready and willing to deposit entire amount as directed by the Trial Court along with interest. Therefore, there is no question of granting any relief in favour of the Applicant.

13 We heard both sides at length. It is to be noted that in the present proceedings, there was an agreement for development of the suit property. Because of dispute between the parties, the payment was not made by the Applicant Plaintiff. Apart from that, injunction order is running against the Respondent Defendant since 10.10.2007. That was challenged by the Respondent by preferring Appeal from Order No.1282/2012, which was dismissed by this court by order dated 18.04.2013. If during pendency of the present appeal, third party right is created by the Defendant in the suit property, nothing will survive in the present proceedings.

14 Considering these facts, we are of the opinion that in the interest of justice, it is necessary to allow the Civil Application. In any case, hearing of the First Appeal has already been expedited by this court by order dated 26.09.2016.

15 Hence, the Civil Application is allowed in terms of prayer clauses (a) and (b), which read thus:

“(a) Pending the hearing and final disposal of the First Appeal, the Respondents herein their agents, servants, contractors and/or any other person(s) claiming through them be restrained by an order of injunction from selling, transferring, alienating and/or disposing of and/or dealing with and/or from creating any third party right or interest in respect of the suit property bearing Sy.Nos.12/1+2+3+4+5/1(b) situate at Pimple Nilkah admeasuring about 120.5 Area, in any manner whatsoever.

(b) Pending the hearing and final disposal of the First Appeal, the Respondents herein their agents, servants, contractors and/or any other person(s) claiming through them be restrained by an order of injunction from carrying out any construction and/or from changing the nature of the suit property in any manner whatsoever till the pendency and final disposal of the First Appeal.”

16 Civil application stands disposed off accordingly. No order as to costs.

(S. K. SHINDE, J.)

(K. K. TATED, J.)