

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.608 OF 2018
WITH
CIVIL APPLICATION NO.795 OF 2018

Nahar Builders Limited

A company incorporated under
the provisions of the Companies Act, 1956
Having their registered office at B-1,
Mahalaxmi Chambers, 22 Bhulabhai
Desai Road, Mahalaxmi Mumbai 400 097

... Appellant.

-vs-

1. Champaklal Pranlal Zaveri
Aged 78 years Adult, carrying on
business in the name and style of
M/s The Art Advertising Bureau as
a sole Proprietor at 104, Tardeo Air
Conditioned Market, First Floor, Tardeo
Road, Mumbai 400 097
2. Birla Industries Group Charity Trust
a Public Charitable Trust registered
under the provisions of the Bombay
Public Trusts Act, 1950 under No.E-912
(Mumbai) through its present Trustees.
3. Yashovardhan Birla
Trustee of Respondent No.2 having
its registered office address at Industry
House, 159, Churchgate Reclamation,
Mumbai 400 020 and also at Birla Mansion No.2,
17/23, Central Wing, 1st Floor, Prarthana Samaj,
D. D. Marg, Mumbai 400 004.
4. Avanti Yashovardhan Birla
Trustee of Respondent No.2 having
its registered office address at Industry
House, 159, Churchgate Reclamation,
Mumbai 400 020 and also at Birla Mansion No.2,

17/23, Central Wing, 1st Floor, Prarthana Samaj,
D. D. Marg, Mumbai 400 004.

5. Jamnadas H. Pitambar, Secretary
of Respondent No.2 having
its registered office address at Industry
House, 159, Churchgate Reclamation,
Mumbai 400 020 and also at Birla Mansion No.2,
17/23, Central Wing, 1st Floor, Prarthana Samaj,
D. D. Marg, Mumbai 400 004. ... Respondents.

Shri Vineet B. Naik, Senior Advocate a/w Shri Sumanth Anchan, Advocate,
Shri Krishna Moorthy, Advocate, Shri Ishaan Savla, Advocate and Shri Akash
Lodha, Advocate i/b Wadia Ghandy & Co. for appellant.

Shri P. S. Dani, Senior Advocate with Shri Amogh Singh, Advocate i/b Shri
Jeet Gandhi, Advocate for respondent No.1.

Ms Trishala B., Advocate i/b Lodha Legal for respondent Nos.2 to 5.

CORAM : A. S CHANDURKAR, J.

DATE : December 12, 2018

Oral Judgment :

This appeal has been preferred by the original defendant No.5 in the suit filed by the respondent No.1 herein as the said defendant is aggrieved by the order dated 17/07/2018 passed by the learned Principal Judge, City Civil Court, Mumbai allowing the notice of motion and restraining the said defendant from obstructing the defendant No.5 from putting any hoarding on the suit site.

2. The facts in brief as can be gathered from the plaint averments are that the plaintiff's family carries on business of advertisements and

displaying of hoardings since the year 1937. The defendant No.1 which is a Public Trust had allotted to the plaintiff's parents hoarding sites at the Birla Trust Compound. Since then the plaintiff has been displaying hoardings thereon. On 14/09/2007 the Municipal Corporation has removed two hoardings and since then the plaintiff was displaying only one hoarding of the size 36' x 8'. Subsequently in view of the Policy Guidelines of 2007 the size of the hoarding was brought down to the standard size of 20' x 20'. The Trust had given permission to the plaintiff to put up the hoarding of size 20' x 20'. The plaintiff was paying license fees and the same had been paid till 31/08/2016. The plaintiff in April 2013 forwarded a cheque for Rs.9121/- being compensation for a period from 01/04/2013 to 31/03/2014. Similarly another cheque in the same amount was also tendered being compensation for the period from 01/04/2014 to 31/03/2015. These cheques however were not encashed by the defendant No.1 and hence the plaintiff requested the Trust to return the same for issuing fresh cheques. It is the case of the plaintiff that on 10/06/2016 when the plaintiff's workers had gone to the site in question for displaying the hoarding they were prevented from doing so. On that cause of action the plaintiff filed the aforesaid suit seeking a mandatory injunction restraining the defendants from preventing the plaintiff from putting his hoarding in any manner whatsoever. In that suit the plaintiff filed a notice of motion seeking interim relief as stated hereinabove.

3. Written statement was filed on behalf of the defendant Nos.1 to 4 opposing the suit as filed. A stand was taken that the Trust has revoked and terminated the license granted in favour of the plaintiff in respect of the said hoarding site and it had also not accepted any license fees for the period from 01/04/2013 onwards. It was thus stated that the plaintiff was not entitled for any relief whatsoever. The defendant No.5 opposed the notice of motion by filing affidavit. It was pleaded that in the light of revocation of the license by the defendant No.1-Trust, the plaintiff had no right to seek any injunction after 01/04/2013. It also claimed that a development agreement had been entered into by it with the defendant No.1-Trust.

4. The trial Court by the impugned order held that the correspondence on record did not reflect any termination of license by the defendant No.1. As the plaintiff was in peaceful possession of the hoarding site, he was entitled to protect his possession. On that premise the notice of motion was made absolute in terms of prayer clauses (a) and (b). Being aggrieved the defendant No.5 has challenged the said order.

5. Shri Vineet Naik, learned Senior Counsel for the appellant submitted that the trial Court committed an error in granting interim relief of mandatory nature. Such relief of a mandatory nature could not have

been granted in the facts of the present case especially when there was no prima facie case made out by the plaintiff. Referring to the pleadings of the parties it was submitted that the defendants Nos.1 to 4 in their written statement had categorically taken the stand that the license in favour of the plaintiff stood revoked and terminated from 01/04/2013. The plaintiff had no right to set up his hoarding and the amount of compensation that was being paid by the plaintiff was not accepted by the Trust after that date. Even the request made by the plaintiff to remit fresh cheques for the subsequent period was not accepted by the Trust. The suit as filed was after the revocation of said license and hence the relief of injunction simplicitor as sought in the suit could not be granted to the plaintiff. Infact the plaintiff ought to have sued for declaration that the revocation of the license was illegal and ought to have also prayed for being put back in possession of the hoarding site. The suit in the present form was likely to fail. As there was a cloud on the character of possession of the plaintiff, it was necessary for the plaintiff to have sought appropriate declaration in that regard. For said purpose the learned Senior Counsel relied upon the decisions in *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs and ors. (2008) 4 SCC 594* and *Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar vs. Chandran and ors. (2017) 3 SCC 702*. It was then submitted that during pendency of the suit the plaintiff had amended the plaint and had sought to set up a plea of having an irrevocable license in his

favour. This amendment was sought in October 2017. However, on the date when the suit was filed no right subsisted in the plaintiff nor was he in possession of the hoarding site. Moreover, right to put up a hoarding could not be said to be a right in perpetuity and advertisements in their nature were transitory as held in *Prochy Numazar Mehta and ors. vs. Municipal Corporation of Greater Bombay and anr.* 2003(5) Bom. C.R. 71. Referring to the decision in *Dorab Cawasji Warden vs. Coomi Sorab Warden and ors.* (1990) 2 SCC 117 it was submitted that it was only in rare cases that the Court could grant interim mandatory injunction and the present was not such a case warranting grant of mandatory relief. The plaintiff could infact be compensated by awarding damages if he ultimately succeeded.

The learned Senior Counsel also referred to the provisions of Easement Act, 1882 and especially Section 60(b) thereof. It was urged that the hoarding site could not be said to be a permanent structure so as to attract the provisions of Section 60(b) for the purposes of claiming an irrevocable license. He referred to the decision in *Jhunka-Bhakar Kendrachalak Sanghatna and ors. vs. State of Maharashtra* 2002 (1) *Mh.L.J.* 89 as well as the provisions of Section 328 of the Mumbai Municipal Corporation Act, 1888 in that regard. It was thus submitted that the trial Court committed a grave error in allowing the notice of motion and granting mandatory injunction in favour of the plaintiff.

6. Per contra, Shri P. S. Dani, learned Senior Counsel for respondent No.1-plaintiff supported the impugned order. At the outset he submitted that the order passed by the trial Court had not been challenged by the defendant Nos.1 to 4 who had title to the hoarding site. The appeal has been filed only by defendant No.5 who was merely a developer who was granted rights by the defendant Nos.1 to 4. It was then submitted that the defendant Nos.1 to 4 had never issued any notice terminating the license in favour of the plaintiff and were merely relying upon the aspect of implied revocation of that license. Even if it was assumed that said license was impliedly revoked, the plaintiff still could not be forcibly dispossessed. As the hoarding site was still in existence and the possession thereof continued with the plaintiff, the trial Court was legally justified in granting the prayers in the notice of motion. Referring to the prayers made in the said notice of motion it was submitted that the nature of injunction as sought was prohibitory in nature and it could not be said that the plaintiff was seeking any mandatory interim injunction as urged by the defendant No.5. In absence of any express revocation of the license in question there was no cloud on the character of the plaintiff's right or possession. The plaintiff had substantial legal rights to seek interim injunction and the trial Court was justified in the facts of the case in granting the said prayer. The discretion in that regard had been rightly exercised and there was no error whatsoever committed to interfere with that order. The learned Senior Counsel thus

submitted that the appeal was liable to be dismissed and the order passed by the trial Court deserved to be maintained.

7. I have heard the learned counsel for the parties at length and I have also perused the documents placed on record. Since the challenge in this appeal is to an interlocutory order granting injunction in favour of the plaintiff, that order would be liable to be interfered with only if it is found that the principles applicable for grant of interim injunction during pendency of the suit have not been satisfied. Merely on the ground that on the basis of material considered by the trial Court another view of the matter is possible would not be a ground to interfere with such discretionary order. Applying the aforesaid yardstick and only by taking a prima facie view of the matter, the contentions as urged are required to be considered.

8. As per the plaint averments, the plaintiff claims that in the year 1937 the hoarding sites were initially allotted to his parents by the defendant No.1-Trust. Subsequently in view of change in the policy of the Municipal Corporation, the size of the hoarding was reduced to 20' x 20'. To enable the plaintiff to put up such hoarding, the defendant No.1 had on 04/03/2013 given its no objection in that regard. The cheques given towards compensation amount for using the hoarding site for the period from 01/04/2013 to 31/04/2014 and 01/04/2014 to 31/03/2015 though

sent to the defendant No.1-Trust had not been encashed. On 18/03/2015 the defendant No.1-Trust called upon the plaintiff to supply a copy of the compensation agreement and according to the plaintiff the same was not traceable. In the light of alleged obstruction caused by the workers of defendant No.5 in the matter of displaying of hoardings, the plaintiff filed the aforesaid suit.

9. In the written statement of defendant Nos.1 to 4 there is a specific plea taken in paragraph 4(iv) that the Trust had revoked the license granted in favour of the plaintiff and had not accepted any license fees for the period after 31/03/2013. Further on 09/07/2013 a joint development agreement between the defendant No.1 and the defendant No.5 was entered into on the basis of which the defendant No.5 had undertaken development activity at the site in question.

10. As per the documents filed on record by the parties, it can be seen that on 04/03/2013 the defendant No.1-Trust gave its no objection to convert the hoarding as per the policy guidelines. The subsequent letters dated 23/04/2013 and 17/04/2014 issued by the plaintiff indicate amount of Rs.9121 being remitted by cheque towards compensation amount. On 12/06/2015 the plaintiff brought to the notice of defendant No.1 that the cheques sent earlier had become outdated and sought replacement of the

same. In reply thereto on 18/03/2015 the Trust called upon the plaintiff to supply a copy of the compensation agreement. On 17/04/2015 the plaintiff informed the defendant No.1 that copy of the agreement was not traceable and it was likely to have been misplaced. By communication dated 21/05/2016 the plaintiff stated that about 2-3 weeks before issuing that letter, the plaintiff's workers had not been allowed by the security guards of the Trust to work on the hoarding structure. Similarly on 24/05/2016, the plaintiff again requested the Trust to grant permission and instruct the security guards to allow his workers to carry out structural maintenance work. Similar letters were addressed on 02/06/2016 and 10/06/2016. A development agreement entered into by the defendant No.1-Trust with the defendant No.5 on 09/07/2013 also placed on record.

11. At the outset the submission as made on behalf of the plaintiff that the defendant Nos.1 to 4 had not filed any appeal challenging the impugned order and the appeal filed only by the defendant No.5 did not deserve to be entertained can be considered. The defendant No.5 claims right on the basis of a development agreement entered into between the defendant No.1 and itself. Under that development agreement the entire property is taken up for development by the defendant No.5 on behalf of defendant Nos.1 to 4. The impugned order permitting the plaintiff to use the hoarding site naturally affects the rights of the defendant No.5-Developer

as the hoarding site forms part of the property which is agreed to be developed under agreement dated 09/07/2013. On that basis it can be said that defendant No.5-Developer is aggrieved by the impugned order passed by the trial Court. Moreover, the defendant Nos.1 to 4 have supported the case of defendant No.5 and hence the submission as made that the appeal preferred only by the defendant No.5 does not deserve to be entertained cannot be accepted. The appeal thus is maintainable and has to be adjudicated on merits.

12. The order under challenge is an interlocutory order granting interim relief in favour of the plaintiff. If it is found on the basis of documentary material on record that the trial Court has erroneously considered the principles applicable for grant of temporary injunction, there would be a scope for interference with the order. In other words if it is found that the plaintiff has failed to make out a prima facie case, the balance of convenience is not in his favour and no irreparable loss would be caused to him, the order granting injunction would be liable to be interfered with. On the other hand if it is found that another view of the matter is possible than the one taken by the trial Court, that would not be a reason to interfere in the impugned order. On the aforesaid touchstone the matter may be examined.

13. The documentary material on record makes it clear that the plaintiff is concerned with a hoarding site admeasuring 20' x 20' and it is his case that since the year 1937 his family had been putting up hoardings at the said site. It is also undisputed that the plaintiff has paid compensation to the defendant No.1 till 31/03/2013. Though cheques for the subsequent period had been tendered, the same had not been encashed by the defendant No.1-Trust. The plaintiff though called upon to produce the compensation agreement has been unable to do so on the ground that it was misplaced. The defendant No.5 has entered into the picture by virtue of the development agreement dated 09/07/2013. The letters dated 21/05/2016 and 24/05/2016 issued by the plaintiff indicate that the plaintiff's workers were not permitted to go to the site in question to carry out necessary works. The complaint made to the police Authority on 02/06/2016 as well as other communications clearly indicate that the plaintiff through his workers was not permitted to approach the hoarding site from May, 2016. The suit in question has been filed on 22/08/2016.

From a prima facie consideration of the aforesaid documentary material on record it becomes clear that from 01/04/2013 the defendant No.1-Trust has not accepted any compensation amount from the plaintiff. The plaintiff has not been able to produce any compensation agreement and at least from May 2016 the plaintiff and his workers have not been permitted to put their hoarding at the site in question or even approach that

site. These aspects can be gathered from the pleadings of the parties and the material placed on record. In the light of this position on record if the prayers in the suit as filed are considered, it is clear that the suit is one for injunction simplicitor seeking to restrain the defendants from obstructing the plaintiff from putting up his hoarding advertisement. Subsequently on 12/10/2017 the plaintiff has amended the plaint and has prayed for a direction that the defendant No.5 be directed to remove the advertisement put by it on the site in question.

14. In the backdrop of the aforesaid position on record if the aspect of prima facie case being made out by the plaintiff is examined, it can be seen that the defendant Nos.1 to 4 have to put forth the plea of revocation of the license in favour of the plaintiff. The fact that from 01/04/2013 the Trust has not accepted the amount of compensation from the plaintiff and the further fact that on the plaintiff's own showing he was restrained from putting up hoarding or approaching the site in question prior to filing of the suit are factors which work against the plaintiff. The further fact that in July 2013 itself the Trust has entered into a development agreement with the defendant No.5 is a factor indicating the reason for non-acceptance of the amount of compensation from the plaintiff. It is thus found on the basis of this material that even prior to the date on which the suit was filed it was the grievance of the plaintiff that he was being prevented at least for two and

half months prior thereto from approaching the hoarding site. These aspects therefore indicate absence of a prima facie case being made out by the plaintiff.

As regards the balance of convenience, in absence of the amount of compensation being accepted from the plaintiff and the fact that the defendant No.5 has an agreement of development in his favour from July 2013 with the Trust clearly indicates that the balance of convenience is not in favour of the plaintiff. Consequently an irreparable loss would be caused to the defendant No.5 and not to the plaintiff. The nature of dispute between the parties is such that plaintiff can be compensated in monetary terms while defendant No.5 if injuncted could face financial hardship.

15. The trial Court in the impugned order has observed that the defendant Nos.1 to 4 had given their no objection to the plaintiff for modifying the size of hoarding. It has also referred to the fact that license fee was paid till 31/03/2013. However the documents placed on record by the parties pertaining to the period thereafter indicating the plaintiff being obstructed in May 2016 from putting up his hoarding which is prior to the suit has not been taken into consideration. Prima facie, absence of a document indicating the compensation agreement would imply that the oral license was holding the field. Non-acceptance of the amount of compensation from 01/04/2013 and development agreement being entered

into shortly therefore assume importance. As these aspects have not been taken into consideration, the impugned order cannot be sustained.

16. Though reference was made to various decisions by the learned Senior Counsel for the defendant No.5 to buttress his submissions, a detailed consideration of the same is not called for in the light of the material on record. Moreover, the suit is pending before the trial Court and any observation at this stage could prejudice the rights of either party.

Though it was urged that the plaintiff had sought a relief in the nature of mandatory injunction, the prayers as made in the notice of motion do not indicate the same. It was rightly submitted on behalf of the plaintiff that the injunction as sought was prohibitory in nature. However in the light of the material on record it could be said that the grant of that prohibitory injunction in effect resulted in granting interim mandatory relief in favour of the plaintiff which was not warranted in the facts of the case.

17. Hence for aforesaid reasons the following order is passed :

- (i) The order dated 17/07/2018 passed in Notice of Motion No.3579 of 2016 in S.C. Suit No.2098 of 2016 is set aside. The said Notice of Motion stands rejected.
- (ii) It is clarified that observations made in this order are only for deciding the challenge to the impugned order. Any observations

made herein shall not influence the trial Court when the suit is taken up for adjudication. The proceedings in the suit be decided on its own merits and in accordance with law.

(iii) The Appeal From Order is thus allowed leaving the parties to bear own costs. Pending Civil Application is also disposed.

(iv) At this stage Shri Amogh Singh, learned counsel for the respondent No.1 seeks stay of this order for a period of four weeks. This request is opposed by the learned counsel for the appellant.

In the facts of the case, the position as prevailing today shall continue to be maintained for a period of four weeks from today.

(A.S.CHANDURKAR, J.)