

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11712/2018

Yatin Hariram Ruparel

... Petitioner

V/s.

Gajanan Deoram Madhavi & Ors.

... Respondents

Mr. Rohan Cama with Aditya Udeshi with Sanjay Udeshi with
Mahesh Lande with Aditya Bhatt I/b. M/s. Sanjay Udeshi & Co.
for the Petitioner
None for the Respondent

CORAM: K.K. TATED, J.

DATED : DECEMBER 3, 2018

P.C. :

1 Heard. By this Writ Petition under Article 227 of the Constitution of India, the Petitioner original Plaintiff seeks to challenge the order dated 04.03.2017 passed below Exhibit- 71 in Special Civil Suit No. 564/2012 by Civil Judge, Senior Division Thane and order dated 26.04.2018 (Exhibit- 23) in Misc. Civil Appeal No.92/2017 by the Adhoc District Judge, Thane rejecting their Application of injunction restraining Defendant Nos.3 to 5 from carrying out any construction and creating third party right, title and interest in respect of the suit plot No.43, admeasuring 300 sq.mtrs. Sector 23, Ghansoli, Navi Mumbai in any manner.

2 The learned counsel for the Petitioner submits that in the present proceedings the Petitioner original Plaintiff had filed

Special Civil Suit No. 564/2012 before the Civil Judge, Senior Division Thane for specific relief, possession and injunction and also for damages of Rs. 1 crore with following reliefs:

“(a) That it be declared and decreed that the agreement dated 27.09.2006 entered into between the Plaintiff and the Defendant in respect of the suit premises to be allotted to the Defendant for valuable consideration.

(b) That the Defendant No.1 by order declare that the agreement for sale dated 27.09.2009 is valid and subsisting and further ordered to perform his part of performance of agreement and decreed to execute the sale deed, and or tripartite agreement between the Plaintiff and Defendants and respect of Plot No.43, admeasuring about 300 sq.mtrs. Sector 23, Ghansoli or in alternate the Defendant No.1 be ordered and decreed to pay a sum of Rs.1,00,00,000/- towards the losses and damages for committing the breach of contract.

(c) That the Hon'ble Court be pleased to appoint court receiver in respect of the suit Plot No.43, admeasuring about 300 sq.mtrs. Sector 23, Ghansoli and the Plaintiff be appointed as an agent of court receiver.

(d) The Defendants himself, his servants, agents, officers and any person claiming through under them be restrained by an order of permanent injunction of this Hon'ble Court from selling, transferring the suit plot allotted by the CIDCO Ltd. under 12.5% scheme to the Defendant No.1 to any third person or persons in any manner whatsoever.

(e) Pending the hearing and final disposal of the suit, the Defendants himself, his servants, agents, officers and any person claiming through under them be restrained by an order of by interim injunction of this Hon'ble Court from selling, transferring the suit plot allotted by the CIDCO Ltd. under 12.5% scheme to the Defendant No.1 to any third person or persons in any manner whatsoever.

(f) Interim and ad-interim reliefs in terms of prayer (b) above.

(g)

(h)”

3 The learned counsel for the Petitioner submits that in that suit they made an Application below Exhibit- 71 on 21.09.2016 for an order of injunction with the following reliefs:

(a) That the Hon'ble Court that the Defendant Nos.3, 4 and 5 by themselves their servant agents hireling partner be restrained by an order of permanent injunction of this Hon'ble Court from carrying out any construction and creating any third party interest in the suit Plot No.43, admeasuring about 300 sq.mtrs. Sector 23, Ghansoli, Navi Mumbai in any manner.

(b) That the pending the hearing and final disposal of the suit the Defendant Nos.3, 4 and 5 by themselves their servants agents, hirelings partner be restrained by an order of temporary injunction from carrying out any construction and creating any third party interest in the suit Plot No.43, admeasuring about 300 sq.mtrs. Sector 23, Ghansoli, Navi Mumbai in any manner.

(c) Interim and ad-interim reliefs in terms of prayer (b) above.

(d)

(e)”

4 The learned counsel for the Petitioner submits that the Trial Court has rejected their Application on the ground that the Petitioner has failed to give proper description of the suit property in their plaint. He submits that by Regular Civil Suit No. 564/2012, the Petitioner has claimed specific performance of

300 sq.mtrs. of Plot No.43 whereas the Defendant has placed on record that the CIDCO has allotted Plot of area admeasuring 293.39 sq.mtr. only.

5 The learned counsel for the Petitioner submits that the Trial Court has failed to consider the fact that the Petitioner has agreed to purchase the said plot by Memorandum of Understanding dated 27.09.2006 for the sum of Rs.60 lacs and that Rs.30 lacs was paid to the Respondent owner. He further submits that the Petitioner has also pointed out to the Trial Court that the Respondent original owner has created third party right, title and interest in respect of the suit plot to defeat the Petitioner's claim for specific performance. Not only that, the Respondent No.1 owner, in collusion with M/s.S.S.Associates obtained the order by consent in Regular Civil Suit No. 275/2013. He further submits that the Respondent has started construction on the suit property. He submits that if the construction is completed by the Respondent, then nothing would survive in the Petitioner's Special Civil Suit No. 564/2012. He submits that these facts were not considered by the Trial Court at the time of passing the impugned order 04.03.2017. Hence, the Petitioner had preferred Misc. Civil Appeal No.92/2017 before the District Court at Thane.

6 The learned counsel for the Petitioner submits that the appellate court, by its impugned order dated 26.04.2018 upheld the order passed by the Trial Court below Exhibit- 71. He submits that even the appellate Court has failed to consider the fact that if the construction is completed by the Respondent on

the suit property, then nothing will survive in their proceedings. He further submits that the appellate court also relied on the compromise in Regular Civil Suit No. 275/2012 confirming the order passed by the Trial Court below Exhibit- 71.

7 The learned counsel for the Petitioner submits that the appellate court has relied on the registered agreement dated 08.01.2015 between Defendant No.3 to 5. He submits that the appellate court has also held in paragraph 18 of the impugned order that on the basis of the tripartite agreement dated 08.01.2015 the Respondent Defendants are in possession of the suit property. He further submits that the appellate court also influenced by the fact that the Defendants have filed plan with the New Mumbai Municipal Corporation and the same was sanctioned and the permission was granted to the Defendant on 24.09.2015. As per the said permission, the Defendants started construction and completed the construction work upto the plinth level. Not only that the Defendants have also accepted bookings from the prospective purchaser and created third party interest. The learned counsel for the Petitioner submits that the appellate court has failed to consider the fact that in spite of the MOU executed by Respondent No.1 with the Petitioner / Plaintiff, the Respondent created third party right, title and interest in respect of the suit property and if the construction is completed on the suit property and third party right, title and interest is created, nothing will survive in the present proceedings. Hence, the order passed by the appellate court as well as the Trial Court is liable to be set aside by allowing the Petitioner's Application below Exhibit- 71 for injunction.

8 Heard the learned counsel for the Petitioner at length. It is to be noted that in the present proceedings, earlier the Petitioner had instituted Regular Civil Suit No. 83/2010 against Respondent No.1 owner and CIDCO for temporary injunction restraining the Defendant Respondent No.1 from selling, transferring, the suit plots to be allotted by the CIDCO under 12.5% scheme pursuant to the award Nos. 188, 195 and 206. In that Regular Civil Suit No. 83/2010 the Petitioners made Application below Exhibit- 5 for an order of injunction restraining the Respondents Defendants in that suit from creating any thirty party right, title and interest in respect of the suit property. That Application was rejected by the Jt. Civil Judge, Junior Division, Vashi, Navi Mumbai by order dated 03.12.2010. In that order dated 03.12.2010 the court has recorded that the Petitioner has failed to establish *prima facie* case for injunction.

Paragraph 11 of the said order reads thus:

“11. From above discussed facts and circumstances, material on record it becomes clear that, Plaintiff failed to establish prima facie case. Balance of convenience do not lie in favour of Plaintiff. So also Plaintiff will not suffer any loss if injunction is refused. hence, I answer point No.1,2 and 3 in the negative.”

9 Thereafter the Petitioner preferred Misc. Civil Appeal No.14/2011 in the court of District Judge 6, Thane under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 challenging the order passed below Exhibit- 5 dated 13.12.2010 passed by the

learned Jt. Civil Judge, Junior Division Vashi, Navi Mumbai. The learned District Judge, by order dated 22.01.2010 dismissed the Petitioner's Misc. Civil Appeal No.14/2010. Thereafter the Petitioner made an Application below Exhibit- 31 in Regular Civil Suit No. 83/2010 for withdrawal of the suit. On that Application, the learned Civil Judge, Junior Division Vashi passed order dated 18.09.2012 and allowed the Petitioner to withdraw the Regular Civil Suit No. 83/2010.

10 Thereafter the Petitioner has filed the present Special Civil Suit No. 564/2012 and made an Application for injunction. It is to be noted that both the courts below concurrently held that the Petitioner has failed to make out any *prima facie* case for injunction restraining the Respondents from carrying out any construction on the suit property. Not only that in an earlier suit the Trial Court as well as the appellate court had rejected the Petitioner's Application for injunction against Respondent No.1 from creating any third party right, title and interest in respect of the suit plot. Thus, this itself shows that the Petitioner has failed and neglected to make out any *prima facie* case for allowing Exhibit- 71 filed by them in the present proceedings.

11 It is to be noted that though the CIDCO has allotted only 293.39 sq.mtr. plot bearing No. 43 in sector 23 at village Ghansoli, Navi Mumbai to Respondent No.1 under 12.5% scheme, the Petitioner has filed Special Civil Suit No. 564/2012 for a plot admeasuring 300 sq.mtr. These facts were considered by the court below and held that the Petitioner has failed to give proper

description of the suit property.

12 In any case, by Special Civil Suit No. 564/2012, the Petitioner, in the alternative to specific performance of contract, also claimed damages to the extent of Rs.1 crore.

13 These facts are also considered by the courts below at the time of rejecting the Petitioner's claim from injunction.

14 It is to be noted that the apex court in the matter of ***Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. & Ors. (2012) 6 SCC 792*** held that *prima facie* case in favour of party seeking relief not enough. It must be shown *prima facie* that injury suffered by the Plaintiff on refusal of temporary injunction would be irreparable. Paragraph 29, 30 and 36 read thus:

29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

30. In Dalpat Kumar & Anr. Vs. Prahlad Singh & Ors. [(1992) 1 SCC 719] this Court held:

“5. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in “irreparable injury” to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no

physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages.”

36 To quote the words of Alderson, B. in *The Attorney-General vs. Hallett* [153 ER 1316: (1857) 16 M. & W.569]:

“.....I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause.”

15 Considering all these facts and the concurrent findings of facts recorded by both the courts below, I am of the opinion that the Petitioner has failed to make out any case to entertain the Writ Petition. Hence, following order is passed.

- A. The Writ Petition stands rejected.
- B. The Trial Court to decide the Special Civil Suit No. 564/2012 on its own merits without being influenced by this order.
- C. Hearing of Special Civil Suit No. 564/2012 is expedited.
- D No order as to costs.

(K. K. TATED, J.)