IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 736 OF 2017
WITH
CIVIL APPLICATION NO. 986 OF 2017
IN
APPEAL FROM ORDER NO. 736 OF 2017

M/s. Sab Developers ….Appellant
V/s.
M/s. Swati Builders & Ors. ….Respondents

Mr. Vishwanath Patil a/w. Ms. Shamim Naik i/b. AAK Legal for the appellant.
Mr. Rajesh S. Datar for Respondent No.2.

CORAM: SMT. ANUJA PRABHUDESSAI, J.
DATED: 04th APRIL, 2018.

P.C.:

. The appellant herein has challenged the judgment dated 20th July, 2017 whereby the learned Joint Civil Judge, Senior Division, Kalyan has dismissed the application for temporary injunction at Exhibit 5 filed in Special Civil Suit No.114 of 2016.

2. Heard the learned counsels for the respective parties. With consent of the parties, matter is heard finally at the stage of admission.

3. The appellant herein was the plaintiff and the respondents were

the defendants in the suit and shall be hereinafter referred to as 'the plaintiff and the defendants' respectively.

4. In a suit for declaration, specific performance and perpetual injunction, the plaintiff had filed an application for temporary injunction seeking to restrain the defendants, their servants, agents, etc from creating third party rights and interests in respect of the suit property, which is more particularly described in paragraph 6 of the plaint.

5. The case of the plaintiff is that the defendant nos.1 to 3 had executed in its favour a memorandum of understanding (MoU) dated 31st October, 2006 under which the defendant nos.1 to 3 had transferred in its favour development rights in respect of the suit property. The plaintiff had filed an application for injunction alleging breach of the said agreement (MoU).

6. The learned Trial Judge has dismissed the application mainly on the ground that the Memorandum of Understanding dated 31st October, 2006 on the basis of which the plaintiff was claiming right to the property was insufficiently stamped and hence the same cannot be

read in the evidence.

7. Mr. Vishwanath Patil, learned counsel for the plaintiff contends that the question whether the document is sufficiently stamped or not cannot be considered at the stage of deciding the application for interim relief. He further submits that even if the agreement is not adequately stamped, it can be used for collateral purpose. He has relied upon the decisions in ***Kailashchandra and Ors. V/s. Ghanshyam and Ors (MANU/MH/3182/2015).*** *In the above decision,* the Single Judge of this Court relying upon the decision in ***Marine Container Services (I) Pvt. Ltd. V/s. Rajesh Dhirajlal Vora 2001(4) Mh.L.J. 353*** has held that the question regarding the document being insufficiently stamped or not being registered is not required to be gone into at the interlocutory stage.

8. Mr. Rajesh S. Datar, the learned counsel for respondent no.2 contends that the MoU is neither registered nor sufficiently stamped. Relying upon the decision of the Apex Court in ***Avinash Kumar Chauhan v/s. Vijay Krishna Mishra (2009) 2 SCC 532*** and the decision of this Court in ***Ravindra Ganpati Kempwade v/s. Namdeo Dnyanoba Bhosale 2016 SCC Online Bom 7909*** he contends that such

a document cannot be used even for collateral purpose.

9. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

10. It is not in dispute that the defendant nos.4 to 22 are the original owners of the suit property. The defendant nos.4 to 22 had executed different development agreements in favour of defendant nos.1 to 3, by virtue of which the defendant nos.1 to 3 acquired development rights in respect of the suit property.

11. The plaintiff claims to have entered into a Memorandum of Understanding dated 31st October, 2006 with the defendant nos.1 to 3 whereby the defendant nos.1 to 3 agreed to assign development rights in respect of the suit property in favour of the plaintiff on payment of Rs.6,70,00,000/-. The said agreement was subject to the defendant nos.1 to 3 obtaining building commencement certificate from Kalyan-Dombivali Municipal Corporation (KDMC). In terms of the said MoU, the plaintiffs paid to the defendant nos.1 to 3 an amount of Rs.50,00,000/- and the balance was to be paid as per the payment schedule in the MoU.

12. The plaintiff has sought the relief based on the Memorandum of Understanding dated 31st October, 2006. It is not in dispute that the said MoU is not registered and is insufficiently stamped. In this regard, it is relevant to refer to section 34 of the Maharashtra Stamp Act, which reads thus :-

> *" 34. Instruments not duly stamped inadmissible in evidence, etc.- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped [or if the instrument is written on a sheet of paper with impressed stamp [such stamp paper is purchased in the name of one of the parties to the instrument]. "*

13. In ***Avinash Kumar Chauhan*** (supra), the Apex Court while considering the provisions of Section 35 of the Stamp Act, 1899, which is pari materia with Section 34 of the Maharashtra Stamp Act has observed thus :-

> *" .....23. The contention of learned counsel for the appellant that the document was admissible for collateral purpose, in our opinion, is not correct. In Bondar Singh (supra) this Court was not concerned with the provisions of the Act. Only interpretation of the provisions of the Registration Act, 1908 was in question. It was opined :-*
>
> *" 5. The main question, as we have already noted, is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9-5-1931 by Fakir Chand, father of the defendants*

in favour of Tola Singh, the predecessor-in-interest of the plaintiffs, is an admitted document in the sense its execution is not in dispute. The only defence set up against the said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of the plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorized."

24. In this case, by reason of the statutory interdict, no transfer at all is permissible. Even transfer of possession is also not permissible. [See Pandey Oraon v. Ram Chander Sahu 1992 Supp (2) SCC 77 and Amrendra Pratap Singh v. Tej Bahadur Prajapati and Others (2004) 10 SCC 65]

The Registration Act, 1908 provides for such a contingency in terms of the proviso appended to Section 49 thereof, which reads as under :-

"*49. Effect of non-registration of documents required to be registered.-*

No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument."

25. Section 35 of the Act, however, rules out applicability of such

> *provision as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes. "*

14. Relying upon the said decision of the Apex Court, Single Judge of this Court in ***Ravindra Ganpati Kempwade v/s. Namdeo Dnyanoba Bhosale 2016 SCC Online Bom 7909*** has also held that the instrument which is not adequately stamped cannot be used for any purpose whatsoever which will also include collateral purpose.

15. In the light of the decision of the Apex Court in ***Avinash Kumar Chauhan,*** the learned Trial Judge was justified in not granting interim relief solely on the basis of the said document.

16. The learned Trial Judge has not considered the other factors relevant for grant of injunction. Nevertheless, I have considered the same. The records reveal that MoU dated 31st October, 2006 on the basis of which the plaintiff is seeking relief is an unregistered agreement. A perusal of the said MoU reveals that the defendant nos.1 to 3 had not assigned development rights in favour of the plaintiff. The plaintiff had therefore not acquired any development rights in the

suit property. The plaintiff were to acquire development rights subject to the defendants obtaining building commencement certificate from Kalyan Dombivali Municipal Corporation (KDMC). A perusal of the MoU also indicates that Rs.50,00,000/- was paid at the time of execution of the MoU and the balance amount was to be paid on execution and registration of development agreement and Power of Attorney. The defendant nos.1 to 3 were also required to obtain consent and confirmation of the owners at the time of execution of the said agreement.

17. It is therefore evident that the MoU does not grant any development right in favour of the plaintiff. At the most, it can be considered as an agreement between the plaintiff and the defendant nos.1 to 3 to enter into a development agreement. *Prima facie*, such an agreement cannot be enforced. Hence, no injunction could be granted in favour of the plaintiff on the basis of such agreement. The plaintiff having failed to prove prerequisites of grant of injunction viz. prima facie case, balance of convenience and irreparable loss, is not entitled for interim reliefs.

18. Under the circumstances and in view of discussion supra, appeal

has no merits and is accordingly dismissed. Civil Application is dismissed in view of dismissal of the appeal.

(SMT. ANUJA PRABHUDESSAI, J.)