

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 4091 OF 2017

IN

FIRST APPEAL NO. 1359 OF 2017

Kashinath Baburao Gaikwad & Ors. ..Applicants/Appellants

Vs.

Smt. Nanda Shailesh Kare & Ors. ..Respondents

Mr. Sandeep M. Phatak for the Applicant/Appellant.

Mr. Mayur Khandeparkar a/w Mr Nilesh Gala & Mr Ketan Joshi
i/b Manish N. Gala for Respondent Nos.1 to 3.

CORAM:- **K. K. TATED &
B. P. COLABAWALLA, JJ.**

DATE :- **JUNE 19, 2018.**

P. C.:

1. This Civil Application has been filed to stay the effect, implementation and operation of the impugned Judgment, Decree and Order dated 12th September, 2017 passed in Special Civil Suit No. 1644 of 2010.

2. We must mention that First Appeal No. 1359 of 2017 was admitted on 18th December, 2017. In the present Civil Application, an order was passed on the same day issuing notice to

the Respondents returnable after four weeks and in the meanwhile the Court was pleased to grant ad-interim relief in terms of prayer clause (b) of the Civil Application which reads thus:

“(b) that the pending hearing and final disposal of this Civil Application, as and by way of interim relief, this Honourable Court be pleased to stay the effect the implementation and operation of the Impugned Judgment, Decree and order dated 12th September, 2017 passed in Special Civil Suit No.1644 of 2010.”

The Civil Application has now come up before us for final hearing.

3. Mr Phatak, learned advocate appearing on behalf of the Applicants/Appellants, (who were original defendants before the Trial Court) submitted that the Trial Court had completely gone wrong in passing the impugned Judgment and Decree dated 12th September, 2017. He submitted that the Trial Court, by the impugned order, had decreed the suit filed by the Respondents herein (original Plaintiffs before the Trial Court) and declared the sale-deed executed by Defendant Nos.1 and 2 in favour of Defendant Nos. 3,4 and 5 dated 17th July, 2009, as null and void and directed the Defendants to hand over vacant and peaceful

possession of the suit property (described in paragraph 1 of the plaint) to the Plaintiffs within three months from the date of the order.

4. Mr Phatak submitted that in the present case, the total area of Survey No.126/2C is 75 Are. The part of this property, namely, $1/3^{\text{rd}}$ share and which is 25 Are, belonged to one Gangadhar Lad. The Respondents herein, namely, original Plaintiffs, have become owners of this $1/3^{\text{rd}}$ share (25 Are) by way of succession.

5. Mr Phatak submitted that on 2nd November, 2007 a registered Development Agreement was executed between the Plaintiffs and Defendant Nos.1 and 2. Over and above this, on 2nd November, 2007 a registered Irrevocable Power of Attorney was also executed. Mr Phatak brought to our attention clause 21 of this Development Agreement and contended that by virtue of this clause Defendant Nos.1 and 2 were entitled to assign, either partly or in full, the rights acquired under the Development Agreement to any person or Company and at such rate of consideration as Defendant Nos.1 and 2 may deem fit. The clause further

stipulated that in case of such assignment the responsibility of making payment of the consideration amount, as per the schedule given in clause (1) of the Development Agreement dated 2nd November, 2007, as also the responsibility to construct tenements retained by the plaintiffs was that of the developer and also the proposed assignee. Clause 21 reads thus:

“(21) The present DEVELOPERS shall be entitled to assign, either partly or full, the rights acquired by it by these presents to any person or company of the DEVELOPERS own choice at such rate of consideration as the present DEVELOPERS may deem fit. However, in case of such assignment the responsibility of making payment of the consideration amount as per the Schedule given in Clause No.1 of the present Agreement and also the responsibility to construct the tenements retained by the OWNERS for themselves shall be that of the DEVELOPERS and also the Assignee.”

6. Mr. Phatak submitted that in pursuance of this clause, on 17th July, 2009, Defendant Nos.1 and 2 executed a registered Deed of Conveyance in favour of Defendant Nos.3 to 5 assigning their development rights subject to the terms and conditions of the original Development Agreement. He submitted that the suit came to be filed on the ground that Defendant Nos.1 and 2 by allegedly playing a fraud upon the Plaintiffs, had created third party interest by executing a Deed of Conveyance dated 17th July, 2009 in favour of Defendant Nos.3,4 and 5. In the suit it was the

case of the original Plaintiffs that rights assigned in this Deed of Conveyance, goes far beyond the powers given by the original Plaintiffs in favour of Defendant Nos.1 and 2 in the Development Agreement dated 2nd November, 2007. He submitted that this suit was ultimately decreed by the impugned Judgment and Decree of which a stay is sought.

7. Mr. Phatak further submitted that this appeal has already been admitted and ad-interim relief has already been granted in terms of prayer clause (b) [reproduced above] and if the same is not continued, irreparable loss and injury shall be caused to the Appellants (original Defendants), as well as the appeal would be rendered virtually infructuous. He, therefore, prayed that the ad-interim order granted on 18th December, 2017 be continued till the hearing and final disposal of the appeal.

8. On the other hand, Mr Khandeparkar learned counsel appearing on behalf of the Respondents (original Plaintiffs) submitted that the impugned order was passed after taking into consideration all the pleadings and evidence of the parties and was well reasoned order. He submitted that in the facts of the

present case it was ex-facie clear that the Development Agreement entered into between the Plaintiffs and Defendant nos.1 and 2 was only to permit them for developing the suit property and it was only for this limited purpose that the possession of the suit property was handed over to Defendant Nos.1 and 2. In this regard, he brought to our attention clause 5 of the Development Agreement dated 2nd November, 2007 which reads thus:

“(5) The OWNERS have delivered the actual, physical vacant and peaceful possession of the property more particularly described in Schedule-A here under written to the DEVELOPERS as a part of this agreement, for the purpose of development, as a License.”

9. Placing reliance on this clause, Mr Khandeparkar submitted that legal possession was never handed over to Defendant Nos.1 and 2 but was given to them only for the purpose of development of the suit property and that too only as a licensee. Mr Khandeparkar submitted that Clause-21 only gives a right to Defendant Nos.1 and 2 to assign, either partly or in full, the rights acquired by Defendant Nos.1 and 2 under the Development Agreement dated 2nd November, 2007 and nothing more. Despite

this, Defendant Nos.1 and 2 have executed a Deed of Conveyance dated 17th July, 2009 in favour of Defendant Nos.3,4 and 5 under which they have sought to deal with and transfer the suit property in favour Defendant Nos.3,4 and 5 which is way beyond the powers and rights granted to Defendant Nos.1 and 2 under clause 21 of the Development Agreement dated 2nd November, 2007. This being the case, he submitted that the Trial Court was fully justified in setting aside the Deed of Conveyance dated 17th July, 2009 and ordering that possession of the suit property be restored back to the Plaintiffs within three months from the date of the impugned order. He submitted that these facts would clearly show that the original Defendants (the appellants herein) have not made out any case whatsoever for grant of stay of the impugned Judgment and Decree, much less a strong *prima facie* case. In these circumstances, Mr Khandeparkar submitted that the present Civil Application is wholly misconceived and ought to be dismissed with costs.

10. We have heard learned counsel for the parties at length and have perused the papers and proceedings as well as the impugned Judgment and Decree. As mentioned earlier, Clause-21

(reproduced above) of the Development Agreement dated 2nd November, 2007 gives limited right to Defendant Nos.1 and 2 to assign, either partly or in full, the rights acquired by them under the Development Agreement. It is not in dispute that under this Development Agreement, there was no sale of the suit property by the Plaintiffs to Defendant Nos.1 and 2. This was in fact conceded before us by Mr Phatak. Despite this we find that Defendant Nos.1 and 2 entered into a Deed of Conveyance dated 17th July, 2009 under which they sought to convey the suit property in favour of Defendant Nos.3,4 and 5. Under this Deed of Conveyance, the possession also is sought to be handed over to Defendant Nos.3,4 and 5 and there is even a covenant that Defendant Nos.1 and 2 have full power and absolute authority to sell, transfer and convey the said property to Defendant Nos.3,4 and 5 and that Defendant Nos.3,4 and 5 (referred to as the purchaser in the Deed of Conveyance) were and may at all times hereafter peaceably and quietly occupy, possess and enjoy the suit property, ought to receive the rents, issues and profits thereof etc.

11. On going through the Deed of Conveyance, at least *prima facie*, we are of the opinion that the said deed was executed

by Defendant Nos.1 and 2 in favour of Defendant Nos.3,4 and 5 without any authority. As mentioned earlier, Clause-21 of the Development Agreement only gave a limited right to Defendant Nos.1 to 2 to assign either partly or in full their development rights and nothing more. Defendant Nos.1 and 2 were never the owners of the suit property. This being the case, at least *prima facie*, Defendant Nos.1 and 2 could not have transferred the suit property in favour of Defendant Nos.3,4 and 5. This being the case, at least *prima facie*, we do not think that Mr Phatak has made out a *prima facie* case seeking stay of the impugned Judgment, Decree and Order dated 12th September, 2017.

12. We must also mention that ad-interim relief granted by this Court by its order dated 18th December, 2017 was in absence of the original Plaintiffs and without their affidavit being filed on record. Now that we have all the pleadings before us and the facts as narrated above, we have no hesitation in holding that the applicants herein, namely, original Defendants before the Trial Court have not made out a *prima facie* case to seek stay of the impugned Judgment, Decree and Order.

13. In these circumstances, and in view of the foregoing discussion, the Civil Application is dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.

(B. P. COLABAWALLA, J.)

(K. K. TATED, J.)