

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1404/2019
IN
FIRST APPEAL NO.852/2019

Mr. Kiran J. Choksi Applicant

In the matter between

Nihalchand N. Kothari & Ors. Appellants
(Ori. Plaintiffs)

Vs.

Sumermal Mishrimal Bafna & Ors. Respondents
(Ori. Defendants)

WITH
CIVIL APPLICATION NO.2067/2018
IN
FIRST APPEAL NO.33/2019

Godavari Sumermal Bafna & Ors. Applicant
(Ori. Defendants)

Vs.

Nihalchand Menichand Kothari & Ors. Respondents
(Ori. Plaintiffs)

Mr. V. A. Thorat, Senior Advocate with P. G. Iad I/b. Akshay
Jadhav for the Applicant in Civil Application No.1404/2019
and for the Respondents in Civil Application No.2067/2018.

Mr. Vineet B. Naik, Senior Advocate with Mr. Vivek
Kantawala with Mr. Amey Patil with Mr. Vivek M. Sharma
and Ms. Hetal Jobanputra I/b. Vivek Kantawala and Co. for
the Applicant in Civil Application No.2067/2018 and for the
Respondents in Civil Application No.1404/2019.

CORAM : K.K.TATED, J.

RESERVED ON : 23th July 2019
PRONOUNCED ON : 2nd August 2019

P.C.

1 Heard. For the sake of brevity parties will be referred to as per their nomenclature in the suit i.e. Applicant in Civil Application No.1404/2019 and Respondents in Civil Application No.2067/2018 as the Plaintiff No.2b / Plaintiffs and - Applicants in Civil Application No.2067/2018 and the Respondent in Civil Application No.1404/2019 as Defendants.

2 By Civil Application No.1404/2019 the Plaintiff No.2b is seeking stay of clause 2 of the impugned judgment and decree dated 19.01.2018 passed by the Bombay City Civil Court in Suit No.7574/1981, injunction restraining the Respondent Defendant from changing the nature of the suit property i.e. carrying out any demolition or construction activities and restraining the Defendants or their agents, employees or attorneys from creating any third party rights or parting with possession in respect of the suit property. The Plaintiffs are also seeking direction against the Defendants to deposit in the court an amount calculated as per the price/rate notified in the Ready Reckoner for the suit property or the area in which the suit property is situated on the basis of the FSI as on the date of final order as a condition for staying the execution and operation of the decree. Following prayers are made in Civil Application No.1404/2019.

“a) Pending the hearing and final disposal of the First Appeal the impugned judgment and decree dated 19/01/2018 passed by Ld. Trial Court, in Suit No. 7574 of 1981 (H.C. Suit No. 2123 of 1981) to the extent that operation of part of Clause 2 of the Order i.e. “payment of additional land value to the Defendants/ Vendors as per perice notified in the Ready Reckoner for the Suit Property or for the area where the Suit property is situated on the basis of FSI available to the Suit Property on the date of the Order of final Court I.e. Final Order”, part be stayed;

b) Pending the hearing and final disposal of the First Appeal, this Hon’ble Court be pleased to restrain the Respondents from changing the nature of the Suit property ie. carrying out any demolition or construction activity on the Suit Property;

c) Pending the hearing and final disposal of the First Appeal, this Hon’ble Court be pleased to restrain the Respondents and or their agents, employees or attorneys from creating any third Party rights or parting with possession in respect of the Suit Property;

d) Pending the hearing and final disposal of the First Appeal, this Hon’ble Court be pleased to direct the Respondents to deposit in the Court an amount calculated as per price/ rate notified in the Ready Reckoner for the Suit Property or the area in which the Suit Property is situated on the basis of FSI as on the date of Final Order as a condition for staying execution and operation of the Decree;

e) Pending the hearing and final disposal of the First Appeal, this Hon’ble Court be pleased to direct the Respondents to declare on oath the detailed present status of the suit property as in how much constructed area is in the possession of the Respondents, whether there are any tenants, how much constructed area is covered under the structures standing on the suit property etc.

(f) Interim and ad interim orders in terms of prayer clauses (a) to (e).

(g) For such other and further orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the case."

3 The Civil Application No.2067/2018 is preferred by the Defendants for stay of the operation and implementation of the impugned judgment and decree dated 19.01.2018 passed by the learned Bombay City Civil Court in Suit No.7574/1981 (H.C.suit No.2123/1981). Following prayers are made by the Defendant in Civil Application:

"a. That this Hon'ble Court be pleased to Admit the instant First Appeal preferred by the Applicants.

b. That this Hon'ble Court be pleased to call for the records and proceedings of B.C.C.C Suit 7574 of 1981 (H. C. Suit No.2123 of 1981).

*c. That pending the hearing and final disposal of the above First Appeal, this Hon'ble Court be pleased to stay the effect, implementation and operation of the impugned order dated 19th January, 2018 passed by the Learned City Civil Court at Mumbai in Suit No. 7574 of 1981 (H. C. Suit No. 2123 of 1981) being **EXHIBIT "A"** hereto.*

d. Ad-Interim relief in terms of prayer clause (c) above be granted in favour of the Applicants herein.

e. Costs of this Civil Application; and

f. Such other and further reliefs as this Hon'ble Court may deem fit and proper be granted in favour of the Applicants (Orig. Appellants)."

4 The said suit was decided by the Trial Court on 19.01.2018 and directed the Plaintiffs to pay sum of Rs.27,81,500/- and the land value to the Defendants / vendors as per the price notified in the Ready Reckoner for the suit property or for the area where the suit property is situated on the basis of FSI available to the suit property on the date of the order of the final court i.e. final order. The operative part of the said judgment and decree reads thus:

“1 Suit stands decreed.

2 The plaintiffs shall pay Rs.27,81,500/ and land value to the defendants/ vendors as per price notified in the Ready Reckoner for the suit property or for the area where the suit property is situated on the basis of FSI available to the suit property on the date of order of final Court i.e. final order.

3 If the plaintiffs do not deposit the amount to be paid to the defendants/vendors within six months, the defendants shall deposit in Court within six months thereafter the amount calculated as per price/ rate notified in the Ready Reckoner for the suit property or the area in which the suit property is situated on the basis of FSI as on the date of final order ie by way of compensation to be paid to the plaintiffs.

4 The defendants/vendors shall pay or deposit the earnest amount of Rs.2,50,000/ along with amount of compensation.

5. On deposit of compensation and earnest amount, the defendants shall discharge all the obligations under the suit agreement.

6 if the Plaintiffs deposit or pay the amount, then the Defendants shall execute sale deed in favour of the plaintiffs or the persons nominated by the plaintiff within three months thereafter and deliver vacant possession which is available with them and deliver symbolic possession of the area which is in possession

of the tenants / occupants at the cost of the Plaintiffs.

7 The plaintiffs and the defendants shall bear their respective costs.

8 Decree be drawn up accordingly.

Dictated and declared in open Court.”

5 Being aggrieved by the said decree, the Plaintiffs as well as the Defendants have filed the First Appeal and preferred the present Civil Application for various reliefs.

6 The learned senior counsel for Plaintiff No.2b submits that clause 2 of the operative part of the impugned judgment is contrary to the law. He submits that the court below has grossly erred in directing the Plaintiffs to pay land value to the Defendants as per the price notified in the Ready Reckoner for the entire suit property or the value of the FSI available on the suit property calculated as per the price notified in the Ready Reckoner of 2018 over and above the balance consideration to be paid as per the agreement by the Plaintiffs to the Defendants in spite of the fact that the learned court held every finding and issues in favour of the Plaintiff . He submits that the Trial Court directed the Plaintiffs to pay the balance consideration as mentioned in the agreement, and also pay the value of the land as per the Ready Reckoner price. He submits that the Trial Court ought to have taken into consideration that, the delay in granting the decree as well as the amount, time and efforts spent by the Plaintiff in pursuing the suit for justice would not result in saddling the Plaintiff with additional financial burden for no fault of theirs.

7 The learned senior counsel for the Plaintiff submits that, the suit land admeasuring 1042 sq.mtr. i.e. 1247 sq.yd situated at Dongarsey Road, Malbar and Cumballa Hill Division, Greater Bombay along with standing structure purchased by the Defendants from the earlier owner on 03.02.1978 for the sum of Rs.3,50,000/-. Out of total consideration, the Defendant paid sum of Rs.1,25,000/-. He submits that before paying the entire consideration to the owner, the Defendants entered into agreement for sale dated 21.02.1979 with the Plaintiffs for sum of Rs.29,81,500/-. He submits that from the said amount the Defendants paid remaining consideration to the owner and obtained the conveyance dated 27.03.1979 in his favour.

8 The learned senior counsel for the Plaintiffs submits that in the mean while the Defendant entered into agreement dated 21.02.1979 with the Plaintiffs and agreed to sell the said property for consideration of Rs.29,81,500/-. Out of that the Plaintiffs paid sum of Rs.2,50,000/- to the Defendants. As per the terms and conditions of the agreement dated 21.02.1979, when the Defendants failed and neglected to execute the conveyance, they called upon the Defendants to do the same immediately. He submits that thereafter the Plaintiffs wrote letters dated 03.03.1979, 16.03.1979 and 08.09.1979 to the Defendants stating that, they are ready and willing to execute the conveyance deed and for that purpose the Plaintiffs required certain documents and information. Though the Plaintiffs called upon the Defendants on several occasions to comply with the said agreement dated 21.02.1979, they

filed the suit before this Court on 21.12.1981 for several reliefs including the declaration that the said agreement is binding on both the parties.

9 The learned senior counsel for the Plaintiffs submits that, thereafter the Plaintiff moved this court for interim relief which was rejected. Thereafter, the matter was transferred to Bombay City Civil Court at Mumbai for hearing. Thereafter they preferred Notice of Motion No.3751/2015 before the Bombay City Civil Court seeking temporary injunction restraining the Defendants from dealing with or disposing of suit property and/or created third party right, title and interest.

10 The learned senior counsel for the Plaintiffs submits that the Trial Court, by order dated 04.11.2016 rejected their Notice of Motion No.3751/2015 recording in paragraph 8 of the impugned order, that the Defendant's Advocate made a statement that there was no intention to deal with the suit property in any manner. He submits that because of the said statement, the learned counsel for the Plaintiffs decided not to prefer any appeal against the said order dated 04.01.2016.

11 The learned senior counsel for the Plaintiffs submits that during pendency of the present appeal, this Hon'ble Court be pleased to stay clause 2 of the impugned judgment and decree and also restraining the Defendants from creating any third party right, title and interest in respect of the suit property. He submits that once third party

interest is created by the Defendants then nothing will survive in their First Appeal. Hence, in the interest of justice, this Hon'ble Court be pleased to restrain the Defendants from creating any third party right, title and interest in respect of the suit property.

12 On the other hand, the learned senior counsel for the Defendants has vehemently opposed the prayers of Civil Application No.1404/2019 made by the Plaintiffs. He submits that in the present proceedings, bare reading of agreement dated 21.02.1979 shows that the duty was cast upon by the Plaintiffs to do certain acts. He submits that to understand the true meaning of the agreement dated 21.02.1979, it is necessary to reproduce some clauses, which are as under:

"1 The Vendor shall sell and the purchaser shall purchase all and singular the piece or parcel of land or ground and premises situate at Dundersey Road within Greater Bombay and more particularly described in the Schedule hereunder written with their appurtenances free from incumbrances at or for the price of Rs.29,81,500/- to be paid as follows: that is to say, a sum of Rs. 2,50,000/- to be paid to the Vendors as deposit or earnest money on the execution of this agreement (the payment and receipt whereof the Vendors do and each of them doth hereby acknowledge) and the balance of Rs.27,31,500/- to be paid to the Vendors on the completion of sale.

2 The Purchasers have agreed to purchase the said property on the basis that the F.S.I. available for construction of the new building on the said property hereby agreed to be sold is 14,926 sq. feet, excluding balconies areas. After deducting an area of 3,000 sq. feet, excluding-balconies areas, to be granted to the tenants by way of permanent alternative

accommodation in the new building to be constructed by the Purchaser as hereinafter provided, the net F.S.I. available for the exclusive benefit of the Purchasers would be Rs. 11,926 sq. feet. The Purchasers have agreed to pay the purchase price of Rs.on the basis that the net F.S.I. that will be 11,926 sq. feet. -It is agreed that if the net F.S.I. that may be sanctioned by the Bombay Municipal Corporation for construction of the new building for the exclusive benefit of Purchasers shall be more or less than 11,926 sq. feet, the purchase price hereby agreed to be paid shall be proportionately increased or decreased as the case may be. It is hereby further agreed that if by reason of change in policy or by reason of any change in the Rules and Regulations and Byelaws of the Bombay Municipal Corporation, the Government or the Corporation permits in the locality in which the said property is situate additional F.S.I., then the existing F.S.I. of 1.33 before the completion of the new building by the Purchasers on the said property, the Purchasers shall be entitled to utilize and consume such additional F.S.I. on payment to the Vendors of the additional price of Rs. 250/- per sq. foot in respect of such additional F.S.I. that may be consumed and utilised by the Purchasers provided however and it is hereby further agreed that if by reason of any efforts made by the Purchasers in respect of the said property agreed to be sold, the Purchasers shall be able to obtain the additional F.S.I. in respect of the said property from the Bombay Municipal Corporation, then and in such event the Purchasers shall be entitled to the benefit of such additional F.S.I. and they shall not be liable and/or required to pay to the Vendors any additional price in respect of such additional F.S.I. procured or obtained by the Purchasers through their own efforts.

4. The sale shall be completed within 3 months from the date hereof. If the sale is not completed within the said period of three months by reason of the Vendors being unable to hand over and deliver to the Purchasers vacant possession of the said property, the Purchaser will have the option either to extend the time for completion of sale for further

period of three months or to terminate this Agreement. In the event of the Purchasers exercising the option to terminate this Agreement, the Vendors shall forthwith return to the Purchasers the said earnest money of Rs.2,50,000/- with interest therein at the rate of 10% per annum and thereupon neither the Vendors nor the Purchasers shall have any claim against each other and each party shall bear and pay their respective costs of sale incurred upto then. Either party shall be entitled on or after the expiration of the aforesaid period of three months or to the extended period as aforesaid on 15 days notice in writing given to the other make time essence of the contract.

5. The Vendors shall within 4 days from the execution hereof, deliver or cause to be delivered to the Purchaser's advocates all the title-deeds relating to the land, hereditaments and premises hereby agreed to be sold for the purposes of enabling the Purchaser's advocate to examine the title thereto.

11. The Purchasers have informed the Vendors that the Purchasers have agreed to purchase the said property with intention to demolish the present building and structure standing thereon and to construct new building and for that purpose, the Purchasers will be entitled to sign and submit all application, plans, specifications etc., to the Competent Authority for obtaining his permission for re-development under Section 22 of the Urban Land (Ceiling & Regulation) Act, 1976 and also to the Bombay Municipal Corporation for obtaining its approval and sanction to the plans, specification etc. for construction of the new building on the said property and for obtaining Commencement Certificate in respect thereof. The Vendors shall sign and execute or cause the Original vendors to sign and execute all Such applications, plans, specifications, deeds, documents, undertakings, writings etc. that may be required by the Competent Authority for granting his permission under Section 22 of the said Act, and/or that may be required by the Bombay Municipal Corporation for granting approval or sanction to the

plans, specifications etc., for construction of the new building on the said property and/or for granting Commencement Certificate in that behalf. Provided However and it is hereby agreed that all costs, charges of and incidental to the obtaining of such permission under Section 22 of the said Act and for obtaining the Sanction to the Building Plans and the Commencement Certificate including payment of deposits, scrutiny charges and professional costs of the Architects engaged by the Purchasers for the purposes aforesaid shall be borne and paid by the Purchasers alone. The Purchasers shall be entitled to engage and appoint their own Architects for the purpose aforesaid and the Vendors shall produce to the Purchasers such Letter of Discharge signed by the Vendors' Architects as may be required by the Purchasers' Architects to enable the Purchasers' Architects to represent the Vendors before the Bombay Municipal Corporation and any of its concerned officer and the Competent Authority."

13 The learned senior counsel for the Defendants submits that bare reading of those clauses clearly show that, the burden was cast upon the Plaintiffs to do particular acts within time, failing which the Defendants have right to forfeit the amount deposited by the Plaintiffs towards earnest money. He submits that as the Plaintiffs has failed and neglected to comply with all those terms and conditions, they forfeited the amount deposited by the Plaintiff as per the terms and conditions of the agreement dated 21.02.1979.

14 The learned senior counsel for the Defendants submits that, the Plaintiffs has failed and neglected to comply with the terms and conditions of agreement dated 21.03.1979, they started taking action against some of the

tenants of the said building. He submits that they filed eviction suit against four tenants viz. R. C. Patuck, Sanghvi Watch Co., Dickey Chothia and Mr. Arvind Pakwasa. He submits that thereafter they settled the matter with Mr. Sanghvi Watch Co. by paying sum of Rs.40 lacs, Arvind M. Pakwasa sum of Rs.1,10,00,000/- and Dicky Chothia Rs.12 crores. He submits that, in this way, Defendant protected the suit premises from time to time.

15 The learned senior counsel for the Defendants submits that the present suit was filed by the Plaintiffs in the year 1981. Neither this Court, nor the court below passed any interim order in favour of the Plaintiffs. He submits that the suit was dismissed for non prosecution on 12.12.2001. Thereafter the Plaintiffs preferred Notice of Motion No.3580/2005 for restoration, wherein, this court (Coram : S. J. Vazifdar, J., as he then was) passed order dated 01.12.2005 and refused ad-interim relief. By order dated 29.04.2010 this court has restored the suit on file for hearing and final disposal on merits without any interim relief. Thereafter again the Plaintiffs preferred Notice of Motion No.3751/2015 before the Trial Court. In that Notice of Motion also the Trial Court has rejected the Plaintiff's prayer restraining the Defendant from creating third party right, title and interest in respect of the suit property. Mainly he relies on paragraph 8 and 9 of said order dated 04.01.2016 which read thus:

"8. While seeking the temporary injunction what is required to be looked into is whether the plaintiff is having prima facie case and whether he will suffer an irreparable loss which cannot be compensation in

terms of money. Perusal of the affidavit of the plaintiff No.1 reveals, that one Sanjay Siroya had handed over him certain documents contending that one Rakesh Shah, the broker, had brought him those documents for the purpose of sale/re-development of the suit property. I am convinced with the argument canvassed by the learned Advocate for the Defendant Nos. 1(a) to 1(d) that the instant motion is not supported with the affidavit of either Sanjay Siroya or Rakesh Shah who could disclose the real controversy between the parties and to justify the reasonable apprehension in the mind of the plaintiffs that the suit property will be disposed of in any manner whatsoever by the defendants if the temporary Injunction as sought by them is not granted. The defendants in their reply categorically stated that they are not intending to deal with the suit property in any manner. In such circumstances, the contention of the Plaintiffs that simply on the basis of some documents they apprehend that the defendants are trying to dispose of the suit property appears to be unconvincing. As such, the plaintiff utterly failed to establish that they are having, prima facie case, that is an arguable case in their favour.

9 So far as balance of convenience and irreparable loss, pertinently the instant suit is pending since 1981. Till date no attempt were being made by the plaintiffs to seek any temporary injunction or to bring on record that any attempt ever being made by the defendants till date to deal with the suit property with the third party. In such circumstances, I am of the view that the plaintiffs again miserably failed to establish that they would suffer an irreparable loss which cannot be compensated in terms of money if the temporary injunction as sought is not granted. For the foregoing reasons, I am further of view that the balance of inconvenience tilts in favour of the defendants as they would be put to grave inconvenience if the further progress of the suit is hampered by granting temporary injunction as sought by the plaintiffs. Eventually, the point No.1 is answered in the negative and point Nos.2 and 3 accordingly. In the net result, the following order.”

16 The learned senior counsel for the Defendants submits that as soon as the decree was passed by the Trial Court, the advocate for the Plaintiffs wrote letter dated 12.03.2018 informing the Defendants that as per the judgment and decree passed by the Trial Court, the market value of the suit property comes to Rs.35,26,00,200/-. He submits that immediately, the Defendants, by his letter dated 25.04.2018 informed the Plaintiff's Advocate that the calculation made by them is not correct. In fact, the market value of the suit property in the year 2018 comes to Rs.134 crores on the basis of the ready reckoner. Along with the said letter, the Defendants also provided detail calculation to the Plaintiff's advocate. In spite of that, the Plaintiffs have failed and neglected to comply with clause 2 of the judgment and decree passed by the Bombay City Civil Court.

17 The learned counsel for the Defendants submits that in view of the above mentioned facts, it is crystal clear that during pendency of the suit since 1981 there was no ad-interim relief or interim relief in favour of the Plaintiffs restraining the Defendants from creating any third party right, title and interest in respect of the suit property. Therefore, there is no question of granting any interim relief. He submits that in any case the Plaintiffs have already made a prayer in the plaint, in the alternative to specific performance, they claimed damages also. Therefore, at the most, the Plaintiffs can claim damages if they succeed before this court in the First Appeal.

18 On the basis of these submission, the learned senior counsel for the Defendants submits that there is no substance in the Civil Application filed by the Plaintiffs and same is liable to be dismissed. He submits that in the interest of justice this Hon'ble Court be pleased to stay the the operation and implementation of the impugned judgment and decree till hearing and final disposal of the First Appeal. He submits that if stay is not granted, irreparable loss will be caused to the Plaintiff.

19 Heard both sides at length. It is to be noted that in the present proceedings though the Plaintiffs filed the suit for specific performance in the year 1981 and made Applications for injunction, same was rejected by this court as well as the Trial Court from time to time. Apart from that, when the judgment and decree was passed by the Trial Court on 19.01.2018 the Plaintiffs have failed and neglected to deposit market value of the property in court and/or to pay to the Defendants. It is crystal clear from the letter dated 12.03.2018 written by the Plaintiff's advocate to the advocate for the Defendants stating that, the market value of the suit property comes to Rs.35,23,00,200/- and failed to deposit the said amount in the court. This, prima facie, itself shows that the Plaintiffs are not interested to execute the judgment and decree passed by the Trial Court.

20 In the present proceedings, admittedly, as on today, the Defendants are in possession of the suit property. The suit was pending for more than 35 years in the Trial Court. In any case, the Plaintiffs have already made prayers in

their suit for damages and compensation in case prayer for specific performance was not allowed. In view of these facts, I am of the opinion that the Plaintiffs have failed to make out any case for allowing their Civil Application No.1404/2019. Whereas the Defendants have made out a case for allowing their Civil Application No.2067/2018.

21 Hence, following order is passed:

a. Civil Application No.1404/2019 filed by the Plaintiffs stands rejected.

b. Civil Application No.2067/2018 filed by the Defendants is partly allowed in terms of prayer clause (c) which reads thus:

*“(c) That pending the hearing and final disposal of the above First Appeal, this Hon'ble Court be pleased to stay the effect, implementation and operation of the impugned order dated 19th January 2018 passed by the Learned City Civil Court at Mumbai in Suit No.7574 of 1981 (H.C.Suit No.2123 of 1981) bearing **Exhibit-A** hereto.”*

c. Hearing of the First Appeals is expedited.

d. No order as to costs.

(K.K.TATED, J.)