

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO.253 OF 2018
WITH
CIVIL APPLICATION NO.326 OF 2018
IN
APPEAL FROM ORDER NO.253 OF 2018**

Poonam Property Co-Operative Housing Limited ...Appellant

vs.

Crest Hotel Limited Company And Ors. ...Respondents

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Mr. Bhavin Gada, i/b. Mahendra Patel & Associates, for the Appellant.

Mr. Mustafa Doctor, Senior Advocate, a/w. Mr. Siddharth Samantaray
and Ms. Anita Irani, i/b. Kanga & Co., for Respondent No.1.

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CORAM : S.C. GUPTE, J.

DATED : 16 SEPTEMBER 2019

P.C. :

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Heard learned Counsel for the parties.

2. This appeal from order challenges an order passed by the City Civil Court at Bombay on a notice of motion taken out by the Appellant herein (original plaintiff). The Appellant's suit is in respect of certain land, which has been subleased by the Appellant Society in favour of Respondent No.1, and on which the Respondent was entitled to construct and create third party rights. The suit prays for various reliefs. We are, however, concerned in the present appeal from order with the use made by Respondent No.1 of the subleased portion of land of about 2579 sq.mtrs., forming part of subleased plot H-2 in Shivsagar Estate at Worli, Mumbai.

3. There has been litigation between the parties earlier, in which settlement terms were arrived at. The settlement terms *inter alia* required that the original indenture of sublease executed between the parties, under which the disputed portion of land was merely allowed to be used by Respondent No.1 herein *inter alia* for a swimming pool, and not developed or divested in any manner, was altered or modified in accordance with a draft annexed to the consent terms. In consideration of the consent terms, Respondent No.1 agreed to make payment of a sum of Rs.66 lakhs to the Appellant Society. The manner of payment of this additional consideration was provided for in the settlement agreement. It appears that in keeping with this settlement, the parties entered into a supplemental sublease on 12 November 1983, i.e. on the same day as the consent terms. The supplemental deed *inter alia* permitted Respondent No.1 herein as the sub-lessee to construct or caused to be constructed on the demised premises or any part thereof not only a swimming pool, as was the term of the original sub-lease, but any other structure or structures for use of any nature and also to deal with or alienate or encumber the demised premises as a sub-lessor without obtaining consent of the Appellant.

4. In pursuance of this supplemental deed, Respondent No.1 has gone ahead and constructed row houses in the demised portion, that is to say, the disputed land admeasuring 2579 sq.mtrs., and even allotted these row houses to third parties. After all this was done, by their notice of motion, wherein the impugned order has been passed by the trial court, the Appellant sought a temporary injunction restraining Respondent No.1 from executing any document in favour of Madhuli Co-

Op. Housing Society Ltd., the society, which *inter alia* holds structures in the adjacent plot, marked as 'H-1', as well as the suit premises. The interlocutory application of the Appellant was rejected by the trial court.

5. There is no infirmity to be found in the impugned order. The Appellant was very much aware of the construction on the disputed portion of the land, forming part of the land marked as 'H-2', and third party rights created or to be created in respect of that land. In fact, the Appellant's suit, filed in the year 1991, has prayers *inter alia* seeking a perpetual injunction restraining Respondent No.1 herein from dealing with or disposing of or parting with possession or creating any third party rights in respect of the disputed sub-leased portion of land, which originally was to only house the swimming pool. No interim relief was or could be obtained by the Appellant in respect of this prayer at the relevant time, that is to say, any time after the filing of the suit in the year 1991 and till the present notice of motion was taken out in the year 2016. It is pertinent to note that during all this period, not only did the Appellant stand by the construction in, and use by third parties of, the suit premises, but even accepted annual rent fixed for the demise of the suit premises under the sub-lease.

6. It is pertinent to note that the grievance of the Appellant in the present notice of motion is that the previous managing committee of the Appellant Society, without any cause or justification, illegally accepted payment of annual rent from Madhuli Co-Operative Housing Society Ltd. for use of the disputed sub-leased plot. It is hard to believe that steps taken by the Appellant ever since the execution of the

supplemental deed, including acceptance of annual rent, can be brushed aside in a broad brush manner, such as the one proposed by the Appellant in its affidavit in support of the notice of motion.

7. The impugned order of the trial court is on the basis of the rights created in favour of Respondent No.1 under the settlement agreement and the supplemental deed executed between the parties in pursuance thereof. The trial court, has, after consideration of the relevant clauses of the supplemental deed, observed that the Appellant had not challenged the supplemental deed; this deed was binding upon the Appellant; and the case put forth by the Appellant in support of its interlocutory application was *prima facie* unacceptable having regard to the terms of the supplemental deed. The Court has also observed that any relief of temporary injunction at this stage would prejudicially affect the interest of those third parties, who had booked the row houses constructed by Respondent No.1. The Court observed that on the other hand, the Appellant had, in the present suit, sought a relief for demolition of the construction, which, if the Court were to hold in favour of the Appellant at the hearing of the suit, could anyway be granted to the Appellant. The Court observed that the issues of balance of convenience and irreparable loss also were, in the premises, against the Appellant.

8. These are perfectly reasonable conclusions, which are supported by material on record. All relevant aspects of the matter have been duly considered by the trial court whilst arriving at these conclusions. The appeal, accordingly, has no merit.

9. The appeal from order is, accordingly, dismissed. Costs to be costs in the cause.

10. In view of the dismissal of the appeal from order, the civil application does not survive and the same is also dismissed.

Smita
Gonsalves

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Smita Gonsalves
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(S.C. GUPTE, J.)