

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1726 OF 2017
IN
FIRST APPEAL NO.654/2017

Mayur Mangaldas Kothari

..... Applicant

Vs.

Linky Hotel & Shopping Pvt. Ltd. & Ors.

..... Respondents

Mrs. Deepti Panda with Aakanksha Patil with Khyati Pandit I/b.
Dhru & Co. for the Applicant

Mr. S. J. Khera for Respondent No.6

Mr. Mahernosh Humrenwala with Biswadeep Chakravarty with
Dipanwita Ghosh I/b. Mahernosh Humranwala for Respondent
No.3A in the First Appeal

Ms. Adline Rodrigues – Administrator for Respondent No.4.

Mr. Anuj Narula I/b. Jhangiani Narul & Associates for
Respondent No.2.

Mr. Sidharth Chandrashekhar I/b. Suresh Chandrashekhar &
LI SHU FEN for Respondent No.5.

CORAM : K.K.TATED, J.

DATED : JUNE 13, 2019

P.C.

1 Heard. The learned counsel for the Applicant / Plaintiff has filed an additional compilation of documents in three volumes. Same is taken on record.

2 By this Civil Application, the Applicant – Plaintiff is seeking an order of injunction restraining Respondent Nos.2 to 6 from creating any third party right, title and interest in respect of the suit property.

3 For the sake of convenience, the parties will be referred to as per their nomenclature in suit No.7034/1998. The Applicant - original Plaintiff, Respondent No.1 - original Defendant No.1, Respondent No.2 - Defendant No.2, Respondent No.3 - Defendant No.4A, Respondent No.4 - Defendant No.6(c), Respondent No.5 - Defendant No.7 and Respondent No.6 - Defendant No.8.

4 In the present proceedings, the Plaintiff filed S.C.Suit No.7034/1998 in the Bombay City Civil Court for injunction restraining Defendant Nos.2 to 8 from creating any third party right, title and interest in respect of the suit property i.e. "all that piece or parcel of land or ground together with buildings, cottage, garages, out houses and hereditaments standing thereon known as "Meherabad" lying and being at Juhu Koliwada in the Registration Sub District of Bandra Bombay suburban District containing by admeasurement 3571 sq. mtrs. or thereabouts and forming part of the Final Plot No.35-C/1 under the Santacruz Town Planning Scheme No.II (Juhu Sector) and bearing Survey Nos.1070, 1070/1 and 1070/2 and bounded as follows:

On or towards the East : by Juhu Koliwada Road (Azad Road)

On or towards the West : by the foreshore

On or towards the North : by Final Plot No.55-C/2

On or towards the East : by Final Plot Nos.35-B/2 & 35-C/3"

5 In that suit the Plaintiff had filed Notice of Motion No.5702/1998 for interim relief. After hearing both the sides,

the Trial Court, by its order dated 29.11.2001 restrained the Defendants from creating any third party right, title and interest in respect of the suit property till hearing and final disposal of the suit. The operative part of the said order reads thus:

“(1) Pending the hearing and final disposal of the suit the Defendants, their servants and anyone claiming through or under them are restrained from in any manner alienating, encumbering, selling or parting with possession of the suit property as described in para 3(i), (ii) and (iii) of the plaint.

(2) It is clarified that this order is passed subject to any order that may be passed in the Probate proceedings. It is further clarified that this order will not be binding on anyone who is not a party to this suit.

(3) This order is passed on condition that even the Plaintiff will maintain the status quo as regards the suit property.

(4) On request of Mr. Gala it is further clarified that the “status quo” referred to earlier will be as regards the occupancy and also development of the said property.

(5) In view of the fact that the Plaintiff claims right in the suit property by virtue of majority share-holding the Plaintiff is also directed to obtain permission from this court before transferring his share-holding.

(6) Cost costs in the cause.

(7) Defendants to file their written statement. Adjourned to 07.02.2002.”

6 Thereafter the Trial Court, vide its impugned judgment and decree dated 13.04.2017 dismissed the Plaintiff's suit. Hence, the Plaintiff filed the present First Appeal and filed this Civil Application for an order of injunction.

7 The learned counsel for the Plaintiff submits that in the present proceedings the Plaintiff is holding more than 95% shares in Defendant No.1 Linky Hotels and Shopping Pvt. Ltd. She submits that, initially, it was agreed between the parties that Defendant Nos.2 and 3 will purchase the suit property in the name of Defendant No.1 and for that purpose the Plaintiff would finance. She submits that as per their understanding the Plaintiff financed Defendant No.2 to purchase the said property in the name of Defendant No.1. She submits that instead of purchasing the property in the name of Defendant No.1, Defendant No.2 executed MOU dated 31.01.1992 with Defendant No.4 for purchase of the suit property in his own name. She submits that though the Plaintiff brought on record the documentary evidence to that effect, the Trial Court has failed to consider the same and dismissed the suit.

8 The learned counsel for the Plaintiff submits that, the Plaintiffs have good chance of success in this case. She submits that since the interim relief was granted by the Trial Court on 29.11.2001 same may be continued till hearing and final disposal of the First Appeal. She submits that even this court, by order dated 07.06.2017 has continued interim relief granted by the Trial Court. She submits that if interim relief is not granted till the hearing and final disposal of the First Appeal, irreparable loss will be caused to the Plaintiff. She submits that once the third party interest is created by the Defendant, then nothing will survive in the present proceedings. She submits that they have good chance of success in the matter.

9 On the other hand, the learned counsel for Defendant No.2 has vehemently opposed the Civil Application. He submits that in the present proceedings bare reading of the prayer clauses show that the Plaintiff has not filed the suit for the relief of specific performance and/or transfer of the suit property in the name of Defendant No.1. He submits that in any case, the Plaintiff is only a shareholder of Defendant no.1. The present suit is not filed by Defendant No.1 for any relief before the Trial Court, nor Defendant No.1 preferred any appeal before this court against the impugned judgment and decree dated 13.04.2017 passed by the Trial Court. He submits that on the basis of the MOU dated 31.01.1992 and other documents the suit property has already been transferred in the name of Defendant No.2 to the extent of 50% and the property card has been issued. He relies on the said property card which is at page No.566 of the appeal memo - Volume II.

10 The learned counsel for Respondent No.2 submits that in the present proceedings bare reading of the prayers made by the Plaintiff in the said suit, shows that same is filed for simplicitor injunction. He submits that neither the Plaintiff is owner nor he is in possession of the property. He submits that Defendant No.2 is admittedly in possession of the suit property. He submits that the suit as it is filed by the Plaintiff itself is not maintainable, as it is not for specific performance of any agreement, nor the Plaintiff is in possession of the suit property. In support of this contention, he relies on judgment of the Apex Court in the matter of **Anathula Sudhakar Vs. p. Buchi Reddy (Dead) By Lrs. and Ors. (2008) 4 SCC 594.**

He submits that in this authority, the Apex Court has specifically held that the simplicitor suit for injunction in respect of the property cannot be entertained unless the Plaintiff shows their possession and/or agreement for purchase of the same. Paragraph No.21 of the said judgment reads thus:

“21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate

or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

11 The learned counsel for the Defendant No.2 submits that in the case in hand, neither the Plaintiff is in possession nor there is any agreement in his favour to purchase the said property. He submits that the said suit is filed by the Plaintiff on the basis that he is holding 95% shares in Defendant No.1 company and it was agreed between the parties that Defendant Nos.2 and 3 will purchase the said suit property in the name of Defendant No.1. He submits that on the basis of the prayers

made in the suit, there is no question of transferring the said property in the name of Defendant No.1. He submits that Defendant No.2 being owner on the basis of the property card and as he is in possession, there is no question of granting any injunction against the true owner. Therefore, in the interest of justice, this Hon'ble Court be pleased to dismiss the present Civil Application.

12 The learned counsel for the legal heirs of Defendant No.4 supports the case of Defendant No.2.

13 The learned counsel for Defendant No.7 supports the case of the Plaintiff.

14 The learned counsel for Defendant No.8 has vehemently opposed the Civil Application. He submits that as on today, he is in possession of the portion of the suit property to the extent of 15000 sq.ft. on the basis of lease. He submits that there is no question of granting any injunction against Defendant No.8. He submits that the Plaintiff has not shown any cause of action against Defendant No.8 in the present proceedings. Therefore, there is no question of allowing the Civil Application, as it is. Same is liable to be dismissed with costs.

15 Heard both sides at length. It is to be noted that, admittedly, in the present proceedings the Plaintiff has filed the simplicitor suit for injunction restraining Defendant Nos.2 to 8 from creating any third party right, title and interest in respect of the suit property. Bare reading of the plaint shows that neither the Plaintiff nor Defendant No.1 is owner of the suit

property. It is the case of the Plaintiff that Defendant No.2 and 3 agreed to purchase the suit property in the name of Defendant No.1. For that purpose, the Plaintiff has financed to Defendant No.2. In spite of that there is no prayer in the plaint to that effect. It is to be noted that the Apex Court, in the matter of **Anathula Sudhakar** held that injunction cannot be granted in favour of third party who is neither owner nor in possession of the suit property. Neither the Plaintiff nor the Defendant No.1 is in possession of the suit property nor they filed any suit for specific performance of any agreement. Therefore, I do not find any reason to grant injunction in favour of the Plaintiff restraining the Defendants from creating third party right, title and interest in respect of the suit property during pendency of the First Appeal.

16 Hence, following order is passed:

- a. The Civil Application stands rejected.
- b. No order as to costs.
- c. At this stage, the learned counsel for the Plaintiff submits that effect and operation of the present order may kindly be stayed and the earlier order passed by this court may be continued for some time.
- d. Considering the submissions made by the learned counsel for the Plaintiff and as the interim relief is running for last more than 18 years, I am satisfied that the Plaintiff has made out a case for further stay.

e. Hence, operation and implementation of the present order is stayed for a period of eight weeks from today.

(K.K.TATED, J.)