

to temporarily restrain from initiating construction activities upon the suit property till decision of the suit and till adjudication of plaintiff's $\frac{1}{4}$ share.

2 Heard the learned Counsel appearing for the petitioner/original plaintiff. He drew my attention to the plaint in the civil suit by which declaration is sought by the petitioner/original plaintiff that an agreement of sale dated 31/12/2007, the irrevocable power of attorney dated 03/01/2008 and the consequent sale deed dated 04/10/2016 are fraudulent, without consideration as well as null and void. My attention is also drawn to the prayer for declaration made by the petitioner/original plaintiff to declare these documents as ineffective and not binding on plaintiff. With this, it is argued that the learned trial Court had granted temporary injunction on 26/03/2018 restraining the defendants from initiating construction activities. It is pointed that on 27/02/2018 itself ad-interim injunction was granted *ex parte* and ultimately it was confirmed. Still in submission of the learned Counsel for the petitioner/plaintiff, the respondent No.1/defendant No.1 applied to the Assistant Director of Town Planning for Building Commencement Certificate, which was ultimately granted on 01/06/2018. This conduct, in submission of the petitioner/original plaintiff, dis-entitled the respondent No.1/original defendant No.1 for seeking equity.

3 The learned Counsel for the petitioner/original plaintiff drew my attention to the notice of cancellation of power of attorney issued on 23/11/2011 by defendant No.2 Atmaram Patil, who happens to be father of petitioner/original plaintiff Yashwant Patil as well as public notice dated 11/09/2012 published in the local newspaper and argued that power of attorney issued in favour of the respondent No.1/original defendant No.1 was cancelled way back. He argued that even in power of attorney dated 03/01/2008, no right to execute sale deed was granted in favour of the Power of Attorney Holder. The sale deed under challenge was not executed by the petitioner/original plaintiff and he was not a party to the said sale deed. According to the learned Counsel for the petitioner that sale deed was executed by the respondent No.1/original defendant No.1 in favour of himself by using the cancelled power of attorney which was not even containing any delegation of powers to execute the sale deed. It is further argued that no consideration whatsoever was even paid to the petitioner/original plaintiff in this transaction. The agreement for sale reflects consideration of Rs.1,10,67,000/- whereas the sale deed is reflecting the consideration of Rs.82,95,525/-. The learned Counsel for the petitioner/original plaintiff further urged that very limited construction is sought to be effected on the suit property and majority of construction is on Survey No.90/4, which is not the subject of the suit property. By taking support from the Judgment

of the Honourable Supreme Court in the matter of ***Suraj Lamp & Industries Pvt. Ltd. Versus State of Haryana & Anr.***¹, the learned Counsel for the petitioner further argued that the Power of Attorney Holder cannot execute sale deed in exercise of powers granted to him under power of attorney and no title can be conveyed on behalf of the grantor.

4 As against this, the learned Counsel appearing for respondent No.1 herein/original defendant No.1 argued that in fact, more than agreed consideration was paid to defendant No.2 Atmaram Patil, who happens to be father of the petitioner/plaintiff. The plaintiff was a party to the agreement to sell as well as the power of attorney executed in favour of the Director of respondent No.1 – M/s.Neptune Developers Limited namely Sachin Manohar Deshmukh. The learned Counsel further argued that it is no case of the petitioner/plaintiff that no consideration was paid to him in the transaction. He drew my attention to the copy of the plaint which contains an averment to the effect that the amount of Rs.27,71,475/- is remained to be paid by the defendant No.1 i.e. M/s.Neptune Developers Limited. It is further argued that the agreement for sale is with delivery of possession and it is duly stamped. Power to sell is contained in Clause No.16 thereof. Factual position is the same in respect of the power of attorney and Clause No.2 thereof shows power to execute conveyance deed. It is further argued that the suit is

1 (2012) 1 Supreme Court Cases 656.

based primarily on two documents i.e. agreement of sale dated 31/12/2007 as well as power of attorney dated 03/01/2008. However, the suit is belatedly filed in the year 2016. This was done after the land is converted to the non-agricultural use and after interest is created in 300 purchasers of the flats. The property is now mortgaged to the bank. The suit though claims partition is filed without joining two daughters of defendant No.2 Atmaram Patil. As such, it cannot be said that the petitioner/original plaintiff has $\frac{1}{4}$ share in the suit property. It is also urged that the petitioner/original plaintiff cannot suffer any irreparable loss as if ultimately something is said in his favour then property can be directed to be sold in order to re-compensate the petitioner/original plaintiff.

5 I have considered the submissions so advanced and also perused material placed on record. For valid claim of temporary injunction, the plaintiff is required to establish *prima facie* case and to show that balance of conveyance lies in his favour. It is also required to be demonstrated that the plaintiff would suffer irreparable injury if the temporary injunction, as claimed, is not granted to him. So far as appeal challenging either grant or refusal of temporary injunction is concerned, its scope is very limited. The Appeal under Order XLIII Rule 1(r) of the Code of Civil Procedure is an appeal on principle and the learned Appellate Court is required to examine whether the discretion is exercised by the trial Court arbitrarily or capriciously in order to

grant relief to the appellant in said appeal. Keeping in mind these principles let us examine the case in hand in order to ascertain whether the impugned appellate Order can be sustained or not.

6 The petitioner, who happens to be the plaintiff challenges agreement of sale dated 31/12/2007, power of attorney dated 03/01/2008 and the sale deed dated 04/10/2016 by filing a suit for declaration, injunction as well as partition. He claimed $\frac{1}{4}$ share in the suit properties, which are the lands bearing Survey Nos.70/4, 73/15 and 90/4 situated at village Ambivali in Kalyan Taluka of Thane District. The declaration is to the effect that these documents are ineffective and not binding on the petitioner/original plaintiff. In paragraph 8 of the plaint it is categorically averred by the plaintiff that consideration amount was not fully paid by respondent No.1 herein/original defendant No.1 i.e. M/s.Neptune Developers Limited to vendors and an amount of Rs.27,71,475/- is yet to be paid by the purchaser i.e. defendant No.1. It is further averred that the petitioner/original plaintiff as well as defendant Nos.2 to 4 issued legal notice dated 23/11/2011 and cancelled the agreement for sale dated 31/12/2007 so also the power of attorney dated 03/01/2008. It is further averred that the public notice in Daily Janmat is issued on 11/09/2012 for inviting attention of the public at large in order to see that the public should not make any transaction with defendant No.1 i.e. M/s.Neptune Developers Limited, in respect of the suit land.

7 On the backdrop of these material averments in the plaint, let us examine the agreement of sale dated 31/12/2007 and subsequent power of attorney dated 03/01/2008, which is undisputedly an irrevocable power of attorney. Agreement for sale of suit property dated 31/12/2007 is an agreement by which vendors had parted with possession of the suit property. The petitioner/original plaintiff is a party to this agreement for sale. It is duly stamped by valuing the same as per the consideration reflected in the said agreement. In Clause (16), vendors averred that because of threat of encroachment, the purchaser is entitled to construct and develop the said land and to sell apartments constructed on the said land to others. It is further averred in the agreement for sale that vendors have decided to execute the power of attorney and that power of attorney shall be construed as part of the agreement for sale. Agreement for sale also reflects that at the time of execution of Memorandum of Understanding dated 24/10/2007 an amount of Rs.4.84 Lakhs was paid by the purchaser. It further reflects that at the time of execution of agreement for sale, an amount of Rs.22,82,750/- was paid to vendors in order to make the amount at 25% of the total consideration. The agreement also reflects stages by which the balance amount needs to be paid as well as the persons to whom the amount needs to be paid. This description is by way of Schedules to the agreement. Those Schedules annexed to the agreement show that balance consideration was to be paid to

Atmaram Kathod Patil i.e. defendant No.2, who happens to be father of the petitioner/original plaintiff. Thus, the agreement for sale of the suit land makes it clear that the consideration was to be paid to father of the petitioner/original plaintiff namely Atmaram Kathod Patil (defendant No.2).

8 On this backdrop, as per Clause (16) of the agreement for sale, an irrevocable power of attorney came to be executed on 03/01/2008 by the petitioner/original plaintiff as well his father Atmaram Kathod Patil (defendant No.2) and his brothers Pradip Patil and Hemant Patil – defendant Nos.3 and 4 respectively. In Clause (3) of irrevocable power of attorney, it is mentioned that because of personal work it may not be possible for the Executors of the power of attorney to execute sale deed by attending the office of Sub-Registrar, Kalyan and, therefore, the power of attorney is executed in favour of Sachin Manohar Deshmukh, Director of the Neptune Developers Pvt. Ltd. Clause ‘*dha*’ (दे) of this power of attorney is also relevant and it empowers the power of attorney holder to get the sale deed registered at the office of Sub-Registrar. The power of attorney itself refer to the agreement for sale executed by the Executors of the power of attorney in favour of M/s.Neptune Developers Pvt. Ltd. As stated in foregoing paragraphs, it is seen that 25% of consideration fixed between the parties was already paid at the time of execution of the agreement for sale. Therefore, at this juncture, Section 202 of the Indian

Contract Act, 1872 becomes relevant and it reads thus :

“202. Termination of agency, where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.”

Thus, if the agent i.e. Power of Attorney Holder has himself an interest in the property, such power of attorney cannot be terminated in absence of an express contract. *Prima facie*, it is seen that in the case in hand, the contract is otherwise. The power of attorney is irrevocable.

9 Now, let us examine the registered legal notice issued by the learned Advocate for the petitioner/original plaintiff as well as defendant Nos.2 to 4 to the respondent No.1 herein/defendant No.1. Relevant portion of paragraph 8 of that legal notice needs to be quoted, which reads thus :

“8.... In view of these violations of various laws as mentioned above, Annexure ‘C and D’ (Colly.) executed by our client in favour of you no. 04 for and on behalf of you nos. 01 to 03 being illegal and bogus and therefore the same is not binding on our client, by way of this notice you are hereby called upon that

Annexure 'C' and 'D' (Colly.) executed by our client in respect of the lands shall be treated as cancelled and he was/is ready and willing to refund the amount i.e. the undervalue consideration of the lands within 15 days from receipt of this notice, or alternatively, you are hereby called upon to pay the consideration as per market rate in respect of the lands, failing which our client shall be constrained to file a civil suit and a criminal case against all of you before competent Court of Law by knocking the doors of justice that you may kindly please note"

Recitals in paragraph 8 of the legal notice which was issued on behalf of the defendant No.2 Atmaram Kathod Patil i.e. father of the petitioner/original plaintiff makes it clear that in fact there was no cancellation of power of attorney, but contingencies are stated therein. The said notice, as seen from perusal thereof, was not issued by the petitioner/original plaintiff. This legal notice was followed by paper publication of public notice dated 11th September 2012. Perusal of this public notice shows that it is not a notice by the petitioner/original plaintiff revoking the power of attorney, but it is a public notice to the public at large that they should not deal with respondent No.1 herein/defendant No.1 M/s.Neptune Developers Pvt. Ltd. in any manner so far as the suit land is concerned.

10 The net result of the foregoing discussion makes it

clear that the petitioner/original plaintiff is neither having *prima facie* case nor balance of convenience is in his favour. It is also pointed out to the Court that two daughters of defendant No.2 Atmaram Kathod Patil, who are co-sharers in the joint family properties are not made as parties to the suit. If ultimately, the petitioner/original plaintiff succeeds in the suit, he becomes entitled for his share determined by the Court in the suit properties. He can very well be compensated in terms of money if ultimately the suit is decreed in his favour.

11 In this view of the matter, it cannot be said that the learned appellate Court exercised its jurisdiction erroneously. This Court is unable to hold that the impugned Order is either illegal or irrational. No procedural improprieties can be found in the impugned Order and, as such, I proceed to pass the following Order :

ORDER

The Writ Petition is dismissed.

Needless to state that all these observations are *prima facie* in nature and shall have no bearing on disposal of the suit on its own merit.

(A.M.BADAR, J.)