

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.406 OF 2019
WITH
CIVIL APPLICATION NO.478 OF 2019
IN
APPEAL FROM ORDER NO.406 OF 2019

Smt. Ratnaben Premji Gala ...Appellant
vs.
Subhash Pandit Kothmire And Ors. ...Respondents

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Mr. Girish S. Godbole, Senior Advocate, a/w. Mr. Mayur Khandeparkar, Ms. Leena Shah and Mr. Dipen Furia, i/b. Shah and Furia Associates, for the Appellant.

Mr. Mayur D. Sapkale, for Respondent Nos. 1 to 3.

Mr. Akash A. Singh, i/b. Mr. Ashok M. Saraogi, for Respondent No.4.

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CORAM : S.C. GUPTE, J.

DATED : 16 SEPTEMBER 2019

P.C. :

Heard learned Counsel for the parties.

2. This appeal from order challenges an order passed by the City Civil & Sessions Court, Borivali Division, Dindoshi. The appeal is admitted and taken up for hearing forthwith by consent of Counsel.

3. The impugned order has been passed on a notice of motion

taken out by Respondent Nos. 1 to 3 herein (original plaintiffs). The plaintiffs' suit is for a declaration of invalidity of a deed of conveyance purportedly executed by defendant no.2, late Kamlabai Pandit Kothmire, late Shantabai Pandit Kothmire, who are, respectively, mother and step-mother of plaintiff no.1, as also plaintiff no.1 himself in favour of defendant no.1. The notice of motion seeks an interim injunction restraining the defendants from creating any third party interest by way of sale, mortgage or lease in respect of the suit property.

4. The suit property was originally owned by one Pandit Appaji Kothmire, who expired on or about 17 March 2001. Late Kamlabai Kothmire and late Shantabai Kothmire, the vendors of the suit property and the mother and step-mother, respectively, of plaintiff no.1, survived Pandit Appaji Kothmire. Shantabai, who was the second wife of Pandit Kothmire, died on or about 5 January 2003. She had no issue. Kamlabai, the first wife of Pandit Kothmire, died on or about 15 August 2014, and is survived by plaintiff no.1 herein (her son), defendant no.2 (the other son) and two daughters, one Ranjana (defendant no.3) and one Mangala (defendant no.4) and the successors of one Aruna, the third daughter of Pandit Kothmire and Kamlabai. These successors are, respectively, plaintiff nos. 2 and 3 and defendant nos. 5 and 6. The suit has been dismissed as against defendant nos. 3 to 6 for want of service of writ of summons; it survives today merely as between the plaintiffs, on the one hand, and defendant nos. 1 and 2, on the other. Defendant no.1, who is the Appellant herein, is the purchaser of the suit property, whereas plaintiff no.1 and defendant no.2 are the vendors of the suit property along with late Kamlabai and Shantabai. As noted above, the

controversy in the suit concerns the validity of the conveyance executed by plaintiff no.1, defendant no.2, and late Kamlabai and late Shantabai in favour of defendant no.1.

5. The conveyance is a registered conveyance. Plaintiff no.1 being a party to the conveyance, there is *prima facie* no case to urge on his part for any protective relief in respect of the suit property. The only case, which deserves to be considered, is really the one urged by plaintiff nos. 2 and 3, who are legal heirs of deceased Aruna, who claim 1/6th share in the suit property as on the date of its conveyance in favour of defendant no.1.

6. There is, indeed, no way the share of deceased Aruna could have been dealt with by the vendors of the suit property, namely, the two wives of Pandit Kothmire (since deceased) and two sons of Pandit Kothmire. There is, therefore, a case, but only to that extent, for restraining defendant no.1 from creating third party interest in the suit property till the decision of the suit. The injunction granted by the trial court in the matter of creation of third party interest in the whole of the suit property cannot be justified. The trial court rightly observed that Aruna was not a party to the deed of conveyance; she admittedly had a share in the property, which was represented at the relevant time by plaintiff nos. 2 and 3. What is, however, missed by the trial court is the fact that there was no *prima facie* case as regards the shares of vendors themselves in the suit property; after execution of the suit conveyance in favour of defendant no.1, the defendant was in actual possession and control of the suit property; she was collecting rent and paying assessment and other taxes from time to time. Whilst the defendant was

so in possession of the suit property and collecting rent and meeting outgoings of the property, the Municipal Corporation of Greater Mumbai (MCGM) had issued a notice under Section 354 of the Mumbai Municipal Corporation Act. In pursuance of that notice, the building was vacated. Defendant No.1, thereafter, applied for a construction permission. On 26 May 2017 and 9 February 2017, IOD and commencement certificate were, respectively, issued for such construction. Between February 2018 and August 2019, the construction was completed by defendant no.1 and even occupation certificate was received. On these facts, a blanket injunction in respect of creation of third party rights over the whole of the suit property certainly could not have been granted by the trial court.

7. Interim protection, as noted above, is mainly needed for the legal heirs of deceased Aruna, plaintiff nos. 2 and 3 amongst them being the claimants before this Court. They could at the most represent 1/6th share of deceased Aruna in the suit property, and the only question that really fell for consideration was, what should be the 1/6th share of Aruna. From the list of unsold flats handed over by defendant no.2 (the Appellant herein) to the Court, it is seen that there are two flats (Flat No. C-301 and C-303, which, respectively, admeasure 292.35 sq.ft. and 408.66 sq.ft.), whose market value, which together can be said to be of about Rs.68 lakhs, may be adequate as a security towards the share of deceased Aruna, which the vendors of the suit property could not have divested in favour of defendant no.1. Learned Counsel representing the plaintiffs (the Respondents to the present appeal) submits that the value of 1/6th share of deceased Aruna in the whole of

the suit property would go well over the value of the two flats referred to above. That is not correct. The share of deceased Aruna in the suit property has to be assessed as the share of the original vendors in the suit property as on the date of the registered conveyance. The suit property today is developed by defendant no.1. Defendant No.1 has constructed a building having about 76 flats, 47 of which have been allotted to the existing tenants, including both commercial and residential tenants, of the original building. The legal heirs of deceased Aruna have played no part in either this construction or re-housing of tenants. The value of the existing suit property, in other words, has come about as a result of its development by defendant no.1. The legal heirs of deceased Aruna cannot claim 1/6th share in this developed property, which includes not just the original vendors' share but the developer's share as well. The legal heirs of Aruna have no right to the developer's share. Having regard to all the facts and circumstances of the case, this Court is of the view that the interests of the legal heirs of deceased Aruna would be adequately protected if defendant no.1 is asked not to create any third party rights in respect of these two flats, namely, Flat Nos. C-301 and C-303.

8. Accordingly, the impugned order of the trial court is quashed and set aside and substituted by the following order :-

(i) Pending the hearing and final disposal of Special Civil Suit No.1710 of 2015, defendant no.1 is restrained from creating any third party interest in Flat Nos. C-301 and C-303 in the new building constructed in the suit property.

(ii) In case defendant no.1 herself, or through her immediate family member/s, occupies any of these two flats for her own use, she will have to furnish a suitable undertaking of herself and her immediate family member/s, who propose/s to occupy the flat/s, to the Court before commencing occupation or use of the flat/s. A prior intimation of such occupation or use must be furnished to the plaintiffs along with a copy of the undertaking/s to be furnished to the Court in accordance with this order. This order shall apply not only against defendant no.1 herself but her legal heirs and successors during the pendency of the suit.

(iii) All rights and contentions of the parties on merits, including the contentions of defendant no.1 on the bar of limitation vis-a-vis the reliefs claimed by the legal heirs of deceased Aruna in respect of the suit property, shall be kept open, to be agitated before the trial court.

(iv) It is also clarified that since, having regard to the provisions of Maharashtra Ownership Flats Act, defendant no.1 will have to convey the suit property to a co-operative society or other organisation of purchasers/occupants of the new building, she will have the liberty to do so, but as regards Flat Nos. C-301 and C-303, it will be defendant no.1, who shall be a member of such society or organisation, as the case may be.

(v) Notice of Motion No.3241 of 2017 in Short Cause Suit No.1710 of 2015 is disposed of in the above terms.

9. The Appeal from order is disposed of in the above terms. In view of its disposal, the civil application does not survive and is disposed of.

10. No order as to costs.

(S.C. GUPTE, J.)

Smita
Gonsalves

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