

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 19 OF 2021.

WITH

CIVIL APPLICATION NO. 42 OF 2021

THOMAS GAMA AND 9 ORS ...Appellants.

VS

PASCOAL ROSARIO PIMENTA ...Respondent.

Mr. S. Gaonkar, Advocate for the appellants.

Mr. A. Bhobe, Advocate for the respondent.

CORAM: A. K. MENON, J.

DATE: 21st March, 2022.

ORAL ORDER

1. I have today rejected the Appeal from Order for reasons set out hereinafter. The challenge to the impugned order is on the basis that the plaintiff had failed to make out a strong prima facie case in order to seek an interim injunction restraining the appellants from continuing the construction work , let alone occupying the same and

from changing the nature of the suit premises.

2. Briefly put the facts leading to the filing of the appeal are as under:-

The respondent herein /original plaintiff has filed Special Civil Suit No.8/2020/A before the Senior Civil Judge, at Vasco Da Gama against the appellant no.1(original defendant no.1) and other appellants(original defendant nos.2 to 10) who are claiming to be purchasers of premises sold to them by the appellant no.1. These premises are said to be put up on a plot bearing survey no.73/2 of village Cortalim Goa admeasuring 1775 sq. mts. The plaintiff has filed the suit seeking inter alia a declaration to the effect that a Deed of Sale dated 1.3.2019 "Sale Deed" is void ab initio and is required to be cancelled. It is the case of the plaintiff that he was co-owner of the properties along with his brother having inherited the same

from his late father Jose Pimenta. Upon the demise of his brother, the widow Leena and her children and their spouses have acquired rights in the properties. The plaintiff had granted a Power of Attorney dated 16.4.2012 in favour of the defendant no.1/Appellant no.1 herein for the purpose of getting mutation carried out in respect of the various properties allotted to him under a Deed of Partition and Family Settlement Deed dated 1.10.1993.

3. The plaintiff's case is that the suit property was fraudulently subjected to the Sale Deed by the appellant no.1 misusing a Power of Attorney granted to him.. The plaintiff claims that he noted certain construction activities being carried out on the suit property only in the year 2020 and upon making inquiries, he was shocked to learn that defendant nos. 2 to 10(Appellants nos. 2 to 10 herein) claimed to have purchased the suit property vide Sale Deed dated 1.3.2019.

These appellants nos. 2 to 10 claim as bonafide purchasers through defendant no.1. Those appellants are hereinafter referred to as the 'Purchasers' and they claim to be protected by virtue of Section 41 of the Transfer of Property Act. The plaintiff, therefore, sought an injunction which came to be granted by the impugned order.

4. Mr. Gaonkar, learned Counsel on behalf of the appellants has today assailed the order on the basis that his client (appellant no.1) has acted on the strength of the Power of Attorney. It is an undisputed fact that the Power of Attorney specifically permits the appellant no.1 to deal with the suit property including by way of sale. He submitted that Power of Attorney is irrevocable and in its recitals, he invited my attention to the fact that the grantor, the original plaintiff has described the suit property as "my property" hence there was no question of co-ownership. Survey no. 73/2 forms a specific

part of the property described therein and clause (4) entitles the attorney to sell the property. This includes power under clause 8 to divide sub divide or to develop the property into plots and sub plots and for such purpose to obtain NOC from appropriate authorities.

The execution of the Power of Attorney being admitted, Mr. Gaonkar, submitted that there is no occasion to challenge the exercise of powers granted. He submits that the Power of Attorney has been belatedly terminated for extraneous reasons and although there was no occasion to do so.

5. Mr. Gaonkar, submits that the appellant no.1 has acted within the scope of the power granted to him and there is no occasion to question the exercise of those powers. He submits that third party rights have been created in favour of the original defendant nos. 2 to 10 and their rights cannot be now prejudiced. Mr. Gaonkar has

further submitted that the learned Judge has erred in passing the order without considering the essential requirement of the prima facie case before considering the balance of convenience or irreparable injury.

6. He relied upon the decision of *Venkataraja and others Vs Vidyane Doureradjaperumal, (2014) 14 SCC 502, Suhrid Singh alias Sardool Singh Vs Randhir Singh and others, (2010) 12 SCC 112 and Shiv Kumar Chadha Vs Municipal Corporation of Delhi, (1993) 3 SCC 161*, in support of his contentions and submitted that the order is harsh. It not only restrains the continuation of the construction but also restrains persons from occupying the same and although it is evident that appellant no.1 had the power to sell the properties and create third party rights. He has assailed the decision also on the basis that the plaint itself is defective. The suit is not maintainable since

Section 34 of the Specific Relief Act requires the plaintiff to also claim possession since it is the case of the appellants that he was now in possession of the property pursuant to the power granted. According to Mr. Gaonkar, merely seeking a declaration that the Sale Deed is required to be cancelled and seeking a mandatory injunction directing demolition of the construction is of no avail.

7. Relying upon the aforesaid decisions Mr. Gaonkar, canvassed the point that the trial court could not have found in favour of the plaintiff who had not made out a prima facie case. Absent of a prima facie case there was no occasion for the learned Judge to hold against the appellants. Mr. Gaonkar, has invited my attention to the specific terms of the Power of Attorney in support of his contention that prima facie case could not have been made out by the plaintiff and that the fact reveals that the appellants would be aggrieved parties

especially since specific power existed to deal with the property and that power was exercised during the subsistence of power granted. Bonafide rights have been created in favour of the third parties which the plaintiff is now seeking to question without any proper explanation. He submits that if maintainability of the suit itself is in question, there was no occasion to grant any relief much less that very wide injunction that has now being granted. He therefore seeks that this Court interferes and sets aside the impugned order.

8. Mr. Gaonkar had in the meanwhile submitted that the co-owners were deliberately not made parties to the suit although it was incumbent upon the plaintiff to implead the co-owners especially since it is part of his defence that certain amounts have been paid to the co-owners as well.

9. In opposition, Mr. Bhobe, learned Counsel for the

respondent/plaintiff has refuted the appellants' contentions. He submits that the plaintiff was all-time co-owner of the properties. It was originally held by his father. Later by his brother and his wife as co-owners. After the plaintiff brother died, his wife and sons were co-owners and were in possession of the properties. Mr. Bhobe, submitted that under a Deed of Partition and Family Settlement several other properties also devolved upon the plaintiff and other co-owners, and in view thereof, it became necessary for the plaintiff to appoint the appellant to carry out mutation. It is only for this reason that the Power of Attorney was granted. The appellant no.1 has obviously misused Power of Attorney and committed a huge fraud which the plaintiff came to learn of and immediately filed the suit. Mr. Bhobe, invited my attention to the averments in the plaint and in particular paragraphs 9 to 14 and sought to justify the

injunction.

10. As far as the preliminary objection to the maintainability of the suit is concerned, Mr Bhobe, made a reference to the prayer clause(b) in the plaint which seeks mandatory injunction against appellants nos. 2 to 10 to demolish the construction undertaken by them and to reinstate the property to its original condition. He submits that even otherwise absence of prayer for possession as on date cannot affect the power of the Court to grant urgent interim relief and that the plaint could always be amended since he was well within the period of limitation to so apply.

11. Mr. Bhobe, therefore contended that the appellant had misused the trust reposed in him, made false statements on oath not only before the trial Court in the reply/written statement but also in the present appeal. He has invited my attention to the fact that the

appellants claim to have paid a sum of Rs. 75,0,000/- to the plaintiff which is an absolutely incorrect statement. No amount whatsoever has been paid. On the contrary, the appellant no.1 has collected Rs.30,90,000/- from the appellants nos. 2 to 10, out of which he claims 90,000/- as his commission and out of the remaining Rs.30,00,000/-, the appellant no.1 claims that he has paid Rs.15,00,000/- to the widow of the plaintiff's brother and to other co-owners- one Alina. He submits that these are all factually incorrect statements sought to be made only to avoid the consequences of the fraud that he had purported.

12. Mr. Bhobe also invited my attention to the fact that the sale deed deliberately misdescribed the property and faced with this, in the Written statement and the pleadings attempts are made to say that the description was an inadvertent error reference being had to

paragraphs 12 of the written statement. The Purchasers have supported the appellant no.1 and they have also contended that they have acquired right as the innocent persons. It is in this background that the appeal has been urged before me today.

13. I have heard the learned Counsel for the parties at some length and having perused the record with their assistance, I am of the view that no case is made out for interference with the impugned order.

14. To deal with the preliminary objection on the maintainability, I find that proviso to Section 34 of the Specific Relief Act requires a Court not to make a declaration if the plaintiff being able to seek further relief does not do so. In the facts of the present case, Mr. Gaonkar, has canvassed the point that the appellant no.1 claims to be in possession and the suit is not competent since it does not seek relief of recovery of possession and hence exercise of the Court's

discretion as contemplated in Section 34, in absence of claim for possession granting an injunction is bad and hence the order impugned is not sustainable.

15. In my view, it is always open for the plaintiff to seek an amendment provided the proposed amendment is not barred by limitation. It is also relevant that under Order 2 Rule 2 of the CPC the plaintiff is required to sue for the whole of the relief sought. However, in the instant case, a prima facie case of fraud has been made by misrepresenting the facts and suppressing the true facts is evident from the facts at hand and in my view, the proviso to Section 34 need not have deterred the Court from granting the injunction since the bar is to granting a declaration without the entire set of reliefs being claimed. That stage will arise only at the hearing of the suit. The impugned order grants a temporary injunction. The stage

for considering maintainability has not passed. In my view, the plaintiff had made out a strong prima facie case considering the misrepresentation of facts including having apparently misled the purchasers into believing the appellant no.1's version while dealing with the property.

16. In *Venkataraja and others* (supra), that suit sought declarations with consequential reliefs and Court found that suit for declaration of the title without consequential relief of possession was not maintainable. The plaintiffs in *Venkataraja and others* (supra) had not amended the suit despite the objection taken by the respondents. Read with Order 2 Rule 2 requiring the suit to include whole of the claim, the Court found that plaintiff had failed to make necessary amendment was not entitled to declaration. Facts, in that case, are clearly distinguishable. In the present case, we are only

concerned with the interim order of injunction which was required to be passed given the prima facie case made out that injunction cannot be dislodged by reference to the decision in *Venkataraja and others* (supra) which is of no assistance to the appellants in the facts of this case.

17. In *Suhrid Singh alias Sardool Singh* (supra) the executant wanted a deed to be annulled and therefore was required to seek cancellation. *Suhrid Singh* (supra) holds that if non-executant seeks relief that the deed was not valid non-executant can also seek possession in addition but that case dealt with the issue of Court fees payable on the reliefs. Interestingly what *Suhrid Singh* (supra) observes is that if executant seeks an annulment he has to seek cancellation. The issue that fell for consideration in that case is one of differential court fees. In the facts at hand however, the plaintiff is

in fact the executant of the Power of Attorney and it could be argued that the plaintiff was only required to seek a declaration for cancellation. That, however, is an aspect that can be considered at a later stage. At the present interim stage *Suhrid Singh* (supra) offers no assistance to the appellants.

18. The other decision cited by Mr. Gaonkar, in the case of *Shiv Kumar Chadha* (supra) which emphasizes the need for a strong prima facie case as opposed to a balance of convenience. In the facts at hand, the plaintiff in my view has indeed made out a prima facie case. I also find the balance of convenience favours the plaintiff who would suffer irreparable injury had the injunction not been granted.

19. I have also perused the impugned order which has narrated the relevant factual aspects. It has considered the fact that the first requirement for the grant of temporary injunction was a prima facie

case and the Court has found after considering the documents and the pleadings that the sale deed is clearly referring to the suit property described as being exclusively owned by the plaintiff. However, deed of partition and family settlement deed did disclose that the property was co-owned and that cast serious doubt on the exercise of Power by the Attorney in executing the sale deeds. The trial Court has considered the powers granted and observed that the defendants had failed to explain that there was a discrepancy in the description of the suit property. Furthermore, it was the duty of the Purchasers to verify the details of the suit property. Although Mr. Gaonkar, during his contention submitted that the appellant nos. 2 to 10 were lay persons unaware of the law and legal niceties and that the partial misdescription apart the boundaries were correctly showing. . I am afraid that is no reason to interfere with the

impugned order. The trial court has considered all the relevant factual aspects and found prima facie that defendants were acting in connivance to acquire right in the suit property. Furthermore it is found that there was nothing on record to show that construction was legitimate and carried out after obtaining licences and statutory permissions. The construction was thus prima facie found to be illegal and even today it is not the case of the appellants that the construction was carried out after obtaining necessary statutory approvals. There is also no occupancy certificate in respect of other structures which has already been constructed and it is not the possible to permit the parties to occupy the same even assuming a partial challenge to the impugned order restraining the defendants from occupying the premises. The impugned order need not be upset since it is an admitted position that there is no occupancy certificate.

There is not even an attempt on the part of the Purchasers who have supported the appellant no.1 to establish the legitimacy of the construction. In these circumstances, I find no reason to interfere with the impugned order. As a result, the appeal fails and I pass the following order:

- i. The appeal is dismissed.
- ii. Pending applications in the appeal, if any, stand disposed of.
- iii. No costs.

A. K. MENON, J.