

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.102 OF 2022
WITH
INTERIM APPLICATION NO.976 OF 2022

M/s.Sungold Developers .. Appellant

Versus

Ganesh Pannalal Oswal .. Respondent

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Mr.Nitin Gaware Patil with Mr.Vinod P. Sangvikar and Ms.Shweta Tripathi for the Appellant.

Mr.Mahesh Vishwakarma with Ms.Anagha Tandel i/b Chavhan & Associates for the Respondent.

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CORAM: BHARATI DANGRE, J.

DATED : 08th APRIL, 2022

P.C:-

1. The appeal is filed against an order granting injunction in favour of the respondent, who has instituted a Special Civil Suit No.4 of 2019 before the Civil Judge, Senior Division, Pune in which the present appellant is impleaded as defendant No.1.

The suit property was described as plot Nos.5+6+7+14, admeasuring 1115.24 sq.mtrs. out of land survey No.34/3A i.e. total area 68 R situated at village Yewalewadi, Taluka Haveli, District Pune with the boundaries set out in the plaint.

The plaintiff (respondent herein) claimed to be the purchaser of the suit property vide sale deed dated 10/01/2018, which has been placed on record at Exh.E, for a valuable consideration of Rs.47,50,000/-. The vendors of the plaintiff are one Ramchandra Unecha and Champalal Dandi, who in the sale deed made a disclosure of the fact, that the suit property is encroached and the property is sold, subject to the said encroachment, the responsibility to clear the same, was fastened on the purchaser. Since the land was encroached, the sale deed contemplated a symbolic possession by marking the boundaries on the spot.

Pertinent to note that the plaintiff purchased the suit property alongwith the encroachment and on the basis of 'as is where is basis'.

2. In the year 2019, he filed a suit against the respondent (appellant herein) and by relying upon the sale deed in his favour, the plaintiff pleaded that defendant No.1 has carried out a construction in the suit property, by encroaching thereupon and he prayed for removal of encroachment and sought a declaration to the effect that the plaintiff is entitled for peaceful possession of the suit property. A declaration was also sought, that the defendant be restrained, as the plaintiff is in possession of the suit property and by appointment of a Court Commissioner, in the presence of the DSLR, the land should be measured.

It is in this suit, the application for injunction came to be filed, which is granted.

3. As far as the appellant before me is concerned, his specific case is that as a developer, the appellant purchased the property in Survey No.34/3A vide three distinct sale deeds in the year 2013, from three distinct vendors and this covered the property bearing 17.2 R, 26 R and 14 R by executing registered sale deeds. The sale deeds are placed on record, which reflect that the property is described as the area situated in 34/3A with the respective boundaries, being mentioned. Pertinent to note that the developer issued a notice on 04/06/2013 informing the public at large about the suit property being purchased by him through the registered sale deeds. No objection was ever raised upon publication

The appellant submits that on 18/05/2015, the commencement certificate was issued in his favour and the project commenced and even the land of 17 R, which was required to be handed over to the Pune Municipal Corporation was made over on 12/02/2018.

4. The relief sought in the suit as well as in Exh.5 was opposed by the appellant by pleading that the description of the property of the plaintiff is vague and the properties are purchased by the plaintiff, on being misled by his earlier vendor, since the sale deed specifically refers to the encroachment, but for the first time in the pleadings in the suit, it is pleaded that encroachment means construction undertaken by defendant No.1.

5. In absence of identification of the suit property by the plaintiff, defendant No.1 i.e. the present appellant, specifically pleaded that necessary permission are obtained from the Planing Authority before the construction was commenced and the construction is complete to the extent of 75% and after obtaining the necessary permission of NA from the concerned Collector and even the area of 1717.61 sq.mtr. is transferred in favour of the Pune Municipal Corporation.

Pleading that unless and until the plaintiff is able to establish his suit property in the larger Survey No.34/3A, the injunction could not be granted is the submission.

The learned Judge decided the said application and made specific reference to the sale deeds of the plaintiff as well as the sale deeds in favour of defendant No.1, where the properties were specifically carved out. He also made reference to the measurement of the suit land carried out in the year 2013, based on which the permission for construction was granted in favour of defendant No.1 by the Planning Authority i.e. Pune Municipal Corporation.

In the backdrop of these facts, when the question arose whether the plaintiff has established *prima facie* case and whether the balance of convenience lies in favour of the plaintiff, the learned Judge, by referring to the documents filed by the defendants, including the mutation entries, 7/12 extract as well as various sale deeds and the NA permission, failed to take cognizance of the same by recording that at this stage, the mini trial is prohibited and he would merely look into *prima facie* case, balance of convenience and irreparable loss.

By referring to the various authoritative pronouncements, the learned Judge concluded his finding in para 40 as under :-

“40. Now, I am turning towards Sale Deed executed by Ramchandra Hemraj Unecha and Champalal Chaganlal Dangi in favour of the plaintiff on 10.01.2018. It bears description of the property as mentioned in the plaint i.e. plot no. 5+6+7+14 having area of 12000 sq. ft along with the boundaries as mentioned in the plaint. Ramchandra Hemraj Unecha had purchased the land i.e. plot no. 5+6+7 having area of 9000 sq. ft. along with boundaries, At East Yewalewadi road, At South - Plot no. 4, At North - Plot no. 8 and At West-road.”

6. The sale deeds produced by the defendants alongwith other documents like, part completion certificate reflecting that the construction of ‘A’ and ‘B’ wings of the defendants is complete, the learned Judge thought it appropriate to stop, further construction in order to avoid complications to the both the parties.

By recording his reasoning to the above effect, he allowed Exh.5 by restraining the defendants from carrying out construction on the suit property (as mentioned in plaint para no.1) till disposal of the suit. The defendants are also restrained from creating third party interest in the suit property.

7. It is a trite position of law that while considering the application for grant of injunction, the Court should be persuaded to believe a prima facie case and balance of

convenience in favour of a party and that the plaintiff will suffer irreparable loss, if the injunction sought for is not granted.

Applying the aforesaid parameters to the case in hand, as far as the prima facie case is concerned, the plaintiff who is unable to demonstrate the exact location of the suit property, which is described as plot Nos.5+6+7+14, in a larger plot bearing survey No.34/3A and, particularly, when his vendors had made clear that it is encroached, on what basis the plaintiff established that the property is covered under the construction, being undertaken by defendant No.1, is not at all adverted to. If the plaintiff was able to establish through his sale deeds, that there is overlapping of the property of the plaintiff with that of the defendants, it would have been said that he has made prima facie case.

However when the sale deeds of the plaintiff are vague and, particularly, when the boundaries of his property do not match with the property mentioned in the four sale deeds of the defendants, it cannot be said that defendant No.1 is occupying or has encroached upon the very same property.

Even today, when I specifically asked the learned counsel for the respondent/plaintiff as to whether he can distinctly carve out the suit property in Survey No.34/3A, his answer is in the negative.

In such contingency, since the plaintiff is not able to establish his property as distinct from the suit property, which is purchased by defendant No.1, in my considered opinion, the plaintiff did not have prima facie case. As far as the two facets i.e. balance of convenience and irreparable loss is concerned,

the learned Judge ought to have considered that defendant No.1, who is a developer, has purchased almost 69 to 70 R land from Survey No.34/3A in the year 2013 itself. After obtaining the necessary permission, he started the construction work and he specifically pleaded before the trial Court that work is 75% complete. In these circumstances, balance of convenience, lies in favour of defendant No.1, so also the factor of irreparable loss. Defendant No.1, who is a developer, has obtained necessary permission from RERA, his deadlines are determined and by order of injunction, he is restrained from creating third party interest in the suit property. This is, particularly, in absentia of the plaintiff establishing which part of Survey No.34/3A include plot Nos.5+6+7+14 admeasuring 12000 sq.ft. If he is able to demonstrate the same, then, in only that contingency, the injunction restricting it to the suit property, could have been granted. Since, the plaintiff has failed to prove the specific identification of this 12000 sq.ft. which he has purchased through the sale deed in the year 2018, the learned Judge is in gross error in granting the injunction in his favour, ignoring the three parameters which ought to have guided him while deciding the application for grant of injunction.

In any contingency, it is open for the plaintiff to apply for appointment of Court Commissioner or get his land measured and then it is open for him to take out appropriate application before the Court so that he can restrain the defendants from creating third party interest or occupation certificate, if obtained.

In the wake of the above, appeal is allowed. The impugned order is quashed and set aside.

Needless to that that if an application is made by the plaintiff for demarcation of the suit property, it shall be decided on it's own merits.

(SMT. BHARATI DANGRE, J.)