

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.160 OF 2023
WITH
INTERIM APPLICATION NO.2078 OF 2023**

Santosh Yashwant Bhandari & Ors. ... Appellants
versus
Vishnu Halya Bhandari and Ors. ... Respondents

Mr. Shriram Kulkarni i/by Ms. Pranjali Khatavkar for Appellants.
Mr. Rashid Khan i/by Ms. Vinali Bhaidkar for Respondent Nos.18 and 19.

CORAM: N.J.JAMADAR, J.

DATE : 19 APRIL 2023

P.C.

1. Heard the learned Counsel for the parties.
2. This Appeal is directed against an order dated 23 November 2022 passed by the learned Judge, City Civil Court, in Notice of Motion No.1676 of 2020 in S.C.Suit No.651 of 2009 whereby the Notice of Motion taken out by the Appellants-Plaintiffs to restrain Defendant No.19 from carrying out development at Survey No.40, Hissa No.4A, CTS No.719 admeasuring 10.II gunthas of Village Kandivali, Mumbai (the suit property) came to be dismissed.
3. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.
4. Plaintiff Nos.1 and 2 are the sons and Plaintiff No.3 is the daughter of Yashwant Gopal Bhandari – Defendant No.16. The Plaintiffs claim that late Poshya

Bhandari and Undir @ Udoor Langdya Bhandari were the original holders of the suit property. The Plaintiffs represent Poshya Bhandari branch. They are the coparcenars along with Defendant No.1 to Defendant No.17, particularly Defendant No.16 – Yashwant Gopal Bhandari – their father. The Plaintiffs claim to have $\frac{1}{4}$ share each along with Defendant No.16 in the share which devolves upon Defendant No.16. The suit property has not been partitioned by meets and bounds.

5. Defendant Nos.1 to 17 executed a registered Conveyance dated 24 September 2008 in favour of Defendant No.18 behind the back of the Plaintiffs and without payment of consideration proportionate to the share of the Plaintiffs. Thus, notices were addressed to Defendant Nos.1 to 17 and Defendant No.18 calling upon the Defendants to pay the consideration to which the Plaintiffs are entitled to. Defendant No.18 unjustifiably denied the liability to pay the consideration. Hence, the Plaintiffs were constrained to institute a Suit for partition of the suit property and to restrain Defendant No.18 from taking forcible possession of the suit land from the Plaintiffs and also carrying out any development in or over the suit land or creating third party rights therein.

6. In the said Suit, the Plaintiffs took out a Notice of Motion being No.1554 of 2009 seeking interim reliefs. By an order dated 25 August 2009, the Court declined to grant ad-interim reliefs. Defendant No.18 executed Conveyance in favour of Defendant No.19 on 30 October 2014. Thereupon, Defendant No.19 came to be

impleaded as a party Defendant to the Suit. Alleging that Defendant No.19 has been carrying out development in the suit property to the prejudice of the rights of the Plaintiffs, the Plaintiffs took out the instant Notice of Motion seeking interim reliefs.

7. The Notice of Motion was resisted by Defendant No.19. Tenability of the Suit at the instance of the Plaintiffs was put in contest, as Defendant No.16, father of the Plaintiffs, had executed a Conveyance for a valuable consideration in favour of Defendant No.18, predecessor in title of the Defendant No.19. As there has been a substantial development in the suit property with due permission of the concerned planning authority, Defendant No.19 contended, grant of injunction, at this stage, would cause an irreparable loss to Defendant No.19.

8. By the impugned order, the learned Judge, City Civil Court, was persuaded to reject the application after adverting to the time lag between the institution of the suit and the Notice of Motion seeking interim reliefs. The fact that the Plaintiffs did not seek to restrain Defendant No.19 immediately after the Defendant No.19 acquired ownership over the suit property, pursuant to the Conveyance executed on 13 October 2014 was arrayed against the Plaintiffs. It was held that grant of injunction, at this stage, when the suit property has been substantially developed would cause severe hardship to Defendant No.19.

9. Being aggrieved, the Plaintiffs are in appeal.

10. I have heard Mr. Kulkarni, learned Counsel for the Appellants and Mr.

Khan, learned Counsel for Defendant Nos.18 and 19. I have also perused the material on record.

11. Mr. Kulkarni endeavoured to impress upon the Court that the learned Judge, City Civil Court committed an error in non-suiting the Plaintiffs on the ground that their father – Defendant No.16 had executed a Conveyance in favour of Defendant No.18. It was urged that the Plaintiffs being the coparcenars have interest in the suit property, independent of the interest of Defendant No.16. The learned Judge did not keep in view the fundamental principles of Hindu Law. If the suit property is fully developed and third party rights are created, the claim of the Plaintiffs for partition would be rendered infructuous. Therefore, Defendant No.19 ought to have been restrained from carrying out further development in the suit property and creating third party rights therein, urged Mr. Kulkarni.

12. Mr. Khan joined the issue by canvassing a submission that the Plaintiffs have no semblance of right in the suit property during the lifetime of Defendant No.16, who was one of the vendors of Defendant No.18, the predecessor in title of Defendant No.19. Mr. Khan laid emphasis on the fact that the initial claim of the Plaintiffs was that they were entitled to receive consideration in their own right and the Plaintiffs did not seek to assail the conveyance in favour of Defendant No.18. The question as to whether the Plaintiffs have right and interest in the suit property as being the members of the Hindu Joint Family representing the branch of Poshya

Bhandari, is a matter for trial. Even if one proceeds on the premise that the Plaintiffs have some interest in the suit property, yet, initial stand of the Plaintiffs and the time lag, detract materially from the Plaintiffs' claim for injunctive reliefs.

13. Mr. Khan was justified in canvassing a submission that in the pre-suit notice dated 4 November 2008 addressed to the Defendant No.18, the Plaintiffs called upon Defendant No.18 to pay the consideration proportionate to the purported undivided interest of the Plaintiffs in the suit land. It seems that the Plaintiffs did not assail the alienation of the suit land as such. In any event, indisputably, the Court declined to grant ad-interim relief in the first Notice of Motion and, thereafter, the said Notice of Motion was not pursued till the filing of the instant Notice of Motion.

14. The developments in the intervening period bear upon the exercise of discretion. The suit property came to be conveyed by Defendant No.18 in favour of Defendant No.19 on 13 October 2014. The learned Judge, City Civil Court noted that the development had reached an advance stage and building was erected upto 15th floor. This would imply that the Defendant No.19, in the usual course, created third party rights in the suit property. In the circumstances, even if the Plaintiffs case is taken at par, the prima facie case, which the Plaintiffs, at best, had at the time of the institution of the suit, got eroded by the passage of time. The learned Judge, City Civil Court, was, thus, within his rights in construing the inaction against the Plaintiffs.

15. On the aspects of the balance of convenience and irreparable loss, in the light of the fact-situation, the learned Judge does not seem to have committed any error in the exercise of discretion. The learned Judge rightly noted that any restraint would cause an irreparable loss to the Defendant No.19. In a sense, the character of the suit property has been completely altered. In the circumstances, the balance of convenience tilts in favour of Defendant No.19. Any injunctive relief, at this stage, would also cause irreparable loss to the Defendant No.19.

16. For the foregoing reasons, I am dissuaded from interfering with the discretionary order passed by the trial court.

17. In response to the grievance of Mr. Kulkarni that in the absence of appropriate disclosure by Defendant No.19 as to how he had dealt with the units which are developed at the suit site, the Court would not be in a position to work out the equities even at the stage of final adjudication, the Defendant No.19 has filed an Affidavit of disclosure. The situation as regards the Project 73-East and 19-North being developed at the suit property is spelled out. This Affidavit of disclosure, filed on behalf of Defendant No.19, can be taken into account by the learned Judge, City Civil Court in balancing the equities between the parties in the event the Plaintiffs succeed.

18. Subject to the aforesaid clarification, the Appeal deserves to be dismissed.

19. Hence, the following order :

ORDER

- (i) The Appeal stands dismissed.
- (ii) In view of the dismissal of the Appeal, Interim Application does not survive and also stands dismissed.

(N.J.JAMADAR, J.)