IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

COMMERCIAL APPEAL FROM ORDER NO. 12 OF 2023

Prarthana Developers and Anr. ....Appellants

V/s.

Bhagwan Khandu Chavan and Ors. ...Respondents

ALONGWITH
INTERIM APPLICATION NO. 1506 OF 2023
IN
COMMERCIAL APPEAL FROM ORDER NO. 12 OF 2023

Prarthana Developers and Anr. ....Applicants

V/s.

Bhagwan Khandu Chavan and Ors. ...Respondents

Mr. Y.S. Jahagirdar, Senior Advocate a/w Mr. Jaydeep Deo for Appellants/ Applicants.
Ms. Madhavi Ayyappan i/b Talekar and Associates for Respondents.

CORAM : K.R. SHRIRAM &
RAJESH S. PATIL, JJ.
DATED : 2nd MAY 2023

P.C. :

1. This appeal is impugning an order dated 19th January 2023 passed by the Trial Court namely District Judge-2, Pune rejecting an application usually called Exhibit “5”. Exhibit “5” is an application under Order 39 Rule 1, 2 of the Code of Civil Procedure, 1908 (C.P.C.).

2. Since English translation of the agreement and plaint etc., have not been filed with the appeal memo, we have relied on the impugned order for the facts of the case.

3. Appellant claims to be a registered partnership firm and has filed a suit for specific performance against Respondent Nos. 1 to 15 and for certain declarations against Respondent No.16. We are informed that respondents had taken out an application under Order 7 Rule 11 of C.P.C. for rejection of the plaint on the ground that appellant was not a registered partnership firm. This application was rejected with an observation that the issue whether appellant is registered firm can be considered at the time of the trial.

4. It is appellant's case that there were certain properties in the joint names of Respondent Nos.1 to 15 and Respondent Nos. 1, 10 and 11 were basically managing/Kartas of the joint family. Appellant entered into a development agreement dated 3rd March 2003 with Power of Attorney in favour of partner of appellant with Respondent Nos.1, 10 and 11 and prior thereto had entered into an agreement for sale dated 18th June 2002 of certain plots of lands from Survey No. 415/1A/1 to 415/1A/10 (suit property). The consideration agreed was Rs.9,25,000/- along with three flats admeasuring 625 sq. ft. Parties agreed that an amount of Rs.8,10,000/- would be paid after sanction of building plan.

Certain rights and obligations of the respective parties are mentioned in the agreements.

5. It is appellant's case that sometime in 2017 it came to light that

Respondent Nos.1 to 15 have entered into an agreement with Respondent No.16 by which they have transferred all their rights with regard to the suit property to Respondent No.16. It is also appellant's case that sometime in February 2018 appellant and respondents met to see if the matter could be resolved. Admittedly, Respondent No.16 made certain offers to appellant which was not acceptable to appellant. Therefore, on or about 25th August 2021 the suit came to be filed for a decree of specific performance against Respondent Nos.1 to 15 of the Development Agreement dated 3rd March 2003 and the Agreement for Sale dated 18th June 2002. Appellant is also seeking declarations against Respondent No.16 that the agreement entered into between Respondent Nos. 1 to 15 on the one part and Respondent No.16 on the other be declared as null and void.

6. It is appellant's case that appellant has paid a sum of Rs.1,03,21,868/- from time to time. Appellant has put lot of efforts to bring about a family settlement, *inter se*, between Respondent Nos. 1 to 15. Appellant has also spent money to settle with certain tenants who were occupying the suit property. Appellant has also stated that appellant has taken all efforts and spent money to get certain plans to clear the area. Appellant is ready and willing to perform the agreements.

7. Respondents opposed and the impugned order dated 19th January 2023, after detail hearing, came to be passed.

8. We agree with the conclusions arrived at by the Trial Court. The Trial Court has rightly considered the parameters required to be considered for an application under Order 39 Rule 1/2, i.e., prima facie case, balance of convenience and irreparable loss and injury. In all these points the Trial Court has leaned in favour of respondents. One of the main point that the Trial Court has found against appellant is the delay in filing the suit and there is no explanation for the inordinate delay. In the suit it is avered that the cause of action arose in February 2019 but the suit itself came to be filed only on 24th August 2021.

9. The Trial Court has also observed that all the steps which appellant claims to have taken pursuant to the agreements with Respondent Nos. 1 to 15 are all prior to 2012. Mr. Jahagirdar submitted that payments were made to Respondent Nos. 1 to 15 even after 2012 and as late as in January 2018. Ms. Ayyappan disagreed with what Mr.Jahagirdar stated and points out that the statement annexed to the appeal memo either does not disclosed how the payments were made or states cash payments were made. Therefore, it cannot be accepted any payments were made.

10. Mr. Jahagirdar submitted that Respondent No.16 has in its reply to the Interim Application and written statement has submitted that it was aware about the earlier agreement between Appellant and Respondent Nos.1 to 15 and had also offered to pay Rs.50,00,000/- on 7th February 2018

to appellant. Ms. Ayyappan submitted and we agree with her that the reply/written statement has to be read in its entirety and not here and there as was read. In the paragraphs relied upon by Mr. Jahagirdar it is also stated by Respondent No.16 that though it was aware of the earlier agreements, these agreements were not be acted upon and were never relied upon and appellant has not done any activity relating to development of the property. On the payment of Rs.50,00,000/- it was supposed to be paid upon appellant executing a cancellation deed. In the reply/written statement it is also stated that the NOC dated 3rd August 2018 from Drainage Department and NOC dated 6th September 2018 from Fire Department were obtained by Respondent No.16. A proposal to PCMC for sanctioning of plans was submitted on 19th October 2018. From the written statement it also appears that appellant filed a complaint bearing Criminal Miscellaneous Application No. 1022/2018 before the JMFC and a complaint dated 1st November 2018 to the PCMC. But still the suit is filed only on 24th August 2021 almost three years later. In fact the trial court has observed that appellant became aware of transactions between Respondent Nos. 1 to 15 and Respondent No.16 as early as in January-February 2018 but filed the suit only on 24th August 2021. Appellant, therefore, was not diligent. In the written statement of Respondent No.16 it is stated that it had even issued a public notice dated 3rd May 2017 in daily newspaper Prabhat inviting objections before they executed the development agreement with Respondent Nos.1 to 15 and no objection was received. Respondent No.16, it is stated have even registered the project with RERA on 3rd May 2021 and project as per RERA authorities has to be completed by 25th December 2025 and some flats have also been sold.

11. The Trial Court has followed the guiding principles for granting interim injunction as settled by the Hon'ble Apex Court in ***Colgate Palmolive (India) Ltd. vs. Hindustan Lever Limited***[1].

12. We are not satisfied that appellant has made out a prima facie case. The balance of convenience also tilts in favour of respondents. If an injunction of the kind sought is granted grave prejudice will be caused not only to respondents, Respondent No.16 in particular who is not even a party to the agreements of which appellant is seeking specific performance but to the flat purchasers in the project registered with RERA.

13. Moreover the Hon'ble Apex Court in ***Wander Ltd. and Another vs. Antox India P. Ltd.***[2] in Paragraph No.14 has mentioned about the principle the approach an appeal court should take when the appeals are filed against the exercise of discretion by a single Judge. Paragraph No.14 reads as under :

> *The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own*

1 (1999) 7 SCC 1
2 1990 (Supp) SCC 727

discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph :

> *"... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton and Co. v. Jhanaton '....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."*

The appellate judgment does not seem to defer to this principle."

14. Having considered the impugned order, we are satisfied that the discretion has been exercised by the Trial Court reasonably and in a judicial manner. The Trial Court has exercised its discretion correctly. That has our approval. We cannot even state that we would have taken a different view.

15. In the circumstances, appeal dismissed with costs.

Appellant to pay a sum of Rs.50,000/- (Rupees Fifty Thousand Only) as cost to respondents by way of cheque drawn/payment made in favour of advocate for respondents and this amount shall be paid within two weeks from the date this order is uploaded. We make it clear that if the amount is not paid within time, the Trial Court may even consider dismissing the suit.

16. We hasten to add that the views expressed by us above are prima facie views to decide this appeal.

17. In view of the above, Interim Application No.1506 of 2023 also stands dismissed.

(RAJESH S. PATIL, J.) **(K.R. SHRIRAM, J.)**