

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 256 OF 2023
WITH
INTERIM APPLICATION NO.3501 OF 2023.**

M.S. ARHA Infra Space (LLP)
A Limited Liability Partnership Firm
Through its Partners
Raju Thakurdas Jaisinghani & Ors.

... Appellants / Orig.
Defendant No.34.

Versus

The Tharwani Construction Pvt. Ltd.
and Ors. 33

...Respondents

Mr. Vishwajeet S. Sawant, Sr. Advocate i/b. Mr. Jatin R. Shah for Appellant.

Mr. G. S. Godbole, Sr. Advocate i/b. Mr. Drupad S. Patil for Respondent Nos.1 & 2.

**CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 06 SEPTEMBER 2023.
PRONOUNCED ON : 14 SEPTEMBER 2023.**

JUDGMENT:

1. By this appeal, Appellants have challenged order dated 16 January 2023 passed by the Civil Judge Senior Division, Kalyan allowing application for temporary injunction filed by Plaintiffs / Respondent

Nos.1 and 2. The Trial Court has restrained the Appellants from creating third party interest in 2/3 undivided share of Defendant Nos.1 to 33 in land Survey No.3/3, 3/4 and 3/6 Mauje Barave Gaon and from carrying out in development activities in the suit property detrimental to the rights of the Plaintiffs till the decision of the suit.

2. Considering the narrow controversy involved in the present appeal, it is not necessary to narrate the entire facts. Suffice it to state that one Lakdu Kalu Mirkute claimed ownership in land bearing Survey Nos. 3/3, 3/4 and 3/6. On Lakdu's death, Narayan, Nana and Namdev became 1/3 owners in the suit property. A development agreement was executed in favour of the Appellant / Defendant No.34 by Narayan Mirkute and Defendant Nos.1 to 33 in respect of suit property. Admittedly Namdev Murkute is not party to the said development agreement. Thus, under the development agreement, rights in respect of only 2/3 shares of Narayan and Nana were sought to be granted in favour of the Appellants. Under the development agreement, the Appellants agreed to pay Rs.50,00,000/- as well as 50% of constructed portion in favour of Narayan and Defendant No.1 to 33. The power of attorney was also executed by Narayan and Defendant Nos.1 to 33 on 29 October 2013. Later, Assignment Deed dated 14 November 2018 was executed by Narayan and Defendant Nos.1 to 33 assigning their right to receive 50% of the constructed area in the suit property in favour of Plaintiffs / Tharwani Construction Pvt. Ltd.

3. Narayan and Defendant Nos.1 to 33 subsequently executed conveyance deed in favour of the Appellants in respect of land admeasuring 7946 sq. mtr. out of Survey No.3/6, which totally admeasures 14470 sq. mtr.

4. On 19 September 2020, Narayan and Defendant Nos.1 to 33 issued notice to the Plaintiff for cancellation and termination of Assignment Deed dated 14 November 2018. This became the cause of action for Plaintiffs to institute Special Civil Suit No.411 of 2022 in the Court of Civil Judge Senior Division, Kalyan *inter alia* seeking a declaration that the Assignment Deed dated 14 November 2018 executed in their favour is legal, valid and enforceable. In this suit, Plaintiffs sought temporary injunction against the Appellants from creating third party interests in the suit property, from dispossessing Plaintiffs and from carrying out any development of the suit property detrimental to the rights of the Plaintiffs.

5. By impugned order dated 16 March 2023, the Trial Court has proceeded to allow the application for temporary injunction filed by the Plaintiffs and has restrained the Appellants from creating third party rights in respect of entire suit property bearing Survey No.3/3, 3/4, and 3/6 and from carrying out any development activities in the suit property.

6. I have heard Mr. Sawant the learned senior advocate appearing for Appellants and Mr. Godbole learned senior advocate

appearing for Respondent Nos.1 and 2.

7. Under the development agreement, Narayan, Nana and Namdev were to be granted together 50% of the constructed area in respect of the construction to be carried out on the suit property. However Namdev was not party to the development agreement and therefore the agreement may not cover his 1/3 share. Thus, Narayan and Nana become entitled to 1/3 share each (total 2/3 share) of the 50% constructed area of the entire suit property bearing Survey No.3/2, 3/3 and 3/6. The Plaintiffs have purchased the said entitlement of Narayan and Nana (and their legal heirs) to receive 2/3 of 50% constructed area. Thus, the right of the Plaintiffs, if they ultimately succeed in the suit, is restricted to 2/3 of the 50% constructed area in respect of the entire suit property.

8. As of now, the Appellant has purchased only the area of 7946 sq. mtrs. and intends to carry out construction on the said property. Therefore, Plaintiffs can at the moment claim 2/3 of 50% of constructed area in respect of land admeasuring 7946 sq. mtrs. Since the Plaintiffs can claim limited right of 2/3 of 50% constructed area on the basis of Assignment Deed and Development Agreement, they cannot claim that the Appellants should not carry out any construction on the entire suit property. In my view, the Trial Court has not considered this aspect while passing the impugned order of temporary injunction.

9. Even if Plaintiffs ultimately succeeds in the suit, they cannot claim anything in excess of 2/3 of 50% constructed area. It would be therefore necessary to find out as what would be exact constructed area to which Plaintiffs would be entitled to in respect of land admeasuring 7946 sq. mtrs. in Survey No.3/6.

10. It is common ground that 1.00 FSI is admissible at the moment. Thus, for developing land admeasuring 4679 sq. mtrs. Appellants would be entitled to construct total built up area of 7964 sq. mtr., Which approximately comes to 85530 sq. feet. 50% of the said constructed area comes to 45765 sq. feet. Since the Appellants can claim only 2/3 of the said 50% constructed area, their entitlement would come to roughly about 28500 sq. feet. Thus, in respect of the land adm. 7946 sq. mtr. Where construction is undertaken by Appellants, entitlement of Plaintiffs would, at the highest, be in respect of area 28500 sq. ft. To secure this entitlement of Plaintiffs, entire development of the suit property need not be held up.

11. There is some degree of debate between Mr. Sawant and Mr. Godbole about area of road to be handed over to Kalyan-Dombivali Municipal Corporation. Mr. Sawant would contend that out of total area of 7946 sq. mtr. the area of 1932 sq. mtr. is required to be handed over to KDMC and therefore the said area is required to be deducted from the total area of 7946 sq. mtr. for computing Plaintiffs' entitlement. He has placed reliance on Clause 11 of the Development Agreement in support

of his contention that Narayan and Nana had specifically agreed not to claim any right over the additional FSI. Mr. Godbole, on the other hand, has contended that Appellants are not going to give up the land admeasuring 1932 sq. mtr. to KDMC free of costs. That the Appellants would in fact gain incentive FSI for handing over the land for construction of road to the Municipal Corporation. He would submit that such incentive FSI would be higher than permissible 1.00 FSI. That therefore Plaintiffs would be entitled to higher constructed area than 28500 sq. ft.

12. For the purpose of deciding entitlement of the Plaintiffs to temporary injunction, it is not necessary to undertake the exercise of determining the Appellant's entitlement on giving up land admeasuring 1932 sq. mtrs. for road. Therefore, I would momentarily proceed on a footing that the Appellants would be entitled to utilize 1.00 FSI for handing over the land admeasuring 1932 sq. mtrs. to the Municipal Corporation. I am not impressed by Mr. Sawant's submission that the Plaintiffs are not entitled to any constructed area in respect of area handed over to the Municipal Corporation for road. *Prima facie* Clause 11 of the Development Agreement applies to 'additional FSI' Furthermore whether FSI grantable in future after handing over land for road would be considered as 'additional FSI' or not would be a matter of debate while deciding the Suit finally. Therefore, I am not inclined to exclude any area while computing Plaintiffs' entitlement for deciding the issue of temporary injunction.

13. Mr. Godbole has sought to contend that Plaintiffs' entitlement to 2/3 of 50% constructed area is required to be computed on the entire area of Survey No.3/6 i.e. 14470 sq. mtrs. I fail to comprehend as to how Plaintiffs can claim any right in respect of land which is not even taken up for development. As and when the remaining portion of the suit land is taken up for development, Plaintiffs can seek appropriate protection in respect of that area as well. As of now, admitted position is that only 7946 sq. mtrs. is taken up for construction.

14. In my view, ends of justice would meet if Appellants are permitted to carry out construction on land admeasuring 7946 sq. mtrs. out of Survey No.3/6. They shall however keep constructed area admeasuring 28500 sq. feet only unencumbered in any manner.

15. The Appeal is accordingly disposed of by modifying the order dated 16 January 2023 passed by the Trial Court by permitting Appellants to carry out construction on land admeasuring 7946 sq. mtrs. out of land in Survey No.3/6. The Appellants shall however keep 28500 sq. feet constructed area in the building unencumbered by not handing over, mortgaging, creating lease or leave and license, etc. in respect thereof. The appeal is accordingly disposed of. There shall be no order as to costs.

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SANDEEP V. MARNE, J.