

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.208 OF 2023
WITH
INTERIM APPLICATION NO.2573 OF 2023
IN
APPEAL FROM ORDER NO.208 OF 2023

Ashok Kashinath Talware
V/S
Jayshree Jagdish The & Ors.

....Appellant/Applicant
....Respondents

...

Mr. Shekhar Jagtap a/w Ms. Sairuchita Chowdhary and Mr. Akash Pandey i/b M/s. J. Shekhar & Co. for the Appellant/Applicant.

Mr. Girish Godbole, Senior Advocate a/w Mr. Prathamesh Nirkhe i/b Mr. Amit Bharadwaj for Respondent Nos.1, 2 and 3.

Mr. S.M. Gorwadkar, Senior Advocate i/b Mr. Gurudas Gorwadkar for Respondent Nos.4 to 7.

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CORAM: SANDEEP V. MARNE, J.
DATE : NOVEMBER 04, 2023.

ORAL ORDER

1 The Appellant in the present Appeal challenges order dated 17 February 2023 passed by the Joint Civil Judge Senior Division, Nashik, rejecting application at Exhibit-5 for grant of temporary injunction and allowing application filed by Defendant Nos.4 to 7 at Exhibit 64 granting temporary injunction in their favour. By the impugned order, the Trial Court has temporarily restrained the Plaintiff from disturbing the Defendants' possession over the suit property till final decision of the suit.

2 Plaintiff has instituted Special Civil Suit No.563 of 2020 in the Court of Civil Judge Senior Division, Nashik, seeking a prayer for specific performance of the development agreement dated 5 October 1992. The Plaintiff has also challenged the development agreement dated 18 November 2020 and General Power of Attorney dated 19 November 2020 executed by Defendant Nos.1 to 3 in favour of Defendant Nos.4 to 7. In his Suit, Plaintiff filed application at Exhibit-5 seeking temporary injunction to restrain the Defendants from creating third party rights in the suit property and from disturbing his possession. Defendant Nos.1 to 3 appeared in the suit and filed their written statement and reply to the application for temporary injunction. Defendant Nos.4 to 7 filed a separate written statement and reply to the application for temporary injunction. They additionally filed a counterclaim seeking a mandatory injunction against the Plaintiff from creating obstruction to the possession and development of the suit property. In their counterclaim Defendant Nos. 4 to 7 filed an application at Exhibit-64 seeking temporary injunction against the Plaintiff. The Trial Court has proceeded to reject Plaintiff's application and has allowed application filed by Defendant Nos. 4 to 7 restraining Plaintiff from disturbing Defendants' possession over the suit property till final decision of the suit.

3 Plaintiff's suit is premised on the development agreement executed by Defendant Nos.1 to 3 in his favour on 5 October 1992. It is Plaintiff's case that he was required to spend time, energy and funds in protecting the suit property from the provisions of ceiling legislation. That he also

satisfied the claims of tenants in the suit property. That when he cleared the suit property from the provisions of ceiling legislations and was about to take the same for development, Defendant Nos. 1 to 3 surreptitiously executed development agreement dated 18 November 2020 and General Power of Attorney dated 19 November 2020 in favour of Defendant Nos. 4 to 7. It is his case that in pursuance of the development agreement and power of the attorney executed in his favour in the year 1992, Plaintiff has been put in possession of the suit property which was never handed over by him to Defendant Nos.1 to 3. That therefore it was not possible for Defendant Nos.1 to 3 to handover possession of the suit property in favour of Defendant Nos.4 to 7. With this grouse, the Plaintiff has filed the Special Civil Suit No.563 of 2020 in the Court of Civil Judge Senior Division, Nashik seeking specific performance of development agreement dated 5 October 1992 as well as setting up a challenge to the development agreement and power of attorney executed in favour of Defendant Nos.4 to 7.

4 Mr. Jagtap, the learned Counsel would appear on behalf of the Appellant. He would submit that the development agreement and power of attorney executed by Defendant Nos.1 to 3 in favour of Plaintiff still continues to subsist as the same has never been terminated. Without terminating the said development agreement and power of attorney, Defendant Nos.1 to 3 could not have executed any transaction in favour of Defendant Nos.4 to 7. He would submit that the Plaintiff has been put in possession of the suit property as per the power of attorney executed in

his favour, which according to Mr. Jagtap, empowered the Plaintiff not only to construct flats/shops/garages etc. on the suit property, but to also handover possession thereof to the purchasers. He would submit that if Plaintiff himself was not to be put in possession, he could not have been empowered to hand over possession of flats to purchasers. That such a clause in the power of attorney would undoubtedly indicate the fact that the Plaintiff was put in physical possession of the suit property. He would further submit that except execution of the development agreement and power of attorney in favour of Defendant Nos.4 to 7, there is nothing to indicate that the possession of the suit property was taken away from the Plaintiff in any manner by Defendant Nos.1 to 3, for being handed over to Defendant Nos.4 to 7. He would place on record photographs showing Plaintiff being physically dragged out of the suit property on the strength of the injunction order passed by the Trial Court. He would submit that the factum of use of police machinery for physically dragging the Plaintiff out of the suit property would once again indicate that he was in possession thereon. He would submit that the Plaintiff had fenced the suit property for protecting it encroachment and now the injunction order is being misused by the Defendant Nos.4 to 7 for physically dispossessing the Plaintiff from the property.

5 Mr. Jagtap would further submit that the counterclaim filed by Defendant Nos.4 to 7 is faulty as there is no declaration sought therein about the binding nature of development agreement dated 5 October 1992 and power of attorney executed in favour of the Plaintiff. That

Defendant Nos.1 to 3 have not filed any counterclaim for cancellation of development agreement dated 5 October 1992 and power of attorney executed in favour of the Plaintiff. That in absence of any challenge to the development agreement and power of attorney executed in favour of the Plaintiff, no *prima facie* case was made out by the Defendants for grant of any temporary injunction in their favour. On the contrary subsistence of the development agreement and power of attorney in Plaintiff's favour was a clear reason why temporary injunction ought to have been granted in favour of the Plaintiff. In support of his contentions Mr. Jagtap would rely upon the following judgments:

- i) ***Dorab Cawasji Warden vs. Coomi Sorab Warden & Ors.***, (1990 2 SCC 117,
- ii) ***Purshottam Vishandas Raheja & Anr. vs. Shrichand Vishandas Raheja & Ors.***, (2011) 6 SCC 73,
- iii) ***Mohd. Mehtab Khan and Ors. vs. Khushnuma Ibrahim Khan & Ors.***, (2013) 9 SCC 221,
- iv) ***Vishnu Babu Tambe vs. Apurva Vishnu Tambe***, (2017) 2 SCC 454,
- v) ***Naredra Hirawat & Co. vs. Sholay Media Entertainment Pvt. Ltd. & Anr.***, 2022 SCC OnLine sC 18978.

6 I have also heard Mr. Godbole the learned senior advocate for Respondent Nos. 1to 3 and Mr. Gorwadkar, the learned senior advocate for Respondent Nos. 4 to 7.

7. After considering the rival contentions raised by the learned counsel appearing for the parties, it is seen that the Plaintiff's suit is for

specific performance of the development agreement executed 28 years before the institution of the suit. The agreement is shown to have been executed on 5 October 1992. Except making the alleged efforts for saving the property from the provisions of ceiling legislation, admittedly Plaintiff has not carried out any development on the suit property. It is not Mr. Jagtap's case that the Plaintiff has actually put up any construction at the suit property. Perusal of the development agreement dated 5 October 1992 would indicate that the possession of the suit property always remained with Defendant Nos.1 to 3 and Plaintiff was merely granted a license to enter upon the suit property for the purpose of carrying out construction. If no construction is carried out, the Plaintiff was not supposed to enter the property as his license was for limited purposes of carrying out construction thereon.

8. Mr. Jagtap reliance on clause 12 of the power of attorney empowering Plaintiff to handover possession of constructed flats/shops/godown/ garages in favour of purchasers would not cut any ice as the said power of handing over possession was to be exercised by the Plaintiff on behalf of the owners. The said clause cannot be read to mean that Plaintiff was put in physical possession of the suit property. Plaintiff is relying on the development agreement dated 5 October 1992 and therefore he would be bound by all the terms and conditions therein. The agreement clearly provides that a mere license was granted to Petitioner to enter upon the property with a clear caveat that the possession of the suit property shall always remain with Defendant No.1 to 3. It is

therefore difficult to believe that the Plaintiff had physical possession of the suit property in pursuance of the development agreement dated 5 October 1992.

9 Plaintiff was seeking temporary injunction in his suit filed for specific performance of the development agreement 28 years after execution of the same. It was therefore necessary for him to demonstrate the development activities carried out on the suit property in the said gap of 28 long years. However, except alleged efforts taken by him to save the property from ceiling, it appears that the actual development was ever commenced by the Plaintiff on the suit property. There is nothing to indicate that any proposal was submitted with the planning authority for procurement of a development permission by the Plaintiff. The averments in the plaint would indicate that Plaintiff has paid total amount of Rs.13,30,000/- to the Plaintiff during the period from 10 March 1992 to 27 December 1999. Thus after the year 1999 nothing is paid or done by the Plaintiff in pursuance of the development agreement dated 5 October 1992. In my view therefore no *prima facie* case existed for grant of any temporary injunction in favour of the Plaintiff.

10. Coming to the relief of temporary injunction granted by the Trial Court in favour of Defendant Nos.4 to 7 in application filed by them in their counterclaim, Mr. Jagtap strongly objects to grant of such relief. According to him the said relief is in the nature of mandatory temporary

injunction and in that regard he has placed reliance on the judgment of the Apex Court in ***Dorab Cawasji Warden*** (supra). Perusal of the order passed by the Trial Court would indicate that the Plaintiff has been temporarily restrained from disturbing possession of the Defendants over the suit property till final decision of the suit. There is no mandatory direction issued by the Trial Court. Therefore, it is difficult to accept the contention of Mr. Jagtap that the Trial Court has granted a mandatory temporary injunction. Therefore Mr. Jagtap's reliance on the judgment of the Apex Court in ***Dorab Cawasji Warden*** (supra) enunciating principles governing grant of mandatory temporary injunction would have no application to the facts and circumstances of the present case. For same reasons reliance of Mr. Jagtap on Apex Court judgment in ***Purshottam Vishandas Raheja*** is misplaced. ***Vishnu Babu Tambe*** deals with the principle that final relief cannot be granted at interim stage, which principle is not attracted in the present case.

11 The development agreement executed by Defendant Nos.1 to 3 in favour of Defendant Nos. 4 to 7 clearly contains a covenant to the effect that the Defendant Nos. 1 to 3 were in possession of the suit property. The development agreement further grants a license in favour of Defendant Nos.4 to 7 to enter upon the suit property for the purpose of carrying on development thereon. Thus the development agreement executed in favour of Defendant Nos.4 to 7 would indicate that Defendant Nos.1 to 3 would continue to retain the possession of the suit property and Defendant Nos.4 to 7 shall have a license to enter upon the same for

the purpose of carrying out development thereon. Additionally, Mr. Gorwadkar would rely upon possession letter by which the suit property is shown to have been put in actual possession to the Defendant Nos.4 to 7. Be that as it may, so far as Plaintiff is concerned, there is nothing to indicate that he was put in actual possession of the suit property since the development agreement granted a mere license in his favour, retaining the possession of the suit property with the original owners.

12 The position as it stands today is that despite execution of development agreement in favour of the Plaintiff as earlier as on 5 October 1992, he has failed to carry out the development on the suit property during last 31 long years. The owners are apparently interested in monetizing suit property by developing the same. Since the Plaintiff has failed to develop the same despite grant of an opportunity over a long period of time, the original owners have decided to grant development rights in favour of Defendant Nos.4 to 7. In these circumstances, the question is whether Defendant Nos.4 to 7 could have been enjoined carrying out development on the property with a view to secure the alleged rights of the Plaintiff arising out of the development agreement dated 5 October 1992. The answer to this question, to my mind, appears to be in the negative. The owners as well as Defendant Nos.4 to 7 could not have been enjoined by the Trial Court from carrying out development over the suit property, till the Plaintiff establishes his case at the end of the trial of the suit. Perusal of the prayers made in the plaint would indicate that Plaintiff has also sought an alternate prayer for

compensation of amount of Rs.34,65,00,000/-. If the Trial Court ultimately comes to the conclusion that any of the Plaintiff's rights arising out of development agreement are indeed violated, it can take the corrective action by directing the Defendants to pay the appropriate compensation to the Plaintiff. However till Plaintiff establishes that right, development of the property need not be delayed any further. In my view therefore the Trial Court has rightly rejected Plaintiff's application for grant of temporary injunction while allowing the application filed by Defendant Nos.4 to 7. There is no patent error in the order passed by the Trial court.

13. In ***Mohd. Mehtab Khan and Ors.*** (supra) relied upon by Mr. Jagtap the scope of interference by the Appellate Court in discretion exercised by the Trial Court in the matter of grant of temporary injunction is discussed. Considering that narrow scope of interference, no case for interference is made out considering the fact that no palpable error is traced in the order passed by the Trial Court.

14 The Appeal, being devoid of merits, is accordingly rejected. However, it is clarified that the Trial Court shall not be influenced by any observations made in the present order while deciding the suit finally.

15 In view of the disposal of the Appeal from Order, the Interim Application also disposed of accordingly.

(SANDEEP V. MARNE, J.)