

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.445 OF 2022
WITH
INTERIM APPLICATION NO.2879 OF 2022**

Bechar Raghavji Patel ... Appellant
versus
M/s. Mukul Develpoers and Ors. ... Respondents

**WITH
APPEAL FROM ORDER NO.444 OF 2022
WITH
INTERIM APPLICATION NO.2866 OF 2022**

Jamiat Co-op. Hsg. Soc. Ltd. ... Appellant
versus
M/s. Mukul Develpoers and Ors. ... Respondents

Mr. Y.S.Jahagirdar, Senior Advocate with Mr. M.V.Thorat for Appellant in AO 445 of 2022.

Mr. V.M.Thorat, with Mr. Amar Bodke, for Appellant in AO 444 of 2022.

Mr. Atul Damle, Senior Advocate i/by Mr. P.B.Gujar for Respondent No.1 in AO 445 of 2022.

Mr. Vaibhav Sugdare for Respondent No.1 in AO 444 of 2022.

CORAM: N.J.JAMADAR, J.

DATE : 13 APRIL 2023

P.C.

1. Heard the learned Counsel for the parties.
2. These appeals under Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908 are directed against an order dated 21 February 2022 passed by the learned Joint Civil Judge, Sr. Division, Kalyan, on an application for temporary injunction in Special Civil Suit No.387 of 2021, whereby the Appellant in Appeal

No.445 of 2022 and his agents and assigns were temporarily restrained from doing excavation work at the land Survey No.2/1 (part) and Survey No.5/2 (part), admeasuring 11331.2 sq. mtrs., situated at Ambernath (the suit property) till the decision of the Suit.

3. The parties are hereinafter referred to in the capacity in which they are arrayed before the Civil Court, Kalyan.

4. The background facts can be stated, in brief, as under :

4.1 The Plaintiff is a developer. Defendant No.1 is a co-operative housing society. Defendant No.1 had entered into a development agreement dated 27 February 2008 with the Plaintiff for development of three parcels of land including Survey No.2 Hissa No.1 (part), Survey No.53/2, Survey No.5 Hissa No.2 (part), City Survey No.55 admeasuring 13,552 sq. yards - 11,331.2 sq. mtrs. (the suit property).

4.2 Defendant No.1 had represented to the Plaintiff that the original owner of the suit property, Gopal Kalu Bhoir had executed an Agreement for Sale in respect of the suit property and had accepted the entire consideration. However, the Sale Deed was not executed. A Suit bearing Special Civil Suit no.167 of 1980 was instituted by the Defendant No.1 and a decree was passed in the said Suit. The said decree was put to execution in Regular Darkhast No.6 of 2013.

4.3 The Plaintiff - Respondent claimed to have developed three parcels of land and delivered 23% of the constructed residential area to the members of

Defendant No.1 Society in accordance with Clause 28 of the development agreement.

The Plaintiff claimed to have been in possession of the suit property.

4.4 In Regular Darkhast No.6 of 2013, the executing Court directed Defendant No.1 – Appellant to deposit the amount towards the stamp duty to facilitate the execution of conveyance. The Plaintiff asserts, Defendant No.1 Society deliberately avoided to comply with the said order. Nor the Plaintiff was permitted to pay the stamp duty, though the Plaintiff was ready and willing to bear the expenses.

4.5 In the meanwhile, Defendant No.2 – Appellant in AO 445 of 2022 laid claim over the suit property. Defendant No.2 claimed to have purchased 50% share of the suit property from one of the legal heirs of original holder Gopal Kalu Bhoir. For the remaining 50% share, Defendant No.2 had instituted Suit bearing Suit No.214 of 2016 for specific performance of the contract purportedly executed by Gopal Kalu Bhoir in favour of Defendant No.1 on 29 April 1974, against other legal heirs of Gopal Kalu Bhoir. The said Suit was decreed. Execution proceedings being Regular Darkhast No.14 of 2015 was instituted by Defendant No.2 to execute the said decree. A Sale Deed came to be executed by an Officer appointed by the Court. Defendant No.2, thus, claimed sole and absolute ownership over the suit property.

4.6 The Plaintiff asserts, Defendant No.2 gave a proposal to Defendant No.1 Society vide letter dated 14 April 2019. Defendant No.1 despite being fully aware of having executed the Development Agreement in favour of the Plaintiff, surreptitiously

entered into a Settlement with Defendant No.1. Defendant No.2 was impleaded as Obstructionist in the pending Execution proceedings i.e. Regular Darkhast No.6 of 2013 filed for execution of the decree passed in Special Civil Suit No.167 of 1980. On 15 October 2019, the said execution proceedings was withdrawn pursuant to the settlement arrived at between Defendant Nos.1 and 2.

4.7 Alleging that the instruments on the basis of which Defendant No.2 claimed ownership are false and forged and the Defendant Nos.1 and 2 have entered into a fraudulent arrangement, the Plaintiff instituted a Suit for declaration that Defendant No.1 is legally bound to comply with the terms and conditions of the Development Agreement dated 27 February 2008, consent terms/settlement executed between Defendant Nos.1 and 2 are illegal, invalid and void and do not bind the Plaintiff, registered Sale Deed dated 8 January 2014 executed by legal heirs of Defendant Nos.4 to 9 in favour of Defendant No.2 is null and void and does not bind the Plaintiff and to restrain the Defendant No.1 from carrying out the excavation work in the suit property.

4.8 The Plaintiff preferred an application for temporary injunction. Defendant Nos.1 and 2 resisted the Application. The tenability of the suit was assailed on multiple grounds. It was contended that the Plaintiff was not in possession of the suit property. Defendant No.2, pursuant to the registered Sale Deed, acquired lawful title over the suit property. It was further contended that Defendant No.2 has made

huge investments and commenced construction work on the suit property and an order of injunction would cause an irreparable loss to the Defendant No.2.

4.9 By the impugned Order, the learned Judge was persuaded to partly allow the application and restrain Defendant No.2 and his agents and assigns from carrying out excavation work in the suit property.

4.10 Being aggrieved, the Defendant Nos.1 and 2 are in Appeal against the said order.

5. I have heard Mr. Jahagirdar, Senior Advocate appearing for the Appellant in Appeal No.445 of 2022, Mr. V.M.Thorat, learned Counsel for Appellant in AO 444 of 2022, Mr. Atul Damle, Senior Advocate, appearing for Respondent No.1 in AO 445 of 2022 and Mr. Sugdare, learned Counsel for Respondent No.1 in AO 444 of 2022. With the assistance of the learned Counsel for the parties, I have also perused the pleadings, documents and the material on record.

6. At the outset, Mr. Thorat, learned Counsel for the Appellant in AO 444 of 2022 submitted that the Appellant - Defendant No.1 are aggrieved by the fact that the learned Civil Judge, Sr. Division, Kalyan, did not hear the Defendant No.1 while deciding the application for temporary injunction. Mr. Thorat would urge that the impugned order itself indicates that only the submissions canvassed on behalf of Defendant No.1 were noted and dealt with by the learned Civil Judge. The denial of an effective opportunity of hearing to the Appellant - Defendant No.1 constituted a

fundamental defect in the procedure, urged Mr. Thorat.

7. To lend support to this submission, Mr. Thorat tendered Affidavits on behalf of Defendant No.1 and the learned Advocate who appeared for Defendant No.1 in the Suit.

8. Mr. Damle, learned Senior Advocate appearing for Respondent No.1 – Plaintiff submitted that he has no instructions to controvert the contentions of the Defendant No.1 that the Defendant No.1 was not at all heard in temporary injunction application.

9. From the perusal of the impugned order, it becomes evident that the learned Judge noted that the Plaintiff had filed pursis (Exhibit 34) stating that the Plaintiff was claiming injunction against the Defendant No.2 only. Thereafter, the learned Judge proceeded to note the case put forth by the Defendant No.2. The impugned order does not refer to any submissions made on behalf of Defendant No.1, probably for the reason that the Plaintiff sought injunction against the Defendant No.2 only.

10. The issue of prejudice to Defendant No.1 on account of absence of opportunity of hearing is required to be appreciated in the light of the jural relationship between Defendant Nos.1 and 2 and the consequences of the impugned order passed by the learned Civil Judge, Kalyan.

11. A reference to the Consent Terms executed between Defendant No.1 –

Decree holder and the Obstructionist in R.D.No.6 of 2013 becomes necessary to appreciate the jural relationship between Defendant Nos.1 and 2. Clauses 1 to 6 of the Consent Terms dated 26 July 2019 are material. They read as under :

- “1) That the decree holder does hereby releases, surrender and relinquish all their right, title and interest in the suit property acquired by virtue of judgment and decree dated 30/01/1980 passed in Special Civil Suit No.167 of 1980 by C.J.S.D., Thane unto Obstructionist herein permanently and forever subject to receipt of the constructed area of 27,950 sq. feet in the form of flats in the proposed building to be constructed over suit property by the Obstructionist or his nominees.
- 2) That the decree holder does hereby admits the title of Obstructionist to the suit property acquired by him as mention herein above and will not dispute the same in any way or manner.
- 3) That in lieu of surrendering, releasing and relinquishing the right and claim by decree holder, the Obstructionist does hereby agree to give and allot 27,950 sq. ft. constructed area in the form of flats in the proposed building to be constructed over said property within the period of 36 months from the day of sanctioning of building plan and construction and permission of the suit property free of cost as a kind consideration.
- 4) That the Obstructionist further agree to pay and bear all the cost and expenses of stamp duty and registration charges of flat sale Agreement/ Allotment agreement to be executed in favour of the decree holder society or its members.
- 5) That pursuant to the receipt of the said kind consideratin of 27,950 sq. ft. constructed area in the form of flats, the decree holder release, relinquish and surrender all their right, title and interest in the suit property forever and will not claim or execute the judgment and decree obtained in Special Civil Suit No.167 of 1980.
- 6) That in lieu of settlement, the judgment and decree passed in Special Civil Suit No.167 of 1980 in favour of Decree Holder shall be treated

as determined and satisfied.”

12. The Consent Terms would, thus, indicate that in lieu of the relinquishment of the rights in Suit No.167 of 1980, Defendant No.1 would get 27950 sq. ft. constructed area in the form of flats in the proposed building to be constructed by Defendant No.2 over the suit property. It would be contextually relevant to note the effect of the impugned order. By the impugned order, Defendant No.2 has been restrained from doing any excavation work in the suit property. This implies that Defendant No.2 would be restrained from carrying out construction and erecting building on the suit property. This injunctive relief would, thus, operate against Defendant No.1 as well in the sense that Defendant No.1 would be deprived of the consideration which Defendant No.2 has agreed to give for Defendant No.1's relinquishment rights under the decree.

13. From this standpoint, it was imperative to hear Defendant No.1 as well before passing any order which entailed the consequence of stopping the development over the suit property.

14. Even otherwise, the rights of the Plaintiff emanated from the Development Agreement executed by Defendant No.1 in favour of the Plaintiff on 27 February 2008. It is the case of Defendant No.1 that the said Development Agreement was duly terminated by a public notice. The question whether the said

termination is legal and valid is undoubtedly a matter for trial. However, Defendant No.1 ought to have been given an opportunity to oppose the prayer for temporary injunction on the ground that the agreement under which the Plaintiff claimed rights in the suit property stood duly terminated.

15. In the aforesaid view of the matter, the impugned order deserves to be quashed and set aside. Both the Appeals deserve to be allowed. Interim Application is required to be restored to the file of the learned Civil Judge, Sr. Division, Kalyan for determination afresh after providing an effective opportunity of hearing to all the parties. However, since the impugned order is in operation since 21 February 2022, it may be expedient to continue the status quo till afresh decision of the application.

16. Hence, the following order :

ORDER

- (i) The Appeals stand partly allowed.
- (ii) The impugned order dated 21 February 2022 stands quashed and set aside.
- (iii) Temporary injunction application (Exhibit 5) in Special Civil Suit No.387 of 2021 stands restored to the file of the learned Civil Judge, Sr. Division, Kalyan.
- (iv) The Civil Judge, Sr. Division, Kalyan shall decide the application for temporary injunction (Exhibit 5) afresh after providing an effective opportunity of

hearing to all the parties including Defendant No.1.

(v) The learned Civil Judge shall not be influenced by any of the observations made hereinabove and shall decide the application on its own merits and in accordance with law.

(vi) Till the decision on the application (Exhibit 5) for temporary injunction, by way of ad-interim order, Defendant No.2 and his agents and assigns shall maintain status quo in respect of the suit property.

(vii) No costs.

(viii) In view of the disposal of the Appeals, the Interim Application(s) also stand(s) disposed.

(N.J.JAMADAR, J.)