

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

APPEAL FROM ORDER NO.241 OF 2023
WITH
INTERIM APPLICATION NO.3346 OF 2023
WITH
APPEAL FROM ORDER NO.444 OF 2023
WITH
APPEAL FROM ORDER (ST.) NO.10020 OF 2023
WITH
INTERIM APPLICATION NO.7975 OF 2023

M/s. Siddhi Real Estate Developers and Others ...Appellants
vs.
Vinod Dhanaji Bhoir and Others ...Respondents

Mr. Pravin Samdani, Senior Advocate a/w. Mr. Karl Tamboly, Mr. Hrushika Navrekar, Mr. Samit Shukla, Mr. Parag Khabadi and Mr. Abhishek Kothari i/b. DSK Legal, for the Appellants.

Mr. P.S. Dani, Senior Advocate i/b. Mr. Sachin Hande, for the Respondents in AO No. 241 of 2023.

Ms. Dipali Mainkar, for the Appellants in AO No. 444 of 2023 and Respondent No. 6 in AO No. 241 of 2023.

CORAM : N. J. JAMADAR, J.
RESERVED ON : JULY 25, 2023
PRONOUNCED ON : DECEMBER 22, 2023

JUDGMENT :

1. All these appeals are directed against an order dated 23rd March, 2023 passed by learned Civil Judge Senior Division, Thane on an application for temporary injunction (Exhibit 5) in Special Civil Suit No. 48 of 2022. By the said order, the learned Civil Judge was persuaded to restrain the defendant No.1/ appellant in Appeal From Order No. 241 of 2023; defendant No. 2/appellant in Appeal

From Order No. 444 of 2023 from creating third party interest in any manner only in respect of suit properties bearing survey Nos. 59/1A, 59/1B and 59/1C (Old Survey Nos. 116/1) admeasuring 36.6 R situated at Balkum/Dhokali, Thane (the suit property) till the final disposal of the suit.

2. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed in the suit.

3. Background facts leading to these appeals can be summarized as under:-

3A. Vithu Hira Bhoir, the predecessor in title of the plaintiffs and defendant No. 72 had acquired the suit property under the Conveyance Deed dated 21st December, 1938 from late Bendya Hasha Bhoir, late Ramchandra Bendya Bhoir, late Balkrushna Bendya Bhoir, late Hasha Hira Bhoir and late Jagannath Hasha Bhoir. The suit property came to be mutated in the name of the said Vithu Bhoir in the revenue records vide Mutation Entry No. 644.

3B. The plaintiffs asserted that the deceased Vithu Bhoir during his life, and, after his demise, the plaintiffs and

defendant No. 72, have been in lawful possession and cultivation of the suit property. However, since few years prior to the institution of the suit, the plaintiffs and defendant No. 72 had not been cultivating the suit property as it was uneconomical. Thus, the suit property was lying barren and vacant.

3B. The plaintiffs averred, in the month of December, 2020 some unknown persons made an effort to take forcible possession of the suit property. It transpired that they were the representatives of defendant Nos. 1 and 2. The plaintiffs further averred that on a subsequent visit they noticed that piling activities have been carried out over the suit property. Upon being questioned, the representatives of defendant Nos. 1 and 2 informed that defendant Nos. 1 and 2 had purchased the suit property. The plaintiffs averred, upon further inquiry it transpired that the defendant Nos. 3 to 41 and 58 to 63 and their predecessors in title had got their names mutated to record of rights of the suit property bearing new Survey Nos. 59/1B/1, 59/1B/3, 59/1/C and on the strength thereof executed a Deed of Conveyance on 19th April, 2008 in favour of defendant No. 1. Likewise, defendant Nos. 42 to 57 and 64 to 71 and their predecessors in title by surreptitiously getting

their names mutated to the record of right of suit property bearing new Survey Nos. 59/1A/1 and 59/1A/3 had executed a registered conveyance in favour of defendant No. 2 on 18th March, 1987. It further transpired that defendant Nos. 1 and 2, in turn, had surrendered a portion of the suit property in favour of Thane Municipal Corporation, defendant No. 73 for a road under registered instrument dated 31st May, 2016 and obtained benefits in the form of TDR. Resultantly, the name of Thane Municipal Corporation also came to be mutated to the portions of new survey Nos. 59/1A/2 and 59/1B/2.

3C. The plaintiffs averred that the defendant Nos. 3 to 71 had no right, title or interest in the suit property as the predecessors in title of defendant Nos. 3 to 71 had already conveyed the suit property in favour of late Vithu Bhoir, the predecessor in title of the plaintiff and defendant No. 72. The ownership of the suit property continued to vest in the plaintiffs and defendant No. 72. Thus no lawful title could pass to defendant Nos. 1, 2 and 73 on the basis of aforesaid instrument. As the defendants did not make any amends despite the service of notice, the plaintiffs were constrained to institute the suit seeking declaration that the conveyance dated 21st December, 1938 in favour of late Vithu Bhoir was

legal, valid and binding, and the plaintiff became absolute owner of the suit property, the Deeds of Conveyance dated 18th March, 1987 and 19th April, 2008 and the instrument dated 31st May, 2016 executed by defendant Nos. 1 and 2 in favour of defendant No. 73 were void, illegal and did not bind the plaintiffs and defendant No. 72 and the consequential relief of cancellation of those instruments and clear and vacant possession of the suit property.

3D. In the said suit, the plaintiffs filed an application for temporary injunction seeking to restrain the defendants No. 1 to 71 and 73 from selling, alienating, transferring or otherwise creating third party interest in and/or dealing with the suit property and also to restrain defendant No. 73 from granting any TDR in respect of suit property and any permission/approval for development over the suit property.

4. In the said application, after adverting to the case set up in the plaint, the plaintiffs asserted that if the injunction, as sought, was not granted, the plaintiffs would suffer an irreparable loss as defendant Nos. 1 and 2 would erect, construction and create third party interest therein and thereby frustrate the claim of the plaintiffs.

5. The defendant Nos. 1 and 2 resisted the prayers in the application for temporary injunction contending, inter alia, that the Deed of Conveyance dated 21st December, 1938 in favour of late Vithu Bhoir referred only to old Survey No. 116 and not Survey No. 116/1. There was significant discrepancy in the area of land as well. Under the Deed of Conveyance an area admeasuring 33 guntha was purported to be sold, whereas, in the instant suit the plaintiffs have laid claim over an area admeasuring 37.6 gunthas (3803.92 sq.mtrs.).

6. It was further contended that on 25th May, 1951 pursuant to direction/ hukum (order) No. PHS/25.5.1951 and as per *Purvani Akar Phod Patrak (Hissa Form No. 12)*, *Gunakar Book*, the record of rights with respect to several Hissa numbers for village Balkum (including the suit property) came to be corrected, by way of Mutation entry No. 959 dated 24th December, 1951. Hasha Hira Bhoir's name was mutated as the occupant (Kabjedar) of a portion of the property bearing old Survey No. 116/1A (now 59/1A/1, 59/1A/2 and 59/1A/3), and Bendya Bhoir was shown the Kabjedar of the balance portion of the suit property. Vithu Bhoir, the predecessor in title of the plaintiffs was shown the Kabjedar of the properties, then bearing Survey Nos. 89/9C, 213/1C, 233/5/6,

233/5/9, 233/5/12, 125/5B, 125/5D and 77/3C. On the strength of the said Mutation entry No.959, subsequently, the names of Vithu Bhoir and his successors in interest as well as Hasha Bhoir and Bendya Bhoir and their successors in interest were mutated to the record of rights of the respective lands and they accordingly continued to cultivate their respective lands.

7. The defendants contended after the demise of Vithu Bhoir, the names of his successors in interest were mutated to the properties which stood in his name vide Mutation entry No. 2490 dated 28th March, 1978. The successors interest of Vithu Bhoir conveyed the properties in favour of defendant No. 1. It was contended that Mutation entry No. 959 entailed the consequence of realignment of right, title and interest qua the suit property in favour of defendant Nos. 1 and 2's predecessors in title and simultaneously conferment of right, title and interest on Vithu Bhoir in the new properties, which were thitherto not owned by the late Vithu Bhoir.

8. Banking upon the Deed of Conveyance dated 18th March, 1987 executed by the heirs of Hasha Bhoir in favour of defendant Nos. 1 and 2 and Deed of Conveyance dated 9th April, 2008 executed by successors in interest of Bendya Bhoir in favour of defendant No.

2, the defendant Nos. 1 and 2 claimed that they acquired absolute ownership over the suit property. In any event, defendant Nos. 1 and 2 were the bonafide purchasers of the suit property without notice of the alleged claims of the plaintiff, for valuable consideration. The defendants contended that the transfer in favour of defendant Nos. 1 and 2 were also valid as the instruments were executed by the persons who were the ostensible owners of the suit property.

9. Moreover, since the year 2014, the defendant Nos. 1 and 2 had been developing the huge tract of land including the suit property, by obtaining the permission of the planning authority. Several instruments have been executed by defendant Nos. 1 and 2 in favour of the third party purchasers in respect of flats and shops being developed in the said project. The suit was thus stated to be barred by limitation and the prayer for equitable reliefs suffered from delay and laches. The grant of injunction in the face of substantial developments by the defendant Nos. 1 and 2 at a huge cost, would entail grave prejudice not only to defendant Nos. 1 and 2 but also to the purchasers in whose favour the rights were created.

10. It would be contextually relevant to note that the learned

Civil Judge by an order dated 19th October, 2022 had initially granted an interim injunction. The said order was carried in appeal before this Court. By an order dated 23rd February, 2023 in Appeal From Order No. 1170 of 2022 and connected matters, this Court was persuaded to set aside the said order and remit the matter back to the Civil Court with a direction to decide the interim application afresh after providing effective opportunity to the parties.

11. After the parties filed additional pleadings and hearing the parties, the learned Civil Judge, by the impugned order, was impelled to again restrain the defendant Nos. 1 and 2 from creating any third party interest in the suit property holding, inter alia, that prima facie the plaintiffs and defendant No. 72 appeared to have a better title to the suit property and the balance of convenience tilted in favour of the plaintiffs and defendant No. 72 and they would suffer irreparable loss in the event the defendant Nos. 1 and 2 carry out the construction and create third party rights therein as that would render the decree which may be eventually passed, in the event the plaintiffs succeed, infructuous.

12. The learned Judge, inter alia, observed that there was nothing to erode the validity and sanctity of the registered conveyance

dated 21st December, 1938 executed in favour of Vithu Bhoir, the predecessor in title of the plaintiffs and to show that the defendant Nos. 1 and 2 derived better title on the basis of entries in the revenue record which were made for fiscal purpose. However, the learned Judge, considered it appropriate to restrain the defendant Nos. 1 and 2 from creating third party interest as in the view of the learned Judge restraining the defendants from carrying out construction would not have been equitable as the defendant Nos. 1 and 2 had raised many buildings by amalgamating various properties.

13. Being aggrieved by and dissatisfied with the order restraining defendant Nos. 1 and 2 from creating third party interest in the suit property, the defendant No. 1 M/s. Siddhi Real Estate Developers has preferred Appeal From Order No. 241 of 2023 and defendant No. 2 has also assailed the order by filing Appeal From Order No. 444 of 2023. The plaintiff Nos. 1 to 6 have also assailed the impugned order to the extent the learned Judge declined to grant the relief of temporary injunction restraining the defendant Nos. 1 and 2 from carrying out the construction and defendant No. 73 from granting TDR and approvals to the development over the suit property.

14. As all the appeals assailed the very same order and common questions of law and facts arise for consideration, all the appeals were heard together and are being decided by this common judgment.

15. I have heard Mr. Pravin Samdani, learned Senior Advocate for the appellants in Appeal From Order No. 241 of 2023; Mr. P.S. Dani, learned senior counsel for the respondents in Appeal From Order No. 241 of 2023 and Ms. Dipali Mainkar, learned counsel for the appellants in Appeal from Order No. 444 of 2023 and for respondent No. 6 in Appeal From Order No. 241 of 2023, at some length. The learned counsel took the Court through the pleadings and the documents tendered before the Court. The learned counsel have also tendered the written submissions in elaboration of the submissions canvassed across the bar.

16. Mr. Samdani, learned senior advocate for the appellant, took a slew of exceptions to the impugned order. First and foremost, the learned trial Judge lost sight of the fact that the plaintiffs failed to establish the nexus between old Survey No. 116 which was referred to in the Conveyance dated 21st December, 1938 and the suit property. There is no material to indicate that old survey No. 116

which was originally claimed by the plaintiffs got converted into the suit property. Secondly, the discrepancy in the area of old survey No. 116 which was acquired under the Sale Deed and the suit property was also not properly accounted for. It was urged that in the year 2008, the plaintiffs had sold an area admeasuring 7340 sq. mtrs. deriving title thereto on the strength of Mutation entry No. 959 of 1951 which was the property presumably acquired under the Sale Deed dated 21st December, 1938.

17. Secondly, Mr. Samdani urged that the plaintiffs had allowed the vendors of defendant Nos. 1 and 2 to sell the respective portions of the suit property as the ostensible owners thereof and were thus precluded from questioning the title of the defendant Nos. 1 and 2 thereto. A number of circumstances including certification of Mutation entry No. 959, mutation of the names Bendya and Hasha Bhoir and their predecessors in title to various portions of the property covered by Mutation entry No. 959, dealing with the properties which were mutated in the name of Vithu Bhoir under the said Mutation entry No. 959 by the plaintiffs and their predecessor in title and not claiming the suit property as the property owned by the plaintiffs in the return filed under section 6 of the Urban Land (Ceiling and Regulation) Act, 1976 and

conversely the vendors of the defendant Nos. 1 and 2 laying such claim, were pressed into service to bolster up the case that the vendors of the defendant Nos. 1 and 2 were the ostensible owners of the suit property.

18. Thirdly, the plaintiff's cause suffers from the vice of inordinate delay and laches. Elaborating this point, Mr. Samdani urged that there is no material to indicate that plaintiffs or their predecessor in title ever cultivated any portion of the suit property since 1938. The plaintiffs and defendant No. 72 had slept over their alleged rights and despite categorically recording the said fact in the impugned order, the learned Civil Judge went on to grant equitable relief in favour of the plaintiffs. The conduct on the part of the plaintiffs in not resisting the development over the suit property being carried out by the defendant Nos. 1 and 2 since the year 2014 despite staying in the vicinity thereof, was also urged by Mr. Samdani as a ground which dis-entitles the plaintiffs from the equitable relief of injunction.

19. Mr. Samdani further urged that the learned Judge committed a manifest error in not properly appreciating the aspect of balance of convenience and irreparable loss. The defendant Nos. 1 and 2 had

developed a number of properties including the suit property by amalgamating various holdings, substantially. Third party interests have been created in the suit property over a period of time. To restrain the defendant Nos. 1 and 2 from creating third party rights in the suit property, at this distant point of time, entails the consequences of jeopardizing the development of the entire project. The learned Judge, lost sight of the principle that all the three prerequisites for grant of temporary injunction must exist simultaneously, and granted interim injunction being swayed by the fact that the prima facie the plaintiffs appeared to have a better title. Such an approach vitiated the determination, urged Mr. Samdani.

20. Ms. Mainkar, learned counsel for the appellants in Appeal From Order No. 444 of 2023, adopted the submissions of Mr. Samdani.

21. Mr. Dani, learned senior advocate for the plaintiff/respondents countered the submissions on behalf of the defendant Nos. 1 and 2, with equal force. Mr. Dani would urge that the defendant Nos. 1 and 2 can not derive better title than what their alleged vendors had. In the face of the registered Sale Deed dated

21st December, 1938 in favour of Vithu Bhoir, the predecessor in title of the plaintiffs executed by the predecessor in title of defendant Nos. 3 to 71, no semblance of title in the suit property vested in the vendors of the defendant Nos. 1 and 2 and, therefore, the learned Civil Judge was absolutely justified in returning a finding that the plaintiffs had made out a prima facie case. Such a title, acquired under a registered instrument, can not be displaced by the entries in the revenue record. Mutation entry No. 959, according to Mr. Dani, cannot constitute a source of title over the properties mentioned therein as those entries are made only for fiscal purpose.

22. Mr. Dani further submitted that the alleged delay and laches, sought to be pressed into service on behalf of the defendant Nos. 1 and 2, is a subterfuge. The plaintiffs have categorically asserted that the defendant Nos. 1 and 2 were developing other properties and only when the defendant Nos. 1 and 2 started to encroach over the suit property, the plaintiffs had a cause of action. Immediately after noticing the wrongful act on the part of defendant Nos. 1 and 2, the plaintiffs, approached the revenue authorities, gave notice to the defendants and, eventually, instituted the suit. Therefore, the aspect of delay, in the facts of the case, does not impair the claim for

equitable relief of injunction.

23. Lastly, Mr. Dani would urge that the learned Civil Judge was in error in not granting the plaintiffs prayers in the application for temporary injunction to the fullest. Mr. Dani submitted that once a finding was recorded that the plaintiffs and defendant No. 72 had prima facie title over the suit property, there can be no cloud on the incident of plaintiffs ownership over the suit property. The learned Judge thus fell in error in permitting the defendant Nos. 1 and 2 to carry out construction over the suit property. Eventually, if the defendants fully develop the suit property, equities would intervene and the plaintiffs would be left in the lurch. Therefore, according to Mr. Dani, the trial Court ought to have restrained the defendant No. 1 and 2 from carrying out further construction over the suit property. To this extent, the exercise of discretion by the trial Court, according to Mr. Dani, requires correction in appeal.

24. To begin with, few un-controverted facts. The claim of the plaintiffs that they are the successors in interest of Vithu Bhoir is, by and large, not seriously contested. Indisputably, the sheet anchor of the plaintiff's claim is registered Sale Deed dated 21st December, 1938 in favour of Vithu Bhoir. Under the said Sale Deed, property

bearing old survey No. 116 admeasuring 33 Gunthas was acquired by Vithu Bhoir. There is not much controversy over the fact that pursuant to the said Sale Deed, the name of Vithu Bhoir was mutated to the record of rights of the said land vide Mutation entry No. 644 though the said Mutation entry is not forthcoming.

25. The execution of the instruments in favour of the defendant Nos. 1 and 2 namely the Deed of Conveyance dated 18th March, 1987 by the successors in interest of Hasha Bhoir in respect of new Survey Nos. 59/1A/1, 59/1A/2 and 59/1A/3 and Deed of Conveyance dated 19th April, 2008 by the successor in interest of Bendya Bhoir in respect of Survey Nos. 59/1B/1, 59/1B/3, 59/1/C are rather uncontroverted though the parties are at issue over the vendors title to the said lands.

26. Likewise, the certification of Mutation entry No. 959, on 24th December, 1951 evidencing the Purvani Akar Phod Patrak (Hissa Form No. 12) is not much in contest. The controversy revolves around the consequences that emanate from the said Mutation entry qua the right, title and interest of the parties.

27. The controversy between the parties essentially revolves

around the question as to whether the property which was acquired by Vithu Bhoir under the Sale Deed dated 21st December, 1938 is the suit property or on account of the certification of Mutation entry No. 959 the rights and interest in the various properties were realigned and the suit property thereby stood vested in the predecessors in title of defendant Nos. 3 to 71, and Vithu Bhoir and his successors and defendant Nos. 3 to 71 exercised incidence of ownership over the respective properties mutated against their names vide Mutation entry No. 959.

28. There can be no duality of opinion that the entries in the record of rights are made for fiscal purposes. Mutation entries do not make or unmake title. In the case at hand, Mutation entry No. 959 represents the mutation of the properties pursuant to the directions of the Settlement Commissioner based on actual possession of the holders captioned as 'Purvani Akar Phod Patrak'. The entries made pursuant to Mutation entry No. 959, it seems, have been acted upon and subsequent mutations have taken place over a period of 70 years. These mutations, according to the plaintiffs, do not displace the title of Vithu Bhoir acquired under the registered instrument dated 21st December, 1938.

29. The learned Civil Judge was persuaded to hold that the Sale Deed dated 21st December, 1938 commands precedence over the title claimed on the strength of the mutation entries. At the first blush, the approach of the learned Judge can not be faulted at. The learned Judge was perfectly justified in recording an observation that the question as to whether the predecessor in title of the defendant Nos. 1 to 71 acquired title over the suit property on the strength of entries in Akar Phod Patrak and Gunakar Book can only be decided on the basis of evidence at the final adjudication of the suit.

30. Nonetheless, the attendant facts and circumstances, as emerged from the record, deserve to be considered in taking a prima facie view of the matter. Two facets of defendant Nos. 1 and 2's case deserve consideration. First the certification of Mutation entry No. 959 in the form of Purvani Akar Phod Patrak and the consequences that emanated therefrom. Second, defendant Nos. 3 to 71 being the ostensible owners of the suit property.

31. On the first count as noted above, the edifice of the claim is based on Mutation entry No. 959. Mr. Samdani laid emphasis on the fact that in Mutation entry No. 959, Survey No. 116, which was

acquired under the Sale Deed dated 21st December, 1938, was not shown against the name of Vithu Bhoir though a number of other survey numbers were shown to have been mutated in the name of Vithu Bhoir. In contrast, survey No. 116/1A was mutated in the name of Hasha Bhoir and 116/1C in the name of Bendya Bhoir and those survey numbers were re-numbered as 116/1A and 116/1B and 116/1C respectively. Mr. Samdani would thus urge with a degree of vehemence that under the Purvani Akar Phod Patrak, the lands which were thitherto not owned by the holders were allotted to them and few of the lands which they were holding were divested.

32. The aforesaid submission is ex facie borne out by the record. The question as to what is the utility of the entries in the Purvani Akar Phod Patrak wrenches to the fore. It appears that after Mutation entry No. 959, record of rights in respect of the lands were maintained in conformity with the entries made therein. At this stage, however, it would be difficult to draw a definitive inference on the strength of the continuity in the record of rights of lands to make or unmake the title thereto.

33. The conduct of the parties may shed light on the animus of the

parties qua the properties shown in the Mutation entry No. 959 against their respective names. Whether the parties exercised any dominion over those properties as owners thereof ?

34. First the three instruments under which Defendant Nos.1 and 2 acquired the subject lands including the suit property. On 18 March 1987, the successor in interest of Hasha executed a conveyance in favour of Defendant No.2 in respect of Survey Nos.116/H/1A admeasuring 2320 sq.mtrs. for a consideration of Rs.2,36,555/-. On 25 February 2008, the Plaintiffs and other successors in interest of Vithu executed a conveyance in favour of Defendant No.1 in respect of lands bearing old Survey No.125/5B, 125/5D, 213/1C, 233/5/6, 233/5/9 and 233/5/2 corresponding to new Survey Nos.82/5B, 82/5D, 48/C, 86/5/6, 86/5/9 and 86/5/12, thereby conveying an area admeasuring 2960 sq. mtrs., for a consideration of Rs.9,11,000/-. On 19 April 2008 the successors in interest of Bendya executed a conveyance in respect of old Survey Nos.116/1B, 116/1C, 117/3(P), 123/3, 123/9, 125/3, 126/6B, 211/18 and 212/18, corresponding to new Survey Nos.59/1B, 59/1C, 75/3P, 80/3, 80/9, 82/3, 82/6B, 46/18, 46/8 conveying thereby an area admeasuring 14520 sq. mtrs, for a total consideration of Rs.45,74,000/-.

35. In the context of the controversy at hand, it would be contextually relevant to note that under mutation entry No.959 dated 24 December 1951, original Survey No.116/1A was shown to be in the possession of Hasha Hira and renumbered as 116/1A. 116/1B was shown in the name of Bendya Hasha and renumbered as 116/1B. Likewise, 116/1C was shown in the name of Bendya and renumbered 116/1C. Thus, the successors in title of Hasha executed a conveyance dated 18 March 1987 in respect of Survey No.116/1A in favour of Defendant No.2 and under a conveyance dated 19 April 2008, the successors in interest of Bendya transferred the lands inter alia, bearing Survey Nos.116/1B and 116/1C, corresponding to new Survey Nos.591B and 59/1C (the suit property).

36. Before advertng to consider the import of aforesaid conveyances from the perspective of the manner in which the parties exercised the proprietary rights over the lands shown in the names of their respective predecessors in title, it may be expedient to note the manner how Vithu dealt with the properties mutated in his name, during his life time. ULC order dated 26 November 1987 passed under Section 8(4) of the Urban Lands (Ceiling and Regulation) Act, 1976, indicates that Vithu had made a declaration

under Section 6(1) of the said Act in respect of Survey No.233/5/12, 233/5/9, 233/5/6, 252/6, 77/3/C and Gaothan area. Upon verification and inquiry, Vithu was found to be holding the lands bearing Survey nos.77/3C, 95/21, 233/5/6, 233/5/9, 233/5/12, 125/5B, 125/5/D, 213/1/C and Gaothan area. Notice was issued to Vithu under Section 8(3) of the said Act, 1976. Dhanaji V. Bhoir, Vithabai Bhoir, Devkibai Patil and Savitribai S. Patil were stated to be the shareholders. Eventually, the competent authority declared that Vithu was not a surplus land holder and the proceedings was dropped.

37. What is conspicuous by its absence in the declaration made by Vithu under Section 6(1) and the order passed by the competent authority, even post inquiry, is that Survey No.116 or Survey No.116/1A, 116/1B, 116/1C were neither claimed by Vithu nor found by the competent authority to be the holding of Vithu.

38. Conversely, the order dated 21 August 1987 passed by the competent authority under Section 8(4) of the said Act, indicates that Atmaram Hasha Bhoir, successor in title of Hasha had declared Survey No.116/1A admeasuring 22H in the Return filed under Section 6(1) of the Act, 1976. All the persons who are shown as the

successors in title of Hasha, in the said order, have executed conveyance. Eventually, after noting the legal representatives of Hasha and their entitlement to hold the land, the competent authority declared that the declarant was not the surplus holder and dropped the proceedings. All the legal representatives of Hasha who were shown in the said order, joined the other legal heirs of Hasha to execute a conveyance in respect of the very same Survey No.116/1A in favour of Defendant No.2.

39. Likewise, the successors in interest of Bendya in the return filed under section 6(1) of the ULC Act, 1971 declared Survey No. 116/1B and 116/1C, amongst other lands, as their holdings. The order dated 28th March, 2021 passed under section 8(4) of the ULC Act, 1971, evidences the said fact.

40. Prima facie, it appears that during the life time of Vithu, the latter had not asserted the proprietary title over Survey No.116/1A and, conversely, the legal representatives of Hasha in whose name Survey No.116/1A was shown in mutation Entry No.959 and the legal representatives of Bendya in whose name Survey No. 116/1B and 116/1C were shown in ME No. 959 asserted such title and orders came to be passed under Section 8(4) of the Act, 1976.

41. It is imperative to note that the lands transferred by the successors in title under the conveyance dated 25 February 2008 bearing old Survey Nos.125/5B, 125/5D, 213/1C, 233/5/6, 233/5/9, 233/5/2 were all mutated in the name of Vithu in mutation entry No.959. Prima facie, it appears that the survey numbers which were mutated in the name of Vithu were either declared by Vithu under Section 6(1) of the Act, 1976 or found in his name during the course of inquiry and, eventually, all those lands were conveyed by the successors in interest of Vithu in favour of Defendant No.1.

42. Coupled with the aforesaid rather incontrovertible record, the absence of material to show that Vithu, during his life time, and the Plaintiffs, after the demise of Vithu, had ever cultivated the suit property bears upon the issue. Secondly, a number of mutation entries were effected in the intervening period, starting from the year 1966, which the Plaintiffs claimed, were fraudulently effected. Indisputably, mutation entries do not confer title. However, the conduct of Vithu, during his lifetime, and his successors in interest in not asserting title to old S.No.116 all these years, and at this stage, there being not a shred of material to indicate that Vithu or his successors in interest ever cultivated the suit property, lends heft to the submission on behalf of Defendant Nos.1 and 2 that the

parties had acted upon mutation Entry No.959 and exercised ownership rights over those properties mutated in their respective names.

43. On the second count of ostensible ownership, Mr. Dani, learned Senior Advocate for the Plaintiffs strenuously submitted that to successfully make out a defence under Section 41 of the Transfer of Property Act, a person has to show that he took the property from the original holder, but the holder executed a sale deed on behalf of and signed by a person holding the record. Defendant Nos.1 and 2 have not asserted in the written statement that they acquired the property from the real owners.

44. To bolster up this submission, Mr. Dani placed reliance on the decision of the Supreme Court in the case of Suraj Rattan Thirani and Ors. V/s. Azamabad Tea Co. Ltd. and Ors.¹, a decision of Nagpur High Court in the case of Nainsukhdas Sheonarayan V/s. Gowardhandas Bindrabandas and Ors.² and a decision of Bombay High Court in the case of Khushalchand Bhagchand V/s. Trimbak Ramchandra and Ors.³

1 AIR 1965 SC 295

2 AIR 1948 Nagpur 110

3 AIR 1947 Bombay 49

45. In the case of Suraj Rattan Thirani and Ors. (supra), the Supreme Court enunciated that ‘in order that Section 41 of the Transfer of Property Act could be attracted, the transferee of co-sharers should prove that the transferor was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether the transferor had the power to make a transfer of the full interest.

46. In the case of Nainsukhdas Sheonarayan (supra), a Division Bench of the Nagpur High Court, after referring to the previous pronouncements, enunciated that the object of Section 41 of the Act was to protect the bonafide transferee for good consideration who has made proper enquiries from being prejudiced by the conduct, however innocent, of the real owner in allowing the world at large to think that someone else is the owner of the property and that it was immaterial that the attestation was made in ignorance of his rights. It was emphasized that the proviso to Section 41 enjoined duty on the transferee to take reasonable care to ascertain that the transferor had power to make the transfer, and the transferee acted in good faith.

47. Following the aforesaid pronouncement, in the case of

Khushalchand Bhagchand (supra), it was held that Section 41 is an exception to the general rule that a person cannot convey a better title than what he himself has in the property, and hence the conditions set forth in that section must be strictly fulfilled before its benefit can be made available to the transferee. Those conditions are : (1) that with the consent, express or implied, of the person claiming title that another person is held out as the ostensible owner of such property, (2) that such ostensible owner transfers it for valuable consideration, and (3) that the transferee has acted in good faith and has taken reasonable care to ascertain that the transferor has power to make the transfer. Mr. Dani would urge that none of the aforesaid conditions have been fulfilled.

48. In opposition to this, Mr. Samdani placed reliance on the decisions of the Supreme Court in the cases of **V. Chandrasekaran and Anr. vs. Administrative Office and Others⁴**; **Hardev Singh vs. Gurmail Singh⁵**; **Crystal Developers vs. Asha Lata Ghosh⁶**. In the case of **Crystal Developers** (supra) the import of the provisions contained in section 41 of the Transfer of Property Act was expounded as under:-

57] In the case of Gurbaksh Singh v. Nikka Singh &

4 (2012) 12 SCC 133.

5 (2007) 2 SCC 404.

6 (2005) 9 SCC 375.

another reported in [AIR 1963 SC 1917] it has been held that section 41 is an exception to the general rule that a person cannot confer a better title than what he has. Being an exception the onus is on the transferee to show that the transferor was the ostensible owner of the property and that the transferee had after taking reasonable care to ascertain that the transferor had power to transfer, acted in good faith.

58] In the case of Seshumull M. Shah v. Sayed Abdul Rashid & others reported in [AIR 1991 Karnataka 273], it has been held that in every case, where a transferee for valuable consideration seeks protection under section 41 of the Transfer of Property Act, the transferee must show that the real owner had permitted the apparent owner either by express words, consent or conduct to transfer the property in favour of the transferee. In other words, it must be shown that with the consent of the true owner, the ostensible owner was able to represent himself as the owner of the property to the purchaser for value without notice.

49. In the facts of the case, at this stage, a determinative finding on the question as to whether the predecessors in title of defendant Nos. 1 and 2 executed the conveyances as the ostensible owners of the suit property is neither permissible nor possible. However, the conditions of the transfer being for consideration and the defendant Nos. 1 and 2 having taken reasonable care to ascertain that their predecessor in title had the power to transfer and acquired the property in good faith can be said to have been prima facie fulfilled. The defendant Nos. 1 and 2 prima facie appear to be bonafide purchasers for valuable consideration as the record pertaining to the subject property for over 70 years does not show the trace of

title in Vithu, save and except the Sale Deed of the year 1938 which undoubtedly commands value being registered instrument. But the subsequent dealings with the properties and conduct of the parties, prima facie, gives an impression of Vithu and his successors not being the owners of the suit property. In the circumstances, the aspect of the predecessor in title of defendant Nos. 1 and 2 being the ostensible owner of the suit property deserves adjudication at the trial post evidence.

50. The aspect of conduct of the parties in not approaching the Court for an equitable relief of injunction is required to be appreciated in the light of the averment in the plaint that the plaintiffs were cultivating the suit land since certification of Mutation entry No. 644 pursuant to Sale Deed dated 21st December, 1938.

51. As noted above, under Mutation entry No. 959, old Survey No. 116 came to be mutated in the name of Bendya Bhoir and Hasha Bhoir. The mutation entries continued on those lines all along. It is the claim of the plaintiffs that they had stopped cultivating the suit land few years prior to the institution of the suit. Prima facie, there is no material to indicate the cultivation of the suit property by the

plaintiffs and defendant No. 72. Such a long cultivation exceeding 60 years must have been evidenced by documents showing actual cultivation by the plaintiff. It also does not stand to reason that over a half century, the plaintiffs and their predecessors in title would not have had the occasion to verify the entries in the record of rights of the suit property. The assertion in the plaint that the plaintiffs learnt about the fraudulent mutation of the names of the vendors of defendant Nos. 1 and 2 when their title was questioned, was thus required to be accepted with a pinch of salt.

52. There is another facet which bears on the knowledge of the plaintiffs about the infraction of their stated rights. It could not be controverted that the defendant Nos. 1 and 2 have been developing project since the year 2014. An endeavour was, however, made to assert that the plaintiffs had known that the defendant Nos. 1 and 2 were developing the project but those developments were in the adjoining lands. Implied in this assertion is an admission about the development potential of the suit property. It, therefore, defies comprehension that such a valuable land with development potential would have remained unattended for years together.

53. The aforesaid facts assume significance in determining the

elements of balance of convenience and irreparable loss. The trial Court was alive to this position and indeed noted that the plaintiffs maintained silence for over 70 years. If a person does not exercise his rights over the property and allows the other to develop that property to a substantial extent, then equities intervene. Creation of third party interests is often an inevitable consequence. The aspect of delay and laches is required to be considered through this prism.

54. There is material to indicate that the defendant Nos. 1 and 2 have started development by amalgamating various holdings. A restraint to develop the particular portion of the property in such a project may have the consequence of destroying the very unity and integrity of the project. The learned Judge justifiably declined to restrain the defendant Nos. 1 and 2 from carrying out further construction. That would have entailed the consequence of stalling the entire project. The grievance of the defendant Nos. 1 and 2 is that the restraint to create third party interest is equally onerous. Whether the impugned order is justifiable or deserves to be modified to mould equitable relief is the moot question ?

55. Two competing interests deserve consideration. One, the

assertion of the plaintiffs that once the Court finds that the title vests in the plaintiff, there could be no interference with the incidence of ownership and possession of the plaintiffs over the suit property. Second, the contention of the defendants No.1 and 2 that the plaintiffs by their conduct have dis-entitled themselves from equitable relief since the defendant Nos. 1 and 2 have carried out substantial development and construction over the suit property from the year 2014 onwards and the defendant Nos. 1 and 2 as well as the transferees would suffer grave prejudice in the event of restraint over creation of third party rights.

56. I have noted the circumstances which obtained. Ex facie there is material to show that the defendant Nos. 1 and 2 have been developing the lands including the subject property since the year 2014. It is the claim of defendant Nos. 1 and 2 that they have amalgamated various plots and the integrity of the project as a whole would be destroyed if restraint to transfer the units constructed over the subject property is ordered. Conversely it is, prima facie, difficult to readily accede to the contention of the plaintiffs that they did not seek enforcement of their rights qua the subject property, as the defendant Nos. 1 and 2 were developing adjacent lands and they approached the authorities upon noticing

that the defendant Nos. 1 and 2 committed encroachment over the subject property. Pertinently, the portions of the land which the plaintiffs had conveyed to the defendant Nos. 1 vide Deed of Conveyance dated 25th February, 2008 were also part of the integrated development. The plaintiffs thus must have been put on guard. I am, therefore, inclined to hold that the attendant circumstances render it inconceivable that the plaintiff had no inkling of the suit property being part of the integrated development.

57. Mr. Dani, learned senior advocate for the plaintiff, strenuously urged that to allow the defendant Nos. 1 and 2 to complete the construction over the suit property and also create third party rights therein would amount to putting a premium on illegality and permit the defendant Nos. 1 and 2 to take advantage of their own wrong. There are no equities in favour of defendant Nos. 1 and 2. Mr. Dani, submitted that according to the plaintiff, the appellants are constructing only wing D and E in the suit property. Therefore, the restraint does not operate onerously as claimed by defendant Nos. 1 and 2.

58. The defendant No. 1 has submitted a list of the transferees

and allottees in High Land Spring A, B and C being developed by the defendants over the subject lands and it is submitted that the defendants and appellants have executed 287 residential units and 30 shops. In addition, allotment of 34 residential units and 9 shops have also been made. Prima facie, it appears that the project has reached an advanced stage. Where a party entitled to raise the dispute allows the development to take place by not raising the grievances at an opportune time, the Court can not lose sight of the fact that substantial development has taken place. If a party chooses not to approach the Court and seek interim reliefs at an opportune time, the inaction and delay operate to its peril. With the passage of time invariably third party rights are created and equities intervene. This fact must also weigh with the Court in deciding an application for interim relief in the nature of stay to the development or on creation of third party rights.

59. As noted above, the trial Court was also alive to these considerations and chose not to prohibit the defendants from carrying out the construction but thought it appropriate to restrain the defendants from creating third party rights.

60. I find substance in the submissions of Mr. Samdani, learned

Senior Advocate that in the facts of the case the restraint on transfer also operates onerously. One, the unity of the project gets disturbed if the defendants No. 1 and 2 are prohibited from transferring the units, despite full development. Two, the capital which the defendants No. 1 and 2 would invest to build the structures would remain locked. Three, since third party rights in respect of more than 240 prospective purchasers have already been created by execution of registered instruments as claimed by the defendant No. 1, the interest of the third parties would also be jeopardized. Four, a restraint on transfer of units till the disposal of the suit would bring in its trail the element of vicissitudes of litigation as the disposal of the suit may take time.

61. A useful reference in this context can be made to the decision of the Supreme Court in the case of **ECE Industries Limited Vs. S. P. Real Estate Developers Pvt Ltd and Others**⁷

26. It is well settled that when construction has been made on a land, which is of considerable magnitude, and when the plaintiff shall not face any substantial injury, if no order of injunction is granted because of payment/deposit of the entire amount payable by the defendant to the plaintiff under the Agreement, though belatedly, we are of the view that the Court will not, as a matter of course, pass an order of injunction against the other party restraining the other party from raising any construction on the suit property till the disposal of the suit.

⁷ (2009) 12 SCC 776.

27. If ultimately, the suit filed by the plaintiff-appellant is decreed, he can be compensated in damages or the defendants/respondents may be directed to pull down the construction and deliver vacant possession to the plaintiff/appellant when no equity can be claimed for such construction by the respondent-defendants".

62. In the facts of the case, in my considered view, the balance of convenience tilts in favour of defendant Nos. 1 and 2 on account of the conduct of the parties, attendant circumstances the substantial development and imminent potentiality of prejudice to the third parties. At the same time, I find substance in the submission of Mr. Dani that the plaintiffs cannot be presented with a fait accompli and left in the lurch. An exercise of balancing equities is thus warranted. The interest of the plaintiffs is also required to be adequately protected keeping in view the possibility that eventually the plaintiffs may succeed.

63. To address this concern, the appellants-defendants were called upon to state as to how best they propose to secure the interest of the plaintiffs. Mr. Samdani, submitted that ready reckoner rate of the suit property was Rs. 37,500/- per sq. mtr. (2022). A two BHK built up unit commanded a price of 1.9 Crore. In my view, the plaintiffs interest deserves to be protected in such a manner that in the event they succeed, the security which the

Court may obtain from the defendants does not turn out to be inadequate and illusory. Undoubtedly, the Court would be justified in passing an appropriate order of demolition of the structures as indicated in the case of **ECE Industries** (supra). Yet, the likely alternative relief, which the Court may grant must also be, in a sense, efficacious. The area of land comes to around 3760 sq. mtr. The value of the subject land on the basis of the ready reckoner rate Rs. 37,500/-, as indicated by Mr. Samdani, would come to Rs. 14,10,00,000/-. It is common knowledge, the ready reckoner rate does not represent the market value, in all situations. Potentiality of development also needs to be factored in.

64. Having regard to the entire gamut of the circumstances, in my view, it may be appropriate to obtain security in the sum of Rs. 21 Crores. In addition, it needs to be clarified that the defendants No. 1 and 2 shall not be entitled to claim any equities whatsoever on account of creation of third party rights. It is also necessary to cast an obligation on the defendant Nos. 1 and 2 to specifically apprise the prospective transferees about the pendency of the suit and that the orders passed therein. Such a disclosure will ensure that the transferees would be in a position to take an informed decision and their interest would not be jeopardized.

65. The conspectus of the aforesaid consideration is that the impugned order to the extent it restrains the defendant Nos. 1 and 2 from creating third party interest in the suit property, deserves to be quashed and set aside subject to the defendant Nos. 1 and 2 furnishing adequate security.

66. Resultantly, the appeals preferred by defendant No.1, being Appeal From Order No. 241 of 2023, and defendant No. 2, being Appeal From Order No. 444 of 2023, deserve to be partly allowed and the appeal preferred by the plaintiffs is liable to be dismissed.

Hence, the following order.

ORDER

1] The Appeal From Order (St.) No.10020 OF 2023 filed by the plaintiffs stands dismissed.

2] The Appeal From Order No. 241 of 2023 filed by defendant No. 1/ appellant and Appeal From Order No. 444 of 2023 filed by defendant No. 2/appellant are partly allowed.

3] The impugned order restraining the defendant Nos. 1 and 2 from creating third party interest in the suit properties, stands quashed and set aside subject to the following conditions:

(i) The defendant Nos. 1 and 2 shall furnish a bank guarantee of a

nationalized bank in the sum of Rs. 21 Crores to the satisfaction of the trial Court, within a period of two months.

(ii) Defendant Nos. 1 and 2 shall not claim any equities on account of development and creation of third party interests in the suit property.

(iii) The defendant Nos. 1 and 2 shall also file an undertaking before the trial Court to the effect that they will make a specific disclosure to the prospective transferees about the pendency of the suit and the orders passed therein, including this order.

4] It is clarified that in the event of default to fulfill the above conditions, within the aforesaid period, this order shall stand vacated and the order passed by the trial Court shall continue to operate till the disposal of the suit.

5] By way of abundant caution, it is further clarified that till the fulfillment of all the above conditions, the impugned order shall continue to operate.

6] The hearing of suit stands expedited.

7] The parties shall bear their respective costs.

(N. J. JAMADAR, J.)