IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 15280 OF 2024
IN
FIRST APPEAL (ST.) NO. 32772 OF 2024

Neena Rajeev Rastogi (Neena Gokaldas Rathod) ...Applicant.

Versus

Narmada Gokaldas Rathod and Others. ...Respondents.

Mr. Simil Purohit, Senior Advocate along with Mr. Gaurav Jangle and Ms. Nidhi Mistry i/b I. V. Merchant & Co.,for the Applicant.

Mr. Shailesh Shah, Senior Advocate along with Mr. Ankit Lohia i/b Mr. Ketan Arvind Chothani for the Respondent No. 5.

Mr. Piyush Shah and Ms. Manisha Jain for the Respondent Nos. 1 and 2.

Coram : Sharmila U. Deshmukh, J.
Reserved on : February 5, 2025
Pronounced on : February 11, 2025.

ORDER :

1. By way of present Interim Application, the Applicant-original Plaintiff seeks *inter alia* interim order of prohibitory injunction restraining the Respondent Nos.1, 2, 4 and 5 from alienating the suit property and from carrying out any development in respect of the suit property or any part thereof being land bearing CTS No.32 of Revenue Village Malad, Taluka Borivali, Mumbai admeasuring 323.60 square meters situated at Liberty Garden Cross Road No.2, Malad (West) and for appointment of Court Receiver. For sake of convenience, the parties are referred to by their status before the Trial Court.

2. To briefly encapsulate the facts of the case, S.C. Suit No.1977 of 2022 was filed in the City Civil Court, Mumbai in which the mother, brother and sister were arraigned as Defendant Nos.1 to 3 and the subsequent transferees of the suit property were arraigned as Defendant No.4 and 5. The suit sought a declaration about the Plaintiff's ¼th share in the suit property and cancellation of the Conveyance Deeds dated 22nd January 2015 executed between Defendant Nos.1 and 2 with Defendant No.4 and 3rd February 2020 executed between Defendant No.4 and Defendant No.5. The claim was on the basis of being the daughter and legal heir and representative of original owner Gokaldas Rathod, who expired in the year 1972. The plaint pleaded ignorance of the developments taking place in respect of the suit property by pleading that after marriage in the year 1995, the Plaintiff had shifted to United Kingdom and did not visit the suit property till 18th July, 2022 and it is only in the year 2022 when she was informed by Defendant No.1 and 2 about the conveyance in favour of Defendant No.4 and subsequently to Defendant No.5 that the suit came to be filed.

3. In the Trial Court, the Defendant Nos.1 and 2 supported the Plaintiff. The Defendant No.4 did not participate in the proceedings.

4. The Defendant No.5 filed its written statement contending that the Defendant Nos.1 and 2 were shown as owners of the suit property in the property card in the year 2005 and they had entered into Agreement for Sale in the year 2007 firstly with one Raj Construction and had thereafter sold the suit property under registered Deed of Conveyance in the year 2015 to Defendant No.4. It was pleaded that subsequently by registered Deed of Cancellation of the year 2017, the agreement with Raj Construction was cancelled. It was contended that the Defendant No.5 purchased the suit property by registered Deed of Conveyance dated 3rd February, 2020 and had expended amount of Rs 7,52,02,901/ for carrying out development of property.

5. The Trial Court by the impugned judgment and order dated 5th September 2024 partly decreed the suit and declared that the Plaintiff and Defendant no.3 are entitled to ¼th each share in the sale consideration from Defendant Nos.1 and 2 and rejected other relief of cancellation of Conveyance Deeds,which is subject matter of challenge in the First Appeal.

6. The present Application has been supported by the Defendant No.1 and 2 contending that they have filed substantive suit being Suit (L) No.26891 of 2023 in the High Court challenging the agreements executed in respect of the suit property.

7. The Defendant No.5 by its affidavit in reply resisted the grant of interim relief contending that similar reliefs were prayed for during pendency of Suit and not granted. It is pleaded that pursuant to the agreement for sale, the original bungalow was demolished by Raj Construction in the year 2008 and construction of building was commenced after obtaining necessary approvals. It is contended that Raj Construction handed over four flats to the Defendant Nos.1 and 2 and their relatives including Defendant No.3, which were subsequently surrendered to Defendant No.4. It was contended that the Defendant No.5 is the bonafide purchaser for value without notice and it cannot be believed that the Plaintiff was unaware of all the developments in respect of the subject property when the Plaintiff is shown to have transferred and remitted amounts to Defendant No.2. It is further contended that the Plaintiff visited India between 1998 to 2021 about 22 times and therefore cannot feign ignorance of the developments.

8. Heard Mr. Simil Purohit, learned Senior Advocate appearing for Applicant, Mr. Shailesh Shah, learned Senior Advocate appearing for the Respondent No. 5 and Mr. Piyush Shah, learned Counsel appearing for the Respondent No. 1 and 2.

9. Mr. Purohit would submit that once the Trial Court has accepted that the Plaintiff has ¼th share in the suit property, it could not have restricted the decree to ¼th share in the sale consideration to be received from Defendant Nos.1 and 2. He submits that the Defendant No.5 cannot be said to be bonafide purchaser for value without notice firstly as there was no public notice issued prior to execution of Conveyance Deed in the year 2020 and secondly that the inclusion of Defendant No.3 in the execution of Deed of Surrender in the year 2016 ought to have put the Defendant No.5 to notice. He submits that under Section 41 of the Transfer of Property Act, the consent has to be express or implied and the proviso to the said Section provides for reasonable care to be taken before Defendant No.5 can be termed as bonafide purchaser for value without notice, which is not so in the present case. He submits that the Trial Court has applied the doctrine of estoppel by imputing knowledge to the Plaintiff without appreciating that knowledge cannot amount to estoppel or waiver and can only trigger the period of limitation which has been held in Plaintiff's favour. He submits that under Section 115 of the Evidence Act it is necessary for the person by his act or omission to intentionally cause another person to believe a thing to be true and to act upon such belief, which is not so in the present case. He submits that demolition of bungalow in the year 2008 would not extinguish the right of the Plaintiff. He would further submit that the Defendant Nos.1 and 2 had no right to deal with Plaintiff's share and the right of plaintiff has not evaporated by reason of subsequent transfers. He submits that the Defendant No.5 has denied that the Plaintiff is the daughter of Gokuldas and therefore the Plaintiff's ¼th right in the property was in *lis* and came to be crystallized only when the declaration was given by the Trial Court.

10. *Per contra* Mr. Shailesh Shah for Defendant No.5 would submit that the proceedings are collusive proceedings. He submits that it cannot be accepted that the Plaintiff was not aware of any development particularly when the bungalow itself was demolished in the year 2008 and the Plaintiff is shown to have visited India from 1998 to 2021 atleast 23 times. He submits that the Defendant No.5 cannot be directed to secure the share of Plaintiff as the decree provides for ¼th share of sale consideration to be received from Defendant Nos.1 and 2. He, on instructions, would however submit that the Defendant No.5 is ready and willing to reserve one flat admeasuring 520 square feet in the new building subject to outcome of the First Appeal.

11. He submits that as the Trial Court has held that as the Plaintiff had implied knowledge, she is estopped from claiming otherwise particularly when there is no objection raised by the Plaintiff during the period 2008 to 2022. He would further point out findings of the Trial Court which has considered the evidence that Plaintiff's constituted attorney was residing at a distance of 5 minutes from the suit property, that from 1998 to 2021, the Plaintiff had visited India 23 times, and, that in the year 2019 she had remitted monies to the account of Defendant No.2 on 6 to 7 occasions. He submits that the fact that no action has been taken by Plaintiff against the Defendant Nos.1 and 2 proves collusion. He submits that the Plaintiff was passive observer for many years and now cannot claim any equities. He submits that Defendant No.5 is bonafide purchaser for value without notice and drawing attention of this Court to paragraph 43 of the impugned judgment, he submits that the Defendant No.5 had examined witness from Bank of India who had given the title certificate prior to the conveyance being executed in the year 2020.

12. In rejoinder Mr. Purohit would submit that the transactions are severely undervalued and considering the ready reckoner rates, the approximate value of Plaintiff's ¼th share in the suit property would be in the sum of about Rs.4.5 crore. He submits that as the Trial Court has held that the Plaintiff is entitled to ¼th share, the Defendant No.5 should be directed to reserve ¼th constructed area for the Plaintiff to balance equities.

13. Mr. P. M. Shah for Defendant Nos.1 and 2 would submit that it was argued before the Trial Court that the suit property is purchased at a far less consideration than the actual market value and would submit that the Defendant Nos.1 and 2 have filed a comprehensive suit to challenge the conveyances.

14. I have considered the submissions and perused the record.

15. The relevant interim relief sought by the Plaintiff reads as under:

> "b) Pending hearing and final disposal of this First Appeal, this Hon'ble High Court be pleased to pass an order of injunction restraining the Respondent No. 1 to 2 and 4 and 5, their agents, servants, assigns and/or any person claiming through them, either directly or indirectly, from further alienating and/or creating third party interest and/or parting with possession and/or inducting any third party in the Suit Property and/or carry out construction, demolition, development or re-development and/or any improvements or alterations/modifications and/or apply for any permissions, approvals, sanctions, renewal re-validation of permissions from the MCGM or concerned statutory authorities in respect of the Suit Property or any part thereof i.e. structure with Land Bearing CTS No. 32 of Revenue Village, Malad (South), Taluka Borivali, Mumbai Suburban District admeasuring about 323-60 Square Meters situated at Liberty Garden Cross Road No. 2, Malad (West), Mumbai 400064 until future directions by this Hon'ble Court;
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> (c) Pending hearing and final disposal of this First Appeal, this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay or some other fit and proper person on the Suit property i.e. structure with Land Bearing CTS No 32 of Revenue Village, Malad (South), Taluka Borivali, Mumbai Suburban District admeasuring about 323.60 square meters situated at Liberty Garden Cross road No 2, Malad (West), Mumbai 400064 with the direction to take forcible possession of the Suit Property with all powers under Order 40 Rule 1 of the Code of Civil Procedure and for such period as this Hon'ble Court deems fit and proper."

16. As far as appointment of Court Receiver is concerned, there were no submissions advanced in that respect. The arguments were confined to the grant of prayer clause (b). Prayer clause (b) as pleaded shows that prohibitory relief is not confined to ¼th share of suit property but is claimed in respect of entire suit property, i.e. CTS No. 32 admeasuring 323.60 sq. meters. As the suit itself challenged the conveyances executed in the year 2015 and 2020, it is clear that prior to the institution of the suit, the suit property was not available for partition. The Trial Court has declined the relief of cancellation of deeds of conveyance and has partly decreed the suit holding that Plaintiff is entitled to ¼th share in the sale consideration and that too from Defendant Nos.1 and 2. The decree which is now in the hands of the Plaintiff is essentially a money decree to the extent of ¼th share of the sale consideration.

17. For the grant of interim relief of injunction, the trinity of principles is a *prima facie* case, balance of convenience and irreparable loss and prejudice. As far as *prima facie* case is concerned, the Plaintiff sought declaration and possession of her ¼th share in the property, which property had admittedly changed hands and identity at the time of institution of the suit. The bungalow was demolished in the year 2008 and the property was undergoing extensive development. The Plaintiff not being the executant of the agreements, the appropriate relief which should have been sought was that the agreements are not binding on the share of the Plaintiff. Instead the Plaintiff has sought cancellation of the Conveyance Deeds of the year 2015 and 2020, which obviously could not have been granted.

18. Assuming for sake of argument, even if it is accepted that the Plaintiff is entitled to partition and separate possession of her ¼th share in the suit property, the status of Defendant No.5 would be that of a co-owner as the Conveyance of the year 2015 was executed by Defendant Nos.1 and 2, who had right in the property, and by virtue of the execution, the Defendant No.4 has acquired the rights of Defendant Nos.1 and 2 in the suit property. The rights were subsequently transferred to Defendant No.5, who stepped in the shoes of Defendant Nos.1 and 2 as co-owner of the property. Thus even if the Plaintiff succeeds and it is held that Plaintiff is entitled to $\frac{1}{4}^{th}$ share in suit property being a co-owner, no relief of injunction can be granted against the Defendant No.5.

19. The claim of Plaintiff that she was unaware that the bungalow was demolished or that it was sold in the year 2007 is *prima facie* difficult to accept for the simple reason that it has come in her evidence that she had visited India almost 23 times from 1998 to 2021 and it cannot be accepted that she did not visit the suit property even once. She has further admitted that she had remitted amounts to the account of the Defendant No.2 which would in fact demonstrate that relationship was cordial between the parties. The Trial Court has come to a specific finding based on the evidence led by the Plaintiff and Defendant No.3 that they had knowledge of the conveyance, which finding is *prima facie,* sustainable.

20. Even if the Plaintiff succeeds and it is held that the Plaintiff is entitled to $\frac{1}{4}^{th}$ share in the suit property and the Defendant Nos.1 and

2 could not have dealt with her share of property, the substantial development of the property over the years have created a physical impossibility of partition by metes and bounds and thus the entitlement of the Plaintiff will be restricted to ¼th share in the value of the property. At this stage or even upon the Plaintiff succeeding in the Appeal, *prima facie* the entitlement of the Plaintiff would be a money claim, which can be secured. The Plaintiff has valued her ¼th share in the plaint in the year 2022 for purpose of Court fees and jurisdiction at Rs.35 lakhs and therefore the valuation now sought to be produced before this Court to demonstrate that her ¼th share stands at Rs.4.5 crore cannot be accepted.

21. In the interim Application, the Plaintiff seeks stay against alienation and further development in respect of entire property, when as discussed above, the claim of the Plaintiff is *prima facie* reduced to only a money claim. The Defendant No.5 is the purchaser of the suit property under a valid registered sale Deed of the year 2020 and the interim application seeks to place fetters on ownership rights of Defendant No.5, which cannot be granted firstly for the reason that at this stage, the Defendant No.5 is the owner of the suit property and secondly that the Plaintiff is a decree holder of money decree against the Defendant Nos.1 and 2.

22. As regards the finding of Trial Court about implied knowledge of

Plaintiff under Section 3 of Transfer of Property Act, a person is said to have notice of a fact when he actually knows the fact or when but for willful absentation from an enquiry or search, which he ought to have made or gross negligence, he would have known it. The Trial Court has come to a finding based on evidence that the Plaintiff had knowledge of the developments in respect of the suit property and by omission of any action has caused Defendant Nos.4 and 5 to believe that Defendant Nos.1 and 2 are the joint owners and in that context, the Trial Court has applied Section 115 of Indian Evidence Act and held that the Plaintiff is now estopped from denying that Defendant Nos.1 and 2 were owners of the property. The Trial Court has not arrived at a finding that the Defendant Nos.1 and 2 are ostensible owners and has merely recorded the submissions in paragraph 46 of the impugned judgment. The findings of Trial Court are *prima facie* sustainable.

23. The challenge to the conveyance deeds of the year 2015 and 2020 without restricting the challenge only *qua* her share coupled with inaction against the Defendant Nos.1 and 2, when considered with the position, that in the year 2023, the Defendant Nos.1 and 2 have filed a suit challenging all agreements *prima facie* shows collusion between the Plaintiff and the Defendant Nos.1 and 2. In light of the above discussion in my view, the Plaintiff has failed to make out *prima facie* case for grant of injunction.

24. Even if *prima facie* case is made out, as the balance of convenience is not in favour of the Plaintiff, no interim relief can be granted. It is an admitted position that during the pendency of suit, there was no interim relief granted in favour of the Plaintiff and consequently the Defendant No.5 has progressed with the development of the suit property. The agreement for sale was executed by the Defendant Nos.1 and 2 in favour of Raj Construction in the year 2007 and the bungalow came to be demolished in the year 2008 and thereafter there was subsequent transfers in favour of the Defendant No.4 and then to Defendant No.5. The suit has been instituted in the year 2022 and the inaction of the Plaintiff for several years results in tilting the scales in favour of the Defendant No.5. Although the Plaintiff had challenged the sale-deeds, the relief was declined, and similarly the suits filed by the Defendant Nos.1 and 2 challenging the sale-deeds have not yielded any result. Resultantly, as of today the position is that the Defendant No.5 is the owner of the subject property and is entitled to carry out construction thereon. This Court is informed that as of today there are six flats constructed and third party rights have been created and approval has been sought for construction of 11 more flats.

25. The Defendant No.5 had purchased the property by Deed of conveyance dated 3rd February 2020 and by examining the witness

No.2, who was on panel of Bank Of India and had given a search report in respect of the property, shows due diligence being exercised by Defendant No.5. The Deed of Surrender executed in the year 2016 was not only by the Defendant No.3 but also by other relatives and therefore the issue will have to be considered at the time of hearing the Appeal on merits. It is clear that in all the documents the Defendant Nos.1 and 2 were shown as owners of the property and the findings of Trial Court *prima facie* establishes that the Defendant No.5 was a bonafide purchaser for value without notice.

26. Subsequent to the execution of conveyance deed the Respondent No.5 has taken various steps to develop the property and is stated to have expended an amount of Rs.7,12,02,901/- towards the development of property. On the other hand, the Plaintiff has been inactive at least from 2008 when the bungalow came to be demolished and has only filed suit in the year 2022 and as of today is the decree holder only against Defendant Nos.1 and 2. The balance of convenience is in favour of the Defendant No.5 and in event interim relief is granted irreparable loss, harm and injury will be caused to the Respondent No. 5.

27. In order to secure the interest of the Plaintiff in event she succeeds in Appeal, the offer given by the Defendant No.5 to keep reserved a flat ad-measuring about 520 square feet in the building which is being constructed on the subject land is accepted. The value of said flat would be approximately in the range of Rs.1.5 to 2 crore considering the location of plot and would more than secure Plaintiff's ¼th share which she has valued in the suit at Rs.35 lakh.

28. Resultantly, the Interim Application is disposed of with direction to the Defendant No.5 to reserve a residential tenement admeasuring 520 square feet carpet area in the newly constructed building on the suit plot, the details whereof to be communicated to the Plaintiff within period of 15 days from date of uploading of the order on the official website.

[Sharmila U. Deshmukh, J.]