

(2013) 10 BOM CK 0109

In the Bombay High Court

Case No : Appeal From Order No. 402 of 2013 and Civil Application No"s. 486 and 536 of 2013

M/s. Mahavir Associates

APPELLANT

Vs

Shri Anthony John D'Souza and Others

RESPONDENT

Date of Decision : 23-10-2013

Acts Referred:

Citation : (2014) 1 ABR 769 : (2014) 4 ALLMR 29 : (2014) 1 BomCR 766 : (2014) 1 MhLj 86

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Janak Dwarkadas and Mr. Vineet B. Shah, s, Mr. Cyrus Ardeshir, Mr. Rahul Dwarkadas, Ms. Prachi Dhanoni and Ms. Atika Vag instructed by M/s. Wadia Ghandy and Co, for the Appellant; R.D. Soni instructed by y, M/s. Ram and Co. for Respondent Nos. 2 to 14 in AO. No. 402 of 2013 and for Respondent Nos. 4 to 17 in AO. No. 321 of 2013 and Mr. M.A. Kamdar instructed by y, Kanga and Co. for Respondent No. 18 Mr. A.Y. Sakhare and Mr. A.R. Shaikh for Respondent Nos. 15 to 17 in AO No. 402 of 2013 and for Respondent Nos. 1 to 3 in AO No. 321 of 2013, for the Respondent

Final Decision : Disposed Off

Judgement

Anoop V. Mohta, J.—The Appellants, in both these Appeals from Order, have challenged common order dated 11 February 2013, passed in Special Civil Suit No. 577 of 2010 filed by the Appellants for declaration and injunction and Special Civil Suit No. 628 of 2010 filed by the Respondents for a specific performance, declaration and cancellation of the instruments. The order is against the Appellant in both the matters. The operative part of the impugned order is as under:-

ORDER

The application Exh. 5 in Spl.C.S. No. 577/2010 is hereby rejected.

The status-quo granted by this Court Dt. 18/08/2010 is hereby vacated.

The application Exh. 5 in Spl.C.S. No. 628/2010 is hereby allowed.

The defendants, their servants, agents etc. are hereby directed not to interfere in the occupation & possession of the suit property to the plaintiff till the decision of the suit.

The defendants, their servants, agents etc. are hereby further directed not to alienate the suit property in any manner till the decision of the suit.

The costs of these applications shall abide by the suits.

The copy of the order be kept in Spl.C.S. No. 577/2010.

2. The relevant prayers of the Appellants in Special Civil Suit No. 577 of 2010 filed in the month of August 2010 read as under:-

a) This Hon''ble Court be pleased to hold and declare that the Suit Development agreement dated 3/8/2007 is bogus, fabricated, forged, fraudulent, illegal, bad in law, void ab initio and the same is ultra virus to the provision of law and the same is without the force of law and not binding upon the Plaintiff.

.....

e) This Hon''ble Court be pleased to hold and declare that, the Suit agreement dated 6/6/1988 executed by defendant no. 2 with defendant no. 16 and 17 is bogus, fabricated, forged, fraudulent, illegal, bad in law, void ab initio and the same is ultra virus to the provision of law and the same is without the force of law and not binding upon the Plaintiff.

The Respondents are the Defendants in this Suit.

3. The relevant prayers of the Respondents in their Special Civil Suit No. 628 of 2010 filed on 3 September 2010, read as under:-

a) It be held, declared and decreed that the purported sale deed dated 7th February, 1995 is illegal, bogus, got up and fraudulent documents and be cancelled.

...

c) It be held, declared and decreed that the alleged Agreement dated 15th November, 1989 and/or Power of Attorney dated 20th February, 1990 and alleged agreement dated 19th June, 1992 all are false, fabricated, illegal and bogus documents.

d) The Defendant nos. 2 to 15 be directed to specifically perform the first suit agreement and/or the second suit agreement as the case may be by executing requisite Deed of Conveyance in favour of the Plaintiff no. 1 by obtaining requisite N.A. Permission from the N.A. Authority AND/OR such other directions be given to the Defendants nos. 2 to 15 for compliance of their part of First Suit Agreement and/or Second Suit Agreement.

The Appellants are the Defendants in this Suit.

4. There is no dispute that the Trial Court has passed the order of status-quo on 18 August 2010 which was vacated on 11 February 2013, but this Court on 3 May 2013, continued the order of status-quo again. In the result, the order of status-quo has been in force since 18 August 2010, with regard to the common properties in question.

5. The learned Senior Counsel appearing for the Appellants has submitted referring to the Civil Applications filed in both these Appeals, by invoking Order 41, Rule 27 of the CPC (for short, "the CPC") and thereby contended that the documents referred in the Applications, the compilation from serial Nos. 1 to 23, be permitted to be taken on record of the Suit and the Appeals as those documents go to the root of the matter and specifically the findings given by the learned Judge in paragraph Nos. 14 to 18 about the thumb impressions and the signatures of the real sole owner of the suit property for want of documents/materials. The relevant paragraphs of the same are as under:-

14 It is pertinent to note here that the documents filed by parties & more particularly filed by the defendant No. 1 i.e. The Copy of Registered Deed of Conveyance Dt. 07/02/1995, The Copy of the Power of Attorney Dt. 03/08/2007, The Copy of the Development Agreement Dt. 03/08/2007, The Copy of Power of Attorney Dt. 03/08/07 & The Letter of Possession Dt. 06/06/1988 etc clearly shows & reads that these documents do not bear the signatures of the defendant No. 2 Smt. Dumubai Anthony D'Souza who is the real & sole owner of the suit property. However, these documents shows that the defendant No. 2 Smt. Dumubai Anthony D'Souza put her thumb impressions but the said thumb impressions have neither attested, acquainted or identified by any person or the defendant Nos. 3 to 15 who are her family members. Per contra, the defendant No. 2 has filed her Written Statement on her behalf & on behalf of the defendant Nos. 3 to 15 vide Exh. 29 along with her affidavit which bears her signatures. Not only this but also the defendant No. 2 has specifically submitted that neither she herself nor the defendant Nos. 3 to 15 have executed any document in favour of either the defendant Nos. 1 or the defendant No. 16 as alleged.

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18 Per contra, the documents filed by the defendant No. 1 more particularly the crucial document i.e. The Deed of Conveyance Dt. 07/02/1995 which is alleged to have been executed by & between the defendant Nos. 1, 16 & defendant Nos. 2, 3, 4, 7 & 8 put the question mark & doubt in respect of its duly execution as it was alleged to have been pending before The Sub-Registrar, Thane for the registration since 07/02/1995 till 01/02/2007 more particularly when such document does not bear the signatures of the defendant No. 2 Smt. Dumubai Anthony D'Souza but it bears the unidentified thumb impression which is denied by the defendant No. 2 herself.....

6. The contesting Respondents (Plaintiffs in other Suit) have opposed the

Applications on the ground of "No due diligence" and "no sufficient and bonafide reasons" made out for such Applications, at this Appellate stage, place on record these additional documents, which were well within their knowledge since long. They referred a Division Bench Judgment *Ferani Hotels Pvt. Ltd. Vs. Nusli Neville Wadia*, also for the same proposition. That was a case where the Chamber Summons was taken out to bring on record the documents in Appeal from final decree, where the parties have already led evidence in support of their case. We are concerned with the Appeals from Order, where the challenge is to the grant and the rejection of interim injunction Applications for and against the parties. The trial is yet to be commenced. The Division Bench itself actually considered all the documents placed along with the Chamber Summons on merits and not permitted to place those documents on record. In the present case, the situation is different. The documents filed at the earlier stage of the proceedings, need to be considered in these backgrounds. The aspect of due diligence cannot be overlooked and so also the omission to file such documents at the earliest point of time, while arguing and/or submitting the documents for the purpose of interim protection/injunction. In a given case, pending the trial, the learned Judge can pass ad-interim and/or interim order based upon the affidavits/counter affidavits of the parties. All the documents, may or may not be placed at this interim stage of the proceedings. The due diligence and/or omissions so referred and dealt with even in the Division Bench, as well as, under Order 41 Rule 27 of the CPC, just cannot be extended in a situation like this where admittedly the trial is not even commenced. In the Appeals from Order the grant of injunction/interim injunction is the only issue therefore, cannot be equated with the situation as contemplated under Order 41 of the CPC and so also the Judgment so referred above. *Ferani Hotels Pvt. Ltd. (Supra)*. There is no total bar. The Appellate Court, if the case made out, even permits the documents to be taken on record. The Court at interim stage of the Suit, can give all opportunity to the parties.

7. Order 39 Rule 4 of the CPC, as read and referred, is also a situation where the Trial Court may vary or discharge or set aside the order of injunction granted for the reasons provided in the same. The Court on various occasions, even modified such orders at their own, if the case is made out. The order if passed after hearing both the parties, the Court may still vary, provided the reasons should be given and to see that there should be no injustice and/or undue hardship to the other party. This provision if available to the Trial Court, I am inclined to observe that the Appellate Court in Appeal from Order, if the case is made out, may vary and/or set aside the order based upon the material available on record and/or taking note of additional documents/affidavits, but subject to hearing both the parties. The Applications therefore, so filed along with the compilation of documents, need to be considered in view of above provisions of the law itself, apart from the basic principle of giving opportunity to both the parties.

8. After hearing both the parties referring to the documents referred and relied upon by the learned Judge, the documents which are part of these present

Applications, are not new documents. The contesting Respondents-Defendants are also aware of those documents which have bearing on the reasons so given while passing the order against the Appellants, as the same itself signed and/or executed by some of the contesting Defendants-Respondents, specially the sole owner of the property as observed. There is no even submission made that those documents are totally new and/or they are not aware of the same. The main submission is, those documents though available with them, not produced at the relevant time and therefore because of lack of due diligence in view of order 41 Rule 27 principle, such documents cannot be permitted to be taken on record in these Appeals from Order, is unacceptable for the simple reason that the documents so referred, if are necessary for proper adjudication of the dispute between the parties including the rival submissions so raised, just cannot be overlooked by the Trial Court and so also, the Appellate Court.

9. The learned Judge in paragraph Nos. 14 to 18 read and referred basic documents of both the parties and thereby rejected the Application filed by the Appellants and granted the Application filed by the Respondents. The doubt was raised about the signature/thumb impression of one of the owner of the property (Smt. Dumubai).

10. In the present case, some of the documents so listed along with the Applications are in fact and factually referred in the documents admitted and/or relied upon by the parties. The registered documents if read and referred various other documents/agreements and as there is no dispute and/or denial to those registered documents, the contents of the same along with the documents so referred for some reasons, could not be produced at the relevant time, but the Appellants and/or party concern wants to place on record, even at the prima facie stage of the proceedings, I see there is no reason not to give an opportunity to place documents on record. The paragraph Nos. 7 and 8 of the Applications, though denied, given sufficient reasons for the Appellants, not to trace out and/or to place these documents before the Trial Court along with the injunction Application and/or reply.

11. Admittedly, both the parties have challenged these registered documents, where the question is of specific performance of the contract referring to the property in question. The effect of the same needs to be tested at the time of trial, but the fact of prior registration of the documents, just cannot be overlooked and so also the reasons for delay in registration of documents from 7 February 1995 till 1 December 2007.

12. Though documents, which the Appellants want to rely were definitely not part of the proceedings therefore, the learned Trial Judge based upon the material available, has passed the order, but the Appellants, as contended and as referred and shown those documents, if they want to place it on record are relevant and important for adjudicating their case, including their case of injunction and/or protection. Therefore, I am inclined to say that there is no reason not to grant this opportunity as it would be in the interest of all and even

for proper adjudication of the issue so raised covering the prima facie case and/or balance of convenience and/or equity.

13. I am not inclined to accept the submission that on the basis of these documents itself, this Court may pass the appropriate order and vary and/or modify the order of the Trial Court. The documents, even otherwise, required to be placed in the Trial Court and be accepted in accordance with law, by placing original documents and/or for some reasons the original documents are misplaced and/or not available, by filing an affidavit in support of the secondary documents. The Court required to consider even to accept the secondary documents by giving the opportunity to both the parties. Let the Trial Court consider and to take these documents on record and pass appropriate order, even on merits of the matter, as these documents if related and connected with the transactions in question, required to be re-considered for passing the interim injunctions/reliefs, as prayed.

14. Therefore, in the interest of justice, by keeping all points open and as I am inclined to grant these Applications, but subject to filing of an appropriate Application to take these documents on record before the Trial Court. The liberty is accordingly granted. This is also for the reason that by granting these Applications at appellate stage and I would not be in a position to pass a fresh order based upon the merits of these documents without testing its merits. I am permitting them to take out these Applications in the Trial Court, let the Trial Court deal with these documents in accordance with law and pass fresh order on merits of these Applications (Exhibit-5) also by hearing both the parties.

15. For the above reasons, by keeping all points open, the common impugned order passed needs to be quashed and set aside, as the reasons are common and interconnected for both the Applications filed by the respective parties. The matter is remanded back. Both the Applications be re-heard by the learned Trial Judge by giving an opportunity to the parties and dispose of the same preferably within 12 weeks from the date of the order. All the contentions are kept open.

16. The status-quo order granted by the Court has been in force since 18 August 2010. That should be continued till the decision of these Applications (Exhibit-5) in both the Suits. Both these Appeals are accordingly disposed of. All the Civil Applications are also disposed of. There shall be no order as to costs.