

(2017) 06 BOM CK 0169
In the Bombay High Court
Case No : 428 of 2017

M/s Prince Developers, & Ors.

APPELLANT

Vs

Smt. Filomena Anthony Pereira @ Filomena Jesus Rebelo e
Pereira @ Filomena Santaur Rebelo @ Maskar Rebelo, & Ors.

RESPONDENT

Date of Decision : 16-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 1 Rule 10](#)

Citation : (2017) 06 BOM CK 0169

Hon'ble Judges : C.V. Bhadang

Bench : SINGLE BENCH

Advocate : Ashwin D. Bhobe, Shradha Bhobe, Sachin Desai

Judgement

1. Rule made returnable forthwith. The learned Counsel waives service for the respondent no. 1, who is the contesting respondent being the original plaintiff. Heard finally by consent of parties.

2. Respondent no. 1 has filed Special Civil Suit No. 35/2014/B, for declaration and injunction. The respondent no. 1 is claiming declaration that the Power of Attorney and the Memorandum of Understanding, both dated 11.10.2011 are not valid as they are tainted with fraud and misrepresentation. Respondent no. 1 also sought temporary injunction, which application is pending before the Trial Court. The petitioners have purchased the suit property from the original defendant no. 5, during the pendency of the suit. The petitioner sought impleadment in the suit and that application filed by the petitioner is also pending before the Trial Court.

3. A perusal of the order sheet would show that on 02.11.2016, the petitioner had filed an application for impleadment (Exhibit D/25), to which the respondent no. 1 had filed reply (Exhibit D/26) on 09.12.2016 and the matter was adjourned to 25.01.2017. In the meantime, on 13.12.2016, the respondent no. 1 moved an application for preponement of the date of the hearing, on which the Trial Court, issued notice returnable on 02.01.2017 to all the Advocates. According to the

petitioner, the notice of preponement was never served on the Advocate for the petitioner. Thus, on 02.01.2017, there was no appearance on behalf of the petitioner. On 02.01.2017, the learned Trial Court found that it was necessary to hear the application under Order I, Rule 10 of CPC, before hearing the application for temporary injunction. The petitioner filed an application for recall of that order on 31.01.2017, being application Exhibit D/29, which has been rejected on 24.04.2017, on the ground that the application for recall is not maintainable. The petitioner is challenging the orders dated 02.01.2017 and 24.04.2017.

4. I have heard Shri Bhobe, the learned Counsel for the petitioner and Shri Dessai, the learned Counsel for the respondent no. 1.

5. On behalf of the petitioner, reliance is placed on the decision of the Supreme Court in the case of Amit Kumar Shaw & Another Vs. Farida Khatoon & Another, (2005) 11 SCC 403, in order to submit that the application for impleadment in such cases has to be allowed. It is submitted that the learned Trial Court was not justified in preponing the date and that too, without satisfying about the service of the application on the petitioner or his Advocate.

6. It is submitted by the learned Counsel for the respondent no. 1 that the respondent no. 1 had filed an affidavit stating that the learned Counsel for the petitioner was orally informed about the preponement.

7. Without going into this controversy, it appears that both the applications, namely, application for temporary injunction filed by the respondent no. 1 and the application for impleadment filed by the petitioner, are pending before the Trial Court. It appears from the record that the decision of the Supreme Court in the case of Amit Kumar Shaw (supra), was not brought to the notice of the Trial Court, when the Trial Court decided to hear the application for temporary injunction first by order dated 02.01.2017. It would thus be appropriate to direct the Trial Court to consider the question afresh, after hearing the parties. The learned Counsel for the respondent no. 1, in all fairness, states that he has no objection for such a course to be followed.

8. In such circumstances, the petition is disposed of in the following terms, by consent of parties: O R D E R

(a) The impugned orders dated 02.01.2017 and 24.04.2017, are set aside.

(b) The learned Trial Court shall hear the parties and decide the question whether the application for injunction needs to be heard before the application for impleadment or both the applications need to be heard together.

(c) The petition is disposed of in the aforesaid terms.