

(2016) 08 BOM CK 0078

In the Bombay High Court

Case No : Appeal From Order (St) No. 23230 of 2016 in Notice of Motion No. 1811 of 2016 in Suit No. 702 of 2016 with Civil Application (St) No. 23231 of 2016 in Appeal From Order (St) No. 23230 of 2016

M/s. Zodiac Developers Pvt. Ltd. Mumbai,	APPELLANT
Vs	
M/s Krishna Developers Mumbai	RESPONDENT

Date of Decision : 24-08-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2016) 5 AIRBomR 827 : (2017) 1 ALLMR 749 : (2017) 1 MhLJ 166

Hon'ble Judges : Dr. Shalini Phansalkar-Joshi, J.

Bench : Single Bench

Advocate : Mr. Madhur Section Surana, Advocate, for the Appellant; Mr. P.K. Dhakephalkar, Senior Advocate I/by Ashok Dhanuka, Advocate, for the Respondent No. 1; Mrs. S.U. Deshmukh, Advocate, for the Respondent No. 2; Mr. Anoop Patil, Advocate, for the Respondent No

Final Decision : Disposed Off

Judgement

Dr. Shalini Phansalkar-Joshi, J. (Oral)—Admit.

2. With the consent of the learned counsels for the appellant and respondents, this appeal is heard finally at the stage of admission itself.

3. This appeal is preferred by the original defendant No. 1 challenging the order dated 22nd August, 2016, passed by the City Civil Court, Dindoshi, Mumbai, thereby making the Notice of Motion No. 1811 of 2016 in S.C. No. 702 of 2016, absolute in terms of prayer clause (a) thereof, restraining defendant No. 1 from entering upon and/or remaining upon the suit property bearing CTS No. 484 (part), situated at village Vile Parle (West), at Gulmohar Road, Juhu, Mumbai 400 049, ad-measuring 4400 sq. meters and further restraining him from carrying out any construction thereon. (For the sake of convenience, parties to this appeal are referred to by their original status in the trial court as plaintiff and defendant)

4. Facts of the appeal are to the effect that the respondent No. 1 plaintiff claims himself to be the sole proprietary firm of Mr. Rajiv Kashyap. The appellant-defendant No. 1 is a Private Limited Company dealing in construction and development activities. Defendant No. 2 is the statutory authority constituted under the Maharashtra Regional Town Planning Act; whereas defendant No. 3 is Slum Rehabilitation Authority (for short referred as "S.R.A."). It is common ground between the parties that plaintiff through his Architect placed an offer for development of the property bearing C.T.S. No. 455, 464 and 484 (part). Defendant No. 2 Maharashtra Housing and Area Development Authority (for short referred as, "MHADA"), approved the development of the said property and sanctioned plan vide letter dated 11th March, 2007 addressed to the plaintiff's Architect. The suit property was occupied by several slum dwellers which was declared as "slum" by defendant No. 3-S.R.A. and was declared open for slum redevelopment. The slum dwellers had formed two co-operative housing societies viz i) Juhu Hanuman Nagar Co-operative Housing Society and ii) Hanuman Nagar Co-operative Housing Society. Out of them, Juhu Hanuman Nagar Co-operative Housing Society appointed the plaintiff as their developer ; whereas another society appointed defendant No. 1 as their developer.

5. In view thereof, the plaintiff and defendant No. 1 executed agreement dated 20th February, 1997 and October, 1997 agreeing amongst themselves to develop property ; whereby plaintiff shall have 80% stake in the said project and defendant No. 1 shall have 20% stake in the said project. In pursuance thereof, various terms have been agreed upon between them. Plaintiff then obtained necessary permissions from defendant Nos. 2 and 3, and spent huge amount for the redevelopment of the said property. Defendant No. 3 also issued Letter of Intent dated 10.03.1998, for development of the S.R.A. scheme.

6. However, due to the litigation between plaintiff and one Shree Bhanubai Nensi Mahila Vidyalaya, a public Trust ; the defendant No. 2, vide letter dated 24.7.2000, informed to the plaintiff that the C.T.S. 484 (part) cannot form the part of the S.R.A. Scheme as it belongs to private party. Defendant No. 3 also informed the plaintiff by the letter dated 2.11.2000 that the S.R.A. scheme cannot be implemented on C.T.S. 484 (part) as defendant No. 2 has withdrawn their no objection for the same.

7. However, subsequent thereto the disputes also arose between plaintiff and defendant No. 1 concerning development of the said S.R.A. scheme. Hence with a view to settle those disputes an agreement came to be executed between the parties on 29.3.2004 whereby plaintiff had resigned as developer of the said scheme in lieu of valuable consideration and allowed defendant No. 1 to obtain Letter of Intent from Slum Rehabilitation Authority, for the entire project except C.T.S. No. 484 (part) Building No. 4. As per clause No. 9 of the said agreement except for this 484 (part) building No. 4, plaintiff removed his charge and handed over possession of the rest of the property to defendant No. 1. By clause No. 7 of the said agreement, it was agreed and endorsed that plot No. 484 (part) was not

part of the scheme and defendant No. 1 has no objection to plaintiff dealing with the said plot No. 484 (part) in any suitable manner without affecting the said scheme. It was also agreed that defendant No. 1 has no objection to S.R.A. withdrawing MRTP proceeding or other proceedings in respect of the said plot. Accordingly revised scheme and Letter of Intent was obtained excluding Plot No. 484 (part) from the entire project.

8. The grievance of the plaintiff was that despite execution of the said agreement and letters received from defendant No. 2 MHADA and defendant No. 3-S.R.A. also, deleting plot No. 484 (part) from the entire project of redevelopment, defendant No. 1 has started proceeding with the construction on the said plot. Hence plaintiff was constrained to file the suit before trial Court for declaration that defendant No. 1 has no right to develop, enter or remain upon the plot No. 484 (part) and for restraining defendant No. 1 from proceeding with the construction in respect of plot No.484 (part) which as per agreement between parties was deleted from the said scheme and declared as private property of plaintiff.

9. Initially the suit was filed in respect of plot No. 484 (part) and also C.T.S. No. 1755 and 1756, but subsequently on the objection raised by defendant No. 1, the other two survey Nos. 1755 and 1756 were deleted and relief was limited only in respect of Plot No. 484 (Part), admeasuring 4400 sq. meters.

10. Plaintiff, along with suit also filed Notice of Motion seeking interim relief as afore stated, restraining defendant No. 1 from carrying out construction in any manner over plot No. 484 (part) admeasuring 4400 sq. meters and for declaring permission and commencement certificate granted by defendant No. 2 as not enforceable in respect of construction on plot No. 484 (part).

11. This notice of Motion came to be resisted by defendant No. 1 admitting the execution of the agreement dated 29th March, 2004 and further submitting that as per said agreement, plaintiff has accepted an amount of Rs. 80 lacs from defendant No. 1 and has resigned from the said Slum Redevelopment Scheme. It was submitted that plaintiff also executed Power of Attorney in favour of defendant No. 1, in respect of remaining part of the property for redevelopment scheme. It was further submitted that after plaintiff's resignation from Slum Redevelopment Scheme, defendant No. 1 has modified the Letter of Intent and permission was sought in his name only. It was contended that the plaintiff does not have right title or interest in the suit property bearing C.T.S. No. 484 which was originally a larger property and thereafter C.T.S. 484 came to be sub divided into separate parts and they were separately numbered. According to defendant No. 1, under the garb protecting his interest in C.T.S. No. 484 (part) plaintiff is restraining defendant No. 1 from carrying out construction on the other parts of the property in respect of which defendant No. 1 has obtained valid permission. It was contended that, vide letter dated 13.04.2012, written by the plaintiff himself to the S.R.A. on 13th April, 2010, area of C.T.S.484 (part), alleged to be owned by the plaintiff, was mentioned to be 2840 sq.meters ; whereas now

plaintiff is claiming the area to be 4400 sq. meters. Thus, it is urged that under the garb of protecting or excluding C.T.S. 484 (part) from the scheme, the plaintiff is staking his claim over the larger area and hence he is not entitled to get any relief of interim injunction,.

12. In the reply filed to the Notice of Motion, defendant No. 1 has also raised issue of jurisdiction on the ground that dispute pertains to the implementation of the Slum Scheme and under Sections 42 of the Slum Rehabilitation Act, Civil Court cannot have jurisdiction. The another issue was also raised relating to limitation. It was urged that the cause of action for filing suit arose in the year 2012 ; whereas the suit is filed in the year 2016 and hence it was barred by limitation.

13. The trial Court, on hearing learned counsel for plaintiff and defendant No. 1 on this Notice of Motion and after relying upon the agreement executed between the parties and the various correspondence made by the parties with MHADA and SRA, came to the conclusion that as C.T.S. No. 484 (part) is not forming part of the redevelopment scheme and plaintiff has retained his rights and possession over the said C.T.S., defendant No. 1 cannot carry out any construction thereon. Accordingly, the trial Court held that the plaintiff is having prima facie case in his favour ; the balance of convenience also lies in his favour and if defendant No.1 completes construction on the property, which is excluded from the redevelopment, plaintiff will suffer irreparable loss. Accordingly the trial Court granted relief of interim injunction and made the Notice of Motion absolute in terms of prayer clause (a).

14. While challenging the impugned order in this appeal, submission of learned counsel for defendant No. 1-appellant is two fold. In the first place it is submitted that when the issue relating to jurisdiction of trial Court was expressly raised in the reply filed to the Notice of Motion, it was incumbent on the trial Court, first to frame and decide the said issue as preliminary issue and thereafter only to proceed to decide the Notice of Motion. According to learned counsel for appellant, the trial Court has committed an grave error in not framing such preliminary issue and straightway making the Notice of Motion absolute. It is also submitted by learned counsel for appellant that, as the defendant No. 1 has also raised a contention of the suit being barred by limitation, the said issue was also not framed and trial Court has rejected contention to that effect in the impugned order itself. Hence according to learned counsel for defendant No. 1, the impugned order is liable to be set aside and matter needs to be remanded to the trial Court for framing of preliminary issues on jurisdiction and limitation.

15. As to the merits of the order passed by the trial Court, it is submitted by the learned counsel for appellant-defendant No. 1 that the plaintiff has in its letter dated 13.04.2012, addressed to the S.R.A., mentioned area of C.T.S. 484 (part) as only 2840 sq. meters ; whereas in the plaint, plaintiff is claiming area to the extent of 4400 sq. meters ; which fact makes it apparent that under the garb of staking his possession over the C.T.S. 484 (part), plaintiff is restraining

defendant No. 1 from carrying out construction even on property of defendant No. 1 which is part of the Slum Redevelopment Scheme. Thus, according to learned counsel for appellant-defendant No. 1, trial Court has not properly appreciated the contentions raised by defendant No. 1 and made the Notice of Motion absolute. It is urged that it will be the defendant No. 1 who is bound to suffer irreparable loss and hardship if he is restrained from carrying out construction activity as per Redevelopment Scheme of S.R.A. Thus, according to learned counsel for appellant, impugned order passed by the Trial Court needs to be quashed and set aside.

16. Per contra, learned counsel for respondent No. 1-plaintiff has supported the said order by submitting that no separate application was filed by the defendant No. 1 under Section 9-A of Code of Civil Procedure, for framing of preliminary issue on the point of jurisdiction or even as to the limitation. Defendant No. 1 has proceeded with the hearing of the Notice of Motion without insisting on framing of preliminary issue under Section 9A of the Code of Civil Procedure Code. Hence now he cannot raise the said grievance in the appeal. Secondly, it is submitted that as to the jurisdiction, the trial Court has considered the fact that C.T.S. 484 (part), in respect of which relief is claimed, is no more part and parcel of slum development agreement, but it is declared to be the private property of the plaintiff. In such situation, provisions of Section 42 of the Slum Rehabilitation Act, have no application.

17. According to learned counsel for plaintiff, the trial Court has also rightly considered that there is no question of bar of limitation attracting, as actual cause of action ; accrued on 23.2.2016, when defendant No. 1 started digging over the suit property and the cause of action is otherwise also continuing one. Therefore, according to learned counsel for respondent No. 1-plaintiff, no fault can be found in the impugned order of the trial Court, especially having regard to the execution of agreement and when contents thereof are not disputed and also having regard to the letters issued by S.R.A. and other by MHADA, excluding C.T.S. 484 (part) owned by plaintiff from the Slum Redevelopment Scheme and it was treated as private property of the plaintiff.

18. As to the area of the said C.T.S.No. 484 (part), submission of learned counsel for respondent No. 1-plaintiff is that along with plaint, plaintiff has annexed plan demarcating area of survey No. 484 (part) and also the letter issued by the S.R.A. clearly stating the area of C.T.S. 484 (part) as 4400 sq. meters. Therefore, according to learned counsel for respondent No. 1-plaintiff, at this stage, at least, even assuming that there is some dispute relating to area of C.T.S. 484 (part), unless area of 2840 sq. meters owned by plaintiff is ascertained, defendant No. 1 cannot be permitted to proceed with the construction.

19. Having heard the submissions advanced at length by learned counsel for appellant and respondent No. 1, some facts which have emerged as unequivocal can be stated. They are to the effect that the execution of agreement dated 29th

March, 2004, and its contents are not disputed by the defendant No. 1. Clause No. 7 of the said agreement reads thus :-

"7. Simultaneously with the execution of these presents, Krishna (Plaintiff) has resigned as developer of the Juhu Hanuman Nagar (SRA) 1 Co-operative Housing Society Ltd. Further, Krishna hereby resigns as developer under the said LOI and hereby allows and permits Zodiac to obtain fresh LOI from the SRA for the said entire project except 484 and bldg No. 4".

(emphasis supplied)

Clause No. 9 of the said agreement reads thus :-

"Krishna has prior to the execution of these presents removed itself, its sign boards, of site office, security personnel etc. from the C.T.S.No. 455-464 except Bldg No. 4 and CTS No. 484 (part) and simultaneously herewith has handed over charge and possession of the entire project to Zodiac (defendant No. 1), except bldg No. 4 and 484 (part).

(emphasis supplied)

Clause No. 17 of the said agreement reads thus :

"It is agreed, understood and confirmed that Plot No. 484 is not a part of the Scheme at present and Zodiac has no objection to Krishna dealing with the owners of plot No. 484, in any suitable manner without affecting present scheme in any manner whatsoever, Zodiac also has no objection to SRA withdrawing the MRTTP proceedings or any other actions and proceedings pending against Krishna."

(emphasis supplied)

20. The conjoint reading of these three clauses of the agreement thus make it clear that so far C.T.S. 484 (part) was concerned, it was excluded from the Slum Redevelopment Scheme and the defendant No. 1 has given categorical no objection to the plaintiff to deal with the owners in respect of said plot. Thus, it is crystal clear that the defendant No. 1 has given up the rights for redevelopment scheme on plot No. 484 (part) in favour of plaintiff. The plaintiff was allowed to retain his rights over the said plot. It is pertinent to note that accordingly Letter of Intent dated 28.5.2015 (Exhibit L) was also got modified by defendant No. 1 from S.R.A. and it was obtained only in respect of C.T.S.No. 455, 455/1 to 16, 1755, 1756 and 464 (part). The C.T.S. 484 (part) was excluded from the Letter of Intent.

21. It is also pertinent to note that even before the execution of this agreement, by the letter issued by MHADA dated 24.7.2000, copy of which is produced at Exhibit "E", it was clearly stated that though initially "No objection" was granted to implement Slum Redevelopment Project on the area admeasuring about 23338.72 sq. meters, consisting of land bearing C.T.S.No. 455 (part), 464 (part) and 484(part) of Vile Parle (West), now it was noticed that C.T.S. No. 484 (part) belongs to private party and in view thereof no objection granted for

redevelopment of slum project on C.T.S. 484 (part) was cancelled. There is also one letter dated 2.11.2011, produced at Exhibit "F" issued by Slum Rehabilitation Authority informing the plaintiff that C.T.S.No. 484 (part) is owned by private owner. Hence plaintiff should submit the revised scheme excluding area in C.T.S. 484 (part), from the proposed Rehab and sale buildings on area of C.T.S. 464 and 455 only. Thus, both the MHADA and S.R.A. had also admitted that C.T.S. 484 (part) is owned by private owner and as a result thereof the said plot is excluded from slum redevelopment scheme.

22. Admittedly defendant No. 1 is also not disputing execution of agreement and contents thereof and also fact that C.T.S. 484 (part) no more forms part of slum redevelopment scheme. The only dispute raised by defendant No. 1, is in respect of the area of C.T.S. 484 (part) which was allowed to be excluded from the slum redevelopment scheme. According to defendant No. 1, on own showing of plaintiff, the area of the said plot was only 2840 sq. meters. For this submission, learned counsel for defendant No. 1 has placed reliance on the letter Exhibit "I" dated 13.4.2012 which was written by plaintiff to Slum Rehabilitation Authority and in the said letter, it was mentioned that C.T.S. 484 (part) is admeasuring 2840sq. meters. According to learned counsel for defendant No. 1, therefore, now plaintiff cannot claim any excess area of 4400 sq. meters. Therefore, under the garb of excluding C.T.S. 484 (part) from the Slum Development Scheme, plaintiff is claiming larger area by including the area from redevelopment scheme and thereby causing irreparable loss to defendant No. 1.

23. In this respect, as rightly submitted by learned counsel for the plaintiff, there can be two fold argument, one is that along with plaint, plaintiff has also produced sanctioned plan in which plot No. 484 was clearly earmarked and plaintiff is claiming ownership and rights over that plot. Secondly plaintiff has also produced on record along with the plaint the letter from S.R.A. stating that the area of plot No. 484 (part) is 4400 sq meters. Thus, prima facie it has to be held that the plaintiff is having right over this area of 4400 sq. meters.

24. Even assuming that, plaintiff is having right over the area of only 2840 sq. meters, out of C.T.S.No. 484 (part), even then, at this stage unless evidence is led, it will be difficult to earmark that particular area of C.T.S.484 (part). If as per agreement, C.T.S. 484 (part) was deleted/excluded from the slum Development scheme, then whatever its area may be, defendant No. 1 cannot make any construction on C.T.S. 484 (part) and at least till decision of the suit. If during the pendency of the suit, defendant No. 1 carries out construction over the said plot, then naturally it will amount to usurping on the rights of plaintiff and plaintiff is therefore, bound to suffer irreparable loss and hardship. In my considered opinion, therefore, the trial Court has rightly held that the prima case and the balance convenience lies in favour of the plaintiff and plaintiff will suffer irreparable loss if relief of interim injunction is not granted.

25. As to the issue of jurisdiction, it is true that defendant No. 1 has raised it in reply to the Notice of Motion and as per the law laid down by this Court, in the

case of Mukund Ltd v. Mumbai International Airport and others, 2011 (2) Mh. L.J. 937, relied upon by learned counsel for defendant No. 1, once such issue is raised by defendant in reply, it becomes the duty of the Court to frame a preliminary issue under Section 9-A of the Code of Civil Procedure, even if defendant No. 1 does not press for it. However, it can be seen that in this case, defendant No. 1 has challenged the jurisdiction of the Civil Court only on the ground that by this suit, plaintiff is challenging the Slum Redevelopment Scheme framed by S.R.A. hence in view of Section 42 of the Slum Rehabilitation Act, Civil Court has no jurisdiction.

26. On the basis of prima facie findings which are arrived at by the trial Court and by this Court also, once it is held that plot No. 484 (part) was excluded from the slum redevelopment scheme, as can be seen from the letters referred earlier, then there is no application of section 42 of the Slum Rehabilitation Act. Therefore, when the jurisdiction of the trial Court was challenged on this ground only, and the trial Court found that there was no substance to challenge the jurisdiction, it was not necessary for trial Court to again frame separate issue.

27. As to the issue of Limitation, the trial Court has considered that the cause of action is continuous one and finally arose on 23.2.2016, when there was physical encroachment on the said plot. Therefore, on these two points also, I do not find the trial Court has committed any error so as to warrant interference by this Court, in the discretion exercised by the trial Court in holding that the plaintiff has made out a prima facie case and balance of convenience lies in favour of plaintiff and the irreparable loss would be caused, if the order of injunction is not granted.

28. As a result of above said discussion, the appeal holds no merit, hence stands dismissed with no order as to costs.

29. In view of disposal of appeal itself, Civil Application does not survive and the same is disposed of accordingly.