

(2023) 02 BOM CK 0115
In the Bombay High Court
Case No : Writ Petition No.7087, 7088 Of 2022

Ravikiran Vasant Gore And Others

APPELLANT

Vs

M/s. Sainath Enterprises Partnership Firm And Others

RESPONDENT

Date of Decision : 27-02-2023

Acts Referred:

Citation : (2023) 02 BOM CK 0115

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : Girish Godbole, Ketki Gadkari, Rahul Soman, Atul Damle, R.S. Datar, Omkar M. Kulkarni, Sandeep Mishra

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1 Rule. Rule is made returnable forthwith, with the consent of the parties and is taken up for final hearing.

2 In these Petitions, judgment and order dated 25 January 2021 passed by the District Judge-II, Panvel, Raigad in Misc. Civil Appeal Nos.260/2019 and 258/2019 are under challenge. By that judgment and order, the District Court has allowed the Appeals and has set aside the order of temporary injunction dated 29 October 2018 passed by the Joint Civil Judge Senior Division, Panvel in Special Civil Suit No.459 of 2016. Petitioner is thus aggrieved by lifting of temporary injunction clamped by the Trial Court on Defendant Nos. 3 to 5 from further developing suit property as well as from alienating the same.

3 Facts, in a nutshell, are that Petitioner is the Plaintiff in Special Civil Suit No.459 of 2016 filed against his sister (Defendant No.1), his mother (Defendant No.2), purchasers of the suit property (Defendant Nos.3 and 4) and the Developer (Defendant No.5). The suit is filed seeking declaration of share of Petitioner-Plaintiff in the suit property. Petitioner-Plaintiff has also sought a declaration that the deed of revocation of will dated 27 October 2015 as well as

Gift Deed dated 27 October 2015 are void as void and not binding on him.

4 Petitioner-Plaintiff's father Vasant Vasudeo Gore was apparently in Government service and his mother Smt. Pramila Vasant Gore was a teacher. It is the case of Petitioner-Plaintiff that the father purchased the suit property out of his own funds in the name of the mother. The mother executed registered Will on 11 June 2008 in respect of 23 movable properties and also in respect of suit property in which she gave equal shares to Petitioner-Plaintiff and his sister (Defendant No.1). The mother (Defendant No.2) however subsequently executed two documents on 27 October 2015 by which she revoked her will and also gifted the entire suit property in favour of the sister (Defendant No.1). The sister thereafter executed a conveyance deed of the suit property in favour of Defendant Nos.3 and 4 on 15 February 2016. Defendant Nos.3 and 4 thereafter executed Development Agreement in favour of Defendant No.5 on 18 March 2016. The Developer (Defendant No.5) started developing suit property by constructing a building thereon.

5 Petitioner-Plaintiff issued notice dated 30 September 2016 to Defendant Nos.3 and 4 calling them upon to rescind the Conveyance Deed and Development Agreement. Petitioner-Plaintiff noticed the bungalow standing on the suit property being demolished and made enquiries with the then Panvel Municipal Corporation about issuance of development permission. He later came to know that the Municipal Corporation had issued development permission in favour of Defendant Nos.3 and 4.

6 Petitioner-Plaintiff therefore instituted Special Civil Suit No.459 of 2016 in the Court of Civil Judge Senior Division, Panvel seeking declaration that the Deed cancelling Will as well as Gift Deed, both executed on 27 October 2015, are void and not binding on him. Petitioner-Plaintiff sought temporary injunction to restrain Defendant Nos.3 to 5 from carrying on any construction on the suit property. By its order dated 29 October 2018, the trial Court was pleased to pass an order of temporary injunction restraining Defendant Nos.3 to 5 from further developing the suit property, alienating the same, creating third party interest therein and parting with possession thereof till decision of the suit.

7 Aggrieved by the order of temporary injunction passed by the trial Court on 29 October 2018, Defendant Nos.3 and 4 filed Misc. Civil Appeal No.258 of 2019 and Defendant No.5 (Developer) filed Misc. Civil Appeal No.260 of 2019 in the Court of District Judge, Panvel. By separate judgments delivered on 25 January 2021, the District Court has proceeded to allow both the Appeals by setting aside the order of temporary injunction granted by the Trial Court.

8 Appearing for Petitioner-Plaintiff, Mr. Godbole the learned senior advocate would contend that the facts of the case are so gross that the District Court ought not to have lifted the temporary injunction granted by the trial Court stopping further development of the suit property. As three transactions (i) cancellation of Will, (ii) Execution of Gift in favour of Defendant No.1, and (iii)

payment of part consideration by Defendant Nos.3 and 4 to Defendant No.1, took place on same day on 27 October 2015, a presumption is required to be drawn that the mother did not cancel the Will or execute the Gift out of her free will. He would submit that the entire transaction is a part of systematic conspiracy hatched by Defendant Nos.3 and 4 to take over the property at a throw away price. He would further submit that after execution of sale deed by Defendant No.1 in favour of Defendant Nos.3 and 4 for a paltry sum of Rs.1.55 crores on 15 February 2016, Defendant Nos.3 and 4 were able to execute a Development Agreement a month later on 18 March 2016 for huge consideration of Rs.1 crore plus 50% of constructed portion. These back-to-back transactions, according to Mr. Godbole, would clearly demonstrate that cancellation of Will and execution of Gift Deed were clearly orchestrated by Defendant Nos.3 and 4. Mr. Godbole would further contend that the suit property is not the self-acquired property of mother as the purchase was funded essentially by the father. Referring to the contents of the Will, Mr. Godbole would contend that mother herself admitted the factum of she acquiring title in the suit property through her husband. That since mother is not the exclusive owner of the suit property, it was otherwise not open for her to execute the Gift in respect thereof in favour of Defendant No.1.

9 Mr. Godbole would further contend that the trial Court correctly appreciated the entire background of the case and stopped Defendant Nos.3 to 5 from further developing the property regardless of stage of construction. Referring to the order of the Appellate Court, he would contend that the finding of suit being filed belated is perverse as the suit is within limitation. With regard to the finding recorded by the Appellate Court on the issue of the suit property not being ancestral, That what is essentially held by the trial Court is the fact that the suit property is not a self-acquired property of the mother. Lastly Mr. Godbole would contend that since the Panvel Municipal Corporation has already issued a conditional occupancy certificate to the building after passing of the impugned orders of the Appellate Court, the Developer (Defendant No.5) be directed to disclose on oath as to how many flats still continue to remain unsold and in the event of no flat being available, the purchaser of the flat as well as subsequent purchasers be put to notice by this Court.

10 Mr. Damle, the learned Senior Counsel appearing for the Purchasers (Defendant Nos.3 and 4) would oppose the Petition and support the orders passed by the Appellate Court. He would submit that the Deed by which the suit property was purchased by the mother is not under challenge and therefore, it is no longer open to the Petitioner-Plaintiff to contend that the suit property is self-acquired one. Petitioner-Plaintiff failed to produce any material on record to prove that the father had funded purchase of suit property in the name of mother. That the Conveyance Deed dated 15 February 2016 executed by Defendant No.1 in favour of Defendant Nos.3 and 4 as well as the Development Agreement dated 18 March 2016 is also not under challenge. That since Petitioner-Plaintiff has failed to challenge these three documents, he is not entitled to any relief in the suit, much less an order of temporary injunction. Mr.

Damale would refer to the Written Statement filed by the mother in support of the Gift Deed executed in favour of Defendant No.1. Though the suit was filed on 17 November 2016, the Application for temporary injunction came to be decided only on 29 October 2018 by which time, the entire construction of the building was virtually complete and third party rights were already created. That in such circumstances, the trial Court erred in stopping further development on the suit property. That the trial Court erred in recording findings about mental condition of mother which could not have been recorded while deciding application for temporary injunction. Lastly, Mr. Damle would contend that the occupancy certificate issued by the Panvel Municipal Corporation is already made subject to the outcome of suit filed by Petitioner-Plaintiff and that therefore no further interim orders are necessary.

11 Mr. Omkar Kulkarni, the learned Counsel appearing for Respondent No.1, (a) and (b)/Defendant No.5 also opposes the Petition and adopts the submissions of Mr. Damle. Additionally, he would submit that all flats in the building have already been sold and that there is no question of passing any interim order/injunction in the present Petition. That in view of all flats being sold, the only possible relief that the Petitioner-Plaintiff may get at the conclusion of the suit is to seek monetary compensation for Defendant No.1 and that therefore there is no question of passing any order of temporary injunction in favour of Defendant Nos.3 to 5.

12 Rival contentions of the parties now fall for my consideration.

13 The suit filed by Plaintiff-Petitioner is premised essentially on a contention that the purchase of suit property is funded by the father in the name of mother (Defendant No.2). However Petitioner-Plaintiff has not set up a challenge to the concerned document by which the property came to be purchased in the name of mother. The contention about purchase being funded by father will have to be proved by adducing evidence. Merely on the basis of recital in the Will by the mother to the effect that 'after his death I am absolutely entitled to his assets, both, movable and immovable.' would not be sufficient to record a finding atleast at this stage that the property is not self-acquired property of the mother.

14 Though the mother had executed a registered Will on 11 June 2008, she has revoked the same by Deed of Revocation and Cancellation executed on 27 October 2015. On the same day, she executed Gift Deed in favour of sister (Defendant No.1) by which the mother gifted the entire suit property in favour of sister to the exclusion of Petitioner-Plaintiff. Both Deed of Revocation of Will as well as Gift Deed executed on 27 October 2015 are subject matter of challenge in the suit filed by Plaintiff-Petitioner.

15 However, after acquisition of right, title and interest in the suit property on the strength of Gift Deed dated 27 October 2015, Defendant No.1 proceeded to execute a Conveyance Deed in favour of Defendant Nos.3 and 4 on 15 February 2016. Defendant Nos.3 and 4 in turn executed Development Agreement in favour

of Defendant No.5 on 18 March 2016. Plaintiff-Petitioner has failed to challenge the Conveyance Deed dated 15 February 2016 as well as the Development Agreement dated 18 March 2016. The effect of non-setting up of challenge to the Conveyance Deed and Development Agreement will have to be examined at the time of final hearing of the suit. However, suffice it to state at this juncture that the rights acquired by Defendant Nos.3 and 4 on one hand and Defendant No.5 on the other are not under challenge in the suit instituted by Plaintiff-Petitioner and therefore it is incomprehensible as to how the Plaintiff-Petitioner can seek an order of temporary injunction to restrain them from carrying out development on the suit property. Prima facie, therefore, no case was made out by Petitioner-Plaintiff for grant of any interim injunction.

16 True it is that Defendant Nos.3 and 4 paid part consideration of Rs.5,50,000/- to Defendant No.1 on 27 October 2015 (date of execution of Revocation of Will and Gift Deed). Petitioner-Plaintiff seeks to draw an inference on the basis of this event that the cancellation of Will and execution of Gift Deed was orchestrated by Defendant Nos.3 and 4. This will have to be examined by the trial Court at the time of decision of the suit. However, payment of part consideration by Defendant Nos.3 and 4 on the date of execution of Deed of Revocation of Will and Gift Deed would not be sufficient at this stage to draw an inference that the cancellation of Will and Gift Deed does not come out of free Will of mother. It is difficult to hold even prima facie that rights acquired by defendant nos. 3 and 4 (which are not even under challenge) would get completely wiped out only on account of payment of part consideration on same day when will was revoked and gift deed executed.

17 Also of relevance is the fact that though Plaintiff-Petitioner was quick enough to file the suit on 17 November 2016, he did not get the Application for temporary injunction decided for a considerable period of time till 29 October 2018. As a matter of fact, by the time the suit was filed on 17 November 2016, the bungalow on the suit property was already demolished, development permission was procured and excavation work had commenced. The building that was proposed to be constructed was of 4/5 floors only. By not pressing the application for temporary injunction for two long years, Petitioner virtually permitted construction of almost the entire building. Nonetheless the trial Court proceeded to injunct Defendant Nos.3 to 5 carrying out further development on the suit property or from creating any third party rights herein, ignoring the fact that third party rights were already created by completing substantial construction of the building. The rights created in favour of third parties are not under challenge in the suit filed by the Petitioner-Plaintiff. In such circumstances, the trial Court clearly erred in injuncting the Defendant Nos.3 to 5 from handing over possession of the flats in favour of purchasers.

18. True it is that the judgment and order of the appellate court is not completely free from blemish, especially with regard to finding on delay in filing the suit. However, this alone would not be a fit ground to reverse its order or to restore

the injunction clamped by the trial court.

19 No prima facie case was made out by Petitioner-plaintiff for grant of temporary injunction in his favour. The balance of convenience was tilted against him as he permitted the construction of building to be completed by sitting over his application for over two years. The trial Court, in my view, committed an error in granting temporary injunction in favour of Petitioner- Plaintiff. The lower Appellate Court has rightly lifted the injunction while expediting the trial of the suit. The Panvel Municipal Corporation has granted conditional occupancy certificate incorporating following condition therein:

"This Occupancy Certificate is issued subject to condition that the final order/ decision pass in the pending litigation in the High Court, Writ Petition No.4182 & 4183 and Suit No.R.C.S.459/2016 in the Panvel Civil Court. The final order/ decision pass in said case shall be binding on you and your successors as mentioned in affidavit dated 07/04/2021."

This in my view affords sufficient protection to Petitioner, in given circumstances.

20 The Petitions are thus devoid of merit. They are dismissed without any orders as to costs. Needless to observe that the Trial Court shall not be influenced by any of the observations made in the present judgment. Rule is discharged.