

(2013) 09 BOM CK 0119

In the Bombay High Court

Case No : Appeal From Order No. 960 of 2013 and CAA/1144 of 2013

Sobha Developers Limited

APPELLANT

Vs

Ms. Lanka Sitaram Kamthe and Others

RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Citation : (2013) 6 ABR 29 : (2014) 2 ALLMR 706 : (2014) 1 BomCR 830 :
(2014) 3 MhLj 445

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Milind Sathe and Murtaza Chherawala, Mr. Lokesh Zade instructed by Chherawala and Associates, for the Appellant; G.S. Godbole and Mr. Sumit S. Kothari, for the Respondent

Judgement

Anoop V. Mohta, J.—Rule. Heard finally by consent of parties. The Appellant-original Defendant No. 1, developer, has challenged order dated 26 July 2013 passed by the Joint Civil Judge, Senior Division, Pune, whereby granted Injunction Application (Exhibit 5) filed by Respondent No. 1 (Original Plaintiff).

2. The Suit is filed on 14 February 2013 by the Plaintiff for partition claiming 1/6th share in the property in question and claims to set aside the registered development agreement, and the Power of Attorney with power to convey the property, executed between Defendants 1 to 8 and Defendants 9 and 10 dated 20 May 2005 and later on Defendants 9 and 10 executed further development agreement and power of Attorney with right to convey the property with Appellants-original Defendants, dated 21 July 2006. An Application (Exh. 5) is also filed for the ad-interim relief/injunction on 18 February 2013.

3. The Appellant opposed the ad-interim injunction by filing detailed reply dated 18 March 2013 and raised various issues including of limitation, by raising specific averments that the Plaintiff was fully aware of the documents, as well as, the development and at least from 11.11.2009. Admittedly, there was no ad interim relief pending the impugned order dated 26 July 2013 whereby the

learned Judge has granted the relief so recorded below:

1 Application below Exh.-5 is partly allowed.

2. Defendant no. 11 is hereby temporarily restrained from further alienating the suit property or creating third party interest in the suit property or selling etc the suit property in any manner through anybody till the disposal of the suit.

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4. It is relevant to note here that the Appellant has also filed Special Civil Suit No. 228/2013 against all Respondents (for partition of family property of all Respondents i.e. 5 Hectares and 14 ares.). The claim, even if any, of the Plaintiff/Respondent No. 1 in the present property in question is about 23 ares. An Application for injunction (Exh. 5) filed by the Appellant in the Suit some time in June 2013 is also pending with the Civil Judge, Senior Division, at Pune. The filing of Suit by the Appellant, as contended by the learned counsel appearing for the original Plaintiff/Respondent No. 1 itself shows the entitlement of Respondent No. 1's right.

5. The issue of partition even if any, as sought to be contended in the background, needs to be considered in view of above undisputed position at later stage, but the ultimate challenge is to the development agreements/Power of Attorney of the year 2005 and 2009, by this Suit of the year 2013. The Suit for partition, even otherwise, could have been filed at the earliest point of time, as the transfer of the property for development in the year 2005 and subsequently in 2009, itself was well within the knowledge and so also the development which has been going on since then. There is no dispute raised except by the plaintiff. All other legal heirs/owners have signed those registered documents, based upon which the development commenced with requisite sanctions from the concerned Authorities, at Pune. Those sanctions are also not in dispute. That itself means the requisite consent/verification of documents and no objection from the owners have been obtained as a part of the procedure. There is no averment made by the plaintiff that she was not aware of these developments at any earlier point of time. The property development has been in progress, based upon those documents since 2005, uninterruptedly.

6. The learned Judge recorded in paragraph 13 factual background about the appellant's knowledge and also the fact that 130 developed flats have already been sold by the appellant/Defendant No. 11. No ad interim relief was granted till the impugned order. The construction was on and so also the development. The issue of limitation also though discussed by the learned Judge, but without deciding the same proceeded to grant injunction as recorded above.

7. The prayer for partition, in the present facts and circumstances, cannot be isolated with reference to other prayers, where declaration is admittedly sought beyond a period of three years to set aside and/or declare those registered documents null and void. At present, the Appellant's rights are admittedly

flowing from those registered documents specifically when except Plaintiff, all other heirs never objected for the development at any point of time.

8. The dispute between the family members, if any and/or the rights of the plaintiff in the family property is always a matter of trial and discussion in a situation where knowing fully the transfer of property by all other heirs, no objection whatsoever raised at any earlier point of time. The internal arrangement between the family members in such background just cannot be overlooked, though not possible to decide and/or adjudicate at this prima facie stage, but the conduct to claim 1/6th share, even if any, out of the property in question, though other properties are available and is again a matter which just cannot be overlooked while granting and/or considering the prayer of interim relief/injunction, so made by the plaintiff, to halt the project in question.

9. The conduct of Plaintiff, in above background, is also relevant factor apart from delay in initiating the proceedings at the appropriate stage knowing fully the development on the property in question. The law with regard to the grant of injunction and/or refusal as discussed need no discussion. What required by the Court is to consider the facts and circumstances of the case in hand. Having once noted the stage of development, as well as, the creation of third party rights, I am inclined to observe that at this stage, no case is made out by the Plaintiff for grant of injunction as ordered. It is not question of deciding the shares and/or rights of the Plaintiff as it is a matter of trial, but the question is also to consider the right so created in favour of the Appellant based upon the registered and valid documents of 2005 and 2006 and the right of third party so already created since long, is again an additional factor which goes against the Plaintiff.

10. The question of balance of convenience and/or equity, in view of above, is also tilt in favour of the Appellant and the persons in whose favour, rights have already been created. The injunction so granted, only after hearing both the parties on the basis that the Suit is for partition only. This is not the stage to disturb the right so already created. The issue of irreparable loss, in view of the above admitted position on record, in no way, support the Plaintiff as her interest is to secure her share of the property basically from the family property and against all other legal heirs/co-owners of the property. This is not the only property as recorded above, as the Appellant has also filed Suit with intention to have a partition of the family property so that considering the share of the Plaintiff, if any, in the present property, can be compensated and adjudicated in the other Suit. The right of the Plaintiff to have a share also in the property, in the facts and circumstances needs to be adjudicated and can be decided during the trial and/or subject to settlement between the parties which can be done at any point of time. Had the Suit and/or proceedings initiated immediately from the date of knowledge, the situation would have been different. I am not deciding the rights of the Plaintiff, even if any. It is kept open for the trial Judge to decide.

11. Now, what remains is the security to the extent of Plaintiff's share which,

after trial and/or settlement, may be compensated as recorded above from the remaining property by the remaining owners and/or by paying monetary consideration. The Plaintiff has estimated value of her share to the extent of Rs. 50,00,000/- (Rupees fifty lacs) in the Suit. The estimation itself is not final amount. In the interest of justice at this stage, therefore, I am inclined to accept the statement of the learned Senior Counsel for the Appellant, that they will not create third party rights in respect of three flats in building known as "Carnation" on the suit plot having estimated cost about Rs. 3 crores (Rupees three crores). This statement, in my view, is sufficient to protect the interest of the plaintiff for the time being. Therefore the injunction, as granted by the learned Judge in view of above undisputed position on record, is wrong.

12. In view of above, I am inclined to set aside/modify the order dated 26 July 2013 and that there is no question of any restraintment order against Defendant No. 1 from alienating and/or creating third party right or interest in the property as ordered.

13. The liberty is granted to parties to apply for transfer and/or tagging of Suit No. 769/2013 with Suit No. 228/2013 as both Suits are pending before the Civil Judge, Senior Division, Pune having equal jurisdiction.

14. The liberty is also granted to the parties to apply for early hearing of Application (Exh. 5) in the Suit filed by the Appellant. In view of the present Appeal from Order is partly allowed and it is disposed of accordingly. In view of disposal of AO, Civil Application No. 1144/2013 stand disposed of accordingly.