



IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 477 OF 2013

Naperol Tower Condominium. ... Appellant.

V/s.

The Bombay Dyeing & Manufacturing Co.Ltd.
and another. ... Respondents.

Sanjay Jain with Ms.Jesal Shah i/b. Dara Shah & Co.
for the appellant.

D.J.Khambatta, Advocate General with Ms.Meena Doshi, Ms.Nina
Nariman i/b. S.V.Doijode and P.A.Kabadi of Doijode Associates
for respondent No.1.

CORAM: B.R.GAVAI, J.

DATED : 2nd May 2013.

P.C. :

This appeal arises out of the order dated 8th April 2013 passed by learned Judge of the City Civil Court whereby he rejected the notice of motion taken out by the appellant- plaintiff seeking an order of restraint restraining the respondent No.1/ original defendant No.1 from directly or indirectly interfering with the plaintiffs right of way and from preventing the plaintiff and their members/visitors from continuing to use the right of way as set out as in red colour on the sketch (Ex.C to the plaint).



2. The plaintiff is a condominium consisting of 187 residential flats on a plot of land situated at Rafi Ahmed Kidwai Marg, Wadala (East), Mumbai. The flats have been purchased in a scheme constructed by defendant No.2 on a plot of land originally belonging to defendant No.1. It is the case of the plaintiff that since defendant No.2 was not in a position to sell the flats in around 2001 as the access from Rafi Ahmed Kidwai Marg was not convenient, on account of hutments and the residents of the nearby locality using the road for reading Namaz, an impression was given to the flat purchasers that an alternate road would be provided from the remaining area owned by defendant No.1 which was to connect Dr.Ambedkar Marg through a narrow lane. It is the case of the plaintiff that on this representation the flat takers purchased the flats. On a cause of action, that defendant No.1 was illegally refusing the plaintiff and its members to use the said alternate road, the aforesaid suit came to be filed for permanent injunction restraining defendant No.1, their directors, officers etc, from directly or indirectly interfering with the plaintiff's right of way and from preventing the plaintiff and its members from continuing to use the right of way. Along with plaint a notice of motion also came to be filed, claiming for an interim injunction restraining the defendants from obstructing the use of the plaintiff from the aforesaid alternate road. The learned trial Judge had, initially, granted ad-interim order. However, vide impugned order dated 8th April 2013, the notice of motion has been dismissed. Being aggrieved thereby the present appeal.

3. Shri Jain, learned counsel appearing on behalf of the appellant submits that learned trial Judge has grossly erred in



dismissing the notice of motion. Learned counsel submits that firstly when an issue of jurisdiction was raised by defendant No.1, the learned trial Judge without deciding issue of jurisdiction could not have decided the motion, in view of provisions of section 9A of Code of Civil Procedure, 1908 (C.P.C.). Learned counsel submits that though at the stage of hearing of the motion the defendants have given up their objection regarding jurisdiction, in the written statement they are still insisting the objection on the ground of jurisdiction. The learned counsel relying on the judgment of Division Bench of this court in Appeal No.1167/2010 dated 15th February 2011 (*Mukund Ltd. v. Mumbai Intentional Airport & ors.*) submits that once the issue of jurisdiction was raised, learned trial Judge ought to have decided it first irrespective of the waiver of the defendants in that regard.

4. Shri Jain, learned counsel further submits that learned trial Judge failed to take into consideration that in the map annexed with the deed of declaration two gates were shown. Learned counsel, therefore, submits that since the representation was made to the members of the plaintiff that the suit property had two gates, defendant No.1 is not justified in restraining the plaintiff from using the alternate road. Learned counsel further submits that learned trial Court had failed to take into consideration that the right of the plaintiff did not flow from the licence, but was an easementary right. Learned counsel relying upon the provisions of section 52 of the Easement Act submits that from the very nature of right claimed, it would be an easement and not a licence. Shri Jain further submits that the learned trial Judge has only referred to a part of the letter of the plaintiff dated 16th January 2013. Learned counsel submits that if the letter is read in



entirety, it would reveal that the members of the plaintiff society were never aware of the licence agreement between defendant No.1 and defendant No.2. Learned counsel, therefore, submits that learned Judge has erred in relying only on part of the said letter, while ignoring the other part thereof. Learned counsel further submits that learned trial Judge has also erred in observing that no attempt is made by the plaintiff for paying the licence charges to the defendants. Learned counsel submits that, there are various letters on record which would reveal that the plaintiff was intending to make the payment, however the payment could not be made as it was not clarified by the defendants as to whom the said payment was to be made. Shri Jain, therefore, submits that the view taken by the trial Court is not in accordance with law and, in any case, the view taken is either impossible or perverse, warranting interference at the hands of this Court.

5. Shri Khambatta, learned Advocate General appearing on behalf of respondent No.1, on the contrary, submits that learned trial Judge has rightly construed the various clauses of the deed of apartment executed in the year 2005 with each of the flat purchasers and come to the conclusion, that the right given to defendant No.2 was purely a licence, which is terminable either on termination of the terms and conditions or if defendant No.1 requires the said land for its own purposes. He submits that the deed of apartment refers to the licence agreement. It is the case of defendant No.1 that copies of the said licence agreement were duly furnished to each of the flat purchasers. He, therefore, submits that the contention of the plaintiff, that they were not aware of the licence agreement is without any substance.



Learned counsel further submits that, so called reliance on the declaration by the plaintiff is also without any substance, inasmuch as the note to the Schedule-I of the said declaration specifically states that the access would be from Rafi Ahmed Kidwai Marg. Learned counsel submits that, the contention that the impression was given to the plaintiff that they would have an access to the alternate road, is without any substance. Learned counsel further submits that in view of the judgment of the Apex Court in the case of *Wander Ltd. v/s Antox India Pvt Ltd.* reported in 1990 Supp.(1) SCC p.727, the scope of jurisdiction of this Court under order 43 rule 1(r) of C.P.C. is very limited. Learned counsel submits that unless this Court finds that the view taken by the trial Court is either perverse or impossible, this Court should not interfere with the view taken by the trial Court.

6. Shri Thorat, learned counsel appearing on behalf of respondent No.2, also submits that the trial Judge has passed a well reasoned order which requires no interference.

7. The scope of appeal against the order, under order 43 of Code of Civil Procedure, 1908 is very limited. The Apex Court in the case of *Wander Ltd. v. Antox India PLtd*, (Supra) has held that unless the view taken by the trial Court is found to be perverse or impossible, it is not permissible for this Court to interfere with the impugned order. It has been further held that merely because the appellate Court finds that other view is possible, it is not proper on the part of appellate Court to replace the view taken by the trial Court with its own view.



8. In the light of the law laid down by the Apex Court, I would have to examine as to whether the view taken by the trial court is either perverse or impossible.

9. The learned trial Judge in paragraphs-9 and 10 has reproduced three clauses which are appearing in the deeds of apartment, duly executed by defendant No.2 with each of the flat purchasers. All these deeds of apartment, specifically refer to the agreement of licence for a right of way, dated 7th February 2000. It is further to be noted that in the agreement of licence executed by defendant No.1 with defendant No.2 there is specific clause, which states that the licence is terminable, on the breach of any of the terms and conditions or as and when defendant No.1 requires the said land for its own purpose. The learned trial Judge has given a reasoning, that in order to comply with the arrangement, that defendant No.1 has arrived at with Maharashtra Housing and Area Development Authority (MHADA), the strip of the land which was provided as an alternate access to the plaintiff society, is required for its own purpose by defendant No.1.

10. In so far as contention of Shri Jain to the effect that the learned trial Judge could not have decided an application under section 39 rules 1 and 2 without deciding the issue under section 9A of C.P.C. is concerned, the said contention is without any substance. It is seriously disputed by defendant No.1, that any such objection was raised by them regarding jurisdiction of the Court. However, without going into the question as to whether defendants had, in fact, raised any objection regarding jurisdiction or not, I am of the view that, if for some reasons



the said objection is raised and not pressed into service and waived by the defendants, there would be nothing which would prevent the learned trial Judge from proceeding with the hearing of the motion. In so far as reliance placed by Shri Jain on the Division Bench judgment in the case of *Mukund Ltd. v. Mumbai Intentional Airport & ors.* (supra), the view taken by the Division Bench is that, if the objection regarding jurisdiction is waived at the stage of motion, then it is not permissible for the parties to reiterate that objection at the subsequent stage of the suit. If it is the case of the plaintiff, that at the stage of hearing of the motion the defendants have given up the objection regarding jurisdiction, the plaintiff would be at liberty to use the said judgment of the Division Bench, to oppose any move by the defendants regarding jurisdiction at the subsequent stage. If such an objection is raised, the learned trial Court would be bound to decide the same in accordance with law. However, in my considered view, the aforesaid judgment of the Division Bench could not have come in the way of the trial Court in deciding the motion. It is, normally, the defendants who object to the hearing of the motion, if an issue regarding jurisdiction is raised. For a change, in the present matter, this contention is advanced on behalf of the plaintiff.

11. In so far as reliance on the occupation certificate is concerned, the perusal of the said deed of declaration would reveal that in Schedule-I there is a specific note that the land of plaintiff society has access from Rafi Ahmed Kidwai Marg. Apart from that, I have gone through the agreement of sale executed by the members of the plaintiff society with defendant No.2. A layout is annexed with the said agreement. The said layout plan also shows that access to the



building wherein members of the plaintiff reside is shown from Rafi Ahmed Kidwai Marg. Along with plan there is schedule annexed thereto, which would also specifically show that the access is from Rafi Ahmed Kidwai Marg.

12. The question as to whether the right of the plaintiff was an easementary right or a licence granted by defendant No.1, would be an issue, which would be required to be considered at the stage of hearing of the suit, after the parties lead their evidence in respect thereof. At this stage, the trial Judge is only required to take into consideration the *prima facie* case and the test of balance of convenience and irreparable injury.

13. Upon perusal of clauses as mentioned in the deed of apartment, executed by defendant No.2 with each of the flat purchasers and the licence agreement executed by defendant No.1 with defendant No.2, which is specifically referred to in the said deed of apartment, the learned trial Judge has, *prima facie*, come to the conclusion that the right in favour of the plaintiff was a licence which was terminable on breach of the conditions and/or if the defendant No.1 requires the said land for their own purpose. Perusal of the impugned order would reveal that the learned trial Judge has come to the conclusion, that the plaintiff has failed to make out any *prima facie* case regarding easementary right. Perusal of the reasoning given by the trial Court, would lead to an inference, that the view taken by the trial court upon appreciation of material placed on record could neither be termed as perverse nor impossible.



14. In so far as test of balance of convenience and irreparable injury is concerned, the learned trial Judge has given sound and cogent reasons. Learned trial Judge, after appreciation of material placed on record and, particularly, the photographs placed on record has come to the conclusion that access to the plaintiff society from Rafi Ahmed Kidwai Marg cannot be said to be an inconvenient access. He has further come to the conclusion, that the Rafi Ahmed Kidwai Marg is a four-lane road and even at time of Namaz being read, the members of the plaintiff society have a convenient access to their building. On the contrary, the learned trial Judge has found that, if the injunction as prayed is granted, defendant No.1 would not be in a position to comply with its arrangement with MHADA. Learned trial Judge has further found that loss, if any, caused to the plaintiff is not of such a nature which cannot be compensated in the monetary terms.

15. In that view of the matter, it cannot be said that the view taken by the trial Court is either perverse or impossible.

16. It is equally settled that merely because the appellate Court finds that the other view is possible, that cannot be a ground for it to upset the view taken by the trial Court and substitute the view of the trial Court with its own view.

17. In that view of the matter, no case is made out for interference. Appeal is, therefore, rejected.



18. At this stage, Shri Jain, learned counsel for the appellant requests for continuation of interim protection granted by the trial Court for a further period of eight weeks.

19. Shri Khambatta, learned Advocate General appearing for defendant No.1, on instruction, makes a statement that for a period of six weeks from today, defendant No.1 will not hand over the strip of land to the MHADA or shall not obstruct the use of the road in question by the plaintiff and its members.

20 In view of this statement, no orders are necessary.

(B.R.GAVAI, J.)