

Presented on : 28/3/2016
Registered on : 28/3/2016
Decided on : 24/9/2019
Duration : 03y. 05M.27D.

IN THE COURT OF 19th Jt. CIVIL JUDGE SENIOR DIVISION, PUNE.

(Presided over by S.M.A. Sayyed)

Special Civil Suit No.436/2016

Exh.50

CNR No.MHPU020017312016

1) Prashant Dnyanoba Keswad

Age :- 38 yrs., Occ. :- Agriculture & Business

2) Hemant Dnyanoba Keswad

Age :- 50 yrs., Occ. :- Agriculture & Business

3) Sulochana Dnyanoba Keswad

Age :- 68 yrs., Occ. :- Agriculture & Housewife

1 to 3 R/at:-Sutarwadi, post Ambadwet

Tal-Mulshi, Dist- Pune.

4) Jyostana Pralhad Phadatare

Age :- 42 yrs., Occ. :- Service

R/at:- Happy coloney Vadgoan Bk

Tal-Haveli, Dist-Pune.

5) Jyoti Vijay Goriwale

Age:- 44 yrs, Occ. :- Service

R/at:- S. No. 12/1/1, Nimbaj Nagar,

A-3/24, Near Nirmal Township,

Anandnagar, Sinhgad Road,

Pune 411 051.

...

Plaintiffs

V/s.

1)M/s Balaji Developers
Address - A/4, Shivrudra, S. No. 51,
Opp. Ashish Garden, New D. P. Road,
Kothrud, Pune 411 038

2) Nilesh Gangadhar Bacchewar
Age: 40 yrs, Occ.:- Business

3) Sarika Nilesh Bacchewar
Age: 37 yrs, Occ.:- Housewife
1 & 2 R/at:- A/4, Shivrudra, S. No. 51,
Opp. Ashish Garden,
New D. P. Road, Kothrud, Pune 411 038.

... **Defendants.**

Suit for Declaration and Permanent injunction.

For Plaintiffs	:- Adv. S.M.Katkar.
For Defendants	:- Adv. S.S.Kashyap.

J U D G M E N T

(Delivered on 24th September 2019)

Present suit is filed for cancellation of development agreement and power of attorney dated 27/09/2012 registered at serial No.7712/2012 and 7722/2012 along with correction deed dated 19/12/2012 and for permanent injunction restraining the defendants from creating third party interest over the land admeasuring 2.50 R out of 00. 05 HR of plot No.16A having CTS No.714 and survey No.88/4+138+161 (in short suit property) on the basis of above mentioned documents having four boundaries as under;

Towards East	-	Property of Dhondiba Gholap
Towards West	-	Alkapuri Society
Towards South	-	property of Plot No.16 B
Towards North	-	property of Plot No. 15

Admitted facts:

2] The relationship between the parties, ownership of the plaintiffs

over the suit property, execution of development agreement, power of attorney and correction deed are admitted.

Pleadings of plaintiffs are as under:-

3] That the city survey No.714 in which plot No.16A is situated was originally owned by Shantabai Kapoorchand Nahar. The father of plaintiff Dyanoba Ranu Keswad and one Dhondiba Kondiba Gholap jointly purchased said plot through sale deed dated 31/01/1972 and accordingly, mutation entry No.4285 was recorded and their names appear in the 7/12 extract. Both of them possessed their shares separately. On 24/10/2002 Dyanoba Keswad died thereafter, the names of plaintiffs were recorded over the suit property being legal heirs and since then they are in possession of the same. The plaintiffs intended to develop the suit property for benefit. The defendant No.1 is registered real estate development partnership firm and the defendant No.2 and 3 are its partners. The defendant No.2 and 3 approached the plaintiffs and showed their willingness to develop the suit property. It was agreed that the defendants will pay an amount of Rs.1,02,000/- and constructed area of 1800 sq.ft i.e. 167.22 sq.mts salable built up area along with parking as consideration in cash and constructed area. Accordingly, on 27/09/2012 development agreement was executed. It was agreed that after the execution of development agreement the defendants will obtain sanctioned plan for construction within six months and will construct entire building within 30 months. It means overall 36 months limit has been provided to the defendants to develop the entire suit property. It was also agreed that if the defendants failed to complete or allot agreed built up area to the plaintiffs then they will pay Rs.10,000/- per month to the plaintiffs till handing over possession of agreed built up area. On 27/09/2012 a correction deed was executed as there was mistake in names of defendant No.3 and partnership firm. The development agreement,

power of attorney and correction deed are in possession of defendants. On 27/09/2012 the defendants paid plaintiff No.1 and 2 Rs.51,000/- each vide cheque Nos.208578 and 208581. But the defendants failed to carry any construction over the suit property as per the terms and conditions of development agreement and prolonged the matter. Since the date of execution of development agreement the defendants never contacted plaintiffs nor carried construction over the suit property. On the contrary, when the plaintiffs enquired with the defendant No. 2 and 3 they stated that preparation of map and sanctioned plan is in process. The defendants simply gave assurance and prolong the matter by not abiding the terms and conditions of development agreement. Lastly, on 19/01/2016 the plaintiffs issued notice through their advocate and called upon the defendants to execute cancellation deed of above mentioned documents within 15 days from receipt of said notice. The defendant No.2 avoided service of said notice whereas defendant No.3 was served with the same. Thereafter, on 04/03/2016 the plaintiff No.1 had been to defendant No.2 and prayed to cancel the above mentioned documents to which he flatly denied. Hence, this suit.

4] The defendant No.1 and 2 appeared and filed their written statement at Exh.25. Besides pleadings of mis-joinder of party and by denying the entire pleadings of the plaintiffs they contended that it is the responsibility of the plaintiffs to obtain permission of joint and adjacent owner of suit property for measurement and for preparation of sanctioned plan. But the plaintiffs till date did not obtain consent from joint/adjoining owner Dhondiba Gholap. Obtaining permission for measurement of suit property from the joint owner is condition precedent and said permission was to be obtained by plaintiffs but, till date they failed to do so. The defendants time and again informed the plaintiffs to obtain such permission

from the joint owner but they paid no heed. The defendants even had been to Dhondiba Gholap on the say of plaintiffs to obtain consent about measurement of suit property. But he flatly denied and avoided to give way for the development of suit property. Actually, the suit property is situated at the back side of property of Dhondiba Gholap. There is only pathway available from the property of Dhondiba Gholap to approach main road. The plaintiff orally agreed to made available road for the development of suit property and for division of plot No.16A. But, inspite of repeated request till date the plaintiffs failed to make arrangement regarding approach way for the development of the suit property. The defendants had filed rough sketch map along with written statement at annexure 'A' which is marked as Exh.43 during the cross-examination of plaintiff No.1. As the plaintiffs failed to sought permission of joint/adjacent owner therefore development cannot be done of suit property. Lastly, prayed for dismissal of suit.

5] Following issues were framed by my learned predecessor at Exh.28 to which I record my findings along with reasons as under : -

<u>ISSUES</u>	<u>FINDINGS</u>
1) Whether the plaintiffs proves that the defendants has not complied the terms and conditions of the development agreement and power of attorney dated 27/09/2012 ?	No
2) Whether the plaintiffs proves that they are entitled for cancellation of development agreement and power of attorney ?	No
3) What order and decree ?	Suit dismissed without costs.

REASONS

6] The plaintiffs to substantiate their claim examined the plaintiff

No.1 as PW-1 at Exh.29 who proved following documents viz. development agreement Exh.32, power of attorney Exh.33, correction deed Exh.34, the PW-1 during cross examination admitted rough sketch map of suit property annexed with written statement therefore, said map at Exh.43. The plaintiffs closed their evidence by filing pursis Exh.46. On the other hand, the defendants examined defendant No.2 as DW-1 Exh.48 and closed their evidence by filing pursis at Exh.49.

As To Issue No.1:-

7] The crux of the suit is that the defendants has not carried construction over the suit property as per terms and conditions of development agreement hence, committed breach. The defence of defendants is of two folds firstly, the plaintiffs did not obtain consent of joint/adjacent owner of suit property for measurement and secondly, they failed to made road available to approach suit property therefore, the suit property is not developed.

8] The initial burden is on the plaintiffs to prove that the defendants had committed breach of terms and conditions of development agreement. If they succeed in discharging their burden then the onus will shift on the defendants to prove that the plaintiffs had orally agreed to made road available to approach suit property by obtaining permission from the joint/adjacent owner. Moreover, if the plaintiffs failed to discharge their burden then they will be non-suited.

9] The plaintiff No.1 (PW-1) deposed that the defendants agreed to allot 1800 sq.ft salable built up area along with parking and an amount of Rs.1,02,000/- as consideration amount. As per the development agreement the defendants were duty bound to obtain sanctioned plan from the

concerned authority within 6 months from the execution of development agreement and will allot ready flats to the plaintiffs within a period of 30 months. But, till date the defendants neither obtained any permission nor prepared sanctioned plan with respect to suit property. During cross-examination he admitted that out of 5 R land 2.50 R is owned by his father and remaining 2.50 R land is owned by Dhondiba Gholap. The property of Dhndiba Gholap is towards Eastern side of suit property. In the property of Dhondiab Gholap there are two chawls situated towards South and North having East-West directions. The plaintiffs have to use the way which is situated on the Northern side of the Southern chawl to reach main road. There are 10 ft two roads from the said chawls and no other road is available except these roads. As Dhondiba Gholap did not consent therefore, sanctioned plan of suit property and its measurement cannot be done. He further admitted that the suit property cannot be developed till road is made available to approach suit property.

10] The learned for the plaintiffs submitted that the defendant had to obtained sanction plan from the date of execution of development agreement till March 2014 and thereafter within 30 months they have to construct building over the suit property but, they failed to do so. The defendant No.2 admitted that he had visited suit property and he had knowledge about development and what are the difficulties arise during development process. Rights of division of suit property were given to the defendants but, neither they obtained permission from the Revenue Authority within the prescribed period nor developed the suit property as per development agreement.

11] Per contra, the learned advocate for the defendants submitted that if the description of suit property is considered there is no mention of separate share, it means still it is a joint property owned by the plaintiffs and

Dhondiba Gholap. The developer is not entitled to obtain permission for division of suit property. The para 11 of development agreement clearly speaks that it is the duty of plaintiffs to obtain consent as well as permission for road to develop suit property. The plaintiffs did not obtain consent of joint owner for measurement. The plaintiffs failed to tender any notice to the defendants asking them to act as per the development agreement. The suit property is in possession of the plaintiffs then how the development can be done.

12] The PW-1 during cross-examination volunteers that the defendants agreed to obtain permission from Dhondiba Gholap for measurement of suit property. Whereas, the DW-1 admitted during cross-examination that there is no document to show that the plaintiffs agreed to obtained permission and consent from Dhondiba Gholap for measurement of suit property. It is pertinent to note that the plaintiffs as well as defendants are denying fact of obtaining permission from the joint/adjacent owner Dhondiba Gholap. But, the perusal of para 11 of development agreement reveals that there is specific mentioned that it is the sole responsibility of the plaintiffs to resolve any dispute about four boundaries as well as road/way. Moreover, as per para 14 (e) of the said document the burden is casted upon the plaintiffs to get the way approved for the development of suit property. The plaintiffs failed to putforth any explanation about facts mentioned in these paragraphs. On the contrary, during cross-examination the PW-1 admitted that the contents of para 11 of development agreement are true and correct. It is settled principle of law that an oral evidence is not permitted to denied the contents of written document. It is important to note that Dhondiba Gholap is adjacent owner of suit property therefore, the plaintiffs are only the right persons to obtain consent as well as permission from Dhondiba Gholap for measurement. The defendants are third person and by no stretch

of imagination it can be said that the defendants ought to have or agreed to have obtained consent from Dhondiba Gholap in absence of any agreement or written document.

13] It is an admitted position that towards Eastern side of suit property there is property of Dhondiba Gholap and the plaintiffs had a way from the said property to approach main road. The plaintiffs denied that the plot No.16A is joint property till date. Even, if it is assumed that properties of plaintiffs and Dhondiba Gholap are separated. Then also it is the duty of plaintiffs to sought permission/consent from Dhondiba Gholap for measurement of suit property as well as to make available road from the property of Dhondiba Gholap to approach suit property for its development in view of para 11 and 14 (e) of the development agreement.

14] Admittedly, from the date of execution of development agreement within six months i.e. March 2013 the defendants ought to have obtained permission and sanctioned plan of the suit property from the concerned authorities. The plaintiffs were well aware that till March 2013 the defendants did not obtain any permission or prepared sanctioned plan of suit property. It is specifically deposed that the defendants intentionally prolonged to develop the suit property and when the plaintiffs enquired with them they stated that process of sanctioned plan is going on. No doubt, any specific date is not pleaded by the plaintiffs but, it can be safely infer that after March 2013 the plaintiffs would have approached the defendants and enquired about development of suit property. It is pertinent to note that the Para 30 of the development agreement specifically speaks about issuance of 15 days notice to the parties to fulfill the obligations as per terms and conditions of development agreement. Admittedly, the plaintiffs did not issue such notice to the defendants immediately after expiry of six months period

to act and fulfill the terms and conditions as per the development agreement. They had straight way issued notice to defendants to cancel the development agreement on 19/01/2016. Moreover, when the defendants had not obtained sanction plan within six months from the date of execution of development agreement then the plaintiffs would have terminated said agreement immediately. But instead of doing so, the plaintiffs granted time for further three year and later on issued notice in the year 2016 to cancel the development agreement and power of attorney to show cause of action to file present suit. The perusal of oral and documentary evidence clearly shows that the plaintiffs failed to perform their part of contract as per the terms and conditions mentioned in development agreement. Therefore, considering the above mentioned reasons I hold that the plaintiffs failed to prove the defendants has not complied the terms and conditions of the development agreement and power of attorney dated 27/09/2012 by leading any cogent and clinching evidence. Hence, I answer issue No.1 in negative.

As to issue No.2 and 3 :-

15] In view of my findings recorded to issue No.1 as I hold that the plaintiffs failed to prove that the defendants has not complied the terms and conditions of the development agreement and power of attorney dated 27/09/2012 therefore, I hold that they are not entitled for cancellation of development agreement and power of attorney. Hence, I answer issue No.2 in negative. Thus, issue No.3 is answer accordingly;

O R D E R

- 1) The suit is dismissed with costs.
- 2) Decree be drawn up accordingly.

Date:-24/09/2019
Pune.

Sd/xxx
(S.M.A.Sayyed)
19Th Jt. C.J.J.D., Pune.

C E R T I F I C A T E

“I affirm that the contents of this P.D.F. File are same word for word as per original order.”

Name of Steno : D.K.Wade
Court Name : S.M.A. Sayyed,
19th Jt. C.J.S.D. Pune.
Date : 24.09.2019
Order signed by
presiding officer on : 30.09.2019
Order uploaded on : 30.09.2019