

A ECE INDUSTRIES LIMITED
v.
S.P. REAL ESTATE DEVELOPERS P. LTD. & ANR.
(Civil Appeal Nos. 5127-5128 of 2009)

B AUGUST 6, 2009
[TARUN CHATTERJEE AND R.M. LODHA, JJ.]

C *Code of Civil Procedure, 1908 – O. 39 r. 1 and 2, s. 151 – Application for injunction under – Rejection by two courts concurrently – Interference with – Held: Third court can interfere with the concurrent findings only when findings are perverse or arbitrary – On facts, courts below refused to grant injunction in favour of appellant from making any further construction in suit property – Findings of High Court and trial*
D *court as also report of Advocate Commissioner appointed by Supreme Court were to the effect that substantial construction has already been made by respondent for which crores of rupees have been spent – Respondent has deposited the entire agreement amount though belatedly – Appellant will*
E *not suffer any substantial injury and balance of convenience lies against granting order of injunction – Thus, order of courts below justified – However, respondent would not claim equities over construction made.*

F **In these appeals, the order of High Court upholding the order of the trial court whereby it refused to grant the order of injunction restraining the respondent from making further construction in the suit property, is under challenge.**

G **Dismissing the appeals, the Court**

HELD: 1.1. When two courts concurrently reject the application for injunction, it would not be open for the third court to interfere with the said concurrent findings

until and unless it is brought to the notice of the third court that such findings are perverse or arbitrary. [Para 12] [576-A-B] A

1.2. As regard the construction on the suit property, the trial court came to the finding that as per the report of the commissioner and also as per the photographs produced that major construction work was undertaken and completed, and it must have required the respondent to invest crores of rupees. High Court came to the finding that the defendants/respondents have already taken over possession and made substantial construction. These are the two concurrent findings of fact arrived at by the High Court as well as by the trial court on the question of extent of construction on the suit property. [Para 12] [576-E-F] B C

1.3. In order to be satisfied on the question of construction in the suit property, Advocate Commissioner was appointed by this Court. A perusal of the report shows that out of 1800 flats to be constructed in the suit property in 8 Blocks, only in 295 apartments in the Triangular area, work has not been started, whereas in the rest 1,555 apartments in 5 Blocks, work is in progress at various stages. It is evident from the report that substantial progress has been made in the matter of construction on the suit property. Therefore, in view of the concurrent findings of the courts below and also from the findings arrived at by the Advocate Commissioner appointed by this Court in his report, it is held that substantial construction has been made. [Paras 13, 15 and 17] [576-D; 577-G-H; 578-A, E-F] D E F

1.4. The Development Agreement-cum-General Power of Attorney was entered into by the defendants/respondents with the plaintiff-appellant and as per the terms and conditions, parties agreed that a sum of Rs. 13.50 crores had to be paid besides 16.72 crores for the G H

A service of consultancy and Rs. 28,36,175/- was the cost, which comes to Rs. 30.50 crores. It was further agreed that it was only after the payment of the amount agreed upon, necessary documents were to be executed. Under the Agreement, the defendants/respondents had to furnish bank guarantee in regard to the amount stated to have been paid in four cheques. It is true that the respondents, after paying the first installments had failed to pay the other installments payable within the time specified, under the agreement, but it is an admitted position that although, the deposits were belatedly made but the entire amount under the Agreement has already been deposited and in compliance with the Agreement, a Bank Guarantee has also been furnished. [Para 18] [578-G-H; 579-A-E]

D 1.5. Substantial construction has been made on the suit property in respect of which crores of money have been invested by the defendants/respondents and since the defendants/respondents have already paid/deposited the amount payable in terms of the agreement, although belatedly, to the plaintiff/appellant, the plaintiff-appellant will not suffer any substantial injury if the construction work is not stopped by an order of injunction. The Court will not, as a matter of course, pass an order of injunction against the other party restraining the other party from raising any construction on the suit property till the disposal of the suit. If ultimately, the suit filed by the plaintiff-appellant is decreed, he can be compensated in damages or the defendants/respondents may be directed to pull down the construction and deliver vacant possession to the appellant when no equity can be claimed for such construction by the respondents. On the other hand, if at this stage, an order of injunction is granted against the defendants/respondents from proceeding with further construction in the suit property, it will undoubtedly destroy the constructions already

made by the defendants/respondents and the
defendants/respondents will suffer irreparable loss and
injury for not allowing them to make construction on the
suit property. That apart, the entire amount payable by
the defendants/respondents having been paid/deposited
in favour of the plaintiff/appellant, there is no reason to
pass an order of injunction against the defendants/
respondents when the plaintiff/appellant would not face
substantial injury for permitting the defendants/
respondents to proceed with the construction in the suit
property. [Para 19] [579-E-H; 580-A-E]

1.6. The balance of convenience lies against granting
an order of injunction, which, if granted, will substantially
and irreparably injure and prejudice the defendants/
respondents. The High Court was fully justified in
upholding the order of the trial court refusing to grant any
order of injunction in favour of the plaintiff/appellant.
[Para 20] [580-F-G]

1.7. When the High Court as well as the trial court had
refused to grant injunction in favour of appellant based
on consideration of materials on record and after
considering the balance of convenience and
inconvenience of the parties and when such findings of
the High Court as well as of the trial court does not suffer
from any perversity or arbitrariness, it is not open to
interfere with such order of the High Court as well as of
the trial court. [Para 21] [580-G-H; 581-A]

1.8. The trial court, while refusing to grant injunction
in favour of the plaintiff/appellant gave certain directions
to the defendants/respondents. Clause Nos. 1 and 2 as
regard depositing the balance value of the property; and
to furnish bank guarantee for the value of the unrealized
post dated cheques need not remain as they have
already been complied with by the defendants/

A respondents. Clause No. 3 that the defendants/
respondents shall not claim equities over the
construction made in the suit property and they would
be bound by the decision in the suit, shall remain.
Furthermore, the defendants/respondents, as directed by
B the trial court, shall furnish particulars of the prospective
buyers of the residential units in advance to the
Competent Authority/Urban Land Ceiling. [Para 22] [581-
B-D]

C CIVIL APPELLATE JURISDICTION : Civil Appeal No.
5127-5128 of 2009.

From the Judgment & Order dated 27.04.2009 of the High
Court of Judicature Andhra Pradesh at Hyderabad in Civil
Miscellaneous Appeal Nos. 1297, 1298 of 2008.

D R.F. Nariman, Dr. A.M. Singhvi, Akhil Sibal, Ajay
Bhargava, Vanita Bhargava (for M/s. Khaitan & Co.) Ananga
Bhattcharyya, J. Mohan Reddy, Bupender Mahendra, Aribam
Guneshwar Sharma, G. Ramakrishna Prasad for the appearing
E parties.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted.

F 2. These two appeals have been filed from a common
order passed by the High Court of Andhra Pradesh at
Hyderabad, by which the High Court had affirmed an order of
the Second Additional City Civil Judge at Hyderabad, disposing
of an application for injunction filed at the instance of the
G plaintiff-appellant on two applications for injunction in a suit for
recovery of possession and damages. The plaintiff/appellant
alleged in their plaint that they are the owner of 67,824.50 sq.
yards of land, situated at Borabanda, Fathenagar, Ashok Marg,
Hyderabad (hereinafter referred to as the suit property). The
H plaintiff-appellant as well as the defendants/respondents
executed a Development Agreement cum Power of Attorney

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on 21st of September, 2007. Under the said Agreement, the defendants/respondents agreed to pay an aggregate sum of Rs. 30.50 crores in the following manner :- A

(i) Rs. 13.50 crores by way of non-refundable amount.

(ii) Rs. 16.72 crores for utilizing the consultations, advice and services of the petitioner over the suit property along with service tax on the said amount for which invoices had been raised by the plaintiff/appellant. B

(iii) Rs. 28,36,525/- towards the cost of land. C

3. It is the case of the plaintiff-appellant that since the defendants/respondents had acted in breach of the agreement, the same was duly terminated. Some of the breaches of the agreement in question, as alleged by the plaintiff/appellant, are as follows :- D

(i) The respondent No. 1 issued 12 post dated cheques for a total sum of Rs. 16.72 crores – 11 post dated cheques for Rs. 1.40 crores each and one post-dated cheque for a sum of Rs. 1.32 Crores. E

(ii) The respondent did not furnish a Bank Guarantee for the amount of Rs. 16.72 crores and also did not pay the service tax payable on the said amount. F

(iii) Out of the 12 post dated cheques given by the Respondent, 2 cheques were honoured, 4 of Rs. 1.4 crores each were dishonoured on presentation and balance cheques were not presented. G

(iv) The respondent no. 1 did not carry out construction in accordance with the sanctioned scheme.

(v) The respondents entered into agreement with third parties without furnishing any details thereof. H

A (vi) The respondents were selling dwelling units to persons who cannot be termed as members of the weaker sections of the society.”

B 4. Since the agreement was terminable and when it was found by the plaintiff-appellant that the defendants/respondents were proceeding to change the nature and character of the suit property, a suit has been filed by the plaintiff/appellant for recovery of possession and damages.

C 5. In the aforesaid suit, two applications for injunction under Order 39 Rule 1 and 2 read with Section 151 of the Code of Civil Procedure were filed by the plaintiff-appellant. In one application, the main relief that was claimed by the plaintiff-appellant was to restrain the defendants/respondents from alienating or transferring the suit property including the structures coming up thereon and in the other, for injunction over the suit property from changing the nature and character thereof pending disposal of the suit.

E 6. While dealing with the applications for injunction, the Second Additional City Civil Judge at Hyderabad had appointed an Advocate Commissioner to find out the extent of construction raised by the defendants/respondents in the suit property as the plaintiff-appellant sought to contend that there was no construction at all in the suit property. The Advocate Commissioner appointed by the trial Court submitted his report, which is already on record. While deciding the applications for injunction, the said report was taken into consideration by the trial Court and after hearing the learned counsel for the parties, the trial Court was prima facie satisfied that substantial construction was undertaken and completed by the defendants/respondents, which had required them to invest crores of rupees. The trial Court, considering this fact that substantial construction was completed, refused to grant an order of injunction in favour of the plaintiff-appellant from making any further construction in the suit property but the applications

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for injunction were, however, disposed of with the following conditions :-

“(1) That the defendants/respondents shall deposit the balance value of the property, which comes to around Rs. 28,00,000/- into Court within one month.

(2) That it shall furnish bank guarantee for the value of the unrealized post dated cheques, and pay/deposit the value of four cheques, which were dishonoured, within one month from today.

(3) That the defendants/respondents shall not claim equities over the construction made in the land and they are bound by the decision in the suit. The Defendants/respondents shall furnish the particulars of the prospective buyers of the residential units in advance to the Competent Authority/Urban Land Ceiling, and it must be made clear to the prospective buyers that their purchases are subject to the result of the suit by making a ‘specific recital’ in the agreement of sale or sale deed, as the case may be.”

7. Aggrieved by the order of the trial Court, two appeals were preferred by the plaintiff/appellant before the High Court of Andhra Pradesh at Hyderabad, which by the impugned order, had affirmed the order of the trial Court on the question of construction in the suit property, but set aside the directions given by the trial Court so far as Clause Nos. 1 and 2, as mentioned above, are concerned in the order of the trial Court. It is these concurrent orders, which are now under challenge before us in these appeals.

8. At the time of admission of this matter, caveat had already been filed by the defendants/respondents. In that view of the matter, we fixed the hearing of the matter on 22nd of July, 2009. While hearing the petitions on merits, Mr. R. F. Nariman, learned senior counsel appearing for the plaintiff/appellant, invited us to the report of the Advocate Commissioner and after

A taking us through the same, sought to contend that in fact, no construction has been made by the defendants/respondents and, therefore, in view of the admitted fact that the agreement, having been already cancelled, the defendants/respondents cannot be permitted to proceed with the construction on the suit property and the application for injunction, therefore, must be allowed. On the other hand, Dr. A. M. Singhvi, learned senior counsel appearing for the defendants/respondents also took us to the report of the Advocate Commissioner and other materials on record and at the same time, also had produced recent photographs, which were not produced in the Courts below and contended that the High Court was fully justified in affirming the orders of the trial Court inter alia holding prima facie that a substantial construction has already been made in the suit property, for which the defendants/respondents have invested huge sum of money and in that view of the matter, the question of grant of injunction at this stage could not arise at all.

9. After hearing the learned senior counsel for the parties and after going through the Advocate Commissioner's report and the impugned order of the High Court as well as of the trial Court, application for injunction and counter filed to the same, we were of the prima facie view that before deciding these appeals finally on merits, it would be for ends of justice to find out the actual position of the suit property and for that reason, we appointed an Advocate Commissioner from this Court by our Order dated 23rd of July, 2009, who would inspect the suit property and submit a report by 27th of July, 2009 on the following points :-

- (i) Whether constructions have been made on the different blocks of the suit property and how many blocks are still remaining vacant ?
- (ii) If constructions have been made, what is the nature and extent of such constructions ?

- (iii) Whether such constructions can be said to be substantial constructions or not ; A
- (iv) Whether constructions have been completed in some blocks of the suit property and the flats constructed in such blocks are ready for use and occupation ; B
- (v) Also to see the local features.

10. Accordingly, the learned Advocate Commissioner visited the spot and submitted his report, which was also taken up for consideration along with the main matter. The report of the Advocate Commissioner may be kept on record. C

11. On behalf of the plaintiff-appellant, Mr. Nariman, learned senior counsel, submitted that even from the report submitted by the Advocate Commissioner appointed by this Court, it would be clear that substantial construction has not been made in the suit property, whereas Dr. Singhvi, learned senior counsel, also has drawn our attention to the report of the Advocate Commissioner of this Court and submitted that there cannot be any doubt that a substantial construction has already been made by the defendants/respondents, for which a huge sum of money has already been invested. On the question of extent of construction made by the defendants/respondents in the suit property, we have, therefore, considered the findings of the High Court as well as of the trial Court and also the report submitted by the learned Advocate Commissioner in this Court. The High Court as well as the trial Court concurrently found, after going through the report of the Advocate Commissioner, which was appointed by the trial Court, that substantial construction has already been made in the suit property. Since no objection was raised by either of the parties to the report of the learned Advocate Commissioner, we accept the same without any objection and direct that the same may be kept on record. D
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12. It is well settled now by catena of decisions of this H

A Court that when two Courts concurrently rejected the application for injunction, it would not be open for the third Court to interfere with the said concurrent findings until and unless it is brought to the notice of the third Court that such findings are perverse or arbitrary. So far as the findings of the trial Court regarding construction on the suit property is concerned, let us look into its said findings on the question of construction, which are as follows :-

C *"In the light of the above circumstances, I find that, already as per the report of the commissioner and also as per the photographs produced by him, major construction work was undertaken and completed, it must have required the respondent to invest crores of rupees."*

D 13. So far as the findings of the High Court on the question of extent of construction is concerned, it is also the finding of the High Court that the defendants/respondents have already taken over possession and made substantial construction, as would be evident from the record and also from the report of the Advocate Commissioner, who was appointed by the trial Court. These are the two concurrent findings of fact arrived at by the High Court as well as by the trial Court on the question of extent of construction on the suit property. Still, in order to be satisfied on the question of construction in the suit property, as noted herinearlier, we appointed an Advocate Commissioner, who submitted its report.

14. We have carefully examined the report of the Advocate Commissioner appointed by us, from which, following points may be noted :

G "4. The Defendants/respondents' Counsel had supplied the layout of the site plan of the project. Principally, the entire project is divided into 8 Blocks. The plan for construction of 8 Blocks is approved by the authorities. A photocopy of the approved site plan of the project is annexed as

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Annexure C-2. Each Block is divided into various Rows. There is no evenness in the number of Rows for each Block. Some Blocks have more Rows and some Blocks have less Rows. The Blocks are numbered in the site plan attached herewith as *Annexure C-3.* For better understanding and for better description of the areas in the Blocks, I had given numbers for the Rows in each Block separately in the site plan. The layout is as under :

1.	Block - I	2 Rows (60 Apartments)	295
2.	Block - II	2 Rows (150 Apartments)	Apartments in the
3.	Block-III	2 Rows (85 Apartments)	Triangular area. Work has not been started.

4.	Block - IV	6 Rows (330 Apartments)	
5.	Block - V	7 Rows (385 Apartments)	1,555
6.	Block-VI	2 Rows (240 Apartments)	Apartments
7.	Block-VII	6 Rows (300 Apartments)	in the
8.	Block-VIII area.	6 Rows (300 Apartments)	Rectangular Work in progress at various stages.

5. It is stated that each Block will have ground floor (car park) + 5 floors."

15. A perusal of the report of the learned Advocate Commissioner therefore shows that out of 1800 flats to be constructed in the suit property in 8 Blocks, only in 295 apartments in the Triangular area, work has not been started,

A whereas in the rest 1,555 apartments in 5 Blocks, work is in progress at various stages. Therefore, it is evident from the perusal of the report of the Advocate Commissioner filed in this Court that substantial progress has been made in the matter of construction on the suit property as it is evident that such

B substantial construction has been completed at least 50% in the rectangular pieces of the suit property whereas work for Blocks IV to VIII are going on except Row Nos. 3 to 6 in Block No. VII where there is a mound of soil to a height of about 2 floors and also boulders of granite rock cut into rectangular

C pieces of identical sizes lying in the area. It is also found from the report that the constructions have been completed in Row Nos. 1 and 2 in Block No. VIII.

16. Apart from that, 98% of the work is also completed on 1st, 2nd and 3rd floors of Row Nos. 1 and 2 of Block No. VIII.

D Since the roads have not been laid and the parking has not been made available, according to the learned Advocate Commissioner, the purchasers would not be in a position to occupy the flats. So far as other Blocks are concerned, the learned Advocate Commissioner was of the view that huge

E construction activity on a war-footing basis is under-way in respect of the disputed area which includes Blocks- IV to VIII.

17. Therefore, in view of the concurrent findings of the Courts below and also from the findings arrived at by the Advocate Commissioner appointed by this Court in his report,

F we cannot but hold that substantial construction has been made and therefore, the submission of Mr. Nariman that substantial construction has not been made, cannot be accepted.

18. Keeping this in mind, let us now proceed to consider

G whether substantial injury would be faced by the plaintiff-appellant in the event an order of injunction is not granted to them. As noted hereinafter, the Development Agreement-cum-General Power of Attorney was entered into by the defendants/respondents with the plaintiff-appellant and as per the terms

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and conditions, parties agreed that a sum of Rs. 13.50 crores had to be paid besides 16.72 crores for the service of consultancy and Rs. 28,36,175/- was the cost, which comes to Rs. 30.50 Crores. It was further agreed that it was only after the payment of the amount agreed upon, necessary documents were to be executed. That apart, under the Agreement, the defendants/respondents had to furnish bank guarantee in regard to the amount stated to have been paid in four cheques. In the plaint as well as in the application for injunction, it was alleged by the plaintiff-appellant that the defendants/respondents, after paying first installment, had failed to pay the balance installments as agreed upon by them because of an order of injunction obtained by the plaintiff/appellant against the defendants/respondents in a writ petition filed by them in the High Court of Andhra Pradesh at Hyderabad. It is true that the defendants/respondents, after paying the first installment, had failed to pay the other installments payable within the time specified, under the Agreement, but it is an admitted position that although, the deposits were belatedly made but the entire amount under the Agreement has already been deposited and in compliance with the Agreement, a Bank Guarantee has also been furnished.

19. Such being the state of affairs, i.e. substantial construction has been made on the suit property in respect of which crores of money have been invested by the defendants/respondents and since the defendants/respondents have already paid/deposited the amount payable in terms of the agreement, although belatedly, to the plaintiff/appellant, we do not think that the plaintiff-appellant will suffer any substantial injury if the construction work is not stopped by an order of injunction. It is well settled that when construction has been made on a land, which is of considerable magnitude, and when the plaintiff shall not face any substantial injury, if no order of injunction is granted because of payment/deposit of the entire amount payable by the defendant to the plaintiff under the Agreement,

A though belatedly, we are of the view that the Court will not, as
 a matter of course, pass an order of injunction against the other
 party restraining the other party from raising any construction
 on the suit property till the disposal of the suit. If ultimately, the
 suit filed by the plaintiff-appellant is decreed, he can be
 B compensated in damages or the defendants/respondents may
 be directed to pull down the construction and deliver vacant
 possession to the plaintiff/appellant when no equity can be
 claimed for such construction by the defendants/respondents.
 On the other hand, in our view, if at this stage, an order of
 C injunction is granted against the defendants/respondents from
 proceeding with further construction in the suit property, it will
 undoubtedly destroy the constructions already made by the
 defendants/respondents and the defendants/respondents will
 suffer irreparable loss and injury for not allowing them to make
 D construction on the suit property. That apart, in view of our
 discussions made hereinabove, the entire amount payable by
 the defendants/respondents having been paid/deposited in
 favour of the plaintiff/appellant, there is no reason to pass an
 order of injunction against the defendants/respondents when the
 plaintiff/appellant would not face substantial injury for permitting
 E the defendants/respondents to proceed with the construction in
 the suit property.

20. Accordingly, in view of our discussions made
 hereinabove, we are, therefore, of the view that the balance of
 F convenience lies against granting an order of injunction, which,
 if granted, will substantially and irreparably injure and prejudice
 the defendants/respondents. For the reasons aforesaid, we are,
 therefore, of the view that the High Court was fully justified in
 affirming the order of the trial Court refusing to grant any order
 G of injunction in favour of the plaintiff/appellant.

21. That apart, in our view, when the High Court as well
 as the trial Court had refused to grant injunction in favour of the
 plaintiff/appellant based on consideration of materials on record

and after considering the balance of convenience and inconvenience of the parties and when such findings of the High Court as well as of the trial Court do not suffer from any perversity or arbitrariness, it is not open for this court to interfere with such order of the High Court as well as of the trial Court. A

22. However, there is one another aspect of the matter. As noted hereinafter, the trial Court, while refusing to grant injunction in favour of the plaintiff/appellant, has given certain directions to the defendants/respondents, which have already been noted hereinafter. In view of the fact that the Clause Nos. 1 and 2 have already been complied with by the defendants/respondents, those clauses need not remain. So far as Clause No. 3 is concerned, it appears to us that the said clause should remain, that is to say, the defendants/respondents shall not claim equities over the construction made in the suit property and they would be bound by the decision in the suit. Furthermore, the defendants/respondents, as directed by the trial Court, shall furnish particulars of the prospective buyers of the residential units in advance to the Competent Authority/Urban Land Ceiling as it must be made clear to the prospective buyers that their purchases are subject to the result of the suit by making a 'specific recital' in the agreement of sale or sale deed, as the case may be. B
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23. In view of our discussions made hereinabove, we do not find any merit in these appeals. F

24. We, however, make it clear that whatever observations we have made while deciding these two appeals, would not stand in the way of the Courts below from deciding the merits of the suit and it is also made clear that the trial Court shall not be influenced by any of the observations or findings made in this order or of the High Court, while deciding the application for injunction. G

25. Considering the facts and circumstances of the present case, we direct the trial Court to dispose of the suit at an early H

A date, preferably within six months from the date of filing the written statement by the defendants/respondents. The defendants/respondents are directed to file their written statement within four weeks from this date, if not filed in the meantime.

B 26. The appeals are thus dismissed. There will be no order as to costs.

N.J.

Appeals dismissed.