

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

**APPEAL FROM ORDER NO. 1126 OF 2014
WITH
CIVIL APPLICATION NO. 1356 OF 2014**

Asif Iqbal Memon ... Appellant.

V/s.

Abdul Hamid Aboobakar Coatwala & Anr. ... Respondents.

Mr. Surel Shah i/b Mangesh Chavan for the appellant.

Mr. Abdul Hamid Aboobakar Coatwala respondent no.1 party in person.

**CORAM : K. K. TATED, J.
DATED : 21/07/2015.**

P.C.:

. Heard learned Counsel for the appellant and respondent no.1 party in person.

2 By consent of the Appellant as well as respondent no.1 party in person, matter is taken up for final hearing at the stage of admission itself.

3 For the sake of convenience hereinafter the nomenclature of the parties will be referred as in the plaint i.e. Appellant as Defendant no.1, Respondent no.1 as plaintiff and respondent no.2 as Defendant no.2.

4 This Appeal from Order is preferred by defendant no.1

challenging the common oral order dated 09.10.2013 passed by Bombay City Civil Court at Bombay in Notice of Motion no. 716 of 2011 and Notice of Motion no. 3597 of 2011 restraining the defendant no.1 from acting on the basis of Conveyance Deed dated 05.03.2003 in respect of suit premises i.e. Chaiwala Building, 10th Israil Mohalla, Khadak, Mumbai – 400 009. The plaintiff filed suit initially in the High Court at Original Side and subsequently, it was transferred to Bombay City Civil Court at Bombay for following reliefs.

“a) That this Hon'ble Court be pleased to pass an order for delivering up and canceling the said document being Exhibit 'B' to the Plaint and for rectification of the records / revenue records relating thereto;

b) That this Hon'ble Court be pleased to declare that the document annexed at Exhibit 'B' to the Plaint is illegal, unlawful, void ab-initio, non-est and not binding upon the Plaintiff and / or any one else;

c) That the Defendants be restrained by permanent order and injunction of this Hon'ble Court from in any manner acting on the document being Exhibit 'B' to the Plaint and / or from using the same against the Plaintiff;

d) That pending the hearing and final disposal of the suit the Defendants be restrained by order and injunction of this Hon'ble Court from in any manner acting upon the document being Exhibit 'B' to the Plaint and / or from using the same against the Plaintiff;

e) ad-interim reliefs in terms of prayer (d) above be granted;

f) the costs of this suit be provided for;

g) for such other and further reliefs as the nature and circumstances of the case may require.”

5 In that suit, the defendant no. 1 also filed cross objections. The plaintiff preferred Notice of Motion no. 716 of 2011 for following

reliefs:

“a) That pending the hearing and final disposal of the Suit, the Defendants be restrained by an order and injunction of this Hon'ble Court from in any manner acting upon the document being Exhibit “B” to the Plaintiff and or from using the same against the Plaintiff or tenanted property by illegally calling themselves as landlord.

b) Ad-interim order in terms of prayer (a) above;

c) For costs;

d) For such other and further reliefs as the nature and circumstances of the case may require.”

6 The defendant no.1 also preferred Notice of Motion no. 3597 of 2011 for following reliefs.

“(a) Pending the hearing and final disposal of this Suit, this Hon'ble Court be pleased to restrain the Plaintiff from in manner acting on the document being 12th June, 2009 at Ex. “A/1” to the Plaintiff and/or in any manner using the same against the Defendant No.1;

(b) Pending the hearing and final disposal of this Suit, the Plaintiff be restrained by an order and injunction of this Hon'ble Court from in any manner acting upon the suit property viz. the Chaiwala Building, 10th Israil Mohallah, Khadak, Mumbai – 400 009 or representing himself as the landlord of the suit property or continuing, pursuing, filing or proceeding with any legal proceedings with any respect to any of the tenements in the suit property;

(c) pending the hearing and final disposal of this Suit, this Hon'ble Court be pleased to pass appropriate injunction inter alia restraining the Defendant and/or his servant, agents or representatives from creating any third party rights in respect of the suit property and/or any of the tenements in it and also to refrain from entering into any discussions or negotiations with any third party in respect of the suit property and/or any of the tenements in it;

(d) interim and ad-interim prayers in terms of prayers above be granted;

(e) such further and other reliefs be granted to the Defendant No.1 in his favour as this Hon'ble Court may deem fit and proper.”

7 The Trial Court by common oral order dated 09.10.2013, Notice of Motion no. 716 of 2011 was made absolute in terms of prayer clause (a) and Notice of Motion no. 3597 of 2011 preferred by defendant no.1 dismissed. Hence, the present Appeal from Order.

8 The learned Counsel Mr. Shah appearing on behalf of the defendant no.1 submits that the impugned order passed by the Trial Court is against justice, equity and good conscience and same is liable to be set aside. He submits that the learned Judge has failed to consider the purportedly Deed of Conveyance dated 12.06.2009 Exh. B to the plaint was the fabricated documents and therefore, has arrived a perverse finding. He submits that the Trial Court failed to consider that the defendant no.1 has purchased the suit property by way of registered Conveyance Deed dated 05.03.2003 prior to the alleged purchase by the plaintiff in the year 2009. He submits that in view of Section 48 of the Transfer of Property Act, 1882 plaintiff cannot claim any better title than defendant no.1.

9 The learned Counsel for the defendant no.1 submits that originally suit property was belonging to one Mrs. Batruddin Mithaiwala. The original owner gifted the said property to his wife Mrs. Shirinbai Batruddin Mithaiwala by registered Gift Deed dated

04.07.1975. Thereafter, the said Mrs. Shirinbai Batruddin Mithaiwala entered into agreement for sale dated 18.11.1982 with Abbasbhai Dolfar and thereafter, executed registered Conveyance Deed dated 17.03.1983. He submits that Abbasbhai Dolfar subsequently, sold the suit property by registered Conveyance Deed dated 29.07.1996 to the defendant no.2 i.e. Bhavnaben Mafatlal Seth. The defendant no.1 purchased the said suit property from defendant no.2 by registered Conveyance Deed dated 05.03.2003. He submits that though the defendant no.1 placed on record all these documents before the Trial Court, the Trial Court failed and neglected to consider them in the proper way and restrained defendant no.1 from acting on the basis of registered Conveyance Deed dated 05.03.2003.

10 The learned Counsel for the defendant no.1 submits that conveyance deed dated 17.03.1983 between Mrs. Shirinbai Mithaiwala and Abbasbhai Dolfar was not available. But, defendant no.1 placed on record the receipt issued by the Sub-Registrar showing that the conveyance deed dated 17.03.1983 was submitted by Mrs. Shirinbai Batruddin Mithaiwala for registration and paid Rs.480/- towards copying charges. He further submits that even the assessment order issued by the BMC for the year 2009-10 shows the name of Abbasbhai Kadarbhai Dolfar. He submits that Abbasbhai Dolfar used to collect the rent from tenants of the suit premises and used to issue rent receipt for that. Those rent receipts shows the name of Abbasbhai. He submits that even the original owner Mrs. Shirinbai Batruddin Mithaiwala issued a letter dated 17.03.1983 to all the tenants of the suit premises stating that she sold the suit property to Shri. Abbasbhai Kadarbai

Dolfar and directed tenants to pay all arrears/ current rent/ compensation/ mesne profit to the purchaser or his constituted attorney Mr. Hasmukh Mehta under his receipt. He submits that before purchasing the suit property the defendant no.1 issued a public notice in the newspaper Janmabhumi (Gujarati) dated 03.01.2003 and in Mid-Day (English) dated 03.01.2003. Pursuant to the said public notice, neither plaintiff nor anybody raised any objections. He submits that because of the dispute between the plaintiff and defendants herein, he obtained search report about the suit property . That search report also stated that Mrs. Shirin Batruddin Mithaiwala sold property to Abbas Bhai Dolfar. He submits that thereafter, because of dispute between the plaintiff and defendants, as per the request made by the police authority from Mata Ramabai Ambedkar Marg Police Station, Mumbai by letter dated 20.05.2011, Sub-Registrar Mumbai informed the police authority by their letter dated 04.08.2011 that the conveyance deed dated 17.03.1983 was lodged with them to inspect of the suit property. He submits that inspite of these documents the Trial Court erred in coming to the conclusion restraining defendant no.1 from acting as per Conveyance Deed dated 05.03.2003.

11 The learned Counsel for the defendant no.1 submits that it is the case of the plaintiff that he purchased the suit property from Mrs. Shirinbai Batruddin Mithaiwla by registered Conveyance Deed dated 12.06.2009. The learned Counsel for the defendant no.1 submits that the plaintiff on the basis of alleged subsequent Conveyance dated 12.06.2009 is collecting the rent from all the tenants. Apart from that, he has filed the eviction suit against the tenants and thereafter,

compromised the same. He submits that in this way the plaintiff is creating third party right, title and interest in respect of suit property, claiming himself as owner and landlord of the suit property. He submits that in the interest of justice, this Hon'ble Court either be pleased to restrain the plaintiff from collecting rent from the tenants and creating third party rights, title and interest in respect of suit property or direct both the parties to maintain status quo as of today. He submits that if the interim relief is not granted till the hearing and final disposal of the suit, irreparable loss and injury will be caused to them. He submits that defendant no.1 has good chance of success in the present proceeding.

12 On the other hand, plaintiff Abdul Hamid Aboobakar Coatwala party in person vehemently opposed the present Appeal from Order. He submits that the Trial Court after considering the evidence on record and particularly conveyance dated 12.06.2009 executed by Mrs. Shirinbai Batruddin Mithaiwala in the favour of plaintiff held that plaintiff shows prima facie case as a owner of the property. Hence, the Trial Court restrained the defendant no.1 from acting as a owner of the suit premises on the basis of Conveyance dated 05.03.2003. He submits that defendant no.1 committed several frauds before the Trial Court as well as this Court. He submits that defendant no.1 has not placed on record all the pleading filed by the plaintiff. He submits that defendant no.1 suppressed the several important documents from this Court and therefore, on that ground itself the Appeal from Order is required to be dismissed with costs. He submits that the defendant no.1 was making a false and incorrect statement on several occasion.

He submits that these facts are recorded by this Court in order dated 27.01.2012 (Coram : S. J. Vazifdar, J) in Notice of Motion no. 3597 of 2011 with 716 of 2011. He further submits that though the plaintiff called upon the defendant no.1 to give inspection of documents referred and relied upon by him in their written statement on several occasions, the same was not given with malafide intention.

13 The plaintiff party in person submits that in a suit filed by him in Small Causes Court against several tenants, the defendant no.1 filed application for joining him as a party. He submits that those applications were dismissed by the Small Causes Court observing that defendant no.1 failed and neglected to show the documentary proof about his ownership. He further submits that even in criminal case the learned Magistrate held that the defendant no.1 has not shown any documents as an owner of the suit property. He further submits that even the BMC issued notice to the plaintiff as a owner of the suit property calling upon the plaintiff to pay repairs. He submits that even the BMC in Assessment extract dated 04.01.2010 shows the plaintiff as a landlord of the suit property. He submits that as of today the plaintiff is paying property taxes in respect of suit property.

14 The plaintiff party in person submits that the learned Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai in its common order below Exh. 11 in 72/N/2013 and Exh. 29 in Criminal Case no. 179/PW/2011 in paragraph 9 & 10 specifically recorded that the defendant no.1 failed to produce any documentary evidence to show that he was the owner of suit premises. He submits that all these documents clearly shows that the plaintiff was the owner of the suit

premises, on the basis of conveyance dated 12.06.2009 executed by Mrs. Shirinbai Batruddin Mithaiwala in his favour. On the basis of these submissions, the plaintiff party in person submits that there is no substance in the present Appeal from Order and same is required to be dismissed with costs.

15 I heard both the sides at length. I have gone through the several documents placed on record by the defendant no.1 by way of compilation of additional documents. It is to be noted that in the present proceeding, the dispute is whether the plaintiff can be an owner of the suit property on the basis of conveyance deed dated 12.06.2009 or defendant no.1 is the owner on the basis of conveyance deed dated 05.03.2003 and who can manage the suit property till the hearing and final disposal of the suit. It is to be noted that the conveyance executed in favour of defendant no.1 is of 2003. He placed on record all the earlier documents i.e. proof about the execution of conveyance dated 17.03.1983 from Mrs. Shirinbai Mithaiwala to Abbas Bhai Dolfar and thereafter, Abbas Bhai to defendant no.2 conveyance dated 29.07.1996. The defendant no.1 purchased the suit property from defendant no.2 by registered conveyance deed dated 05.03.2003. Not only that, plaintiff has also placed on record several documents to prove his ownership in respect of suit property. Admittedly, there is no dispute that the plaintiff has purchased the suit property in the year 2009. Whereas, defendant no.1 has purchased the same property in the year 2003.

16 Therefore, in the view of Section 48 of the Transfer of Property Act, 1882 prima facie the defendant no.1 has better title, subject to the

outcome of the pending suit. Section 48 of the Transfer of Property Act, embodies a well established rule founded on law and justice that if the vendor creates at different times, by way of transfer, rights over the same immovable property and if such rights cannot co-exist, then each later created transfer shall be subject to rights previously created. Section 47 of the Registration Act, provides that a document executed earlier, though registered later, shall be effective and operative from the date of its execution.

17 It is true that under Section 54 of the transfer of Property Act sale of tangible immovable property of the value of Rs.100/- and upwards can be made only by a registered instrument. But, once the document is registered, Section 47 of the Registration Act comes into operation which provides that the registered document shall operate from the time from which it would have commenced to operate if no such registration thereof had been required or made and not from the time of its registration. Section 48 of the Transfer of Property Act determines the priority when there are successive transfers. It provides that where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

18 These facts are not considered by the Trial Court at the time of passing a common order dated 09.10.2013. In any case the suit is pending for hearing and final disposal on its own merits. If the impugned order passed by the Trial Court remained inforce, then the

plaintiff may create third party rights, title and interest in respect of suit property as alleged by the defendant. Hence, it is necessary to protect the property in the interest of both the parties till the hearing and final disposal of the suit.

19 Considering the above mentioned facts and the fact that defendant no.1 purchased suit property by the registered Conveyance Deed dated 05.03.2003, I am of the opinion that in the interest of justice, the impugned order passed by the Trial Court dated 09.10.2013 required to be set aside and appropriate arrangement to be made to protect the property till the hearing and final disposal of the suit.

20 Hence, the following order.

ORDER

- i) Appeal from Order is partly allowed.
- ii) The impugned common order dated 09.10.2013 passed by the Bombay City Civil Court at Bombay in Notice of Motion no. 716 of 2011 and Notice of Motion no. 3597 of 2011 is set aside.
- iii) Both the parties are directed to maintain status quo in respect of the suit property as of today till the hearing and final disposal of L.C. Suit No. 2501 of 2010.
- iv) The Trial Court is directed to appoint fit and appropriate person after hearing both the sides to collect the rent of the suit premises and deposit the same in Court till the hearing and final disposal of the suit and same to be invested in fixed deposit of

any nationalised bank, subject to the outcome of the suit.

v) Hearing of L.C. Suit No. 2501 of 2010 is expedited.

vi) This Court expects from the Trial Court to decide the suit as early as possible, but in any case on or before 30.06.2016.

vii) No order as to costs.

21 In view of disposal of the Appeal from Order, nothing survives in the Civil Application. Hence, same is dismissed as infructuous.

(K.K.TATED, J.)