

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.817 OF 2014

with

CAA/983/2014

Prakash Shantaram Ambike

... Appellant/applicant

Vs.

Tilottama Vasant Phatak & ors.

... Respondents

Mr.R.S. Datar for the Appellant/Applicant

Mr.A.S. Khandeparkar i/b Khandeparkar & Asso. for Respondent No.7

Mr.Sushant Karandikar for original Defendants 1 to 5

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 31st AUGUST, 2015

P.C.:

1. Admit. By consent of the parties, appeal called out and heard finally at the stage of admission itself.

2. In this appeal, order dated 4.8.2014 passed by the learned Joint Civil Judge, Senior Division, Kalyan rejecting the application of the injunction below exhibit 5 is challenged. The appellant, who is the original plaintiff, has filed suit for declaration and injunction against the respondents. Respondent Nos.1 to 6 are the owners of the property; Respondent No.7 is the Developer; Respondent No.8 is a Bank and Respondent No.9 is a person who is an occupant of flat No.102 of the building. The plaintiff i.e., the

appellant, claims his ownership and possession in the suit flat i.e., flat No.102 admeasuring 550-sq.ft. in the building by name Sundarnarayan Ganesh @ Indira Niwas. He claims that he has purchased the suit flat by an agreement dated 28.1.2010 from respondent No.3 Sunil Phatak. It is the case of the plaintiff that Respondent Nos.1 to 6, who have inherited the property, had entered into an agreement for development of the land alongwith respondent No.7, who is a builder/developer and respondent No.7 has carried out the development process and there is a threat to the plaintiff that he would be evicted from flat No.102 of the said building and hence, the suit is filed. The learned Counsel for the appellant has submitted that the trial Judge has committed error in rejecting the application for stay. The appellant is the owner and in occupation of flat No.102. He submitted that in the plaintiff's suit i.e., 261 of 2013, Respondent Nos.1 to 5 have filed an application below exhibit 174 seeking mandatory injunction against the appellant i.e., the plaintiff, that he should not obstruct in taking possession of the said suit property which the plaintiff has taken the possession of forcibly from Respondent No.3 earlier. The learned Counsel has submitted that the suit property and the said suit flat in exhibit 174 is one and the same and yet, the learned trial Judge has rejected both the applications of stay which were filed against each other by the original plaintiff and defendant Nos.1 to 5. It is submitted that if his

application for injunction was rejected by the trial Court then, the other application of Respondent Nos.1 to 5 ought to have been allowed or converse. He has submitted that while rejecting the application exhibit 174 filed by the defendants i.e., respondent Nos.1 to 5, the Court has given finding that the plaintiff is in possession of the suit premises i.e., flat No.102 of Indira Niwas. Therefore, the learned Counsel submitted that if it is so, once the possession is admitted by the Court, then he should have been protected by injunction.

3. The learned Counsel for the respondents opposes the appeal and submitted that Sundarnarayan Ganesh and Indira Niwas are two different buildings and the plaintiff claims his possession in respect of flat No.102 in Sundarnarayan, which is false. The learned Counsel for the respondents supported the order passed by the learned trial Judge. It is also pointed out that the Court Commissioner was appointed in the said matter who gave report and the said report was considered by the learned trial Judge.

4. Perused the orders passed by the learned Judge under exhibit 5 and also under exhibit 174. Also perused the report of the Court Commissioner dated 26.9.2013. A confusion is created by the plaintiff by representing the flat No.02 in Sundarnarayan Ganesh building and the premises which are

occupied by the plaintiff in Indira Niwas as one and the same. However, after going through the report of the Court Commissioner, it is clear that these two premises in Sundarnarayan Ganesh and Indira Niwas are not the same. They are two different premises. The learned trial Judge has rightly placed reliance on the report of the Court Commissioner disclosing that these two buildings are different. The suit premises 102 in Sundarnarayan Ganesh is different and as rightly held to be occupied by respondent No.9. Thus, the learned trial Judge has rightly held that when the plaintiff is not in possession of the suit premises 102 in Sundarnarayan Ganesh building, no injunction can be granted to him as he is not in possession of the said suit premises.

5. In this view of the matter, the appeal fails and is hereby dismissed.
6. Civil Application also stands disposed of.

(MRIDULA BHATKAR, J.)