

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

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APPEAL FROM ORDER NO. 833 OF 2016
WITH
CIVIL APPLICATION NO. 1038 OF 2016
AND
APPEAL FROM ORDER NO. 834 OF 2016
WITH
CIVIL APPLICATION NO. 1039 OF 2016

Mr. Oveash Mohsin Kadiwala .. Appellant/Applicant
Vs.
Mr. A. Rahim Haroon Malkani & Ors. .. Respondents

AND
APPEAL FROM ORDER NO. 835 OF 2016
WITH
CIVIL APPLICATION NO. 1040 OF 2016

Mr. Arif Abdul Sattar Hingora .. Appellant/Applicant
Vs.
Mr. A. Rahim Haroon Malkani & Ors. .. Respondents

Mr. S. R. Singh for the Appellant/Applicant.
Mr. Kirit J. Hakani with Mr. N. Hakani for Respondent Nos.1 to 5.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 6th SEPTEMBER, 2016.

ORAL JUDGMENT

1. Admit.
2. Heard learned counsel for the appellant and respondents finally at the stage of admission itself.
3. As all these appeals involved common question of facts and

law and they are heard together, they are being decided by this common judgment.

4. These appeals are preferred against the order dated 28.06.2016 passed by the City Civil Court, Mumbai thereby rejecting the Notice of Motion, tendered by the appellant herein, seeking relief of interim injunction, restraining the respondents from dealing with, disposing of, alienating, assigning or creating third party rights or interest in respect of certain shop premises in the proposed construction of Building No.8.

5. For the purpose of convenience, facts of Appeal No. 833 of 2016 are referred by the parties and by this Court also for deciding these appeals.

6. The appellants herein are the shop purchasers in the suit building under the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 and the respondents are the builders and developers. By virtue of an agreement entered into between the appellant and respondents on 27.01.1992, the respondents have agreed to allot shop premises admeasuring 290 sq. ft. (carpet area) on ground floor of the new building, that may be constructed on ownership basis, at the lumpsum cost of Rs.10,000/- on or before 31.12.1992, and on failure to do so, the agreed

amount of quantified liquidated damages to the tune of Rs.5,00,000/- only. As per clause 8 of the agreement, the amount of Rs.5,000/- was paid by the appellant at the time of the agreement and remaining amount of Rs.5,000/- was to be paid at the time of getting possession of the shop premises.

7. It is the grievance of the appellant that respondent herein has neither given him the possession of the shop premises as agreed to, nor the quantified liquidated damages of Rs.5,00,000/- in the alternate. Despite the two notices issued to respondent on 04.02.2012 and 22.08.2012, the respondent has failed to perform his part of the contract and, therefore, the appellant is constrained to file the suit for specific performance of agreement.

8. Along with suit, the appellant has filed a Notice of Motion restraining the respondents from creating third party interest in at least one shop premises in the proposed building, which can be reserved for the purpose of allotment to the appellant.

9. This Notice of Motion came to be resisted by the respondents vide affidavit-in-reply contending, *inter alia*, that the appellant has failed to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. It is submitted that

the plaintiff-appellant has never shown his readiness to hand over the possession of temporary alternate accommodation, against the possession of the suit shop. It is submitted that the appellant has received the possession of temporary alternate accommodation, which he seems to have disposed of. Moreover, the appellant has not paid the balance amount of Rs.5,000/- which he has mischievously attempted to pay for the first time in the year 2012 i.e. after the lapse of more than 20 years. In such situation, there is no question of appellant being entitled even for the specific performance of the agreement, his suit itself being barred by limitation. According to the respondent, the very fact, that the appellant has never demanded the specific performance of the agreement for last 21 years and has remained silent, makes it clear that the appellant must have entered into the oral settlement with the predecessor-in-title of the respondent, Mr. Haroon Ali Malkani in the year 1993-94 and as a result of the said settlement, the appellant has given up claim for permanent alternate accommodation or quantified compensation, against the allotment of temporary alternate accommodation, on permanent basis. In sum and substance, it was contended that the appellant has absolutely no prima facie case and hence, his Notice of Motion for interim relief of injunction needs to be dismissed.

10. The appellant filed his affidavit-in-rejoinder and disputed the contention of the respondent that he has entered into any oral settlement

with Mr. Haroon Ali Malkani and in pursuance of the said oral settlement, he has disposed of the temporary alternate accommodation. As per the appellant, since beginning, he is ready and willing to perform his part of the contract. He has also issued notices to the respondent. Only with an ulterior motive, the respondent has denied his claim. It was submitted that if such a relief of interim injunction is not granted, the appellant will face hardship in getting the suit shop allotted to him as per the agreement. As the respondent has already disposed of the flats in 7 buildings, now, it is the last building No.8, which pertains to the sale component and in the said building, it is necessary to reserve one shop for the appellant as per the agreement.

11. The Trial Court, after hearing the learned counsel for the parties, was pleased to hold that the appellant has failed to make out a *prima facie* case, especially considering the fact that the appellant remained silent about his alleged claim in newly constructed building since the year 1998 till the filing of the suit. Therefore, the Trial Court held that there is possibility of appellant entering into oral settlement with Mr. Haroon Ali Malkani and disposing of the alternate accommodation allotted to him. In view thereof, the Trial Court rejected the Notice of Motion. Hence, the instant appeal.

12. I have heard the submissions advanced by the learned

counsel for the appellant and respondents, from which certain facts emerged as undisputed on record, to the effect that the agreement between appellant and respondent was executed way back in the year 1992. Paragraph 7 of the agreement makes it clear that time was the essence of the contract and the respondent was to allot the appellant permanent alternate accommodation on or before 31.12.1992. Otherwise, the respondent was liable to pay the quantified damages of Rs.5,00,000/- together with repayment of Rs.5,000/- which the appellant has paid to the respondent towards the costs of the purchase of the shop premises.

13. As rightly observed by the Trial Court therefore, there is inordinate delay of more than 22 years on the part of the appellant in filing the present suit. Even assuming that in the year 2012, the appellant had issued the notices, even then there is delay of 20 years. One fails to understand as to why the appellant remained conspicuously silent for such a long period of 20 years, if the possession of alternate accommodation, like the shop, was to be given to him by the end of December, 1992 itself. When the agreement itself was making it clear that time was the essence of the contract, then there is absolutely no explanation on the part of the appellant as to why he kept silent for such a long period of 20 years without taking any steps for execution of the specific performance of the said agreement. The first notice is issued in the year 2011, which makes it clear that the appellant has either not been ready to perform his part of the

agreement or in the alternate he was no more interested in getting the possession of the permanent alternate accommodation.

14. It is also surprising to note that though the agreement itself provided for the payment of quantified damages of Rs.5,00,000/- together with a sum of Rs.5,000/-, the appellant has not even bothered to raise his claim for the damages during the period of 20 years, knowing fully well that the respondent has failed to perform his part of the agreement by the end of December, 1992. Though the respondent has already constructed not one or two but seven buildings and disposed them of, till the appellant preferred to remain silent. Hence, at this stage after 24 years when the appellant is coming before the Court for specific performance of such agreement, the Trial Court has rightly come to the *prima facie* conclusion of the appellant not being interested in getting the possession of the permanent alternate accommodation. Otherwise also, even assuming that there was no such settlement, the fact remains that the agreement itself provides for payment of quantified damages and in such situation even if the relief of interim injunction as claimed by the appellant is not granted, if the appellant ultimately succeeds in the suit, he will get the quantified damages for Rs.5,00,000/- and the amount of Rs.5,000/- which he has paid to the respondent. Therefore, there is no question of appellant suffering any loss or hardship if the relief of interim injunction is not granted.

15. As to the observations made by the Trial Court at the time of granting ad interim relief on 28.06.2016, those observations were simplicitor, prima facie view of the matter. Only when both the parties were heard at length, the Trial Court has considered the case on merits and thereafter rejected the Notice of Motion. I do not find that the Trial Court has committed any error or the impugned order of the Trial Court suffers from any illegality.

16. Having regard to the conspectus of the facts and circumstances of the case, the agreement itself takes care of the interest of the appellant, if ultimately he succeeds in the suit. Hence, on failure of the appellant to make out the prima facie case, balance of convenience or irreparable loss, the impugned order of the Trial Court rejecting the Notice of Motion does not call for any interference at the hands of this Court. After all it was a discretionary relief claimed by the appellant and the Trial Court has rightly exercised the said discretion.

17. Hence, the appeals, therefore, hold no merits and stand dismissed. All the Civil Applications pending in the appeals having become infructuous, stand dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]