

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 4316 OF 2014
IN
FIRST APPEAL NO. 113 OF 2015
IN
SHORT CAUSE SUIT NO. 4474 OF 1998

Mirza Zulfikar Ali

.....Applicant
(Original Appellant/
Defendant no.5)

IN THE MATTER BETWEEN :

Mirza Zulfikar Ali

.....Appellant

V/s.

1. Kadarkhan Adamkhan & anr.

.....Defendants
(Original Plaintiffs)

AND

3. Shezadi Rasul Khan & Ors.

.....Respondents
(Original Plaintiff and
Defendants no.1(a) to
1(c) and 2 to 4)

* * * * *

Mr. Atul Damle, Senior Advocate i/by. Ivor Peter D'cruz, Advocate for the appellant.

Mr. U.S.R. Singh, Advocate for respondents no.1, 2, 6 and 7.

Mr. S.M. Gorwadkar, Senior Advocate with Mr. Ravi Shinde, Advocate for respondents no.3 to 5.

Ms. Meena Bhoir, Advocate for BMC, respondent no.8.

Coram :- Smt. R.P. SondurBaldota, J.

23rd March, 2016.

P.C. :-

1). In view of admission of the appeal, the appellant seeks stay

of the impugned decree by which the applicant is directed to handover possession of the suit premises. Mr. Singh, the learned Advocate appearing for the respondents, vehemently opposes the application contending that the applicants have no right to the suit premises and hence would not be entitled for stay of the impugned decree. Mr. Singh, relies upon the decision of the Apex Court in the case of ***Dorab Cawasji Warden Vs. Coomi Sorab Warden and Others, reported in AIR 1990 Supreme Court page 867*** to submit that Section 4 of the Transfer of Property Act and Section 44 thereof, are complementary to each other and if the appellant is continued in possession of the premises by depriving the rightful owners thereof, it would cause irreparable injury to the respondents and balance of convenience would also be in their favour. In the facts of the decision cited, undivided share of a co-owner in a dwelling house was transferred to a third party. The vendee had taken possession of the house. The other co-owner filed suit under Section 44 of the Transfer of Property Act. The Apex Court noted that, the sale in question was executed in a hush-hush manner and the manner in which the vendee was put in possession of the property suggested that, the vendor was attempting to gain an undue advantage to defeat the claim of the co-owner. On these facts, it held that the interim mandatory order of injunction against the vendor and the vendee regarding possession was justified. Thus, the facts of the case cited are entirely different and the ratio therein cannot be applicable to the facts of the case on hand.

2). The second decision relied upon by Mr. Singh is of the Apex Court in the case of ***M/s. Babu Ram Gopal and Others V. Mathra Dass, reported in AIR 1990 Supreme Court page 879***, where it was held that tenant in possession of the building only in legal sense was

liable for eviction. In the facts of the present case, the appellants have undisputedly been in possession of the suit premises and in view of admission of the appeal, that possession cannot be disturbed.

3). Mr. Damle, the learned Senior Advocate appearing for the applicant, on the other hand, relies upon the decision of the Apex Court in ***Thomson Press (India) Limited Vs. Nanak Builders and Investors Private Limited and Others. reported in (2013) 5 SCC page 397*** to submit that, transferee pendente lite can be impleaded to a suit for specific performance and that such added defendant can raise defences. The Apex Court, in the facts and circumstances of the case, has held that the transfer during the pendency of the proceedings had taken place despite having notice and knowledge of the injunction by Court passed in such pending suit, prohibiting transactions or alienation of the suit property and despite such facts, it has held that the transfer *pendente lite* is neither illegal nor void *ab-initio* but remains subservient to rights eventually determined by Court in the pending litigation. The appellant herein is on a better footing since he claims to be a *bonafide* purchaser without notice.

4). For the above reasons, the Civil Application is allowed. However, grant of the interim order of stay of the impugned decree must be subject to the condition that the appellants will not part with possession of the suit premises to any third person, except with the leave of the Court as the building in which the premises are situate, is likely to be redeveloped. The appellants shall also not create any third party interests in the suit premises. It is clarified that, this order does not prevent the appellants from participating in the process of redevelopment.

(SMT. R.P. SONDURBALDOTA, J)