

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 729 OF 2015
WITH
CIVIL APPLICATION No. 883 OF 2015 IN A.O. No. 729 OF 2015

Sudhakar Pandurang Belose ... Appellant/Applicant

Vs.

Arakal Peter James & Anr. ... Respondents

Mr. Kiran Jain a/w. Neeta Solanki i/b. Kiran Jain & Co., Advocate fore the appellant/applicant.

Mr. Hemant Deshpande a/w. Mr. Y.K. Tiwari i/b. K.P. Tiwari and Co., Advocate for respondent nos. 1 and 2.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 18th August, 2017.

P.C.:

Admit. By consent, the Appeal is heard finally and decided at the stage of admission.

2. This Appeal from Order is directed against the order dated 21st April, 2015 passed by the learned Judge of the City Civil Court, Greater Mumbai thereby partly allowing the Notice of Motion No. 1524 of 2012 in Suit No. 3522 of 2012. The appellant/original plaintiff has filed the suit for specific performance in respect of agreement arrived at by Memorandum of Understanding dated 19th September, 2007 of the suit shop with the respondents/defendants. In the suit,

the appellant/plaintiff has prayed for injunction against the respondents/defendants that they should not create any third party interest and should not disturb his possession. The appellant/plaintiff is in possession of the suit premises since 2005. Initially, the appellant was occupying the premises from 2005 as a licensee on payment of fees of Rs.6,000/- p.m. and thereafter it was increased and in September 2007 at the time of execution of MOU, the appellant was paying Rs.15,000/- p.m. to the respondents/defendants, who are the owners of the suit shop. It was agreed between the parties that the respondents/defendants shall sell the suit shop to the appellant/plaintiff at a market rate and according to the case of the appellant, the market rate of the suit shop, as per ready reckoner, is Rs.35,00,000/- at the time of filing the suit.

3. As submitted by the learned counsel for the appellant/plaintiff that at the time of execution of MOU, the appellant deposited Rs.40,000/- towards the security deposit and paid Rs.10,00,000/- by cash and Rs.1,50,000/- by cheque. Thus, according to him, the appellant/plaintiff has made total payment of Rs.11,90,000/- and he is supposed to pay balance amount of Rs.13,10,000/- to the respondents/defendants. The learned counsel has submitted that as

on today, the appellant/plaintiff is ready to perform part of his contract and he is ready to pay an amount of Rs.13,10,000/- today itself. While challenging the order passed by the learned Judge of the City Civil Court mainly on the point of directing the appellant/plaintiff to pay compensation of Rs.40,000/- p.m. from January, 2010 onwards on or before 10th July, 2015, the learned counsel argued that this order is illegal, as there is no contention raised or any statement made by the respondents/defendants about the compensation in their written statement or affidavit-in-reply. It is further argued that in the MOU also, there is no such agreement in respect of compensation and the parties in the Court cannot go beyond the terms of the contract. Therefore, when no provision of payment of such compensation is made either in the MOU or in the written statement, the direction given by the Court to the appellant/plaintiff to pay compensation of Rs.40,000/- p.m. is illegal and it is beyond the scope of the contract. He has further argued that the appellant/plaintiff is in possession of the suit premises earlier as a licensee and subsequent to 19th September, 2007 as a owner of the suit shop. He further submitted that the respondents/defendants are not in a position to show whether at any time, they demanded the amount or expressed that they are ready to execute the documents

of the ownership in favour of the appellant/plaintiff. He further submitted that the appellant was always ready and willing to perform the contract and it is only because of the fault of the respondents/defendants, the plaintiff could not pay the amount of consideration.

4. Per contra, the learned counsel for the respondents/defendants has submitted that the respondents/defendants have earlier sent a notice to the appellant/plaintiff demanding the amount, however, though the appellant/plaintiff has replied to that notice, he did not pay any amount further. The learned counsel has argued that the readiness and willingness is the essence of the specific performance, however, it is not shown from the acts of the plaintiff. He supported the order passed by the learned Judge of the City Civil Court of directing the appellant/plaintiff to pay the amount of Rs.40,000/- p.m. towards the compensation from 2010 onwards.

5. Heard the submissions of learned counsel for both the parties. Today, the evidence of the appellant/plaintiff is over and the respondents/defendants have to step in the witness box. The dispute as on today in this Appeal from Order is in respect of only directing the plaintiff to pay an amount of compensation of

Rs.40000/-. From the submissions of learned counsel of the parties and after perusal of the documents especially the plaint, it is clear that the plaintiff is in possession of the suit shop since 2005 initially as a licensee and thereafter as a prospective purchaser/owner of the suit premises from 2007. The issue of specific performance so also readiness and willingness will be decided by the learned trial Court after marshalling the evidence of the parties. The main objection of the learned counsel for the appellant is whether the Court can pass such order of directing payment of compensation when it is not at all asked for in the written statement or in the reply given by the respondents/defendants in the suit. Interim relief is asked under Order 39 Rule 1 of the Code of Civil Procedure and the Court at the time of deciding such interim prayer has to weigh the circumstances and facts before the Court in each case. Thus, it is a discretionary relief based on equitable principles. The plaintiff is in possession of the suit premises since 2007 and in use and enjoyment of the same. In the year 2005, he was paying Rs.15,000/- towards licence fees. Hence, the order passed by the learned Judge directing the appellant to pay compensation is legal and cannot be faulted with. However, considering the amount which was not paid by the appellant before the execution of the MOU, the amount initially can be fixed from

September 2010 as Rs.30,000/- till April 2015, i.e., date of the order and then from the date of the order, the amount is to be paid at Rs.40,000/- p.m. The amount is to be deposited within two weeks, i.e., till 1st September, 2017. Further, the amount of Rs.13,10,000/- which the appellant wants to deposit, may be deposited with the Registrar, City Civil Court till 1st September, 2017.

6. With this modification, the Appeal from Order is disposed of. Civil Application is also accordingly disposed of.

7. The learned counsel for the appellant submitted that the appellant wants to challenge this order before the Supreme Court and hence he prays to stay the operation of this order for 6 weeks.

8. The learned counsel for the respondents opposed this prayer.

9. As the appellant wants to challenge this order before the Hon'ble Supreme Court, the operation of this order is stayed till 15th September, 2017

(MRIDULA BHATKAR, J.)