

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.793 OF 2016**

Pratap Upendra Baral)...Appellant

V/s.

Abhimanyu Upendra Baral
& Ors.)...Respondents

Mr. S.S.Manjrekar, Advocate for the Appellant

Mr. Jitendra J. Mistry h/for Mr. C.K.Tripathi, Advocates for the Respondents.

CORAM : A. M. BADAR, J.
(Vacation Court)
DATE : 29th May, 2017.

P.C. :

Heard the learned advocate for the Appellant at sufficient length of time.

2 By this appeal, the Appellant/Original Defendant No.1 is taking exception to the order dated 30.6.2016 passed by the learned Judge, City Civil Court, Borivali Division, Dindoshi in the Draft Notice of Motion moved in the Special Civil Suit No.1158 of 2015 initiated by the Plaintiff/Respondent No.1 herein, thereby refusing to grant interim relief prayed for by the present Appellant/Original Defendant No.1.

3 The facts leading to the institution of the present Appeal can be summarised thus:

(a) The Plaintiff Abhimanyu/Respondent No.1 herein filed suit against the Defendant No.1-Pratap Baral/Appellant herein for a declaration that he has 50% shares in the Suit Premises. A decree for partition and division of the Suit Premises i.e. Room No.B-9 admeasuring 25 sq.mtrs. situated at Nirmal Co-operative Housing Society Ltd., Gorai, Mumbai and other reliefs are also claimed in the suit. The Respondent Nos.2 and 3 herein are the Original Defendant Nos.2 and 3 in the suit. The Plaintiff is also claiming permanent injunction restraining the Original Defendant No.1/Appellant herein from creating third party rights and dispossessing him from the Suit Premises.

(b) During the pendency of the said suit, the Original Defendant No.1-Pratap Baral/Appellant herein appeared and had taken out Draft Notice of

Motion claiming mandatory injunction in temporary form to allow him and his family members to reside in the Suit Premises along with the Plaintiff, till final decision of the suit. The Plaintiff replied to the said Draft Notice of Motion and opposed the prayer for grant of interim relief.

(c) After hearing both the parties, by the impugned order dated 30.6.2016, the learned Judge of the City Civil Court, Borivali Division, Dindoshi was pleased to reject the Motion for grant of temporary relief in the mandatory form. The said order is impugned in the instant Appeal by the Original Defendant No.1.

4 Heard the learned Advocate appearing for the Appellant/Original Defendant No.1 at sufficient length. He vehemently argued that apart from provisions of Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908, the learned trial Court was having ample powers under Section 151 of the Code of Civil Procedure, 1908 to grant temporary injunction as prayed for by

the Original Defendant No.1 in the said suit. The learned Advocate argued that the Original Defendant No.1 has 50% share in the Suit Premises and the Plaintiff cannot deprive him from residing in the Suit Premises. In submission, of the learned Advocate for the Appellant/Original Defendant No.1, the learned trial Court erred in refusing to grant the interim relief as prayed for by the Original Defendant in the Suit by filing the Draft Notice of Motion.

5 I have also heard the learned Advocate appearing for the Respondent No.1/Original Plaintiff. I have also perused the material made available including the impugned order rejecting the application for temporary injunction filed by the Original Defendant No.1.

6 It is not in dispute that the Plaintiff/Respondent No.1 herein has filed the suit against Defendants for declaration and permanent injunction. It is the case of the Plaintiff that he has 50% share in the Suit Premises and Defendants cannot dispossess him from the Suit Premises without following due process of law. It is seen that even according to the case of the Appellant/Original

Defendant No.1 before the Trial Court that it is the Plaintiff who is in exclusive possession of the Suit Premises. It is thus, clear that it is the Original Plaintiff/Respondent No.1 herein who is in possession of the Suit Premises as on date. The Appellant/Original Defendant No.1 during the pendency of the suit wants to enter into the Suit Premises by seeking mandatory injunction in temporary form by directing the Original Plaintiff to allow him as well as his family members to reside along with the Original Plaintiff and his family members in the Suit Premises.

7 The interlocutory relief of temporary injunction cannot be granted as a matter of course and the Court is required to exercise judicious discretion in order to satisfy itself as to whether 3 essential conditions viz., prima-facie case, balance of convenience and irreparable loss are satisfied by party claiming temporary injunction. The Court is required to ascertain whether party has made out clear case free from objections of equitable grounds for claiming temporary injunction, which is a preventive relief. In the case in hand, the Plaintiff and his family members are residing in the Suit Premises and by way of interim relief, the

Original Defendant No.1/Appellant herein is asking the Court to allow him and his family members to reside in the Suit Premises with the Original Plaintiff and his family members. Equity does not allow grant of such temporary injunction in mandatory form when the suit is pending for trial. In this view of the matter, neither prima-facie case is made out nor balance of convenience is shown to be in his favour by the Original Defendant No.1/Appellant herein. Moreover, as the Original Defendant No.1 is already residing separately and is not residing in the Suit Premises, it cannot be said that he will suffer an irreparable loss. Temporary injunction in mandatory form is to be granted in 'rarest of rare' case when strong case is made out.

8 Perusal of the impugned order goes to show that the learned Trial Court has exercised its discretion in the judicious manner and it does not appear from the record that discretion in refusing to grant temporary injunction is exercised arbitrarily and capriciously.

9 In the result, the Appeal challenging the interim order passed by the learned Trial Court is devoid of merits and the same is, therefore, dismissed.

(A. M. BADAR, J.)