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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 202 OF 2019
WITH
CIVIL APPLICATION NO. 244 OF 2019
IN
APPEAL FROM ORDER NO. 202 OF 2019

Abuali Malik Shroff

... **Appellant.**
(Org. Defendant)

Versus

New Greenfied Co-operative Housing
Society Ltd. and Ors.

... **Respondents.**

.....

Mr. Vineet Naik, Sr. Advocate a/w Mr. Sameer Pandit and Mr. Pranay Kamdar i/b Wadia Ghandy & Co for the Appellant.

Mr. Uzair Kazi a/w Adil Mirza i/b Atiq Mirza for the Respondent No.1.

Mr. Suraj Iyer i/b M/s Ganesh & Co. for the Respondent Nos.2 & 3.

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CORAM : A. S. GADKARI, J.

DATE : 5th NOVEMBER, 2019

P. C. :

1] By the present appeal filed under Order 43 of the Code of Civil Procedure, the appellant/original defendant has impugned Order dated 17th December 2016 passed by the learned Judge, City Civil Court, Dindoshi, Mumbai, in Notice of Motion No. 2332 of 2016 in S.C. Suit No. 1748 of 2016, making the said Notice of Motion absolute in terms of prayer clause (a).

2] Heard Mr. Naik, learned senior counsel appearing for the

appellant, Mr. Kazi learned counsel appearing for the respondent No.1 and Mr. Iyer learned counsel appearing for the respondent Nos.2 & 3. Perused the entire record annexed to the appeal.

3] The record indicates that, the respondent No.1-Society entered into an agreement dated 15th January 1995 with the respondent No.2 whereby the respondent No.2 agreed to construct four additional floors on the respondent No.1-society's building under the terms and conditions more specifically stipulated in the said Agreement. As per the said Development Agreement, the respondent No.2 was to construct four additional floors on or before 31st December 1996 on the existing structure of the respondent No.1 – Society. That, Ms. Dropadi Thakur was in actual use, occupation and possession of Flat No.2 situated on the ground floor of the respondent No.1- Society. By an Agreement of Exchange dated 29th December 1995 executed between Ms. Dropadi Thakur and respondent No.2, Ms. Dropadi Thakur agreed to transfer Flat No.2 and to pay an additional sum of Rs. 5.25 lakhs to respondent No.2 in exchange of and towards the consideration of Flat No. 602 which was to be constructed on the sixth floor of the respondent No.1-Society's building. That, an agreement dated 24th May 1999 has been executed between the appellant and respondent No.2 towards sale of said Flat No.2 situated on the ground floor of the respondent No.1-Society's building for valuable consideration.

The record further indicates that, the appellant has, in fact,

paid valuable consideration mentioned in the agreement dated 24th May 1999 to the respondent No.2. That, by a letter dated 16th January 2009, the respondent No.2 handed over vacant possession of the suit premises i.e. Flat No.2 situated on the ground floor of the respondent No.1 – Society to the appellant.

4] In view of the facts mentioned above, the respondent No.1 filed the aforesaid suit before the City Civil Court, Mumbai for permanent injunction against the appellant, restraining him from taking forcible possession of the suit flat i.e. Flat No.2 situated on the ground floor of the respondent No.1- society. The respondent No.1 also filed a Notice of Motion No. 2332 of 2016 in the said suit for interim relief *interalia* for temporary injunction against the respondent No.1.

5] It is pertinent to note here that, the pleadings in the plaint are silent on the crucial aspect, as to how the respondent No.1 came in possession of the suit flat when it was allotted and was in use, occupation and possession of Ms. Dropadi Thakur prior to his execution of Agreement of Exchange dated 29th December 1995. It is the trite position of law that, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue the possession. Reliance is placed on the decision of the Supreme Court in the case of *Maria Margarida Sequeira Fernandes and Others Vs. Erasmo Jack De Sequeira* reported in (2012) 5

Supreme Court Cases 370. As noted earlier, in the present case, the pleadings in the plaint are totally silent on the fact as to how the respondent No.1- Society came into possession of the suit flat and how it was prevented from taking forcibly possession by the appellant.

6] Perusal of record would further indicate that, though the said plaint was affirmed by Mr. Ashfaque Abdullah Saudagar in his capacity as Secretary of the plaintiff society, a resolution in his favour by the society permitting/authorizing him to file the said suit is not placed on record.

7] The Trial Court, in para 8 of the impugned Order has recorded a finding that, the document filed on record showing, giving the possession to the defendant (appellant) does not appear to be probable. Except letter dated 16th January 2009, the defendant (appellant) has not shown any other documents to prove his possession over the suit property. The said finding recorded by the Trial Court is contrary to the record produced by the appellant, which is noted above in the forgoing paragraphs and therefore, according to this Court, the said finding is totally erroneous.

8] The record clearly indicates that, the appellant has purchased the suit premises from the respondent No.2 for valuable consideration. The respondent No.1 has not filed the suit for cancellation of the said agreement dated 29th December 1995. In fact, admittedly even the letter dated 16th January 2009 issued by the respondent No.2 in favour of the

appellant clearly indicates handing over of the suit premises to the appellant and it is also not disputed. The record further indicates that, balance of convenience lies in favour of the appellant and irreparable loss would cause if the possession of the suit premises is handed over to the respondent during the pendency of the present suit.

In view of the above, I find that the Trial Court has committed an error in granting permanent injunction by allowing the notice of motion. The impugned Order dated 17th December 2016 is therefore hereby set aside.

Appeal is accordingly allowed.

9] In view of allowing of appeal the Civil Application for stay does not survive and is accordingly disposed off.

10] At this stage, learned counsel for the respondent No.1 submitted that, the respondent No.1 is intending to challenge the present Order before the Hon'ble Supreme Court and therefore the Order granting status-quo dated 22nd March 2017 passed by this Court directing the parties to maintain status-quo may be continued for a period of six weeks from today.

In view thereof, the appellant is directed not to sale, transfer or create any third party interest in the suit premises for a period of six weeks from today.

(A. S. GADKARI, J.)