

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Application No.695/2019
in
First Appeal No.210/2019

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders.
	Mr. Mayur Khandeparkar a/w. Ranjeev Carvalho a/w. Riya Makheana I/b. I.C. Legal for the applicant Mr. Jaydeb Sahe a/w. Manish Bijutkar a/w. Dhopatkhar for the respondent.

CORAM : K.K.TATED, J.
DATED : JUNE 10, 2019

P.C.

1 Heard. By this civil application, the applicant – Defendant is seeking stay to the operation and implementation of the impugned judgment and decree dated 24.10.2018 passed by the Bombay City Civil Court in S.C.Suit No.647/2015 allowing the Respondent – Plaintiff's suit for specific performance, till hearing and final disposal of the first appeal.

2 The learned counsel for the applicant submits that in the present proceedings, the respondent – plaintiff had filed the said suit for specific performance of agreement dated

12.09.2013 in respect of the residential premises i.e. Flat No.602, 6th Floor, Jyoti Arch Building, Amcon Jyoti CHS Ltd., Behind Om Sai Motors, S.V. Road, Kandivali (W), Mumbai - 400067.

3 The learned counsel for the applicant submits that at the time of passing the impugned judgment and decree the trial court has failed to consider the fact that there was transaction between the plaintiff and the defendant about the security arrangement. He submits that the trial court has failed to consider the fact that the respondent - plaintiff has filed the present suit on 07.03.2015. He submits that at the time of deciding the suit, the trial court has considered the amended provision of section 20 of the Specific Relief Act, 1963 which came into force on 01.10.2018. Therefore, they have good chance of success in the first appeal. He submits that during the pendency of the first appeal, this Hon'ble Court be pleased to stay the operation and implementation of the impugned judgment and decree passed by the trial court. He submits that if the stay is not granted, irreparable loss and injury will be caused to them. He submits that as on today the

applicant and his family members are in possession of the suit premises. He submits that this Hon'ble Court (Coram : A. S. Chandurkar,J.) vide order dated 20.12.2016 granted ad-interim stay to the impugned judgment and decree. He submits that this court has also directed the applicant not to creat any third party right in respect of the suit premises.

4 On the other hand, the learned counsel for the respondent - plaintiff has vehemently opposed the civil application. He submits that by agreement for sale dated 12.09.2013 they purchased the suit flat for sum of Rs.31 lacs. He submits that admittedly, said sum of Rs.31 lacs has already been paid to the applicant. He submits that even the applicant, in the trial court has admitted the execution of the agreement for sale. In support of his contention, he relies on paragraph Nos.19, 20 and 22 of the impugned judgment. More particularly, paragraph 22, which reads thus:

“22. In view of admission of defendant, regarding execution of agreement of sale and receipt of an amount of Rs.31,00,000/-, the onus of proof shifted upon the defendant to show that said

agreement is nominal agreement. In order to discharge the onus of proof, he has examined himself only. He testified that sometime in August 2013 Umakant Gupta was in urgent need of Rs.31,00,000/- for a period of 6 to 9 months for his personal use. Umakant Gupta introduced him with one Vijay Mishra and said Vijay Mishra informed Umakant Gupta and him that plaintiff has agreed to advance the amount to Umakant Gupta provided that suit property should be shown to have been transferred in the name of plaintiff. Thus, he did not dispute the execution of agreement of sale for payment of Rs.31,00,000/-. He pleaded that entire amount of Rs.31,00,000/- was transferred by Umakant Gupta to the account of his relative by issuing bearer cheque. It is to be noted that in cross examination defendant admitted that it is not recorded in agreement to sale that he obtained loan from Mogaveera Bank worth Rs.14,50,000/-. It is to be noted that he admitted that he has purchased the suit flat from Amcon Developers Pvt. Ltd. for consideration of Rs.9,50,000/-. In the year 2008, defendant has mortgaged the suit flat with Mogaveera Bank for loan of Rs.14,50,000/-. He further admitted that he informed to the plaintiff before entering into transaction that the original agreement to sale is misplaced and he lodged report to the police. However, at that time original agreement to sale was not in custody of Mogaveera Bank."

5 The learned counsel for the respondent submits that the respondent has paid the

full consideration of the suit flat therefore, there is no question of granting any stay to the applicant. He submits that if the stay is granted irreparable loss will be caused to the respondent, because they have already paid full consideration i.e. Rs.31 lacs. Therefore, there is no substance in the civil application. Same be dismissed with costs.

6 The learned counsel for the respondent submits that in the interest of justice, this Hon'ble Court be pleased to direct the applicant - defendant to deposit sum of Rs.31 lacs with interest, paid by them in September 2013, because the present appeal will take some time.

7 In the present proceedings, the first appeal has already been admitted by this court. This court, has already granted ad-interim stay to the impugned judgment and decree on 28th December 2018 which is continued till today. Apart from that whether amended provision of section 20 of the Specific Relief Act, 1963 is applicable in the matter or not, is required to be decided at the time of final hearing. Apart from that the applicant and his family members are in

possession of the suit premises. Considering these facts and earlier order passed by this court, I am satisfied that the applicant has made out a case for allowing the civil application. At the same time, it is necessary and in the interest of justice, the applicant - defendant is required to be restrained by an order of injunction from creating any third party right, title and interest in respect of the suit premises till hearing and final disposal of the first appeal.

8 Hence, following order is passed:

a. The operation and implementation of the impugned judgment and decree dated 24.10.2018 passed by the Bombay City Civil Court in S.C.Suit No.647/2015 is stayed.

b. The applicant - defendant is restrained by an order injunction from creating any third party right, title and interest in respect of the residential premises i.e. Flat No.602, 6th Floor, Jyoti Arch Building, Amcon Jyoti CHS Ltd., Behind Om Sai Motors, S.V. Road, Kandivali (W), Mumbai - 400067.

c. No order as to costs.

d. Liberty granted to the respondent - plaintiff to take out appropriate application for refund of Rs.31 lacs with interest which will be decided on merits.

(K.K.TATED, J.)