

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 438 of 2022

Laxmikant R. Sawant

..Appellant/Applicant.

v/s.

Avinash Kesari Mali

..Respondents

Mr. Sanjay Jain, Counsel a/w. Aanchal Singhania, Vishal Thaker and Anjali Trivedi i/b. V. Thakers Advocates for the Appellant/Applicant.

Mr. Makarand Raut for the Respondent.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 6th JULY, 2022.**

P.C.

1. With consent, heard finally at the stage of admission.
2. The challenge in this appeal is to the order dated 05.03.2022 passed by the learned Principal Judge, City Civil Court, Dindoshi, Mumbai, dismissing the Notice of Motion No. 1797 of 2021 filed in S.C.Suit No.1667 of 2019.
3. The Appellant, who shall hereinafter be referred to as the Plaintiff claims to be the owner of the property under Plot No.633 situated at Village Shimpoli, Borivali (West). It is the case of the Plaintiff that the structures situated in the suit property were occupied by several tenants.

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The Predecessor of the Plaintiff decided to redevelop the property with consent of the occupants/tenants. The dispute is in respect of the tenanted premises admeasuring 135 sq.ft of Saraswati Gupta. The said premises shall be hereinafter referred to as 'the suit premises'. Saraswati Gupta, entered into an agreement dated 15.08.2003 with the predecessor of Plaintiff, consenting for redevelopment and agreed to vacate the suit premises and hand over peaceful possession thereof to the owners/developers to enable them to develop the property after obtaining IOD.

4. On 24.04.2007, said Saraswati entered into a Deed of Assignment dated 20.04.2007 with the Respondent herein, who shall hereinafter referred to as the Defendant, assigning her rights in respect of the suit premises in his favour. This resulted in the Plaintiff instituting a suit for eviction on the grounds of sub-letting the premises without his consent. The Defendant herein was impleaded as party to the suit. The defendant also filed a suit for declaration of his tenancy rights. Both these suits are pending in the Court of Small Causes. During the pendency of these two suits, the plaintiff filed another suit for eviction of the defendant with Notice of Motion No.2600 of 2019 for compensation of Rs.10,000/- per month from the defendant as mesne profit, and another Notice of Motion No.1797 of 2021 for appointment of Receiver and for Interim mandatory relief against the defendant to vacate and hand over vacant possession of

the suit premises for the purpose of redevelopment of the plot bearing Plot No.633. The learned Judge, City Civil Court, dismissed both these motions. Being aggrieved by the Notice of Motion, the Plaintiff has filed this appeal.

5. Mr. Sanjay Jain, learned Counsel for the Plaintiff has restricted the challenge only to the rejection of interim mandatory injunction. He submits that the Defendant who is claiming right to the suit premises by virtue of Deed of Assignment dated 24.04.2007, is bound by the terms of agreement dated 15.08.2004 between Saraswati Gupta and the predecessor of the Plaintiff. Learned Counsel for the Plaintiff submits that as per the said agreement, the Defendant is under an obligation to vacate and hand over possession of the suit premises to the plaintiff to enable him to redevelop the plot. Learned Counsel for the Plaintiff submits that pendency of the suits before the Small Causes Court cannot be a impediment to grant such relief. In support of this contention, he has relied on the decision of in ***Sennaji Kapurchand vs. Pannaji Devichand*** ***Indian Law Reports Vol XLVI 432***, wherein it is held that “Section 10 provides that no court shall proceed with the trial in the suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. That does not prevent the Court from making interlocutory orders, such as orders for a receiver, or an injunction, or, an order for attachment before judgment.”

6. Learned Counsel for the Plaintiff submits that the construction would be completed within 24 months from the date the defendant vacates the premises. He further submits that though the original tenant had given up her right for compensation for alternative premises, the Plaintiff, without prejudice to his rights and contentions, shall deposit Rs.1,20,000/- per annum towards compensation for alternative accommodation, till the time the possession of the premises is handed over to the Defendants. Learned Counsel for the Plaintiff, under instructions, states that the Plaintiff shall ensure that the column of the shop no.2 are in alignment with the walls of the premises.

7. Mr. Raut, learned Counsel for the Defendant submits that the suit itself is not maintainable in view of the pendency of the suit before the Small Causes Court. Consequently, the Plaintiff is not entitled for interim relief. Learned Counsel for the Defendant further submits that there is dispute regarding the area of the premises. Furthermore, the premises offered by the Plaintiff is not suitable for running the flour mill. Learned Counsel for the Defendant further submits that relief of interim mandatory injunction will adversely affect the rights of the defendant in the suit before the Small Causes Court.

8. I have perused the records and considered the submissions

advanced by the learned Counsel for the respective parties.

9. It is not in dispute that the Plaintiff is the owner of Plot No.633, whereas the Defendant is the owner of the adjoining plot no.634 situated at Shimpoli, Borivali (West). The predecessor of the Plaintiff had decided to develop the chawl situated in plot No.633. He had entered into agreements with the tenants. Saraswati Gupta, who was one of the tenants, had also entered into an agreement dated 15.08.2004 in respect of the suit premises. A perusal of the said agreement reveals that Saraswati Gupta was in possession of the premises admeasuring 135 sq. ft. situated on the ground floor of the said property. She had consented for development and had agreed and undertaken to hand over possession of suit premises having carpet area of 135 sq. ft. situated on the ground floor of the building for the purpose of development after obtaining IOD from the Mumbai Municipal Corporation. The owner/Developer had agreed to allot to the tenant shop no.2 admeasuring 135 sq.ft. (162 sq. ft built up area) in the building to be constructed on the suit property, which would be as per the sanctioned plan of Mumbai Municipal Corporation. The parties agreed that the said premises would be used for commercial purposes.

10. The owner/Developer agreed to complete the construction and get Occupation Certificate from the concerned Authorities within 24 months

from the date of commencement of construction and further agreed and undertook to provide to the tenants the amenities described in Clause 8 of the Agreement, more particularly described in the list annexed to the agreement. The parties had agreed that after acquiring the new premises in the newly constructed premises, the tenancy would cease to exist and the tenant would be a allottee with all rights, title and interest to use, occupy and enjoy the new premises as owner thereto under the provisions of M.O.F.A. without any interference and/or hindrance and/or obstruction or any claim from the Owner/Developer.

11. It is not in dispute that the IOD was not obtained till the year 2007, and on 24.04.2007 said Saraswati Gupta entered into a Deed of Assignment with the Defendant herein in respect of the suit premises having carpet area of 135 sq. ft for consideration of Rs.5 lakhs. A perusal of the Deed of Assignment clearly indicates that the Defendant herein was well aware of the agreement dated 15.08.2004 entered into between Saraswati Gupta and the erstwhile owner. Furthermore, clause 8 of the agreement states that all the terms and conditions of the agreement dated 15.08.2004 would be binding on him as if all the terms and conditions are incorporated in the Deed of Assignment.

12. The records thus prima facie reveal that the original tenant had by agreement dated 15.08.2004 agreed to vacate the suit premises

admeasuring 135 sq. ft for the purpose of development and the owner /developer had agreed to provide to her permanent alternative accommodation being shop no.2 as per the sanctioned plan. The defendant, who has entered into a Deed of Assignment with Saraswati Gupta is bound by the said terms and conditions of agreement dated 15.08.2004 and is liable to vacate and hand over possession of the suit premises for the purpose of redevelopment. As noted above, the agreement dated 15.08.2004 as well as the Deed of Assignment clearly indicates that the area in possession of Saraswati Gupta was only 135 sq. ft. This fact is also admitted by the Defendant in Civil Suit No. 189 of 2018. Hence defendant cannot be heard to say that the area of the premises in possession of Saraswati Gupta is more than 135 sq. ft.

13. The other tenants have already vacated their respective premises. In such circumstances, the Defendant cannot be permitted to stall the redevelopment process on a vague apprehension that grant of such relief will adversely affect his rights. It is pertinent to note that the Plaintiff has sought possession of the suit premises for a temporary period of 24 months, till the new building is constructed. Upon the building being constructed, the Defendant will be put in possession of shop no.2 as per the sanctioned plan. The question whether he will have right to continue in the shop no.2 as a tenant or whether he is a trespasser will be adjudicated in the suit filed by the respective parties. Under the

circumstances, the learned Judge was not justified in rejecting the relief in view of the pendency of the suits before the Small Causes Court.

14. Under the circumstance, and in view of the discussion supra, following order is passed:-

- (i) The Appeal is allowed . The impugned order to the extent of rejecting prayer clause (b) is set aside.
- (ii) The defendant is directed to vacate the suit premises and hand over vacant possession of the suit premises within a period of four weeks from the date of uploading of this, order.
- (iii) The Plaintiff shall hand over to the defendant possession of shop no.2 having carpet area of 135 sq. ft. as per the sanctioned plan, within 24 months from the date the Defendant vacates the premises.
- (iv) The Plaintiff shall ensure that the columns of the shop no.2 are in alignment with the walls of the premises.
- (v) The Plaintiff shall deposit before this Court Rs.1,20,000/- per anum towards compensation of alternative accommodation from the date the defendant vacates the premises till he is put in possession of the new premises.
- (vi) The Plaintiff shall not claim any equity in his favour on the basis of the interim relief granted.

. Appeal and Civil Applications stand disposed of.

(ANUJA PRABHUDESSAI, J.)