

Sayali Upasani

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

APPEAL FROM ORDER NO.- 274 OF 2023

WITH

INTERIM APPLICATION NO. 3580 OF 2023

WITH

APPEAL FROM ORDER NO.- 275 OF 2023

WITH

INTERIM APPLICATION NO. 3581 OF 2023

WITH

APPEAL FROM ORDER NO.- 276 OF 2023

WITH

INTERIM APPLICATION NO. 3582 OF 2023

Mr. Rajendra Balkrishna Vichare

...Appellant

Vs.

M/s. S.D. Corporation pvt. Ltd and Others

...Respondents

Mr. Induprakash Tripathi i/b Mr. Abhishek Lalji Tripathi, for
Appellant.

Mr. Ketan Parekh i/b K.R. Parekh and Co., for Respondent
No. 2.

CORAM:- N. J. JAMADAR, J.

DATED:- 3rd May, 2023

ORDER:-

1) This Appeal is directed against a common order dated 27th January, 2023, passed by the learned Judge, City Civil Court in Notice of Motion Nos. 2067 of 2017, 2366 of 2017 and 1097 of 2018, whereby the Notices of Motion Nos. 2067 of 2017 and 2366 of 2017 taken out by the appellant-plaintiff came to be dismissed and the Notice of Motion No. 1097 of 2018 taken out by the respondent-defendant No. 2 came to be partly allowed thereby directing the respondents-defendant Nos. 1, 5 and 6 to hand over possession of permanent alternate accommodation i.e. Flat No. 2074 in Building No. 2, to defendant No. 2 with further direction to the defendant No. 2 not to part with the possession of the permanent alternate accommodation and create any third party interest therein, till disposal of the suit.

2) For the sake of convenience and clarity the parties are hereinafter referred to in the capacity in which they are arrayed before the City Civil Court.

3) Background facts can be stated in brief as under:-

(a) In the year, 1983, the premises bearing Room No. 2005 in Building No. 108, Poisar Pancholi Housing Soc. Ltd, the

defendant No. 5 was allotted to the plaintiff by the Mumbai Housing and Area Development Board ("suit premises").

(b) After marriage of Ravindra, the plaintiff's brother, the plaintiff permitted Ravindra and defendant No. 2, his wife, to occupy the suit premises. The proprietary title in the suit premises, however, continued to vest in the plaintiff. Ravindra, plaintiff's brother and husband of defendant No. 2, passed away on 8th November, 2011. Defendant No. 5-Society went for redevelopment.

(c) Plaintiff asserts, defendant No. 2 surreptitiously got executed an agreement for transit/permanent alternate accommodation with defendant No. 1- the Developer. Upon the persuasion by the plaintiff, the defendant No. 1 executed another agreement for permanent alternate accommodation with the plaintiff.

4) As the defendant Nos. 1, 5 and 6 threatened to deliver the possession of the permanent alternate accommodation to defendant, instead of the plaintiff, he was constrained to institute a suit for declaration that the defendant No. 2 has no right, title and interest in the suit premises and that agreement dated 28th January, 2013, executed by and between the defendant Nos. 1

and 2 with respect to the suit premises was illegal, void and did not bind the plaintiff and also for an order to the defendant No. 1 to provide the permanent alternate accommodation in lieu of the suit premises, to the plaintiff in pursuance of the agreement dated 20th April, 2013 and restrain the defendant Nos. 1, 5 and 6 from handing over the possession of the permanent alternate accommodation to defendant No. 2.

5) In the said suit, the plaintiff took out Notice of Motion No. 2067 of 2017 against defendant Nos. 1, 3 and 4 and Notice of Motion No. 2366 of 2017 against defendant Nos. 1, 5 and 6, to temporarily restrain the defendant No. 1 and 3 to 6 from delivering possession of the permanent alternate accommodation to defendant No. 2 and interim mandatory injunction directing defendant Nos. 1 and 3 to 6 to hand over the possession of the permanent alternate accommodation to the plaintiff.

6) The defendant No. 2, in turn, took out the Notice of Motion No. 1097 of 2018, seeking direction to defendant Nos. 1, 5 and 6 to hand over the possession of the permanent alternate accommodation to defendant No. 2.

7) By the impugned order, after appraisal of the pleadings and material pressed into service and the submissions canvassed on

behalf of the parties, the learned Judge, City Civil Court was persuaded to dismiss the Notice of Motion taken out by the plaintiff and partly allow the Notice of Motion taken out by the defendant No. 2, as indicated above.

8) Being aggrieved the plaintiff is in Appeal.

9) I have heard Mr. Induprakash Tripathi, the learned Counsel for the appellant, and Mr. Ketan Parekh, the learned Counsel for the respondent No. 2 at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record.

10) Mr. Tripathi strenuously submitted that the learned Judge, City Civil Court committed a manifest error in granting a mandatory injunction in favour of the defendant No. 2 in the absence of counter claim in the suit instituted by the plaintiff. Though the learned Judge correctly observed that the case of the defendant No. 2 was not covered by any of the situations contemplated in Order 39 Rule 1 of the Code of Civil Procedure, 1908 ("the Code, 1908"), yet the learned Judge committed a grave error in granting injunction by resorting to the provisions contained in Section 151 of the Code, 1908. Mr. Tripathi urged with a degree of vehemence that the fact that the suit premises

was allotted to the plaintiff was incontestible. In the circumstances, there was no justifiable reason to deprive the plaintiff from all the incidences of ownership. Thus, the Notice of Motion taken out by the plaintiff could not have been dismissed, urged Mr. Tripathi.

11) In opposition to this, Mr. Parekh would urge that the learned Judge, City Civil Court correctly exercised the discretion in favour of the defendant No. 2. Emphasis was laid on the fact that the plaintiff had never been in possession of the suit premises and on the day the building, in which the suit premises was situated, went into redevelopment, Defendant No. 2 was in actual physical possession of the suit premises and thus initially the permanent alternate accommodation agreement came to be executed with defendant No. 2. Moreover, since the plaintiff had divested his interest in the suit premises by executing an instrument in favour of the husband of defendant No. 2 and was never in possession of the suit premises, only defendant No. 2 is legitimately entitled to the possession of the permanent alternate accommodation.

12) I have given careful consideration to the aforesaid submissions. It is imperative to note that *prima facie* findings

recorded by the learned Judge, City Civil Court that defendant No. 2 and her husband, during later's life time, were in the occupation of the suit premises; on the date the suit premises was vacated for redevelopment, the defendant No. 2 was in actual physical possession of the suit premises and that defendant No. 1 – Developer had provided transit accommodation to defendant No. 2, are rather impeccable. Mr. Tripathi attempted to salvage the position by canvassing a submission that what matters is the title to the suit premises. The fact that the defendant No. 2 and her husband were in permissive possession of the suit premises would not divest the plaintiff's ownership thereof, urged Mr. Tripathi.

13) At this stage, I find it difficult to accede to the aforesaid broad submissions unreservedly. The question of title to the suit premises and the entitlement of the plaintiff to the declaration that the defendant No. 2 has no right, title and interest in the suit premises can be legitimately determined at the stage of final adjudication of the suit. At this stage, the legality and propriety of impugned order which, in a sense, makes an interim arrangement till the disposal of the suit deserves to be tested.

14) The learned Judge, City Civil Court, in my view, correctly appreciated the parameters of *prima facie* case and balance of convenience. In the case at hand, there is not much controversy over the fact that the defendant No. 2 had been in possession of the suit premises on the day the defendant No. 5- Society went into redevelopment. Initially, defendant No. 1 executed permanent alternate accommodation with defendant No. 2. Indisputably, the defendant No. 1 has provided transit accommodation to defendant No. 2.

15) In a situation of this nature, the entitlement to permanent alternate accommodation primarily turns on the factum of possession rather than the title to the property, which has since been redeveloped. Subject to the final determination of the competing rights of the parties, ordinarily the benefits which flow from the redevelopment are permitted to be granted to the person who is found to be in the occupation of the premises which goes into redevelopment.

16) A useful reference, in this context, can be made to a judgment of this Court in the case of **Heritage Lifestyles and Developers Pvt Ltd Vs. Amar-Villa Co-operative Housing Society**

Ltd and Others¹, wherein this Court held that the person who is dispossessed would be entitled to the benefits emanating from redevelopment of the premises, of which he is dispossessed. The aforesaid pronouncement was followed with approval in another order of this Court in **Commercial Arbitration Petition (L) No. 4301 of 2022**, dated 16th March, 2022. The observations in paragraph No. 9 are material and hence extracted below:-

“....The fact remains that as respondent No. 3 is in possession of the tenement in question and would not be handing over possession of such tenement to the petitioner/society. Hence, considering the consistent view taken by this Court in **Heritage Lifestyles and Developers Pvt Ltd Vs. Amar-Villa Co-operative Housing Society Ltd and Others** and in **Saikripa Co-operative Housing Society Ltd V/s Osho Developers and Ors.**, the party who is dispossessed, would be entitled to the transit rent as it is such party who is put to hardship.....”

17) The learned Judge, City Civil Court rightly held that the fact that the case of the defendant No. 2 did not fall within the ambit of the provisions under Order 39 Rule 1 of the Code, 1908, did not constitute an impediment in granting the injunctive relief in favour of the defendant No. 2. There is nothing in Order 39 rule 1 and 2 which precludes a Court from granting temporary injunction in cases which are not covered by those rules.

1 2011 (3) Mh.L.J. 865

Reliance by the learned Judge, City Civil Court on the judgment of the Supreme Court in the case of **Manohar Lal Chopra Vs. Rai Bahadur²**, in the facts of the case, was well placed.

18) The matter can be looked at from the perspective of grant of an equitable relief. It is incontrovertible that the defendant No. 2 was in possession of the suit premises on the day it went for redevelopment. It was the defendant No. 2 who, upon being displaced, was provided transit accommodation by defendant No. 1. Initial agreement for transit/permanent alternate accommodation came to be executed in favour of the defendant No. 2. She was constrained to approach the Court for direction to hand over the permanent alternate accommodation as defendant No. 1 threatened to evict her from the transit accommodation. Moreover, the permanent alternate accommodation, despite being ready in all respect, remains unoccupied on account of the dispute between the plaintiff and defendant No. 2. In this factual backdrop, the dictates of justice command that defendant No. 2, who was dispossessed of the suit premises, be put in possession of permanent alternate accommodation subject to the final adjudication of competing claims thereto.

2 AIR 1962 SC 527

- 19) In the aforesaid view of the matter, I do not find any justifiable reason to interfere with exercise of discretion by the learned Judge, City Civil Court.
- 20) Hence, the Appeal deserves to be dismissed.
- 21) Thus, the following order.

:-ORDER:-

- i) The Appeal stands dismissed.
- ii) In view of the dismissal of the Appeal, the Interim Application also stands dismissed.
- iii) Having regard to the fact that the suit came to be instituted in the year 2013 and the limited nature of the controversy, the learned Judge, City Civil Court is requested to adjudicate the suit as expeditiously as possible.

[N. J. JAMADAR, J.]