

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 817 OF 2023
WITH
INTERIM APPLICATION NO.15839 OF 2023

Mr. Sunil Lachmandas Golani

... Appellant

Versus

Mr. Udaykumar B. Narayan and Others

...Respondents

...

Mr. Aditya Rajeev Khare, for Appellant.

Ms. Mamta Sadh a/w Ms. Asha Bhambwani i/by Ms. Smita Gadkari for
Respondent Nos.1 & 2.

Mr. Salman Haider Khan i/by Mr. Mahesh L. Kukreja for Respondent Nos.4
& 5.

...

CORAM : SANDEEP V. MARNE, J.

DATE : OCTOBER 06, 2023.

P.C.:

1. This appeal is instituted challenging order dated 7 July 2023 passed by the City Civil Court rejecting Notice of Motion No.1665 of 2020 instituted by the Appellant/Plaintiff No.24 seeking removal of Respondent Nos. 1 & 2 from Flat No.506 and for handing over possession of that Flat to himself and for a direction to the Court Receiver to secure vacant and peaceful

possession of that Flat with a further direction to appoint Plaintiff No.24 as Court Receiver's agent by handing over Flat's possession to him.

2. It appears that the flat purchasers were aggrieved by non construction of the building and therefore instituted a Suit in this Court. In that Suit, this Court appointed a Court Commissioner for the purpose of ensuring that construction of the building is completed. The Court Receiver accordingly appointed a contractor and completed the construction of the building. It appears that before completion of construction of the building, and before possession of Flat No.506 could be handover to Plaintiff No.24, who was the original flat purchaser, Plaintiff No.24 executed an Agreement on 6 December 1999 with Respondent Nos.1 & 2 for transfer of the said Flat No.506. Accordingly, the possession of Flat No.506 came to be handover to Respondent Nos.1 & 2 and they have been occupying the said flat.

3. The case of the Plaintiff No.24 is now that the Respondent Nos.1 & 2 have illegally procured possession of the Flat No.506 from the contractor and not from the Court Receiver and that therefore the possession of the flat must be taken back from Respondent No.1 & 2 by the Court Receiver. With this grievance, Notice of Motion No.1665 of 2020 was filed seeking a relief for removal of Respondent Nos.1 & 2 from Flat No.506 with a further direction

to the Court Receiver to take back possession of the flat and hand over the same to Plaintiff No.24. The City Civil Court has proceeded to reject the Notice of Motion by its order dated 7 July 2023.

4. Mr. Khare, the learned counsel for the Appellant would submit that the finding recorded by the City Civil Court in Paragraph No.14 its order is factually incorrect in that the relevant Undertaking executed by Respondent Nos.1 & 2 was placed on record before the City Civil Court. He would submit that the said Undertaking is also placed on record at Exhibit-B to the Appeal. His next grievance is that a comprehensive Suit has been filed by the Flat purchasers seeking declaration and possession of the suit flats that as per the order passed by this Court, the Court Receiver has been appointed, who alone could handover possession of completed flat to the Plaintiffs in the suit. That in the present case, there is nothing on record to indicate that the Court Receiver has handed over possession of Flat No.506 to Respondent Nos.1 &2.

5. He would invite my attention to the Court Receiver's Report dated 18 June 2005 to demonstrate that the possession of Flat No.506 was obtained by Respondent Nos.1 & 2 from Shri. Ambika Construction, who is the contractor. He would submit that since Flat No.506 was *custodia legis*, the possession obtained by Respondent Nos.1 & 2 from the contractor is ab initio

void and in breach of the order passed by this Court. He would therefore submit that the possession of the flat is required to be taken back by the Court Receiver from Respondent Nos.1 & 2 and handed over to Plaintiff No.24 as Court Receiver's agent, who is actually entitled to possess the same.

6. *Per contra*, Ms. Sadh the learned counsel appearing for Respondent Nos. 1 & 2 would oppose the appeal and support the order passed by the City Civil Court. She would invite my attention to the agreement executed by Plaintiff No.24 in favour of Respondent Nos.1 & 2 on 6 December 1999, by which the Plaintiff No.24 has sold and transferred Flat Nos.506 to Respondent Nos.1 & 2. She would submit that having sold the Flat to Respondent Nos. 1 & 2, Plaintiff No.24 cannot claim any right title or interest in that flat.

7. Having heard the learned counsels for the parties, it is seen that the Plaintiff No.24 has executed Agreement dated 6 December 1999 in favour of Respondent Nos.1 & 2 by which he has sold/agreed to sale Flat No.506 to Respondent Nos.1 & 2. Whether that agreement is valid or not is something, which cannot be decided at this stage. Also, validity of that agreement also does not appear to be the subject matter of the Suit.

8. Since the Plaintiff No.24 executed Agreement for sale of the Flat in favour of Respondent No.1 & 2, it appears that the possession of the Flat has been handed over to Respondent Nos.1 & 2. It appears that the Appellant is attempting to wriggle out of that Agreement by raising a technical plea that possession of the flat is handed over not by the Court Receiver, but by Contractor. It is not that Respondent Nos. 1 and 2 have purchased the flat from the contractor. Court Receiver's report would indicate that Flat's possession is handed over in terms of Court Orders. Having sold his right, title and interest in Flat No.506, it is incomprehensible as to how the Plaintiff No.24 could have filed Notice of Motion to dispossess Respondent Nos.1 & 2 from that Flat which is occupied by them since the year 2007.

9. Much has been made with regard the findings recorded by the City Civil Court in Para 14 of its order. The relevant finding reads thus:

“14. Here, it is important to note that, the Court receiver has filed the report on 18.06.2005. However, till filing of present notice of motion, no steps taken by plaintiff No.24, so as to obtain possession of suit flat from non-applicants by filing separate suit. Nothing on record to show that, non applicants have furnished any undertaking wherein admitted that they are in illegal possession of suit flat and ready to handover its possession as and when directed by this Court, in view of order dated 28.02.2007.”

10. Appellant has placed on record undertaking executed by Respondent Nos.1 & 2 before this Court in pursuance of order dated 28 February 2007. It appears that this Court had directed, by its order dated 28 February 2007, that all the occupants of the tenements to file a usual undertaking. In pursuance of that direction, following undertaking has been filed by Respondent No.1 & 2.

“ Mr. Udaykumar B. N. Occupant of flat No.506 in the suit Building known as Mangal Mahesh Baugh, S.V. Road, Borivli (West) Mumbai 400 092, do hereby on solemn affirmation say and undertake as follows :

1) I say that I am filing this undertaking in compliance with the order dated 28.02.2007 passed by His Lordship Justice Shri D.B. Bhosale in Review Petition (L) No.36 of 2006, filed by original plaintiffs.

2) I say that I am in use and occupation of flat No.506 in the suit Building known as Mangal Mahesh Baugh, S.V. Road, Borivli (West), Mumbai 400 092.

3) I hereby undertake to this Hon'ble Court that I shall not dispose off or part with or assign or transfer or sell or encumber or mortgage or exchange or offer as security or otherwise in any way alienate or deal with or dispose off or part with the premises or any part of the premises, situated at flat No.506 in the Suit Building known as Mangal Mahesh Baugh, S.V. Road, Borivli (West) Mumbai 400 092, which has been allowed by the Court Receiver to be occupied and used by me.

4) I further undertake that I shall handover the vacant and peaceful possession of the said premises to the Court Receiver as and when directed by this Hon'ble Court to do so.

5) I further undertake that I shall use the said premises for my personal use and shall not allow any third party to occupy the said premises or any part thereof in any capacity whatsoever.

I state that the statement of facts in paragraphs 1 to 5 are true to my own knowledge”

11. All that City Civil Court has observed is that the Respondent Nos.1 & 2 have not undertaken that their possession in respect of the flat is illegal. This all I can read in the above quoted findings recorded by the City Civil Court.

12. The Undertaking would also leave no matter of doubt that possession of Flat by Respondent Nos. 1 and 2 is in their capacity as Court Receiver's agent as they have undertaken to hand back possession of flat to Court Receiver as and when directed by the Court.

13. I am therefore of the view that no case was made out by the Appellant for grant of any relief in the Notice of Motion. The City Civil Court has rightly rejected the Notice of Motion. Appeal being devoid of merits, is dismissed without any order as to costs.

14. In view of disposal of Appeal, Interim Application does not survive and stands disposed of.

(SANDEEP V. MARNE, J.)