

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1025 OF 2022
WITH
INTERIM APPLICATION NO.19574 OF 2022
IN
APPEAL FROM ORDER NO.1025 OF 2022

Jayshree Manilal ShahAppellant
V/S
M/s. Sai Siddhanath Developers & Ors.Respondents
...

Mr. Ashok M. Saraogi for the Appellant/Applicant.
Mr. Shakeeb Shaikh a/w Mr. Mangesh J. Nalawade i/b M/s. Upshot Legal
for Respondent Nos.1 to 4.
Mr. Arvind Gaikwad for proposed Intervenor (Smt. Sarita Redkar).
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CORAM: SANDEEP V. MARNE, J.
DATE : NOVEMBER 03, 2023.

P.C.:

1 The challenge in the present Appeal is to the order dated 14 September 2022 passed by the City Civil Court rejecting the Appellant/Plaintiff's Notice of Motion No.1662 of 2021.

2 The Appellant/Plaintiff claims that the Respondent-Developer has allotted her flat No.901 on 9th floor, admeasuring 975 square feet super-built-up area in the proposed Building Nos.6 to 17, at D.N. Nagar, Andheri (West), Mumbai - 400 053 vide allotment letter dated 1 February 2007.

She has instituted S.C. Suit No.1529 of 2021 seeking a declaration that the Defendants do not have right to create any third party rights or to part with the possession of Flat No.901. She has also sought a permanent injunction to restrain the Defendants from creating third party rights or parting with possession of the suit flat. Appellant/Plaintiff filed Notice of Motion No.1662 of 2021 seeking temporary injunction against the Defendants from creating third party rights or parting with possession of the suit flat. The Suit and the Notice of Motion were instituted sometime in July 2021. For opposing the Notice of Motion No.1662 of 2021 Defendant Nos.1 to 3 filed Affidavit-in-Reply dated 12 August 2021 contending that flat No.901 on 9th floor in Building No.16 has already been allotted to Smt. Sarita Ashok Redkar on 26 June 2021 on the basis of her letter of request dated 25 June 2021. The Trial Court took note of the said contentions raised by Defendant Nos.1 to 3 and held that unless Smt. Sarita Ashok Redkar has impleaded as party to the suit no interim order can be passed in respect of the possession of the suit property.

3 This is principally the reason why the Notice of Motion No.1662 of 2021 rejected.

4 Perusal of letter dated 25 June 2021 of Smt. Redkar requesting for handing over possession of Flat No.901 makes an interesting reading. In her letter she states that she had given her undertaking dated 28 June 2021. The letter of Smt. Redkar is dated '25 June 2021' in which she has stated that she had already given her undertaking dated '28 June 2021'.

Perusal of the undertaking would indicate that the same was actually executed on '29 June 2021'. The stamp duty for execution of the undertaking was apparently purchased on 28 June 2021. This prima facie creates an impression that letter dated 25 June 2021 is possibly backdated and its authenticity becomes questionable. On the basis of letter dated 25 June 2021, Defendant Nos.1 to 3 claim that they have handed over possession of flat No.901 to Smt. Redkar on 26 June 2021. If the undertaking was indeed executed on 29 June 2021, the letter requesting possession of the flat would ideally be issued after 29 June 2021. Therefore, how possession of the flat could be handed over to Smt. Redkar on 26 June 2021 becomes questionable.

5 Be that as it may, the Advocate representing Smt. Redkar in the present Appeal makes a statement that Smt. Redkar has taken over possession of the suit flat and is actually residing in the same. Mr. Saraogi would seriously dispute the said contention by submitting that the building does not have occupancy certificate and there is no supply of water or electricity. That even lift is not operational. Be that as it may, the Appellant/Plaintiffs will have to take necessary steps for impleadment of Smt. Redkar as party to the suit. I am informed that the Appellant/Plaintiff has already filed Chamber Summons for impleadment of Smt. Redkar in the suit.

6 The situation that is faced today by the Appellant/Plaintiff is such that the Developer is taking a stand that Flat No.901 is already allotted to

Smt. Redkar and that she has taken possession thereof. In the allotment letter dated 1 February 2007 the description of flat is 'Flat No.901'. However, no specific Building number is mentioned in the allotment letter. Appellant/Plaintiff feels cheated on account of the conduct of the Developer and has relied on several WhatsApp messages to prove her case that the Developer was actually willing to execute an agreement in respect of Flat No.901 with her. This is something which needs to be taken into consideration by the Trial Court.

7 In view of position taken by the Developer and Smt. Redkar that possession of Flat No.901 in Building No.16 is already taken over by her, it will be for the Appellant/Plaintiff to seek appropriate relief in respect of other constructed portion in the building with a view to secure her interest in respect of her rights and entitlements arising out of letter of allotment dated 1 February 2007. It would be also open for her to pursue her claim in respect of Flat No.901 after impleadment of Smt. Redkar.

8 The learned Counsel appearing for the Developer would submit that as of now there are no unsold flats left in the Building. He would however submit that there is proposal to construct additional floors in Building No.16.

9 Mr. Saraogi did attempt to convince me that the Developer be directed to keep one flat unencumbered during pendency of the suit so as to secure the rights of the Appellant/Plaintiff during pendency of the

suit. However, such relief cannot be entertained in view of the limited ambit of the suit which is filed only qua flat No.901. If Appellant/Plaintiff desires to seek relief in respect of any other constructed portion in the building, he will have to raise necessary pleadings and prayers in the suit. For that purpose Appellant/Plaintiff can be permitted to amend the suit with a view to seek necessary reliefs to protect her rights and entitlements, if any, arising out of the letter of allotment dated 1 February 2007.

10 Accordingly the present Appeal is disposed of by granting liberty to the Appellant/Plaintiff to file an application for amendment of Plaint to incorporate necessary pleadings as well as reliefs in the plaint. After carrying out amendment in the Plaint, the Appellant/Plaintiff shall be at liberty to file a fresh Notice of Motion for seeking temporary injunction. Such Motion, if filed, shall be decided by the City Civil Court on its own merits uninfluenced by the findings recorded in the order dated 14 September 2022.

11 With the above directions, the Appeal is disposed of.

12 With the disposal of the above Appeal from Order, the Interim Application shall stand disposed of accordingly.

(SANDEEP V. MARNE, J.)