



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.816 OF 2023
WITH
INTERIM APPLICATION NO.15836 OF 2023
IN
APPEAL FROM ORDER NO.816 OF 2023

Desmond Charles Mascarenhas] ... Appellant/Applicant

Versus

Rajesh S/o. Charles Charly & Ors.] ... Respondents

Mr. Rushabh Sheth a/w Mr. Kunal Maskar & Ms. Urvi Shah for Appellant / Applicant.

Mr. A. M. Saraogi for Respondent No.1.

Mr. Kaustubh Patil for Respondent No.2.

CORAM :- SANDEEP V. MARNE, J.

DATE :- 03 OCTOBER, 2023

P. C. :-

1. This Appeal is filed challenging order dated 31/07/2023 passed by the City Civil Court allowing Notice of Motion No.1771 of 2022. By the impugned order, the Plaintiff is directed to vacate the suit shop and hand over its possession to the Defendant No.2 with a further direction to the Defendant No. 2 to pay transit rent, corpus fund and permanent alternate accommodation to the Plaintiff in lieu of suit shop.

2. Plaintiff Rajesh Charles Charly is the brother of Defendant No.3- Desmond Charles Mascarenhas, who is the Appellant in the present

Appeal. The Appellant claims that there was a partnership between the two brothers. That Defendant No.3 / Appellant purchased the suit shop by way of Sale Deed dated 04//10/2012 and that he is the owner thereof. That, the Plaintiff was permitted to occupy the suit shop only in capacity as a partner for conducting the business activities of the partner firm in the suit shop. That, despite having no right in respect of the suit shop, the Plaintiff has been illegally occupying the same and now that the building is undergoing redevelopment, the Plaintiff wants to reap the benefits arising out of redevelopment exclusively for himself to the complete exclusion of the Appellant. That, in his capacity as owner, the Appellant alone is entitled to receive transit rent, corpus fund as well as permanent alternate accommodation in lieu of suit shop. He would submit that in fact, the agreement for permanent alternate accommodation has already been executed in favour of the Appellant by the developer and the society on 30/06/2023.

3. The Plaintiff felt that his possessory rights in respect of the suit shop would be adversely affected on account of proposed redevelopment where the transit rent, corpus fund and permanent alternate accommodation might be paid/handed over to the Appellant who has not been possessing the suit shop. It is with this grievance that the Plaintiff instituted S.C. Suit No.1265 of 2022 before the City Civil Court seeking injunctive relief against the Defendant not to disturb his possession in respect of the suit shop without granting him all the benefits which are otherwise granted to other occupants / members of the society towards redevelopment. In that suit, the Plaintiff filed Notice of Motion No.1771 of 2022 seeking temporary injunction. By order dated 31/07/2023, the City Civil Court has proceeded to allow the Notice of Motion and has passed the following order :-

- “1. *The Notice of Motion No.1771 of 2022 is allowed.*
2. *The plaintiff is directed to vacate the suit shop and hand over its possession to defendant No.2 within one month from the date of this order.*
3. *The defendant No.2 is directed to pay transit rent, corpus fund and the permanent alternate accommodation to the plaintiff (if the building to be constructed is completed during pendency of the suit) in lieu of the suit shop.*
4. *Costs in cause.*
5. *The Notice of Motion No.1771 of 2022 stands disposed of accordingly:*

The Appellant is aggrieved by the order dated 31/07/2023 and has filed the present Appeal.

4. Mr. Sheth, the learned counsel would appear on behalf of the Appellant and would submit that the City Civil Court has erred in travelling beyond the scope of prayers in the Notice of Motion. He would submit that the prayer in the Notice of Motion was just for protecting alleged possession of the Plaintiff in respect of the suit shop. As against the prayer sought in the Notice of Motion, the City Civil Court has granted mandatory temporary injunction directing the Defendant No.2 to pay transit rent, corpus fund and permanent alternate accommodation to the Plaintiff. All these prayers were never made in the Notice of Motion and therefore could not have been granted. Relying upon the Judgment of Hon’ble Court in the case of ***Samir Narain Bhojwani Vs. Aurora Properties and Investments and Another***¹, Mr. Sheth would contend that power of molding the relief cannot be exercised at an interlocutory stage.

5. Mr. Sheth would then take me through the prayers in the suit to submit that the Plaintiff has not sought any declaration in respect of any of his alleged rights over the suit property. That, the suit is filed for

¹ (2018) 17 Supreme Court Cases 203
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the injunction simplicitor to protect alleged possession of Plaintiff over the suit shop. That, the Appellant's ownership rights in respect of the suit shop are not in dispute in any manner. That, a partner permitted to make use of the suit shop for running partnership business cannot seek any restraint order against owner in absence of any title in respect thereof. That developer and the society have executed permanent alternate accommodation agreement in favour of the Appellant. That therefore, the Appellant alone is entitled to receive all the benefits arising of redevelopment of the building. He would pray for setting aside the order of temporary injunction.

7. *Per Contra*, Mr. Saraogi, the learned Counsel appearing for Respondent No.1, would oppose the Appeal and support the order passed by the City Civil Court. He would submit that the Appellant has already filed a suit against the Plaintiff for possession of the suit shop and that the same has been pending since the year 2014 without grant of any relief in Appellant's favour. That, the Plaintiff's possession over the suit property is undisputed and he alone is entitled to get all benefits of redevelopment on the strength of his possession. He would rely upon the Judgment of this Court in the case of ***Maniar Associates Vs. Vijay Niwas Co.Op.Hsg.Soc. Ltd. & Ors.***². He would pray for dismissal of the Appeal.

8. Rival contentions of the parties now fall for my consideration.

9. The Plaintiff has instituted the suit seeking only injunctive relief to restrain the Defendants from dispossessing him in respect of suit shop without granting benefits that are otherwise granted to other occupants / members of the society. The Plaintiff has not sought any

² ***LAWS(BOM)-2022-3-264 : Commercial Arbitration Petition No.4301 of 2022 decided on 16/03/2022***

declaratory relief in respect of the suit shop. It appears that the suit shop has been purchased by the Appellant by Sale Deed dated 04/10/2012 and on that count, the agreement for permanent alternate accommodation has been executed in his favour on 30/06/2023. It also appears that the Appellant has instituted a separate suit against the Plaintiff, *inter alia*, for recovery of possession of the suit shop and that suit has been pending since long. The fact that recovery of possession is sought in that suit would indicate that the Plaintiff has been in possession of the suit shop at least since the year 2014. On account of the proposed redevelopment of the building, the Plaintiff is likely to lose possession of the suit shop, which may have to be demolished. The short issue is whether the proposed redevelopment of the building would extinguish possessory rights of the Plaintiff. As observed earlier, the agreement for permanent alternate accommodation is executed in favour of the Appellant in his capacity as the alleged owner. As per that agreement, the developer and the society may hand over possession of the permanent alternate accommodation in favour of the Appellant. Thus, the proposed redevelopment of the building may result in extinguishing possessory rights of the Plaintiff in respect of the suit shop. The order of interim injunction granted by the City Civil Court seeks to protect this limited possessory right of the Plaintiff. If the suit shop is to be demolished, Plaintiff's business would be affected and he may have to scout for some alternate arrangement. For that purpose, he would need transit rent. The Appellant has not been possessing the suit shop for last several years and has admittedly not been carrying out any business in the suit shop. In such circumstances, if transit rent is paid to the Appellant, it would be a bounty for him where the Plaintiff would be put to loss by losing the place of his business and not receiving any amount for rent. In my view, therefore, the order of the City Civil Court merely continues the position

that exists today, during the redevelopment process. The City Civil Court's order would result in payment of transit rent to Plaintiff which he can use to run business in alternate premises. It also seeks to put him back in the possession of newly constructed premises. True it is that the Appellant, in his capacity as alleged owner of the suit shop, wants to exercise his right and to take back the possession from the Plaintiff. However, he must seek such relief in the suit that he has already instituted. Till he succeeds in that suit, proposed redevelopment of the building cannot be used as pretext for illegally dispossessing the Plaintiff from the suit shop. This principle is recognized by the Judgment of this Court in *Maniar Associates* (*supra*).

10. Mr. Seth's reliance on the Judgment of the Apex Court in the case of *Samir Narain Bhojwani* (*supra*) would not assist the case of the Appellant. The Plaintiff clearly prayed for protection from dispossession without grant of benefits of redevelopment. Therefore, it cannot be stated that the Plaintiff did not pray for grant of benefits of redevelopment either in the suit or in the Notice of Motion. It, therefore, does not appear that the City Civil Court has moulded the relief or has granted any relief which was never prayed.

11. Resultantly, I do not find any merit in the Appeal. It is dismissed without any order as to costs.

12. Needless to clarify that the observations made in this order are *prima facie* and are made for the limited purpose of examining whether the Plaintiff is entitled to grant of any temporary relief. The City Civil Court shall decide the suit without being influenced by the above observations.

13. In view of dismissal of Appeal, Interim Applicant does not survive and the same is also disposed of.

(SANDEEP V. MARNE, J.)