

MHTH240003312019



Spl.C.S.68/2019

Gafur Inayatulla Sayyad Vs. Kais Mohammad Khan Munshi
& ors.

: ORDER BELOW EXH.5 :

1] Before going to discuss, the point in dispute, it is necessary to mention brief facts of the case.

Suit property mentioned in a plaint is purchased by plaintiff on 22/01/2014 by registered Sale Deed. Electricity meter is in the name of plaintiff. Defendant no.5 is residing in the suit property. Plaintiff is illiterate person. Defendant no.3 and defendant no.5 are husband and wife. Defendant no.5 is the sister of plaintiff. Defendant no.3 and 5 were residing in the America. Defendant no.5 was serving in America and she desired to purchase the property in her name, in India. She has sent Rs.22 Lakhs earned through her own income, in the account of plaintiff to purchase the suit flat, for her. It was not possible for defendant no.5 to come at Mumbai for signature, therefore, plaintiff obtained loan of Rs.20 Lakhs of GIS Bank and purchased the suit flat for Rs.47 Lakhs. Builder has given possession letter on 07/07/2015. Therefore, suit flat has been in the possession of plaintiff.

2] Defendant no.5 and 3 on 01/04/2014 returned in India. The work of suit flat was not completed, therefore, they resided on the rental basis. After acquiring the possession of the suit flat,

plaintiff expended Rs.6 Lakhs of his mother towards the furniture in the suit flat. Defendant no.3 and 5 went to reside in the suit flat. Defendant no.3 gained the belief of plaintiff and told him to transfer the loan in his name and to issue him blank cheque in security. Believing on the defendant no.3, plaintiff has issued two blank cheques with his signature. Defendant no.3 further, told the plaintiff that in order to avoid any harassment, he will transfer the loan amount in the name of defendant no.1. In the guise of bank documents, he obtained the signature of a plaintiff in Sub Registrar Office, thereafter, defendant no.1 was paying the loan amount. Thereafter, there was a dispute between defendant no.3 and 5. So they got separated from each other. Defendant no.5 is still residing in the suit property. When defendant no.5 went to pay the maintenance bill of suit property, society did not accept because the maintenance bill was transferred in the name of defendant no.1 and 2. Plaintiff asked for documents to the builder and Electricity Board. After getting documents from M.S.E.B., plaintiff came to know that by deceiving him, defendant no.1 and 2 have transferred the house tax of suit property in their name.

3] Plaintiff never sold suit property to defendant no.1 and 2. Defendant no.3 has obtained the signature under the guise of transferring the loan amount in his name and misusing that signature, defendant no.3 has transferred the suit flat in the name of defendant no.1 and 2. Plaintiff has purchased the suit flat for Rs.47 Lakhs, therefore, there is no question to sell the suit flat for Rs.32 Lakhs. If the suit property is sold to defendant no.1 and 2 in the year 2016, then why they did not transfer the meter in their

name for two years.

4] The blank cheques signed by the plaintiff given to the defendant no.3 are en-cashed by defendant no.3 and has withdrawn Rs.10,22,425/- from the account of plaintiff. The suit flat is mortgaged to defendant no.4 for Rs.32 Lakhs loan obtained by defendant no.1 and 2. In the domestic violence case, the court has passed interim order against defendant no.1 to 3 not to dispossess the defendant no.5 from suit property.

5] Again defendant no.1 to 3 have borrowed the loan of Rs.23 Lakhs and without any verification, defendant no.4 has given the loan to defendant no.1 and 2.

6] On 20/03/2019 and 10/04/2019, the officer of defendant no.4 came on the suit property and threatened to dispossess the defendant no.5 if she failed to pay the loan amount.

7] Thus, defendant no.1 to 3 by deceiving the plaintiff has transferred the suit flat in their name without any sale consideration and defendant no.4 has given loan without any verification, hence, plaintiff has filed this application for restraining the defendant no.1 to 3 from creating 3rd party interest in the suit property and dispossessing the plaintiff. He also sought the relief against the defendant no.4 not to dispossess the plaintiff from suit property and not to seal the suit property.

8] Plaintiff relied upon Sale Deed in his favour

dtd.22/01/2014, possession letter dtd.21/01/2014, loan allotment letter dtd.13/02/2014, possession letter dtd.07/07/2015, complaint filed by plaintiff and defendant no.5 against the remaining defendants, order passed in D.V. application on Exh.5,

9] Defendant no.5 has given no objection in favour of plaintiff.

10] Defendant no.4 appeared and filed his say vide Exh.31A. They denied the contents of this application. They admitted the loan taken on the suit flat. They submitted that mortgage is enforceable against any person i.e. original owner, occupier or subsequent purchaser. They have right to demand the repayment of loan from defendant. They have right to take the possession of the suit flat which is a security for the loan advanced by the defendant under SARFESI Act. They visited the suit property for pointing out the occupant. Thus, statutory provision for possession.

11] The advocate of defendant no.4 has filed pursis at Exh.33 about the issuance of notice u/sec.13(2) of SARFESI Act. He also submitted that bank has filed an order from District Magistrate to take the physical possession of the secured asset.

12] Defendant no.1, 2 and appeared and resisted the plaint of plaintiff vide Exh.29. They contended that plaintiff has sold the suit flat for Rs.32 Lakhs to defendant no.1 and 2. After the registration of Sale Deed he took the suit flat on Leave & License

basis from defendant no.1 and 2 for the period 01/10/2016 to 31/08/2017. After expiry of Leave & License, he asked his wife defendant no.5 to reside with his mother for which she denied, therefore, he left the suit premises and she is not ready to vacate the suit property. Defendant no.1 has given application to police station in respect of possession of defendant no.5 on the suit property. Defendant no.5 was not working, therefore, there is no question of sending Rs.22 Lakhs to the plaintiff for the purchase of suit flat. Plaintiff approaches the defendant no.3 to buy the suit flat as he was in need of some money, however, defendant no.3 was unable to purchase. That time defendant no.1 and 2 purchased the suit flat from plaintiff and loan amount is transferred in the name of defendant no.1 and 2. They have paid the amount by taking loan from ICICI Bank and through the cheque in the account of plaintiff's account of rs.2 Lakhs and Rs.19,77,575/- and Rs.10,22,425/-. Defendant no.1 and 2 are still paying loan amount. The suit flat was in the name of possession of defendant no.3 and 5 on rental basis and defendant no.5 is allowed to reside in the suit flat in D.V. case. Hence, they prayed to reject the application.

13] They relied upon documents vide Exh.30 i.e. Identity Proof, Agreement for Re-sale of flat No.C/604 dt.27/09/2016, power of attorney, House Tax Receipt and Light Bill of flat No.C/604, Bank Statement, Leave & License Agreement dt.28-09-2016, Furniture Bill receipt, F.I.R. No.39/2018, application dtd.19/04/2018, application dt.01/05/2018, N.C. complaint No.584/2018, F.I.R. No.135/2018, applications dt.17/05/2018 & dt.21/05/2018 to Nallasopara Police Station.

14] Heard both sides. Perused record, documents and following points arose for my consideration and determination:

<u>SR NOS.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1)	Whether there is a prima-facie case in favour of plaintiffs ?	In the affirmative
2)	Whether the balance of convenience lies in favour of the plaintiffs ?	In the affirmative
3)	Whether plaintiffs will suffer irreparable loss, if temporary injunction is not granted ?	In the affirmative
4)	What order ?	As per final order.

: R E A S O N S :

15] It is to be noted that, the discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff :

- (i) Existence of a prima-facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction.
- (ii) When the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

- (iii) Clear possibility of irreparable injury being caused to the plaintiff, if the temporary injunction are not granted.

16] In addition, injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands [Seema Arshad Zaheer and others V/s. Municipal Corporation of Greater Mumbai and others, 2006 (5) SCC 282]. Keeping in mind, the aforesaid law laid down by Apex Court, the facts are required to be adjudged.

As to Point Nos.1 to 3 :-

17] Both the parties have filed Sale Deeds executed in their favour. The plaintiff has challenged the Sale Deed executed by defendant no.1 and 2 as it is executed with fraud, whereas, defendant no.1 and 2 claiming to be owner of the suit property executed in their favour by plaintiff. In D.V. proceeding, respondent i.e. defendant no.3 is restrained from dispossessing the defendant no.5 from the suit property. Bank has filed pursis that they have initiated proceeding of recovery of their loan amount under SARFESI Act. The advocate of plaintiff filed pursis at Exh.37 that they do not want to proceed further against defendant no.5.

18] There is a dispute between the parties in respect of execution of Sale Deed in favour of defendant no.1 and 2. Already criminal court has restrained on 16/10/2018 the defendant no.3 from dispossessing the defendant no.5 from the suit property. Plaintiff is coming with the theory of fraud played upon them, for the Sale Deed in favour of defendant no.1 and 2. Plaintiff is

residing along with his family in the suit property. It will take time to decide the claim of both the parties. Defendant no.5 is residing in the suit property since 2018. Now, at this stage if injunction is not granted against the defendants from disturbing the possession of plaintiff, the possibility of disturbing the possession of plaintiff cannot be ruled out. Plaintiff has made a prima-facie case in view of documents filed by him. Balance of convince lies in favour of the plaintiff. Without deciding the right of both parties, if third party is created, then irreparable loss will cause to the plaintiff. Thus, plaintiff has proved the main three ingredients. Therefore, I answer point Nos.1 to 3 in the affirmative and in answer to point No.4, I proceed to pass following order:-

: ORDER :

1. Application (Exh.5) is partly allowed.
2. Defendant nos.1, 2 and 3 are hereby temporarily restrained from creating third party interest in the suit property and from dispossessing the plaintiff and his family members from the suit property, till further order.
3. Costs will be in main cause.

Vasai.
Date :28/04/2023

(N. K. Patil)
Jt. Civil Judge S.D. Vasai.