

IN THE BOMBAY CITY CIVIL COURT AT MUMBAI

Notice of Motion No. 501 of 2014

In

Short Cause Suit No. 406 of 2014

**Kurla Malayalee Samajam**

**...Plaintiffs.**

V/s.

**M/s. S. Rajesh & Associates & Ors.**

**...Defendants.**

Appearances:

Ld. Adv Mr. Bobde for the plaintiffs.

Ld. Adv. Mr. Sawant for defendant Nos.1, 3, 4 & 6

Ld. Adv. Mr. Holmagi for defendant Nos. 2 & 7.

Defendant No.5 in person.

Coram : D.K. Gudadhe, Ad-hoc Judge.

(G.R.No.4)

Dated: 28<sup>th</sup> April, 2016

Order

1. This Notice of Motion is taken out by the plaintiffs to restrain defendants from disturbing the plaintiffs' possession over the schedule property in any manner whatsoever without adopting due process of law in a suit for permanent injunction for the same. The facts of the case in short are as under.

2. According to the plaintiffs, they are the Public Trust under the Bombay Public Trust Act 1950. The said Trust own and possess a piece of land bearing Survey No. 192, Hissa Nos. 2(Part), 10/2(Part), 12(Part) CTS No. 435 of Kurla village, Mumbai and same has been more specifically described in para 3 of the plaint. The suit is in respect of this property and hereinafter referred to as 'suit property' for the sake of brevity.

3. The plaintiff trust purchased the suit property in the year 1962 and, from this year to 1978, the plaintiffs trust could built a shed consisting of two rooms over the suit property. The Trust was mostly dysfunctional during the period from 1978 to 1993. However, the Trust become active once again in the year 1993. In this year one developer viz. M/s. Rajesh Housing Development Corporation tried to encroach upon the suit property. On this when officer bearers of the Trust made inquiry, it is learnt that during the dormant state of the Trust a group of mischievous persons filed a 'change report before' the Hon'ble Charity Commissioner and got it approved. The said members even sought permission from the Charity Commissioner to dispose of the suit property to M/s. S. Rajesh & Associates (defendant No. 1) a unregistered firm. However, the condition attached to the said order was not observed by the defendant No. 1 and the said sanction lapsed. Even the said unregistered partnership came to be dissolved. However, one of its partner i.e. defendant No. 2 got the another firm registered in the same name and is trying to forcibly encroached upon the suit property.

4. Therefore, the complaints made to the several authorities including the police but they did not restrain the defendants from their illegal activities. Therefore, its President Mr. K.P. Ravi had a filed suit in the year 1994 to revoke the said order of Charity Commissioner to dispose of the suit property alongwith other reliefs including relief not to disturb the plaintiffs' possession. However, the said suit stood dismissed. Therefore, the appeal was preferred. But the appeal also came to be dismissed. Because of the result of these two matters the defendant No. 2 is now claiming that he got right to undertake the construction over the suit property in view of sale agreement coupled

with permission from the Charity Commissioner. He is trying to make encroachment over the suit property and dispossess the plaintiff with the help of local public representative. Because of this, the plaintiffs have apprehension that they may not protect their possession over the suit property and in case the defendants succeeded in dispossessing them from the suit property then the Trust would suffer inconvenience as well as sustained irreparable loss. Hence, in order to protect the property this notice of motion is taken out.

5. Defendant No. 1 through its partner Minojen Subramaniam did not oppose the interim relief as claimed by the plaintiffs and specifically mentioned that the defendant No. 1 would follow due process of law for taking the possession of the suit property from the plaintiffs. However, in his reply he narrated the number of things which should reveal that there is a dispute between the partners of the defendant No. 1 firm and the said dispute has no bearing on the present notice of motion and especially the main relief as the plaintiffs claimed for. Therefore, I do not think it is necessary to mention such dispute in details.

6. Defendant No. 2 vide his affidavit in reply opposed the application on a ground that he is in possession of the suit property in view of agreement to sell the suit property and therefore, there is no substance in the notice of motion as well as the suit. He further contended that the suit suffers from principle of resjudicata as this issue has already been in a suit which the plaintiffs' president K. Ravi had filed. In addition to this, he contended that the defendant Nos. 1, 3 and 6 are unnecessary parties. In addition to this, defendant No. 2 has taken out notice of motion No. 771/14 contending that the order dated

05.04.2014, whereby the parties to the suit are directed to maintain statusquo is obtained by the plaintiffs by playing fraud upon the Court and therefore, the said interim order be recalled and set aside. In addition to this prayer, the said notice of motion is also taken out for initiating appropriate inquiry against the Subramaniam for wrongly representing defendant No. 2. Thus, in short, according to him notice of motion deserves to be rejected.

7. During pendency of the matter some defendants came to be added. Defendant Nos. 3 to 6 have come to be added as heir of one of the deceased partner of defendant No. 1, whereas, defendant No. 7 i.e. the firm which alleged to have formed by the defendant No. 2 in a similar name after dissolution of defendant No. 1 firm. In addition to this, defendant No. 8 also came to be impleaded as a partner of defendant No. 7 firm.

8. The added defendant Nos. 3 to 6 did not challenge the plaintiff's claim in respect of grant of interim injunction however, vide their reply they mentioned that the dispute between the partners of defendant No. 1 firm and subsequently constituted defendant No. 7 firm. But, again considering the scope of the plaintiffs suit, in my view the details of this dispute between the partners need to be mentioned.

9. Defendant Nos. 7 and 8 generally adopted the say of defendant No. 2.

10. On these rival contentions of the parties, the points that arise for determination are as follows. I have given my findings thereon for the reasons mentioned in the subsequent paras.

Sr.No.	POINTS	FINDINGS
1.	Whether the plaintiffs have got prima facie case ?	In the negative.
2.	Whether the balance of convenience lies in favour of the plaintiffs ?	In the negative
3.	Whether the plaintiffs would suffer irreparable loss, if injunction is withheld ?	In the negative.
4.	What order?	As per final order.

**Reasons:**

**As to Point No.1:-**

11. At the outset and even at the cost of repetition, it is important to note here that the present suit is simplicitor for injunction thereby to restrain the defendants from disturbing the plaintiffs' possession over the suit property and this notice of motion is taken out as a temporary measure for the same. Therefore, one need to see whether the plaintiffs are in possession of the suit property and their possession should be protected or not until the decision of the suit.

12. The plaintiff in order to show that they are in possession of the suit property filed on record correspondence between the plaintiffs and the defendants vide list of documents alongwith plaint and in all 8 documents on 05.04.2014 and three documents on 17.10.2015. The first set of documents consist of revenue documents, which show the ownership of the plaintiff over the suit property as well as their

possession. Even the defendant No. 2 did not dispute this fact that they were in possession. What defendant No. 2 disputed is the present position of the suit property. They claimed that in view of agreement to sell they came in possession of the suit property. Therefore, in my view, it is for the defendant No. 2 to establish that he is in possession. Therefore, lets see what defendant No. 2 has brought on record.

13. Defendant No. 2 in support of his contention filed number of documents alongwith his affidavit in reply. These documents mainly consist of the Judgment and Order passed in Civil Suit No. 3565/1994, which came to be filed by the president of the plaintiffs against the defendants, in respect of declaration that an agreement to sell the property in question is void as well as, the permission granted by the Charity Commissioner for sale and the order and judgment of appeal against the decree passed in this suit. In addition to this defendants have filed the bunch of documents consisting of 695 pages on 6.8.2014. These documents mainly consist of documents related to, again, same suit No. 3565/1994 and Appeal against the decree passed in the said suit.

14. On perusal of all these documents it nowhere specifically seen that the defendant No. 2 is in possession of the suit property. No doubt, these documents also consist of agreement to sell of the suit property by the plaintiffs Trust to defendant No. 1. This document is at page 653 of the said compilation. But this document is apparently on the stamp paper of Rs. 10. When the defendant No. 2 claimed that he came in possession of the suit property on the basis of this document which is obviously agreement to sell then it must have been affixed with the stamp as it is conveyance deed as per Art. 25 of the Bombay Stamp

Act. Therefore, one doubts whether this document can be read in evidence. Even for the sake of arguments, and considering the stage of the proceeding this document can be looked into, still the defendant No. 2 has not specifically pointed out when the possession was given. Thus, in my view, this document is of less use to the defendant No. 2 at this stage.

15. However, it is important to note here that the learned Counsel for the defendants argued that the issue in question has been already decided by the competent court in a suit No. 3565/1994 (suit filed by the plaintiff Trust against the defendants) and therefore, the decree in that suit operates as resjudicata in the present. Therefore, lets see what that decree speaks about which is also relied upon and filed by the plaintiff.

16. On perusal of the said decree which is at page 61 of the compilation filed by defendants, it is seen that the plaintiffs Trust filed a suit against the defendants for a declaration that the agreement to sell of the suit property is void and illegal and for injunction restraining defendant Nos. 2 and 3 from entering upon or remaining upon the suit property and also to develop the suit property. Similarly, injunction is also against the other defendants from entering upon or remaining upon in the suit property. But as observed earlier we need to think about the other defendants i.e. defendant Nos. 1, 3 to 6. So, if perused the decree from this angle it is seen that the plaintiffs relief against the defendant Nos. 2 and 7 was turned down. The Ld. Court while turning down this prayer categorically hold that the agreement to sell in question is legal and valid one as well as the permission granted by the authority to be retained. Therefore, defendant Nos. 2 and 7 cannot be

restrained from entering upon the suit property or carrying construction over there. This decree came to be challenged by the plaintiffs in the Hon'ble High Court, but the appeal came to be dismissed. Even the Hon'ble Supreme Court has turned down leave to entertain the appeal against the order of Appellant Court. So, what is seen from this decree passed in 3565/1994 and the Appellate Court's order there from that the defendants cannot be restrained from entering upon the suit property and to make construction activities over there. If this is the position, then how the the plaintiffs can by way of this suit again agitate the same issue and particularly, restraining the defendants from disturbing their possession. So from this point of view I do not find the plaintiff got prima facie case.

17. I am conscious of that the defendants had challenged the plaintiffs' notice of motion on other technical grounds, such as non-joinder of all the Trustees to the suit and mis-joinder of the defendant Nos. 3 to 6. But, again, considering the plaintiffs' failure to show the prima facie case on factual grounds, I do not think that this aspect of technicalities again need to be discussed at this stage and can be decided after fullfledged trial to that effect.

18. At this stage, it will not be out of place to mention here that the learned Counsel for the plaintiffs contended that the defendant No. 1 themselves admit that the plaintiffs trust is in possession and on the basis of this admission only the ad-interim relief came to be passed. But the defendant No. 2 disputed such statement about the possession on a ground that the person who alleged to have made statement was not authorized person. Not only this, he has even taken out Notice of Motion No. 771/2014 for taking appropriate action. But considering

the dispute between the defendants interse, I do not find it safe to consider this admission for deciding the Notice of Motion in question and especially when the documents on record speaks altogether a different thing and particularly, in view of judgment and decree passed in suit No. 3565/1994. Not only this, even the Hon'ble High Court while disposing of the Appeal against the said decree has categorically observed that there is dispute between the defendants and they are trying to settle their claims in the said matter which cannot be done. The observation of the Ld. High Court touching to this finds place in para 16 of its order which runs thus;

“From the submissions of learned Counsel for respondent No. 2 and respondent No. 4, it is clear that there is a dispute between the two partners of respondent No. 2. Whether respondent No. 2 was a partnership firm or a proprietary concern was not an issue in the suit. Admittedly, both the parties are litigating independently by filing the other suit in the Civil Court. As their vested interest are clashed, the are trying to settle their own claims in the present matter which cannot be done. Be that as it may, the sanction order dated 19.12.1988 which is challenged in the suit discloses that the Charity Commissioner has given permission for alienation of the property of the trust in favour of respondent No. 2. Earlier, resolution was passed in the meeting of the managing committee dated 07.10.1986 that the land is to be given to M/s. S. Rajesh & Associates a partnership firm i.e. respondent No. 2. Under such circumstances, when the sanction order is held valid and order of the Charity Commissioner refusing the revocation of the said order is not challenged, the impugned resolution of the managing committee is not challenged, under such circumstances, the finding given by the

trial Court that agreement dated 13.10.1986 cannot be held as illegal, null and void and no order of injunction can be passed cannot be faulted out”.

Thus, in my humble opinion, no weightage at all be given to the alleged admission.

19. Thus, from the discussion made in para supra, it clearly seen that the plaintiffs Trust got no prima facie case. Accordingly, I answer this point in the negative.

**As to Point Nos. 2 & 3:**

20. So far as point of inconvenience and sustaintion of irreparable loss is concerned, since the plaintiffs have got no prima facie case the question of suffering inconvenience and sustaining irreparable loss does not arise. Accordingly, I answer these points.

**As to Point No. 4 :**

21. In view of my findings to the above points and reasons for the same, it clearly seen that the plaintiffs have not made out strong prima facie case for grant of interim relief of injunction. Therefore, in my view, Notice of Motion deserves to be rejected. Accordingly, I answer to this point and proceed to pass order in following terms:

**Order**

1. Notice of Motion No. 501 of 2014 is hereby rejected.
2. Notice of Motion is disposed of accordingly.

**(D.K. Gudadhe)**

Ad-hoc Judge,

City Civil Court, Gr. Bombay.

28.04.2016

Dictated on : 28.04.2016

Transcribed on : 30.04..2016

Signed on : 07.05.2016

“I affirm that the contents of this PDF file Judgment/Order are the same, words to word as per the original Judgment/Order.”

Name of Steno : Mr. S.S.Bathe (Stenographer SG)

Name of Judge : HHJ Shri D.K. Gudadhe (C.R.No.04)

Date of Pronouncement  
of Order : 28.04.2016

Order signed by : 07.05.2016  
the P.O. On

Order uploaded on : 16.05.2016