MHJN020002192024

Spl.C.S.No.123/2024
Dhirendra Vs. Mahemood & ors.

ORDER BELOW EXH. 05
(Passed on 9th August, 2024)

This is an application filed by the plaintiff under Order XXXIX, Rule 1 and 2 of Civil Procedure Code, 1908 to restrain defendants from creating third party interest and also alienating the same to any person in any matter by any one else as also for not causing obstruction to his possession till final disposal of this suit.

Facts of the application in nutshell are as under:-

02. The plaintiff asserted that Gut No.34 adm. 1 H. 82 R and 93 R land Situated at Deogaon, Tq.Badnapur, Dist. Jalna is owned by defendants No.1 and 2 so, there is dispute regarding this property (so, hereinafter is called as suit property for sake of convenient).

03. He further asserted that he entered into contract to purchase the suit property with defendants No.1 and 2 for consideration of Rs.1,08,62,350/-. Accordingly, defendants No.1 and 2 executed notarized agreement-to-sell bearing No. 1079/2021 dt.06.06.2022 by accepting amount of Rs. 49,00,000/- towards sell consideration. When defendant No.3 got the knowledge of this notarized agreement-to-sell, she sent a notice to the plaintiff through her advocate Shri. A.B. Salve on 03/11/2022 by stating to have her share in the suit property. The plaintiff thereafter met defendants No.1 and 2. They assured him that they would convince defendant No.3 and would obtain her signature

on the sale-deed, and on request, defendants no.1 & 2 executed Bharnapavati dt. 16/02/2023 by accepting total amount of Rs. 19,00,000/- towards sell consideration.

04. The plaintiff further asserted that defendants No.1 and 2 sent legal notice through their advocate Shri. Sandip Padol on 24/08/2023 by stating that plaintiff did not perform his part of contract within stipulated period. So, plaintiff replied to the notice on 31/08/2023 by denying all adverse averments made against him. He is always ready & willing to perform his part of contract. But, the defendants No.1 and 2 have again sent reply to the plaintiff's notice on 15/09/2023. Now the property is in plaintiff's possession. Defendants No. 1 and 2 are trying to alienate the suit property. They published paper notice. Plaintiff has fixed the boundaries of suit property. Defendants have obstructed to the plaintiff's possession on 05/01/2024 and also threatened him. With this, plaintiff prayed to allow the application with costs.

05. In reply to the notice-cum-suit summons, defendants No.1 and 2 appeared and filed their say-cum-written statement at (Exh.17) by denying all adverse assertions against them and submitted that they executed agreement-to-sell by accepting amount of Rs.5,00,000/- each towards sell consideration and decided to execute the saledeed till the dt. 30/12/2022. The plaintiff was required to pay remaining amount of sell consideration till dt.30/12/2022 But he failed to perform his part of contract within stipulated period as described in agreement-to-sell. Defendants repeatedly requested the plaintiff to perform his part of contract by making payment of remaining sale consideration. But in-vain. They got suffered irreparable loss for the act of plaintiff & therefore, intimated him about cancellation of contract by sending

notice through their advocate on 06/06/2022. With these & allied grounds, they requested to dismiss the suit along-with present application with costs.

06. In reply to the notice-cum-suit summons, defendant No.3 appeared and refuted all adverse assertions against her by stating that suit property is owned and possessed by defendants No. 1 & 2. Defendant No.3 is not a party to this agreement-to-sell. Plaintiff has made her party without any cause so, he is not entitle to seek any relief against her. With this she prayed to dismiss the application with cost.

07. In view of the pleadings of both parties, material produced on record and arguments advanced at bar and also considering the legal provisions, following points arise for my determination. I have recorded my findings thereon for the reasons given herein below.

	Points	**Findings**
[i]	Whether the plaintiff has made-out prima-facie case?	Yes.
[ii]	Whether balance of convenience tilts in favour of the plaintiff?	Yes.
[iii]	Whether the plaintiff will suffer irreparable loss, if injunction is refused?	Yes.
[iv]	What Order?	Application is allowed to the extent of not to alienate the suit property.

R E A S O N S

AS TO POINT NOS. 1 TO 3:

08. Above all points are inter-linked with each other therefore, in order to avoid repetition of facts and for the sake of convenience, I discuss and decide them together.

09. At the outset, relation amongst defendants are admitted inter-alias. They further admits the fact of executing agreement-to-sell dated 06/06/2022 in the name of plaintiff by defendants No. 1 & 2.

10. The first contention of the plaintiff is that by virtue of agreement-to-sell dated 06/06/2022 & Bharnapavati, he is in possession over suit property on the date of filing suit. After taking possession of suit property, He fixed the boundaries of the suit property. But defendants are causing obstruction to his possession so, request to restrain the them from causing obstruction to his possession. His contention is supported with an affidavit. In support of his contention, he has produced xerox copies of agreement-to-sell dated 06/06/2022 & Bharna pavti dated 16/02/2023. On perusal of both documents, it prima facie reveals that both documents are not registered one. Further more there is not a single recital about the handovering possession of suit property at the hand of plaintiff. Moreover, plaintiff's possession does not prima facie reveal from 7/12 7/12 extract. He has not produced a single document to show his possession over the suit property. These both documents are not helpful to the plaintiff to prove his prima facie possession over suit property. So without prima facie evidence, it cannot be said that by

virtue of agreement-to-sell dated 06/06/2022 and Bharnapavti dated 16/02/2023, plaintiff is in possession over suit property at the time of filing suit & application therefore, he is not entitled to seek the relief in respect of possession.

11. Plaintiff has further asserted that he was ready and willing to perform his part of contract. After executing of agreement-to-sell in his favour, defendant No. 3 sent notice through her advocate by claiming her share in suit property so, he requested the defendants No. 1 & 2 to obtain signature of defendant No. 3 on the sell-deed. But they sent notice by stating the cancellation of their contract so, request to restrain defendants from creating third party interest over suit property. His assertion is supported with an affidavit. In support of his oral assertion, he has produced office copies of notices are on record. On bare reading of recitals of all notices, it is prima facie appeared that there was a contract amongst plaintiff and defendants No. 1 &2 so, the material defence as to whether suit is barred by limitation? and also who were/are ready and willing to perform their part of contract? are a mixed question facts and law. Evidence is essential to appreciate these issues so at this stage only from the avernaments of written statement and suit, application cannot be dismissed at threshold. Contrary, from the averments of written statement (Exh.17), it prima facie reveals that defendants No. 1 & 2 admits the fact of accepting amount of consideration Rs.5,00,000/- each towards contract. It means the right of plaintiff is created and also involved in the suit property. In such case, his right is required to be protected till the final adjudication of the suit. Moreover, by notice dated 15/09/2023 it prima facie seems that defendants No. 1 & 2 are not supposed to execute the sell-deed as

agreed amongst them. This apart, they have not averred that apprehension of the plaintiff regarding alienation are baseless. So I am of the view that apprehension of the plaintiff is prima facie appeared to be genuine and correct. Thus, it would be just and proper to protect the right of plaintiff involved in the suit property till the final adjudication of the suit.

12. Having taken into account submissions and material, I hold that plaintiff has made out such a case to convince the court to come to the conclusion that irreparable injury is going to be caused to him which cannot be properly compensated in damages, if the defendant is not restrained from creating third party interest.

13. Thus, The plaintiff's case has shown well founded on the point of apprehension regarding alienation. Obviously, if defendants are created third party interest certainly, irreparable loss would cause him. He will not enjoy the fruits of the decree in case, he succeeds in the suit. The factors of and balance of convenience and irreparable loss are also in favour of the plaintiff. On the other hand, there would be no hardship to the defendants, if they are restrained from alienating the suit property till conclusion of the suit. In the light of aforesaid discussion, point no. 1 to 3 are answered in affirmative to the extent of not to alienate suit property.

AS TO POINT NO.4:

14. In view of my findings recorded to points 1 to 3, the application Ex.5 deserves to be allowed to the extent of not to alienate suit property. The costs of this application may leave to be considered at

the time of adjudication of the costs of entire litigation. In the conclusion, I pass the following order.

O R D E R

[i] The application [Exhibit-5] is allowed to the extent of not to alienate suit property

[ii] The defendants or any body claiming on their behalf shall temporary restrained from alienating or transferring suit property in any manner by any one else till final disposal of suit.

[iii] Costs in main cause.

Digitally signed by SUNITA PRABHAKARRAO PAITHANKAR
Date: 2024.08.14 11:46:50 +0530

Date : 09.08.2024

(Sunita P. Paithankar)
3rd Jt. Civil Judge S.D., Jalna

CERTIFICATE

I affirm that the contents of this P.D.F. file Order are same word to word, as per the original Order.

Name of the Stenographer : S.S.Khandare

Court Name : 3rd nd Jt.CJSD, Jalna.

Order uploaded on : 12.08.2024

Sd/-
Steno