

1 Spl. Civil Suit No. 125/2021.

Savji Dharmashi Chaudhary and others
Vs. Kamlesh Bhagwatilal Kothari and
others.

CNR No. MHRG-04-001430-2021.

ORDER BELOW EXH. 05

This is an application filed by plaintiffs for temporary injunction to direct defendant No. 01 to vacate and handover peaceful possession of the suit property i.e. Apartment No. F/12-02, Sector 4 E/A, Kalamboli, Navi Mumbai, to the plaintiffs immediately.

02) In nutshell the case of plaintiffs are that, the defendant No. 02 was the original allottee/purchaser of the suit property from CIDCO Ltd. under an agreement for sale of apartment dated 29/09/1997 and deed of apartment was made on 05/10/2017. The defendant No. 02 expressed his willingness to sell the suit property to the plaintiffs and accordingly, in the month of September, 2017, the plaintiffs finalized to purchase the suit property. However, the defendant No. 01 was then illegally occupying the suit property. Defendant No. 01 assured to vacate and handover peaceful possession of suit property within 10 days, but, in vain. On 06/10/2017, plaintiffs acquired and purchased the suit property from defendant No. 02 by obtaining no objection certification from CIDCO Ltd. Thereafter, they visited the suit property and called upon the defendant No. 01 to vacate and handover the peaceful possession of the suit property and also issued legal

notices to that effect, but, in vain. Hence, the application.

03) Defendant No. 01 has resisted the application by filing his say at Exh. 22. In brief, according to him, in the year 2017, he has filed a suit bearing R.C.S.No. 320/2017 against defendant No. 02 in respect of the suit property. The said suit is pending. But, the defendant No. 02 has willfully avoided to remain present in the said suit. On 22/10/2020 defendant No. 02 has appeared in the said suit and filed his written statement. On going through the documents filed in the said suit bearing R.C.S.No. 317/2020, he came to know that, the defendant No. 02 has sold out the suit property in favour of defendant No. 01 by deceiving the plaintiffs. The defendant No. 01 and 02 added the present plaintiffs as defendant No. 02 and 03 in the said proceedings i.e. R.C.S.No. 320/2017. The plaintiffs ought to have visited the suit property prior to entering any transaction. But, the plaintiffs did not visit the suit property and did not verify true facts of the suit property and entered into sale transaction illegally with the defendant No. 02. Defendant No. 01 is in possession over the suit property since 2005. Hence, it is prayed to reject the application.

04) Upon the contentions mentioned in the application and say, the following points arise for determination, to which I have recorded my findings on it with reasons mentioned in the later part of the order.

POINTS

FINDINGS.

- | | | |
|----|---|---------------------|
| 01 | Whether the plaintiffs have prima facie case? | In the negative. |
| 02 | Whether balance of convenience lies in favour of plaintiffs ? | In the negative. |
| 03 | Whether the plaintiffs will suffer irreparable loss? | In the negative. |
| 04 | What order ? | As per final order. |

REASONS

AS TO POINT NOS. 01 TO 03.

05) The plaintiffs and defendant No. 01 have filed some documents in the case which will be discussed later on.

06) The learned counsel of the plaintiffs argued that, deed of apartment was executed in between CIDCO and defendant No. 02 of the suit property on 29/09/1987. The CIDCO has given allotment letter on 06/10/2017. The possession letter of the suit property in favour of defendant No. 02 is of dated 29/09/1987. In the year 1987, the document was not taken place. In the year 2017, the said document has been taken place in favour of defendant No. 02. Conveyance deed in favour of plaintiffs by defendant No. 02 has been taken place on 06/10/2017. The defendant No. 02 was a Secretary of the Society and the keys of the suit property was with him. The plaintiffs have made several requests and also issued legal notice

to the defendant No. 02 to hand over possession of the suit property, but, in vain. At present plaintiffs are residing on rent. Possession of the suit property is to be handed over to the plaintiffs. The defendant No. 01 has not filed any document showing that, purchased the suit property for Rs. 03,00,000/-. There is no agreement and N.O.C. of CIDCO to that effect. Hence, it is prayed to allow the application.

07) The learned counsel of the defendant No. 01 has filed written arguments at Exh. 30 and also argued that, the say is filed at Exh. 22. In the year 2005, the defendant No. 01 has purchased the suit property from defendant No. 02. But, in good faith no sale deed is taken place. Defendant No. 01 has issued the notice to the defendant No. 02 for executing the sale deed of the suit property. But, he did not execute sale deed of the suit property. Therefore, defendant No. 01 has filed suit bearing R.C.S.No. 320/2017. Defendant No. 02 did not make complaint regarding possession of suit property is with third party since 2005 to 2017. The defendant No. 01 is in possession over the suit property. Hence, it is prayed to reject the application.

08) On perusal of the plaint it appears that, the plaintiffs prayed for declaration of ownership of the suit property and also prayed for declaring that, the defendant No. 01 is in wrongful possession of the suit property and further prayed to direct the defendant No. 01 to remove himself and handover peaceful possession of the suit property to the

plaintiffs. From the contention of the plaint, it appears that, according to plaintiffs, defendant No. 01 is in possession over the suit property. But, according to defendant No. 01, he has purchased the suit property from defendant No. 02 in the year 2005. The defendant No. 01 has filed Civil Suit bearing R.C.S.No. 320/2017 against the present defendant No. 02 and plaintiffs.

09) The learned counsel of the plaintiffs has submitted that, the defendant No. 01 was the Secretary of the Society and he had possessed the keys of the suit property and the possession of the suit property by the defendant No. 01 is illegal. It is settled principle that, at the time of deciding temporary injunction, possession of the suit property at the time of filing of the suit, is only to be considered and nature of said possession is not required to be seen. As stated above, according to the plaintiffs, at the time of filing of the suit, the defendant No. 01 is in possession over the suit property. Whether, the possession of the suit property by the defendant No. 01 is legal or not ? is a triable issue. Whether, the plaintiffs are residing in the another premises and the defendant No. 01 has another premises available for residence, are not grounds for consideration because there is no transaction of tenant and landlord.

10) It is material to mention that, in the year 2017, the defendant No. 01 has filed civil suit bearing R.C.S. No. 320/2017 against the defendant No. 02 and the plaintiffs. The

present suit is filed after lapse of more than three years. So far as non filing of any documents of agreement by defendant No. 01 is concerned, burden lies on defendant No. 01 to prove his case i.e. R.C.S.No. 320/2017. For that count, possession of defendant No. 01 over the suit property cannot be taken away or dispossessed, without adducing any evidence to that effect.

11) The learned counsel of the plaintiffs have placed reliance upon the decision of Hon'ble Apex Court, in case of **Deoraj Vs. State of Maharashtra and others, reported in (2004)4 Supreme Court Cases, 697**. It is observed by their Lordships that, "an order of interim relief may or may not be reasoned one but the factors of prima facie case, irreparable injury and balance of convenience do work at the back of the mind of one to passes an order of interim nature. Ordinarily, the court is inclined to maintain status quo as obtaining on the date of commencement of the proceeding. However, there are few cases which called for the Courts leaning not in favour of maintaining the status quo and still lesser in percentage are the cases when an order tantamounting to a mandamus is required to be issued even at an interim stage. There are matters of significance and of moment posing themselves at the moment of truth. Such, cases do cause dilemma and put the wits of any judge to test".

12) As discussed above, the defendant No. 01 is in possession over the suit property at the time of filing of the suit. The defendant No. 01 has filed civil suit bearing R.C.S.No.

320/2017 against the plaintiffs in respect of the suit property and the same is pending. The plaintiffs have no prima facie case. Balance of convenience does not lie in their favour. No irreparable loss will be caused to them, if the injunction is not granted. Hence, I answer Point Nos. 01 to 03 in the negative. The plaintiffs are not entitled for temporary injunction as prayed. The application is liable to be rejected. In the result, I proceed to pass the following order :

ORDER

01 Application Exh. 05 is hereby rejected.

02 cost in cause.

03 Order in open Court.

Panvel.
Dt. 22-07-2022

(A.R.Gunnal)
Civil Judge, Sr. Dn., Panvel.