

Spl.C.S.No.76/2018
Hiravati vs Jagannath & Ors.

ORDER BELOW EXH.5.

01] The plaintiffs have claimed the Temporary Injunction restraining defendants from causing any sort of interference in their lawful possession over the suit property and creating third party interest therein till disposal of the main suit.

02] In short, it is the case of plaintiffs that the suit property as described in plaint para No. 1 was originally allotted to defendant No. 1 from the CIDCO Authority on certain terms and conditions of lease. The plot was under the Ajinkya Tara Co-operative Housing Society (for short, 'the Society'). By that time, the CIDCO has already prepared the construction plan. After the allotment, defendant No. 1 made construction over the plot in accordance with the sanctioned plan way back in the year 1996. The Society also did not take objection for the construction.

03] In the year 2007, defendant No. 1 was in financial crisis and thus he has decided to sell out the suit property. As such, he appointed one Madhukarrao Prabhakar Borkar as his Special Power of Attorney Holder for dealing with the suit property by executing Special Power of Attorney dated 16/05/1997. The said Power of Attorney Holder then

approached the plaintiffs and put forth such proposal for transferring the suit property for total consideration of Rs.6,00,000/-. The plaintiffs also accepted the proposal. Resultantly, one agreement of sale coupled with the General Power of Attorney were effected particularly on 10/08/2007 between the Power of Attorney Holder and the plaintiffs. At that time, the plaintiffs have paid off entire consideration to the Special Power of Attorney as fixed in the agreement. The Special Power of Attorney Holder also put the plaintiffs in possession of the suit property consequent to payment of entire consideration amount. Since then, the plaintiffs have been enjoying the suit property peacefully and without anyone's interference till accrual of the cause of action to the suit.

04] After execution of the Agreement, the plaintiffs have time and again called upon defendant No. 1 and his Special Power of Attorney to perform their part of the agreement. However, they avoided the same for one or the other pretext. Looking at the very conduct of defendant no. 1 and his Special Power of Attorney, the plaintiffs clearly called upon them to perform their part of the contract particularly in the month of October 2017. At that time only, the defendant No. 1 and his Special Power of Attorney for the first time flatly refused to perform their part of contract and further expressed their intention to alienate the suit property in favor of third person.

Consequent to that, the plaintiffs have immediately registered their objection in the office of the CIDCO Authority - defendant Nos. 2 to 4 thereby requesting the authority not to deal with the suit plot so long as the contractual right of plaintiff is finally determined. Looking at the activities of defendant no. 1 and his power of attorney, the great apprehension created in the minds of plaintiffs that defendant No. 1 will create third party interest in the suit property thereby defrauding the plaintiff in respect of his contractual right as well as the disturbing the peaceful possession of plaintiff over the suit property which has been peaceably continuing since the year 2007. Thus, the plaintiffs had left no other option than to file the suit thereby seeking the specific performance of contract. The plaintiffs last prayed for grant of the Temporary Injunction as claimed for.

05] Defendant No. 1 has resisted the application by filing his Reply dated 26/04/2018. Although he has denied the claim, but he has not denied the initial fact of allotment of the suit property in his favour by the CIDCO Authority and then the construction made by him during the year 1996. However, he has specifically denied that he has ever appointed Madhukarraso Prabhakar Borkar as his Special Power of Attorney particularly on 16/05/1997 to deal with the suit property. As per the case of defendant that he could not pay proper attention towards the suit property owing to his residence at different place and also

for his own personal reasons. He could not even pay the necessary maintenance and due charges of the Ajinkya Tara Co-operative Housing Society. Resultantly, one recovery proceedings was initiated by the Society for recovery of due amounts lying upon the suit property. Not only this, the Certificate under section 101 of the Maharashtra Co-operative Societies Act was also issued against him. The matter does not rest here, but the suit property also attached in pursuance of the recovery proceeding. Thus, the suit property is now under attachment of Recovery Officer. As such, the entire case of plaintiffs is false and concocted one just to defraud him. Moreover, the claim of plaintiff is also hopelessly barred looking at the day of the agreement and filing of the suit. Defendant No. 1 lastly prayed for rejection of the application.

06] Defendant Nos. 2 to 4 - CIDCO Authority have resisted the application by filing their Reply (Exh. 23). They have specifically denied the claim against them on the ground that they are not parties to the suit agreement itself and thus, there is no privity of contract between them. They are unnecessarily made parties to the suit. Besides, the proposed transaction is also not permitted unless and until express permission is obtained from it. They lastly prayed for rejection of the application with and costs and compensatory costs of Rs.50,000/-.

07] Heard both the sides and gone through the documents on record. The points arise for my determination along with my findings thereon are as under :

<u>Sr. No.</u>	<u>ISSUES</u>	<u>Findings</u>
1	Whether the plaintiff has prima facie case ?	Yes, but only against defendant no.1.
2	Whether the balance of convenience tilts in her favour ?	Yes, but only against defendant no.1.
3	Whether the irreparable loss will be caused to her if the Temporary Injunction is refused ?	Yes, but only against defendant no.1.
4	What order ?	The application is partly allowed.

REASONS

AS TO POINT NO. 1 :

08] Admittedly, the suit plot No. 11 lying in Ajinkya Tara Co-operative Housing Society was originally owned and possessed by the CIDCO Authority. The CIDCO Authority allotted the same to defendant No. 1 for his personal use and enjoyment. The construction was also carried out in the year 1996 as per the

then sanctioned plans.

09] The plaintiffs have further come with the case that defendant No. 1 through his Special Power of Attorney Holder Madhukarrao Prabhakar Borkar has entered into an agreement for sale in respect of the suit property particularly on 10/08/2007 and put the plaintiffs in possession of the suit property after receiving entire consideration amount of Rs.6,00,000/- as fixed in the suit agreement.

10] In support of the aforesaid contention, the plaintiffs have placed on record the copy of agreement coupled with the General Power of Attorney of dated 10/08/2007 respectively and also the Notarized Special Power of Attorney dated 16/05/1997 lying in favour of Madhukarrao Prabhakar Borkar. Both the documents support the case of plaintiffs on the point of execution of the agreement. As the entire consideration seems to have paid under the aforesaid documents, the possibility of further putting the plaintiff into possession of the suit property cannot be ruled out as averred by plaintiff taking into consideration general circumstances appeared in such type of transaction. Even the Letter dated 21/05/2013 issued by the Joint Registrar, Co-operative Society supports the case of plaintiffs on the point of her physical possession wherein the specific directions were given to Ajinkya Tara Co-operative

Housing Society to transfer the suit plot in favor of plaintiff after accepting the necessary dues and charges lying as against the suit property. As such, the case of plaintiff seems to be prima facie one in the light of documents relied by him and the circumstances involved in the case in the hand.

11] As against the above, defendant No. 1 has raised the objection that the Special Power of Attorney dated 16/05/1997 is completely forged and fraudulent document and he never executed the same in favour of Madhukarrao Prabhakar Borkar. He further alleged that the name of Madhukarrao Prabhakar Borkar seems to have subsequently inserted as the same is not printed form unlike the rest contents.

12] True that the name of Madhukarrao Prabhakar Borkar prima facie seems to have inserted subsequently in the Special Power of Attorney by handwriting, but defendant No. 1 has also not specified whose name should have been appeared in that place. He is completely silent on that point. Moreover, the Special Power of Attorney contains signatures of defendant No. 1 on its every page thereby leaving no further scope for taking doubt about its genuineness at least this preliminary stage. If this is so, the alleged case of fraud and forgery cannot be taken into consideration at least this stage. Even otherwise, the said dispute being the part of trial will have to be at that time only. At this

juncture, the allegations made in that regard will have to be discarded.

13] Defendant No. 1 has further denied the physical possession of plaintiffs over the suit property only on the ground that the suit property is under attachment of the Recovery Officer in in pursuance of the Recovery Certificate issued under Section 101 of the Maharashtra Co-operative Societies Act for due amount of Rs. 4,59,890/- as against the suit property. True that the Recovery Certificate dated 07/10/2011 seems to have issued by the Joint Registrar, Co-operative Society thereby showing an amount of Rs. 4,59,890/- was then due and recoverable as against the suit property. Not only this, the Notice of Attachment dated 01/05/2012 also seems to have issued thereby directing defendant No. 1 to remain present in his house on 10/05/2012 for carrying out further process or executing the Warrant.

14] Although the suit property seems to be subject matter of the Recovery Proceedings in the past as claimed by defendant No. 1, there is no further document showing that the suit property is actual under attachment as alleged. On the contrary, the Letter dated 21/05/2013 issued by the Jt. Registrar, Co-operative Societies (CIDCO), Navi Mumbai shows

that the Recovery Certificate Holder has directed to accept the due amount as against the suit property from the plaintiff. This aspect also shows that the suit property is not under attachment though alleged. Moreover, the plaintiffs have come with the case that they have been enjoying the possession of the suit property since 2007. The defendant could not rebut the said statement by any independent material as required. As such, the very contention will have to be discarded as well.

15] Even for the sake of argument, it is presumed that the suit property is under attachment of the Society, the very dispute will be between the Society and the actual occupier (herein the plaintiffs) to which defendant No. 1 has now no concern. Since it is the case of defendant No. 1 himself that he is not in actual possession of the suit property owing to the attachment proceeding, he has no locus-standi even to deny physical possession of either to plaintiff or anybody else. Thus, the objection raised by defendant No. 1 as regards to the legal and physical possession of plaintiff over the suit property cannot be upheld at least this stage. It will have to be discarded. Resultantly, the case of plaintiffs that they are in physical possession of suit property since long in pursuance of the contractual right seems to be more probable than the case of defendant No. 1.

16] Defendant No. 1 has further raised objection that the Special Power of Attorney is not duly registered under the Registration Act and it is just Notarized document. The defendant has further raised objection that the Special Power of Attorney has allegedly put the plaintiff in possession of suit property. The very act would amount transfer of interest in the suit property within the provisions of the Transfer of Properties Act and the same is effected without there being any registered instrument under the provisions of the Registration Act. Thus, the attorney will not have any right to deal with the suit property only on the basis of unregistered Special Power of Attorney.

17] The very contention though apparently sounds good having regard to the nature of transfer of right, title or interest in immovable property which is to be done by a registered instrument only, but having regard to the facts and circumstances in the case in hand, the same cannot be accepted at the end. True that the clause of delivery of possession is found place in the agreement particularly in para No. 3 of the agreement on happening of certain events. However, the act of putting the plaintiff in possession of the suit property seems to be carried out by the parties to the agreement as their own convenience and not strictly in terms of the agreement what can be gathered from the facts and circumstances in hand. Even the

conduct of defendant remaining silent till this date despite of getting knowledge about physical possession of plaintiff over the suit property also suggests different story than asserted by him. On the contrary, it impliedly suggests that the defendant himself permitted the plaintiff to occupy the suit property through his power of attorney in pursuance of the contract. As such, the contention of defendant in that respect cannot be regarded. The same cannot be considered at least this stage having regard to surviving contractual right of plaintiff. As such, the act of executing agreement on the basis of unregistered Special Power of Attorney dated 16/05/1997 cannot be faulted with at least this stage.

18] Defendant No. 1 has also raised objection as regards to the law of limitation on the ground that the agreement was executed way back in the year 2007 and the suit is filed in the year 2018 after more than 11 years. However, the limitation for seeking the Specific Performance of Contract would only start from the date of refusal from other side as found in Article 54 of the Limitation Act. In the case in hand, it is specific averments of plaintiffs that defendant No. 1 and his attorney has refused to perform their part of contract for the first time in the month of October 2017. At this juncture, there is nothing on record which would prima facie show that the defendant has expressly refused to perform his part of contract prior to the period as averred by

plaintiff. As such, the proper opportunity will have to be given to the plaintiff to substantiate his case even on the point of limitation by adducing evidence or otherwise. The limitation point involved in the matter being mixed question of law and fact will have to be tried. Thus, the very objection will have to be discarded at this juncture.

19] As defendant No. 1 has clearly denied the surviving contractual rights lying in favor of plaintiffs as well as their possession over the suit property, the very act of defendant No. 1 is sufficient to support the case of plaintiffs on the point of reasonable apprehension expressed in respect of the invasion upon their rights pertaining to the contract as well as the possession. Consequently, I hold that the plaintiffs have established prima facie case as against defendant no. 1 which requires to be tried.

20] The plaintiffs have further claimed that defendant No. 2 to 4 being the original owners and controlling authority of the suit plot have no right or authority to deal with the suit property unless and until the fate of the contractual right is finally determined by the court of law. Although the plaintiffs have claimed the relief against defendants, they are not parties to the contract. As such, they are naturally not bound by any of the rights or liabilities arising therefrom. No doubt, the plaintiffs

have given a statutory notice under Section 159-A of the M.R.T.P. Act to the CIDCO Authority but the same is restricted only to extent of execution of the suit agreement to which the CIDCO was not the party. Moreover, the plaintiffs have also not pointed out any illegality in discharge of their official duties. Thus, I hold that the plaintiffs have failed to establish prima facie case against them. Consequently, I hold that plaintiffs have established the prima facie case only against defendant No. 1 and not against all defendants. Hence, I answer point no. 1 accordingly.

AS TO POINT NO. 2 & 3 :

21] The plaintiffs have established their prima facie case in respect of their contractual right and the possession over the suit property. Thus, the balance of convenience lies in their favour. As defendant No. 1, as stated above, has clearly denied the surviving contractual rights lying in favor of plaintiffs as well as their possession over the suit property, the very act of defendant No. 1 is sufficient to support the case of plaintiffs on the point of reasonable apprehension expressed in respect of the invasion upon their rights pertaining to the contract as well as the possession. In these circumstances, if the Temporary Injunction is not granted and the defendant succeeded in his illegal activities with the assistance of third persons, the possibilities of losing possession from plaintiffs succumbing to

the force of defendant and also creation of third party interest in the suit property cannot be ruled out. In that event, they will suffer irreparable loss which cannot be compensated in terms of money. Hence, I answer point Nos. 2 and 3 in the affirmative.

AS TO POINT NO. 4 :

22] As the plaintiffs have established all three essential ingredients required for grant of equitable relief, the temporary injunction will have to be issued only as against defendant no. 1 by partly allowing the application with costs. Hence, in answer to point no. 4, I pass the following order.

ORDER

- 1] The application (Exh. 5) is partly allowed with costs.
- 2] Defendant No. 1, his agent, servant or any other person claiming through him are restrained from interfering in peaceful possession of plaintiffs over the suit property and also creating third party interest therein till the disposal of main suit.

Panvel.
Dt.06/07/2019

(U. L. Pathak)
3rd Jt. Civil Judge, Sr. Dn., Panvel.
06/07/2019