

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.1049 OF 2014
IN
FIRST APPEAL (ST) NO.9179 OF 2008**

Smt.Shantibai Nathu Bhogade .. Applicant

vs.

Rashid Haji Allaudin .. Respondent

Mr.Kalpesh Joshi for the applicant

Mr.Navin Parekh with Ms.Hetal Patel with Ms.Shakti Parwaney for the respondent

**CORAM : K.K.TATED, J.
DATED : 05/03/2015**

PC:

1 Heard the learned counsel for the parties.

2 This application is preferred by defendant for restoration of Civil Application No.1226 of 2011 and Appeal bearing (ST). No.9179 of 2008 which was dismissed in view of conditional order dated 7.4.2011 passed by this court (Coram: A.S.Oka, J.) and for condonation of 1 year 343 days delay in preferring the present Civil Application.

3 For the sake of convenience, the nomenclature of the parties as is stated in the suit will be referred to hereinafter as the

appellant/original defendant and respondent/original plaintiff.

Few facts of the matter are as under:

4 Plaintiff filed Short Cause Suit No.7860 of 1993 in the Bombay City Civil Court at Bombay for declaration that the defendant is trespasser on the piece of land admeasuring 625 sq.ft. being part of the plot of land bearing survey No.41 hissa no.3 and corresponding C.T.S.No.51 of village Ambivali, situated at Amboli, Andheri (West), Bombay - 58. That suit was decreed by the Trial Court on 8.9.2006. Thereafter, the plaintiff filed Execution Application No.616 of 2006. In that Execution Application, the trial court issued writ of possession under Order 21 Rule 35 of the Code of Civil Procedure, 1908 dated 12.03.2008. Pursuant to the said writ of possession, office of the Sheriff wrote a letter to the Sr. Inspector of Police, Oshiwara Police Station, Andheri on 02.04.2008 requesting to render necessary police help to them for executing writ of possession. Pursuant to the said writ of possession, the bailiff partly executed the decree dated 08.09.2006 by handing over vacant and peaceful possession of the suit premises to the plaintiff. The bailiff prepared the report dated 05.04.2008. The said report reads thus:

“Pursuant to the writ of possession under order XVI rule 35 of C.P.C. issued herein on 12th March 2008 I have attended on 05/04/2008 at 2.30 p.m. along with the Plaintiff & Police staff of Oshiwara Police station, consisting PI. Shri Azad Chand Sayyad, Police Naik (belt No.26049) P.C. (32525) and one W.P.C. (belt No.752) at suit premises situated at admeasuring 652 Sq.ft. being the part of the plot of land bearing survey No.41 Hissa

No.3, and corresponding C.T.S. No.51 of village Amboli, Andheri (W), Mumbai - 400 058.

Defendant and family members were present there. I have disclosed my identity and purpose of visit & tendered her copy of writ of possession. Defendant have refused to acknowledged for the same.

Defendant willingly removed their belonging from suit premises and kept their all belongings in their safe custody & vacant quiet & peaceful possession of the suit structure was handed over to the plaintiff.

Plaintiff put his locks on the Suit premises (Lock no.1) 096228, 2) 096217, 3) 096219, 4) 096224, 5) 096222 make Alba)

Defendant requested to Plaintiff not demolish structure till Monday 07/04/2008 & Plaintiff also agreed for the same and assured to Defendant that he will not demolish the Suit Structure and with not put fencing till 07/04/2008.”

5 At the time of executing the warrant of possession, the plaintiff took several photographs showing that the defendant on their own removed their belongings and handed over possession. The photographs also show that the plaintiff put their lock on rooms after taking vacant possession. Thereafter, the defendant applied for certified copy of judgment and decree on 08.04.2008 and filed First Appeal in this court. In the First Appeal, the defendant preferred Civil Application No.2073 of 2008 for condonation of 548 days delay in filing First Appeal. The defendant also preferred Civil Application No.2074 of 2008 for stay of the execution and implementation of the decree dated 08.09.2006 passed by the learned Judge of the Bombay City Civil Court, Mumbai in S.C.Suit No.7860 of 1993. The defendant

moved Civil Application No.2074 of 2008 before this court on 9.4.2008 and at that time, this court (Coram: Anoop V. Mohta, J.) passed following order:

“Considering the apprehension as raised and as the Appellant is in possession of the suit premises since many years, the effect and operation of the judgment is stayed. If the Appellant is failed to serve the Respondent, the stay will be vacated automatically without reference to Court.”

6 Both the Civil Applications for condonation of delay and stay stand dismissed on 29.11.2010 as no one appeared on behalf of the defendant. Thereafter, the defendant preferred Civil Application No.1226 of 2011 for restoration on 14.12.2010. That application was stands dismissed in view of conditional order dated 07.04.2011 passed by this court (Coram: A.S.Oka, J.). Thereafter, defendant preferred Civil Application No.1049 of 2014 on 03.04.2013 for recalling the order dated 07.04.2011 and restoration of Civil Application No.1226 of 2011 and First Appeal (ST) 9179 of 2008 and for condonation of delay in preferring the Civil Application.

7 The learned counsel for the defendant submits that the defendant is in possession of the suit property as on today also. He submits that because of mistake on the part of the earlier advocate Civil Application No.1226 of 2011 stands dismissed. He submits that as per order dated 07.04.2011 passed by this court in Civil Application No.1226 of 2011, they filed affidavit of service in the Registry but there was delay of two days in filing the same. He submits that thereafter defendant contacted

her earlier advocate on several occasions. That time her advocate had informed her that matter is pending and will come for hearing in due course. He further submits that on the basis of information given by her advocate she has not made any enquiry in the Registry of this court.

8 The learned counsel for the defendant on 9.4.2011 when the defendant contacted her advocate for the progress in the present matter, at that time her advocate informed her that office has not given any CMIS date. He further informed the defendant that matter will come for hearing in due course. He further submits that her advocate learnt from the internet that in this matter the returnable date was shown as 15.6.2011 under the caption 'Action.' At that time, her advocate made enquiry and learnt that the Civil Application No.1226 of 2011 and First Appeal (ST) No.9179 of 2008 stand dismissed in view of conditional order passed by this court on 07.04.2011.

9 The learned counsel for the defendant submits that the defendant was not keeping well and therefore there was delay in preferring the present Civil Application. He submits that the defendant has good chance of success in the present matter. He submits that if delay is not condoned in preferring the present Civil Application, irreparable loss and injury will be caused to the applicant. He further submits that as the defendant is in possession of the suit premises, in the interest of Justice, this Hon'ble Court be pleased to condone the delay in preferring the present Civil Application and restore the Civil Application No.1226 of 2011 and First Appeal (ST). No.9179 of 2008 for hearing on its own merits.

10 On the other hand, the learned counsel for the plaintiff vehemently opposed the present Civil Application. He submits that the defendant made several incorrect statements in the present proceeding since beginning. He submits that the decree dated 8.9.2006 was partly executed through the bailiff on 05.04.2008 and took possession of the suit property. He submits that at the time of taking possession they took photographs showing that the defendant on her own handed over vacant and peaceful possession of the suit premises. The learned counsel for the plaintiff relies on 13 photographs which are on page 44 to 56 taken at the time of execution. Description of the photographs are as under:

<u>Exhibit No.</u>	<u>Photographs No.</u>	<u>Description</u>
4	1	The photograph shows the Appellant in sari. Her son is on her left side. The Police Inspector Mr.Sayyad and 2 Police Constables are also seen. This was before the articles were removed. The Appellant was informed about the Writ of Possession.
5	2	The bailiff Mr.Deshmukh is in the foreground, holding papers. The Appellant is in his front wearing a sari. The Police Inspector and 3 Police Constables can also be seen. The Appellant is explained the purpose of the visit of the bailiff and about the Writ of Possession.
6	3	The neighbours are helping in removing the articles.
7	4	The neighbours are helping in removing the articles.
8	5	The neighbours are helping in removing the articles.
9	6	The articles which are removed from the premises are being arranged properly. One

- person can be seen bringing the gas cylinder. Others have the clothes in their hands. The refrigerator, the ceiling fan and other miscellaneous articles can be seen.
- 10 7 The household articles are taken out with the help of the members of the family and the neighbours and arranged in the compound outside. Everything was carried out peacefully. The kitchen stand, gas cylinder, refrigerator, part of ceiling fan, household utensils and other household goods can be seen arranged in a neat way.
- 11 8 After removing all the articles and household goods, the Appellant with the members of her family have gathered together.
- 12 9 The Appellant is standing next to the iron cot, kitchenware, primus stove, foodgrain containers etc.
- 13 10 One of the books put on one of the doors of the subject premises by the Respondent after the bailiff from the office of the Sheriff handed over possession of the vacant premises to the Respondent.
- 14 11 Second lock put on one of the doors of the subject premises by the Respondent after the bailiff from the office of the Sheriff handed over possession of the vacant premises to the Respondent.
- 15 12 Third lock put on one of the subject premises by the Respondent after the bailiff from the office of the Sheriff handed over possession of the vacant premises to the Respondent.
- 16 13 Fourth lock put on one of the doors of the subject premises by the Respondent after the bailiff from the office of the Sheriff handed over possession of the vacant premises to the Respondent.

11 The learned counsel for the plaintiff submits that though the defendant handed over vacant and peaceful possession of the suit

premises to the plaintiff on 05.04.2008, the defendant made a false statement before this court at the time of applying for interim protection on 9.4.2008. He submits that this court (Coram: Anoop V. Mohta, J.) in order dated 9.4.2008 specifically recorded that the defendant is in possession of the suit premises for several years and if ad interim protection is not granted irreparable loss and injury will be caused to them. He pointed out that neither in Civil Application No.2074 of 2008 nor in any other proceeding defendant has disclosed the effect of execution of the decree. On 09.04.2008 by suppressing the effect of the execution of decree they obtained the order from this court of status quo. He submits that person who makes a false statement are not entitled any equitable relief from the court of law.

12 The learned counsel for the plaintiff further submits that in the present Civil Application in paragraph 8 the entire blame is placed on her earlier advocate. Neither the name of the said advocate is disclosed by the defendant nor any affidavit is filed in support of her grounds for restoration, in the present Civil Application.

13 The learned counsel for plaintiff submits that in paragraph 8 of the Civil Application defendant stated that she was not keeping well for more than one year and therefore, she was unable to contact her advocate for taking appropriate steps. He further submits that defendant has not placed on record any documentary proof like doctors certificate to show that she was not keeping well for more than one year. Hence, the defendant is not entitled to any relief in the present Civil Application. In support of this contention, the learned counsel for

the plaintiff relies on the judgment in the matter of Ramdularidevi Vishwanath Dubey and another vs. Ramtej Shiridutt Mishra (1989 Mah L.J. 930). He particularly relies on paragraph 6 and 7 of that judgment. Relevant portion of paragraph 6 and 7 is as under:

“The principle is this : If the Court had been made aware of the real facts, the Court would not have granted such an ad interim injunction. If, therefore, by virtue of such an ad interim injunction, the party, who was not in possession of the premises, gains any advantage, it becomes the duty of the Court to see that it is undone. *Actus Curiae Neminem Gravabit* : An Act of the Court shall prejudice no man. *Nullus Commodum Capere Potest De Injuria Sua Propria* : No man can take advantage of his own wrong. If the order has been obtained by suppressing material facts, it is nothing but fraud on the Court itself. The proper thing in all such cases would be that the Court should pass an order for restoration of the possession forthwith.

In the present case the order of injunction was used as a shield to protect possession obtained by force, after securing an ex parte order of injunction from the Court. In all such circumstances, where the order of injunction is used as a weapon to oust the other party who would not have been so Ordered to be ousted if he had been heard, or where the order of injunction is used as a shield to retain forcible possession obtained just before or after filing the suit, good sense and justice demand that the mischief is undone and status quo ante is restored.”

14 The learned counsel for the plaintiff also relies on the judgment of this court in the matter of Harishchandra Narayan Maurya vs. Rajendraprasad Dargahi Varma (1997(3) Mh. L.J. 437. He relies on paragraph 11 of this judgment. Relevant portion of paragraph 11 reads

thus:

“The Court is not powerless and may pass appropriate order of temporary injunction at the instance of defendant in the interest of justice. The Court cannot be mute and silent spectator to the illegal act and exercise of force by the plaintiff in dispossessing the defendant, in the garb of Court's order of ad-interim injunction and once the Court finds that the plaintiff has taken the law in his own hand and by abusing the process of Court has sought to dispossess the defendant, the Court may not only pass an appropriate order for restoration but also it becomes bounden duty of the Court to ensure that the defendant who has been dispossessed by force is restored back his possession.”

15 On the basis of these submissions and the law declared by this court, the learned counsel for the plaintiff submits that defendant failed and neglected to make out any case on equity. to allow the present Civil Application and same be dismissed with costs.

16 I have heard both the sides at length. It is to be noted that in the present proceeding the Trial Court passed decree on 08.09.2006 for possession of the suit premises. That decree was partly executed by the plaintiff after following due process of law on 05.04.2008. These facts are very clear from the report submitted by the bailiff, letter written by the office of the Sheriff to the police authority and the photographs placed on record by the plaintiff in their affidavit in reply on page 44 to 56. The defendant filed the present First Appeal after 548 days in this court. The defendant preferred Civil Application No.2077 of 2008 for condonation of delay. The defendant also preferred Civil Application

No.2074 of 2008 for stay. The defendant without disclosing the facts which occurred on 05.04.2008 that the defendant on their own handed over vacant and peaceful possession to the plaintiff moved before this court and obtained status quo order. Apart from that, it is to be noted that this court (Coram: D.B.Bhosale, J. as he then was) passed order on 18.10.2010 in Civil Application No.2073 of 2008 directing defendant to file additional affidavit placing on record material to show how defendant obtained possession of the suit property. Thereafter, the Civil Application No.2073 of 2008 appeared before the court for hearing on 29.11.2010. At that time, no one remained present on behalf of the defendant and hence, the Civil Application as well as First Appeal was dismissed for non-prosecution. Thereafter, the defendant preferred Civil Application No.1226 of 2011 on 14.12.2010 for restoration of earlier Civil Application for delay as well as First Appeal. That Civil Application was also dismissed in view of conditional order dated 07.04.2011.

17 The present Civil Application is filed by the defendant on 03.04.2013 i.e. after one year 343 days delay. The explanation given by the defendant in Civil Application and particularly in paragraph 8 to 11 do not disclose sufficient cause for condonation of delay. Apart from that, the defendant did not disclose the true facts of the matter for obtaining the order of status quo.

18 The learned counsel for the defendant failed to disclose any documentary evidence to show how they obtained the possession of the suit property after 05.04.2008. The person who makes incorrect statement and or false statement on solemn affirmation is not entitled

to any equitable relief from the court. To that effect the authorities cited by the learned counsel for the plaintiff are useful.

19 Considering these facts, I am of the opinion that the defendant failed to make out any case for allowing the Civil Application. Hence, Civil Application stands rejected.

(K.K.TATED, J.)