

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

WRIT PETITION NO.4677 OF 2015

Kirit Murji Shah

.. Petitioner

Versus

Milan Laxmidas Samani and another

.. Respondents

Mr. R. A. Thorat, Senior Advocate a/w Mr. Anilkumar K. Patil a/w Mr. Mithun Mahajan, for the Petitioner.

Mr. A. Y. Sakhare, Senior Advocate i/by Mr. A. R. Mishra, for the Respondent Nos.1 & 2.

CORAM : R.M. SAVANT, J.

DATE : 20th AUGUST, 2015

PC.

1. The Writ Jurisdiction of this Court is invoked against the order dated 24.03.2015 passed by the Learned Judge of the City Civil Court, Greater Mumbai, (Borivali Division), Dindoshi, by which order the Notice of Motion filed by the Respondent Nos.1 and 2 herein came to be allowed and the said Notice of Motion was made absolute in terms of the prayer clauses (a) and (b) thereof. The said prayer clauses read thus :-

“(a) That pending the hearing and final disposal of the suit the Court Receiver High Court Bombay be appoint as receiver with full power under Order 40 of CPC with direction to take the forcible possession of the suit premises and to hand over the suit premises to plaintiffs.

(b) That pending the hearing and final disposal of the suit that the Defendant his servants, agents, person/s claiming

through him be restrained by an order and injunction of this Hon'ble court from dealing with disposing off, alienating with, encumbering and/or creating any kind of third party right in respect of suit premises.”

2. The Respondent Nos.1 and 2 are the original Plaintiffs in the suit in question being SC Suit No.649 of 2013 which has been filed by them under Section 6 of the Specific Relief Act for restoration of possession of the suit premises being Shop No.37-A, Laram Centre Premises Co-operative Society Pvt. Ltd. S. V. Road, Andheri (W), Mumbai-400 058. It is the case of the Plaintiffs that they were put in possession pursuant to the agreement which was executed between them and the Defendant i.e. the Petitioner herein on 13.12.2012 pursuant to which on the same day they were put in possession. It is further their case that they were dispossessed on 28.12.2012 from the suit premises as a consequence of which they have lodged a complaint with the local Police. At this stage, it is required to be noted that the Defendant has executed two receipts in favour of the Plaintiffs one for Rs.20 lakhs and the another for Rs.10 lakhs in favour of the Plaintiffs and the said amounts are shown to have been received by the Defendant towards the purchase of flat No.602 and flat No.603 respectively in “Hansa Complex” Borivali. As indicated above, it is the case of the Plaintiffs that they were dispossessed on 28.12.2012 by the Defendant which has constrained them to file the suit in question for

restoration of possession. In the said suit, the Plaintiffs filed the instant Notice of Motion being No.542 of 2013, prayers of which have been adverted to hereinabove. The said Notice of Motion was replied to on behalf of the Defendant who questioned the said agreement which was entered into between the Plaintiffs and the Defendant on 13.12.2012 as a document which has been got executed from the Defendant by the Plaintiffs through force and coercion. Before the Trial Court, the Plaintiffs in support of their assertion that they were dispossessed relied upon various documents which were inter-alia the Police complaint which the Plaintiffs filed pursuant to their alleged dispossession on 28.12.2012, the letter dated 26.12.2012 of the Laram Centre Premises Co-operative Society Pvt. Ltd., in which a reference is made to the letter dated 14.12.2012 addressed by the Defendant to the said society, the receipt of handing over possession which has been executed by the Defendant in favour of the Plaintiffs. The averments made in the Suit No.253 of 2013 filed by the Defendant against the Plaintiffs, wherein the Defendant has raised challenge to the agreement which the Defendant has executed in favour of the Plaintiffs. The Trial Court on consideration of the aforesaid material came to a conclusion that the Plaintiffs have made out prima-facie case for grant of the relief which they have prayed for in the Notice of Motion filed by them. The Trial Court has adverted to the NOC which

was issued by the Society for sale of the suit premises in question which is dated 26.12.2012. The Trial Court has adverted to the averments made in the suit filed by the Defendant i.e. Suit No.253 of 2013, wherein the Defendant has averred in paragraph 8 that “he had been to Panvel and when he came back to his office, he found that a strange lock in his office premises door. He broke it and entered his office.” By referring to the said averment, the Trial Court has at the prima-facie stage accepted the fact that the Defendant has dispossessed the Plaintiffs. The Trial Court has also adverted to the receipt which has been executed by the Defendant in favour of the Plaintiffs for the said two amounts of Rs.20 lakhs and Rs.10 lakhs respectively. The Trial Court thereafter has relied upon the judgments of this Court, which reference can be found in paragraphs 19, 20 and 21 of the impugned order and has come to a conclusion that the Plaintiffs have made out prima-facie case for the grant of the relief sought by way of the Notice of Motion and has accordingly allowed the Motion in terms of prayer clauses (a) and (b).

3. The Learned Senior Counsel Mr. R. A. Thorat appearing on behalf of the Petitioner i.e. original Defendant would question the order to the extent that it directs the handing over of possession of the premises to the Plaintiffs at the interim stage through the Court Receiver. The Learned Counsel would contend that the case put up by the Plaintiffs in the suit

does not warrant the grant of such a relief at the interim stage as there is no material on record to indicate that the Plaintiffs have paid the consideration of Rs.28 lakhs mentioned in the agreement. The Learned Counsel would also contend that since the agreement dated 13.12.2012 and documents annexed thereto have been questioned by the Defendant on the ground that they have been got executed from the Defendant by the Plaintiffs forcibly and coercion in respect of which the suit has been filed by the Defendant, hence the efficacy of the said documents vis-a-vis grant of a mandatory order is questionable.

4. Per contra, the Learned Senior Counsel Mr. A. Y. Sakhare appearing on behalf of the Respondents i.e. original Plaintiffs would justify the relief that has been granted by the Trial Court by the impugned order. The Learned Counsel drew this Court's attention to the documents which are on record as also the averments made in the suit filed by the Defendant as also the averment in the Criminal Writ Petition that was filed by the Defendant in this Court to buttress his contention that it was the Plaintiffs are in possession and who were dispossessed on 28.12.2012 and therefore the grant of the mandatory order is justified.

5. Having heard the Learned Counsel for the parties, I have considered the rival contentions. The question that arises is whether a mandatory order of the nature granted by the Trial Court was warranted

in the facts and circumstances of the present case. It is well settled that in a suit filed under Section 6, the defining aspect is the prior possession of the Plaintiffs and their dispossession by the Defendant. In the instant case, as indicated above, the Plaintiffs have placed various documents on record amongst which is the agreement dated 13.12.2012 executed by the Defendant in favour of the Plaintiffs. To the said document is annexed the possession receipt which is on the letterhead of the Defendant and which is dated 13.12.2012 and which receipt records that possession has been handed over to the Plaintiffs on the said day. The Defendant does not dispute the execution of the said document as also the possession receipt, but attributes its execution through force and coercion exercised by the Plaintiffs on the Defendant. That is a matter which would have to be gone into in the suit filed by the Defendant. However, in so far as the prior possession of the Plaintiffs is concerned, the documents on record unequivocally lead to a conclusion at the prima-facie stage that it was the Plaintiffs who were put in possession of the premises pursuant to the agreement and that they were dispossessed on 28.12.2012. This can also be seen from the averments made by the Defendant in his suit being SC Suit No.253 of 2013 filed by the Defendant, in which the Defendant as indicated above as averred that when he came back from Panvel to his office he found that a strange lock in his office premises door. He broke it

and entered his office. In the context of the facts of the present case, the breaking open of the lock has to be related to the lock put up by the Plaintiffs. It appears that in the Criminal Writ Petition filed by the Defendant in this Court seeking direction to register an FIR against the Plaintiffs and averment was also made as regards the manner in which the documents were allegedly got executed i.e. the agreement dated 13.12.2012 and therefore the relief sought was registering an FIR against the Plaintiffs. I am informed that the said Writ Petition came to be dismissed by a Division Bench of this Court. In my view, having regard to the aforestated facts, the grant of the mandatory order of the nature granted by the Trial Court cannot be taken exception to, no case for interference in the Writ Jurisdiction of this Court is therefore, made out. The Writ Petition is accordingly dismissed.

6. Needless to state that the handing over of possession to the Plaintiffs would be subject to the result of the suit.

7. At this stage, the Learned Counsel seeks continuation of the protection granted by this Court vide order dated 07.05.2015. In the facts and circumstances of the case, the said prayer is rejected.

[R.M. SAVANT, J]