

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

WRIT PETITION NO.5514 OF 2012

Shri. Balasaheb Ganpat Auti

.. Petitioner

Versus

Shri. Vilas Ganpat Auti and others

.. Respondents

Mr. P. B. Shah, Advocate for the Petitioner.

Mr. Vijay Killedar, Advocate for the Respondent No.1.

CORAM : R.M. SAVANT, J.

DATE : 23rd JANUARY, 2015

PC.

1. The writ jurisdiction of this court is invoked against the order dated 04.05.2012 passed by the Learned District Judge-15, Pune, by which order the Appeal filed by the Respondent No.1 herein came to be allowed and resultantly the order dated 07.04.2012 passed by the Trial Court allowing the application Exh.49 filed for temporary injunction by the Defendant No.1 i.e. Petitioner herein in the suit in question being Special Civil Suit No.346 of 2011 came to be set aside.

2. The Respondent No.1 herein is the original Plaintiff in the Special Civil Suit No.346 of 2011 which has been filed for partition of the suit properties and for possession. The parties are closely related since

they are brothers and the Plaintiff claims the suit properties to be ancestral properties in which he is entitled to share. Amongst the suit properties, the property bearing No.1B which is a plot of land on which the construction of about 4600 sq.ft. built up area exist. There are various shops and commercial premises in the said structure. The subject matter of the dispute is a garage admeasuring about 300 sq.ft. in the said structure. As indicated above, it is the case of the Plaintiff that the suit properties amongst which is property 1B are ancestral properties. In so far as the suit property 1B is concerned, it is the case of the Petitioner i.e. Defendant No.1 that the same is his exclusive property which he has purchased out of his own income and that the Plaintiff is not entitled to any share in the said property. The instant application Exh.49 in which the orders have been passed by the Courts below and which has resulted in filing of the above Petition is filed by the Defendant No.1 for mandatory injunction against the Plaintiff. The said application is founded on the fact that after the Defendants No.1, 6 and 11 filed their written statement on 03.10.2011, the Plaintiff has broken open locks of the said garage and has taken forcible possession of the said garage. The Defendant No.1 therefore sought by a mandatory order sought the restoration of possession. The case of the Defendant No.1 comprised in the said application Exh.49 was denied by the Plaintiff. The Plaintiff reiterated his case that the said

property is a joint family property in which he has a share. The Defendant in support of his case that he was in exclusive possession and that the suit property is his self acquired property relied upon the registered Sale Deed in respect of the said property which is in the name of Defendant No.3. The Defendant No.1 also relied upon the property tax receipts, affidavits of the adjoining shop owners and the Police complaint which he had filed against the Plaintiff in respect of his alleged dispossession. The Trial Court considered the said application and having regard to the aforesaid material came to a conclusion that the application Exh.49 was required to be allowed and accordingly by its order dated 07.04.2012 allowed the said application.

3. The plaintiff aggrieved by the said order carried the matter in Appeal by filing Misc. Civil Appeal No.155 of 2012. As indicated above, the Lower Appellate Court has by the impugned order dated 04.05.2012 allowed the Appeal and thereby set aside the order passed by the Trial Court and rejected the application. The gist of the reasoning of the Lower Appellate Court was that the description of the garage in respect of which application Exh.49 has been filed is not proper and hence the application suffers from the said defect. The Trial Court took cognizance of the fact that in the records the property stands in the name of Defendants No.3 and 4 and not in the exclusive name of Defendant No.1. The Lower

Appellate Court further observed that the Defendant No.1 has not placed satisfactory evidence in form of pleadings and proof that no nucleus from joint family funds was either available or otherwise nor used for the acquisition and development of the suit property described in para-1B of the plaint. The Lower Appellate court also adverted to para 1B of the joint written statement filed by the Defendants No.1, 6 and 11 wherein there is an admission by the Defendant No.1 that the property was jointly developed and in-lieu thereof the Plaintiff has been allotted a flat admeasuring 333 sq.ft., on the first floor. The Lower Appellate Court was therefore, of the view that the development of the said property belies the case of the Defendant No.1 that he is the exclusive owner of the said property. In so far as the licence issued under the Bombay Shops and Establishment Act is concerned, the Lower Appellate Court adverted to the fact that both the parties have a certificates in their favour for the same property. The Lower Appellate Court therefore observed mere issuance of the licence under the Bombay Shops and Establishment Act is not sufficient to establish the exclusive possession of the Defendant No.1 over the suit property. The Lower Appellate Court therefore held that the Trial Court has erred in exercising jurisdiction when prima-facie the case of the Defendant No.1 being in exclusive possession could not be accepted. This is in so far as the aspect of the entitlement of the Defendant No.1 to the

grant of the relief sought vide application Exh.49.

4. The Lower Appellate Court also adjudicated upon the issue as to whether the application Exh.49 filed by the Defendant is maintainable. The objection to the maintainability of the said application was raised by the Plaintiffs. The Lower Appellate Court held that in terms of the law which is laid down by the Apex Court as well as this Court on the touchstone of Order 39 as also Section 94 and Section 151, it is only in a case where the Defendant in violation and breach of an order dispossesses the Plaintiff that the Court is not powerless to act in the interest of justice and by taking recourse to Section 94 or Section 151 of the CPC can entertain an application and set right the situation, or make amends. Hence, the exception to the general rule in so far as invocation of Order 39(1) and (2) of the CPC is that the Plaintiff has to act in violation or breach of the order of injunction which operates in his favour and dispossess the Defendant. It is in the said context that to set things right or to make amends that an application for injunction at the behest of the Defendant can be entertained. Useful reference can be made to the judgment of a Learned Single Judge of this Court reported in **1997(1) Bom.C.R. 28** in the matter of **Harishchandra Narayan Maurya Vs. Rajendraprasad Dargahi Varma**. Paragraph 11 of the said report is material as reproduced herein under-

“However, present case is not a case where the defendant was seeking a temporary injunction against the plaintiff under Clauses (b) and (c) of Rule 1, Order 39 and *Nanasaheb's* case (*supra*) has no application wherein the plaintiff on mis-statement of facts or mis-representation of facts obtain a order of temporary injunction from the Court against the defendant and in the guise and garb of that injunction order seeks to dispossess the defendant and in fact dispossesses the defendant. In such situation, and once it is found that in the garb of Court's order; the plaintiff has taken law in his own hand and by use of his muscle and power dispossessed the defendant, the Court in exercise of its inherent power could always pass an order of restoration of possession to the defendant to meet the ends of justice. Such power of the Court could be traced in section 94 as well as section 151 of the Code of Civil Procedure. As observed by the Apex Court in *Manohar Lal Chopra V. Rai Bahadur Rao Raja Seth Hiralal*, A.I.R. 1962 Supreme Court 527, that Order 39, Rules 1 and 2 is not exhaustive and the situations not covered by Order 39, Rules 1 and 2 of the Code of Civil Procedure could be met by passing suitable orders in fit cases under sections 94 and 151 of the Code of Civil Procedure. Of course, such power is sparingly used and cannot be claimed as a matter of right but in deserving cases and where it is imminently required, 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. Such order by the Court may be an exercise of its inherent powers under section 151 of the Code of Civil Procedure or under section 94 of CPC and need not be covered under Clause (b) and (c) of rule 1, Order 39, of the Code of Civil Procedure. In this background and legal position, the order of the trial Court in my view is expedient and meets the ends of justice. The impugned order is also imminently just and proper warranting no interference by this Court.”

5. As indicated above, the application Exh.49 is not founded on any breach or violation of the order which is operating in the suit by the Plaintiffs but is founded on the fact that after the written statement was filed, the Plaintiff has dispossessed the Defendant No.1. The said case apart from not meeting the requirements of the exception which has been carved out, in so far as maintainability of the application at the behest of a Defendant is concerned, is also belied by the averments made in paragraph 12B of the written statement of Defendants No.1, 6 and 11. In the said paragraph 12B after adverting to the joint development, the Defendant No.1 has averred that since the Plaintiff had completed a mechanical course and since he had no other source of income, he was put in possession of the garage. Though in the latter part of the said paragraph 12B, it has sought to be averred that the Plaintiff was in joint possession of the garage with the son of the Defendant No.11. In my view, the latter part would not make any difference as the Defendant No.1 has accepted the position that the Plaintiff was put in possession. There is absolutely no material in fact as to when the Plaintiff handed over possession to the Defendant No.1, except the statement that he has been dispossessed forcibly after the written statement was filed. Hence, having regard to the averments made in paragraphs 5 and 6 of the application Exh.49 as also having regard to the averments made in paragraph 12B of the written

statement, the case of the Defendant No.1 in so far as Exh.49 is concerned, does not fit into the exception carved out and therefore the order passed by the Lower Appellate Court holding that the application Exh.49 filed by the Defendant No.1 is not maintainable cannot be taken exception to.

6. Now, coming to the impugned order covering the aspect of possession. In my view, having regard to the reasons mentioned in the impugned order, the Lower Appellate Court has for cogent reasons set aside the order passed by the Trial Court. The fact that the Defendant No.3 after passing of the order by the Lower Appellate Court has filed his written statement supporting the Defendant No.1 would hardly make any difference. The impugned order passed by the Lower Appellate Court therefore, does not merit any interference at the hands of this Court in the exercise of jurisdiction under Article 227 of the Constitution of India. The Writ Petition is accordingly dismissed. Needless to say that observations made in the instant order are only for purposes of considering the application Exh.49. The suit would undoubtedly be tried on its own merits and in accordance with law.

[R.M. SAVANT, J]