

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

APPEAL FROM ORDER NO.198 OF 2015
IN
NOTICE OF MOTION NO.1425 OF 2014
IN
S.C.SUIT NO.1351 OF 2013
WITH
CIVIL APPLICATION NO.256 OF 2015

Perviz Homi Karapatel & Anr.

...Appellants

V/s.

Zarin Noshir Pardiwala & Anr.

...Respondents

Mr. Navroz Seervai, Senior Counsel with Ranvir Singh i/b. Mandar V.
Sawant for the Appellantss

Mr. Rajiv Narula i/b. Jhangiani Narula Associates for Respondent No.1.

CORAM: K.K. TATED, J.
DATED : APRIL 30, 2015

PC. :

1. Heard the learned senior counsel for the Appellants and the learned counsel for the Respondent No.1.

2. By this appeal, the Appellants - Plaintiffs challenge the order dated 14th/16th October 2014 passed by the Bombay City Civil Court, Mumbai in Notice of Motion No.1425/2014 (said Notice of Motion) in Short Cause Suit No.1351/2015 (said suit) dismissing the Plaintiffs' Notice of Motion.

3. For the sake of convenience, the parties will be referred to as per their nomenclature in the suit i.e. the Plaintiffs – as the Appellants and the Defendants – as the Respondents.

4. The Plaintiffs filed the said suit for the following reliefs :

“a) That this Hon'ble Court be pleased to grant an order and permanent injunction of this Hon'ble Court thereby restraining the Defendants including their respective family members, agents and servants acting for and/or through or under them or on their behalf from forcibly entering into the suit premises and/or inducting third persons into the suit premises and/or forcibly dispossessing the Plaintiffs from the suit premises in any manner whatsoever without following due process of law.

b) That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to grant an order and temporary injunction of this Hon'ble Court thereby restraining the Defendants including their respective agents and servants acting for and/or through or under them or on their behalf from forcibly entering into the suit premises and/or inducting third persons into the suit premises and/or forcibly dispossessing the Plaintiffs from the suit premises in any manner whatsoever without following due process of law;

c) Ad-interim reliefs in terms of prayer (b) above;

d)

e)”

In that suit, the Plaintiff preferred the said Notice of Motion for the following reliefs :

a) That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to grant an order and temporary injunction of this Hon'ble Court thereby restraining the Defendants including their respective family members, agents and servants

acting for and/or through or under them or on their behalf from forcibly entering into the suit premises and/or inducting third persons into the suit premises and/or forcibly dispossessing the Plaintiffs from the suit premises i.e. Flat No.D-1, admeasuring approx. 1250 sq.ft. on the ground floor situated at Sitaram Sadan, 276, Princess Street, Mumbai – 400 002, in any manner whatsoever without following due process of law;

b) *Ad-interim reliefs in terms of prayer (a) above;*

c) *.....*

d) *.....”*

5. In the said Notice of Motion, the Defendants filed their Affidavit-in-Reply and opposed the same. The Plaintiffs as well as Defendants filed several documents on record. Considering the pleadings on record, submissions made by the respective counsel, the Trial Court, by impugned order, dismissed the said Notice of Motion. Hence, the present Appeal from Order.

6. The learned senior counsel for the Plaintiffs submits that the suit property i.e. Flat No.D-1, admeasuring approx. 1250 sq.ft. on the ground floor situated at Sitaram Sadan, 276, Princess Street, Mumbai – 400 002, was in the name of Mrs. Alamai Burjorji Karapatel (mother in law of Plaintiff No.1) as a tenant. The original tenant died in the year March 1972. The learned senior counsel submits that the mother-in-law of Plaintiff No.1 expired in March 1972 leaving behind her son – Late Mr. Homi Karapatel, husband of Plaintiff No.1 and daughters viz. Gool Keki Contractor and Jal Karapatel. The Plaintiff was residing in the said suit premises along with her family members and also the deceased Gool Keki Contractor. After the death of Gool Keki

Contractor, the Plaintiff No.1 continued to occupy the suit premises along with her husband and her 3 daughters and sister-in-law. He submits that both the Defendants are daughters of Plaintiff No.1. He submits that the Defendant No.2 made a statement before the Trial Court that she does not want to claim any interest in the suit premises. He further submits the Defendant No.1 submitted before the Trial Court on 30/03/2013 when she appeared before the court as party-in-person, that she had right in the suit property, but she did not intend to enter the suit premises. In view of the statement made by Defendant Nos.1 and 2, the Plaintiffs did not press the ad-interim relief before the Trial Court.

7. The learned senior counsel for the Plaintiff submits that Defendant No.1 filed Affidavit-in-Reply in the said Notice of Motion and made a statement that on the date of death of Mrs. Gool Keki Contractor, she was occupying two rooms of 400 sq.ft. each in the suit premises. He submits that on the basis of the Will executed by Late Gool Keki Contractor, the Defendant No.1 claimed possession of said two rooms. He further submits the Defendant No.1 also relied on the declaration for claiming the exclusive possession of these two rooms in the suit premises. He submits that the Trial Court, after considering the Will of Gool Keki Contractor, declaration and some other documents filed by the Defendant No.1 in support of her claim, held that the Plaintiff failed to prove her exclusive possession of the suit premises and dismissed the said Notice of Motion.

8. The learned senior counsel for Plaintiffs submits that the Will

relied on by Defendant No.1 is not probated till today. He submits that on the basis of the Will, it cannot be held that Defendant No.1 is in exclusive possession of two rooms and half portion of the kitchen of the suit premises. He further submits that the Defendant No.1 relied on passbooks of the Bank of India, Kalbadevi Branch and Central Bank of India, Marine Lines Branch, warrant of interest issued by the Empire Express Ltd. dated 31/12/2012, letter issued by LIC of India dated 31/01/2013, FD receipt issued by Valecha Engineer Ltd. and other documents. He further submits all these documents show the care off (c/o) address of Defendant No.1 of the suit premises. On the basis of these documents, Defendant No.1 could not prove her possession of the suit premises. He submits that these facts are not considered by the Trial Court properly and erred in coming to the conclusion that the Plaintiffs failed to prove their exclusive possession of the suit premises.

9. The learned senior counsel submits that the Trial Court erred in coming to the conclusion that the tenancy of the suit premises is not transferred in the name of Plaintiff No.1 till today, hence, she cannot claim exclusive possession. He submits in view of section 7(15) of the Maharashtra Rent Control Act, 1999, the Plaintiffs No.1 gets status of a tenant. It does not require any declaration. He further submits that for the last several years, the Plaintiff No.1 has been paying rent to the landlord. The landlord is getting the rent from Plaintiff No.1 and issuing receipts to that effect. According to the senior counsel, these facts are not considered by the Trial Court at the time of passing the impugned order.

10. The learned senior counsel for the Plaintiffs submits that during pendency of the present Appeal from Order, the Defendant No.1 forcibly and illegally entered into the suit premises and dispossessed the Plaintiff No.1 from the portion of the suit premises being two rooms which were occupied by Late Gool Keki Contractor till her death. He submits that these facts are stated by the Plaintiffs in paragraph 10 to 14 of the Civil Application.

11. The learned senior counsel for the Plaintiffs submits that Defendant No.1 is residing on 3rd floor of the same building where the suit premises is situated. He submits that in support of this contention, the Plaintiffs have placed on record a photocopy of ration card bearing Sr.No.506263 which shows that the Defendant No.1 is residing on 3rd floor with her family. The learned senior counsel further submits that the Plaintiffs placed on record voters' ID of Defendant No.1, copy of Life Insurance Policy dated 28/12/2007, birth certificate of Dilshad, daughter of Defendant No.1 issued by the Municipal Corporation for Greater Mumbai and other documents. All these documents show that the Defendant No.1 is residing with her family on 3rd floor of the same building in which the suit flat is situated. He further submits these documents are not properly considered by the Trial Court at the time of passing the impugned order.

12. The learned senior counsel for the Plaintiffs submits that Defendant No.1, in her Affidavit-in-Reply in paragraph 3 and 4 of the Notice of Motion No.1425/2013 dated 26/04/2013 stated that she was in use and occupation of two rooms with part of a kitchen which was in

possession of Late Gool Keki Contractor. Similarly, Defendant No.1 in paragraph 4 also stated about the possession. Whereas, Defendant No.1, in paragraph 6 and 7 of her written statement dated 24/07/2013 admitted that even on the date of filing of written statement, she was not in possession. He submits that in paragraph 6, Defendant No.1 stated that “as against this, it was agreed that Defendant No.1 will get two rooms, admeasuring 400 sq.ft. belonging to Late Gool Keki Contractor and part of kitchen and will also get W.C. which was used by Plaintiff No.1 and Late Gool Keki Contractor in common and the Plaintiff No.2 and Defendant No.2 and their legal heirs and representatives shall not make any claim on the said two rooms admeasuring 400 sq.ft. and part of the kitchen and the W.C. which as exclusively given to Defendant No.1. He further submits that even in a declaration which is on page No.373 Defendant No.1 specifically stated that he is staying at C-7, Sitaram Sadan, 3rd Floor, 308, Princes Street, Mumbai – 400 002. This itself shows that Defendant No.1 was not in possession of those two rooms. When, the matter was before Trial Court for ad-interim relief, the Defendant No.1 made a statement that she will not enter in the suit premises. He submits that these facts are not properly considered by the Trial Court and dismissed the Notice of Motion without restraining the Defendants from entering the suit premises. He further submits that Defendant No.1, on solemn affirmation made a false statement about her possession at several places in her pleadings.

13. The learned senior counsel for the Plaintiffs further submits that though Defendant No.1 placed on record several documents to show

her address of suit premises, same shows c/o address. Moreover, Defendant No.1 has not placed on record a single Government document to show her address being the suit premises. Hence, there is no substance in the case put up by Defendant No.1 that she was and she is in possession of the two rooms of the suit premises.

14. The learned senior counsel submits that during pendency of the present Appeal from Order, Defendant No.1 forcibly dispossessed the Plaintiff No.1 from the portion of the suit premises and therefore, this Hon'ble Court be pleased to issue mandatory order directing the Defendant No.1 to vacate those two rooms of the suit premises and hand over vacant and peaceful possession thereof to the Plaintiffs. In support of this contention, the learned senior counsel for the Plaintiffs relies on the judgment of the Apex Court in the matter of ***Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors. AIR 1990 SC 867***, more particularly, paragraph 10 and 14 wherein the Apex Court issued certain guidelines for passing mandatory orders viz. : (i) The Plaintiff has a strong case for trial. That is, it shall be of higher standard than a prima facie case that is normally required for prohibitory injunction (ii) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money and (iii) the balance of convenience is in favour of the one seeking such relief. He submits that admittedly, the Plaintiff No.1 was in possession of the entire suit premises. He further submits the documents on record show that Defendant No.1 was residing on 3rd floor along with her family in a building where the suit flat is situated. Hence, this Hon'ble Court be pleased to pass a mandatory order directing Defendant No.1 to hand

over vacant and peaceful possession of the suit flat to the Plaintiffs immediately.

15. On the basis of the above submissions, the learned senior counsel for the Plaintiffs submits that the impugned order passed by the Trial Court dismissing the Plaintiffs' Notice of Motion requires to be set aside and the said Notice of Motion be made absolute in terms of prayer clause (a) with direction to Defendant No.1 to hand over vacant and peaceful possession of the portion of the suit premises to the Plaintiffs.

16. On the other hand, the learned counsel for Defendant No.1 vehemently opposed the present Appeal from Order. He submits that the Trial Court considered each and every document and held that the Plaintiffs failed to prove their exclusive possession of the suit premises. He submits that Gool Keki Contractor, in her Will stated that Defendant No.1 along with her was in possession of two rooms and using half portion of kitchen. He relies on paragraph 13 of the said Will which reads thus:

“13. I am in exclusive use, occupation and possession of two rooms and half of the kitchen (half of which is used by my sister-in-law Dr. (Mrs.) Perviz Homi Karapatel). My niece Zarin is residing with me as the member of my family. She takes great care of me. So Zarin shall be entitled to the said two rooms and half portion of kitchen which I use. I have three steel cupboards. I hereby given, devise and bequeath one empty steel cupboard to each of my three nieces Zarin, Kety and Villy. I direct my three nieces to distribute amicably pieces of furnitures, fixtures, artifacts (including those which are presently in Kety's house), wearing apparels, utensils, articles and things lying in the said premises, except the two single

beds. I hereby given, devise and bequeath the said two single beds to Zarin N. Pardiwala absolutely.”

He further submits that bare reading of clause 13 of the Will shows that the Defendant No.1 was residing with Mrs. Gool Keki Contractor at the time of her death and therefore, she has also right in the said property. He further submits that the Plaintiff No.2 and both Defendants are appointed as Executors of the said Will and same was signed by the Plaintiff No.1 as witness. This shows that the Plaintiffs had knowledge about the contents of the said Will. He submits that though the said Will is not probated, the same can be used to show possession of the Defendant No.1. He submits that the Defendant No.1 placed on record several documents such as a bank passbook, FD receipts, letters issued by the LIC and other documents. All these documents show address of Defendant No.1 the suit premises. He submits that the relief claimed by the Plaintiffs in the suit as well as the said Notice of Motion are one and the same. If the said Notice of Motion is allowed in terms of prayer clause (a), that would indirectly amount to decreeing the suit itself. Hence, there is no substance in the present Appeal from Order and same be dismissed with costs.

17. Heard learned Senior Counsel for the Appellant/Plaintiff and learned Counsel for the respondent Defendant No.1. It is to be noted that in the present proceeding, the dispute is between mother and married daughters. On one hand, the mother is claiming possession of the suit premises being Flat No. D1, Ground Floor, Sitaram Sadan, 776 Princess Street, Mumbai – 400 002 on the basis of tenancy rights (being daughter in law of original tenant) and on the other hand, defendant

no.1 is also claiming tenancy rights/possession in respect of part of suit premises through deceased Mrs. Gool Keki Contractor, daughter of original tenant deceased Alamai B. Karapatel.

18. It is the case of the plaintiff that after the marriage, the defendant no.1 shifted to her matrimonial house i.e. flat No.C-7 on 3rd floor in the same building. Hence, the defendants have no right, title and interest to claim possession of two rooms in the suit flat.

19. In the present proceeding, the plaintiff placed on record rough sketch of the suit premises (hereinafter referred to as the said sketch) on page 215 of additional compilation.

20. The Plaintiff relied on several documents to show that the defendant no.1 failed to show prima facie her possession in respect of portion of suit property i.e. particularly 2 rooms shown by Alphabets B & C in said sketch.

21. I have gone through the documents placed on record by both the parties, their affidavits and written statements. Though Defendant No.1 placed on record several documents i.e. electricity bills, LIC policy, letters received from companies about dividend warrant etc., in all these letters, the address of Defendant No.1 is shown "c/o." address. There is not a single document on record issued by any Government Authority to show the suit premises, as her address. Even the ration card does not show the suit premises as her residence, though it is stated in the Will executed by Gool Keki Contractor that Defendant

No.1 was staying with her. Admittedly, on the date of ad-interim relief i.e. 30/03/2013, Defendant No.1 appeared before the Trial Court and made a statement “ Defendant No.1 with her daughter present and seeking time to file reply and appoint an Advocate. She also submitted that she has right in the suit premises but she did not intend to enter the suit premises”. This itself shows that on the date of filing of the suit, the Defendant was not in possession of the suit property. She has her own matrimonial home on 3rd floor in the same building. Her ration card and other documents also show that the Defendant No.1 resided at the third floor of the same building.

22. In the present case, after the Trial Court passed final order dated 14th and 16th October 2014 in the Notice of Motion 1425/2013, Defendant No.1, along with her family members appear to have entered into the suit premises. Hence, the Plaintiffs moved the present Civil Application.

23. The Apex Court in the matter of ***Kashi Math Samsthan and Anr. Vs. Shrimad Sudhindra Thirtha Swamy and Anr. (2010) 1 SCC 689*** held that for grant of interim relief under Order XXXIX Rule 1 and 2, party has to show (a) prima facie case to go for trial (b) balance of convenience in his favour and; (c) irreparable loss and injury if injunction is not granted. paragraph 16 of the said judgment reads thus:

13. It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled

that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted. Therefore, keeping this principle in mind, let us now see, whether the appellant has been able to prove prima facie case to get an order of injunction during the pendency of the two appeals in the High Court.

24. In the present case, on the basis of the documents placed on record, the Plaintiffs prima facie prove that on the date of filing of the suit, they were in possession of the entire suit premises. Prima facie, it is evident that after the impugned order passed by the Trial Court dismissing the Plaintiffs' Notice of Motion, Defendant No.1 entered into 2 rooms in the suit premises along with her family members and started occupying the same. Considering the relationship between the Plaintiff and Defendant No.1 i.e. mother and daughter, in the interest of justice, it is necessary to maintain the position as on the date of filing the suit.

25. The above mentioned documents adduced by the Plaintiffs, when considered along with admission of Defendant No.1 referred to above, it is evident that Defendants entered into possession of the suit premises as claimed by the Plaintiffs after the Trial Court passed the impugned order dated 14/16th October 2014 in Notice of Motion No.1425/2014. Hence, it must be held that the Plaintiffs have made out a strong prima facie case to entitle them to claim mandatory

injunction sought by them, they are likely to suffer irreparable injury which cannot be compensated in terms of money and the balance of convenience is also in their favour.

26. Considering the facts and circumstances of the present case and the law declared by the Apex Court in the above referred authorities, I find that the Plaintiffs are entitled to the interim relief sought by them.

27. Considering the age of Plaintiff No.1, it is necessary to direct the Trial Court to decide S.C.Suit No.1351/2013 as early as possible but in any case on or before 31/03/2016.

28. Hence, the following order:

- a. Appeal from Order is allowed.
- b. Notice of Motion No.1425/2013 in S.C.Suit No.1351/2013 is made absolute in terms of prayer clause (a) which reads thus:

“a) That pending the hearing and final disposal of the suit this Hon'ble Court be pleased to grant an order and temporary injunction of this Hon'ble Court thereby restraining the Defendants including their respective family members, agents and servants acting for and/or through or under them or on their behalf from forcibly entering into the suit premises and/or inducting third persons into the suit premises and/or forcibly dispossessing the Plaintiffs from the suit premises viz. Flat No.D-1, admeasuring approx. 1250 sq.ft. on the ground floor situated at Sitaram Sadan, 276, Princess Street, Mumbai – 400 002 in any manner whatsoever without following due process of law.”

- c. The sketch placed on record by the Plaintiffs in additional compilation on Page 215 to be treated as part of this order for identification of the rooms of the suit premises alleged to have been trespassed after filing of the suit.
- d. Defendant No.1 is directed to handover possession of 2 rooms i.e. "B" & "C" as per the said sketch to the Plaintiffs within 15 days from the date of this order.
- e. Parties are directed to maintain status-quo as of 30/03/2013 when the Plaintiffs moved for ad-interim relief, before the Trial Court till hearing and final disposal of the suit.
- f. Hearing of the S.C.suit No.1351/2013 is expedited.
- g. This court expects that the Trial Court decides the said suit as early as possible but in any case on or before 31/03/2016, taking into account that the Plaintiff No.1 is a senior citizen of the age of 86 years.
- h. Appeal from Order as well as the Civil Application stand disposed off accordingly.
- i. No order as to costs.

29. At this stage, the learned counsel for the respondent no.1 seeks stay of this order to the extent of handing over possession of the two rooms to the plaintiff.

30. Considering the fact that on 30th March, 2013 when the plaintiff moved for an ad-interim relief before the Trial Court, Respondent no.1/defendant no.1 made a statement that she does not intend to enter the suit premises, the request made by learned counsel for the respondent no.1 is rejected.

(K.K. TATED, J.)