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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1270 OF 2014
IN
SUIT NO.786 OF 2014

Vasanti Rama Shetty ...Plaintiff
vs
Premnath Rama Shetty & Ors. ...Defendant

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Mr Rafique Ahmd Shaikh for the Plaintiff.
Mr Karan Bhosale a/w Rakesh L. Singh i/b M.V.Kini & Co. for the Defendants a/w Defendant No.1 present.
Mr N.A.Bandodkar, 2nd Assistant to Court Receiver is present.
Mrs R.S.Gulekar, Second officer of the Court Receiver is present.

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CORAM : S.C. GUPTE, J.

JANUARY 30, 2015

ORAL ORDER:

This Notice of Motion is taken out by the Plaintiff in a suit filed under Section 6 of the Specific Relief Act, 1963. The Motion seeks appointment of a court receiver with power to take possession of the suit premises from the Defendants and handover the same to the Plaintiff. The application is made in the following facts:

2 The Plaintiff is a senior citizen of 72 years and is a tenant in respect of the suit premises, which consists of a flat on the first floor of Baria House also known as Sak na Manzil at 184 Modi Street, Mumbai 400 001. The Plaintiff has been residing continuously in the suit premises since the year 1964 with her husband, late Talipadi Rama Shetty, who expired on 27 March 2014. Defendant No.1 is the son of the Plaintiff, whilst Defendant Nos.2 and 3 are, respectively, wife and daughter of Defendant No.1. It is the case of the Plaintiff that initially the Plaintiff and her husband resided in the suit premises with their six children which

included Defendant No.1. After their respective marriages, sons and daughters of the Plaintiff started residing separately with their respective families at different places. It is the case of the Plaintiff that Defendant No.1 also left the suit premises after a couple of years of his marriage and has since been staying separately with his wife and children for the last about 20 years. Since the death of the Plaintiff's husband the Plaintiff has been residing alone in the suit premises. It is the case of the Plaintiff that on 4 August 2014, she went to her native place at Mangalore for medical treatment. Whilst she was at Mangalore, Defendant No1 along with Defendant Nos.2 and 3 forcibly entered into the suit premises on 14 August 2014, by breaking open the lock of the door, in the absence of the Plaintiff. After receiving a phone call from her younger son, Taranath Shetty, the Plaintiff rushed back to Mumbai and reported the incident to the Station House Officer at MRA Marg Police Station, Cropherd Market, Mumbai. The police initially refused to record an FIR for housebreaking and trespass, and instead recorded an NC complaint under Section 504 and 506 of Indian Penal Code on 15 August 2014. The Plaintiff then approached Additional Commissioner of Police, protesting against refusal of the police to record the FIR. The Additional Commissioner directed the police to record an FIR after investigating the matter. Police thereafter appear to have recorded statements of neighbours of the suit building in respect of the incident complained of. Unable to obtain any further relief from the police, on 1 September 2014 the Plaintiff filed the present suit praying for recovery of possession of the suit flat, under Section 6 of the Specific Relief Act, 1963. By this Notice of Motion, the Plaintiff prays for appointment of a court receiver with power to takeover the physical possession of the suit premises from the Defendants and handover the same to the Plaintiff.

3 The application is opposed by the Defendants. It is the case of the Defendants that there was a family settlement arrived at between the members of the family including the Plaintiff, her deceased husband, Defendant No.1 and his other siblings including Taranath Shetty, under which the tenancy rights of the suit premises were agreed to be transferred to Defendant No.1. It is submitted that at the relevant point of time, father of Defendant No.1 had several businesses; that Defendant No.1 was asked to look after the businesses and was

given a 25 % share in them; that there was a family arrangement and settlement, according to which both the Plaintiff and her deceased husband made simultaneous wills distributing the businesses as well as residence between their sons and daughters including Defendant No.1 and Taranath Shetty. It is submitted that the businesses were respectively distributed between the siblings of Defendant No.1 under the will of their father, whilst the suit premises were agreed to be made over to Defendant No.1 under the will of the Plaintiff. It is the case of the Defendants that in pursuance of this arrangement, Defendant No.1 has been holding the key of the suit premises right from the month of November 2011. It is claimed that the Plaintiff had a duplicate key of the suit premises. It is claimed that after the demise of the Plaintiff's husband, the Plaintiff shifted to her native place at Mangalore and has been staying there. It is claimed that Defendant No.1 had been staying in a separate house on leave and licence basis, which he surrendered on 31 March 2014, and thereafter, for a few months stayed at his sister-in-law's house at Oshivara. It is, however, claimed that Defendant No.1 together with his family was intermittently visiting, and staying at, the suit premises throughout along with his parents. Finally, it is claimed that in August 2014, Defendant No.1 permanently shifted to the suit premises with all household articles and has since been residing there. It is claimed that whilst Defendant No.1 had key of the outer door of the suit flat, the original lock of the inner door was replaced by his brother Taranath Shetty and that, therefore, the lock had to be broken, when the Plaintiff entered the suit flat in August 2014.

4 After the matter was argued at length on 22 January 2015, and was kept on the board on 29 January 2015 to enable the Advocates for the Defendants to take instructions from the Defendants about a possible settlement, on 29 January 2015 learned Counsel for the Defendants tendered an additional affidavit of Defendant No.1. This affidavit contains as its enclosure a sworn statement by the sister of Defendant No.1 as of 9 January 2015. It is claimed in this additional affidavit that the police complaint as well as the suit is proxy fight by the brother of Defendant No.1 - Taranath Shetty. The case of Defendant No.1 originally pleaded in his affidavit in reply is reiterated. In her affidavit, the sister has claimed that though the suit flat was standing in the name of the Plaintiff, the

tenancy right was purchased by her father, the husband of the Plaintiff and that as per the family arrangement, in the month of November 2011 the key of the suit flat was handed over to Defendant No.1, with an understanding that the possession of the suit premises would be with Defendant No.1, whilst the tenancy rights would be transferred in his favour after the lifetime of the Plaintiff.

5 In accordance with the respective pleadings of the parties and the submissions made across the bar, it is an admitted position that the Plaintiff is a tenant of the suit premises. Though the affidavit of the sister claims that the tenancy in the name of the Plaintiff was by way of convenience and as a nominal transaction and that it really belonged to the father, no such case is pleaded in the affidavit in reply or even in the additional affidavit filed by Defendant No.1. It is also clear from the pleadings of the parties and the material produced therewith that the Plaintiff always resided in the suit premises and continued to do so even after the death of her deceased husband. At best, the claim of Defendant No.1 is of joint possession with the Plaintiff. Secondly, it is important to note that the only right claimed to the suit premises by Defendant No.1 is by virtue of a purported family arrangement. The gist of the family arrangement, as pleaded by Defendant No.1, is that whilst the Plaintiff was a tenant of the suit premises, the father, i.e. the deceased husband of the Plaintiff, was the owner of several businesses; that by virtue of this family arrangement the businesses and the suit premises were agreed to be distributed between Defendant No.1 and his siblings by the parents; and that whilst the father gave the businesses to the siblings of Defendant No.1 under a registered will, the mother (i.e. the Plaintiff) bequeathed the tenancy of the suit premises to Defendant No.1 under her registered will executed simultaneously with the will of the father. In the first place, the purported arrangement does not have any incident of a family arrangement as is known to law. A family arrangement is basically on the footing that each of the family members has an antecedent right to the property which is held commonly by the family, though such rights are not defined expressly or ascertainable with any precision, and with a view to bring peace in the family, such antecedent rights are dealt with by entering into a family arrangement which is mutually acceptable to all the family members. The Courts recognize such family arrangements and do

not insist on legal formalities which are normally associated with formal transactions concerning properties. In the present case, admittedly Defendant No.1 and his siblings had no antecedent rights to the property, neither the business/share of business of the father nor the suit premises tenanted by the mother. Secondly, even as per the admitted case of the Defendants, the tenancy of the suit premises was to be transferred to Defendant No.1 only after the demise of the Plaintiff and with a view to achieve such transfer, a will was executed by the Plaintiff purporting to bequeath the tenancy to Defendant No.1. Obviously, therefore, it is not even the Defendants' case that the tenancy of the suit premises had already been transferred to Defendant No.1. At the most, the claim of the Defendants is on the footing of a chance of succession primarily based upon a will executed by the owner of the property. It is trite law that a will has no legal efficacy during the life time of the testator. No right can flow from such a will and indeed no right can be claimed to the suit premises by the Defendants on the basis of such a will.

6 As far as the Defendants' case of possession is concerned, there are greater difficulties in the way of the Defendants. Firstly, in the face of abundant evidence shown by the Plaintiff of her possession of the suit premises (the Plaintiff has relied upon rent receipts, ration card, electricity bills etc. in support of her possession of the suit premises), which is not even disputed seriously by the Defendants, there is not a single piece of evidence produced by the Defendants to show that they were indeed in possession, at any relevant point of time, of the suit premises. The only material adduced in support of their case for possession is the first Defendant's own statement in his affidavit, a key to the outer door of the suit premises claimed to be in possession of Defendant No.1 and a sworn statement of the sister, which, as I have observed above, has come a trifle too late and in any event, as discussed below, does not inspire any confidence. As against this, there are clear admissions of Defendant No.1, in his affidavit in reply, that Defendant No.1 together with his family including Defendant Nos.2 and 3 herein, was living in a separate house, which he claims to have surrendered on 31 March 2014; that thereafter for a few months, Defendant No.1 together with his family stayed at his sister-in-law's house at Oushivara; and that

thereafter it is only in the month of August, which is the time when the Plaintiff claims that the trespass happened, that he permanently shifted to the suit premises with all his household articles. In other words, the settled possession, if any, as claimed by the Defendants has come about only as a result of the act of trespass complained about by the Plaintiff. No doubt, as a matter of law and pending application of due process, courts protect the possession even of a trespasser but that is on the footing that such trespasser has been in settled possession of the trespassed property by the time the plaintiff approaches the Court. But, as I have noted above, that is not the case here.

7 The circumstances in which mandatory injunctions are granted by the courts have been discussed at length by the Supreme Court in the case of **Dorab Cawasji Warden Vs Coomi Sorab Warden & Ors.**[1]**.** The Supreme Court has noted the principles of English law on the point and also traced the history of decided cases in India, where mandatory injunctions have been considered in favour of the plaintiff applicant. The Supreme Court has noted that as far back as in 1914, the court's power to grant an interim injunction in a mandatory form was recognized by the High Courts in India. The Supreme Court, in particular, has noted the observations in the case of **Israil** Vs **Shamser Rahman**[2] where it was held that the High court was competent to issue an interim injunction in a mandatory form. In that case it was held that in granting an interim injunction what the Court had to determine was whether there was a fair and substantial question to be decided as to what the rights of the parties were and whether the nature and difficulty of the questions was such that it was proper that the injunction should be granted until the time for deciding them should arrive. It was further held that the Court should consider as to where the balance of convenience lies and whether it is desirable that the status-quo should be maintained. The Court also noted the observations of **Films Rover International Ltd. Vs. Cannon Film Sales Ltd**[3]**.** which were to the following effect:

> "But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines' , i.e. useful

1 (1990) 2 Supreme Court Cases 117
2 ILR (1924) 41 Cal 436,
3 (1986) 3 All ER 772

generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

Again at page 781 the learned Judge observed:

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term ' mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a ' high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction. "

Finally, this is what the Supreme Court had to say as far as the relief of interlocutory mandatory injunction was considered:

" **16.** The reliefs of interlocutory mandatory injunction are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

In a recent judgment in the case of **Deoraj Vs State of Maharashtra & Ors**[4], the Supreme Court once again considered the cases where relief of mandatory injunction could properly be granted by our courts. The observations of the Supreme Court in that case are as under:

"12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case – of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the court to grant an interim relief though it amounts to granting the

4 (2004) 4 Supreme Court Cases 697

> final relief itself. Of course, such would be rare and exceptional cases. The court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the court may put the parties on such terms as may be prudent"

8 What emerges from the foregoing discussion is that in a case where the relief of mandatory injunction is claimed, the Court in the first place considers whether the plaintiff has a very strong case, that is to say, the case of a much higher standard than a mere *prima facie* case which is normally necessary for a prohibitory injunction. Secondly, the Court considers the question of balance of convenience in the sense that where not granting of an injunction to a party who succeeds, or who would succeed, at the trial would cause greater injustice or irreparable harm than suffered by the party against whom it is granted. In the present case, the Plaintiff has a very strong *prima facie* case to demand recovery of possession. The Plaintiff not only holds title to the suit property but was admittedly in possession of it. The Defendants' case is at best of joint possession. Even a case of joint possession is not only not supported by any documentary evidence, but on the other hand, is undermined by the Defendants' own clear admissions in their pleadings. As noted by me above, the record of the case clearly bears out that the Defendants were admittedly not residing at the suit premises before August 2014 and came into the premises by breaking open the lock, an act complained of by the tenant, who admittedly was in possession, as an act of trespass. The Defendants have no case to continue to reside in the suit premises. There is no right known to law by which the Defendants can support such a case. In the premises, not only do the Defendants not have a fair case to plead at the trial but that they practically have no case at all. In the premises, considering the fact that the Plaintiff is a senior citizen at an advanced age, who was admittedly residing in the premises, would be seriously prejudiced and harmed if the mandatory interim injunction claimed by her is not granted. On the

other hand, the Defendants have till the alleged act of trespass admittedly stayed elsewhere and would be able to assert their right to tenancy under the family arrangement claimed by them if they succeed at the trial, which right, at any rate, under that very family arrangement comes to them only after the lifetime of the Plaintiff. The balance of convenience clearly weighs heavily in favour of the Plaintiff. This is indeed one of those rare and exceptional cases, which the Supreme Court has referred to in **Deoraj's case** (supra), where withholding of the mandatory interim relief would indeed prick the conscience of the court and do violence to its sense of justice. It would result in perpetuation of an injustice throughout the hearing, and which may not after all be vindicated by the time the trial ends.

9 By an ad-interim order, a learned Single Judge of this Court has already appointed the Court Receiver, High Court, Bombay, as a receiver of the suit premises. The Receiver, however, was directed to take only formal possession and not disturb the physical possession of the Defendants at the ad-interim stage. As noted by me above, there is a clear case for directing the Court Receiver to now takeover the physical possession of the premises and handover the same to the Plaintiff to whom it rightfully belongs. Accordingly, the Notice of Motion is made absolute in terms of prayer clause (a). The Defendants are directed to handover the premises to the Court Receiver within a period of three weeks from today. In the event, the Defendants refuse to handover such possession to the Court Receiver, the Court Receiver shall take forcible possession of the suit premises, if necessary, with the assistance of the police. Local Police to render all assistance to the Receiver as may be necessary to recover the possession from the Defendants and handover the same to the Plaintiff. Costs shall be the costs in the cause.

10 At this stage, learned Counsel for the Defendants, on instructions of Defendant No.1, who is personally present in the Court, submits that his clients should be permitted to continue to occupy the suit premises for a period of six weeks from today against written undertakings to be furnished by them to this Court to handover the possession to the Court Receiver at the end of the period

of six weeks. The statement and undertaking are accepted. Formal written undertakings shall be submitted, in that behalf, to this Court within a period of three weeks from today. The Notice of Motion is disposed of accordingly.

(S.C.GUPTE J.)