

Anita Abhay Apte and others	...	Petitioners
Vs.		
Davbindu Co-op. Hsg. Soc. Limited through its Chairman Arwind B. Karambalekar and another	...	Respondents

Mr. A. V. Anturkar, Senior Advocate i/b. Mr. Prathamesh B. Bhargude for Petitioners.
Mr. A. A. Kumbhakoni, Senior Advocate i/b. Mr. Ameya V. Borwankar for Respondent No.2.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 17, 2016

P.C. :

Heard Mr. Anturkar, learned Senior Counsel for petitioners and Mr. Kumbhakoni, learned Senior Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 29.07.2015 passed by the learned 28th Joint Civil Judge, Junior Division, Pune below exhibit-5 in Regular Civil Suit No.2054 of 2013 as also the judgment and order dated 04.01.2016 passed by the learned Ad-hoc District Judge-2, Pune in Miscellaneous Civil Appeal No.271 of 2015. By that order, the learned trial Judge allowed the application made by the respondent No.2, hereinafter referred to as plaintiff, under Order 40, Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') and appointed Advocate Pramod Waman Hardikar as a Receiver under Order 40 Rule 1 of C.P.C. The Receiver was directed to take the possession of the flat from petitioners, hereinafter referred to as defendants No.2 to 4, as per the address mentioned in the cause title of the suit and deliver the same to the plaintiff for the purpose of redevelopment as per the

agreement dated 29.09.2011. Plaintiff is directed to comply his part as mentioned in the redevelopment agreement dated 29.09.2011. Receiver was also directed to submit the report of compliance of his work in the Court within three months from the date of the order.

3. Plaintiff has instituted Suit on 18.10.2013 inter alia praying for declaration that the agreement dated 24.10.2011 executed by respondent No.1 society, hereinafter referred to as defendant No.1, in favour of the plaintiff is valid, subsisting and binding on defendants No.2 to 4; for appointment of any fit and proper person as Receiver under Order 40, Rule 1 of C.P.C. with the necessary powers and directions to take possession from defendants No.2 to 4 and other members of the defendant No.1 to start the process and construction of redevelopment project and / or directing the defendants No.2 to 4 and also other members to deliver the vacant possession to the plaintiff so that the redevelopment process could be started and completed as per the agreement dated 24.10.2011. Plaintiff also sought interim order in terms of prayer clause (c) in the Suit.

4. On the same day, plaintiff filed application exhibit-5 praying for appointment of Receiver under Order 40, Rule 1 of C.P.C. with direction to him to take the possession from defendants No.2 to 4 and deliver the same to the plaintiff for the purpose of redevelopment. Defendants No.2 to 4 resisted the Suit by filing written statement dated 06.01.2014. By judgment and order dated 29.07.2015, the learned trial Judge allowed the application, exhibit-5. Aggrieved by that decision, defendants No.2 to 4 preferred Miscellaneous Civil Appeal, which is dismissed by the learned District Judge. It is against these decisions, defendants No.2 to 5 have instituted the present Petition.

5. Mr. Anturkar submitted that the relief claimed by the plaintiff in exhibit-5 is in the nature of final relief. Relief of final nature cannot be granted at interim stage unless plaintiff satisfies that he has made out exceptional case. In the present case, no exceptional case is made out by the plaintiff. He relied upon the following decisions:

- (a) *Dorab Cawasji Warden Vs. Coomi Sorab Warden*,
1990 (2) SCC 117; and
- (b) *Metro Marins Vs. Bonus Watch Co. (P) Ltd.*,
(2004) 7 SCC 478.

6. He further invited my attention to Clause 14 of the Development Agreement, which is to the following effect:

“14. After the building plan is sanctioned along with TDR, the developer shall issue allotment letter, confirming the flat numbers, locations in terms of these presents. After the said confirmation, and handing over of possession by members, the demolition work will begin.”

7. Order 40, Rule 1(2) of C.P.C. lays down that nothing in this Rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the Suit has not **a present right so to remove**. In other words, he submitted that plaintiff has no existing right for appointment of Court Commissioner unless he fulfills the obligations cast on it under Clause 14 of the Development Agreement.

8. He further submitted that in exercise of powers under Section 79-A of the Maharashtra Co-operative Societies Act, 1960 (for short 'Act'), the State Government, by Notification dated 03.01.2009, has issued directives requiring the societies, who are proposing redevelopment, to first pass primary resolution whether the redevelopment is to be undertaken or not, and if yes, then to pass final resolution for appointing the developer. In the present case, defendant No.1 society has not passed primary resolution. In other words, without complying with the

requirements of directive issued under Section 79-A of the Act, defendant No.1 Society has straight-way appointed developer by passing resolution on 29.09.2011.

9. Mr. Anturkar further submitted that the Courts below have relied upon the following decisions:

- a. *Girish Mulchand Mehta Vs. Mahesh S. Mehta*,
2010 (1) Bom.C.R. 31; and
- b. *Vas Infrastructure Limited Vs. Jaydeep Apartment CHS Ltd.*,
2012 (3) Bom.C.R. 498.

10. Mr. Anturkar submitted that in the case of **Girish Mehta** (*supra*), the Court was considering the provisions of Section 9(ii)(d) and (e) of the Arbitration and Conciliation Act, 1996. The powers under these provisions are wider than the powers under Section 40 of C.P.C.

11. On the other hand, Mr. Kumbhakoni supported the impugned orders. He submitted that the building is constructed in the year 1973. There are, in all, 12 members in defendant No.1 society. Except defendants No.2 to 4, all the other members are ready and willing for redevelopment of the building. He further submitted that defendants No.2 to 4 have not challenged – 1) General Body Resolution dated 29.09.2011 and 2) Development Agreement dated 24.10.2011. He has invited my attention to – a) clause 3 of the development agreement where plaintiff has given 3 options to the members for choosing the transit accommodation; and b) communication dated 30.09.2011 addressed by the Deputy Registrar, Co-operative Societies, Pune City (1), Pune to the Chairman / Secretary of defendant No.1 wherein it is recorded that after following the procedure prescribed in Notification dated 03.01.2009, the society had selected plaintiff by passing resolution on 29.09.2011. He further submitted that the contention based on

Notification dated 03.01.2009 was also not raised in the Courts below.

12. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit for declaration that the development agreement dated 24.10.2011 executed by defendant No.1 in favour of the plaintiff is valid, subsisting and binding. It is not in dispute that there are 12 members in defendant No.1 society. Except defendants No.2 to 4, other members are ready and willing to participate in the redevelopment scheme. That apart, defendants No.2 to 4 have not challenged the resolution dated 29.09.2011 passed by the General Body of defendant No.1 as also the development agreement dated 24.10.2011 whereby plaintiff is appointed as Developer. It is also not in dispute that plaintiff is ready and willing to abide by clause 3 of the development agreement whereunder he has given three options to the members for transit accommodation.

13. Mr. Anturkar relied upon Order 40, Rule (1)2 of C.P.C. to contend that unless and until plaintiff complies clause 14 of the development agreement, he has no existing right to apply for appointment of Court Receiver so as to dispossess defendants No.2 to 4. Mr. Kumbhakoni states that in terms of clause 14 of the development agreement, plaintiff will not begin the demolition work unless the building plan is sanctioned along with the TDR and plaintiff issues allotment letter confirming the flat numbers, locations in terms of the development agreement. Statement made by Mr. Kumbhakoni, on instructions, is recorded. In view thereof, the contention advanced by Mr. Anturkar based on Order 40, Rule 1(2) of C.P.C. loses importance.

14. As far as the contention advanced by Mr. Anturkar that by

allowing the application at interlocutory stage, the Court has granted final relief and that no exceptional case is made out, I do not find any merit in this submission. Mr. Anturkar relied upon the decision in **Metro Marins case** (*supra*). In that case, respondent had instituted Suit for possession alleging that appellant therein to be a licensee and the period of licence having expired, he was entitled to a decree for khas possession of the suit property and other ancillary reliefs. During the pendency of the Suit, he took out interlocutory application praying for a judgment on admission and in the alternative, for an injunction directing the appellant to immediately hand over vacant and peaceful possession. The learned Single Judge of Calcutta High Court held that no case was made out for passing a decree on admission or granting any interim order directing the appellant handing over possession of the property in dispute. Accordingly, the learned Single Judge rejected the application.

15. The Appellate Bench reversed that order and appointed interim Receiver to make an inventory of the movables in the property, to take symbolic possession of the suit property and put the respondent-plaintiff in possession of the property under the authority of that Receiver subject to final adjudication in the original suit. It is in that context, the Apex Court observed in paragraph 9 that the case made out by the respondent did not come under any one of those exceptions noticed in the decision in the case of **Dorab Cawasji Warden** (*supra*).

16. In the case of **Dorab Cawasji Warden** (*supra*), the Apex Court was considering the Suit filed under Section 44 of the Transfer of Property Act, 1882 (for short 'T.P. Act') and in particular 2nd paragraph thereof. The Apex Court was considering the expression “dwelling house belonging to an undivided family” within the meaning of Section 44 of the T.P. Act. After considering the material on record, in

paragraph 24 of that report it was observed that even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property that is the property had not been divided by metes and bounds it would be within the provisions Section 44 of the T.P. Act. In paragraph 26, it was observed that prima facie, transfer by defendants 1 to 3 would come within the mischief of second paragraph of Section 44 of the T.P. Act. The Apex Court also observed that respondent No.4 was fully aware of the provisions of Section 44 of the Act and had purchased the property with the full knowledge of the rights of the other members of the family taking a complete risk. The Apex Court, therefore, held that in such circumstances, respondents cannot be permitted to take advantage of their own acts and defeat the claim of the appellant in the suit by saying that old cause of action under Section 44 of the T.P. Act no longer survived in view of their taking possession.

17. In my opinion, the said decision has no application to the facts of the present case. In the first place, plaintiff has not applied for mandatory injunction. Secondly, plaintiff has applied for appointment of Court Receiver. Order 40, Rule 1(a) and 1(b) read thus,

- “1. Appointment of receivers.- (1) Where it appears to the Court to be just and convenient, the Court may by order-
- (a) appoint a receiver of any property, whether before or after decree;
 - (b) remove any person from the possession or custody of the property;”

18. Perusal of the above extracted portion shows that where it appears to the Court to be **just and convenient**, the Court may by order (a) appoint a receiver of any property, whether before or after decree; (b) remove any person from the possession or custody of the property.

19. In the case of *Krishnaswamy Vs. Thangavelu*, AIR 1950

Madras 430, the learned Single Judge of the Madras High Court has laid down 5 requirements embodied in the words “just and convenient” in Order 40, Rule 1 of C.P.C., which are as under:

“These five requirements are:

- (1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.
- (2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has a very excellent chance of succeeding in the suit.
- (3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration.
- (4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one. And
- (5) The Court, on the application made for the appointment of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame.”

20. As noted earlier, in the present case, out of 12 members, 9 members have consented for redevelopment scheme. Without any challenge being raised by defendants No.2 to 4 to the General Body Resolution as also Development Agreement, defendants have raised objections based on paragraph 14 of the Development Agreement. I, therefore, do not find that the Courts below committed any error in passing the impugned order.

21. In the case of *Surya Dev Rai Vs. Ram Chander Rai*, (2003) 6 SCC 675, the Apex Court, after exhaustively considering the scope of Petitions under Article 227 of the Constitution of India, have summarized the conclusions in paragraph 38. Conclusions 5 to 8 read

thus,

“(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.”

19. If the tests laid down in the above judgment are applied to the facts of the present case, I do not find that the Courts below committed any error in exercising discretion while deciding the application for appointment of receiver. It cannot be said that the discretion exercised

by the Courts below is arbitrary, capricious or perverse. This Court will not be justified in interfering with the exercise of discretion solely on the ground that if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by Courts below reasonably and in a judicial manner, the fact that this Court would have taken a different view may not justify interference with the exercise of discretion by the Courts below. Hence, Petition fails and the same is dismissed.

20. At this stage, Mr. Bhargude orally applies for stay of this order for a period of 4 weeks from today. Mr. Kumbhakoni opposes the application.

21. Having regard to clause 14 of the development agreement, plaintiff cannot start demolition work, unless he complies clause 14 of the development agreement. In view thereof, notwithstanding dismissal of the Petition, this order shall remain stayed for a period of 4 weeks from today subject to defendants No.2 to 4 neither creating third party interest nor parting with possession. Order accordingly.

(R. G. KETKAR, J.)