

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (ST) NO. 7465 OF 2016
WITH
CIVIL APPLICATION (ST.) NO. 11186 OF 2016
IN APPEAL FROM ORDER (ST.) NO. 7465 OF 2016

Mrs. Zaibunissa Abdul Kalim ... Appellant
(Orig. Defendant)

V/s.

Ms. Nilofar Salim Mulani ... Respondent
(Orig. Plaintiff)

.....
Mr. J. G. Damani for the Appellant.
Mr. Anil R. Mishra for the Respondent.

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CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : OCTOBER 17, 2016.

P.C.:

1. Heard learned counsel for the parties.
2. This appeal is preferred against the common order dated 09.02.2016 passed by the City Civil Court, Dindoshi, Mumbai, in Notice of Motion No.280 of 2015 and Notice of Motion No.1747 of 2015 in Short Cause Suit No.213 of 2015.
3. By the impugned order, the trial Court has restrained the appellant-original defendant from causing obstruction to the possession

of the respondent-original plaintiff in the suit premises without following due process of law. At the same time, the respondent is also restrained from creating third party interest in the suit premises till decision of the appeal.

4. Considering the issue involved in this appeal, the appeal is heard finally at the stage of admission itself. Learned counsel for the respondent waived service of notice accordingly.

5. The case of the respondent is that she is in use and occupation of the suit premises, which is a room admeasuring 650 square feet attached with a toilet and a bathroom in Unit No.2, Aarey Milk Colony, Near Sankraman Studio, Next to Aarey Staff Cottage, Opposite Fire Station Gate, Road No.2, Aarey Colony Road, Goregaon (East), Mumbai (suit premises). The appellant is the original owner of the suit premises. According to the respondent, she has acquired the suit premises from the appellant under an agreement dated 01.01.2013, initially for a period of 22 months, on monthly compensation of Rs.4,000/- and security deposit of Rs.10,000/-. She has paid the entire amount of compensation of 22 months to the appellant. It is her further case that thereafter, the appellant approached her for providing financial assistance, and hence, she paid the amount of Rs.3,71,000/- to the

appellant and in lieu thereof, the appellant mortgaged the suit premises to her for Rs.3,81,000/- and assured to refund the amount within 11 months commencing from 02nd February 2013. According to her, again in the month of March 2013, the appellant approached her and told her that she is unable to refund the amount and intends to assign the suit premises for a consideration of Rs.5,81,000/- to the respondent. Accordingly, the appellant got prepared the declaration cum release deed from her Advocate on 16.03.2013. It was duly notarized. The respondent paid the appellant the balance amount of Rs.2,00,000/- towards full and final settlement. The appellant also executed power of attorney in favour of the respondent and assigned all her rights in the suit premises in favour of the respondent.

6. Thus, the sum and substance of the case of respondent is that she is in lawful and authorized possession of the suit premises. Despite that, on 19.03.2013, the appellant tried to forcibly dispossess her from the suit premises. Therefore, she was constrained to lodge a report at Aarey Police Station. Thereafter, again on 31.10.2014, the appellant with the assistance of other persons, tried to dispossess her from the suit premises. Hence she has lodged another report at Aarey Police Station, on the basis of which a criminal case for offences punishable under sections 452, 427, 323, 504, 506 r/w 34 of IPC has been registered

against the appellant.

7. In view of the apprehension of dispossession at the hands of the appellant, the respondent filed a suit before the trial Court for declaration that the appellant has no right to dispossess her from the suit premises without following due process of law. Alongwith the suit, she also filed a Notice of Motion for restraining the appellant from dispossessing her without following due process of law during pendency of the suit. On this Notice of Motion, the trial Court was pleased to grant ad-interim relief on 12.02.2015. On the receipt of notice, the present appellant appeared in the suit and filed cross Notice of Motion No.1747 of 2015 for setting aside the order of ad-interim relief dated 12.02.2015 contending *inter alia* that she is the owner of the suit premises, she has not executed any document in favour of the respondent and the alleged documents like leave and license agreement, release cum declaration deed, power of attorney and mortgage deed are all forged and fabricated documents. It was contended by the appellant that even a cursory glance over these documents would reveal that the same are fabricated documents, and therefore, the respondent cannot derive any legal right on the basis of such documents. Hence, the ad-interim relief granted in favour of the respondent needs to be vacated.

8. The learned trial Court heard the counsel on both these Notices of Motion and vide its impugned order, was pleased to allow the Notice of Motion filed by the respondent, thereby restraining the appellant from dispossessing the respondent without following due process of law. At the same time, the trial Court also partly allowed the Notice of Motion filed by the appellant and restrained the respondent from creating any third party rights in respect of the suit premises.

9. While challenging this impugned order passed by the trial Court, the submission of learned counsel for the appellant Mr. Damani is that the trial Court has not at all considered the documents which, on the face of it also, can be proved to be forged and fabricated. Learned counsel for the appellant has taken this Court through those various documents like the leave and license agreement which bears the date 1st January, 2013. However, it is submitted that franking of the said document can be seen to be on 14th January 2013. He has alleged that even the endorsement below the said document reveals that an amount of Rs.88,000/- towards compensation is said to be received in cash. The signature of the appellant on the said document is shown to be in Urdu, whereas, the appellant is used to sign in English.

10. Learned counsel for the appellant has also drawn attention of this Court to the document titled as 'deed of mortgage' alleged to be dated 2nd February 2013. He has submitted that the stamp paper for the said document is of 05th December 2012 and the document is not having any registration, though for a deed of mortgage registration is compulsory. He has also submitted that on this document also there is endorsement that an amount of Rs.3,81,000/- is received in cash. It is his specific case that the appellant has not received any such amount in cash at any time.

11. Lastly, learned counsel for the appellant has pointed out the declaration cum release deed to submit that here also a certain amount is stated to be received in cash, and according to him, there is no question of assigning any such rights as stated in the said document.

12. The sum and substance of the submissions of learned counsel for the appellant is that, on the basis of these alleged forged and fabricated documents, if the respondent is allowed to remain in possession of the suit premises in pursuance of the order passed by the trial Court, then it would be a travesty of justice. The appellant would be deprived from possession of the suit premises for indefinite time as the hearing of the suit may take several years, and in such a situation, it is necessary to

vacate the impugned order passed by the trial Court so that the appellant can take legal recourse to get possession of the suit premises from the respondent. He has submitted that the appellant has already filed a suit for possession before the competent authority under Section 33 of the Maharashtra Rent Control Act, 1999, which is clear to show that the appellant has taken recourse to law and is following due process of law for getting possession of the suit premises. He has also submitted that even on the basis of the alleged leave and license agreement, the respondent could have been in possession for only 22 months. Now that period has expired. Further, according to him, if the respondent claims to be in possession on the basis of the leave and license agreement, then the trial Court has no jurisdiction to decide the suit or to grant such relief. Thus, according to him, it is necessary not only to vacate the ad-interim order, but also to expedite hearing of the suit.

13. Learned counsel for the respondent, however, strongly resists these submissions made by learned counsel for the appellant by pointing out that even as per the own case of the appellant, the respondent is in possession of the suit property, and that is the reason why the appellant has filed the suit for possession before the competent authority under Section 33 of the Maharashtra Rent Control Act, 1999. According to him, whether the documents produced in the case are genuine or not

can be decided only at the stage of final hearing and till then, possession of the respondent in the suit premises needs to be protected against any illegal or unlawful attempt of her dispossession. He has also pointed out to the reports lodged with the Police Station against such attempts of dispossession. According to him, no ground is made out by the appellant to vacate the order of interim injunction passed by the trial Court or to expedite hearing of the suit merely because the appellant has preferred this appeal.

14. I have given my thoughtful consideration to the submissions advanced by learned counsel for both the parties. One uncontroverted fact which emerges on record is that the respondent, as on the date of filing of the suit, was in possession of the suit premises and that is why, by way of ad-interim relief, her possession was also protected by the trial Court by the order dated 12th February, 2015. Now, the question is, whether her possession is that of a leave and licensee or whether it is that of a mortgagee or of the assignee on the basis of the alleged release deed? All these questions are to be decided at the time of final hearing after both the parties adduced their evidence in support of their respective contentions. Merely looking at the documents, on the face thereof, it would not be appropriate to stamp or brandish those documents as false, forged or fabricated. It requires the oral evidence

of the parties to call these document as forged or fabricated. The oral evidence is yet to be recorded before the trial Court. Whether the payment in cash is really made and received or not, whether the possession of the respondent in the suit premises is having legal source or not, can not be decided at this stage as these are the intricate questions of facts which can be decided only after both the parties are given opportunity to lead evidence. *Prima facie*, it is to be seen at this stage that the respondent has entered into possession of the suit premises on the basis of some document which she calls as leave and license agreement. Therefore, it cannot be said that her entry and possession over the suit premises is itself illegal, unauthorized or based on the forged and fabricated documents. Even in respect of possession of a trespasser, the law expects that such possession be protected against any unlawful attempts of dispossession and this protection is available even against the lawful owner. The appellant is having the full opportunity at the time of final hearing of the suit to prove that the documents, on which the respondent is relying, are false and fabricated. However, at this stage, it would not be appropriate to decide the legality of these documents merely on a cursory perusal thereof to hold that the respondent's possession over the suit premises is illegal and unauthorized.

15. The relief which the respondent is claiming is also limited one that of protection against dispossession without following due process of law. It is a matter of record that the appellant has already approached the competent authority for eviction of the respondent by filing a suit under Section 33 of the Maharashtra Rent Control Act, 1999. In such a situation, it is clear that the appellant is also admitting possession of the respondent in the suit premises, and is adopting due process of law. Till the appellant gets decision in the suit proceedings, it goes without saying that respondent's possession over the suit premises needs protection. The trial Court has also ensured that during this period, the respondent does not create any third party interest in the suit premises and therefore, the respondent is restrained from creating such third party interest. Hence, there remains no more apprehension on that score. However, considering the fact that already the appellant has made two attempts to dispossess the respondent from the suit premises, in respect of which complaints are also lodged with the Police, and as can be seen from the impugned order passed by the trial Court that the Police visited the spot and prepared panchanama when the household articles of the respondent were found in the house, the apprehension of respondent that she may be dispossessed without due process of law is *prima facie* reasonable and justified.

16. In view of the above discussion, it cannot be said that the trial Court has committed any illegality in passing the impugned order. The impugned order cannot be called as illegal or void so as to warrant interference in the discretion exercised by the trial Court.

17. At the most, taking into consideration that the issues involved in the present case are factual, hearing of the case can be expedited but without any time limit as such, considering the calender of the trial Court, of which this Court is not aware and that the suit is only of the year 2015.

18. In light of the above, the appeal stands dismissed. The trial Court, considering its own calender, may expedite hearing of the suit proceedings.

19. In view of dismissal of the appeal, nothing survives in pending Civil Application (St.) No. 11186 of 2016 and the same stands disposed of.

(DR. SHALINI PHANSALKAR-JOSHI, J.)