

Mr. P. J. Thorat i/b. Mr. Bipin Joshi for Petitioners.
Mr. V. Y. Divekar i/b. M/s. Divekar and Co. for Respondents.

ORDER :

Heard Mr. Thorat, learned Counsel for petitioners and Mr. Divekar, learned Counsel for respondents at length. Rule. Mr. Divekar waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

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Mumbai 400 071; for appointing plaintiffs as agent of the Court Receiver without security and without compensation; for direction to the respondents-defendants to pay to the plaintiffs the sum of Rs.45,000/- by way of damages and / or mesne profits and / or compensation from the date of filing of the Suit till permanent alternate accommodation is given to the plaintiffs; for direction to the defendants to handover possession of the temporary alternate accommodation described in prayer clause (a) under protest and without prejudice and in the alternative of prayer clause (a), issue mandatory direction to the defendants to grant permanent alternate accommodation.

3. Mr. Thorat submitted that plaintiffs had filed application for amendment of the plaint. That was rejected on 11.08.2008. Aggrieved by that decision, plaintiffs preferred Writ Petition No.1873 of 2009. By order dated 05.08.2009, Petition was admitted by issuing rule. Hearing of the Suit was stayed till further orders. However, notwithstanding the stay, the trial Court was directed to decide any application for interim relief in accordance with law. Mr. Thorat submitted that while rejecting the application, the learned trial Judge observed in paragraph 6 that on 05.08.2009, this Court disposed of the Petition by directing the trial Court to expedite any application for interim order in accordance with law. He submitted that this was patently misreading of High Court's order dated 05.08.2009. The learned trial Judge further observed in paragraph 7 that plaintiffs took out injunction notice, which was rejected by the trial Court. Though it was observed that appeal against that order was pending as of date, the said Appeal was withdrawn by the plaintiffs. In paragraph 8, the learned trial Judge has referred to the orders passed by the authorities under the Urban Land (Ceiling and Regulation) Act, 1976 (for short 'Act') as also the undertakings. The said orders and also undertakings were denied by the defendants by observing it is the matter

of evidence to be proved by the plaintiffs whether defendants have given undertaking before the Authorities for handing over alternate possession or the possession of any flat as the temporary alternate accommodation to the plaintiffs as has been mentioned by the defendant in their written statement. He submitted that basically, the learned trial Judge did not consider whether plaintiffs have made out a case for appointment of Court Receiver or not.

4. As far as the order of the appellate Court is concerned, in paragraph 5, the appellate Court recorded the submissions made on behalf of the defendants that flat No.202 admeasuring 1000 sq.ft. consisting of three bedrooms has been reserved in order to provide the same to the plaintiffs, subject to the outcome of the Suit. It was further observed that the learned trial Judge has rightly held that plaintiffs have taken out application exhibit-29 in the background that there is order of the Authorities under the Act. As defendants kept flat No.202 for giving it to the plaintiff subject to the outcome of the Suit, no case is made out for appointment of the Court Receiver under Order 40 of C.P.C.

5. Mr. Thorat submitted that plaintiffs have claimed reliefs in respect of flats No.201 and 202. Flat No.201 is already disposed of by the defendants on 27.04.2013. It is, therefore, appropriate to appoint Court Receiver in respect of flat No.202, which is presently kept under lock. He, therefore, submitted that the impugned orders deserve to be set aside thereby appointing the Court Receiver in respect of flat No.202 and appointing plaintiffs as agent of the Court Receiver without payment of royalty, security and compensation.

6. On the other hand, Mr. Divekar has invited my attention to the affidavit made by Mr. Nitin Kantilal Gandhi - respondent No.1, and in

particular paragraph 3. In paragraph 3, it is admitted that by an agreement of sale dated 27.04.2013, respondents have sold flat No.201 in Skyrise Building to Mr. Raju Bijlani and Ms Alisha Bijlani. As far as flat No.202 is concerned, the same is being used by the respondents themselves. He, therefore, submitted that no case is made out for interfering with the impugned orders.

7. As noted earlier, by order dated 05.08.2009 passed by this Court in Writ Petition No.1873 of 2009, this Court had expedited hearing of the Petition and stayed hearing of the Suit. At the same time, notwithstanding the stay, the trial Court was permitted to decide any application for interim relief in accordance with law. While rejecting the application, the learned trial Judge has observed in paragraph 6 that Writ Petition was disposed of on 05.08.2009. In my opinion, this is a complete misreading of the order dated 05.08.2009 passed by this Court, which reads thus,

- “1] Heard learned counsel for the petitioners.
- 2] Rule. Hearing is expedited.
- 3] The hearing of the suit will remain stayed till further orders.
- 4] However, notwithstanding the stay, the trial court shall decide any application for interim relief in accordance with law.”

8. The learned trial Judge failed to appreciate that this Court had stayed further proceedings of the Suit and at the same time permitted the trial Court to decide any application for interim relief in accordance with law. It is no doubt true that at that time, application made by the plaintiffs for amending the plaint was not finally allowed. By order dated 30.06.2016, Writ Petition No.1873 of 2009 was allowed and application for amendment was allowed with direction to the plaintiff to carry out the amendment within four weeks and serving the amended plaint on the defendants. Defendants were also permitted to file written

statement within four weeks from the receipt of the amended plaint. Mr. Divekar assures that defendants will file written statement in terms of paragraph 13 of the order dated 30.06.2016 passed in Writ Petition No.1873 of 2009.

9. After perusing the impugned orders, it is evident that the Courts below have not applied the principles regulating the appointment of Court Receiver. In the case of ***T. Krishnaswamy Chetty vs C. Thangavelu Chetty***, AIR 1955 Madras 430, the learned Single Judge of Madras High Court, after exhaustively considering the principles governing appointment of Court Receiver, has observed thus,

“(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised-for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding : -- Mathusri v. Mathusri, 19 Mad 120 (PC); Sivagnanathammal v. Arunachallam Pillai, 21 Mad LJ 821; Habibullah v. Abtiakallah, AIR 1918 Cal 882; Tirath Singh v. Shromani Gurudwara Prabandhak Committee, AIR 1931 Lah 688; Ghanasham v. Moraba, 18 Bom 474; Jagat Tarini Dasi v. Nabagopal Chaki, 34 Cal 305; Sivaji Raja Sahib v. Aiswariyanandaji, AIR 1915 Mad 926; Prasanno Moyi Devi v. Beni Madbab Rai, 5 All 556; -- Sidheswari Dabi v. Abhayeswari Dahi, 15 Cal 818; Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das, AIR 1925 Lah 349; Bhupendra Nath v. Manohar Mukerjee, AIR 1024 Cal 456.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit. Dhumi v. Nawab Sajjad All Khan, AIR 192.3 Uh 623; Firm of Raghubir Singh Jaswant v. Narinjan Singh, AIR 1923 Lah 48; Siaram Das v. Mohabir Das, 27 Cal 279; Mahammad Kasim v. Nagaraja Moopnar, AIR 1928 Mad 813; Banwarilal Chowdhury v. Motilal, AIR 1922 Pat 493.

(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. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. *Manghanmal Tarachand v. Mikanbai*, AIR 1933 Sind 231; *Bidurramji v. Keshoramji*, AIR 1939 Oudh 31; *Sheoambar Ban v. Mohan Ban*, AIR 1941 Oudh 328.

(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. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through, fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. *Nilambar Das v. Mabal Behari*, AIR 1927 Pat 220; *Alkama Bibi v. Syed Istak Hussain*, AIR 1925 Cal 970; *Mathuria Debya v. Shibdayal Singh*, 14 Cal WN 252; *Bhubaneswar Prasad v. Rajeshwar Prasad*, AIR 1948 Pat 195. Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bonafides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application 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. He must come to Court with clean hands and should not have disintitiled himself to the equitable relief by laches, delay, acquiescence etc.”

10. In view thereof, impugned orders are liable to be set aside thereby

restoring application exhibit-29 for deciding it afresh in the light of the principles referred hereinabove. Mr. Thorat states that within one week from today, plaintiffs will file additional affidavit placing on record subsequent events. Mr. Divekar states that defendants will also file additional affidavit within one week from receipt of the additional affidavit of plaintiffs. Mr. Divekar states that respondent No.1 is present in the Court. Upon taking instructions from him, he states that the statement made by him and recorded in the order dated 30.06.2016 will be continued pending the Suit. Statement, on instructions, is recorded in the form of undertaking and the same is accepted.

11. In view thereof, Petition is disposed of in the following terms:
 - a. Impugned order dated 26.10.2010 below exhibit-29 is quashed and set aside and application exhibit-29 is restored to the file of the trial Court;
 - b. Plaintiffs will file additional affidavit placing on record subsequent events, within one week from today;
 - c. Defendants will file additional affidavit within one week from receipt of the additional affidavit of plaintiffs;
 - d. Trial Court will decide the application exhibit-29 and thereafter proceed with the hearing of the Suit;
 - e. Liberty is reserved to the parties to apply for expeditious disposal of the Suit. If such application is made, the learned trial Judge will pass appropriate order.
 - f. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)