

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

APPEAL FROM ORDER NO.328 OF 2015

WITH

CIVIL APPLICATION NO.417 OF 2015

Mr. Prem C. Mirchandani

.. Appellant

Versus

Mrs. Indra Haresh Mirchandani

.. Respondent

Shri. Chirag Shah i/by Shri. Jitendra J. Shah for the Appellant.

Shri. Anand J. Shinde for the Respondent.

CORAM : R.M. SAVANT, J.

DATE : 4th JULY 2016

PC.

1. The above Appeal from Order challenges the order dated 05.11.2014 passed by the Learned Judge of the City Civil Court, Borivali Division, Dindoshi, Mumbai, by which order, the Notice of Motion filed by the Appellant/original Plaintiff being No.1838 of 2013 came to be dismissed.

2. The Appellant herein is the original Plaintiff and the Respondent herein is the original Defendant. The Appellant/Plaintiff has filed the suit in question being SC Suit No.882 of 2009. In the said suit,

the Plaintiff took out the instant Notice of Motion alleging contempt in the matter of breach of undertaking given by the Respondent to the effect that the Defendant would not dispossess the Plaintiff without following the due process of law. The Plaintiff had also prayed for other reliefs. However, at the hearing of the Notice of Motion a statement came to be made on behalf of the Plaintiff that except the prayer for contempt the Plaintiff is not pressing other prayers.

3. The suit flat is undisputedly owned by the Respondent i.e. original Defendant. It appears that the original Defendant resides in the USA. The Plaintiff and the Defendant are brother and sister. The mother of the Plaintiff was residing in the suit flat and the Defendant it seems permitted the Plaintiff to come and visit the mother and occasionally also reside in the suit premises. It is the case of the Defendant that her son resides therein and that Plaintiff is making efforts to dispossess the son and deal with the property in question. It seems that in the Notice of Motion filed by the Plaintiff being Notice of Motion No.518 of 2010 a statement came to be made on behalf of the Defendant through Counsel that the Defendant or anybody claiming through her would not dispossess the Plaintiff from the suit premises without following the due process of law. It seems that the Defendant has put up her own lock on the suit premises and thereby according to the Plaintiff has prevented his entry in

the suit premises. This resulted in the instant Notice of Motion being filed by the Plaintiff seeking action to be taken against the Defendant under Order XXXIX Rule 2A of the CPC. The said proceedings were contested between the parties and it seems that the parties also led evidence. The Trial Court i.e. the Learned Judge of the City Civil Court held that in view of the fact that since the Plaintiff is not seeking the punishment of the Defendant, the relief sought in the Notice of Motion could not be granted. The Trial Court has also observed that whether the Plaintiff was occupying the suit premises would have to be decided on the merits of the case in the suit. This was in view of the stand taken by the Defendant that the Plaintiff was only visiting the suit premises to take care of the mother. The Trial Court has observed that the Defendant is allowing the Plaintiff from visiting the suit premises. What has weighed with the Trial Court in passing the impugned order is the fact that undisputedly the premises are owned by the Defendant. In the light of the said fact, namely that the ownership of the suit premises is that of the Defendant and the Plaintiff was only visiting the suit premises for taking care of the mother. The order passed by the Trial Court refusing to take action under Order XXXIX Rule 2A cannot be found fault with. No case for interference is made out. The Appeal from Order is accordingly dismissed.

4. In view of the dismissal of the Appeal from Order, the Civil

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Application does not survive and to accordingly stand disposed of as such.

5. Needless to state that the suit would be tried on its own merits and in accordance with law.

[R.M. SAVANT, J]