

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

**APPEAL FROM ORDER (ST) NO.2441 OF 2017
WITH
CIVIL APPLICATION (ST) NO.2442 OF 2017
IN
APPEAL FROM ORDER (ST) NO.2441 OF 2017**

Pradeep Laxman Ghivalkar ..Appellant/Applicant
V/s.

Laxman Vitthal Ghivalkar & Ors. ..Respondents

Mr.Uday P. Warunjikar I/by Mr.M.A. Khan for the
Appellant/Applicant.

Mr.Kunal Bhange for Respondent Nos.1 & 2.

Mrs.M.R. Bhoir for Respondent No.3-BMC.

CORAM : M. S. SONAK, J.

DATE : 27 JANUARY 2017.

P.C.

1. Heard Mr.Warunjikar learned counsel for the appellant and Mr.Kunal Bhange for respondent no.1 and 2. Ms.Bhoir appears for respondent No.3-Municipal Corporation of Greater Mumbai (MCGM).

2. The challenge in this appeal is to the order dated 19-01-2017 made by the City Civil Court rejecting the appellant

(Original Plaintiff) Notice of Motion No.173 of 2017 in L.C. Suit No.492 of 2016.

3. Mr.Warunjikar the learned counsel for the appellant submits that the main reason for dismissal of the appellants Notice of Motion is that on two earlier occasions Notices of Motion taken out by the appellant came to be dismissed. Mr.Warunjikar submits that since the dismissal of the previous Notices of Motion, there has been a change in circumstance. Accordingly, the appellant took out a Chamber Summons seeking leave to amend the plaint. Along with the Chamber Summons or shortly thereafter, the appellant took out the Notice of Motion No.173 of 2017. In these circumstances, the Trial Judge was duty bound to examine whether there was indeed any change of circumstance and appellants Notice of Motion was required to be decided on the basis of such change of circumstance. Mr.Warunjikar submits that the Trial Court has erred in principle by simply dismissing the Notice of Motion on the ground that previous two Notices of Motion of came to be dismissed without advertting seriously to the issue of change of circumstance.

4. Mr.Warunjikar submits that on the earlier occasions when the Notices of Motion were rejected, there was only an

apprehension that the MCGM, at the behest of respondent No.1 (Original Defendant No.1) might transfer the suit license in favour of respondent No.2 (Original Defendant No.2). However, now, by communication dated 17 December 2016, the MCGM has made it clear that it has, in principle, approved the transfer. Secondly, Mr.Warunjikar adverts to nokarnama which are placed on record at pages 76 to 79, and submits that these establish the possession all the appellant. Finally, Mr.Warunjikar submits that there are rules for transfer of licensees due to incapacitation or death of licensee, in terms whereof, the license, will normally have to be transferred in favour of the eldest son, which in this case, will be the appellant qua the respondent No.1. Mr.Warunjikar submits that all these are change in circumstances and therefore, the Notice of Motion No.173 of 2017 was required to have been considered by the learned Trial Judge in light of such change circumstances. Since this has not been done, Mr.Warunjikar submits that the impugned order is vulnerably neither its liable to be set aside.

5. Mr.Bhange the learned counsel for the respondent Nos.1 and 2 submits that the license has already been transferred by the MCGM in favour of respondent No.2. He submits that there is absolutely no change of circumstances and the Notice of Motion

No.173 of 2017 was noting but a device to overcome the effect of the orders dated 30 June 2006 and 08 December 2016 made by this Court declining very similar interim relief to the appellant. Mr.Bhange points out that the order dated 08 December 2016 has been challenge by the appellant before the Hon'ble Apex Court and the matter is pending. He submits that possibly because no interim relief was obtained by the appellants before the Hon'ble Supreme Court, the Notice of Motion No.173 of 2017 came to be taken out and this according to Mr.Bhange amounts to abuse of the process of the Court. For these reasons Mr.Bhange submits that this appeal is liable to be dismissed to the exemplary cost.

6. Ms.Bhoir the learned counsel for MCGM submits that the transfer of license is strictly in accordance with the rules and there is really no infirmity in that regard. For these reasons she submits that this appeal may not be entertained.

7. As a matter of principle, Mr.Warunjikar may be right that a party is entitled to apply for interim reliefs even when such interim reliefs may have been declined earlier, where, there is a significant change in the circumstances. In this case however, such principle will not apply because, what Mr.Warunjikar refers to as

change in circumstances it is really not any change in circumstances. In any case, even assuming that the circumstance that earlier was no factual transfer but only an apprehension of transfer and on 17 December 2017, the MCGM in writing approved the proposal for transfer, is to be regarded as some sort of change in circumstance, even then, such circumstance does not in any manner, improve the case of the appellant, rather, it renders, the case of the appellant even weaker. Mr.Bhange points out that by now, even the license has been transferred/issued by the MCGM in favour of respondent No.2.

8. The submission on the basis of rules was considered by this Court in its order dated 08 December 2016 at paragraph 5 of the said order, this Court has observed thus :-

“Having considered the nature of the grievance and the impugned order, it is clear that the issue is as regards transfer of the licence issued by the Municipal Corporation. The legal position is that a licence would be issued by the Respondent Municipal Corporation to conduct the business in the Municipal Market as per the Rules which are framed by the Municipal Corporation. There is a dispute interse between the Appellan-Plaintiff-son and Respondent No.1 father. If the rules permit the transfer of a licence by Respondent No.1 in favour of any

other person or for that matter Respondent No.2 his grand son, surely the Appellant-Plaintiff cannot contend that it ought to be transferred in his name only on the ground that he was conducting the father's business. In any event any issue-touching the grant of licencess is a subject matter falling within the powers of the licensing authority.”

9. The order dated 08 December 2016 is subject matter of Special Leave Petition. Pending decision of the Hon'ble Supreme Court, it was really not proper for the appellant to have taken out Notice of Motion No.173/2017 and attempted to secure some relief, which would run counter to the orders of this Court dated 30 June 2016 and 08 December 2016. In fact, the learned Trial Judge was quite right in dismissing the Notice of Motion but the learned Trial Judge erred in granting some ad-interim relief to the appellant since, such ad-interim relief is totally contrary to the orders made by this Court on 30 June 2016 and 08 December 2016.

10. The submissions based on nokarnammas is again not in change of circumstance. In any case, based upon nokarnammas extended only upto the year 2011, there is no question of appellant claiming any rights in respect of the license. Since, the appellant

himself relies upon the nokarnammas it can be presumed that he accepts that his status was that of a servant and nothing further. In such circumstances, there is no question of grant of any relief in Notice of Motion No.173 of 2017 particularly when similar relief was declined on two earlier occasions by this Court in its order dated 30 June 2016 and 08 December 2016.

11. The Hon'ble Supreme Court in the case of ***Maria Margarida Sequeira Fernandes V/s. Erasmo Jack De Sequeira (2012 5 SCC 370)*** as held a caretaker or a servant cannot claim possession in his own right. Therefore, the so called possession on the basis of nokaranamas, can, prima-facie be regarded as no possession as such, which can be protected by any injunctive relief.

12. The law on the aforesaid subject has been considered by the Hon'ble Supreme Court in the case of ***Maria Margarida Sequeira Fernandes V/s. Erasmo Jack De Sequeira (Supra)*** and the principles which emerge have been set out in paragraph 97 in the following terms.

“97. Principles of law which emerge in this case are crystallised as under:

(1) No one acquires title to the property if he or she

was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

(2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

(3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

(4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour.

(5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.

(emphasis supplied)

13. Therefore applying the aforesaid principles, there is no question the appellant claiming virtually the same relief which was denied on two occasions by this Court by its order dated 30 June 2016 and 08 December 2016.

14. There is substance in the contention of the Mr.Bhange

that appellant is bent upon the abusing the process of Court by repeatedly taking out Notices of Motion for substantially the same relief. However, since this is a case involving the father, son and the nephew, no cost or being imposed on this occasion.

15. The appeal is dismissed. There shall be no order as to costs.

16. In view of the dismissal of the appeal, Civil Application does not survive and disposed of accordingly.

(M. S. SONAK, J.)