

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 71 OF 2017
WITH
CIVIL APPLICATION NO. 98 OF 2017

Mr. M.N. Rajendra Kumar .. Appellant
vs.
Agnes w/o. Veldgein D'souza and ors. .. Respondents

Mr. G.S. Hegde i/b Mr. Shriniwas Singh for the Appellant.
Ms R.C. Nichani for Respondent Nos.1 to 7.

CORAM : M. S. SONAK, J.
DATE : 24 FEBRUARY 2017.

P.C. :-

1] Heard Mr. Hegde, learned counsel for the appellant and Ms R.C. Nichani, learned counsel for respondent Nos.1 to 7.

2] The challenge in this appeal is to the order dated 31 January 2017, by which, Notice of Motion No. 2870 of 2015 taken out by respondent Nos.1 to 7 has been made absolute in terms of prayer clauses (a), (b) and (c), which read as under:

“(a) That the Respondent Nos.1 to 3 be added party Defendant Nos.13 to 15 in the suit;

(b) that pending hearing and final disposal of the suit, the Court Receiver, High Court, Bombay be ordered and directed to take physical possession of the eight rooms on the Ground floor of the suit property which were in possession of original deceased Defendant No.1;

*(c) that the Respondent Nos.1 to 3 and/or any one of them be restrained by an order and injunction of this Hon'ble Court from-
i] taking any action pursuant to the alleged conveyance dated 15th November 2009 between the deceased Defendant No.1 and the Respondent Nos.1 to 3;*

ii] dealing with and/or creating any third party rights in the portion of suit property in possession of deceased Defendant No.1;

iii] trying to enter into or take possession of the eight rooms on the ground floor of the suit property which were in possession of the original deceased Defendant No.1;

iv] for ad-interim reliefs in terms of prayer (b) and (c) (i) (ii) & (iii) above;

v] that costs of the Notice of Motion be provided for;

vi] for such other and further reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case."

3] Mr. Hegde, learned counsel for the appellant who was impleaded as respondent No.3 to the said notice of motion, submits that the appellant has purchased 1/3rd right, title and interest from Ms Jennette D'souza, who was original defendant No.1 in Suit No. 1761 of 1993. This right, title and interest is in respect of a Bungalow "Joserose" and the property appurtenant thereto. This purchase is in terms of registered Deed of Conveyance dated 5 November 2009. In pursuance of such conveyance, even the name of the appellant has been entered in the property card. The appellant states that he is in possession of part of the Bungalow (ground floor). The appellant also states that he is a *bonafide* purchaser without notice of the present pending litigation in terms of Suit No. 1761 of 1993. In such circumstances, Mr. Hegde submits that there was no case made out for appointment of any Receiver or for issuance of any directions to the Receiver to take over possession of the property from the appellant.

4] Mr. Hegde also submits that if the plaint in Suit No. 1761 of 1993 is perused, it is clear that Ms Jennette D'souza (defendant No.1) from whom the appellant has purchased the suit property, was only a formal party to the suit. The suit was basically in respect of certain illegal structures, which were in the occupation of original defendant Nos.5 to 12 and even the reliefs were in the context of such structures. Mr. Hegde submits that the order dated 23 September 1996, by which, the Court Receiver came to be appointed in Suit No. 1761 of 1993 does not relate at all to the Bungalow, but, at the highest is related to the structures in the occupation of original defendant Nos.5 to 12. He submits that in any case, the order dated 23 September 1996 is required to be construed in the light of pleadings in the plaint and from the same, it is quite clear that the order does not pertain to the Bungalow. Mr. Hegde states that in any case, the appellant was unaware of pendency of Suit No. 1761 of 1993 and therefore, any orders made in the suit, obviously, cannot bind the appellant, who has now become one of the co-owner of the entire property. He submits that one co-owner cannot injunct any co-owners and since, this principle has been ignored by learned Trial Judge while making the impugned order, the same warrants interference.

5] Without prejudice, Mr. Hegde submitted that at the highest, the Court Receiver could have taken symbolic possession and further, some restraint order could have been made against the appellant in the matter of further alienation. But, the impugned order for appointment of Court Receiver in respect of the portion of the property, in which the appellant is in possession, is quite harsh and

unwarranted, in the facts and circumstances of the present case.

6] Ms Nichani, learned counsel for respondent Nos.1 to 7, submits that by order dated 23 September 1996 in Suit No. 1761 of 1993, the Receiver was appointed in terms of prayer clause (c) of the notice of motion. Upon perusal of prayer clause (c), it is quite clear that the Receiver was appointed in respect of the Bungalow and the areas appurtenant thereto. Further, Ms Jennette D'souza has furnished specific undertaking that she will not sell, transfer or alienate the suit property or create any third party rights any time. She points out that in 2001, in breach of such undertaking, Ms Jennette D'souza did attempt to induct some strangers in the suit property. However, by order dated 5 February 2001, this court, accepted her apology as well as her undertaking that henceforth, she will not induct any strangers in the suit property. Ms Nichani also points out that this is not at all a case where the appellant can claim to be a *bonafide* purchaser without notice of the pending litigation. She submits that on bare perusal of the Deed of Conveyance, it makes clear that hardly an amount of Rs.5 Lakhs came to be paid to Ms Jennette D'souza and amount of Rs.20 Lakhs from out of total consideration of Rs.25 Lakhs were paid to one Subhakar Kotian and one Mr. Ajay Yadav. In the conveyance, there is reference to the suit pending between the said two persons and Ms Jennette D'souza. However, there is no reference to the present suit in respect of which the Court Receiver was already appointed and there were restraint orders against Ms Jennette D'souza. All this circumstance, according to Ms Nichani, makes it apparent that the appellant is not a *bonafide* purchaser for value or without notice of pending litigation.

Ms Nichani also makes reference to the Court Receiver's report and the circumstance that the board of the Court Receiver was very much at the site. For all these reasons, Ms Nichani submits that there is no case made out to interfere with the impugned order.

7] In this case, the Court Receiver came to be appointed by order dated 23 September 1996. This order, at paragraph 6, clearly states that the Receiver is appointed in terms of prayer clause (c) of the notice of motion. This prayer clause (c) of the notice of motion reads thus:

“(c) that pending the hearing and final disposal of the suit, a Court Receiver, High Court, Bombay or such other fit and proper person be appointed as Receiver of the suit property “Joserose” bungalow and the surrounding land bearing C.T.S.No. 546 and 544, at 81, Himansurai Road, Malad (West), Bombay – 400 064, with all the powers under Order 40 Rule 2 of the Code of Civil Procedure 1908”.

8] This order is very clear. Therefore, the contention of Mr.Hegde that the order appointing the Receiver was not to apply to the actual Bungalow cannot be accepted. The Receiver was appointed in respect of entire property and including very specifically “Joserose” Bungalow.

9] The aforesaid position is further made clear by the order dated 5 February 2001 made by this court, when Ms Jennette D'souza, in breach of the order appointing Receiver and in breach of the undertakings furnished by her, attempted to induct one Shivraj Bhosle in portion of the Bungalow, i.e., the premises on the ground floor of the Bungalow. At that stage, a motion was taken out that the Court Receiver takes over physical possession from Ms Jennette

D'souza, since she has acted in breach of orders appointing the Court Receiver and the undertakings furnished by her. The order dated 5 February 2001 reads thus:

"1. Heard Mr. Nagvekar in support of this Motion, which is taken out by defendant No.1. Ms. Nichani appears for the plaintiffs.

2. The grievance of the plaintiffs is that in breach of the order passed earlier, defendant No.1 has inducted some third person in the premises on the ground floor by name Shivaji Bhosle. In view of the complaint made by the plaintiffs, the officer from the Receiver's office visited that particular place and he has confirmed what is alleged by the plaintiffs.

3. Mr. Nagvekar for defendant No.1 points out that defendant No.1 is an old lady and for her income, she was doing some activity and at that time perhaps some other persons were seen in the premises. Mr. Nagvekar assures that neither this Shivraj Bhosle nor anybody else will be inducted in this premises hereafter. On this assurance, this Motion is entertained and the Receiver is directed not to take possession from defendant No.1.

4. It is made clear that defendant No.1 should comply with the order passed strictly and any breach hereafter will be visited with strict order viz. taking away possession from her.

Motion disposed of."

10] From the aforesaid again, it is very clear that the order appointing the Court Receiver and the undertakings furnished by Ms Jennette D'souza applied, *inter alia*, to the Bungalow and in particular, the ground floor premises in possession of Ms Jennette D'souza. In the aforesaid order, it is made clear that Ms Jennette D'souza should comply with the orders passed strictly and any breach hereafter will be visited with strict order, i.e., taking away possession from her. Ms Jennette D'souza has, in fact, given an undertaking that she will not induct any person in the premises thereafter.

11] The submission of Mr. Hegde that the appellant in this case is a *bonafide* purchaser without notice of any pending litigation or encumbrances, at least *prima facie*, deserves no acceptance. The Deed of Conveyance, on basis of which, the appellant claims title has been entered into on 5 November 2009. Suit No. 1761 of 1993 is pending. The order appointing Court Receiver, which was made on 23 September 1996 is still holding the field. So also, the order dated 5 February 2001 is still holding the field, inasmuch as on 5 November 2009, the undertakings furnished by Ms Jennette D'souza to this Court that she will not create any third party rights or that she will not induct any strangers was very much in force. This means that the appellant has purchased the property in respect of which, the Court Receiver had already been appointed; in respect of which there was an undertaking furnished by the Vendor with regard to alienation; in respect of which there was a restraint order for alienation in operation.

12] In respect of 1/3rd rights to the suit property, which is a Bungalow in Malad and substantial area around the same, all that Ms Jennette D'souza was allegedly paid an amount of Rs.5 Lakhs. The balance consideration of Rs.20 Lakhs was paid to one Subhakar Kotian and one Ajay Yadav, with whom the said Ms Jennette D'souza was allegedly litigating. Such transaction, hardly inspires any confidence. At least *prima facie*, it is evident that the appellant realising that Ms Jennette D'souza is an old lady and there is some litigation pending in respect of the property has executed in the Deed of Conveyance and on the basis of the same, is claiming possession in respect of ground floor of the Bungalow.

13] The impugned order notes that the board of the Official Receiver is very much at the site of the suit property, which, undoubtedly, includes the Bungalow in question. Respondent Nos.1 to 7 reside in the Bungalow and they also confirm that the board of the Court Receiver is very much at the site. There is absolutely no reason in a case of this nature to suspect that the board was at the site. In such circumstances, the appellant cannot simply say that he was not aware of any pending litigation and that by paying a paltry amount of Rs.5 Lakhs to Ms Jennette D'souza, the appellant becomes *bonafide* purchaser for consideration and without any value. At least *prima facie*, this is a case where the appellant is seeking to take any undue advantage of the situation on the basis of Deed of Conveyance or the consequent entry of his name in the property card.

14] This court, in its order dated 5 February 2001, had made it very clear to Ms Jennette D'souza, in case she breaches the orders of the Court, in the matter of inducting strangers, she will be visited with a strict order, i.e., taking away possession from her. Ms Jennette D'souza has expired. However, the person, who claims to have purchased 1/3rd rights from her, cannot, wish away the directions contained in the order dated 5 February 2001 by simply saying that he is not aware of the pending proceedings or that he is not aware of orders made in the pending proceedings.

15] This is not clearly a case of one co-owner seeking an injunction against co-owner. This is a case where the appellant has interfered with the property in respect of which a Court Receiver had

been appointed. This is a case where the appellant has attempted to interfere with the property which was *custodia legis*. In such circumstances, the impugned order is absolutely appropriate and there is really no case made out to interfere with the same.

16] This appeal is, therefore, dismissed with costs assessed at Rs.25,000/- . Such costs to be deposited within a period of two weeks from today.

17] At the request of Mr. Hegde, learned counsel for the appellant, it is clarified that the observations made in this order are only *prima facie* and for the purposes of this appeal.

18] In view of dismissal of the main appeal, Civil Application No.98 of 2017 does not survive and the same is also disposed of.

19] At this stage, Mr. Hegde, learned counsel for the appellant, requests for continuation of the ad-interim relief granted by the learned Trial Judge. This is not a fit case for continuation of ad-interim relief. Therefore, the request is rejected.

(M. S. SONAK, J.)