

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

WRIT PETITION NO.5983 OF 2016

Mr. Ganesh Sunder Shetty and ..Petitioners.
Anr.

Vs

Smt Vijaya Sharad Vichare and .. Respondents
Anr.

Mr. S. Shamim i/b Shamim & Co., Advocates for Petitioners.
Mr. S.P.Srivastava, Advocate for Respondents.

**CORAM : R.G.KETKAR,J.
DATE : 17/01/2017**

PC:

1. Heard Mr. S.Shamim, learned counsel for the petitioners and Mr. S.P.Srivastava, learned counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants', have challenged the Judgment and order dated 19.3.2016 passed by the learned Ad-hoc District & Assistant Sessions Judge, City Civil & Sessions Court, Gr. Bombay in Notice of Motion No.3748 of 2015 in S.C.Suit No.773 of 2010. By that order, the learned trial Judge rejected the prayer made by the defendants for deleting issue no.7.

3. In support of this petition, Mr.Shamim strenuously contended that the respondents, hereinafter referred to as

'plaintiffs', have instituted the suit, inter-alia, praying for declaration that the defendants have no right to encroach and/or enter in the suit premises and/or interfere with and/or keep any material and/or disturb the peaceful use, occupation and possession of the plaintiffs in the suit premises, i.e. covered rear space admeasuring about 146 sq.ft adjacent to shop no.17, situated at ground floor, Molax Bhavan, Molax Cooperative Housing Society Ltd., situate at plot no.64 to 68 and 70, CTS No.661 of village Chembur, CTS No.320, Chheda Nagar Chembur, Mumbai 400089 or any part thereof; for perpetual injunction restraining the defendants, their servants and agents and/or any other person claiming through the defendants from trespassing and/or encroaching and/or keeping an material and/or entering upon the suit premises.

4. During the pendency of the suit, the plaintiffs took out Notice of Motion No.1006 of 2010, inter-alia, praying for injunction restraining the defendants from making any attempt to trespass or to make encroachment or disturb the physical possession of the plaintiffs over rear 146 sq.ft stilt portion of shop no.17 in Molax Co-operative Housing Society Ltd till decision of the suit, among other prayers. By order dated 10.5.2010, the learned trial Judge allowed the Motion in terms of prayer clause (a) of the motion. By separate order dated 10.5.2010, the learned trial Judge ordered status-quo for a period of four weeks

from 10.5.2010 upto 7.6.2010. Appeal was heard on 7.6.2010. After hearing both sides, this Court continued the order dated 10.5.2010 separately passed by the learned trial Judge extending the status-quo. On 29.3.2011 Appeal from order was admitted. Civil Application No.752 of 2010 was disposed of by continuing the status-quo order till the disposal of the Appeal. Appeal from order was ultimately disposed of on 18.9.2014 and the order impugned was set aside. Interim order dated 29.3.2011 passed by this Court was ordered to continue as interim relief pending the suit.

5. Mr. Shamim submitted that the plaintiffs took out Notice of Motion No.1313 of 2010 alleging breach of order passed by the trial Court on 10.5.2010. In the first place, he submitted that the said order was set aside by this Court on 18.9.2014 and status-quo order was continued pending the suit. Secondly, in Motion for initiating contempt proceedings against the defendants, the plaintiffs cannot seek possession of the suit premises on the ground that notwithstanding injunction they have been dispossessed. He submitted that basically the plaintiffs were not in possession and, therefore, there is no question of their dispossession.

6. Mr. Shamim further submitted that it is not uncommon that though the plaintiff is not in possession, he files suit claiming injunction and on the basis of that order, he alleges that the

defendant had dispossessed the plaintiff from the suit premises and initiate contempt proceedings against the defendant. He submitted that even in the present case though the plaintiffs are not in possession, they claim that they were in possession and were allegedly dispossessed by the defendants.

7. Mr. Shamim further submitted that by the proposed Chamber Summons, the plaintiffs have claimed relief of possession. The said relief is not claimed in the suit. The appropriate course was to amend the plaint so as to claim relief of possession. Without amending the plaint, by the Notice of Motion the plaintiffs cannot enlarge the scope of the suit. Even otherwise, in contempt proceedings no interim relief can be claimed. The remedy of the plaintiffs is to institute suit under Section 6 of the Specific Relief Act, 1963. The plaintiffs have neither amended the plaint claiming relief of possession nor instituted the suit under Section 6 of the Specific Relief Act.

8. He further submitted that in the written statement the defendants have specifically raised plea that the plaintiffs have not properly valued the suit. In fact, the learned trial Judge has framed additional issue on 7.5.2016 as to whether the suit is properly valued. He submitted that in case the suit is properly valued, it will exceed the pecuniary jurisdiction of the City Civil Court. He, therefore, submitted that the learned trial Judge ought to have deleted issue no.7 and allowed the Notice of Motion.

9. On the other hand, Mr. Srivastava supported the impugned order. He submitted that the contempt notice of motion was kept along with the main suit and, therefore, the learned trial Judge has framed issue no.7 having regard to prayer clause (b) in that motion.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have instituted suit for the reliefs indicated earlier. During the pendency of the suit, they took out the Notice of Motion which was allowed on 10.5.2010. On the same day, by separate order, the learned trial Judge has passed status-quo order which order was ultimately continued. Pending the suit, the plaintiffs have filed contempt notice of motion no.1313 of 2010. Prayer clause (b) of that motion reads thus:

(b) That this Honourable Court will be pleased to direct the Sheriff High Court, Bombay under Order 39 Rule 2(a) and Section 151 of the C.P.C. whereby the articles dumped by the defendants in the stilt portion of 146 sq.ft, Ground floor, near shop no.17, Molax Bhavan, Chheda Nagar, Chembur, Bombay 400 089 be removed forthwith with the help of police and if any obstruction is being caused by the defendants and/or the servants, agents, they should be removed and/or thrown out from the said premises **and put the plaintiffs in the possession of the said stilt portion 146 sq.ft as mentioned herein above and submit the report to this Honourable Court."**

(emphasis supplied)

11. It is also evident from the record that the contempt notice of motion is ordered to be heard along with the main suit. Having

regard to prayer clause (b) of the Motion, extracted herein above, the learned trial Judge has framed issue no.7. In view thereof, I do not find any merit in the submission of Mr. Shamim submitted that the learned trial Judge ought to have deleted issue no.7 as it enlarges the scope of the suit.

12. Mr. Shamim submitted that the defendants have contended that the suit is not properly valued by the plaintiffs. In fact, the learned trial Judge has also framed additional issue in that regard. It will be open to the defendants to request the trial Court to take the issue of valuation first before taking any other issues. Subject to this liberty, I do not find that any case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)