

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 13 OF 2017
WITH
CIVIL APPLICATION NO. 16 OF 2017
IN
APPEAL FROM ORDER NO. 13 OF 2017

Mr. Shamshad Mehboob Ali & Anr. .. Appellants
VS.
Mr. Mohamed Mehboob Ali & Anr. .. Respondents

WITH
WRIT PETITION NO. 13712 OF 2016

Mr. Shamshad Mehboob Ali & Anr. .. Petitioners
VS.
Mr. Mohamed Mehboob Ali & Anr. .. Respondents

Mr. P. J. Thorat with Ms Yogita Deshmukh for Appellants in AO and
for Petitioners in WP.
Mr. Dinesh Tiwari with Mr. S. Ambre i/b. Dinesh Tiwari & Associates
for Respondents.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 22 March 2017

Date of Pronouncing the Judgment : 03 April 2017

COMMON JUDGMENT :-

1] Heard learned counsel for the parties. They agree that the Appeal from Order and the Writ Petition can be disposed of by a common order.

2] The challenge in the Appeal is to the order dated 29 August 2016, by which, the learned Trial Judge has directed the appellants (defendants) to remove themselves and to refrain from entering into the suit premises pending disposal of the suit. In the Writ

Petition, the challenge is to the order dated 29 August 2016, by which, the learned Trial Judge has dismissed the appellants' notice of motion for framing of preliminary issue under section 9A of the CPC.

3] Mr. Thorat, learned counsel for the appellants – petitioners has submitted that the suit as instituted by the respondents was not maintainable as the reliefs in the plaint were undervalued. Mr. Thorat also submits that the suit was basically to seek eviction of gratuitous licensees and therefore, under the provisions of the Presidency Small Causes Court Act, 1882, such a suit was not maintainable before the City Civil Court, Mumbai, but, ought to have been filed before the Small Causes Court in Mumbai. Mr. Thorat submits that the moment the defendants raised preliminary objections to the maintainability of the suit at the time of hearing of an application for interim relief, the learned Trial Judge had no option but to frame such preliminary issue and thereafter decide whether it has jurisdiction in the matter. Mr. Thorat has placed reliance upon the decisions in case of ***Foreshore Co-operative Housing Society Limited vs. Praveen D. Desai (Dead) through L.Rs. & Ors.***¹, ***Prabhudas Damodar Kotecha & Anr. vs. Manharbala Jeram Damodar & Ors.***² and ***John Francis Anthony Gonsalves & Anr. vs. Colin M. Rebello***³, in support of his submissions.

4] In the Appeal from Order, Mr. Thorat submits that the learned Trial Judge has virtually granted a mandatory injunction at the interim stage without adverting to the principles set out in the case of ***Dorab Cawasji Warden vs. Coomi Sorab Warden & Ors.***⁴ Mr.

1 AIR 2015 SC 2006

2 2007 (5) Bom. C.R. 1 (Full Bench)

3 2014 (2) ALL MR 651

4 AIR 1990 SC 867

Thorat submits that although the suit premises may have been in the name of the respondents who are the parents / parents-in-law of the appellants, nevertheless, it is the appellant no. 1 who is the owner of the suit premises, since, the suit premises have been purchased from the funds provided for by the appellant no. 1, who is presently a Captain in the Merchant Navy. Mr. Thorat submits that the impugned order is vulnerable because the learned Trial Judge lacked jurisdiction over the subject matter of the suit. The suit was clearly undervalued and in any case, since the suit was between a licensor and the licensee, section 41 of the Presidency Small Causes Court Act, 1882 barred institution of such a suit before the City Civil Court. Strong reliance was placed upon the decisions of the Full Bench in the case of *Prabhudas Kotecha* (supra) and *John Gonsalves* (supra). Mr. Thorat also submitted that the other siblings of appellant no. 1 were behind this litigation and therefore, the stories of alleged harassment by the appellants to the respondents have been concocted in the matter. For all these reasons, Mr. Thorat submits that the impugned order warrants interference.

5] Mr. Dinesh Tiwari, learned counsel for the respondents submits that the suit premises is owned and was purchased by the respondents, at the stage when the appellant no. 1 was hardly 14 years of age. The appellants have approached the Court with a patently false case that they are true owners of the suit premises and such falsity cannot be permitted to prevail. He submits that the preliminary objections raised by the appellants were entirely frivolous. This is a case of a suit seeking injunction simplicitor and therefore, the provisions of section 41 of the Presidency Small Causes Court, are not at all attracted. Besides, the appellants themselves claim to be owners of the suit premises and therefore, are disentitled to question the jurisdiction of the City Civil Court

upon the ground urged. He submits that there is absolutely no infirmity in the valuation of the suit. He submits that the appellants have their own plush apartment. The appellant no. 1 who is a Captain in the Merchant Navy is, on most occasions, travelling. In such circumstances, there is no question of his wife insisting upon entering the suit premises. He points out that there have been several unfortunate and ugly incidents and the appellant no.2 i.e. wife of the appellant no. 1 has also gone to the extent of making false and frivolous allegations and police complaints against the respondent no. 1 who is an aged person. Mr. Tiwari submits that the learned Trial Judge has applied the correct principles and the impugned orders therefore warrant no interference in Appeal as well as in the Writ Petition.

6] Rival contentions now fall for determination.

7] In this case, the material on record overwhelmingly establishes that it is the respondents – plaintiffs who are the owners of the suit flat no. A-1/32, Asmita Jyoti Society, Near Fire Brigade, Malwani, Malad (West), Mumbai.

8] There is material on record which establishes that in the year 1985 or thereabouts, the Collector of Mumbai allotted a plot of land at Malwani, Malad, for constructing housing accommodation for retired Navy Officers. The respondent no. 1, was admittedly, a petty officer in the Indian Navy and had retired in the year 1976 or thereabouts. He was enrolled as a member of the society formed for the purposes of constructing housing accommodation upon the said plot. There is record which establishes that the respondent no.1 made payments to the society in instalments from 1985 to 1996. The possession of the suit flat in the building constructed upon such

plot was allotted to the respondent no.1 in the year 1996. Asmita Jyoti Society (Society) issued a formal share certificate and possession certificate in the name of the respondent no.1 in the year 1996 and 1998 respectively. This means that the respondent no. 1 has made out more than a *prima facie* case to establish his exclusive ownership in respect of the suit flat.

9] In contrast, the appellant no.1 who is the son of respondent no. 1, has made a very bald claim that the suit flat was acquired by the respondent no. 1 through the funds of appellant no. 1 and therefore, in effect, it is the appellant no.1 who is the owner of the suit flat. Apart from the legal tenability of such a plea, it is to be noted that in the year 1985, when the plot was allotted to the Officers of the Navy and some payments were made in respect of such allotment, the appellant no. 1 was 14 years old. Similarly, in the year 1996 when, the actual possession of the suit flat was allotted to the respondent no. 1, appellant no. 1 was 24 years old. There is absolutely no material produced on record by appellant no.1 that appellant no. 1 had any source of income, in order to finance the acquisition of the suit flat since the age of 14 years or at least between the ages of 14 to 24 years. Significantly, apart from brazenly asserting that he is the owner of the suit flat, appellant no. 1, has neither instituted any counter claim in the present suit nor has he instituted any other proceedings to seek any declaration of ownership in respect of the suit flat. From this, it is quite clear that the appellants, had raised a patently false and a frivolous defence claiming ownership in respect of the suit flat. In contract, as noted earlier, there is overwhelming material on record which establishes that it is the respondent no.1 who is the exclusive owner of the suit flat.

10] In ***Gujarat Bottling Co. Ltd. & Ors. vs. Coca Cola Co. & Ors.***⁵, the Hon'ble Supreme Court has held that the exercise of jurisdiction under Order XXXIX of CPC is equitable and discretionary. The Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking jurisdiction of the Court and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for brining about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. The Hon'ble Supreme Court has also observed :

“These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.”

11] In this case, the claim of the appellants that they are the actual owners of the suit flat is found to be false and frivolous. Primarily, it is on basis of this claim that the appellants seek interference with the interim order already granted by the learned Trial Judge. In such a situation, the observations made by the Hon'ble Supreme Court in the case of *Gujarat Bottling* (supra) are required to be considered. The conduct of the appellants cannot be said to be either fair or equitable in the facts and circumstances of the present case.

12] In ***Maria Margarida Sequeira Fernandes & Ors. vs.***

5 (1995) 5 SCC 544

Erasmo Jack De Sequeira (Dead) through LRS.⁶, the Hon'ble Apex Court has held that false claims and false defences ought not to be tolerated. Further, grant of refusal of injunction in a civil court, being one of the most important stages in the civil trial, due care, caution, diligence and attention must be bestowed whilst granting or refusing injunctions. The observations in paragraphs 81 to 86, read as under :

“81. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

82. This Court in a recent judgment in Ramrameshwari Devi and Ors. (supra) aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

Grant or refusal of an injunction

83. Grant or refusal of an injunction in a civil suit is the most

6 (2012) 5 SCC 370

important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the Defendant. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness.

84. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the Plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction.

85. The Court, in order to avoid abuse of the process of law may also record in the injunction order that if the suit is eventually dismissed, the Plaintiff undertakes to pay restitution, actual or realistic costs. While passing the order, the Court must take into consideration the pragmatic realities and pass proper order for mesne profits. The Court must make serious endeavour to ensure that even-handed justice is given to both the parties.

86. Ordinarily, three main principles govern the grant or refusal of injunction.

a) prima facie case;

b) balance of convenience; and

c) irreparable injury, which guide the Court in this regard.

In the broad category of prima facie case, it is imperative for the Court to carefully analyse the pleadings and the documents on record and only on that basis the Court must be governed by the prima facie case. In grant and refusal of injunction, pleadings and documents play vital role.”

13] In this case, there is material on record that the appellant no. 1 is a Captain in the Merchant Navy and on account of his employment, is required to remain at sea for most part of the year.

It is the appellant no. 2 i.e. wife of the appellant no. 1 along with the daughter, who mostly stays in the suit flat along with the respondents. There is material on record which establishes that the relationship between the respondents and their daughter-in-law i.e. appellant no. 2 is quite strained. The appellant no. 2 has installed CCTV Cameras in the suit flat as also, certain other Spy devices, rendering it impossible for the aged respondents to live with dignity in their own home. As if this was not sufficient, appellant no. 2 has filed complaints to the police authorities making several allegations against the father-in-law i.e. respondent no. 1. The appellant no. 2 has also filed a complaint invoking provisions of section 498A and 323 of the IPC, against the aged respondents. This is not the occasion to decide as to whether there is any truth in such complaints and counter complaints or not. However, if such circumstances are taken into consideration, it cannot be said that the discretion has been exercised unreasonably by the learned trial Judge.

14] It is also not a case where the appellants face prospect of being thrown out on the streets, in case, they are restrained from entering the suit flat. There is material on record that the appellant earns substantially as a Captain in the Merchant Navy. There is material on record that the appellants have plush and furnished apartments elsewhere. There is also the issue raised about the schooling of the appellants' children. The balance of convenience in such a situation, is also in favour of the respondents. At this stage, they are surely entitled to live in their home free from all such disturbances.

15] It appears that the real apprehension of the appellants is that the other siblings might acquire or use the suit flat. Learned

counsel for the respondents has stated that it is only the respondents, who will reside in the suit flat and further, the respondents do not even have any intention to alienate or transfer possession of the suit flats, they are living. In so far as the schooling of the daughter is concerned, in the course of arguments, it transpired that the examinations would conclude by the end of April 2017. In any case, the appellants certainly have both the physical as well as the economic means to stay in their own apartments and continue with the schooling of their daughter.

16] In **S. R. Batra & Anr. vs. Smt. Taruna Batra**⁷, the Hon'ble Supreme Court has held that the daughter-in-law, cannot, as a matter of right, insist upon staying in the house of her parents-in-law, particularly when the house is entirely and exclusively owned by the parents-in-law and even her husband, has no right or title to the same. To the same effect, is the decision of this Court in the case of **Bharti Rajesh Bhawe vs. Vijay Shankar Bhawe & Ors.**⁸ an order quite similar to the impugned order in the present case, was upheld by this Court.

17] In **Sudha Mishra vs. Surya Chandra Mishra**⁹, learned Single Judge of the Delhi High Court has held that daughter-in-law has no right to continue to occupy self-acquired property of her parents-in-law against their wishes more so when her husband has no independent right therein nor is living there.

18] In this case, the respondents – plaintiffs have definitely made out a strong case, which is of a higher standard than a *prima facie* case, which is normally required for a prohibitory injunction. This is

7 2006 (4) Crimes 433 (SC)

8 Appeal from Order (St.) No. 31217 of 2015 @ Civil Application No. 31221 of 2015

9 211 (2014) Delhi Law Times 537

also a case where it is necessary to prevent irreparable and serious injury to the respondents – plaintiffs. The respondents are aged persons, already in the evening of their life. To require them at this stage to stay in their own home under such adverse circumstances is surely not an equitable situation. The injury which the respondents will suffer if the impugned order is vacated, is not compensable in terms of money. In contrast, the appellants, are financially very well off and even have their own plush apartment to reside in. The balance of convenience in such a situation is in favour of sustaining the impugned order than to vacate the same. This means that the parameters prescribed by the Hon'ble Supreme Court in the case of *Dorab Cawasji Warden* (supra) stands substantially complied with.

19] The decision in the case of ***Purshottam Vishandas Raheja & Anr. vs. Shrichand Vishandas Raheja (D) through L.Rs. & Ors.***¹⁰ is also not applicable in the facts and circumstances of the present case. When a permanent injunction is applied for, temporary injunction can also be applied for. If the temporary injunction is granted, the same, cannot be challenged on the ground that the trial Judge, has granted the final relief at the interim stage. In this case, it cannot be said that the exercise of discretion by the learned trial Judge is either arbitrary, capricious or perverse. Therefore, applying the principles in ***Wander Ltd. & Anr. vs. Antox India P. Ltd.***¹¹, which is incidentally been followed in the case of *Purshottam Raheja* (supra), there is no case made out to interfere with the impugned order.

20] The objection on basis of valuation of the plaint was indeed frivolous and therefore, was rightly rejected by the learned trial

10 2011 (6) SCC 73

11 1990 (Supp) SCC 727

Judge. This is basically a suit for injunction and the suit, has been appropriately valued. In the peculiar facts and circumstances of the present case, it cannot be said that *Prabhudas Kotecha* (supra) principle is attracted. The appellants – petitioners, have claimed to be the owners of the suit flat. The appellants - petitioners cannot rely upon certain averments in the plaint, wherein, the respondents have stated that the appellants, being family members were also permitted to stay along with them in the suit flat. If ultimately, a preliminary issue is framed as to whether the appellants are gratuitous licensees in respect of the suit flat, at least the appellants, will have to stand by their own plea that they are not gratuitous licensees in respect of the suit flat but they are the owners of the suit flat. This means that the appellants – petitioners, on the one hand, claim ownership of the suit flat and on this basis, resist grant of any interim reliefs as against them. On the other hands, when it comes to the aspect of jurisdiction, the appellants seek to place reliance upon certain averments in the plaint and urge that on basis of such averments, the appellants / petitioners are gratuitous licensees and therefore, the suit should have been instituted in the Small Causes Court and not in the City Civil Court. The appellants / petitioners are obviously interested in approbation and reprobation. Jurisdiction under Articles 226 and 227 of the Constitution of India, is also discretionary and to a great extent equitable. That apart, in this case, the respondents have applied for relief of injunction against the appellants. If considered from this perspective, there is really no jurisdictional error in the impugned order by which the learned Trial Judge has declined to frame any preliminary issue.

21] For the aforesaid reasons, there is no case made out to interfere with the impugned orders. The Appeal from Order as well

as the Writ Petition are liable to be dismissed and are hereby dismissed. There shall be no order as to costs, since, during the pendency of these matters, some orders were made with regard to payments by the appellants to the respondents. The respondents shall be entitled to retain the amounts which they may have received under the interim orders of this Court, in these matters.

22] The ad interim orders granted earlier, are hereby vacated. However, since, it is stated that the appellants' daughter is answering her examinations until the end of April 2017, the respondents may not execute the impugned order until 30 April 2017.

(M. S. SONAK, J.)

23] At this stage, learned counsel for the appellants / petitioners seeks further continuation of ad-interim relief, since, the appellants / petitioners, would like to take recourse against this order. Since, the ad-interim order is already extended upto 30th April 2017, there is no reason to grant any further extension.

(M. S. SONAK, J.)

Chandka

