

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 282 OF 2016
WITH
CIVIL APPLICATION NO. 364 OF 2016

Maruti D. Thakur .. Appellant
vs.
M/s. Partha Developers and ors. .. Respondents.

Mr. Aditya Thakker a/w. Deepak Shukla i/b Vinod Mistry & Co. for the Appellant.

Mr. Anil Siyal i/b A.V. Jain for Respondent No.1.

Mr. S.Y. Mulani i/b Mulani & Co. for Respondent No.3.

Mr. M.R. Chouhan for Respondent Nos. 5 to 9.

CORAM : M. S. SONAK, J.
DATE : 12 JANUARY 2017.

P.C. :-

1] Heard learned counsel for the parties. With the consent of and at the request of learned counsel for the parties, the appeal is taken up for final disposal, at this stage of admission itself.

2] The challenge in this appeal is to the order dated 28 September 2015 to the extent learned Trial Judge Judge has declined to consider the motion for appointment of Court Receiver in respect of the suit premises and further, initiate the proceedings in terms of Section 340 of Code of Criminal Procedure, 1973 (CPC). The impugned order, restrains some of the defendants from dealing with, disposing off, parting with possession and /or parting with possession and/or creating encumbrances/security/charge over the suit flat till final disposal of the suit. This part of the impugned order is not the subject matter of the challenge in this appeal.

3] Insofar as the prayer of initiation of proceedings under section 340 of Cr.PC. is concerned, from the perusal of the impugned order, it is quite clear that such prayer has not been rejected, but in fact liberty is granted to the appellant to press for such relief at the appropriate stage of the suit. In any case, it is clarified that the appellant shall have the liberty to press for such relief at the appropriate stage of the suit and therefore, the impugned order should not be construed as rejection of such relief.

4] Insofar as the issue of appointment of Court Receiver is concerned, the entire discussion is contained in paragraph 29 of the impugned order, which reads thus:

“29. Plaintiff claimed the appointment of Court Receiver in the facts and circumstances of the case. According to Plaintiff, suit flat is misused and wasted and for preservation of suit flat, appointment of Court Receiver is warranted. Per contra, learned Advocate for Defendant No.4 to 9 argued that such relief of appointment of Court Receiver was previously claimed by the Plaintiff on two occasions in Notice of Motion and in Chamber Summons. On both the occasions, Hon'ble High Court was not pleased to allow the said relief. Thus, as the relief of appointment of Court Receiver was turned down by the Hon'ble High Court on two occasions, there are no change in the circumstances for an Order of appointment of Court Receiver. There is nothing on record to show at this stage that the property i.e. suit flat is being misused and wasted and it requires the Order of appointment of Court Receiver to protect and secure the rights of Plaintiff. After perusal of Notice of Motion No. 10 of 2010, it appears that Plaintiff claimed the relief of appointment of Court Receiver as per prayer clause (d) but such relief was not granted in the final Order dated 23/11/2011. Thus, the Plaintiff was not allowed the relief of appointment of Court Receiver by Hon'ble High Court while passing the Order dated 23/11/2011. Plaintiff failed to put forth any specific change in circumstances so as to pass an

Order in changed circumstances for appointment of Court Receiver. Thus, as the similar relief was turned down by the Hon'ble High Court on previous occasion, Plaintiff is not entitled for the order of appointment of Court Receiver in absence of change in circumstances. Hence, point No.4 is answered accordingly."

5] From the aforesaid, it is quite evident that the only reason which has weighed with the learned Trial Judge in not even considering the appellant's motion for appointment of the Court Receiver was that such a motion was refused on two earlier occasions and the appellant has not been able to demonstrate any change of circumstances.

6] In this case, this Court, on earlier occasion, by order dated 23 November 2011 had restrained some of the respondents from disposing of, alienating, encumbering, parting with possession of or creating any third party rights in respect of the suit flat. In the said order dated 23 November 2011, it is recorded that the appellant does not press for any other reliefs, since the suit itself was ordered to be expedited. The order dated 23 November 2011 reads thus:

"1. The notice of motion is disposed of by the following order for which the counsel do not ask for reasons. The plaintiff has not pressed the reliefs other than those granted in view of the suit having been expedited.

2. Pending the hearing and final disposal of the notice of motion defendant No.4 shall not dispose of, alienate, encumber, part with possession of or create any third party rights in respect of the suit flat. Defendant No.3 is also restrained from recognizing or effecting any transfer in respect of the said flat contrary to the above injunction.

3. The plaintiff is a senior citizen. He has had an unfortunate medical history. This is a fit case for expedition.

4. *The evidence shall be recorded on commission for which the directions shall be passed after the issues are framed.”*

7] Learned counsel for the appellant contends that at the stage when the order dated 23 November 2011 was made, the record indicated that an affidavit had been filed by original defendant N.6 (Treasurer of the society) for and on behalf of the defendant No.3-Society. In the said affidavit, it was indicated that defendant No.2, who was incidentally, the son-in-law of the appellant, had been issued shares in respect of the suit premises, implying thereby that the said defendant was regularly enrolled as the member of the society. The record also indicates that defendant No.2, son-in-law of the appellant, has transferred the suit premises to defendant No.4, who is incidentally, the wife of chair person of the society. It is pointed out that the relationship between appellant's daughter and her husband was strained and the transfer was without authority of law and in collusion with Chairperson of the society and other members of the Managing Committee.

8] The Administrator came to be appointed to govern the affairs of the society, some time in the year 2010. Since the making of the order dated 23 November 2011, this Administrator has filed an affidavit in the proceedings before the Trial Court and has also disclosed certain documents to the appellant. In such affidavit (at page 229 of the paperbook), there is a categorical statement that the suit premises have been given on leave and licence/rental basis since December 2011. This means that despite the order of this court dated 23 November 2011, at least *prima facie*, there is parting of possession of the suit premise.

9] Further, certain documents disclosed by the Administrator to the appellant, at least *prima facie*, indicate that the society and its officer bearers have not been candid to the court. The statement with regard to the status of defendant No.2 (son-in-law of the appellant), stands at least *prima facie* contradicted by the subsequent documents produced/furnished by the Administrator. Such subsequent documents indicate that defendant No.2 was only an occupant in the suit premises and further, there were documents to indicate that it is the appellant, who was purchaser/allottee in respect of the suit premises. Such circumstances and documents at least *prima facie*, indicate the change of circumstance since the making of the order dated 23 November 2011.

10] Without adverting to such circumstances/documents, the Trial Judge, has almost mechanically, stated that there is no change in circumstance and on this basis declined even to consider the motion for appointment of the Court Receiver.

11] The *prima facie* circumstance that the suit premises were licensed or let out after the order dated 23 November 2011, if established, would suggest that the parties, in breach of the order made by this court on 23 November 2011 have dealt with the suit premises. The disclosure of further documents by the Administrator, which *prima facie* contradict the earlier statements or documents, is also, in a sense, a change in circumstance, which is required to be examined. Suffice to note that this was not a matter where motion of appointment of Receiver, could have been summarily rejected even without examining the material on record. For this reason itself, the

impugned order which virtually refuses to consider motion for the appointment of the Receiver, is liable to be set aside.

12] The appellant's motion, to the extent, it seeks appointment of the Court Receiver is therefore, restored to the file of learned Trial Judge. The learned Trial Judge is directed to reconsider the motion for appointment of the Court Receiver after taking into consideration the material on record as produced by the parties. The observations in this order are *prima facie* and though, learned Trial Judge is directed to consider the motion for appointment of Court Receiver, the observations may not be construed to mean and imply that this court has accepted the case of the appellant that a Receiver is, as of necessity, required to be appointed. That is a matter which the Trial Court will have to examine on basis of the material on record as also in terms of the position in law. However, it is clarified that the Trial Court should not once again decline to consider the motion for appointment of Receiver on the ground that there is no change in circumstances. At least *prima facie*, change in circumstance has been established. The appreciation of the documents/materials produced on record by the parties is a matter left to determination of the Trial Court.

13] The order dated 28 September 2015 to the extent impugned, is set aside to the extent indicated. The appeal is therefore, partly allowed. The motion for appointment of Court Receiver should be taken up and disposed of within a period of eight weeks from the date of production of authenticated copy of this order.

14] The civil application in this appeal does not survive and the same is also disposed of.

15] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)