

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7393 OF 2017
WITH
Writ Petition NO. 7394 OF 2017

Mr. Noor Alam Mirza	...Petitioner
<i>Versus</i>	
Shushtary Imambara Trust And Ors.	...Respondents

....
Mr. Khan Javed Akhtar, Advocate for the Petitioner.
Mr. Sajjad H. Patel, Advocate for Respondents No.1 to 4.
....

CORAM : R. G. KETKAR, J.

DATE : 13th JUNE, 2018

P.C.

1. Heard Mr. Khan Javed Akhtar, learned counsel for the petitioner and Mr.Sajjad Patel, learned counsel for respondents No.1 to 4, at length.

2. W.P. No.7393/2017 takes exception to the judgment and order dated 17.8.2013 passed by the learned Judge, Court Room No.7 of the Small Causes Court at Mumbai below Exhibit-7 in R.A.E. Suit No.135/210 of 2009 as also the judgment and order dated 19.8.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Misc. Appeal No.186/2013. By these orders, the Courts below allowed

the application Exhibit-7 filed by respondents No.1 to 4, hereinafter referred to as the 'plaintiffs', and confirmed the ad-interim injunction granted on 12.3.2009 in respect of prayer clause (a) till disposal of the suit; directed the petitioner, hereinafter referred to as 'defendant No.2', to remove the lock on the entrance of the suit building and issued injunction against defendant No.2 not to restrain the plaintiffs' representative from having access to the terrace on the first floor above the hall of the ground floor. The Courts below appointed the Court Commissioner for visiting the suit premises for finding out actual condition and occupation of the suit premises and submit report after giving prior notice to the parties, namely, the plaintiffs and defendant No.2 for executing the Commission.

3. W.P. No.7394/2017 takes exception to the judgment and order dated 17.8.2013 passed by the learned Judge, Court Room No.7 of the Small Causes Court at Mumbai below Exhibit-7 in R.A.E. Suit No.136/211 of 2009 as also the judgment and order dated 19.8.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Misc. Appeal No.185/2013. By these orders, the Courts below allowed the application Exhibit-7 filed by the plaintiffs and confirmed the ad-interim injunction granted on 12.3.2009 in respect of prayer clause (a) till disposal of the suit. The Courts below appointed the Court

Commissioner for visiting the suit premises for finding out actual condition and occupation of the suit premises and submit report after giving prior notice to the parties, namely, the plaintiffs and defendant No.2 for executing the Commission.

4. Since common questions of law and facts arise in both these Petitions, same can conveniently be disposed of by this common order. To appreciate the controversy between the parties, the facts from W.P. No.7393/2017 are taken into consideration for the sake of brevity and convenience.

5. In support of these petitions, Mr. Khan invited my attention to paragraphs-2, 5 and 8 of the plaint. In paragraph-2, the plaintiffs alleged that one Akbar Husain Zariwalla was the monthly tenant. Akbar Husain Zariwalla expired and defendant No.1, being the only son of the deceased tenant, has acquired tenancy rights. In paragraph-5, the plaintiffs alleged that defendant No.1 has illegally, unlawfully, without obtaining written permission from the plaintiffs and in breach of the terms and conditions of the Tenancy Act sub-let, transferred and/or assigned and inducted defendant No.2 in the suit premises for monetary considerations. Defendant No.2 is illegal occupant and/or is in illegal use, occupation and possession of the suit premises. In paragraph-8, the

plaintiffs have alleged that defendant No.2 after taking possession of the suit premises illegally is trying to encroach the terrace of the plaintiffs in adjoining building. It is further alleged that access to the terrace of the Trust Building (adjoining building) is from the suit building. The adjoining building consists of ground + terrace. Ground floor of the adjoining building is a hall which is used for religious functions. Suit building and the Trust building are adjoining to each other and access to the terrace of the Trust building is only through the suit building. The plaintiffs alleged that defendant No.2 is attempting to have access from the backside of the suit premises to encroach the terrace. He submitted that the adjoining building is an independent building. It is inconceivable that independent building will not have separate and independent access and is through the suit building. He invited my attention to paragraph-17 of the written statement, where defendant No.2 denied that ground-floor of adjoining building is used only for religious purposes and functions and that access to the terrace of the Trust building (adjoining building) is only from the suit building. He further submitted that clause (3) of the operative part of the trial Court's order does not refer to the suit building. In other words, as the adjoining building has independent access, the Courts below were not justified in directing defendant No.2 to remove the lock of the entrance

of the suit building and also issuing direction of not restraining the plaintiffs' representative to have access to the terrace on the first floor above the hall of ground floor. He, therefore, submitted that the Petitions require consideration.

6. On the other hand, Mr. Patel supported the impugned orders and submitted that after considering the material on record, the Courts below have issued injunction against defendant No.2. He submitted that in fact as per clause (4) of the operative part of the trial Court's order, though Court Commissioner was appointed for inspecting the site and submitting the report, till date defendant No.2 has not permitted implementation of the said direction. He submitted that in fact there is no interim order of stay of the orders passed by the Courts below. Defendant No.2 was, therefore, not justified in preventing the Court Commissioner from inspecting the site.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The Courts below after appreciating the material on record have held that the plaintiffs have made out a *prima facie* case, balance of convenience lies in favour of the plaintiffs and that the plaintiffs will suffer irreparable loss if injunction is not granted. A

perusal of clause (4) of the operative part of the trial Court's order shows that the trial Court had appointed the Court Commissioner for inspection of the site and for submitting the report. It is also evident that the Appellate Court dismissed the appeal on 19.8.2015 and the present Petitions are instituted in this Court on 15.6.2017. Even during pendency of these Petitions, no interim order was operating in favour of defendant No.2. Thus defendant No.2 was not justified in not permitting the Court Commissioner to inspect the site. The Courts below after appreciating the material on record have issued injunction in favour of the plaintiffs.

8. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter

at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

9. Applying the tests laid down by the Apex Court in **Wander Limited's** case (supra) to the facts of the present case, it cannot be said that the Courts below exercised the discretion arbitrarily or capriciously or perversely or that the Courts below had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. This Court will not reassess the material and seek to reach a conclusion different from the one reached by the courts below if the one reached by that courts below is reasonably possible on the material. This Court would normally not be justified in interfering with the exercise of discretion solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the courts below reasonably and in a judicial manner the fact that this Court would have taken a different view may not justify interference with the exercise of discretion by the Courts below. Hence, Petitions fail and the same are dismissed. The parties are at liberty to apply to the trial Court for expeditious disposal of the Suits. If such an application is made, the trial Court will pass appropriate orders. Order accordingly.

(R. G. KETKAR, J.)