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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 866 OF 2015
WITH
CIVIL APPLICATION No. 567 OF 2015

Prabhatsinh Tapubha Jadeja ... Appellant
Vs.
Smt. Manjula Damji Savla & Ors. ... Respondents

Mr. Girish Godbole a/w Dipen Furia I/b Shah & Furia
Associates, for the Appellant.

Mr. Jenniber Michael a/w Kevin Gala I/b Dhiresh H. Shah, for
the Respondent No. 1.

Mr. Ranjeet H. Patil I/b Kuldeep S. Patil, for Respondent No. 2,
2A, 2B and 3.

CORAM : V. M. DESHPANDE, J.

DATE : JULY 10, 2018

ORAL JUDGMENT :-

1. Heard. **Admit.** By consent of parties, appeal is taken
up for final disposal after the counsel for the respondent waive
service of notice for the respective respondents.

2. The present appeal is directed against the order
dated 21.4.2014 passed in Notice of Motion No. 1871 of 2013,

taken out in S.C. Suit No. 676 of 2013. By the impugned order, the learned Judge of the court below dismissed the notice of motion.

3. Notice of motion was taken out by the Appellant / plaintiff for appointment of the court receiver.

4. The Appellant, who is the original plaintiff filed a suit for specific performance of agreement dated 1.4.2009 and possession with following main prayer:

“(a) This Hon'ble Court may be pleased to pass decree against the Defendant No. 1, 2 and 3 declaring that the Agreement for Sale dated 1.4.2009 executed between the original vendor Premjibhai Bhachubhai Shah and the plaintiff, in respect of the Shop No. A/19 and Shop No. A/20 situated at ground floor, in Satellite Premises Co-operative Housing Society, Gumpha Road, Jogeshwari (East), Mumbai 400 060; and subsequently registered on 10.12.2010 with Registrar of Assurance Andheri at Bandra Mumbai, is binding upon the Defendants; and the Defendants be ordered and directed to handover the peaceful and vacant possession of the suit shops to the Plaintiff;”

5. Pending the suit, plaintiff has taken out notice of motion, which was registered as Notice of Motion No. 1871 of 2013 for following main reliefs:

- “(a) Pending the hearing and final disposal of this suit, this Hon'ble Court be pleased to order to appoint court receiver High Court with full powers under Order 40 Rule 1 of the C.P.C. on the suit premises in this suit and be directed to take charge of the suit premise being Shop No. A/19 and Shop No. A/20 situated at ground floor, in Satellite Premises Co-operative Housing Society, Gumpha Road, Jogeshwari (East), Mumbai 400 060;
- (b) Pending the hearing and final disposal of this suit, this Hon'ble Court may be pleased to appoint as agent of the suit premises, on usual terms and conditions by handing over possession of the suit premises executing the agency agreement between the court receiver High Court and the plaintiff;”

6. Notice of motion was contested by the defendant (respondent herein) by filing the reply affidavit. After hearing the parties to the motion, the court below vide order dated 21.4.2014 dismissed the same. Hence, this appeal.

7. Learned counsel for Appellant Mr. Girish Godbole, vehemently submitted that order impugned cannot stand to the scrutiny of law, inasmuch as one of the consideration for dismissing the notice of motion by the court below was that suit itself is barred by limitation. It is his submission that this

observation of the court below are erroneous on the face of record.

8. Learned counsel for the Respondent has conceded to the submission made by the learned counsel for the Appellant about the observation that the suit is barred by the limitation.

9. It is to be noted that the suit for specific performance of contract was filed in the High Court on 7.3.2012 in respect of specific performance of agreement dated 1.4.2009. Subsequently, this suit was transferred in view of the enhancement of pecuniary jurisdiction of the city civil court to the said court. In that view of the matter, the observation made by the court below that the suit is barred by limitation is erroneous, and is required to be set aside to that extent.

10. Had it was the only reasoning by the court below to reject the notice of motion, then the order impugned ought to have been set aside. However, even on merits, the court below has rejected the notice of motion.

11. Before me, extensive submissions were advanced

from both the sides on merits of the matter to claim their respective reliefs. Therefore, it will be a futile exercise to remand the matter to the court below for decision of the notice of motion for appointment of the court receiver afresh.

12. According to the learned counsel for the Appellant / plaintiff, an agreement was executed in between him and late Premjibhai, the predecessor-in-title of the Respondent Nos. 1 to 3, on 1.4.2009.

13. It is the submission of the learned counsel for the Appellant by inviting my attention to the recitals of the agreement of sale that entire consideration was duly paid and received by late Premjibhai. As per the said agreement of sale, agreed consideration in the alleged agreement of sale was Rs.60,00,000/- and out of Rs.60,00,000/-, Rs.30,00,000/- were paid by the Appellant to Premjibhai in cash and remaining Rs.30,00,000/- were given by post dated cheques. According to the counsel for the plaintiff, therefore, the entire sale consideration was already passed in favour of the vendor. Mr

Godbole faintly initially submitted that the Appellant / plaintiff is in possession of the suit premises.

14. The suit premises comprises of two shops bearing Shop No. A/19 and Shop No. A/20 situated at ground floor, in Satellite Premises Co-operative Housing Society, Gumpha Road, Jogeshwari (East), Mumbai 400 060. According to the learned counsel for the Appellant, though there are no recitals about the handing over possession in the agreement on 1st April, 2009, it was handed over under a memorandum of understanding dated 10.4.2003 and 10.4.2009 which has a reference in the agreement of sale. According to the defendants, the agreement of sale itself is a fabricated document. No sale consideration was given to late Premjibhai. According to the defendants, they are in settled possession of the suit premises.

15. I am afraid that submission of Mr. Godbole that Appellant is in possession of the suit premises can be accepted. The title of suit itself shows that it is a suit for specific performance of contract and for possession. Further, the prayer

clause (a), which is mentioned in the earlier part of this judgment, shows that apart from the declaration, the plaintiff / Appellant sought a decree that they be placed in possession. Further, there is no prayer that the defendant be permanently restrained from dispossessing the plaintiff's possession.

16. Agreement of sale is not a registered document. It is a notorised document. Even under that agreement, the plaintiff is not claiming that he was placed in possession. What is stated in the agreement of sale is that he is placed in possession by virtue of memorandum of understanding dated 10.4.2003 and 27.2.2009. These two documents are also not registered documents.

17. The burden heavily lies on the Appellant / plaintiff to establish that he parted Rs. 30,00,000/- in favour of Premjibhai in cash. The said fact will have to be proved by adducing cogent and reliable evidence when the suit will be taken up for trial. Insofar as cheque payment is concerned, the reference of three cheques is found in the agreement to sale

dated 1.4.2009. Three cheques are for Rs.10,00,000/- each. All the cheques are drawn on Dena Bank. Those cheques are dated 1.7.2009, 1.7.2009 and 1.1.2010. There is nothing on record that cheques dated 1.7.2009 were duly encashed by late Premjibhai during his life time. There is no document placed on record by the Appellant / plaintiff that at any point of time, he made a request to late Premjibhai to encash the cheques dated 1.7.2009. Thus, it is crystal clear that cheques dated 1.7.2009 were not encashed and / or realised in the bank account of late Premjibhai.

18. Insofar as third cheque is concerned, it is dated 1.1.2010. As per the agreement of sale, this cheque was given on the date when the agreement of sale was executed. Late Premjibhai died in December, 2009. Thus, the cheque dated 1.1.2010 cannot be termed as a valid tender since prior to the commencement of the validity period of the said cheque, the person in whose favour the said cheque was drawn expired.

19. In that view of the matter, it is very difficult to

record the finding in favour of the Appellant that entire sale consideration of Rs.60,00,000/- was paid to Premjibhai, and therefore, the contentions in that behalf raised by the learned counsel for the Appellant requires to be rejected.

20. The learned counsel for the Respondent has rightly pointed out that the notice of motion sans pleadings that if the court receiver is not appointed, then in that event, there is an imminent danger to the property in question that it will be wasted or damaged.

21. The principles for granting temporary injunction and order appointing court receiver are altogether different. While granting the order of injunction, the court has to look into the fact that the plaintiff has demonstrated a prima-facie case, which means a case is made out for inquiry, the balance of convenience lies in favour of the plaintiff, and there will be irreparable loss, which cannot be compensated in terms of money if the injunction is not granted.

22. While granting the order appointing the court

receiver, merely because there exist a prima-facie case, is not self-sufficient. Court Receiver is an officer of Court. It is his duty and obligation to manage the property for which he is appointed. Thus, property is entrusted to the court receiver by order of court pending adjudication of dispute in between the parties before court. The suit property thus remains custodia legis for the benefit of the parties, who would be entitled to such suit property at the final determination of the suit. Primarily, the court receiver is appointed to prevent the property in question from waste and damage, so that at final determination of the suit, suit property will be given to the rightful claimants without there being any wastage or damage to the suit property. For that, it was obligatory on the part of the Appellant / plaintiff to point out the circumstances, which led him to file an application for appointment of the court receiver. It appears that plaintiff's intention is to oust the legal representatives of Premjibhai from the settled possession by getting introduced the court receiver. In the present case, as at least at this stage, there is no prima-

facie case in favour of the Appellant. If the ultimately plaintiff succeeds before the court at the end of the trial, the specific performance of the agreement dated 1.4.2009 can be granted in accordance with law and at that time he can claim possession as prayed in the suit.

23. In view of the aforesaid discussion, I am of the view that the order impugned is required to be set aside in part. The observations, made by the court below that the suit is barred by limitation, are hereby set aside. However, on merits, the case of Appellant / plaintiff for appointment of court receiver is hereby rejected. Appeal is dismissed to that extent.

24. At this stage, learned counsel for the Appellant rightly prayed that the observations made by this Court in this order are limited only for the purposes of deciding the present appeal and the court below shall not get himself influenced by it while deciding the suit on its own merits. This prayer of learned counsel for the Appellant is just and accordingly it is granted.

25. Appeal is dismissed with no order as to costs.

Needless to state that civil application pending in this appeal also shall stand disposed of.

Sd/-
[V. M. DESHPANDE, J.]

Vinayak Halemath