

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Civil Application [MCA] No.1255 of 2018
in
Writ Petition No.6278 of 2018 (D)

Pankajkumar s/o Prabhakar Kawale & another
vs.

Dharampeth Mahila Multi State Cooperative Bank & others

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*Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.*

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Court's or Judge's Orders

*Shri M.D. Samel, Advocate for the Applicants.
 Shri H.D. Dangre, Advocate for Non-Applicant No.1.
 Shri R.R. Srivastava, Advocate for Non-Applicant No.2.
 None appears for Non-Applicant No.3.*

CORAM : S.B. SHUKRE, J.
DATE : 10th DECEMBER, 2018.

Heard Shri M.D. Samel, learned Counsel for the applicants, Shri H.D. Dangre, learned Counsel for non-applicant No.1 and Shri R.R. Srivastava, learned Counsel for non-applicant No.2. Nobody appears for non-applicant No.3

02] This application is founded upon the ground that this Court has not considered the prohibition contained in Order XL Rule 1 of the Code of Civil Procedure (C.P.C. for short) in allowing the parties to have the physical possession of the property in dispute. The learned Counsel for the applicants submits that when a civil suit between the parties is pending and the rights of the parties are yet to be finally decided, no

physical possession of the property can be granted or otherwise it would amount to granting final relief during pendency of the suit itself.

03] It is to be noted that by the order passed on 04/04/2018 in Appeal Against Order No.5/2018, this Court had directed that if there was no legal impediment in taking physical possession of the suit property, the person appointed as receiver should take the symbolic possession of the suit property and submit his report to the trial Court within eight weeks. After this order, an effort was made by the receiver and non-applicant No.1 to obtain physical possession of the suit property, but it was resisted by the applicants saying that though they were ready to give symbolic possession, they would not part with physical possession of the property. Thereafter, the bank approached this Court for giving direction to the applicants to handover the physical possession, but then this Court was of the view that the bank and/or the receiver could approach the trial Court for obtaining necessary directions in the matter. Thereafter, the bank filed an application before the trial Court for seeking directions regarding police assistance. That was granted by the trial Court and the bank as well as the receiver were permitted to take physical

possession of the suit property. That order was challenged by the applicants before this Court by filing a Writ Petition No.6278/2018. In this petition, a question arose as to the meaning of “legal impediment” and after hearing at length the rival parties, this Court took the view that the sweet will and/or the choice of a party refusing handing over of the physical possession could not be considered to be a legal impediment. The relevant observations that were made by this Court in the order passed on 25/10/2018 by which the writ petition was dismissed, read thus :

“6.The legal impediment is something which arises as an obstruction created because of some legal provision or some adjudication made by a Court or competent authority and not by virtue of the sweet will of the party against whom such an order has been passed. Here, in this case, as stated earlier, there is no dispute about the fact that there is no order passed by any competent authority which could be said to be creating any legal hurdle for taking physical possession of the property and the hurdle is only in the nature of unwillingness of the petitioners to hand over physical possession of the property. This is clear from what the petitioners have given in writing to the Court appointed Receiver. This written protest is at Page 144 of the paper-book and its relevant portion reads thus :

"I just can't give the possession (Physical). I am ready to give symbolic possession, as I have clear intention to co-operation with Bank people"."

04] The ground which has been raised in this application is that the legal impediment also meant the prohibition contained in Order XL Rule 1 of C.P.C. was never taken in the writ petition nor was it argued at the time of final hearing of that writ petition. It is significant to mention here that as a matter of record, on this very ground, the order dated 04/04/2018 was earlier also sought to be reviewed by the applicants. That review application was M.C.A. St. No.26258/2018. It was filed along with delay condonation application being Civil Application [CAO] No.2031/2018. The delay condonation application was dismissed by this Court after imposing costs of Rs.30,000/- upon the applicants. While deciding this delay condonation application, this Court had also dealt with the aforestated submissions by observing thus :

"On merits of the matter, the defendant Nos.1 and 2 relied on the provisions of Order 40 Rule 1(2) of the Code of Civil Procedure and Section 53 of the Transfer of Property Act to urge that the Court has no power to remove any person from possession or custody of his property, at the behest of a

person who is not having a right to seek removal of the other person from the suit property. The submission cannot be accepted. By the judgment dated 4th April, 2018, it is directed that if there is any legal impediment in taking physical possession of the suit property, symbolic possession of the suit property should be taken by the Receiver. The learned Advocate for the defendant Nos.1 and 2 and the learned Advocate for the plaintiff admitted that the physical possession of the suit property is not taken from the defendant Nos.1 and 2 and only symbolic possession is taken."

05] This would show that it is not the case that the applicants were not aware of the ground of legal impediment, which they maintained, arose from the provisions contained in Order XL Rule 1 of C.P.C., rather they were very much aware of the same and yet they did not raise this ground while arguing Writ Petition No.6278/2018 finally. Perhaps, the reason was that they had already lost on this ground earlier. The applicants also did not point out to this Court then that this very ground was considered and rejected by this Court while dismissing the delay condonation application by imposing costs of Rs.30,000/-. Therefore, this could not be considered to be a *bona fide* mistake of the learned Counsel for the applicants so as to take benefit of the

judgment of the Division Bench of Andhra Pradesh High Court, reported as Y. Venkannachowdary vs. The Special Deputy Collector, Land Acquisition (General), Hyderabad District and others - AIR 1981 Andhra Pradesh 232, wherein, it is held that whenever there is a genuine mistake of the arguing Counsel regarding putting forward of an appropriate legal submission, it would amount to an error apparent on the face of record and, therefore, review of the judgment would be warranted.

06] That apart, in Seth Hiralal Patni vs. Seth Loonkaran Sethiya & others - (1962) 1 SCR 868 & AIR 1962 SC 21, the effect of Order XL Rule 1 of C.P.C. has been considered by the Hon'ble Apex Court, wherein it has been observed in paragraph 13 to the effect, ".....But, when a person is a party to the suit, the court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him....." According to the learned Counsel for the applicants, the ratio of this case cannot be applied to the facts of the present case for the reason that the facts of the case of Seth Hiralal were entirely different from the facts of the present case. He submits that in that case, the receiver was already appointed after the preliminary decree and the property

in question was a running mill which necessitated its being handed over to the receiver in the interest of all the stakeholders. As regards the facts of Seth Hiralal, I must say that they are quite distinguishable from the facts of the present case. In this case, there is no preliminary decree passed and there is no running mill involved. But, in the present case also, the receiver has already been appointed and he has been given authority to take over the possession, physical or, if there is any legal impediment in taking physical possession, the symbolic possession. What could have been the legal impediment in this case has also been interpreted by this Court and not once but twice after which the applicant did not challenge the orders so passed by this Court. Then, the observation of the Hon'ble Apex Court is that whenever a person is a party to the suit, the Court can direct the receiver to remove him from the possession of the property even if the plaintiff has no present right to remove him, has an effect of laying down a general principle of law and which applies, in my considered view, to the facts of the present case.

07] Before parting with the order, it is also necessary to bring on record the conduct of the applicants. The applicants had agreed to sell the suit property to respondent No.2 during subsistence of what

the non-applicant No.1 submits as a valid mortgage and as a part of the consideration the applicants have received from non-applicant No.2 a hefty sum of Rs.1.35 crore in the year 2014. In order to give fair opportunity to the applicants, I had also suggested to the applicants through their learned Counsel to explore the possibility of the applicants showing some reciprocity in the matter, if they were desirous of retaining the physical possession of the suit property. But, no such concrete proposal which could be accepted by the other side came forth from the applicants and the result is that the applicants are still retaining the amount of Rs.1.35 crore, which they had received in the year 2014 and also the physical possession of the property. This is apart from the dispute between the applicants on the one hand and non-applicant No.1, the bank on the other, regarding repayment of the loan, which would be appropriately decided by the learned Arbitrator.

08] I am not, therefore, inclined to grant this application. The application stands dismissed. The Courts below shall not be influenced by the observations made in this order and shall decide the disputes pending before them on their own merits.

JUDGE