

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4287 OF 2017

WITH

CIVIL APPLICATION NO.2931 OF 2017

WITH

CIVIL APPLICATION NO.2932 OF 2017

WITH

CIVIL APPLICATION NO.2935 OF 2017

IN

WRIT PETITION NO.4287 OF 2017

Sharokh Kersi Nikorawalla ... Petitioner

Vs.

Khorshed Faredoon Dalal and others ... Respondents

Mr. A. V. Anturkar, Senior Advocate a/w. Mr. Manmath S. Athalye and Mr. Yatin Malvankar for Petitioner.

Mr. Mayuresh Khandeparkar a/w. Mr. Chaitanya Nikte for Respondent No.2.

CORAM : R. G. KETKAR, J.

DATE : APRIL 10 & 16, 2019

ORAL JUDGMENT :

Heard Mr. Anturkar, learned Senior Counsel for the petitioner and Mr. Khandeparkar, learned Counsel for the respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner / plaintiff No.3 - Sharokh Nikorawalla (for short 'Sharokh'), has challenged the judgment and order dated 11.04.2016 passed by the learned Civil Judge, Junior Division, Mahabaleshwar below exhibit-5 in R.C.S.No.84 of 2015 as also the judgment and order dated 16.11.2016 passed by the learned District Judge-3, Satara in Miscellaneous Civil Appeal No.69 of 2016. By these orders, the Courts below rejected the application exhibit-5 made by Sharokh inter alia praying for interim mandatory injunction directing the respondents No.1 to 3, hereinafter

referred to as 'defendants' to remove the obstruction on the gate and opening the access and enjoyment of the suit property; appointing Court Commissioner or any other competent person to remove the obstruction on access to the suit property. The facts and circumstances giving rise to filing of the present Petition, briefly stated, are as under:

3. Mr. Fardoon Dalal (for short 'Fardoon'), predecessor in title of the defendants, was the owner of "Preston Estate" comprising of two Heritage units namely 'Preston Cottage' and 'Preston Bungalow'. On 14.01.1982, Fardoon rented out "Preston Bungalow" admeasuring 325 sq.mtrs. to Late Aspi Nikorawalla (for short 'Aspi'). In the year 1994, the rent agreement was further renewed for a period of one year. Clause 1 of the agreement of 1994 shows that the landlords agreed to let out and tenant Aspi agreed to take from the landlords, Bungalow known as 'Preston Bungalow' including its out-house at Panchgani in the District of Satara and the furniture and other articles therein for a period of one year from 01.01.1994 upto 31.12.1994 at the rent of Rs.120/- per month for Preston Bungalow including its out-house and Rs.30/- per month for the hire charges of the furniture and other articles therein aggregating to Rs.150/- per month.

4. It is the case of the defendants that when Aspi expired in Australia leaving behind wife Yasmeen Nikorawalla (for short 'Yasmeen') and son Kaizash Nikorawalla (for short 'Kaizash'), all were permanently residing in Australia and not in Preston Bungalow. Some time in the year 2002, Yasmeen and Kaizash filed R.C.S.No.45 of 2002, which was subsequently numbered as R.C.S.No.117 of 2010 inter alia for declaration of their tenancy right and for permanent injunction. It is the case of the defendants that in that Suit, Yasmeen and Kaizash did not even refer and / or mention right of Sharokh. It was contended that Aspi

died in Australia and only Yasmeen and Kaizash have been using and residing in the suit property till date as tenants. On 06.10.2005, Yasmeen executed Power of Attorney in favour of Sharokh to contest the Suit filed by her for declaration of tenancy rights. Respondent No.1, Khorshed Faredoon Dalal (for short 'Khorshed') instituted R.C.S.No.232 of 2006 which was re-numbered as R.C.S.No.264 of 2010 against Yasmeen and Kaizash for their eviction on the ground of non-user. On 01.06.2008, Yasmeen and Kaizash executed another Power of Attorney in favour of Sharokh to maintain the bungalow and contest the pending Suits.

5. During the pendency of R.C.S.No.264 of 2010, Khorshed had filed applications at exhibits-5 and 37 for injunction restraining Yasmeen and Kaizash from creating any third party interest and also from altering nature of the suit property. The injunction was sought on the apprehension that they are likely to sublet the property to Sharokh. By order dated 22.11.2010, the learned trial Judge issued the requisite injunctions. The learned trial Judge held that Sharokh is not a tenant in the suit property. In view of Section 7(15) of the Maharashtra Rent Control Act, 1999 (for short 'Act'), he does not get status of a tenant. The learned trial Judge also restrained Yasmeen and Kaizash from creating any third party rights in the suit property. The said order was not challenged either by Yasmeen and Kaizash or by Sharokh and thus, attained finality.

6. Respondents No.2 and 3 - Gayomard Framroz Panthaki (for short 'Gayomard') and Hoshedar Phiroz Poonawalla (for short 'Hoshedar') respectively instituted Special Civil Suit No.49 of 2014 against Sharokh, Yasmeen and Kaizash for injunction and damages. The Suit was instituted for injunction restraining Sharokh from encroaching Preston

Bungalow.

7. On 13.03.2013, Khorshed filed application exhibit-72 for amending R.C.S.No.264 of 2010 and also impleading Sharokh as a party defendant. By order dated 12.01.2015, the learned trial Judge rejected the application. In that order, the learned trial Judge recorded a finding that there is no subletting in favour of Sharokh and he cannot claim tenancy. On 29.12.2015, Sharokh in capacity of Power of Attorney Holder of plaintiff No.1-Yasmeen and plaintiff No.2-Kaizash and in his personal capacity as plaintiff No.3 instituted present Suit namely, R.C.S.No.84 of 2015 against the defendants for mandatory injunction. In paragraph 2 of the plaint, Sharokh claims that he is a family member of Aspi. He, however, does not claim or plead that he is a tenant. The defendants filed their written statement resisting the Suit inter alia contending that they have not caused any obstruction to Yasmeen and Kaizash. They denied the status of Sharokh and contended that he is not a tenant. By order dated 11.04.2016, the learned trial Judge rejected the application.

8. Sharokh in his personal capacity and in capacity of Power of Attorney Holder of Yasmeen and Kaizash preferred Miscellaneous Civil Appeal No.69 of 2016. During the pendency of that appeal, on 23.09.2016, Yasmeen and Kaizash executed registered Deed of Surrender in favour of the defendants. It is the case of the defendants that Yasmeen and Kaizash handed over vacant and peaceful possession of Preston Bungalow for a valuable consideration. In the Deed of Surrender, Yasmeen and Kaizash revoked and cancelled Power of Attorney in favour of Sharokh. In October, 2016, Yasmeen and Kaizash withdrew R.C.S. No.84 of 2015 and Miscellaneous Civil Appeal No.69 of 2016 to their extent. Before disposing of Suits in terms of the consent

terms, Sharokh preferred third party applications in R.C.S.No.117 of 2010 and R.C.S.No.264 of 2010 for impleading him as a party. Immediately thereafter, he also instituted R.C.S.No.72 of 2016 for declaration of his tenancy rights. By order dated 16.11.2016, the learned District Judge dismissed the Miscellaneous Civil Appeal. On 17.05.2017, the applications made by Sharokh for impleadment were dismissed by holding that he has no status as a family member in the suit property. He has also no exclusive right in the suit property. On the same day, application at exhibit-5 for injunction made by Sharokh in R.C.S.No.72 of 2016 was rejected. Aggrieved by the order rejecting the applications for impleadment, Sharokh instituted Writ Petitions in this Court. By order dated 08.09.2017, this Court disposed of the Writ Petitions. Aggrieved by order dated 17.05.2017 rejecting application exhibit-5 for injunction in R.C.S.No.72 of 2016 made by Sharokh, he filed Miscellaneous Civil Appeal No.128 of 2017 before the District Court, which is stated to be pending. R.C.S.No.264 of 2010 filed for eviction of Yasmeen and Kaizash was disposed of on 28.09.2017 in terms of the consent terms. Aggrieved by the orders dated 11.04.2016 and 16.11.2016, Sharokh has instituted the present Petition.

9. In support of this Petition, Mr. Anturkar submitted that Sharokh has instituted Regular Civil Suit No.84 of 2015 (present Suit) inter alia praying for the following reliefs:

“A. Mandatory injunction may kindly be issued against the defendants herein directing them to remove the obstruction on the gate mentioned para 1C of plaint and opening the access and enjoyment of the suit property more particularly access road described in para 1B;

B. Defendants may be permanently restrained from obstructing the access and enjoyment of the suit properties by the plaintiffs and caretaker, either personally or through someone by mode of permanent injunction;”

10. Mr. Anturkar submitted that R.C.S.No.72 of 2016 is instituted by Sharokh inter alia praying for the following reliefs:

“A. It may kindly be declared that the plaintiff is a tenant in the suit property and enjoying the suit property in the same capacity;

B. That defendants No.1 to 3 may kindly be restrained from obstructing possession of the plaintiff in the suit property and dispossessing him without due process of law either personally or through someone by decree of permanent injunction;”

11. Mr. Anturkar submitted that a perusal of prayers made in the present Suit, namely, R.C.S.No.84 of 2015 clearly shows that Sharokh has claimed only mandatory injunction and not prohibitory injunction. In other words, the prohibitory injunction is not sought for protecting the possession of Sharokh in the suit premises. He further submitted that Yasmeen and Kaizash have admitted that Sharokh is in possession of the suit premises. To a query raised by the Court as regards whether order dated 17.05.2017 passed by the learned trial Judge rejecting the application exhibit-5 for injunction made by Sharokh in Suit No.72 of 2016 was shown to this Court on 08.11.2017 is concerned, he submitted that no advantage was gained by Sharokh by not disclosing order dated 17.05.2017 before this Court on 08.11.2017 when Writ Petition was admitted. He has invited my attention to paragraphs 12 to 14 of the trial Court's order dated 11.04.2016 as also paragraphs 16 to 19 of the order dated 17.05.2017 passed by the learned trial Judge below exhibit-5 in R.C.S.No.72 of 2016 to contend that the contents of paragraphs 12 to 14 of the order dated 11.04.2016 and paragraphs 16 to 19 of order dated 17.05.2017 are verbatim same. In other words, he submitted that there is no application of mind on the part of the trial Court while deciding the applications. He further submitted that Sharokh did not produce the documents before the trial Court and the learned District Judge while

passing the impugned orders. He has however produced compilation of documents and relied upon the following documents:

- a. Notice dated 08.04.2015 address on behalf of Khorshed to the Manager / Engineer of Electricity Distribution Company Limited (for short 'Company'). Copy of that notice was sent to Sharokh at the address of the suit premises;
- b. Summons dated 26.03.2015 issued in R.C.C.No.8 of 2014 to Nilu-wife of Sharokh and Sharokh at the address of the suit premises;
- c. Bill dated 26.10.2013 for the month of October, 2013 issued by the Company to Sharokh having address of the suit premises;
- d. Bill dated 28.01.2014 for the month January, 2014 issued by the Company to Sharokh having address of the suit premises;
- e. Invoice dated 06.01.2014 issued by Bharat Sanchar Nigam Limited (for short 'BSNL') to Sharokh at the suit premises;
- f. Bill dated 06.01.2014 issued by Maharashtra Water Board to Sharokh having following address:
Preston Cottage, Main Road, Reshmy Chowk,
Panchgani, Taluka Mahabaleshwar
District Satara
- g. Letter dated 02.04.2019 addressed by the Deputy Executive Engineer (I/c) of Company to the wife of Sharokh.

12. Mr. Anturkar further submitted that defendants contended that Sharokh has included open area admeasuring 4 acres while describing the suit premises, which was not let out even to the tenants, namely, Yasmeen and Kaizash. He has invited my attention to paragraph 1 of the plaint of R.C.S.No.46 of 2002 where Yasmeen and Kaizash described the premises in dispute as under:

“Description of the property:-

All the piece and parcel of the premises known as "Preston Bungalow" admeasuring 325 sq.mtrs. Consisting of four Bed rooms, Hall, Dining Room, 2 kitchens, Verandah and W.C. along with outhouse / Servant quarters admeasuring 45 sq.mtrs. Consisting of 4 rooms and toilet along with the independent access road and the open area surrounding the bungalow admeasuring appx. 4 acres situate at Mahabaleshwar Road, Panchgani in the District of Satara and bounded as follows:-

On or towards East - Preston Cottage

On or towards West - Open space

On or towards South - Entrance to Preston Estate

On or towards North - Valley."

13. In R.C.S.No.84 of 2015 filed by Yasmeeen and Kaizash along with Sharokh, description of the suit premises is given in paragraph 1A, which is to the following effect:

"01. Description of the suit property:

A. "all that piece and parcel of the premise known as 'Preston Bungalow' admeasuring about 325 sq.mtrs. consisting of four Bedrooms, One Hall, One Dining Hall, Kitchen, Verandah and W.C. along with Outhouse / Servant Quarters admeasuring 45 sq.mtrs. consisting of four rooms and toilet along with the independent access road and open area admeasuring about 4 acres surrounding the bungalow within the Final plot nos.521 and 521A, Panchgani, Taluka Mahabaleshwar, Dist. Satara whose boundaries are as follows:

On or towards East : Preston Cottage

On or towards South: Municipal Road / entrance to Preston Estate

On or towards West: Open Space / Final Plot No.522

On or towards North: Valley."

14. He has also invited my attention to the consent terms of October 2016, and in particular paragraph 4 thereof, which is to the following effect:

"4. The defendants state and declare that they have handed over vacant and peaceful possession of the suit property known as 'Present Bungalow' admeasuring 325 sq.mt., consisting of 4 bedrooms, hall, dining room, 2 kitchens, Verandah and WCs along with outhouse / servant quarters admeasuring 45 sq.mtrs., consisting of 4 rooms and a toilet

along with the independent access road and the open area surrounding the bungalow and the open area admeasuring approx 4 acres on Final plot No.521 and 521A situate on Chesson Road, Panchgani, Tal. Mahabaleshwar, District Satara, Maharashtra, along with furniture, fixtures and articles already lying before occupation of tenancy and being therein to the plaintiffs / applicants as landlords and owners of the suit property.

The suit property whose boundaries are as follows:

On or towards the East	:	Preston Cottage
On or towards the West	:	Open Space
On or towards the South	:	Entrance Road to Preston Estate/Property
On or towards the North	:	Valley”

15. He further submitted that at the time of passing order on 08.11.2017 in this Petition, order dated 17.05.2017 passed by the learned trial Judge below exhibit-5 in R.C.S.No.72 of 2016 was not shown by Sharokh. Defendants could have very well shown that order. Even otherwise, nothing turns on that aspect as defendants admit that Sharokh is in possession of the suit premises.

16. Mr. Anturkar has invited my attention to paragraphs 27 and 33 of the order passed by the learned District Judge. In paragraphs 27 and 33, the learned District Judge observed that Sharokh is in unlawful possession of the suit property. It is in that context, while admitting Writ Petition on 08.11.2017, this Court observed in paragraph 3 that the Appellate Court has in more places than one said in so many words that the petitioner No.3 (Sharokh) is in unlawful possession of the suit premises or a bungalow at Panchgani. Prima facie, the question of whether the possession is unlawful or not is a matter that requires examination.. It is however, not in doubt that the factum of physical possession is noted by the learned District Judge in paragraphs 27 and 33. Mr. Anturkar submitted that the learned Judge also noted that in other places in the order of the learned District Judge, possession of

Sharokh in suit premises is admitted. For all these reasons, he submitted that impugned orders deserve to be set aside thereby allowing application exhibit-5 and granting reliefs claimed therein.

17. On the other hand, Mr. Khandeparkar supported the impugned orders. He submitted that Aspi was inducted by Fardoon in pursuance of the rent agreement dated 14.01.1982. The rent agreement was renewed in the year 1994. In the agreement of 1994, clearly, the description of the suit premises is mentioned. A perusal of the description given in the rent agreement of 1994 leaves no room for doubt that 4 Acres open space was not let out to Aspi. In the present Suit, Sharokh has described the suit property as Bungalow along with surrounding 4 Acres, and thus, he has made misrepresentation to the trial Court. Yasmeen and Kaizash had instituted R.C.S.No.45 of 2002, which was re-numbered as R.C.S.No.115 of 2010 for declaration of their tenancy rights and permanent injunction. In that Suit, plaintiffs therein did not even mention or plead any right of Sharokh. It was specifically asserted that Aspi died in Australia. Yasmeen and Kaizash only are using and residing in the suit property as on that date as tenants. On 06.10.2005, Yasmeen executed Power of Attorney in favour of Sharokh to contest her Suit for declaration of tenancy rights. On 01.06.2008, Yasmeen and Kaizash executed another Power of Attorney in favour of Sharokh to maintain and look after Preston Bungalow and to contest the pending proceedings including R.C.S.No.232 of 2006, which was re-numbered as R.C.S.No.264 of 2010 filed by Khorshed against Yasmeen and Kaizash. In R.C.S.No.264 of 2010 filed by Khorshed, applications at exhibits-5 and 37 were filed, restraining Yasmeen and Kaizash from creating third party interest and also altering the nature of the suit premises. By order dated 22.11.2010, the learned trial Judge allowed that application. The said order is not challenged either by Yasmeen and Kaizash or Sharokh.

18. On 13.03.2013, Khorshed had filed application exhibit-72 for amending the plaint of R.C.S.No.264 of 2010 and for impleading Sharokh as a party defendant. While rejecting that application on 12.01.2015, the Court recorded a finding that there was no subletting in favour of Sharokh and he cannot claim tenancy rights.

19. Mr. Khandeparkar submitted that on 29.12.2015, Sharokh in the capacity of Power of Attorney Holder of Yasmeen and Kaizash and in his personal capacity as plaintiff No.3 filed R.C.S.No.84 of 2015 (present Suit). In paragraph 2, he claimed that he is a family members of Aspi. Sharokh did not claim that he is a tenant. Sharokh has not specifically asserted in what capacity, he is occupying the suit premises. In short, he submitted that Sharokh is not claiming any independent right, title or interest in the suit premises and claims to be a family member of Yasmeen and Kaizash. He submitted that on 23.09.2016, Yasmeen and Kaizash executed a registered Deed of Surrender of their tenancy in favour of the defendants and handed over vacant and peaceful possession of Preston Bungalow for a valuable consideration. In the Deed of Surrender, Yasmeen and Kaizash revoked and cancelled the Power of Attorney in favour of Sharokh. Parties in R.C.S.No.117 of 2010 and 264 of 2010 filed consent terms. Yasmeen and Kaizash, who were plaintiffs No.1 and 2 in R.C.S.No.84 of 2015 as also appellants in Miscellaneous Civil Appeal No.69 of 2016 withdrew from the Suit and the Appeal. Before the pending Suits could be disposed of by drawing decree in terms of the consent terms, Sharokh preferred third party applications in R.C.S.No.117 of 2010 and R.C.S.No.264 of 2010 for impleading himself as a party. By orders dated 17.05.2017, the learned trial Judge rejected the applications holding that Sharokh is not a member of family and has no status in the suit property. He has also no

exclusive right in the suit property. Immediately after filing applications for intervention in R.C.S.No.117 of 2010 and R.C.S.No.264 of 2010, he also instituted separate Suit namely, R.C.S.No.72 of 2016 for declaration of his tenancy rights. Pending that Suit, he filed application for temporary injunction. By order dated 17.05.2017, the learned trial Judge rejected the application. Aggrieved by that decision, Sharokh has preferred Miscellaneous Civil Appeal, which is pending till date and no interim order is operating. He submitted that in all the orders passed by the trial Court as also by the Appellate Court, it is found that Sharokh is not a member of family of Yasmeen and Kaizash. He cannot claim any tenancy rights in the suit premises. As basically, the application for injunction taken out by Sharokh in his own Suit i.e. R.C.S.No.72 of 2016 for declaration of tenancy rights is rejected by holding that he is not in possession, the Courts below were justified in rejecting the application.

20. Mr. Khandeparkar has invited my attention to the order of the learned District Judge dated 16.11.2016. In paragraph 14, the learned District Judge noted that during the course of discussion, the learned trial Judge observed that Sharokh had taken electricity connection and water connection in his name without prior permission of the landlord and without prior permission of the tenants as well. The said act of Sharokh was also resisted by the tenants Yasmeen and Kaizash. In paragraph 21, the learned District Judge noted that in the present case, Sharokh alone is not in possession of the suit premises. He is not tenant in the suit premises and along with his aunt and uncles, he was coming to the suit premises only in holidays. It does not mean that he is having lawful possession over the suit property. He submitted that it is in that context, the findings recorded by the learned District Judge in paragraphs 27 and 33 are to be appreciated. He submitted that in

paragraph 2 of present Suit, namely, R.C.S.No84 of 2015, Sharokh specifically contended that he is nephew of Aspi and Yasmeen. He is residing in the suit property being a member of family. Thus, Sharokh specifically came with the case that he is a member of family of Aspi and Yasmeen and as such, he is residing in the suit property. In other words, he has not claimed any independent right, title and interest in the suit property and his possession is that of a family member of Aspi and Yasmeen. He further submitted that once Yasmeen and Kaizash have surrendered their rights and handed over possession of the suit premises to the defendants, Sharokh cannot claim any right, title or interest in the suit property.

21. Mr. Khandeparkar has also invited my attention to the documents which are produced by Sharokh for the first time. He submitted that as far as the electricity bills issued in the name of Sharokh are concerned, the same were on the basis of declaration dated 18.02.2013 submitted by Sharokh to the Company. In that declaration, Sharokh claimed that he is one of the legal heirs of Aspi, who died on 07.04.2000. He is willing to take over all the past and future liabilities in respect of electrical energy and hire electric installation at Panchgani. He declared that the widow of the deceased Aspi namely, Yasmeen gave power of attorney to him. He submitted that in pursuance thereof, the electricity bills were issued by the Company in the name of Sharokh. He also invited my attention to the Power of Attorney dated 06.10.2005, which does not authorize Sharokh to get the bills transferred in his name. As far as the water bills issued by Maharashtra Water Board are concerned, Sharokh made application to Maharashtra Water Board for transferring water meter in his name on account of death of Aspi in April 2000. He also invited my attention to the consent letter of 2016 of Yasmeen and Kaizash wherein it is stated that telephone connection, watter connection, electricity

connection and gas connection were standing in the name of Aspi, which were transferred in the name of Sharokh on the basis of the Power of Attorney. This was done by him suo moto without either consent or authorization of Yasmeen and Kaizash. They gave precise and specific consent for deleting the name of Sharokh from all and every connection in respect of the suit property and entering names of Gayomard Framroz Pathaki and Hoshedar Phiroz Poonawalla.

22. Mr. Khandeparkar submitted that in the present case, plaintiff has claimed mandatory injunction as a temporary interim relief. He relied upon the decision of ***Dorab Cawasji Warden Vs. Coomi Sorab Warden, (1990) 2 SCC 117***, and in particular paragraph 16 thereof. The Apex Court laid down the guidelines to the effect that plaintiff has to have a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money. The balance of convenience is in favour of the one seeking such relief. In paragraph 17, the Apex Court observed that being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. The guidelines laid down in paragraph 16 are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion. He also relied upon the decision in ***Samir Narain Bhojwani Vs. M/s. Aurora Properties and Investments*** in **Civil Appeal No.7079 of 2018** decided on **21.08.2018**, and in particular paragraph 24 thereof, where the Apex Court has considered **Dorab Cawasji Warden's case** (*supra*) and reproduced paragraphs 16

and 17 of that decision.

23. Mr. Khandeparkar submitted that the Courts below, after appreciating the material on record, have rejected the application made by Sharokh. He submitted that the Courts below have properly exercised the discretion while rejecting the application. He, therefore, submitted that no case is made out for interfering with the impugned orders.

24. In rejoinder, Mr. Athaly submitted that in the Power of Attorney dated 06.10.2005 executed by Yasmeen in favour of Sharokh, there is a recital to the effect that Sharokh resides in the suit premises with her as a member of family of her husband Aspi. Even at the time of death of Aspi, Sharokh was residing together as a member of family. He used to contribute in payment of rent and carry out the repairs and renovation of the bungalow. He submitted that thus this establishes firstly that Sharokh is a member of family of Yasmeen. Secondly, he was residing at the time of death of Aspi.

25. Mr. Athalye also invited my attention to Sections 18 and 21 of the Indian Evidence Act, 1872 to contend that the statements made by the defendants in various proceedings constituted admissions. Admissions of defendants are relevant and while deciding the application at interlocutory stage, the Courts below ought to have taken into consideration these admissions.

26. Mr. Athalye has relied upon the following decisions:

a. ***Baldev Sahai Bangia Vs. R.C. Bhasin, (1982) 2 SCC 210*** to contend that the expression “family” appearing in Section 7(15)(d) of the Maharashtra Rent Control Act, 1999 (for short 'Act') has to be given a wider meaning and not a restricted meaning. This beneficial provision must be meaningfully construed so as to advance the object of the Act. The word “family” should be construed so as to include not

only the head of the family but all members or descendants from the common ancestors who are actually living with the same head.

b. ***Prataprai N. Kothari Vs, John Braganza, (1999) 4 SCC 403*** to contend that it is a settled principle of law that a person who has been in long continuous possession of an immovable property, can protect the same by seeking an injunction against any person in the world other than the true owner. Even the owner of the property can get back his possession only by resorting to due process of law.

c. ***Deoraj Vs. State of Maharashtra, (2004) 4 SCC 697*** to contend that the Courts below ought to have issued mandatory injunction even at the interim stage. Withholding interim relief would amount to dismissing of the Suit as by the time Suit comes up for hearing, nothing would remain to be allowed as relief. In the present case, Sharokh has made out a strong prima facie case. Balance of convenience lies in his favour and irreparable injury would be caused to him in case the interim relief is declined;

d. ***S. Jamiat Singh Vs. Municipal Corporation of Delhi, AIR 2004 Delhi 346*** to contend that in the present case, the learned District Judge has held that Sharokh is in possession albeit unlawful possession. In what capacity he is in possession is not an issue in the Suit. That issue can be decided in eviction suit filed by the landlord against the tenant. Sharokh is, therefore, entitled to injunction as claimed for;

e. ***Baban Anantrao Naik. Vs. Pramila Uttamrao Yenare, 2011 (6) ALL.M.R.15*** to contend that at the time of determination of application for temporary injunction, the factum of possession is the only relevant factum. Whether the possession is lawful possession or not would not be the subject matter of the inquiry. He, therefore, submitted that Petition deserves to be allowed.

27. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on

record. As mentioned earlier, Sharokh as plaintiff No.3 along with Yasmeen as plaintiff No.1 and Kaizash as plaintiff No.2 has instituted R.C.S.No.84 of 2015 inter alia praying for mandatory injunction against the defendants to remove obstruction on the gate mentioned in paragraph 1C of plaint and opening the access and enjoyment of the suit property more particularly access road described in paragraph 1B. They have also claimed permanent injunction restraining the defendants from obstructing the access and enjoyment of the suit premises by the plaintiffs and caretaker either personally or through someone. Thus, a perusal of the main prayers made by Sharokh and others clearly presupposes that they are in possession of the suit property. During the pendency of the Suit, application for interim relief claiming following reliefs was taken out:

“A. Interim Mandatory injunction may kindly be issued against the defendants herein directing them to remove the obstruction on the gate and opening the access and enjoyment of the suit property;

B. In light of peculiar circumstance and urgency involved, court commissioner or any other competent person may kindly be appointed to remove the obstruction on access to suit property immediately.”

28. Mr. Anturkar submitted that Sharokh has not claimed any prohibitory injunction and has claimed only mandatory injunction in the Suit. It is not possible to accept this submission in the light of the prayers made in the Suit. By prayer clause (B) in the Suit, Sharokh and others clearly claimed perpetual injunction restraining the defendants from obstructing the access and **enjoyment of the suit property by the plaintiffs and caretaker** which presupposes their possession. That apart, even in so far as the prayer clause (A) is concerned, mandatory injunction is sought against the defendants directing them to remove the obstruction on the gate and also opening the access and **enjoyment of**

the suit property, more particularly described in paragraph 1B of the plaint. Unless the plaintiffs are in possession of the suit property, they cannot claim mandatory injunction. The very fact that they have claimed mandatory injunction directing the defendants to remove the obstruction on the gate mentioned in paragraph 1C of the plaint and **enjoyment of the suit property** more particularly access road described in paragraph 1B of plaint essentially means that they are in possession.

29. Mr. Anturkar submitted that Yasmeen and Kaizash and defendants admitted that Sharokh is in possession of the suit premises. During the course of hearing, he accepted that order dated 17.05.2017 passed by the learned trial Judge rejecting application exhibit-5 in R.C.S.No.72 of 2016 was not shown at the time of hearing of this Petition on 08.11.2017. Sharokh has instituted R.C.S.No.72 of 2016 for declaration of his tenancy rights in the suit premises. During the pendency of this Suit, Sharokh took out application for temporary injunction restraining Khorshed, Hoshedar and Gayomard (defendants No.1 to 3) from interfering with his peaceful possession in the suit property till the final disposal of the Suit. A perusal of order dated 17.05.2017 passed by the learned trial Judge rejecting that application shows that the learned trial Judge referred to order dated 22.11.2010 passed by the learned trial Judge below exhibits-5 and 37 in R.C.S.No.264 of 2010. In paragraph 6 of that order, the learned trial Judge observed that the defendants therein stated that her nephew (Sharokh), his wife and children are residing with defendant No.1 (Yasmeen) in the suit property. The learned trial Judge observed that nephew of the defendant No.1 and his family members are not the tenant. Considering the definition of 'tenant' in Section 7(15) of the Act, only defendant therein could get the status of tenant. The nephew and his family members cannot get the status of tenant under the Act. It is not in dispute that the said order is not challenged either by Yasmeen and Kaizash or Sharokh. Sharokh has accepted this prima facie

finding. Sharokh is not alleging his right independently but through Yasmeen and Kaizash. He, therefore, cannot independently stand to any capacity as such. In paragraph 19, the learned trial Judge referred to Power of Attorney dated 06.10.2005 executed by Yasmeen in favour of Sharokh where it is stated that Sharokh is a family member. The learned trial Judge referred to Power of Attorney dated 01.06.2008 executed by Yasmeen and Kaizash in favour of Sharokh. In the said Power of Attorney, words “family member” are missing. The learned trial Judge noted that Yasmeen, Kaizash and Sharokh are not residing together. The fact in dispute is whether Sharokh could be termed as family member or not. Prima facie, Sharokh does not have an independent right to visit the suit property. The learned trial Judge referred to R.C.S.No.45 of 2002 filed by Yasmeen and Kaizash, which was re-numbered as R.C.S.No.117 of 2010 for declaration of their rights of tenancy, permanent injunction. In the entire Suit, there is no mention or pleading of any of the right of Sharokh. There is no whisper about joint residence of Sharokh with Yasmeen and Kaizash or that he is occupying the suit premises as a tenant. The learned trial Judge held that apparently, it is not believable that Sharokh has any independent right of tenancy. The learned trial Judge has also referred to decision in **Baldev Sahai Bangia** (*supra*) and **Prataprai N. Kothari** (*supra*). Though Sharokh has preferred Miscellaneous Civil Appeal challenging that order, it is not in dispute that as on date, there is not interim order in that appeal. In other words, no relief as on today is granted to Sharokh in his Suit being R.C.S.No.72 of 2016.

30. It has also come on record that Khorshed had filed application exhibit-72 in R.C.S.No.62 of 2010 on 13.03.2013 for amending the plaint and for impleading Sharokh as a party defendant. By order dated 02.01.2015, the learned trial Judge rejected the application. While rejecting the application exhibit-72, the learned trial Judge observed in

paragraph 5 that defendants (Yasmeen and Kaizash) contended in paragraph 2(h) of the written statement that Sharokh is cousin of defendant No.2 (Kaizash) and nephew of defendant No.1 (Yasmeen) and is residing with his family along with the defendants. The learned trial Judge, therefore, did not accept the contention of Khorshed that suit property is sublet to Sharokh. Sharokh cannot claim any tenancy rights.

31. In paragraph 2 of R.C.S.No.84 of 2015, Sharokh asserted that he is nephew of Aspi and plaintiff No.1-Yameen and being a member of family, has been residing in the suit property with them. In other words, Sharokh is not claiming any independent right of tenancy and is claiming through Aspi. He is claiming to be a member of family of Aspi and Yasmeen.

32. It is also material to note that plaintiff No.1-Yasmeen and plaintiff No.2-Kaizash in R.C.S.No.117 of 2010 and 264 of 2010, who were also plaintiffs No.1 and 2 in R.C.S.No.84 of 2015 and defendants entered into consent terms. Before disposing of these Suits in terms of the consent terms, Sharokh preferred third party applications for impleading him as a party. By order dated 17.05.2017, the learned trial Judge rejected the applications. In paragraph 9 of that order, the learned trial Judge noted that Sharokh participated in the dispute as a Power of Attorney Holder of Yasmeen and Kaizash. These Power of Attorneys are executed pendente lite. Had it been a fact that he is a member of the plaintiffs family, he would have joined as plaintiff than as Power of Attorney. In paragraph 10, the learned trial Judge referred to the Power of Attorney dated 06.10.2005 executed by Yasmeen in favour of Sharokh and Power of Attorney dated 01.06.2008 executed by Yasmeen and Kaizash in favour of Sharokh. In paragraph 11, the learned trial Judge referred to the observations made by the learned District Judge in

order dated 16.11.2016 passed in Miscellaneous Civil Appeal No.16 of 2016 (impugned order). The learned District Judge observed therein that Sharokh is in illegal possession of the suit property. In paragraph 12, the learned trial Judge observed that defendants have resisted entry of Sharokh and not of Yasmeen and Kaizash. Sharokh, therefore, cannot claim benefit of this observation. As far as contentions in other proceedings are concerned, they do not show any inference that defendants admitted Sharokh's entry or possession in capacity of tenant as such. He can be said to be in possession along with Yasmeen and Kaizash at their instance. Hence, mere ingress and egress along with his family cannot be termed as exclusive possession as a tenant.

33. Aggrieved by this order, Sharokh instituted Writ Petitions in this Court. By order dated 08.09.2017, this Court declined to interfere with the impugned orders and clarified that nothing done in R.C.S.No.117 of 2010 and R.C.S.No.264 of 2010 will bind or affect the rights, if any, claimed by Sharokh in those Petitions. In paragraph 2 of that order, this Court noted that Sharokh has already instituted independent proceedings in order to assert his tenancy rights in the form of R.C.S.No.72 of 2016 and the said proceeding is to be decided on its own merits and in accordance with law.

34. Sharokh filed application exhibit-5 in R.C.S.No.84 of 2015 inter alia praying for mandatory injunction directing the defendants to remove the obstruction on the gate and opening the access and enjoyment of the suit property. By order dated 11.04.2016, the learned trial Judge rejected the application. Aggrieved by this decision, Yasmeen, Kaizash and Sharokh preferred Miscellaneous Civil Appeal No.69 of 2016. Yasmeen withdrew appeal vide exhibit-16. Kaizash withdrew appeal vide exhibit-23. In short, Sharokh alone prosecuted Miscellaneous Civil Appeal. In

paragraph 21, the learned District Judge held that Sharokh is not tenant in the suit premises and along with his aunt and uncles, he was coming to the suit premises only in holidays. In other words, the learned District Judge held that Sharokh is not in settled possession.

35. As mentioned earlier, during the pendency of this Suit, Sharokh took out application exhibit-5, which was rejected on 17.05.2017. Mr.Anturkar relied upon the following documents, which are produced for the first time in this Court:

- a. Summons dated 26.03.2015 issued in R.C.C.No.8 of 2014 to Vilu-wife of Sharokh and Sharokh at the address of the suit premises;
- b. Bill dated 26.10.2013 for the month of October, 2013 issued by the Company in the name of Sharokh having address of the suit premises;
- c. Bill dated 28.01.2014 for the month January, 2014 issued by the Company to Sharokh having address of the suit premises;
- d. Telephone bill dated 06.01.2014 issued by Bharat Sanchar Nigam Limited (for short 'BSNL') to Sharokh showing address of the suit premises;
- e. Bill dated 06.01.2014 issued by Maharashtra Water Board to Sharokh showing the address of the suit premises.

36. Mr. Khandeparkar has also filed compilation of documents in this Court in response to the documents produced by Sharokh. A perusal of documents produced by Mr. Khandeparkar shows that the electricity bills were issued in the name of Sharokh on the basis of declaration dated 18.02.2013 submitted by him to the Company. In that declaration, Sharokh claimed that he is one of the legal heirs of Aspi, who died on

07.04.2000. He expressed his willingness to take over all the past and future liabilities in respect of electrical energy and hire electric installation at Panchgani. He further declared that the widow of the deceased Aspi namely, Yasmeen gave power of attorney to him. Prima facie, the bills were issued in the name of Sharokh on the basis of declaration submitted by him to the Company. A perusal of Power of Attorney dated 06.10.2005 shows that prima facie it did not authorize Sharokh to get the bills transferred in his name. In so far as the water bills issued by Maharashtra Water Board are concerned, Sharokh made application for transferring water meter in his name on account of death of Aspi in May, 2000. Prima facie, this explains why the water bills were issued in the name of Sharokh by the Maharashtra Water Board. In this regard, it is also significant to note that consent letter of 2016 of Yasmeen and Kaizash shows that telephone connection, water connection, electricity connection and gas connection were standing in the name of Aspi. They were transferred in the name of Sharokh on the basis of Power of Attorney. This was done by him *suo motu* without either consent or authorization. They have applied to the concerned authorities for deleting name of Sharokh from all and every connection in respect of the suit property.

37. I have examined these documents though in fact Sharokh did not produce these documents in the trial Court or even in the District Court. He ought to have produced these documents in the Courts below when he is claiming mandatory injunction. In the case of **Dorab Cawasji Warden** (*supra*), the Apex Court has laid down the guidelines for issuing mandatory injunction. The Apex Court has held that plaintiff has to make out a strong case for trial. It shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. It is necessary to prevent irreparable or serious injury which normally

cannot be compensated in terms of money. In paragraph 17, the Apex Court observed that being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. In paragraph 24 of **Samir Narain Bhojwani** (*supra*), the Apex Court has considered the decision of **Dorab Cawasji Warden** (*supra*) and reproduced paragraphs 16 and 17.

38. In the case of **Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria**, AIR 2012 SC 1727, in paragraphs 63, 64 and 67, the Apex Court observed thus,

“63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.

64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.

67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.”

39. In paragraph 70, the Apex Court observed that it would be imperative that one who claims possession must give all details such as the date of entry into possession; how he came into possession, basis of his claim that not to deliver possession but continue in possession. In paragraph 71, the Apex Court observed that from the pleadings, the Court must insist on documentary proof in support of the pleadings. In paragraph 76, it was observed that in pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. In paragraph 80, the Apex Court observed that it must be endeavour of the Court that if a Suit for mandatory injunction is filed then it is its bounden duty and obligation to critically examine the pleadings and documents and pass an order of injunction while taking pragmatic realities.

40. In paragraphs 84 and 85, the Apex Court dealt with false claims and false defences and referred to decision in ***Ramrameshwari Devi Vs. Nirmala Devi, (2011) 8 SCC 249***. In paragraphs 86 to 89, the Apex Court dealt with grant or refusal of an injunction in a civil suit is the most 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.

41. In paragraph 101, the Apex Court crystallized the principles of law. Principles No.1 and 3 read thus,

“1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.”

42. Applying the principles laid down by the Apex Court in the case of **Dorab Cawasji Warden's case** (*supra*) and **Maria Margarida Sequeria Fernandes** (*supra*), I do not find that the Courts below committed any error in dismissing the application made by Sharokh. It is also relevant to note the conduct of Sharokh. As mentioned earlier, the suit premises was let out by Aspi to Fardoon by rent agreement dated 14.01.1982. The rent agreement was renewed in the year 1994. Clause 1 of the rent agreement of 1994 is as under:

“1. The Landlords agree to let and the Tenant agrees to take the Landlords bungalow known as “Preston Bungalow” including its out-house at Panchgani in the District of Satara and the furniture and other articles therein for a period of one year from the 1st day of January 1994 upto the 31st day of December 1994 at the rent of Rs.120/- (Rupees One Hundred and Twenty Only) per month for Preston Bungalow including its outhouse and Rs.30/- (Rupees Thirty only) per month for the hire charges of the furniture and other articles therein aggregating to Rs.150/- (Rupees One Hundred and Fifty only) per month.”

43. As against this, in the present Suit, in paragraph 1A, Sharokh has given description of the suit premises as under:

“01. Description of the suit property:

A. “all that piece and parcel of the premise known as 'Preston Bungalow' admeasuring about 325 sq.mtrs. consisting of four Bedrooms, One Hall, One Dining Hall, Kitchen,

Verandah and W.C. along with Outhouse / Servant Quarters admeasuring 45 sq.mtrs. **consisting of four rooms and toilet along with the independent access road and open area admeasuring about 4 acres surrounding the bungalow within the Final plot nos.521 and 521A, Panchgani, Taluka Mahabaleshwar, Dist. Satara** whose boundaries are as follows:

On or towards East : Preston Cottage
 On or towards South: Municipal Road / entrance to Preston Estate
 On or towards West: Open Space / Final Plot No.522
 On or towards North: Valley.”

44. Mr. Anturkar invited my attention to the description of the suit premises in paragraph 1 of the plaint of R.C.S.No.46 of 2002 as also paragraph 4 of the consent terms of October, 2016, which also refers to letting out open area on Final plot No.521 and 521A admeasuring 4 acres. It is not possible to accept this submission in view of the specific description of the suit premises given in paragraph 1 of the rent agreement of 1994. Merely because Yasmeen and Kaizash have described the suit premises consisting of bungalow and 4 Acres open area, Sharokh cannot take advantage of that fact. That apart, order dated 17.05.2017 passed by the learned trial Judge below exhibit-5 in R.C.S.No.72 of 2016 rejecting Sharokh's application for injunction was not disclosed to this Court on 08.11.2017 when Petition was admitted. Thus, the conduct of Sharokh also dis-entitles him grant of any equitable relief. The judgments relied by Mr. Athalye, referred in paragraph 26, are not applicable in the facts and circumstances of the present case.

45. In the case of ***Wander Limited Vs. Antox India Private Limited***, 1990 (Supp.) SCC 727, in paragraph 14, the Apex Court observed thus,

“....., 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."

46. Applying the principles laid down in the aforesaid decision, it cannot be said that the discretion exercised by the Courts below is arbitrary, capricious or perverse. It cannot be said that the Courts below had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. This Court while exercising the power under Article 227 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 was 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 will not justify interference in exercise of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. Rule is discharged. In the circumstance of the case, there shall be no order as to costs. It is made clear that the observations made herein are prima facie and tentative and have been made with a view to testing the correctness of the impugned orders. The Court seized of the Suit and other proceedings pending between the parties shall decide the same on the basis of evidence on record and in accordance with law, uninfluenced by

the observations made in this order.

47. In view of the disposal of the Petition, nothing survives in Civil Applications No.2931 of 2017, 2932 of 2017 and 2935 of 2017 and the same are disposed of accordingly.

48. At this stage, Mr. Malvankar orally applies for continuation of ad-interim order granted by this Court on 08.11.2017. Mr. Khandeparkar opposed this application on the ground that application for injunction made by the petitioner in his Suit was rejected by the trial Court on 17.05.2017 by holding that the petitioner is not in possession. He, therefore, opposed continuation of ad-interim order.

49. After hearing both the sides, Petition was admitted on 08.11.2017 and ad-interim relief in terms of prayer clause (c) was granted. As interim order is operating from 08.11.2017, request for extension is reasonable. Hence, notwithstanding dismissal of Writ Petition, interim order granted on 08.11.2017 shall remain in force for a period of 8 weeks from today with express understanding that no explanation shall be sought for and granted by this Court. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab