

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER (ST.) NO. 19868 OF 2018
IN
NOTICE OF MOTION NO. 1013 OF 2013
IN
S.C. SUIT NO. 8366 OF 1999

1. Fardoon Rustom Afagh
an adult, Indian Inhabitant, having his
address at 2-A/24, Tata Mills Co-op. Hsg.
Society Ltd. Elphinstone Road, Parel,
Mumbai – 400 012.
2. Puran Parviz Niroo
an adult, Indian Inhabitant, having her
address at 2-B/11, Tata Mills Co-op. Hsg.
Society Ltd. Elphinstone Road, Parel,
Mumbai – 400 012.
3. Hormus Rustom Afagh
an adult, Indian Inhabitant, having his
address at 1-A/14, Tata Mills Co-op. Hsg.
Society Ltd. Elphinstone Road, Parel,
Mumbai – 400 012.
4. Mahvash Daryush Nowrazy
an adult, Indian Inhabitant, having her
address at 2-A/24, Tata Mills Co-op. Hsg.
Society Ltd. Elphinstone Road, Parel,
Mumbai – 400 012.
5. Mahindokt Mazdiyasni
an adult, Indian Inhabitant, having his
address at 4, Apt. 22, 5th Floor,
Tata Mills Co-op. Hsg. Society Ltd.
Elphinstone Road, Parel,
Mumbai – 400 012.

6. Parvin Pariboz Mazdiyansi
an adult, Indian Inhabitant, having her
address at 9B/302, Golden Oak Co-op Hsg.
Society, Kalpak, S.M. Road, Antop Hill,
Mumbai – 400 037.
7. Tania Pariboz Mazdiysnsi
an adult, Indian Inhabitant, having her
address at 9B/302, Golden Oak Co-op Hsg.
Society, Kalpak, S.M. Road, Antop Hill,
Mumbai – 400 037.
8. Minocher Rustom Afagh
an adult, Indian Inhabitant, having her
address at 3rd floor, Taushiar Building, St.
Paul's Street, Dadar, Mumbai – 400 014.
9. Behram Merwan Ibtdea
an adult, Indian Inhabitant, having his
address at Room No.35, 2nd Floor, Rahim
Mansion, 44, Gokhale Estate, Cross Lane
Parel, Mumbai – 400 012.

.. Appellants

V/s.

1. Rockford Structures Pvt. Ltd.
A Company incorporated under the
provisions of the Companies Act, 1956,
having its address at 209, 2nd Floor,
Konark Shram, Tardeo, Mumbai -400 034.
2. Mumbai Building Repairs and
Reconstruction Board (M.B.R.R.B.)
A unit of MHADA, having its office at
Grihanirman Bhavan, Bandra (E),
Mumbai – 400 051.
3. The Executive Engineer, FS Division,
M.B.R. & R. Board,
having his office at Annex Building, BMC

Bldg, 3rd Floor, above, Kirti Mahal Hotel,
Parel, Mumbai – 400 012.

4. The Court Receiver,
High Court, Mumbai having office at
Bank of India Buildin, 2nd Floor,
M.G. Road, Fort, Mumbai – 400 032. .. Respondents

Mr. P.K. Dhakephalkar, Senior Counsel a/w Ms. Pooja Thorat and Mr.
Anukul Jeth for the appellants / applicants
Mr. Mayur Khandeparkar a/w Mr. Sharad Wakchaure I/b Kishore
Thakordas & Co. for the respondent no.1
Mr. Kamlesh Ghumase for the respondent nos. 2 and 3

**CORAM : A.S. OKA &
M.S. SANKLECHA, J.J.**

DATED : 2nd APRIL, 2019

ORAL JUDGMENT : (Per A.S. Oka, J.)

1. By an administrative order dated 22nd December, 2018 passed by the Hon'ble the Chief Justice, this Appeal from Order is clubbed along with Writ Petition No. 2014 of 2018. As Writ Petition No.2014 of 2018 pertains to assignment of this Bench, this Appeal from Order is taken up for hearing. On the earlier date, we had put the parties to the notice that the Appeal from Order will be taken up for final disposal.

2. The Appeal from Order takes an exception to the judgment and order dated 5th May, 2018 passed by the learned Judge of the City Civil

Court on a Notice of Motion taken out by the first respondent herein in S.C. Suit No.8366 of 1999. The suit was filed by one Mrs. Puran Parvir Niroo. The appellants are the plaintiffs and defendants. The prayer made in the notice of motion taken out by the first respondent, which is not a party to the suit, is for directing the first defendant (the first appellant herein) in the suit who has been appointed as an agent of the Court Receiver to handover peaceful possession of the property which is the subject matter of the suit and to comply with all necessary formalities for facilitating the development of the property bearing City Survey No.50 at Dadar, Mumbai.

3. With a view to appreciate the submissions canvassed across the bar, it will be necessary to make a brief reference to the factual controversy in the suit. As stated earlier, the subject matter of the suit is a partnership business of New Persian Bakery on the land bearing Cadastral Survey No.50 of Dadar-Naigaon Division, admeasuring about 1440 sq.meters (for short “the said land”). There are two structures on the said land. One of the two structures consists of ground plus one upper floor, in which the partnership business of “New Persian Bakery” is being carried on. The other structure on the said land is known as “Sheriar Tawoosian” which consists of more than 30 tenements. The

structure of 'New Persian Bakery' is hereinafter referred to as “subject premises”.

4. Suit No.1659 of 1999 was filed on the original side of this Court, which was transferred to the City Civil Court and numbered as S.C. Suit No.8366 of 1999. The suit is for a declaration that the partnership exists, for the dissolution of partnership and other consequential reliefs. A Court Receiver has been appointed in the said suit in respect of the subject premises. The appellant – first defendant has been appointed as the Agent of the Court Receiver. There was earlier Notice of Motion taken out by the first respondent herein in the said suit being Notice of Motion No.4210 of 2013 seeking possession of the subject premises. The first respondent claims to have become owner of the subject land and structures on the basis of a conveyance. The prayer made in the said Notice of Motion was for directing the first defendant in the suit who is appointed as an agent of the Court Receiver to handover the vacant possession of the subject premises to the first respondent for demolition. The notice of motion was dismissed by the order dated 8th August, 2014. It was observed that the first respondent is not a party to the suit and hence, for recovery of possession, the said respondent should adopt the appropriate proceedings. Thereafter, a fresh Notice

of Motion was filed by the first respondent, on which the impugned order has been passed.

5. In the present Notice of Motion, the same relief was sought against the first defendant – first appellant who has been appointed as an agent of the Court Receiver. In addition to relief sought in the earlier Notice of Motion, a relief was sought even against the Court Receiver directing the Court Receiver to deliver the possession of the subject premises. A prayer was sought directing the Court Receiver to comply with all necessary formalities for redevelopment of the property and to execute of an alternate accommodation agreement etc. By the impugned order, the Notice of Motion was made absolute and the Court Receiver was directed to hand over possession of the subject premises as and when asked by the Authorities for the purposes of redevelopment. The learned Judge directed the first respondent to deposit a sum of Rs.75,000/- per month in lieu of temporary accommodation with the Court Receiver, till further directions. The Court also issued directions to the Court Receiver to comply with all necessary formalities.

6. After having heard the learned Counsel appearing for the parties,

we find that the impugned order is wholly unsustainable. The first respondent is not a party to the suit. In substance, the Trial Court has directed the Court Receiver and the agent of the Court Receiver to hand over the possession of the subject premises to the first respondent to enable him to carry out re-development. The prayer which is sought and granted is beyond the scope of the suit. The perusal of the prayers made in the suit show that the same arises out of a partnership dispute amongst the partners of the Bakery business. If the first respondent, who is not a party to the suit, wanted possession of the subject premises, it was for him to file appropriate substantive proceedings as observed by the Trial Court in the earlier Notice of Motion taken out for the same relief. If the Authorities who are parties to the Notice of Motion namely the Mumbai Building Repair and Reconstruction Board and its Executive Engineer (who are again not the parties to the suit) desire to evict the persons in possession of the subject premises, they are required to adopt appropriate proceedings in accordance with law. As the subject premises is *custodia legis*, no steps could have been taken for eviction and demolition of the subject premises, even by adopting due process of law either by the Authorities or by the first respondent without seeking leave of the Court appointing the Court Receiver.

7. The first respondent has adopted a short-cut method of obtaining possession of the subject premises by filing the Notice of Motion in a Suit arising out of a partnership dispute. It appears from the record that in fact, the impugned order has been passed on the second Notice of Motion taken out by the first respondent, though the first Notice of Motion seeking similar relief was dismissed on merits. It appears that statutory Authorities who are parties to the Notice of Motion viz; the Mumbai Building Repairs and Reconstruction Board and its Executive Engineer have also joined hands with the first respondent in the attempt of the first respondent to somehow take possession of the subject premises without following due process of law. In fact, it was the duty of the said Authorities to point out to the Trial Court the correct legal position. In fact, the impugned order notes that proceedings under Section 95A of Maharashtra Housing and Area Development (MHADA) Act, 1976 for eviction were also initiated by the said Authorities in respect of the subject property, which is *custodia legis* without obtaining the leave of the Court which had appointed the Court Receiver. As statutory Authorities, they should have taken care to ensure that the first respondent evicts the persons in possession after following due process of law.

8. Therefore, the impugned order deserves to be quashed and set aside being completely illegal.

9. The learned Counsel appearing for the first respondent submits that the said respondent may be permitted to take out a fresh Notice of Motion / an application for grant of *post facto* leave to proceed under Section 95A of the MHADA Act. The first respondent can always take out such application. The question whether in law, the first respondent can take out such application or not is to be decided by the concerned Court as and when such application is made.

10. Accordingly, we pass the following order :-

ORDER

- (i) The impugned order dated 5th May, 2018 is quashed and set aside.
- (ii) The Notice of Motion No.1013 of 2018 is hereby dismissed.
- (iii) The appeal is allowed in the above terms.

(M.S. SANKLECHA, J.)

(A. S. OKA, J.)