

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.1189 OF 2014
WITH
NOTICE OF MOTION NO.1789 OF 2017
IN
SUIT NO.443 OF 2013**

Rajdai Nandlal Shaw

...Applicant/Orig. Plaintiff

In the matter between
Rajdai Nandlal Shaw

Plaintiff

Versus

Mahendra Mangruram Gupta and
Ors.

...Respondents

...

Mr. V.Y. Sanglikar for the Plaintiff.

Mr. Saurabh M. Railkar for the Defendant Nos.1 and 2.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

ORDER PRONOUNCED ON :-26/11/2019

ORDER :-

The Plaintiff has taken out notice of Motion No.1189 of 2014 for injunction to restrain the Defendant nos.1 and 2 from parting possession and /or creating third party rights in respect of the suit shop No.5 pending the final disposal of the suit. The plaintiff has also sought appointment of court receiver to take charge of the suit premises.

2. By order dated 1/8/2017 this Court had appointed the court receiver, who was directed to take symbolic possession of the suit premises, without disturbing possession of the Defendant. After taking over formal possession, the court receiver was directed to apply for directions concerning appointing Defendant Nos.1 and 2 or anyone else as an agent of the receiver on such terms as to royalty and security as may be deemed fit. Liberty was granted to the Plaintiff to apply for further ad-interim reliefs. Pursuant to this order, the Plaintiff took out the second notice of motion No.1789 of 2017 to appoint her as the agent of the court receiver, without security or royalty for the suit premises as well as the business carried out in the suit premises.

3. The Defendant Nos.1 and 2 took out a Notice of Motion No. 235 of 2018 for recall of the order dated 1/8/2017 on the ground that the same was passed in their absence. By order dated 27/3/2019 this Court allowed the said Notice of Motion and thus recalled the said order dated 1/8/2017 and restored the Notice of Motion No. 1189 of 2014 to file.

4. The dispute in the present case is in respect of shop no.5

situated on the ground floor of Bajrang Kripa, N.M. Joshi Marg, Parel, Mumbai, hereinafter referred to as 'the suit shop'. It is the case of the plaintiff that her father Deep Narayan Chatanki was a tenant of the suit shop, wherein he was conducting *chana kurmura* business. As the business flourished, he brought his younger brothers Magruram and Baburam from Uttar Pradesh to Mumbai to help him in the business. Later he allowed them to run the business in the suit shop. As per the mutual arrangement, each one of them i.e., Deep Narayan, Magruram and Baburam were to run the business for one year on rotation. The said arrangement continued till July, 2012.

5. It is the case of the Plaintiff that the Defendant No.1, the son of Magruram was to conduct the business in the suit shop for one year ending on 31st July, 2012. Thereafter he was to handover the business and the possession of the suit shop to the Defendant No.3. The grievance of the plaintiff is that the Defendant Nos.1 and his son i.e., the defendant no.2 refused to handover the business to the defendant no.3 - Baburam. It is alleged that the defendant nos.1 and 2 locked the suit shop and refused to handover possession to the Defendant Nos.3 and 4. The Defendant Nos.1 and 2 thereafter filed a suit against the Plaintiff and also moved a Notice of Motion seeking to

restrain the Plaintiff herein from dispossessing them from the suit shop. The said Notice of Motion has been dismissed by the City Civil Court by order dated 21/12/2012. The Plaintiff has averred that the possession of the defendant nos.1 and 2 was permissive. The mutual arrangement having been terminated, the defendants have no legal right to occupy the suit shop or to conduct the business in the suit shop.

6. The Defendant Nos.3 to 9 i.e., Late Baburam and his successors have supported the case of the Plaintiff. The defendant nos.1 and 2 have contested the suit mainly on the ground that Deep Narayan and his two brothers i.e., Magruram and Baburam were co-tenants in respect of the suit shop. They have averred that the rent receipts were issued in the name of Deep Narayan, he being the eldest among the three brothers. These Defendants have further claimed that Deep Narayan has executed a joint declaration acknowledging the rights of the other brothers. It is further alleged that by an affidavit dated 22nd February, 1990 Deep Narayan had transferred his rights in the suit shop in favour of his brother - Magruram. Upon the death of Deep Narayan, his widow - Antadevi also executed a declaration relinquishing her right, title and interest in shop no.5 in favour of the

defendant no.1 - Mahendra, the son of Magruram. The defendant nos.1 and 2 therefore contend that they have exclusive right over the suit shop. They claim that the Plaintiff in connivance with the Defendant Nos.3 to 7 is trying to dispossess them from the suit shop and hence he was constrained to file a suit against them. The said suit has been dismissed by this Court (Coram : R. Dalvi, J.) by order dated 14/08/2013. It is stated that the Defendant Nos.1 and 2 have filed SLP before the Hon'ble Supreme Court challenging the said dismissal order.

7. Heard Mr. Sanglikar, the learned counsel for the Plaintiff. He contends that the father of the Plaintiff was a tenant of the suit shop. He had permitted his brothers to carry on the business in the suit shop by rotation. As per the mutual arrangement, the term of the Defendant No.1 to conduct the business by rotation, was to end on 31/7/2012 and then the Defendant No.4 was to continue the business for the following year. However, the Defendant No.1 refused to hand over the business and possession of the suit shop to the Defendant No.4 and filed a suit claiming title to the suit shop. The learned counsel submits that the possession of the Defendant Nos.1 and 2 was purely permissive. The Plaintiff having terminated the mutual

arrangement, the Defendant Nos.1 and 2 have no right to conduct the business and occupy the suit shop. The Learned counsel for the Plaintiff states that the suit filed by the Defendant Nos. 1 and 2 to restrain the Plaintiff from dispossessing them otherwise by due process of law has been dismissed. Relying upon the decision of the Apex Court in *Maria Margarida Sequeira Fernandes vs Erasmo Jack De Sequeira, (2012) 5 SCC 370*, he submits that due process of law means an opportunity to the Defendant to file pleadings including written statement and documents before the court of law. It does not mean the whole trial. He urges that the plaintiff has been put to undue hardship and immense loss due to unauthorized conduct of business and occupation of the suit shop.

8. Mr. Railkar, the learned counsel for the Defendant Nos.1 and 2 contends that the Plaintiff as well as the Defendant Nos.1 and 2 have raised conflicting claims over the suit shop. He submits that the Defendants Nos. 1 and 2 are in possession of the suit shop and appointment of receiver will result in depriving them of de facto possession. He submits that the Plaintiff has prima facie failed to show that there is imminent danger to the suit shop, which warrants immediate relief. He submits that in the absence of any material to

show that the property is likely to be dissipated or wasted, the court would not be justified in appointing the court receiver. To substantiate this contention, he has relied upon the decision of the Apex Court in *Premanand Patel (dead) by Lrs. vs. Sudha A. Chowgule and Ors.*, (2009) 11 SCC 127, decision of the Madras High Court in *T. Krishnaswamy Chetty vs. C. Thangavelu Chetty and ORs.*, AIR 1955 Madras 430 and *Hasenbhoy Jetha vs. New India Corporation Ltd.*, AIR 1955 Madras 435 and decision of the Bombay High Court in *B.D.A. Ltd. Vs Central Bank of India and Anr.* in AIR 1995 BOMBAY 14.

9. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties. Order XL Rule 1 of CPC enables the Court to appoint a Receiver where it appears to the Court to be just and convenient. In *Parmanand Patel (supra)*, the Apex Court has observed thus :-

" 23. A receiver, having regard to the provisions contained in O.40 R.1 of the Code of Civil Procedure, is appointed only when it is found to be just and convenient to do so. Appointment of a receiver pending suit is a matter which is within the discretionary jurisdiction of the Court. Ordinarily the Court would not appoint a receiver save and except on a prima facie finding that the plaintiff has an excellent chance of success in the suit.

24. It is also for the plaintiff not only to show a case of adverse and conflict claims of property but also emergency,

danger or loss demanding immediate action. Element of danger is an important consideration. Ordinarily, a receiver would not be appointed unless a case has been made out which may deprive the defendant of a de facto possession. For the said purpose, conduct of the parties would also be relevant. "

10. In *T. Krishnaswamy Chetty (supra)*, the Madras High Court has laid down the five principles described as 'panch sadachar' of our Courts exercising equity jurisdiction in appointing receiver, which read as follows:

" (1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised-for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right, he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.

(4) *An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through, fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver.*

(5) *The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc. "*

11. It would also be advantageous to refer to the decision of this Court in ***Mulji Umershi Shah and Etc. Vs. Paradisia Builders Pvt. Ltd AIR 1998 Bom 87***. The question before the Court was whether the Trial Court was justified in appointing a receiver while refusing to grant temporary injunction in favour of the Plaintiff and in absence of

any application for appointment of receiver. The observations of the learned Single Judge of this Court, (as his lordship then was) are as under:-

" 19. In my view, in suitable cases, the Court is not powerless to pass appropriate order for appointment of receiver without any application by any of the parties while rejecting the application for temporary injunction. Such power of course has to be exercised sparingly and in exceptional cases where dismissal of an application for grant of temporary injunction may lead the parties to take law in their own hands and use their own devices either for protection of unlawful possession of recent origin or for gaining possession or such like circumstances. There is no impediment put by the Code of Civil Procedure in passing such order to prevent the ends of justice being defeated. Such order may be imminently required to be passed also so that possession may be made over to that party who is prima facie entitled to possession but is deprived by unlawful conduct or illegal act of the other party. An appointment of receiver can be made on the application of either parties to the litigation as well as suo motu and therefore, absence of application shall not preclude the Court from passing such order if it is just and convenient. The cases may be varied and many. A party may not have any right to the property and still comes in possession of the property unlawfully and illegally which may be of recent origin and on that basis may seek to protect his possession by filing suit for injunction and by making an application for temporary injunction. The Court may find that such person has no title, right or interest in the property and is not in lawful possession and, therefore, is not entitled to grant of any temporary injunction. To avoid grave situation where the parties may take law in their own hands even while temporary injunction has been refused, in the absence of any application, the Court may make an order of appointment of receiver. Such exceptional order is permissible under law to prevent larger mischief if it is just and convenient in the facts and circumstances of the case. There is nothing wrong if by

taking such recourse the plaintiff who has unlawfully come in possession recently is dispossessed during pendency of suit. In suitable and appropriate case, if the trial Court appoints the receiver while rejecting the application for temporary injunction, it cannot be said that such power is without jurisdiction..."

12. In the instant case, undisputedly, the license as well as the rent receipts of the suit shop were in the name of Deep Narayan Chatanki, the father of the Plaintiff. It is also not in dispute that the chawl wherein the suit shop was existing was in dilapidated condition and the same was acquired by MHADA and Mumbai Housing Repair Board. In the year 1989, the father of the Plaintiff was given notice to vacate the premises and was provided temporary alternative accommodation. The father of the Plaintiff died in U.P. on 09/05/1993.

13. The records prima facie indicate that dispute over allotment of suit shop led to Anta Devi, the mother of the Plaintiff filing a Writ Petition No.1196 of 1996 for allotment of permanent alternative accommodation in the newly constructed building. The records indicate that by interim order dated 09/07/1996; this Court had directed MHADA to put Antadevi in possession of the suit shop. She was permitted to use the suit shop for commercial purpose or for

composite purpose of residential cum commercial. Accordingly, Antadevi was put in possession of the suit shop.

14. The records further indicate that Antadevi had died during the pendency of the writ petition and the Plaintiff herein had been brought on record as the legal representative. The writ petition came to be disposed of by order dated 11/01/2011 in terms of the interim order dated 09/07/1996. The records further indicate that by order dated 09/01/2012, MHADA had transferred the suit shop in the name of the Plaintiff. The electric connection in respect of the suit shop has also been transferred in the name of the Plaintiff.

15. The material on record prima facie indicate that the father of the Plaintiff was a tenant of the suit shop. After demolition of the original shop, his widow - Antadevi was put in possession of the suit shop and upon her death the suit shop has been transferred in the name of the Plaintiff.

16. It is pertinent to note that the Defendant Nos.1 and 2 claim to be the owners of the suit shop, mainly on the basis of the affidavit and declaration executed by Deep Narayan and his wife Antadevi. It is

to be noted that based on the same documents, these Defendants had filed a suit and sought interim relief against the Plaintiff and the other Defendants. The City Civil Court dismissed the Notice of Motion holding that the Defendant Nos.1 and 2 had failed to prove that they had exclusive right or that they were in exclusive possession of the suit shop. The learned Judge has further observed that taking undue advantage of ad-interim relief, the Defendant Nos.1 and 2 have deprived the Plaintiff and other Defendants from conducting business in the suit shop. The Appeal filed against the said order has been dismissed by this Court (Coram : R. Dalvi, J.) by order dated 14/08/2013, wherein it has been observed that the documents on the basis of which the Defendants are claiming rights over the suit shop are unregistered and fall within the mischief of Section 49 of the Registration Act.

17. It is pertinent to note that the Writ Petition No. 1196 of 1996, which was filed subsequent to execution of these documents, was not filed by the Defendant No.1 in his individual capacity but was filed as an attorney of Antadevi, the mother of the Plaintiff. Furthermore, pursuant to the order passed in the said Writ Petition, MHADA had put Antadevi in possession of the suit shop and

subsequently transferred the suit shop in her name without there being any challenge by and/or behalf of the Defendant Nos.1 and 2. The documents on which the Defendant Nos. 1 and 2 have based their claim are unstamped and unregistered. These documents, which are hit by Section 49 of the Registration Act would not create any legal interest in the property.

18. The Defendant Nos.1 and 2 have not been able to prima facie -establish their title or exclusive/settled possession in respect of the suit shop. The material on record indicates that the Defendant Nos.1 and 2 were permitted to conduct business in the suit shop on gratuitous basis. Such permissive possession does not create any right or interest to the property. As per the mutual arrangement, the Defendant Nos.1 and 2 were to carry business in the suit premises till 31/7/2012 and thereafter hand over premises to the Defendant Nos.3 to 7, who were to conduct business for the following year. The records indicate that the Defendant Nos.1 and 2 declined to hand over possession of the suit shop and the business to the Defendant No.3. They locked the suit shop and prevented the Defendant Nos.3 to 7 as well as the Plaintiff from entering the suit shop. These Defendants have continued to remain in possession beyond the agreed term. Prima

facie, they are in unauthorized and unlawful possession of the suit shop. Though the Plaintiff has legal right to be in possession, they have kept her out of possession for over 7 years and thus deprived her from occupying the suit shop and or conducting the business in the suit shop. Under these facts and circumstances, rejecting the application will prima facie result in protecting unauthorized possession of the Defendants Nos. 1 and 2. Hence, in my considered view, it is imminently just and convenient to appoint a receiver

19. Hence, the following order:

- a) Pending the hearing and final disposal of the suit, the Court receiver, High Court, Bombay is appointed as a receiver in respect of the suit shop.
- b) The Receiver shall take possession of the suit shop from the Defendant Nos. 1 and 2 within a period of one week from the date of the order.
- c) The Receiver shall appoint the Plaintiff as his agent in respect of the suit shop, without any security. The receiver shall fix the monthly royalty, which shall be deposited in the court and invested in any nationalized bank until further orders.

20. The Notice of Motion Nos.1189 of 2014 and Notice of

Motion No.1789 of 2017 are disposed of accordingly.

21. Parties to act on an authenticated copy of this order.

(ANUJA PRABHUDESSAI, J.)

Megha
Parab

Digitally signed
by Megha Parab
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2019.11.26
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