

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

CIVIL WRIT PETITION NO. 12499 OF 2019

Asha Rameshkumar Kanodia and Ors. ..Petitioners
Vs.
Madhu Ashok Kanodia and Ors. ..Respondents

Mr. Deepak Chitnis i/b. Deepak Chitnis – Chiparikar & Co., for the Petitioners.

Mr. Ashok Saraogi a/w. Mr. Sushil Upadhyay, for the Respondent Nos.1 to 11.

Mr. Pradeep Thorat a/w. Nitesh Gala, for Respondent No.12.

Mr. D. N. Kher, Court Receiver a/w. Mrs. S. V. Golatkar, Master (Admn.) Court Receiver present.

**CORAM : C.V. BHADANG, J.
RESERVED ON: 18th DECEMBER, 2020
PRONOUNCED ON: 4th JANUARY, 2021**

JUDGMENT :

. Rule. Rule made returnable forthwith. Mr. Ashok Saraogi, learned counsel for the Respondent Nos.1 to 11 and Mr. Pradeep Thorat for Respondent No.12 waives service. Heard finally by consent of the parties.

2. The challenge in this petition is to the order dated 17/12/2016 passed by the learned City Civil Court, Greater Mumbai

in Court Receivers report No.162/2016 in S.C. Suit No.9168/1992 (H.C. Suit No.608/1992). By the impugned order, the learned City Civil Court has refused to pass any order in respect of the said report of the Court Receiver, holding that any order, if passed, shall be rendered without jurisdiction.

3. The brief facts necessary for the disposal of the petition may be stated thus-

(i) The petitioners are the original plaintiffs. Petitioners filed Suit No.608/1992 before this Court, against the respondents for administration of the estate of late Shri. Mahavirprasad Kanodia. The subject matter of the suit included several properties part of which were situated at Bhivani at Haryana. Presently, we are only concerned with the old flat No.1/E/40 in New Sarvottam Co-Operative Housing Society Ltd, Irla Bridge, S. V. Road, Andheri (West), Mumbai which was initially one of the properties which was subject matter of the suit.

(ii) It appears that the suit was decreed exparte on 17/12/1997. A Notice of Motion was taken out by the defendants to set aside the exparte decree, which was dismissed by this Court on 13/8/1999. Feeling aggrieved, the original defendants

challenged the same before the Division Bench of this Court in Appeal (Lodging) No.843/1999. Both the parties filed Consent Terms / Minutes of Order, before the Division Bench and in pursuance thereof, the appeal was disposed of on 2/3/2000. In terms of the agreed terms, the parties had decided to delete the aforesaid flat from the array of the suit property and the suit relating to rest of the properties was remitted back to the learned Single Judge for trial, after setting aside the exparte decree.

(iii) For the present purpose, Clause 1 to 3 of the Consent Terms are relevant, which read thus-

1. The Decree dated 17th December 1997 passed by Mr. Justice V. R. Datar is set aside. The suit is remanded to the Trial Court (except in respect of Flat No.1/E-40, New Sarvottam Co-op. Housing Society Ltd., Irla Bridge, S. V. Road, Andheri (West), Bombay 400 058, for being decided on merits, afresh. The claim in respect of the said flat is deleted from the arena of the suit. The Appellants agree to file written statement within four weeks from today. The Appellant are at liberty to take inspection of the documents tendered by the Respondents and lying in Court at the hearing of the Suit on 17.12.1997 after giving notice to the Advocate of the Respondents.

2. *The Appellants admits that Respondents jointly have 19th share in flat No.1/E-40 situated at Sarvottam Co-op. Housing Society Ltd., Irla Bridge, S. V. Road, Andheri (West), Mumbai 400 058.*

3. *The Court Receiver, High Court, Bombay do sell the suit flat referred above by private treaty to the highest bidder. Appellants and Respondents are at liberty to bring buyers. The Court Receiver do complete the sale within six months from today. In the event of the sale not being completed within a period of six months, by private treaty, the Court Receiver do sell the suit flat by public auction. The sale shall be subject to confirmation of this Hon'ble Court. The Court Receiver do deposit the sale proceeds of the suit flat with Prothonotary and Senior Master upon sale of the flat. The Court Receiver to sale the flat on vacant possession basis. The Court Receiver shall take the steps to complete the sale of the said flat expeditiously. Charges of the Court Receiver shall be borne by the Appellants and the Respondents in 8/9 : 1/9 ratio. Deposits if any demanded by the Court Receiver shall also be made by the parties in the same ratio.*

(iv) In pursuance of the said Consent Terms and the order passed in the appeal, the Court Receiver took possession of the said flat on 14/10/2000. It so happened that the building where the suit

flat was situated was declared as dilapidated and the respondent M/s. Kumar Builders (now M/s. Kumar Builder Project Pune Pvt. Ltd.), had entered into an agreement with the society for development of the entire property. This was so informed to the Court Receiver in a meeting held on 25/1/2008.

(v) The building has been reconstructed and in the new building the said old flat No.1/E/40 has been renumbered as flat No.704-A. It may be mentioned that the said flat has also been taken into possession by the Court Receiver on 12/3/2014. However, for want of the occupation certificate, from the Municipal Corporation, the further part of the Consent Terms regarding the sale of the flat by private treaty or public auction could not be effected.

(vi) In the meantime and in view of the enlargement of the jurisdiction, Suit No.608/1992 has been transferred to the City Civil Court where it is registered as Suit No.9168/1992.

(vii) The record further indicates that the Court Receiver had earlier filed report No.235/2008 seeking certain directions which was disposed of by this Court on 25/7/2008. This Court directed

that the arrears of compensation in respect of the said flat, for alternate accommodation be deposited with the Court Receiver at the same rate at which such compensation was paid to the other members of the Society. The arrears were directed to be paid within four weeks and the Builder was further directed to continue to deposit the future compensation in this Court. According to the Court Receiver, the Builder has deposited compensation till March 2012 alongwith shifting charges etc., totaling to Rs.16,49,005/-. However, the Builder failed to deposit further rent from April 2012. The Court Receiver filed the present report No.162/2016 seeking the following directions.

a) What steps the Court Receiver should take in this matter as the occupation certificate is not obtained by M/s. Kumar Builder from MCGM and in absence of occupation certificate the suit flat cannot be sold as per Orders passed by the Division Bench of the Hon'ble High Court.

b) M/s. Kumar Builder may be directed to deposit arrears of rent from April 2012 to March 2016 amounting to Rs.16,27,200/- alongwith penalty and interest as may be fixed by the Hon'ble Court.

c) That the cost of and incidental to this report be fixed at Rs.3,000/- and the plaintiff be directed to deposit the same in the office of Court Receiver.”

d) Any other directions that this Hon’ble Court may deem fit and proper.

4. The City Civil Court has refused to pass any order on the Court Receiver’s report, on the ground that Flat No.1/E/40 (new Flat No.704-A) has been deleted from the ‘arena of the suit’ and therefore, said flat is not subject matter of the suit which is pending before the City Civil Court. The City Civil Court has found that the plaintiffs have not taken out any final decree proceedings and therefore, any order that may be passed on the Court Receivers report, would be without jurisdiction.

5. Feeling aggrieved, the petitioners had approached this Court in A.O. No.605/2018 which was converted into the Writ Petition.

6. I have heard Mr. Chitnis, the learned counsel for the petitioners, Mr. Sarogi, learned counsel for the respondent Nos.1 to 11 and Mr. Thorat, learned counsel for the respondent No.12 i.e. M/s. Kumar Builders. Perused record.

7. The learned counsel for the petitioners pointed out that the Flat No.1/E/40 was very much part of the consent terms although it was deleted from the property which was subject matter of the suit. It is submitted that there were several orders which are passed by this Court on Court Receiver's report giving directions and in particular the learned counsel has referred to the order dated 25/7/2008 passed on Court Receiver's report No.235/2008 in order to submit that the Builder was directed to pay arrears of compensation for alternate accommodation at the same rate as paid to other members being deposited before the Court Receiver. It is thus submitted that the City Civil Court was in error in refusing to pass any order on Court Receiver's report on an erroneous assumption that any such order would be without jurisdiction.

8. The learned counsel for the contesting respondent No.12 has submitted that the respondent No.12 is not concerned with the administration suit as originally instituted. It is submitted that the Builder came into picture only when the building was declared dilapidated and the Society had decided to go for re-development. It is submitted that otherwise the Builder is not at all concerned with the private dispute.

9. It is submitted that by virtue of the Consent Terms, the old Flat No.1/E/40 (new Flat No.704-A) was deleted and is no longer the subject matter of dispute in the suit which is now pending before the City Civil Court. He therefore submitted that the City Civil Court is right in refusing to pass any order on the Court Receiver's report which is essentially seeking directions in respect of the said flat.

10. I have considered the rival circumstances and the submissions made. It is true that Flat No.1/E/40 was deleted from the arena of the suit. However, at the same time, it is necessary to note that the said flat is very much the part of the "agreed minutes of the order" dated 2/3/2000. The said minutes of the order have been acted upon by the Division Bench of this Court in Appeal (Lodging) No.843/1999 under which the Court Receiver was supposed to take possession of the said flat, sell it by private treaty and in the event of failure thereof by public auction, subject to the confirmation by this Court. The Court Receiver has also been entrusted with the responsibility to distribute the sale proceeds in the ratio as indicated in the Consent Terms. The record also shows that the Court Receiver had taken possession of the old flat No.1/E/40 as well as new Flat No.704-A after redevelopment. There are several instances where the Court Receiver had sought directions from this Court from

time to time. In particular, a reference may be made, in this regard, to the order dated 25/7/2008 on Court Receivers report No.235/2008 whereby this Court had directed the Builder to deposit the compensation in respect of the said flat at the same rate as paid to the other members. Thus, it can clearly be seen that the said flat continues to be in the custody / possession of the Court Receiver and under the directions of the Court.

11. It is well settled that in a given case, property which is not subject matter of the suit can form part of the Consent Terms as may be recorded in the suit. Here, is a case where notwithstanding the fact that the old flat No.1/E/40 was a part of the suit property initially, and although was deleted from the suit property, continues to be the part of the Consent Terms. This was evidently in view of the fact that in so far as the said flat is concerned by virtue of Clause 2, the original defendants, the appellants in Appeal (Lodging) No.843/1999 had admitted that the respondents therein (the original plaintiffs) jointly had 1/9th share in Flat No.1/E/40. It was in these circumstances that the said flat was no longer considered to be necessary being part of the disputed property. However, at the same time, as indicated in Clause 3, the flat has been placed in the possession of the Court Receiver and there are directions for sale of

the said flat by private treaty or public auction and distribution of the proceeds thereof as indicated in Clause 3. Admittedly, the Builder has been unable to obtain occupancy certificate in respect of the said building, as a result of which, according to Court Receiver, the later part of the Consent Terms about sale of the said flat and the distribution of the sale proceeds could not materialize. Precisely, in the context of this situation, the Court Receiver has sought the directions. In the given circumstances, in my considered view, the City Civil Court was clearly in error in refusing to pass order on the Court Receivers report. It is not known whether a formal preliminary decree in respect of the Flat No.1/E/40 is based on the Consent Terms has been passed or not.

12. A perusal of the Court Receiver's report would also indicate that the respondent No.12 had for all practical purposes abided by the order passed in Court Receiver's report No.235/2008 till March 2012. However, according to the Court Receiver, there is non compliance on and from April 2012. Thus, it is for the City Civil Court to pass appropriate orders on the Court Receiver's report.

14. For the aforesaid reasons, in my considered view, the impugned order cannot be sustained. In the result, the following order is passed.

ORDER

1. The petition is partly allowed.
2. The impugned order is hereby set aside.
3. The Court Receiver's report No. 162/2016 is restored back to the file of City Civil Court at Bombay for passing necessary orders as may be deemed, just and necessary and in accordance with the law.
4. In the circumstances, the parties to bear their own costs.

C.V. BHADANG, J.