

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO. 893 OF 2021
IN
SUIT NO. 314 OF 2016**

Mohammed Rafi Ahmed Miya Dalvi	...Applicant/ Intervenor
<i>Versus</i>	
Yehoshua Reuben Naor alias Nowgharkar & Ors	...Respondents

Mr Sandharsh V Waghmare, *for the Applicant/Intervenor.*
Mr Rohaan Cama, *with Shanay Shah & Deryani Deshmukh, i/b VS*
Bhadrkamkar, for the original Plaintiff/Respondent in Interim
Application.
Mr DN Kher, *Court Receiver, present.*

CORAM: G.S. PATEL, J
(Through Video Conferencing)
DATED: 12th July 2021

PC:-

1. Heard through video conferencing.

2. The Interim Application is by a third party, one Mohammed Rafi Ahmed Miya Dalvi. This is filed pursuant to my order of 8th May 2017, which reads thus:

“1. The dispute pertains to the estate of one Jacob Hayeem Pezarkar who died on 23rd April 1962 leaving a Will dated 25th March 1961. The Will received probate on 25th February 1964.

2. The Plaintiff is Jacob’s grandson. The Suit seeks removal of the 1st Defendant as the Trustee named in Jacob’s Will and orders of disclosure against Defendants Nos 1, 3, 9, 10 and 11 in regard to their dealings with the estate property, the principal asset of which is a parcel of land at Mahim, in favour *inter alia* of Defendant No. 11, a firm of builders. The immovable property has a structure on it that is entirely tenanted. The structure is a ground and two floor structure. It has five shops and 37 residential tenements. 40 of these units are tenanted. Two are or were supposedly in the occupation of Defendant No 1. She is the maternal aunt of the Plaintiff and one of the Jacob’s daughters.

3. On 18th February 2016 SJ Kathawalla J passed an order granting ad-interim reliefs in the following terms:

“8. In my opinion, prima facie, having regard to the fact that the Plaintiff is admittedly a beneficiary under the Will and as such would have a right to the suit property in the event of the Suit finally being decreed in his favour, and further having regard to the arguments made and the orders passed by this Court, the suit property is required to be protected at this stage by directing the parties to the Suit to maintain status quo in respect of the same. As the Plaintiff is not a party to the suit filed by Defendant Nos. 9 and 10, it is all the more necessary to pass an ad-interim order to protect the suit property pending the hearing and final disposal of this Notice of

Motion. No prejudice whatsoever will be caused to any of the contesting Defendants by the present order being passed, as it would enure to the benefit of all the parties.

9. In the circumstances, pending the hearing and final disposal of the Suit, it is directed that the parties to the present suit shall maintain status quo in respect of the suit property and the tenements as on date, and accordingly will not alter the same in any manner whatsoever. Needless to state this order will not affect the rights, if any, that the parties may have under the above orders passed by this Court in the allied proceedings set out above.”

4. He also passed directions against Defendants Nos. 1 and 3 in the following terms:

“10. Furthermore, Defendant Nos. 1 and 3 though served have chosen not to appear. In light of the dispute raised in the present suit and particularly in light of the contentions raised by the Plaintiff that the suit property has been sold at an undervalue and that Defendant Nos. 1 and 3 have colluded to enrich themselves to the detriment of the beneficiaries under the Will of Jacob, without expressing any opinion on the merits of the matter, it would be in the fitness of things, and would enable this Court to effectively adjudicate upon the disputes at hand, if Defendant Nos. 1 and 3 are directed to make disclosures in terms of prayer clauses (d-1) and (d-2) of the Notice of Motion. Accordingly, ad-interim relief is granted only

against Defendant Nos. 1 and 3 in terms of prayer clauses (d-1) and (D-2) of the Notice of Motion, which are reproduced hereunder:

(d-1) that pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to order and direct Defendant Nos. 1, 3, 9, 10 and 11 to disclose on oath their purported dealings and/or agreements and/or arrangements in respect of the Trust Property described in Exhibit A to the Plaint and/or any parts thereof;

(d-2) that pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to order and direct Defendant Nos. 1 and 3 jointly and severally to render true and faithful accounts in respect of their dealings with the Trust Property described in Exhibit A to the Plaint and income and receipts therefrom on the basis of willful default;

11. The Affidavit shall be filed by Defendant Nos. 1 and 3 within two weeks from today. The Advocate for the Plaintiff shall serve a copy of this order upon Defendant Nos. 1 and 3."

5. Defendants Nos. 1 and 3 have not appeared at any time. They still do not appear. It is unclear what, if anything, they have done with the rent income since the time of SJ Kathawalla J's order. The 1st Defendant died on 16th March 2017. This throws matters into even greater disarray. There is no response from Defendant No. 3. It is

unclear who is collecting rent. The property cannot be left in this state.

6. Mr Ankhad's application today therefore for the appointment of Court Receiver in terms of prayer clause (a-1) of the Notice of Motion is well founded. At the very least this will ensure that the property is maintained in *custodia legis* and that the interest of all are properly protected and safeguarded.

7. The Court Receiver is appointed to take formal possession of the property described in Exhibit "A" to the plaint. He is only to take formal possession. He is to make a note of the various persons in occupation of the tenements. He is to write to them demanding rent. He will ascertain from them whether they have paid rent since the time of SJ Kathawalla J's order on 18th February 2016. If not, the tenants will make payment to the Court Receiver. If they have paid rent since then, they will produce before the Court Receiver evidence of payment. All unpaid rent and future rent will be collected by the Court Receiver by demanding that payment be made to him directly in the name of the Court Receiver, High Court, Mumbai.

8. The Court Receiver will open a bank account with the Central Bank of India and which will stand to the credit of the Suit. All rent is to be deposited in that account.

9. Further Affidavit in Support on behalf of the Plaintiff to be filed in the Registry. Defendant No. 11 will file a further Affidavit in Reply to the Notice of Motion by 9th June 2017. Affidavit in Rejoinder, if any, to be filed and served on or before 19th June 2017.

10. Leave to the Plaintiff to amend to delete the name of Defendant No. 1. Amendment to be carried out on or before 6th June 2017 without need of reverification.

11. List the Notice of Motion for hearing and final disposal in the week of 3rd July 2017. The preliminary issue under Section 9A will be taken up at that time.”

3. As can be seen, paragraph 7 of the order asked the Court Receiver to take formal possession, and only formal possession. He was to note who was in occupation (it did not say tenant). He was then to write to those persons demanding rent or compensation and that was to be deposited with the Court Receiver.

4. Prayer clauses (a), (b) and (c) of this Interim Application read thus:

- “(a) That this Hon’ble Court be pleased to allow this Intervention Application;
- (b) That the Plaintiff may be directed to implead the Intervener as a party defendant for limited purpose as set out in the present Intervention Application;
- (c) that this Hon’ble Court be pleased to grant leave to the Intervener for transfer of his tenancy rights in respect of the Shop no. 2, admeasuring 200 Sq. Ft. carpet area, on the ground floor in the Jacob Building situated at 77, Lady Jamshedji Road, Mahim, Mumbai – 400 016.”

5. Prayer clause (a) cannot be granted. There is no concept of “intervention” in a Civil Suit. The prayer must be for impleadment as a Defendant. That is indeed the purport of prayer (b).

6. But what prayer clauses (b) and (c) require, by necessary implication, is a recognition or acknowledgment that the Applicant is indeed a tenant and has tenancy rights in respect of Shop No. 2 of Jacob Building. Mr Cama for the original Plaintiff disputes this and does not accept that the Applicant is indeed a tenant of these premises. This immediately raises the jurisdictional bar, however much Mr Waghmare may not like it. A declaration that the Applicant is a tenant can only be made by the Court of Small Causes at Bombay and by no other court. Even if there is no such prayer specifically sought, that declaration is implicit in both prayer clauses (b) and (c). A declaration is required for impleadment in prayer clause (b). It is undoubtedly essential for the purposes of prayer clause (c), which speaks of “his tenancy rights”.

7. The main purpose of the whole Interim Application is prayer clause (c). This is completely misconceived. There is no question of this Court ‘granting leave’ to the Applicant to transfer his tenancy rights, even assuming he has any. The Applicant asks me to refer to a letter from the Court Receiver dated 2nd December 2020 (pages 29-20). This was copied to the Applicant with a request that he obtained necessary orders “from the Hon’ble Court” before entering into any transactions. The Applicant reads this to mean that the Court Receiver has conferred the Small Causes Court’s jurisdiction on this Court. The Court Receiver has done nothing of the kind and could not have done anything of the kind. The Court Receiver has only correctly asked the Applicant to obtain necessary orders from a Court. Evidently, that means a Court of competent jurisdiction. This court on its Original Side is not that Court of competent jurisdiction.

8. At this stage, Mr Waghmare seeks leave to withdraw the Interim Application with liberty to file appropriate proceedings in a Court of competent jurisdiction.
9. Leave granted with liberty as prayed.
10. All contentions of both sides are expressly kept open.
11. I am making it clear that I have not arrived at any final conclusion as to whether or not the Applicant is a tenant of Shop No. 2. He will need to establish this before the jurisdictionally competent Court.
12. The Interim Application is thus disposed of.
13. All concerned will act on production of an ordinary copy of this order.

(G. S. PATEL, J)