

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

APPEAL FROM ORDER NO. 339 OF 2022
with
INTERIM APPLICATION NO. 2394 of 2022

M/s. Naqsh through its Partner
Mr. Danish Amir Abbas ..Appellant/Applicant.

v/s.

Mr. Ahmed P. Surani ..Respondents

Mr. Manish Jain i/b. S.M.Jain Associates for the Appellant/Applicant.
Mr. Mayur Faria for the Respondent.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 15th JULY, 2022.**

P.C.

1. This appeal is directed against Order dated 24.1.2022, whereby the learned Judge, City Civil Court, Borivali Division, dismissed the Notice of Motion No.3148 of 2015 filed in L.C.Suit No.2204 of 2015.

2. Heard learned Counsel for the Appellant and learned Counsel for the Respondent.

3. I have perused the records and considered the submissions advanced by learned Counsel for the respective parties.

4. The Appellant, who shall be hereinafter referred to as the Plaintiff

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has filed the suit for recovery of amount of Rs.53,16,577/-. It is the case of the Plaintiff that he was desirous of extending his retail business of Garment and wanted to open new show room for the said purpose. The Respondent, who shall be hereinafter referred to as the Defendant, owned shop Nos.A1 and A2 at Gokul Shopping Centre, Borivali (West), Mumbai. The said shop shall be hereinafter referred to as “the suit property”. It is the case of the Plaintiff that the Defendant No.1 had agreed to give to him the suit shop on leave and license basis by providing fixed amenities at his own costs. The Plaintiff claims that after finalization of the terms and conditions of the leave and license , he deposited an amount of Rs.15 lakhs. The Defendant No.1 gave him possession of the suit premises in October 2014, and that the Plaintiff designed the shop through his Architect and spent substantial amount in renovating the suit shop.

5. The grievance of the Plaintiff is that the Defendant broke open the lock of the shop and dispossessed him from the suit premises. He further refused to execute any leave and license agreement in his favour. The Plaintiff claims that the defendant did not allow him to complete the work and neither returned his deposit, nor the furniture and other items lying in the suit premises, which has caused loss of Rs.10 lakhs. Hence the Plaintiff filed a suit for recovery of money, and perpetual injunction sought to restrain the Respondent from creating any third party right in

respect of the suit premises, and sought interim relief during the pendency of the suit.

6. The learned Judge has observed that the Notice of Motion is not under Order 38 Rule 5 of CPC, but is under Order 39 Rule 1 and 2 of CPC. The learned Judge has held that the Plaintiff has not made out prima face case, and based on these findings, the learned Judge dismissed the Notice of Motion. Being aggrieved by which, the Appellant has filed the appeal.

7. It is not in dispute that the Defendant is the owner of the suit premises. Undisputedly, the Plaintiff has no right, title or interest in the suit premises. The suit filed by the Plaintiff is essentially for recovery of money. The Plaintiff is seeking interim relief only with an apprehension that he may not be able to recover money in the event he succeeds in the suit.

8. As admitted by the learned Counsel for the Appellant, the Notice of Motion was not filed under Order 38 Rule 5 of CPC. Even otherwise no grounds are made out to grant any relief under Section 38 Rule 5 of CPC. Under the circumstances, the learned Judge was justified in dismissing the Notice of Motion. The order does not suffer from any infirmity. The appeal is dismissed.

. Pending Applications, if any, stand dismissed.

(ANUJA PRABHUDESSAI, J.)