IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 667 OF 2018

Mohammad Khalil Khan & Anr. ..Appellants

v/s.

Sabrunissa w/o. Mohammed Zuber Khan
& Others. ..Respondents

WITH
APPEAL FROM ORDER NO. 108 OF 2022
WITH
INTERIM APPLICATION NO. 593 OF 2022
IN
APPEAL FROM ORDER NO. 108 OF 2022

Sabrunissa w/o. Mohammed Zuber Khan
& Others. ..Appellants

v/s.

Mohammad Khalil Khan & Ors. ..Respondents

Mr. Javeed Hussein with Mr. Mubashir Hussein, Ms. Amina Momin, Mr. Sakib Gufran i/b. M/s. Hussein & Co. for the Appellants in AO/667/2018, and for the Respondents in AO/108/2022.

Mr. Shoaib Ibrahim Memon for the Respondents in AO/667/2018 and for the Appellants in AO/108/2022.

CORAM : ANUJA PRABHUDESSAI, J.
DATED : 29th JUNE, 2022.

P.C.

1. The Appellants in Appeal from Order No.108 of 2022 are the Plaintiffs, whereas the Appellants in Appeal from Order No.667 of 2018 are the Defendants in Short Cause Suit No.2076 of 2014, and shall be

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hereinafter referred to as the Plaintiffs and Defendants respectively.

2. The Defendants have challenged order dated 23.03.2018 allowing the Notice of Motion No. 3184 of 2014, appointing a Court Receiver to take symbolic possession of the properties described in Schedule A & B of the plaint, whereas the Plaintiffs have challenged the order dated 29.09.2021 dismissing the Notice of Motion No.542 of 2020 for modification of order dated 23.03.2018 in Notice of Motion No.3184 of 2014.

3. The Plaintiffs and the Defendant No. 4 are the daughters, whereas the Defendant Nos.2 and 3 are the sons of late Mohd. Shami and late Defendant no.1. The dispute is in respect of (i) shop no.1 admeasuring 1400 sq. meters at New Agra Road, Kurla; and (ii) Plot No.39/4 admeasuring 404.4 sq. meter at Turbhe.

4. The Plaintiffs claim that their late father was a tenant of the suit shop situated at Kurla and a lessee of the plot at Turbhe. Late Mohd. Shami had constructed a building in the suit plot and he was carrying on the business in the name and style as S. Mohammed & Company in the suit shop and the suit plot. The Plaintiffs claim that by agreement dated 01.04.1997 Hyderabad Industries Limited had granted stockiestship of their company’s product to Mohd. Shami and that he was carrying on the business of selling cement sheets manufactured by the said company from the suit shop and suit plot, hereinafter referred to as “the suit property”.

5. The grievance of the Plaintiffs is that immediately after the death of their father, the Defendant Nos.2 and 3 took forcible possession of the suit property as well as cash and stock lying in the suit property, and that they are carrying on business of their late father from the suit property. The Plaintiffs have alleged that Defendant Nos.2 and 3 deprived their mother- late Defendant No.1 of her share in the suit property, and hence she was compelled to file a suit against them. The Notice of Motion filed in the said suit was disposed of with directions to Defendant Nos.2 and 3 to deposit before this Court an amount of Rs.5,75,000/- being the security deposit and further not to part with the property. Defendant Nos.2 and 3 were also directed to pay Rs.20,000/- per month to Defendant No.1. The Plaintiffs claimed that despite their advise, the Defendant No.1 subsequently withdrew the suit in the Lok Adalat held on 23.03.2013.

6. The Plaintiffs claim that they have share in the suit property as well as in the other assets of their late father, including an amount of Rs.6,25,000/- deposited by their father with Hyderabad Industries Limited. Hence they have filed a suit for declaration that the Defendant

Nos.2 and 3 are trespassers and for their eviction from the suit property. The Plaintiffs have also sought partition of the suit property and/or directions to sell the suit property in public auction. The Plaintiffs have also prayed that the business carried out in the suit property be administered under the direction of the Court, and further sought apportionment of Rs.5,75,000/- which is deposited by the Defendant Nos.2 and 3 before this Court pursuant to the order dated 31.07.2003. During the pendency of the suit, the Plaintiffs prayed for appointment of Court Receiver in respect of the suit property.

7. The Defendant Nos.2 and 3 disputed that they are carrying on the business of their late father. The Defendants have stated that the business of their late father run under the name M/s. S. Mohammed & Company was closed down after his death. These defendants have claimed that the Defendant No.2 has been carrying on the business in the name K. Mohammed & Company which was established in the year 1970, whereas Defendant No.3 is the proprietor of M/s. Shalimar Trading established since 23.1.1987. These Defendants claim that they are running their own business and not the business left behind by their father.

8. Learned Judge, referred to order dated 31.07.2003 and held that the contention of the Defendants that they are running their own business and not the business left behind by their father was disbelieved by this Court. The learned Judge also disbelieved the contention of the Defendants in view of lease agreement dated 3.2.1987 with CIDCO and stockiestship agreement with Hyderabad Industries Limited. Learned Judge noted that the Defendant Nos.2 and 3 are not paying any maintenance to the Plaintiff. Moreover, the Plaintiffs have offered to deposit Rs.3,00,000/- per month in the event the Defendants hand over the business to them, while no such offer is made by the Defendant Nos.2 and 3. Learned Judge observed that the material on record prima facie reveals that Defendant Nos.2 and 3 are running the business set up by their father and have deprived the Plaintiffs and Defendant No.4 of their share in the business left behind by their father. Based on these findings, the learned Judge appointed a Court Receiver to take the symbolic possession of the suit property, and appointed Defendant Nos.2 and 3 as agents of the Court Receiver, with directions to submit the accounts to the Court Receiver, every three months. This Order is challenged by the Defendant Nos.2 and 3 in Appeal from Order No.662 of 2018.

9. During the pendency of this appeal, the Plaintiffs applied for modification of Order dated 23.03.2014. The Plaintiffs claimed that they are ready to deposit Rs.3,00,000/- per month and they should be appointed as agents of the Court Receiver. The learned Judge held that

Defendant Nos.2 and 3 who have been appointed as agents of the Court Receiver have submitted their account statement upto 30.09.2020. The learned Judge also observed that the appeal against the Appointment of Court Receiver is already under challenge before this Court, and hence dismissed the Notice of Motion. Being aggrieved by this order, the Plaintiffs have filed Appeal from Order No.108 of 2022.

10. Heard Shri Hussein, learned Counsel for the Defendant Nos.2 and 3. He submits that late Mohd. Shami was carrying on business in the name and style of M/s. S. Mohammed & Company, whereas the Defendant No.2 is conducting independent business under the name & style M/s. K. Mohammad & Company, which was established in 1970, and Defendant No.3 is conducting business under the name & style Shalimar Trading, established in 1982. He submits that they were conducting their independent business from the suit property even during the life time of their deceased father. He submits that the documents relied upon by these Defendants amply prove that the business conducted by Mohd. Shami under the name and style of S. Mohammad & Company is not being run since his death. He submits that Hyderabad Industries terminated their agreement after the death of Mohd. Shami and executed another stockiestship agreement with Defendant No.3, and continued trading with them. He submits that these Defendants have no objection if the Plaintiffs withdraw the amount of Rs.5,25,000/- deposited by the Defendants before this Court pursuant to the order dated 31.07.2003. He submits that the learned Judge has grossly erred in appointing a Receiver in respect of the business which is being run by the Defendant Nos.2 and 3.

11. Per contra, learned Counsel Mr. Memon for the Plaintiffs submits that in the previous litigation this Court has disbelieved the contention of the Defendants that they are running their own independent business. Learned Counsel for the Plaintiffs further submits that the Defendant Nos.2 and 3 had failed and neglected even to take care and maintain their late mother- Defendant No.1, and that she was compelled to file a suit. It is submitted that subsequent to the order dated 31.07.2003, despite their advise, Defendant No.1 withdrew the suit. He submits that the documents relied upon by the Defendant Nos.2 and 3 were generated after the demise of their late father. Most of the documents are duplicate copies and cannot be relied upon. He submits that the Plaintiffs have share in the suit property and that they are ready to deposit before this Court Rs. 3,00,000/- per month if the business is handed over to them.

12. I have perused the records and considered the submission advanced by the learned Counsel for the respective parties.

13. The short point falling for consideration is whether the Plaintiffs have made out a case for appointment of Court Receiver in respect of the suit property. Order 40 (1) CPC enables the Court to appoint the Receiver when it is "*just and convenient*". It is well settled that the appointment of Receiver is a matter resting in the discretion of the Court which can be exercised only on establishing prima facie case. In ***T. Krishnaswami Chetti vs. C. Thangvellu Chetti & Ors. 1955 AIR Madras 430,*** the Hon'ble Madras High Court has laid down the following five principles which have been followed as "Panch Sadachar", for appointment of Receiver.

> *1. The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.*
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> *2. The Court should not appoint a receiver except upon proof by the plaintiff that primafacie he has a very excellent chance of succeeding in the suit.*
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> *3. Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger of 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.*
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> *4. An order appointing a receiver will not be made where it has the effect of depriving a defendant of 'de facto' possession since that might case irreparable wrong. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one; and*
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> *5. The Court, on the application made for the appointment of receiver, looks to the conduct of the party who makes the application and will usually refuse to inference unless his conduct has been free from blame."*

14. In the instant case, it is not in dispute that the suit property was tenanted/leased to late Mohd. Shami, the father the Plaintiffs and Defendant Nos.2 to 4. Mohd. Shami was running business in the name & style M/s. S. Mohammed & Company. It is the case of the Plaintiffs that the Defendants continue running the said business of their father. Whereas the Defendant Nos.2 and 3 have claimed that the business run M/s. Mohd Shami is closed down after his death and that they have been running their independent business even during the lifetime of their father.

15. Learned trial Judge has appointed a Court Receiver on a prima facie finding that the Defendants continue to run the business of their father. It is pertinent to note that the Defendant Nos.2 and 3 have relied upon the Profit & Loss statement for the period ending 10.09.2001, Balance Sheet dated 10.09.2001, Computation of Income Tax returns for the period ending on 10.09.2001 and order dated 19.11.2001 issued by Cess Officer, Seawood, Turbhe, Navi Mumbai, and cancellation of registration certificate of the business conducted in the name of M/s. S. Mohammed w.e.f. 30.09.2001.

16. The above documents prima facie reveal that the business in the name of M/s. S. Mohammed & Company was discontinued after the death of Mohd. Shami. Defendant Nos.2 and 3 have also placed on record letter dated 19.08.2014 issued by Hyderabad Industries Limited certifying that M/s. Shalimar Trading Company and M/s. K. Mohammed are its authorized stockists since last about 30/40 years. The Income tax Assessment filed by the Defendant Nos.2 and 3 along with certificate of Registration, stockiestship agreement dated 23.6.1987 also prima facie prove that the Defendants have been conducting business independently even during the lifetime of their father. The records reveal that Hyderabad Industries Limited, had entered into stockiestship agreement dated 23.06.1987 with Defendant No.2 and the said agreement was signed by Mohd. Shami and Defendant No.3 as witnesses. Similarly, another agreement was executed by Hyderabad Industries Limited with M/s. Shalimar Trading of which Defendant No.3 is a proprietor. The said agreement was also signed by Mohd. Shami and Defendant No.2 as witnesses. The material on record prima facie proves that Hyderabad Industries Limited has continued trading with these Defendants.

17. The material on record, particularly order dated 9.11.2001 prima facie proves closure of business of M/s. S. Mohammad & Company after the death of Mohd. Shami and this prima facie supports the case of the Defendant Nos.2 and 3 that they are running their own independent business. It is also pertinent to note that said Mohd. Shami died on 10.9.2001. In the previous suit filed by late Defendant No.1, a prayer was made for appointment of Receiver, which was not granted by this Court. The Plaintiffs have now once again renewed the said request after a period of over 14 years. It is well settled that appointment of the Receiver is one of the harshest remedies which the law provides for the enforcement of rights and can be allowed only in extreme cases and in circumstances where the interest of the person seeking appointment of Receiver is exposed to manifest peril.

18. In the instant case, prima facie, the rights of the plaintiffs are restricted to the suit property viz. the tenanted shop and the plot leased by CIDCO, with construction thereon. The Plaintiffs have no prima facie right to the business being run by the Defendant Nos. 2 and 3 in the suit property. Admittedly, these Defendants are running the business since 2001, if not earlier. There is no material to show that the business or the suit property is in danger of being wasted, damaged or alienated. The Plaintiffs have failed to make out prima facie case. Receiver cannot be appointed in respect of the running business only because the Plaintiffs have volunteered to deposit Rs.3,00,000/- per month. Appointment of Court Receiver will adversely impact the credibility and commercial interest of the Defendants. The trial Court failed to consider these material aspects and appointed the Receiver in a very casual manner. The order of Appointment of Court Receiver is patently bad and is liable to be set aside.

19. Under the circumstances, the Appeal from Order No.667 of 2018 is allowed. The impugned order dated 23.03.2018 is quashed and set aside. Appeal from order No.108 of 2022 is dismissed. Pending applications, if any, are dismissed.

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(ANUJA PRABHUDESSAI, J.)