

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.164 OF 2023
WITH
IA/2098/2023 IN AO/164/2023

Tarunkumar Bhavarlaji Parmar And Another ... Appellants
Versus
Roshanlal Ranglalji Kothari And Others ... Respondents

WITH
APPEAL FROM ORDER NO.680 OF 2022
WITH
IA/10227/2022 IN AO/680/2022

Roshanlal Ranglalji Kothari, Prop. Real Gold ... Appellants
Versus
Sampatlal Geharilalji Parmar (deceased) Thr.
Lrs. Kamla S. Parmar & Ors. ... Respondents

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Mr. Amogh Singh, i/b. Mr. Jeet Gandhi for Appellant in AO/164/2023
for Appellant.

Mr. Rajesh Kanojiya, for Respondent (C) in AO/164/2023.

Mr. Fayzan Khan, for Respondent No.6 in Both AO.

Mr. Vivek Shukla, (through VC) a/w. Ms. Bhushra Sayed i/b. V. Shukla &
Associates for Appellant in AO/680/2022 & Respondent No.1 (B) in
AO/164/2023.

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CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 12 DECEMBER 2023.
PRONOUNCED ON : 21 DECEMBER 2023.

JUDGMENT:

These Appeals arise out of proceedings filed between same parties and have therefore been taken up for hearing together. In Appeal No. 680 of 2022, the Appellants therein have challenged Order dated 13 June 2022 passed by the City Civil Court rejecting Notice of Motion No. 1212 of 2021 filed by Appellants-Plaintiffs seeking temporary injunction. Notice of Motion No. 1212 of 2021 was filed in SC Suit No. 882 of 2021 instituted by Roshanlal Ranglalji Kothari challenging Deed of Transfer dated 02 February 2021 between Sampathlal Geharilalji Parmar and Mahendra B. Parmar (Jain) and to restrain defendants therein from obstructing Plaintiff's possession over the suit shop.

2. In Appeal No. 164 of 2023, the Appellants-Plaintiffs have challenged Order dated 06 January 2023 refusing *ad interim* relief in Notice of Motion No. 3881 of 2022 filed in S.C. Suit No.2557 of 2022. That suit is filed by the Appellants-Plaintiffs to restrain the Defendants therein from obstructing Plaintiffs' possession over the suit shop.

3. Thus there are competing claims by Plaintiffs in both the suits to claim possession over the suit shop. The City Civil Court has refused to grant interim / *ad interim* injunction in favour of Plaintiffs in both the suits.

4. Facts are common to both Appeals and need to be narrated for better understanding of the exact nature of dispute between the parties. One Mithilesh Umakant Joshi was the owner of Shop No.12 (O)

admeasuring 287 sq. ft. carpet area situated at 'Natraj Market', S.V. Road, Malad (W), Mumbai-64. Cooperative Society has been formed by the occupiers of the structures in the building 'Natraj Market'. Said Mithilesh Joshi was the member of the society. By Deed of Transfer dated 10 July 2009, Mithilesh Joshi sold and transferred the suit shop in the names of Shri. Sampatlal Geharilalji Parmar, Shri. Tarunkumar Bhawarlalji Parmar and Shri. Roshanlal Ranglalji Kothari. This is how Sampatlal, Tarunkumar and Roshanlal acquired 1/3 share each in the Suit Shop. The society transferred the membership and shares in their names. There is some degree of dispute between the parties about possession of the suit shop after acquisition of 1/3rd rights each by Sampatlal, Tarunkumar and Roshanlal. A Partnership Deed dated 08 December 2011 was executed between Sampatlal and Roshanlal under which it was specifically agreed that jewellery business in partnership was to be carried out in the suit shop. Roshanlal claims that he alone was carrying out said jewelry business operation of jewellery shop in the Suit Shop. On the contrary, it is the case of Tarunkumar that the shop largely remained shut after acquisition by the trio.

5. By Deed of Transfer dated 02 February 2021, one of the co-owners, Sampatlal sold his 33.33 % undivided share in the Suit Shop in favour of one Mr. Mahendra Bhavarlalji Parmar. The other co-owner-Roshanlal instituted SC Suit No.882 of 2021 in the City Civil Court challenging the Deed of Transfer dated 02 February 2021 executed in favour of Mahendra. In that suit, Roshanlal impleaded Sampatlal

(Vendor), Tarunkumar (1/3 owner) and Mahendra (purchaser) as well as Society as Defendants. Roshanlal claimed exclusive possession of the Suit Shop and also sought relief for restraining Defendants from causing obstruction to his possession over the Suit Shop. In his suit, Roshanlal filed Notice of Motion No.1212 of 2021 seeking stay to the implementation of Deed of Transfer dated 02 February 2021 and further to restrain Defendants from causing breach of peace or nuisance as well as from creating any third party rights in respect of the Suit Shop or from entering into the Suit Shop or dispossessing the Plaintiff without following due process of law. It appears that an ad interim order of status quo was granted in the Motion. It is case of other co-owners- Tarunkumar and Mahendra that order of status quo was misused by Roshanlal and his legal heirs who took forcible possession of the Suit shop by breaking open the lock. Notice of Motion No. 1212 of 2021 came to be dismissed by the City Civil Court by Judgment and Order dated 13 June 2022 *inter alia* observing that it is permissible for a co-owner to transfer his share in the property. City Civil Court also recorded a *prima facie* finding that Roshanlal failed to prove exclusive use, occupation and enjoyment of the suit shop and that possession of one co-owner is possession by all co-owners.

6. After rejection of application for temporary injunction for exclusive use of Suit Shop by Roshanlal, the other two co-owners Shri. Tarunkumar and Mahendra instituted SC Suit No.2557 of 2022 in the City Civil Court seeking injunction against Roshanlal and his legal heirs

from obstructing their possession and enjoyment of the suit shop and for appointment of Court Receiver to take physical possession of the suit shop and to hand over the same to Plaintiffs. In the suit, Tarunkumar and Mahendra filed Notice of Motion to seek temporary injunction to restrain Defendants from interfering with their possession of Suit Shop and for police assistance to enter the Suit Shop. It was the case of Tarunkumar and Mahendra that since application of Roshanlal for temporary injunction is rejected, Tarunkumar and Mahendra must be allowed to jointly enjoy the possession of the Suit Shop in their capacity as co- owners. The City Civil Court however refused to grant any ad-interim relief in favour of Tarunkumar and Mahendra by Order dated 06 January 2023, which is the subject matter of challenge in the Appeal No.164 of 2023.

7. This is how the issue raised in both the Appeals is about entitlement of Tarunkumar, Mahendra and Roshanlal to use and occupy the Suit Shop.

8. Mr. Shukla would appear on behalf of legal heirs of Roshanlal who are Appellants in Appeal from Order No.680 of 2022 and for respondent No.1(B) in Appeal from Order No.164 of 2023. He would submit that Roshanlal has been in settled possession of the Suit Shop since its purchase in 2009. He would take me through the list of documents filed before the City Civil Court to prove exclusive possession of Suit Shop by Roshanlal. He would submit that Sampatlal had actually sold his 1/3 share in favour of Roshanlal and had accepted consideration

of Rs.4,25,000/-. That therefore the transfer deed dated 02 February 2021 executed in favour of Mahendra is *ab initio* void. Mr. Shukla would place reliance on Partnership Deed dated 08 December 2011 executed between Sampatlal and Roshanlal, under which it was specifically agreed that jewellery business in partnership was to be carried out in the suit premises. That Roshanlal alone was carrying out said jewellery business and has been occupying Suit Shop right since inception. That Mahendra's title itself is in doubt and therefore Roshanlal's possession of Suit Shop cannot be disturbed either by Mahendra or by Roshanlal.

10. Mr. Shukla would submit that once settled possession is proved by Roshanlal, even a true owner cannot dispossess a person who is in settled possession. He would rely upon Judgment of the Apex Court in ***Rame Gowda Vs. M. Varadappa Naidu***, (2004) 1 SCC 769. Relying on judgment in ***Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Ors.***, AIR 953 SC 487, Mr. Shukla would contend that a coparcener cannot alienate his undivided interest in joint family property without consent of other coparceners. He would therefore submit that Deed of Transfer executed in favour of Mahendra is clearly void. Mr. Shukla would rely on Judgment of ***Rame Gowda*** (supra) in support of his contention that in absence of any physical partition of undivided property, transferee of a co-sharer cannot be put in possession. He would further relay upon Judgment of the Apex Court in ***State of UP & Ors. Vs. Ram Sukhi Devi***, (2009) 9 SCC 733 in support of his contention that final relief cannot be granted as an interim relief and would accordingly

oppose Appeal from Order No.164 of 2023 filed by Tarunkumar and Mahendra.

11. Mr. Kanojiya, the learned counsel appearing for another heir of Roshanlal (Sanjay Roshanlal Kothari) who is Respondent No. 1(C) in Appeal from Order No.164 of 2023 and Appellant No.1(C) in Appeal from Order No.680 of 2022, would adopt submissions made by Mr. Shukla. Additionally, he submits that remedy for Tarunkumar and Mahendra is to file suit for partition. Without filing suit for partition and separate possession, Tarunkumar and Mahendra could not seek possession of their shares. That suit filed by them for injunction simplicitor is not maintainable. He would place reliance on paragraph No.19 of the Judgement in ***Ram Sukhi Devi*** (supra).

12. Mr. Singh, the learned counsel appearing for Tarunkumar and Mahendra, who are Appellants in Appeal from Order No.164 of 2023 and Respondent Nos.2 and 3 in Appeal from Order No.680 of 2022, would submit that Roshanlal was never in exclusive possession of the Suit Shop. Inviting my attention to electricity bills he would submit that Suit Shop remained locked for several years. He would also place reliance on Society's letter dated 08 July 2021. He would submit that Roshanlal took forceable possession of the Suit Shop by misusing the *status quo* Order passed by the City Civil Court. That Roshanlal does not have any authority to exclusively occupy the Suit Shop. That since Roshanlal's Motion for claiming exclusive possession of Suit Shop is rejected, the City Civil Court ought to have granted add interim relief in

favour of Tarunkumar and Mahendra in the joint possession of suit property alongwith Roshanlal / his legal heirs. That Tarunkumar and Mahendra are not seeking exclusive possession of the Suit Shop. However, their right for joint possession of Suit Shop alongwith Roshanlal/ his legal heirs cannot be denied. Mr. Singh would submit that no injunction can be granted against a co-owner and in support of his contention he would rely upon Judgment of this court in *Prakash Vs. Mansoorkhan*, 1996 (2) Mh.L.J 30 and *Gochwal Leasing & Finance (P) Ltd. Vs. Harish Chand Jhamb*, 1996 (37) DRS(DB). He would pray for dismissal of Appeal No.680 of 2022 and grant of an *ad interim* relief by setting aside the City Civil Court's Order dated 06 January 2023 in Appeal No.164 of 2023.

13. Mr. Fayzan Khan would appear for Respondent No.6 in both the Appeals (legal heirs of Sampatlal) and would submit that the legal heirs of Sampatlal have already instituted separate Suit to challenge deed of Transfer dated 02 February 2021 executed in favour of Mahendra. That therefore title of Mahendra is not perfect and therefore he cannot seek any injunctive relief against other co-owners.

14. Rival contentions of the parties now fall for my consideration.

15. The shop has undoubtedly been purchased jointly by Sampatlal, Tarunkumar and Roshanlal by Deed of Transfer dated 10 April 2009 and each of them owned 1/3 share in the Suit Shop. The

share of Sampatlal is shown to have purchased by Mahendra by Deed of Transfer dated 02 February 2021. Thus, as of now Roshanlal, Tarunkumar and Mahendra claim 1/3 ownership each in the suit shop. For the purpose of deciding the present Appeals, what is relevant is the right to possess the suit shop. It is contention of Roshanlal / his legal heirs that he/they alone have right to possess the Suit Shop on account of Roshanlal's exclusive possession since 2009. On the contrary, Tarunkumar and Mahendra do not claim right to exclusively possess the suit shop, but according to them, in their capacity as 1/3 owner each, they cannot be prevented from jointly possessing suit shop alongwith Roshanlal/ his legal heirs. As observed above, the City Civil Court has proceeded to reject Application for temporary injunction filed by Roshanlal holding that he is not in exclusive possession of the suit shop. So far as the suit filed by Tarunkumar and Mahendra is concerned, the City Civil Court has refused to grant *ad-interim* relief to restrain Roshanlal/ his legal heirs from permitting Tarunkumar and Mahendra to jointly occupy the suit shop. Both the Orders are under challenge in the present Appeals.

16. There can be no dispute to the settled proposition that one of the co-owners cannot seek an injunction against other co-owners in absence of partition of property. It is also equally settled proposition that one co-owner can alienate his/ her share in joint property but cannot put the purchaser in exclusive possession. The only option for the purchaser, after acquiring undivided right in the property, is to file suit for partition.

Keeping in mind these broad settled propositions of law, I proceed to examine the dispute between the parties to possess the suit shop.

17. Roshanlal has filed Suit No. 882 of 2021 essentially to challenge Deed of Transfer dated 02 February 2021 executed by Sampatlal in favour of Mahendra. The City Civil Court has held that there is no prohibition on transfer of undivided right of Sampatlal in favour of Mahendra. I do not see any error in the said *prima facie* finding of the Trial Court. In fact, in ***Ram Sukhi Devi*** relied upon by Mr. Shukla the Apex Court has recognized right of co-sharer to transfer his undivided share. Therefore, admissibility of Roshanlal's challenge the Deed of Transfer dated 02 February 2021 *prima facie* becomes questionable but the same can be considered by the City Civil Court at the time of final hearing of the suit. As of now, for determining the issue of entitlement for temporary injunction, I do not see any patent error in that transaction. The Deed of Transfer dated 02 February 2021 is also challenged by legal heirs of Sampatlal by filing separate suit.

18. So far as question of possession of the suit shop is concerned, Roshanlal claims to be in settled possession since the date of purchase. Reliance is placed on various documents, list whereof given in paragraph No.8 of the affidavit-in-reply to the Motion filed in Suit No.2557 of 2022. I have gone through the said documents. Almost all the documents, except Gumasta License dated 27 July 2011 and invoices, pertain to the period after the year 2019. Gumasta License is not placed on record and it is difficult to know whether same was issued in the

exclusive name of Roshanlal. Also issuance of Gumasta License would, by itself, not prove exclusive possession of Roshanlal over the suit shop as Municipal Corporation may have issued license in the name of one of the three co-owners. Invoices relied on pertain only to the years 2011 and 2012, which cannot conclusively prove that Roshanlal operated the jewellery business in the suit shop continuously till filing of his suit.

19. On the contrary Mr. Sing has relied on electricity bills which shows 'zero' consumption for several years. Tarunkumar and Mahendra have complained about obtaining forceable possession of suit shop by Roshanlal by misusing the status quo order passed by the City Civil Court. The allegation finds some support in Society's letter dated 08 July 2021. In that letter, the Society has confirmed that the suit shop was closed for several years and that unknown persons forcibly entered the shop on 02 July 2021. It is therefore difficult to believe at this stage that Roshanlal has been in exclusive possession of suit shop. Reliance by Mr. Shukla on the Partnership Deed would also not cut any ice in that the Partnership Deed only envisaged conduct of jewellery business in the name of M/s. Real Gold Palace in partnership of Sampatlal and Roshanlal. The Partnership Deed can, at the highest, envisage joint possession of Roshanlal with Sampatlal. There nothing to show as to why Tarunkumar, who is admittedly 1/3 owner, permitted only Sampatlal and Roshanlal to carry on business in partnership in the suit shop. Therefore, it is difficult to hold, at this stage, that only Roshanlal was in exclusive possession of the suit shop.

20. Mr. Shukla's reliance on various Judgments does not take his case any further. In ***Rame Gowda*** (supra) the Apex Court has held that if a trespasser is in settled possession, he cannot be dispossessed without following due process of law. However, in the present case settled possession of Roshanlal himself is not proved and therefore Judgment in ***Rame Gowda*** would have no application to the case in hand.

21. In ***Sidheshwar Mukharji*** (supra) the issue was about right of co-parceners holding undivided interest in the joint family property with consent of his coparceners. In the present case the shop is not a joint family property nor party are coparceners. The Judgment would therefore have no application to the present case. On the contrary, in ***Ramdas*** (supra) the Apex Court has recognized right of co-sharer to transfer his undivided share without putting vendee in position.

22. I therefore do not find any patent error in the Order of the City Civil Court dated 13 June 2022 rejecting Notice of Motion No.1212 of 2021 in S.C. Suit No.882 of 2021 filed by Roshanlal.

23. The next issue is whether ad interim relief could be granted in favour of Tarunkumar and Mahendra in Notice of Motion filed by them in S.C. Suit No.2557 of 2022. Here the City Civil Court appears to have committed an error in treating the relief sought for by Tarunkumar and Mahendra to be identical as was sought by Roshanlal. Roshanlal had sought to restrain Defendants from disturbing his 'exclusive' possession of suit shop. On the contrary in Notice of Motion No.2557 of 2022,

Tarunkumar and Mahendra *inter alia* sought restraint order against Defendants from denying them ingress and egress to the Suit Shop. In this connection, prayers of Notice of Motion No.3881 of 2022 are reproduced thus :-

- a. That pending hearing and final disposal of the present suit, this Hon'ble Court be pleased to grant temporary injunction restraining the Defendants, their servants, agents, representative and/or person or persons claiming through or under them in any manner, directly or indirectly be restrained from interfering with the possession of the Plaintiff of the suit premises and unlawfully preventing the Plaintiff from ingress and egress to the said suit premises;
- b. That pending hearing and final disposal of the present suit, this Hon'ble Court be pleased to grant temporary injunction restraining the Defendants, their servants, agents, representative and/or person or persons claiming through or under them from in any manner directly or indirectly restrain the Plaintiffs from entering into the suit premises;
- c. That pending the hearing and final disposal of the present suit, the Plaintiff be provided assistance and protection of two local constables to enter into the suit premises;
- d. The interim and ad-interim reliefs in terms of prayer (a), (b) and (c) above be granted;
- e. Cost of this Notice of motion;
- f. For such other and further reliefs as the nature and circumstances of the case may require.

24. It appears that on account prayer sought to restrain Defendants from interfering with possession of Plaintiff over Suit Shop, the City Civil Court has apparently assumed that Tarunkumar and

Mahendra also sought same prayers as was sought by Roshanlal in his Notice of Motion. Mr. Singh has clarified that Tarunkumar and Mahendra did not claim exclusive possession of suit shop and that they are only prayer for an entry to shop in their capacity as joint owners since Notice of Motion claiming exclusive possession of Roshanlal is rejected.

25. Since the City Civil Court has held that Roshanlal is not in exclusive position of Suit Shop and has refused interim injunction to restrain Tarunkumar and Mahendra from entering in Suit Shop, the natural corollary was to permit other co-owners also to possess the suit shop. City Civil Court therefore ought to have permitted Tarunkumar and Mahendra to jointly occupy suit shop alongwith Roshanlal. The net result of two Orders passed by the City Civil Court is such that none of the three owners would be in position to occupy the suit shop. This appears to be an error on the part of City Civil Court in passing Order dated 06 January 2023. Rejection of temporary injunction in favour of Roshanlal would automatically entitle an Order in favour of Tarunkumar and Mahendra to occupy the suit shop jointly. I am therefore of the view that City Civil Court ought to have granted ad-interim relief in favour of Tarunkumar and Mahendra by permitting them to enter the Suit Shop and possess the same jointly with legal heirs of Roshanlal.

26. The suit shop is undoubtedly in joint ownership and possession of Roshanlal (his heirs), Tarunkumar and Mahendra. In such circumstances Tarunkumar and Mahendra cannot be restrained from entering Suit Shop. In fact, rejection of *ad-interim* relief in suit filed by

Tarunkumar and Mahendra has virtually resulted in grant of injunction in favor of Roshanlal, which was earlier denied by the City Civil Court vide Order dated 13 June 2022. It is for this reason that the Order dated 06 January 2022 passed in Notice of Motion No.3881 of 2022 filed by Tarunkumar and Mahendra needs to be modified.

27. I accordingly proceed to pass following order :-

- i) Appeal No.680 of 2022 is dismissed.
- ii) Appeal No.164 of 2023 is partly allowed. There shall be *ad-interim* relief in favour of Plaintiffs in S.C. Suit No.2557 of 2022 instituted by Tarunkumar and Mahendra in the form of restraint Order against Defendants therein from preventing entry to the Plaintiffs (Tarunkumar and Mahendra) to the Suit Shop till decision of Notice of Motion No.3881 of 2022.
- iii) Appeal from Order No.164 of 2022 is accordingly disposed of.
- iv) Since Appeals are disposed of, nothing survives in the Interim Applications and the same are also disposed of.
- v) There shall be no order as to costs.

SANDEEP V. MARNE, J.

28. After the Judgment is pronounced, the learned counsel appearing for the legal heirs of Roshanlal Kothari would pray for stay of the Order for a period of 04 weeks.

29. The request is opposed by the learned counsel appearing for Tarunkumar and Mahendra. Considering the findings recorded in the Order, the request for stay is rejected.

SANDEEP V. MARNE, J.

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