



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.702 OF 2023

WITH

INTERIM APPLICATION NO.14754 OF 2023

IN

APPEAL FROM ORDER NO.702 OF 2023

WITH

APPEAL FROM ORDER NO.699 OF 2023

WITH

INTERIM APPLICATION NO.14751 OF 2023

IN

APPEAL FROM ORDER NO.699 OF 2023

1. Mrs. Veena Vinod Maisheri,
2. Mr. Hitesh Vinod Maisheri.] ... Appellants/Applicants

Versus

Mrs. Priti Harish Maisheri.] ... Respondent

Mr. S. R. Ganbavale /b Mr. Kush M. Lahankar for Appellants / Applicants
in both AOs.

Mr. Shishir Joshi a/w Mr. Chetan Mhatre for Respondent in both AOs.

CORAM :- SANDEEP V. MARNE, J.

DATE :- 11 OCTOBER, 2023

P. C. :-

1. These Appeals are filed challenging common order dated 30/06/2023 passed by the City Civil Court allowing Notice of Motion No. 505/2023 and partly allowing Notice of Motion No.1218/2023. By its order, the City Civil Court has granted temporary injunction restraining the Defendants from interfering with the Plaintiff's possession over the suit property or from forcibly dispossessing the Plaintiff from the suit

property except by following due process of law. The City Civil Court has further restrained the Defendants from obstructing or restricting the Plaintiff and her warehouse keepers' ingress and egress from the entrance gate erected at the entrance of the suit property except by following due process of law.

2. Respondent has instituted L. C. Suit No.145/2023 in the City Civil Court to protect her possession in respect of the suit property bearing a godown situated at Plot of land bearing C.S.No.106 and 107 situated at Pepermentwala Estate, Bhandup, Mumbai – 400 078. Plaintiff and the Defendants are related to each other.

3. By Indenture dated 06/12/1948, 5 brothers viz. Karamsay Kanji Maisheri, Shamji Kanji Maisheri, Lakhamsey Kanji Maisheri, Umersey Kanji Maisheri and Dhanji Kanji Maisheri purchased land popularly known as 'Pepermintwala Estate' situated at L.B.S. Road, Bhandup, Mumbai – 400 078. The Plaintiff and the Defendants are claiming rights from two brothers viz Dhanji Kanji Maisheri (Plaintiff) and Lakhamsey Kanji Maisheri (Defendants). Dhanji had two sons- Harish and Praful and Plaintiff-Priti is Harish's wife. On the other hand, Lakhamsey had two sons-Pratap and Vinod and the Appellants/Defendants-Veena and Hitesh are wife and son of Vinod.

4. It appears that said five brothers ran a business in partnership by name Robin Confectionery Manufacturing Co. (**Robin Confectionary**) by virtue of a Partnership Deed executed on 16/08/1958. A family understanding was effected between 5 brothers on 31/08/1962 for grant of 1/5th share in the property as well as rents and profits to each brother. In pursuance of partnership so effected, it appears that the land which

came to the share of Lakhamsey was numbered as C.S.No.106 and 107, which is the subject-matter of dispute in the suit and the present Appeals. It is the claim of Plaintiff-Priti that the business Robin Confectionery is being run in the godown situated at C.S.Nos.106 and 107 and that she is in possession of such godown. She was obstructed by Defendants in her alleged possession over the godown located on land at C.S.Nos.106 and 107 and has accordingly filed L. C. Suit No.145/2023 before the City Civil Court seeking injunctive reliefs against the Defendants-Veena and Hitesh to restrain them from forcibly dispossessing her from the suit premises and / or from installing any gate at the entrance of the suit premises and / or disturbing her exclusive use, occupation and possession of the suit premises.

5. In the Suit, Plaintiff-Priti tendered a draft Notice of Motion before the City Civil Court on 24/01/2013. The City Civil Court, however, refused to grant any relief in favour of Priti. She, therefore, filed Appeal from Order No.142/2023 before this Court, which came to be disposed of by order dated 24/02/2023 directing the Defendants to open the gate and permit ingress and egress of the Plaintiff for removal of goods twice a week between 12 p.m. to 2 p.m. The City Civil Court was directed to decide the Notice of Motion in an expeditious manner.

6. After passing or order by this Court on 24/02/2023, Plaintiff amended the plaint and included averments relating to construction of gate at the entrance of the suit premises. She also added averments relating to running the business of Robin Confectionery and Anilraj Warehousing Corporation in the suit structure. She also filed Notice of Motion No.1218/2023 to seek temporary injunction for removal of the gate. The City Civil Court proceeded to hear and decide both Notices of

Motion No.505/2023 and 1218/2023 by a common order dated 30/06/2023 by passing the following order :-

- “1. *Notice of Motion No.505 of 2023 is allowed and Notice of Motion No.1218 of 2023 is partly allowed as follows :*
 - a) *Pending the hearing and final disposal of present suit, the defendants by themselves or through their servant, agent or any other person claiming through them are restrained by the order of interim injunction from interfering with the plaintiff's possession over the suit property and from forcibly dispossessing the Plaintiff from the suit property, except by following due process of law.*
 - b) *Pending the hearing and disposal of present suit, the defendants by themselves or through their servant, agent or any other person claiming through them are restrained by the order of interim injunction from obstructing or restricting the plaintiff's and her warehouse keepers' ingress and egress from the subject entrance gate erected at the entrance of the suit property except by following due process of law.*
2. *Notice of Motion No.505 of 2023 and 1218 of 2023 are disposed of accordingly.”*

7. Defendants-Veena and Hitesh are aggrieved by the order passed by the City Civil Court on 30/06/2023 and have filed these two Appeals.

8. Mr. Ganbavale, the learned counsel would appear on behalf of the Appellants to contend that the suit filed by Plaintiff-Priti is faulty as she has not sought any declaratory relief as to title in her suit. He would further submit that it is impermissible for the Plaintiff to maintain the suit for injunction simplicitor, without seeking declaration of title. In support of his contention, he would rely upon the Judgments of Hon'ble Apex Court in the cases of ***Ananthula Sudhakar Vs. P. Buchi Reddy (Dead) By***

LRs. Others¹, T. V. Ramakrishna Reddy Vs. M. Mallappa and Another² and Kayalulla Parambath Moidu Haji Vs. Namboodiyil Vinodan³.

9. Mr. Ganbavale would further submit that there is no dispute about ownership of the land bearing C.S.Nos.106 and 107 vesting in Defendants-Veena and Hitesh by Plaintiff. That, in absence of any challenge to the title of the Defendants, the Plaintiff cannot seek injunction contrary to such title. That, the Plaintiff and her inductees are trespassers, without having any right, title or interest in the suit structure. That therefore the City Civil Court erred in granting temporary injunction in her favour. He would submit that after passing of order by this Court on 24/02/2023, instead of pursuing her Notice of Motion, the Plaintiff amended the suit claiming for the first time that the business of Robin Confectionery and Anilraj Warehousing Corporation are being carried out in the suit premises since 1959 and 1983 respectively. That, the pleading with regard to Robin Confectionery was introduced for the first time by way of amendment. That, otherwise in the suit as originally filed, the Plaintiff had not made any averment to demonstrate as to how she came in possession of the suit structure.

10. Mr. Ganbavale would further submit that the stand of the Plaintiff about running the business in the name Robin Confectionery in the suit premises is entirely false. Inviting my attention to the Partnership Deed dated 05/10/1976, he would submit that the business of Robin Confectionery was actually conducted at altogether different address at 114/115, Kazi Sayed Street, Mumbai – 400 003. He would further submit that ‘Robin Confectionery’ and ‘Robbin Confectionery’ are two different businesses and the Plaintiff is attempting to take disadvantage of

¹ (2008) 4 Supreme Court Cases 594

² (2021) 13 Supreme Court Cases 135

³ 2021 SCC OnLine SC 675

similarity in the names for claiming her possession over the suit premises. He would submit that in absence of any assertion about title in the property, the City Civil Court ought not to have granted any relief in favour of the Plaintiff. He would pray for setting aside the order passed by the City Civil Court.

11. *Per contra*, Mr. Joshi the learned Counsel appearing for Plaintiff – Priti, would oppose the Appeal and support the order passed by the City Civil Court. He would submit that though initially the 5 brothers conducted a business of Robin Confectionery in the partnership since the year 1948, Kasturibai, widow of Lakhamsey and her sons Vinod and Pratap (through whom Vinod's wife Veena and Vinod's son Hitesh claim rights) retired from partnership vide Deed of Retirement dated 30/11/1962. That, said Kasturibai, her sons Vinod and Pratap as well as Defendants Veena and Hitesh do not have any rights in respect of the business of Robin Confectionery. That, the business of Robin Confectionery has always been carried out in the suit premises. That, on account of retirement of few more partners, the business of Robin Confectionery is now being conducted by Plaintiff Priti and in that capacity, she has been occupying the suit structure, notwithstanding the fact that the land on which the suit structures are located may have come to the share of Lakhamsey Kanji Maisheri

12. Mr. Joshi would submit that after retirement from partnership since 30/11/1962, Kasturibai, Vinod Pratap, Veena or Hitesh did not stake any claim in respect of possessory rights over the suit structure by the Plaintiff Priti. That, the Defendants were always aware of the inductees / licensees / tenants in the suit structure by the Plaintiff-Priti. He would invite my attention to the notice dated 10/08/2021 addressed on behalf

of the Defendants, in which they admit induction of tenants in the suit premises after death of Vinod on 28/04/2004. That despite acquisition of knowledge of induction of tenants on 28/04/2004, the Defendants did not take any steps for their ejectment and for the first time, claimed the trespass in the suit structure on 10/08/2021. That, the Defendants are not sure about the exact nature of occupancy by the occupants and that they are referred to as 'tenants' in the notice dated 10/08/2021 but later branded them as 'trespassers' in one of the letters directly sent to the tenants on 06/12/2022. Lastly, Mr. Joshi would submit that the property tax bills in respect of the suit structure were always levied in the name of Plaintiff-Priti till March 2023 and she alone paid the same. That, for the first time in March 2023, they got the names changed in the assessment records of the Municipal Corporation which again is questioned by the Plaintiff. He would pray for dismissal of the Appeal.

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

14. After considering the submissions canvassed by the learned counsels for parties, it appears that the land numbered as C. S. No. 106 and 107, on which the suit structures are located, came to the share of Lakhamsey Kanji Maisheri in the family understanding dated 31/08/1962. Since the Defendants Veena and Hitesh belong to the branch of Lakhamsey, they may be owners / co-owners in respect of the said land on which the suit structures are located. The land bearing C.S.Nos.106 and 107 however is not a vacant piece of land and there are godowns / warehouses located thereon. Plaintiff-Priti claims possession in respect of the said godowns which are the suit structures. Thus, while the Defendants claim ownership in respect of the land, the Plaintiff claims possession in respect of the structures located on that land.

15. It is seen that Plaintiff-Priti has *prima facie* proved that the business of Robin Confectionery is being conducted in the suit structures for last several decades. Though initially all 5 brothers were partners in the business of Robin Confectionery, several partners, including Lakhamsey's widow and her 2 sons Vinod and Prakash, retired from partnership vide Retirement Deed dated 30/11/1962 by accepting an amount of Rs.23,851.21. There is no dispute of the position that the branch of Lakhansey which includes Defendants-Veena and Hitesh, do not have any concern with the business of Robin Confectionery. It is in the capacity of running the business of Robin Confectionery that the branch of Dhanji Kanji Maisheri, including Plaintiff-Priti, is occupying the suit structures for the last several decades. There is nothing on record to indicate that after effecting the family understanding on 31/08/1962, the Defendants ever objected to possession of the suit premises by the branch of Dhanji Kanji Maisheri.

16. Perusal of the notice addressed on behalf of the Defendants on 10/08/2021 would indicate that they acquired knowledge about occupation of the suit premises by some of the occupants on 20/08/2014. They also contended in the notice that the said occupants have been paying rent to Plaintiff Priti. Such occupants are described as 'tenants' in the notice and the Plaintiff was called upon to pay the rent received from such tenants to the Defendants. Thus, the Defendants admit occupation of the suit premises by the inductees of the Plaintiff at least in the year 2004.

17. In these circumstances, it appears that the Plaintiff and her inductees have been occupying the suit structure for a considerable period of time without any obstruction on behalf of the Defendants.

18. Mr. Ganbavale has strenuously contended that the suit for injunction simplicitor is not maintainable in absence of making any claim for title. Relying on the Judgments of the Apex Court ***Ananthula Sudhakar Vs. P. Buchi Reddy (Dead) By LRs. and Others, T. V Ramakrishna Reddy Vs. M. Mallappa and Another*** and ***Kayalulla Parambath Moidu Haji Vs. Namboodiyil Vinodan*** (*supra*), he has submitted that grant of injunction in favour of the Plaintiff is in breach of principles settled by the Apex Court in its Judgment in Ananthula Sudhakar (*supra*) in which the Apex Court has held in para 21 as under :

“21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, as under :

- (a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.
- (b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.
- (c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar?*). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit

for mere injunction.

- (d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

19. True is that a person in wrongful possession is not entitled to injunction against the rightful owner. However, whether the Plaintiff is in wrongful possession of the suit structure is something which will have to be established by trial of the suit. As of now, the Plaintiff has made out of *prima facie* case that the suit structures have always been in occupation of partnership business of Robin Confectionery and on the retirement of other partners, the branch of Dhanji Kanji Maisheri has been occupying the suit structure for last several decades for running the said business. *Prima facie*, therefore, it is difficult to hold, at this stage, that the Plaintiff's possession over the suit structure is unlawful.

20. The Defendants are apparently owners in respect of the land and the structure. They may have the right to eject the Plaintiff and other occupants from the suit structure, but for that purpose, the Defendants will have to adopt necessary legal remedies. The City Civil Court has granted temporary injunction in such a manner that the Defendants are permitted to dispossess the Plaintiff and her inductees out of the suit structure by following the process of law.

21. It is also undisputed that the property tax assessments in respect of the suit structure were always in the name of the Plaintiff and have recently changed in the name of the Defendants after March 2023. Be that as it may, the Plaintiff has made out a strong *prima facie* case of being in peaceful and settled possession of the suit structure for a considerable period of time without any obstruction on the part of the Defendants. Her possession of suit structure is *prima facie* not unlawful. She has also satisfied the other tests of balance of convenience and irreparable loss. In my view, therefore, the order passed by the City Civil Court does not suffer from any patent error.

22. Resultantly, I find the impugned order passed by the City Civil Court to be unexceptional. The Appeals are devoid of merits. They are dismissed without any orders as to costs.

23. It is, however, clarified that the findings recorded in the present order are *prima facie* and are recorded for the limited purpose of examining whether any *prima facie* case has been made out by the Plaintiff for grant of interim injunction. While deciding the suit, the City Civil Court shall not be influenced by the said fact.

24. In view of dismissal of Appeals, Interim Applications do not survive and the same are also disposed of.

(SANDEEP V. MARNE, J.)