

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.933 OF 2024

Afsar Alli Sajjad Ali Shah

.. Petitioner

Versus

The State of Maharashtra and Anr.

.. Respondents

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- Mr. R. R. Varma a/w. Mr. Sanket Thorat and Mr. Sachin Suware, Advocates for Petitioner.
- Ms. V. S. Nimbalkar, AGP for Respondent No.1 – State of Maharashtra.

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 11, 2024

P.C.:

1. Heard Mr. Varma, learned Advocate for Petitioner and Ms. Nimbalkar, learned AGP for Respondent No.1 – State of Maharashtra.

2. Leave to amend is granted. The ‘State of Maharashtra’ nomenclature as Respondent No.1 is directed to be deleted as it is not a proper and necessary party. This dispute essentially is between two brothers namely Petitioner and Respondent No.2. Amendment / Correction shall be carried out within a period of one week from today. Respondent No.1’s name shall be struck off. Respondent No.2’s name be renumbered as sole Respondent.

3. Mr. Varma would submit that Affidavit-of-Service dated 19.01.2024 has already been filed of having effected service of the

Writ Petition on Respondent No.2 (now Respondent).

4. The *farad* order dated 23.01.2024 is pointed out to me by Mr. Varma which shows appearance of one Mr. Manish Margaonhan and Mr. Ankit Upadhay as Advocates appearing on behalf of the Respondent. Record shows that vakalatnama has not been filed by the learned Advocates.

5. The Writ Petition impugns twin orders dated 05.01.2023 and 31.10.2023 passed in Exhibit-5 proceedings by the learned Trial Court and upheld by learned District Court in Miscellaneous Civil Appeal. It is seen that order passed in Exhibit-5 proceedings before the Trial Court partly allows the application filed under Exhibit-5 granting temporary injunction in favour of the Plaintiff and restraining the Defendant from alienating and creating third party interests over the suit flat until the final decision in the main suit. The said order is upheld in Miscellaneous Civil Appeal proceedings.

6. However Mr. Varma would submit that facts in the present case are such gross that by merely looking at the facts, the learned Court ought to have appointed a Court Receiver of the Suit flat. He is aggrieved with rejection of the Receiver's prayer by both the Courts. The learned Trial Court and Appellate Court on the issue of appointing Receiver have held that there are *prima facie* grounds to believe that Respondent who is Defendant and brother of the Petitioner is in

possession of the Suit flat since 28.08.2020 and that there is a Memorandum of Understanding (for short '**MOU**') executed between the parties which incidentally relates to compromise arrived at between the two brothers. The learned Appellate Court in paragraph Nos.12 and 15 have returned the aforesaid two observations and findings while upholding the order passed below Exhibit-5 by the Trial Court.

7. However, Mr. Varma would vehemently contend that the said MOU is on the face of record a fabricated and forged MOU and in that view of the matter, this Court should consider the Plaintiff's case on the basis of *prima facie* evidence as it appears. For considering Mr. Varma's plea, I will have to hear the Respondent.

8. In view of the above, issue notice to the Respondent namely Shera Ali Sajjad Ali Shah who is now nomenclatured as Respondent. Humdast permitted. In addition to Court's notice, Petitioner shall serve copy of this order and file an appropriate Affidavit-of-service of having intimated the Respondent about the next date of hearing by any permissible mode of service and file appropriate affidavit of service with tangible proof thereof on the next adjourned date of hearing. Respondent is directed to remain present either himself or through Advocate on the next adjourned date. Respondent is already served with a copy of the Writ Petition. Respondent is directed to file

Affidavit-in-Reply if he so desires to oppose the Writ Petition.

9. Stand over to **26th March, 2024 at 02.30 p.m.**

H. H. SAWANT

[MILIND N. JADHAV, J.]

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