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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 933 OF 2024

Afsar Ali Sajjad Shah

.. Petitioner

Versus

Shera Ali Sajjad Ali Shah

.. Respondent

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- Mr. R.R. Varma a/w. Mr. Sanket Thorat and Mr. Sachin Suware, Advocates for Petitioner.
 - Mr. Ankit R. Upadhyay i/by Mr. Manish K. Mazgaonkar, Advocate for Respondent.
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CORAM : MILIND N. JADHAV, J.

DATE : JUNE 10, 2024.

JUDGMENT:

1. This Writ Petition takes exception to twin orders dated 05.01.2023 passed by the learned Trial Court in Special Civil Suit No.296 of 2021 and order dated 31.10.2023 by the learned District Court in Misc. Civil Appeal (MCA) No.33 of 2023. Petitioner is Plaintiff before Trial Court. Defendant is his real brother. Plaintiff filed Suit bearing No.296 of 2021 before the Trial Court seeking declaration that Defendant has no right in the Suit flat being Flat No.204 situated in Jasmin Green Park, Survey No.119, Hissa No.2A, 2B and 3 of Village Shil, Taluka and District Thane and for possession.

2. Briefly stated, Plaintiff and Defendant both purchased two flats namely; Flat No.204 and Flat No.203 in their respective names by

separate registered Agreements on the same date in August 2020. Both flats were purchased from the same vendor namely Ms. Savista Bano and Ali Jarrar Siddiqui. It is Plaintiff's case that vendor put the Plaintiff and the Defendant in possession of the two flats separately.

2.1. Thereafter, Plaintiff has averred that Defendant approached him and took the key of Flat No.204 to verify the area and promised to return the key, but did not do so and forcibly trespassed in to Flat No.204. Plaintiff has filed a police complaint dated 31.03.2021 in this regard. Plaintiff has also issued legal notice through his Advocate to Defendant. Thereafter, attempts made by Plaintiff to enter Flat No.204 have been thwarted by Defendant resultantly leading to filing of Suit on 10.05.2021 before the Trial Court. The aforesaid averments are the only averments made in the Suit plaint for cause of action.

2.2. In the above background, Plaintiff filed two Interlocutory Applications namely; Application below Order XXXIX Rule 1 of the Civil Procedure Code, 1908 (for short "**CPC**") seeking injunction against the Defendant in the interregnum alongwith Application below Exhibit "27" under Order XLI Rule 1 of the CPC for appointment of Court Receiver.

2.3. Both the above Interlocutory Applications were heard together and determined by common order dated 05.01.2023 by Trial Court. Trial Court restrained Defendant temporarily from dealing with

the Suit flat until final decision in the Suit. However, in so far as appointment of Court Receiver is concerned, Trial Court held that appointment of Court Receiver and directing the Court Receiver to deliver the Suit flat to Plaintiff would amount to grant of decree without any trial. Hence, prayer for appointment of Court Receiver is refused.

3. Being aggrieved, Plaintiff filed MCA before District Court against order dated 05.01.2023. District Court however on a different ground altogether rejects the MCA by order dated 31.10.2023.

4. Mr. Verma, learned Advocate appearing on behalf of the Petitioner would submit that Plaintiff has a strong *prima facie* case on the basis of registered sale deed in respect of the Suit flat in his name. He would submit that in the written statement filed by Defendant, defence is raised on the basis of Memorandum of Understanding (for short “**MOU**”) dated 22.12.2020 between parties on the ground that he is entitled to receive money as stated in the MOU from a common client, if the parties in respect of certain business dealings. He would submit that it is Defendant’s case that since he has not received those monies, he would hold the Suit flat for himself.

5. Mr. Verma would point out that the MOU is dated 10.12.2020. He would assert that there is no nexus whatsoever between the MOU and acquisition of the Suit flat and a completely

highhanded and arbitrary act on the part of the Defendant of linking the Suit flat with the MOU has been created without substantiating the same. In fact, according to him, Plaintiff has denied execution of the MOU and the signature appearing therein is forged and fabricated. He would submit that Plaintiff is used to append his signature in English at all times, but the signature appearing in MOU is in Hindi. He has drawn my attention to the signature at page No.138 of the Writ Petition and would contend that the said signature appearing is not that of the Plaintiff. He would then draw my attention to the contents of paragraph No.13 of the Trial Court's order dated 05.01.2023 and paragraph No.15 of the District Court's order dated 31.10.2023. He would submit that both the Courts below have committed a grave error in not appointing the Court Receiver in the facts of the present case. He would submit that though the Courts have held that Plaintiff *prima facie* has established his lawful title over the Suit property and Plaintiff has given sufficient material to show balance of convenience his favour, still appointment of Court Receiver has been refused. According to him, both the Courts below have erred in holding that appointment of Court Receiver would amount to grant of decree in the Suit without trial at the initial stage. Hence, he would urge the Court to consider the twin orders which are impugned and consider appointment of Court Receiver in respect of Suit flat No.204. In support of above submission, he has taken me through the registered

Agreement of the Suit flat in the name of Plaintiff which is appended at page No.38 of the compilation of documents. He has supported his above submission by drawing my attention to page No.118 of the Petition wherein Statement of Account of Petitioner's Bank Account in Federal Bank show that Petitioner has paid the considerations to the vendor for purchase and acquisition of the Suit flat.

6. In support of his submissions, Petitioner has relied upon the following five cases:-

- (i) *Meghji Jetha Shah Versus Kalyanji Nanji Shah*¹;
- (ii) *Khushnuma Ibrahim Khan and Another Versus Asadullah Khan alias Sameer Khan and Others*²;
- (iii) *Raj Kishan Dass Versus Kusum Sanghi*³;
- (iv) *T. Krishnaswamy Chetty Versus C. Thangavelu Chetty and Others*⁴; and
- (v) *Anwar Faramosh Khan Versus Mahendrakumar Jugalkishore Gupta and Others*⁵.

6.1. On the basis of above submissions, he would submit that appointment of Court Receiver in respect of the Suit flat should not be delayed by this Court.

7. *PER CONTRA*, Mr. Upadhyay, learned Advocate appearing

1 1987 SCC OnLine Bom 19 : 1987 Mah LJ 254

2 2012 SCC OnLine Bom 1512 : (2012) 114 (6) Bom LR 3502

3 1997 SCC OnLine Del 367 : (1997) 43 DRJ 181

4 1954 SCC OnLine Mad 374 : AIR 1955 Mad 430

5 2004 SCC OnLine Bom 63 : (2004) 3 Mah LJ 315.

on behalf of Defendant who is brother of Plaintiff, would contend that both the parties had agreed to purchase one property from Mohd. Yakub for Rs.1.72 Crores and both decided to pay 50% of the amount each. He would contend that Defendant paid his share of 50% namely Rs.86 Lakhs to the Plaintiff. Thereafter, the said deal did not fructify and was cancelled. According to Defendant, Plaintiff agreed that until he returned back the amount of Rs.86 Lakhs to the Defendant, Defendant will remain in possession of the Suit flat. This was agreed by the parties and is the subject matter of the MOU dated 22.12.2020 which is appended at page No.209 of the Writ Petition. He would submit that in this view of the matter, after the Suit flat was purchased in August 2020, it is the Plaintiff i.e. Petitioner herein, who had put the Defendant in possession of the Suit flat himself. He would submit that Plaintiff is required to return Rs.86 Lakhs to Defendant and in *lieu* thereof, Defendant has been put in possession of the Suit flat. He would submit that there is no denial of the fact that the Suit flat stands in the name of the Plaintiff but equally, claim of the Defendant of Rs. 86 Lakhs against the Plaintiff is an admitted liability. He would submit that a false and fictitious story has been made out by the Plaintiff with respect to putting the Defendant in possession of the Suit flat. He would submit that admittedly Plaintiff and Defendant carried out business dealings together during which the Defendant paid over Rs. 86 Lakhs to the Plaintiff which was not returned back after the

transaction to buy a different property did not go through.

8. Mr. Upadhyay would further submit that it is in this regard that the Plaintiff executed the MOU in the presence of witness i.e. panchas in order to effect a compromise. He would contend that in these disputed facts of the case, without trial appointment of Court Receiver and handing over possession of the Suit flat to the Plaintiff would amount to disposal of the Suit by awarding final relief without trial. He would submit that right from inception i.e. date of purchase of the Suit flat, Defendant has been in possession of the same and Plaintiff has failed to explain about he being in possession since then. He would submit that possession of the Defendant has not a trespassed but on the basis of the MOU dated 22.12.2020 and the impending liability of the Plaintiff towards Defendant.

9. I have heard Mr. Verma, learned Advocate appearing for the Petitioner and Mr. Upadhyay, learned Advocate appearing for the Respondent. With their able assistance, I have perused the records and pleadings of the case. Both parties have also filed the written submissions in support of their arguments. Submissions made by the parties have received due consideration of this Court.

10. It is seen that Special Civil Suit No.296 of 2021 has been filed by the Plaintiff without giving any reference to the MOU and the defence raised by the Defendant in his written statement. Suit

proceeds merely on two counts namely, registered Agreement dated 28.08.2020 in favour of Plaintiff and keys of the Suit flat being taken by the Defendant of the Suit flat of the verification of the area and never been returned back to the Plaintiff.

11. As against the Plaintiff's case, it is seen that Defendant has placed on record copy of MOU dated 22.12.2020 giving reference to an earlier transaction wherein Defendant had given Rs.86 Lakhs to the Plaintiff and the said monies not been returned back to the Defendant. It is seen that it is in *lieu* of these monies, the Suit flat was given by the Plaintiff to the Defendant. This case of Defendant is refuted by the Plaintiff. However, it is seen that the MOU is executed by the Plaintiff in the presence of a witness. Copy of the MOU is appended to the Writ Petition and is part of the written submission of the Defendant. The aforesaid are disputed questions of fact. The MOU is titled as “समझौता पत्र” and though the stamp paper is dated 10.12.2020, the date of MOU is 22.12.2020. It is at page No.136 of the Writ Petition. On page No.138 of the Petition, both the brothers have appended their signatures in the presence of four witnesses. Contents of the MOU reveal that the Defendant is entitled to 50% of the amount which was given by him to purchase a land parcel at Taloja which did not fructify and therefore he was occupying the Suit flat. It further reveals that upon return of the said monies, he would return back the Suit flat in

vacant condition. It is seen that the Defendant has not denied the title of the Plaintiff to the Suit flat.

12. On perusal of the twin orders, the only dispute before me is whether refusal to appoint Court Receiver is justified or otherwise. In paragraph No.13 of the Trial Court's order, the learned Trial Court has opined that Plaintiff has established *prima facie* case in title, however, the material on record is not sufficient to appoint the Court Receiver. In the same breath, the Trial Court has held that since the Suit plaint is also for recovery of possession, appointment of the Court Receiver at this stage and directing the Court Receiver to deliver the Suit flat to Plaintiff would amount to a decree at the inception stage without a trial.

13. However, the District Court in the MCA order has opined that appointment of Court Receiver is for protection of property during pendency of litigation and since Plaintiff has failed to explain as to why he did not possess the Suit property from the date of his purchase, nor he has shown payment of maintenance charges to the Society since the date of purchase, *prima facie*, the Court has believed the possession to be with the Defendant. The District Court has expressed its opinion on the MOU also and held that it is in fact a compromise effected between both brothers. It is seen that both the brothers were running a joint business of manufacturing paper boxes. Both brothers purchased two

flats; namely Flat No.203 and Flat No.204 by a registered sale deed on the same date. However, 4 months after the date of purchase in December 2020, both brothers entered into the compromise/MOU with respect to the receipt of the amount of Rs.1.72 Crores and agreed that upon receipt of the said amount, Defendant will evict himself and handover peaceful possession of the Suit flat to the Plaintiff. Though the District Court has expressed its opinion on the MOU, the same will have to be treated *prima facie*.

14. At first blush, considering the registered Agreement in favour of Defendant in respect of the Suit flat, one is inclined to believe that the Defendant would have absolute right, title and interest in the Suit flat. Next, averments in the Suit plaint do not point to any dispute between the parties, much less the MOU. Hence the question that would arise is that how did Defendant come to occupy and take possession of the Suit flat since inception. The case of Plaintiff that Defendant sought key to the Suit flat to verify the area, *prima facie*, appears to be weak. This is so because, Plaintiff has not taken any steps after purchase of Suit property right from its inception. Plaintiff has not shown that he paid maintenance and society charges to the Society since inception. Therefore one is inclined to consider the dispute raised by the Defendant because Defendant does not deny the title to the Plaintiff to the Suit flat.

15. In view of the above observations and findings, trial is imminent. Injunction has already been granted by the Trial Court which is upheld by the learned District Court from dealing with the Suit flat. In this background, appointment of Court Receiver may not be a correct order since considering the narrow dispute between the parties, it would be appropriate to direct the Trial Court to determine the Suit proceedings as expeditiously as possible and in any event within a time bound programme so as to determine the *lis* between the parties finally. This, in my opinion, would be an appropriate order to be passed at this stage because there is a title document in respect of the Suit flat in favour of the Plaintiff who is the Petitioner before me and if the Plaintiff is right, then he should enjoy the fruits of his entitlement to the Suit flat.

16. In view of the above, both the twin orders are upheld with further direction that the Defendant shall not deal with the Suit flat in any manner whatsoever so as to disturb the title of Plaintiff therein until Trial Court determines Suit of the Plaintiff.

17. Trial Court is directed to dispose of SCS No.296 of 2021 within a period of 6 months from today without seeking any extension of time due to any reason whatsoever.

18. Both parties namely Plaintiff and Defendant are directed to cooperate with the Trial Court and ensure that no adjournments are

taken unnecessarily by the parties. Trial Courts shall give adjournments to the parties only if utmost necessary due to any emergency and exigency. Both parties are directed to prepare draft issues and appear before the learned Trial Court alongwith the server copy of this judgment/order on 13.06.2024 at 10:30 a.m. and the Trial Court is requested to pass appropriate directions for listing of the Suit for framing of issues as per its convenience and discretion.

19. Both parties shall exchange the issues on that date and file their draft issues with the Trial Court also. Defendant is directed to maintain absolute *status quo* in respect of Suit property i.e. Flat No.204 until determination of the Suit by the Trail Court. Defendant shall not induct any third party in the Suit flat and if so required to be done, will not do so without the leave of the Trial Court. In doing so, trial of the Suit shall not be protracted or delayed which shall be noted by the Trial Court.

20. With the above directions, Writ Petition is disposed.

[MILIND N. JADHAV, J.]

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