

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1016 OF 2023

M/s. Rajendra Trading Company }
A Registered Partnership Firm }
Registered under the Indian Partnership Act, }
carrying on business at 46/48, }
Vithalwadi, Mumbai – 400 002. } **... Appellant/
Original Plaintiff**

V/s.

1. **M/s. S. P. Builders,** }
Partnership firm carrying on business }
at 119, Jolly Maker Chamber – 2, }
Nariman Point, Mumbai – 400 021. }
2. **Mrs. Prem C. Mehra,** }
Having address at Shop No. 16, }
Ground Floor, Heera Panna Shopping Centre, }
Bhulabhai Desai Road, Tardeo, Mumbai – 400 034 }
3. **Samarth Phoolchand Seth,** }
(since deceased partner of Defendant No. 1) }
- 3a. **Smt. Babli S. Seth,** }
Aged about not known, Indian Inhabitant }
- 3b. **Manju Dinesh Seth,** }
Aged about not known, Indian Inhabitant }
- 3c. **Vidhya S. Seth,** }
Aged about not known, Indian Inhabitant }
All residing at Purab Apartment, }
Ridge Road, Mumbai – 400 006. }

4. **Ramesh Samrathmal Seth,** }
(a partner of the Defendant No. 1 and legal heirs }
of Samrathmal Phoolchand Seth), }
Aged about not known, Indian Inhabitant }
residing at Purab Apartment, Ridge Road, }
Mumbai – 400 006. } **... Respondents/
Original Defendants**

**WITH
INTERIM APPLICATION NO. 890 OF 2024**

Mr. Raj Patel a/w Mr. Bharat Jain a/w Ms. Priyanka Priyadarshi i/b IC Legal for Appellant.

Mr. Mohit Arora a/w Ms. Hita Chandarana i/b Desai & Diwanji for Respondent No. 2.

Shri. B. V. Baravkar, Court Receiver, High Court of Bombay.

CORAM : FARHAN P. DUBASH, J.

**RESERVED ON : 7th APRIL 2026
PRONOUNCED ON : 10th JUNE 2026**

JUDGMENT:

1. The present appeal challenges an order dated 13th September 2023 passed by the Trial Court in Notice of Motion No. 4568 of 2017 (hereinafter, referred to as the *“impugned order”*) that was preferred by the Appellant / Plaintiff. By

the said Notice of Motion, the Appellant sought appointment of the Court Receiver, High Court, Bombay in respect of Shop No. 15A situated on the ground floor of the building popularly known as *Heera Panna Shopping Centre* located at the junction of Bhulabhai Desai Road and Tardeo Road at Haji Ali, Mumbai 400034 (hereinafter, referred to as the “*suit shop*”) together with a direction to the Court Receiver to take possession thereof from the Respondents / Defendants or any other person/s found to be in possession and hand over the same to the Appellant.

2. The Notice of Motion was principally founded upon the allegation that Respondent No. 2 had violated earlier orders passed by this Court, breached the undertaking dated 17th July 1986 furnished to this Court and acted contrary to the Agency Agreement executed by her with the Court Receiver in respect of the suit shop. By the impugned order, the Trial Court rejected these contentions and dismissed the Notice of Motion.

BRIEF FACTS

3. For the purposes of adjudication of the present Appeal, the relevant facts may be briefly stated thus:

- (a) In August 1980, the Plaintiff instituted a suit seeking specific performance of an agreement dated 6th January 1976 allegedly executed by Defendant No. 1 in its favour in respect of Shop No. 16 in Heera Panna Shopping Centre.
- (b) Along with the suit, the Plaintiff preferred Notice of Motion No. 1335 of 1980 seeking interim and ad-interim reliefs. By an order dated 3rd September 1980, this Court granted an injunction restraining Defendant No. 1 from parting with possession of, disposing of, dealing with or encumbering the suit shop.
- (c) Thereafter, by order dated 5th August 1981, this Court recorded the statement of the Advocate for Defendant No. 1 that his client had not parted with possession of the suit shop and consequently confirmed the earlier order of injunction. Since a Court Receiver had already been appointed in respect of Heera Panna Shopping Centre in Suit No. 1477 of 1977, liberty was granted to the Plaintiff to seek appointment of a Court Receiver in the event the order in the said suit was vacated.
- (d) According to the Plaintiff, despite the aforesaid orders, Defendant No. 1 created third-party rights in favour of Defendant No. 2 under a pur-

ported back-dated agreement dated 27th August 1976 and placed her in possession of the suit shop on 9th November 1983. This led the Plaintiff to file Notice of Motion No. 893 of 1984 seeking reliefs against Defendant No. 2.

- (e) By order dated 12th April 1984, this Court restrained the Respondents from disposing of, assigning, transferring, selling, encumbering or otherwise dealing with the suit shop. The Court Receiver was directed to inspect the premises and ascertain the identity of the person in possession without dispossessing such person.
- (f) Upon inspection, the Court Receiver found Defendant No. 2 in possession of the suit shop. Consequently, by order dated 27th March 1986, Defendant No. 2 was permitted to continue in possession as Agent of the Court Receiver, without payment of compensation or furnishing security. The Court Receiver was directed to affix his board upon the premises and the interim protection granted earlier was continued.
- (g) Pursuant thereto, Respondent No. 2 executed an affidavit-cum-under-taking dated 17th July 1986 undertaking, inter alia, not to alienate,

transfer, assign, encumber or otherwise deal with the suit shop and further undertaking that she would use the premises only for her business of running a department store and would not part with possession thereof save in the course of carrying on such business.

- (h) In or about 2012, the suit stood transferred to the Bombay City Civil Court. Subsequently, Respondent No. 2 was impleaded as Defendant No. 2 and the heirs and legal representatives of a deceased partner of Defendant No. 1 were brought on record.
- (i) Respondent No. 2 thereafter filed Notice of Motion under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter, referred to as “*the Code*”) seeking rejection of the plaint and also filed her written statement.
- (j) According to the Plaintiff, during a visit to the suit shop on 14th October 2017, its Director discovered that Respondent No. 2 was not in occupation of the suit shop and that one Mr. Sanjay Mehra had been in possession thereof for several years. It was also noticed that the boards of the Court Receiver, both inside and outside the suit shop, had been removed.

- (k) The Plaintiff accordingly addressed a communication dated 10th November 2017 to the Court Receiver requesting inspection of the suit shop. A site visit was conducted on 30th November 2017 and a report was submitted.
- (l) It was in these circumstances that Notice of Motion No. 4568 of 2017 came to be filed seeking the aforesaid reliefs. The said Notice of Motion was dismissed by the impugned order.
- (m) It is necessary to note that although the suit pertains to Shop No. 16, the premises in possession of Respondent No. 2 and covered by the Agency Agreement and undertaking is Shop No. 15A. The Appellant contends that Shop Nos. 15A and 16 are one and the same premises, whereas Respondent No. 2 disputes the same. Both parties, however, are *ad idem* that determination of this controversy is unnecessary for deciding the present Appeal, and I therefore refrain from expressing any opinion thereon.

SUBMISSIONS OF THE APPELLANT

4. Mr. Raj Patel, learned Counsel appearing on behalf of the Appellant, submits that the Trial Court has committed a manifest error in concluding that Respondent No. 2 had neither violated the orders of this Court nor breached the undertaking and Agency Agreement executed by her.
5. Inviting attention to the undertaking dated 17th July 1986 and the earlier order dated 27th March 1986 passed by this Court, Mr. Patel submits that Respondent No. 2 has surrendered possession of the suit shop to a third person and permitted him to conduct an independent business therefrom. Reliance is placed upon the Court Receiver's Report dated 30th November 2017 and the extract of the C-Register maintained under the Shops and Establishments legislation to contend that the business presently conducted from the suit shop by one Mr. Sanjay Mehra, son of Respondent No. 2 is that of "*M/s. Fifth Season*", dealing in watches, photo frames and gift articles, and not the department store business contemplated by the undertaking.
6. It is further submitted that Respondent No. 2 has violated the Agency Agreement by permitting removal of the Court Receiver's board/s and has also car-

ried out unauthorized construction in the form of a mezzanine floor. It is therefore contended that the Trial Court ought to have appointed the Court Receiver and directed delivery of possession to the Appellant.

SUBMISSIONS OF RESPONDENT NO. 2

7. *Per contra*, Mr. Mohit Arora, learned Counsel appearing for Respondent No. 2, supports the impugned order and submits that no case warranting appointment of a Court Receiver or dispossession of Respondent No. 2 has been made out.
8. While fairly admitting that Mr. Sanjay Mehra is conducting business from the suit shop, Mr. Arora submits that he is doing so on behalf of Respondent No. 2 owing to her advanced age and ill health. According to him, there is no parting with possession since Sanjay Mehra is the son of Respondent No. 2. It is further contended that the registration of M/s. Fifth Season in the name of Respondent No. 2's husband and two sons, predates both the order dated 27th March 1986 and the undertaking dated 17th July 1986.

9. Insofar as the Court Receiver's board is concerned, it is submitted that the same was inadvertently misplaced during renovation works carried out in the year 2007 and has since been re-affixed.
10. With regard to the alleged mezzanine floor, it is contended that no unauthorized construction has been carried out and that the structure has existed since at least 1983. He draws support from the Court Receiver's Report dated 16th April 1984 which indicates that construction and renovation work was being undertaken in the suit shop.

ANALYSIS AND FINDINGS

11. Having heard the learned Counsel for the parties and having perused the material on record, the principal question which arises for consideration is whether Respondent No. 2 has violated the order dated 27th March 1986 and the undertaking dated 17th July 1986.
12. The material portions of the undertaking read thus:

"I, PREM C. MEHRA of Bombay Inhabitant residing at Hira Panna Building, Haji Ali, Bombay do hereby solemnly affirm and say that I, hereby undertake to this Hon'ble Court that I will not dispose off or part with or assign or transfer or sell or encumber or mortgage or exchange or offer as security or otherwise in any way alienate or deal with the premises viz. Shop No. 15A in Hira Panna Building, Haji

Ali, Bombay which has been allowed by the Court Receiver to me to use and occupy the same as his agent under an Agreement signed by me on that behalf.

1...

2...

3. I further undertake that I will use the said premises for my business of a department store and except in the course of carrying on my business of the department store shall not part with the possession thereof to anyone.”

(emphasis supplied)

13. The undertaking makes it abundantly clear that Respondent No. 2 was permitted to remain in possession of the suit shop only for the purpose of carrying on *her* business of a department store. The Court Receiver’s Report dated 30th November 2017, coupled with the admissions made on behalf of Respondent No. 2, establishes that the business presently carried on from the suit shop is that of M/s. Fifth Season, engaged in the sale and servicing of watches, photo frames and gift articles, and that the same is conducted by her son, Sanjay Mehra.

14. Significantly, neither Respondent No. 2 nor Sanjay Mehra has disclosed when the department store business ceased or when the business of M/s. Fifth Season commenced from the suit shop. Nor has any documentary material been produced to establish that the business of M/s. Fifth Season is carried on for and on behalf of Respondent No. 2.

15. Section 119 of the Bharatiya Sakshya Adhiniyam, 2023 permits the Court to draw an adverse inference where evidence which could be produced is withheld. In the facts of the present case, the failure to produce relevant financial and business records warrants such an inference. The applicable illustration (g) under sub-section (1) reads thus:

“119. Court may presume existence of certain facts —

(1) The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

...

...

(g) evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

16. I am therefore unable to accept the contention that M/s. Fifth Season is merely an extension of the business of Respondent No. 2.
17. Even assuming that the business was commenced prior to the order dated 27th March 1986, the undertaking dated 17th July 1986 contains no disclosure whatsoever that the premises were being used by Sanjay Mehra for carrying on the business of M/s. Fifth Season. On the contrary, Respondent No. 2 un-

equivocally represented¹ to this Court that she was using the premises for her business of a department store.

18. The undertaking imposed two cumulative conditions: *first*, that the business conducted from the suit shop would be that of Respondent No. 2 herself; and *second*, that the business would be a department store. The business of M/s. Fifth Season satisfies neither requirement.
19. The exception contained in paragraph 3 of the undertaking is equally unavailable to her. The exception permits arrangements incidental to carrying on Respondent No. 2's department store business. It does not authorize an independent business to be carried on by another person.
20. Furthermore, Respondent No. 2 occupied the suit shop as Agent of the Court Receiver. As such, she was under a continuing obligation to keep the Court Receiver informed of all material developments affecting the suit shop and its use. No disclosure appears to have been made regarding the change in user, the nature of the business, or the role assumed by Sanjay Mehra.

¹ made by Respondent No. 2 in paragraph 13.2(iv) of her affidavit dated 20th February 2024 filed in IA No. 890 of 2024 in the present Appeal from Order No. 1016 of 2023

21. The cumulative effect of these circumstances leaves little room for doubt that Respondent No. 2 has acted in breach of both the order dated 27th March 1986 and the undertaking dated 17th July 1986.
22. The Trial Court therefore erred in holding that no breach had occurred merely because Sanjay Mehra is the son of Respondent No. 2. The Trial Court also erred in disregarding the evidentiary significance of the C-Register extract and in construing paragraph 3 of the undertaking as authorizing the present arrangement.
23. However, insofar as the allegations concerning removal of the Court Receiver's board, unauthorized mezzanine construction and inclusion of Respondent No. 2's name in the share certificate are concerned, I find no reason to interfere with the findings recorded by the Trial Court.
24. The remaining question is whether the established breach necessarily warrants removal of Respondent No. 2 as Agent of the Court Receiver and delivery of possession to the Appellant.
25. In my view, the answer must be in the negative. The underlying suit is one for specific performance and title to the suit shop remains disputed. Respon-

dent No. 2 also asserts an independent claim to ownership, which claim is yet to be adjudicated.

26. It is equally relevant that Respondent No. 2 has remained in possession of the suit shop since at least 1983 and has continued as Agent of the Court Receiver for nearly four decades. While such long possession cannot excuse the breach established on record, it is nevertheless a relevant circumstance while determining the nature of the relief to be granted.
27. In the peculiar facts of the case, the ends of justice would be met by withdrawing the indulgence granted under the order dated 27th March 1986, whereby Respondent No. 2 was permitted to continue as Agent of the Court Receiver without payment of compensation or furnishing security.
28. Accordingly, Respondent No. 2 shall be permitted to continue in possession of the suit shop as Agent of the Court Receiver, only upon payment of compensation / monthly royalty and upon furnishing such security as may be determined by the Court Receiver, in accordance with the usual terms and conditions applicable to agency arrangements. Respondent No. 2 shall execute a fresh Agency Agreement on or before 31st July 2026.

29. The compensation / monthly royalty shall be payable only from 1st August 2026 onwards and shall remain subject to further orders in the suit and the final outcome thereof.
30. In the event Respondent No. 2 fails to comply with the aforesaid directions on or before 31st July 2026, she shall forthwith cease to be Agent of the Court Receiver and the Court Receiver shall take possession of the suit shop from Respondent No. 2, Sanjay Mehra or any other person found in occupation thereof.
31. In such eventuality, the Court Receiver shall issue a public notice inviting offers for appointment of an agent on the usual terms relating to royalty and security and shall complete the process, including execution of the requisite Agency Agreement, on or before 30th September 2026. The Appellant shall also be entitled to participate in such process and seek appointment as Agent of the Court Receiver.
32. Accordingly, the present Appeal from Order is disposed of with the following directions:

::: ORDER :::

- (i) The present Appeal is partly allowed.
- (ii) The finding of the Trial Court that Respondent No. 2 had not violated the order dated 27th March 1986 and the undertaking dated 17th July 1986 is set aside. It is declared that Respondent No. 2 has acted in breach of the said order and undertaking.
- (iii) Respondent No. 2 shall continue as Agent of the Court Receiver only upon execution of a fresh Agency Agreement, furnishing security and payment of compensation / monthly royalty in accordance with the directions contained in paragraphs 28 and 29 above.
- (iv) In default of compliance on or before 31st July 2026, the Court Receiver shall take possession of the suit shop and proceed in accordance with paragraph 30 above.
- (v) Save and except to the extent indicated hereinabove, the impugned order stands confirmed.
- (vi) There shall be no order as to costs.

(vii) All pending Interim Applications taken out in the present Appeal from Order, if any, also stand disposed of in terms of this judgment, and all interim orders passed therein, if any, shall stand vacated.

(FARHAN P. DUBASH, J.)

Shubham Gadhavepatil