

(2003) 09 DEL CK 0099

In the Delhi High Court

Case No : IA No. 7626 of 2003 in Suit No. 1456 of 2003

Geetanjali Nursing Home (P) Ltd.

APPELLANT

Vs

Dr. Dileep Makhija and Others

RESPONDENT

Date of Decision : 10-09-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Companies Act, 1956 — Section 190, 284, 630
Specific Relief Act, 1963 — Section 41

Citation : AIR 2004 Delhi 53 : (2005) 127 CompCas 659 : (2004) 1 CompLJ 457 : (2003) 107 DLT 180 : (2003) 48 SCL 524

Hon'ble Judges : Om Prakash Dwivedi, J

Bench : Single Bench

Advocate : P.V. Kapur and Vikas Dhawan, for the Appellant; Sandeep Sethi and Sumit Mehta, for the Respondent

Judgement

O.P. Dwivedi, J.—By this order I shall govern the disposal of IA. No. 7626/ 2003, under O. 39 Rule 1 and 2 CPC, filed by the plaintiff in suit No. 1456/2003 seeking injunction against the defendants restraining them from entering into the hospital premises, committing illegal trespass into the hospital premises at 3 MMTC/ STC Colony, New Delhi, opposite Geetanjali Enclave, New Delhi, causing any disruption, interference in the working of hospital and from carrying on any personal and/or professional work from the hospital premises.

2. plaintiff Geetanjali Nursing Home (P) Ltd. duly incorporated under the Companies Act, 1956 having its registered office 3, MMTC/STC Colony, Geetanjali Enclave, New Delhi is engaged in the business of running and maintaining hospital under the name and style of "Geetanjali Hospital". The defendants herein are medical practitioners/ Doctors who were permitted by the plaintiff to practice their medical profession from the said hospital. Defendant No. 1 is surgeon, Defendant No. 2 is Pediatrician, Defendant No.3 Orthopadiatrition. Defendants were allowed space/ work chambers in the hospital purely on leave basis to carry on their medical profession. The defendants are also share holders

of the plaintiff company and they together hold approximately 18% of the total paid up capital of the company. Earlier defendants were also Directors of the plaintiff company but vide resolution dated 21.6.2003 they were voted out from Directorship in extra ordinary general meeting of the company. Then by subsequent decision taken by the company on 23.6.2003, the defendants were removed from the hospital and the permission granted to them to carry on their professional work from the premises of the hospital and the facility to use the space/chambers allowed to them was also withdrawn. It is alleged that with the removal from the Directorship of the company and withdrawal of facility of the space/working chambers to carry on their profession from hospital premises, the defendants are illegally and unauthorizedly entering the hospital premises thereby committing trespass and disrupting the working of the hospital. The defendants allegedly misappropriated the income received from the clients/patients visiting the hospital instead of depositing the same with the plaintiffs thus causing financial loss to the plaintiff. Besides, they have committed various delinquent acts of financial irregularity and breach of fiduciary duty as Directors. Therefore, the plaintiff vide notice dated 22.1.2003 convened a meeting of its Board of Directors on 25.1.2003 on which date a date was fixed for calling extra ordinary general meeting for taking appropriate steps against the defendants for their delinquent acts. Defendants thereupon served a legal notice through their counsel making false allegations and calling upon the plaintiff to adjourn the meeting scheduled for 25.1.2003. However, scheduled meeting for 25.1.2003 of Board of Directors was held and a resolution was passed for convening an extra ordinary general meeting of the plaintiff company. The defendants thereafter filed a suit No. 383/2003 before this Court. In the suit defendants sought declaratory and injunctive relief against present plaintiff who was arrayed as defendant No.6 in the said suit and other Directors in respect of some Board Resolutions as well as the convening of extra ordinary general meeting. Along with the said suit defendants also filed application under O. 39 R. 1 and 2 seeking prohibitory injunction to that end. But the said application No. 1880/2003 was rejected by the learned single Judge vide order dated 14.5.2003. Against the said order defendants preferred an appeal which was dismissed by the Division Bench vide order dated 20.6.2003. While dismissing the appeal, Division Bench vide judgment dated 20.6.2003 expressly disallowed the request of the defendant (who were plaintiff in the earlier suit) for injunction restraining the present plaintiff from removing the defendants from Directorship of the company holding that the agreement dated 3.8.1995 relied upon by the defendants herein was not binding on the plaintiff company.

3. A notice dated 27.5.2003 u/s 284 read with section 190 of the Companies Act was received by the plaintiff company from one of the share holder which was duly circulated among the share holders and in the extra ordinary general meeting held on 21.6.2003, the defendants were removed from the Directorship. Then in a subsequent meeting of Board of Directorship held on 21.6.2003 there was discussion regarding fresh terms and conditions for all the Doctors including

defendants, for working in the hospital. Accordingly, a circular was issued to all the Doctors requesting them to attend office of the Chairman-cum Managing Director by 10 A.M on 23.6.2003 to discuss and finalize fresh terms and conditions of the working in the hospital. Defendants, however, did not attend office of the Chairman-cum-Managing Director. Thereafter, a meeting of the Board of Directors was held on 25.6.2003 and necessary resolution was passed for removal of the defendants from the hospital premises and withdrawing permission given to them for carrying on their professional work from the hospital. Details of various acts of misappropriation, misconduct are given in para No. 13 (i), (ii) and (iv) of the plaint. It is alleged that despite removal of the defendants from the hospital and withdrawal of the permission given to them for carrying on their professional work from the hospital premises they illegally and unlawfully entered into the hospital premises and disrupted the smooth functioning of the hospital. Hence the suit.

4. Along with suit, plaintiff has filed this application is 7626/2003 seeking an interim injunction to the same effect.

5. In reply, defendants have denied the allegations regarding misappropriation of funds, misconduct, disturbing of smooth functioning of the hospital by them. The pendency of the earlier suit filed by them against plaintiff and other Directors of the plaintiff company and the rejection of their application for interim injunction as also disposal of the appeal is not disputed. As regards their removal from the Directorship on 23.6.2003 and subsequently withdrawal of the permission to practice from the hospital premises, their contention is that these actions are vitiated by malafide. It is further contended by the learned counsel for the defendants that they are in "settled possession" of the space/working chambers of the hospital and they cannot be removed from without a court decree for possession of the said premises.

6. In their written statement, the defendants have given a detailed history of the circumstances under which the plaintiff hospital came into being. It is pleaded that the plaintiff company, was incorporated in the year 1984 by Hakim Harkishan Lal and his son Dr. Vasdev About . The said two persons were the signatories to the Memorandum of Association and first share holder and Directors of the company. The company was incorporated with the main object of running and maintaining hospital and nursing home. The said company purchased plot No.3, STC/ MMTC Colony, New Delhi in auction from President of India vide perpetual lease deed dated 5.6.90 in favor of the company. In 1992, the defendants and one Dr. Chander Vir were working in Mother & Child Hospital, Safdarjung Development Area and they were desirous of setting up a hospital of their own. They came to know that the said plot i.e plot No.3, STC/ MMTC Colony, New Delhi was available as the original promoters of the company were not inclined to establish the hospital on the said location. During preliminary negotiation, Dr.Chander Vir aforesaid suggested the name of Arun Mittal, a builder by profession. He was a patient of Dr. Chander Vir and could be of some

help in building of the hospital. Thereupon discussions were held between the parties and Sh. Arun Mittal, now one of the Directors and majority shareholder of the plaintiff company, volunteered to join the said Doctors in building the hospital.

7. After discussions, the parties conceived of a basic scheme and structure for building the said hospital. The structure was that the venture of hospital shall be undertaken in partnership. The partnership shall have 3 groups. The answering defendants formed one group, Shri Arun Mittal formed the second group, and Dr.Chander Vir and his wife formed the third group. The terms of partnership were that the 3 groups shall hold equal shareholding in the company i.e 33% each. The partnership would purchase the said plot and after purchase, the 3 groups shall jointly erect on the plot a hospital. A few pillars had already been erected by the original promoters which was as good as no construction on a plot. The partnership was to operate the said hospital. The answering Defendants and Dr. Chander Vir were to have permanent chambers in the hospital, each of them having right in perpetuity to practice from the said nursing home for which the separate working chambers were provided in the hospital. It was also agreed that the hospital shall not engage any doctor in the field relevant to the answering Defendants and Dr.Chander Vir. It was also an essential term that the answering defendants and Dr. Chander Vir shall not practice outside the said hospital. The said partnership was to be operated through the firm of the plaintiff company. This became necessary because the original promoters had purchased the said plot in the name of the company, and Therefore, the easiest way to purchase the rights in the said plot was by transfer of shares in the plaintiff company. Even though the plaintiff is a limited company, the form of company is merely a facade for undertaking the partnership venture, as aforesaid. The company was conceived and had all trappings of a partnership.

8. Accordingly, in the year 1992, the defendants along with Arun Mittal, Chander Vir, Sheila Vir, wife of Dr.Chander Vir, purchased the entire shares in the plaintiff company from the original promoters in the following ratio:

(i)Dr.Dileep Makhija, Defendant No.1 678 (8.34%) (ii)Dr.Anil Kanwar, Defendant No.2 1355 (16.67%) (iii)Dr.Pramod K.Kohli, Defendant No.3 675 (8.33 %) (iv)Mr. Arun Mittal 2710 (33.33%) (v)Dr.Chander Vir along with his wife Dr.Sheila 2710 (33.33%)

9. Company raised loans from various financial institutions and contribution was also made by three groups of shareholders and thus the hospital was set up after obtaining necessary permission and license from the authorities. A Memorandum of Understanding dated 29.9.1992 was signed between the shareholders at that time under which the defendants were to be provided working chambers for carrying on their medical profession in the hospital. It was also stipulated in the said memorandum that defendants and Dr.Chander Vir will remain on the Board of the Directors of the company and neither of the shareholders shall use their share holding power to remove them from Directorship of the company. Thus, according to the defendants, they were conferred rights in perpetuity to carry on

medical profession from the chambers provided to them.

10. In July/August 1995 Dr. Dharam Vir and Dr. Sheila Vir withdrew from company. Sh. Arun Mittal was allowed to purchase their share holding. Thus Arun Mittal became majority share holder, holding about 66 % of the shares. Again a fresh Memorandum of Understanding dated 3.8.95 was signed between defendants Doctors on one side and Arun Mittal and his wife Rosy Mittal on the other side whereby the defendants were conferred rights in perpetuity to carry on their medical profession from chamber allotted to them in the hospital. It is contention of defendants that later on Arun Mittal allotted some more shares to some of his relations and appointed them as Directors. With the passage of time difference crept up between the two groups, namely Arun Mittal group who is majority shareholder and the defendant Doctors who were in minority, holding only about 18% of the share capital. Sh. Arun Mittal issued a notice dated 22.1.2003 to convene a meeting of Board of Directors for considering to increase the share capital and for calling AGM to take steps against defendants. The defendants protested against the said agenda. Later on defendants also came to know that Arun Mittal had fabricated record of the plaintiff company which were in his custody and appointed some of his relations as Directors of the Company and also allotted shares to them at the back of the defendants. In these circumstances the answering defendants had filed suit No. 383/2003 in this court challenging the validity of various meetings held on different dates and also the appointment of other relations of Arun Mittal as Directors. The said suit is still pending. It is further contended by the defendants that they are in the settled possession of the working space chambers and they cannot be removed there from except in due course of law.

11. I have learned counsel for the parties and perused the record.

12. From the above recapitulation of the pleadings of the parties, it becomes clear that defendants' claim for entitlement to the possession of the working chambers in perpetuity is based on two documents namely, Memorandum of Understanding dated 22.9.92 and 3.8.95. These documents were subject matter of consideration and discussions in the earlier suit filed by the defendants bearing No. 383/2003. The application under O 39 R.1 and 2 CPC, filed by the defendants (plaintiff in suit No.383/2003) was declined by the learned single Judge vide detailed order dated 14.5.2003 against which defendants had preferred appeal FAO (OS) 244/2003. In the said appeal, the defendants had filed an application being C.M.No. 635/2003 with the following prayers:-

(i) Stay the operation of the impugned order dated 14.5.2003 passed by the learned single Judge of this Hon'ble Court in is NO. 1880/2003 in suit No. 383/2003 and restrain the respondents from in any manner removing or causing to be removed the appellants from the office of Directors of the respondent No.6 company and from in any manner disturbing, obstructing or interfering with the appellant's carrying on of their profession from Geetanjali Hospital, 3- MMTC/STC Colony, Geetanjali Enclave, New Delhi and stay the operation of notice dated

27.5.2003.

(ii)pass such other order or direction as this Hon"ble Court may deem fit and proper in the facts and circumstances of the case."

13. The said appeal along with CM NO. 635/2003 was dismissed by the Division Bench vide order dated 20.6.2003 . The Memorandum of Understanding dated 3.8.95 was specifically considered by the Division Bench and it was held that since the said agreement between the shareholders was never incorporated in the Articles of Association of the Company, the same is not binding on the company. The Division Bench accepted the contention of respondent (who is plaintiff in the present suit) that no fetters can be put on the rights of the shareholders conferred upon them by various provisions of the Company Act to remove or elect Directors in the manner prescribed under the Act. Ultimately, the appeal as well as defendants" C.M. No.631/2003 containing the prayer to restrain the company from in any manner disturbing, obstructing, interfering with their professional work being done from the cabins/chambers in the said hospital was rejected.

14. It may be pointed out here that in the meantime the defendants had filed another suit being Suit No. 726/2003 with the following prayers:-

(a) Pass a decree of permanent prohibitory injunction restraining the defendants from in any manner directly or indirectly dispossessing, removing or otherwise obstructing or interfering with the peaceful conduct of profession of the plaintiffs from the Defendant-6 hospital located at 3, MMTC/ STC Colony, New Delhi in perpetuity, and from in any manner engaging at the said hospital any doctors or medical professionals in disciplines/ fields of the plaintiffs i.e. Surgery, Pediatrics and Orthopedics;

(b) Any other decree (s) or order(s) or direction (s) in favor of the plaintiffs and against the Defendants as may be deemed just and proper in the facts and circumstances of the case.

(c) Grant costs.

15. The said suit No. 726/2003 was got dismissed as withdrawn by the defendants as is clear from order dated 3.4.2003 which reads as under:-

"03.04.2003

Present: Mr.Sandeep Sethi for the plaintiff.

Mr.Gaurav Nagar for the Defendant.

Suit No.726/2003

16. Mr. Sethi, learned counsel appearing for the plaintiff states that he has now obtained instructions and since the contentions and submissions urged in this suit have already been raised in suit No. 383/2003, this suit is not pressed.

As prayed for the suit is dismissed as withdrawn.

All the pending applications also stand disposed of.

17. In CM No. 631/2003 filed in FAO (OS) 244/2003 as well as in the earlier suit No 726/2003 which was got dismissed as withdrawn, the defendants had raised similar plea that the company was in the nature of the partnership of different groups of shareholders and that the defendants have a right in perpetuity to carry on medical profession from the hospital in view of the said MOU, Therefore, with the withdrawal of suit No. 726/2003 and the dismissal of appeal FAO (OS) 244/2003 and CM 631/2003 in the said appeal by the Division Bench, the defendants' claim to continue their profession from the hospital premises stands rejected. It was contended by the learned counsel for the defendants that they have filed SLP against the Division Bench's order and in that SLP Hon'ble Supreme Court has issued notice. Thus, according to the learned counsel for the defendants the said order of the Division Bench does not operate as res-judicata as the matter is open for scrutiny by the Supreme Court. It is true that in view of the pendency of the SLP against the Division Bench order dated 20.6.2003, the said order cannot be said to have attained finality, Therefore, it does not operate as resjudicata. Yet, since the operation of Division Bench order has not been stayed by the Supreme Court, it remains a binding precedent on this Court being an order by a larger bench of this Court on the same issue. Since the defendant's claim to a right in perpetuity to practice from the hospital premises stands rejected by the Division Bench and given up by themselves in Suit No 726, the only issue for consideration at this stage will be whether the suit for perpetual injunction filed by the plaintiff will meet the requirements of "due process of law" and whether in the circumstances of the present case the grant of perpetual injunction will be adequate relief for the plaintiffs or the plaintiff must necessarily seek the relief of possession.

18. In this connection, it is necessary to examine the nature of possession which the defendants claim over chambers allotted to them in the hospital under MOU dated 22.9.92 and 3/8/95. Defendants claim that they are in settled possession of working space/chamber in the hospital since 1992 on the basis of the said MOUs and after withdrawal of permission by the plaintiff on 23.6.2003 they can at worst be treated as trespasser. Therefore, in view of the decision of the Supreme Court in the case of Puran Singh and Others Vs. The State of Punjab, the defendants cannot be dispossessed except in due course of law. In that case, Supreme Court was dealing with the case of trespasser who had forcibly taken possession of the land and had sown crops thereon. The apex court was dealing with the question of right of private defense of property in a criminal case. Referring to an earlier decision in the case of Munshi Ram Vs. Delhi Administration AIR 1968 SC 702 it was observed that even true owners have no right to dispossess by use of force, a trespasser who is in settled possession of the land and in such a case unless he is evicted in due course of law he is entitled to defend his possession even against rightful owners. The possession

which trespasser is entitled to defend against a rightful owner must be a settled possession. This "settled possession" must be extended over a sufficiently long period and acquiesced in by the true owner. Explaining the concept of the settled possession of the trespasser, Supreme Court observed that :

" It is indeed difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into a settled possession. But what this Court really meant was that the possession of a trespasser must be effective, undisturbed and to the knowledge of the owner or without any attempt at concealment. For instance a stray or a casual act of possession would not amount to settled possession. There is no special charm or magic in the word "settled possession" nor is it a ritualistic formula which can be confined in a straitjacket but it has been used to mean such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner. Similarly an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession. Thus in our opinion the nature of possession in such cases which may entitled a trespasser to exercise the right of private defense of property and person should contain the following attributes:

(i)that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii)that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of animus possendie (sic possidendi). The nature of possession of the trespasser would however be a matter to be decided on facts and circumstances of each case;

(iii)the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced in by the true owner; and

(iv)that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defense and the true owner will have no right of private defense."

19. In the present case, defendants came to occupy the chambers on the basis of MOUs dated 22.9.92 and 3.8.95 as they were Directors of the Company at that time. Besides, they have rendered services to the hospital and in consideration thereof they were allowed the facility to carry on their profession from the chambers in the hospital. It is nobody's case that the defendants occupied chambers by force. So the question of their claiming settled possession as trespasser as referred to in the case of Puran Singh (supra) does not arise.

The word "settled possession" in the case of Puran Singh (supra) and in the case of Munshi Ram's (supra) has been used in the sense of "adverse possession". Where a trespasser occupies the property by force and such occupation is of sufficiently long duration, open, exclusive and hostile to the true owner, it is called "settled possession" or "adverse possession" which the trespasser is entitled to defend even against true owner. Clearly that is not the case here. The nature of defendants' possession after withdrawal of the permission by the plaintiff company on 23.6.03 can at best be described that as of an ex-office bearer/ employee of the company. After withdrawal of the permission by the company, such possession would fall in the category of holding over of the premises by ex-employee or agent who was in fiduciary relationship with the company. In the case of Puran Singh (supra) Hon'ble Supreme Court has clearly observed that "the occupation of property by a person as agent or servant at the instance of the owner will not amount to physical possession". In the case of Southern Roadways Ltd., Madurai, Represented by its Secretary Vs. S.M. Krishnan, , the apex court was dealing with the nature of possession of agent whose agency had been terminated. It was held that possession of the agent or employee is not on his own behalf, Therefore, the possession is considered to be of the owner/employer and in such circumstances it is not necessary for the appellant company in that case to file a suit for recovery of possession against the agent who had refused to leave the possession despite the termination of agency. Hon'ble Supreme Court observed that agent whose agency has been terminated can have no right to remain in possession of the suit property after termination of his agency. He has also no right to interfere in the company business. The apex court upheld the order of the learned Single Judge of High Court of Madras granting ad interim prohibitory injunction thereby restraining agent from entering the premises and interfering in the running of the business of the company. It may be pointed out here that the order granting prohibitory injunction passed by the learned single Judge was set aside by the D.B. of the said High Court being of the view that the ad interim injunction could not have been granted as the company has placed no material to show that it had already taken the possession of the premises from the defendants. Commenting on the nature of the agent/ employee's possession, the Supreme Court while referring to its earlier decision in the case of Smt. Chandrakantaben Modi and Narendra Jayantilal Modi Vs. Vadilal Sapalal Modi and Others, , observed that possession of the agent is the possession of the principle and in view of fiduciary relationship, the defendants cannot be allowed to claim his own possession. The agent holds the principle's property only on behalf of the principle. He acquires no interest for himself in such properties. His possession is the possession of the principal for all purposes. The defendants' claim for right to carry on their medical profession in perpetuity from the space/chamber allotted by the company has been given up by themselves by withdrawing suit No. 726/2003 and has been expressly declined by the Division Bench vide order dated 20.6.2003 in FAO (OS) 244/2003. Therefore, at this stage, nature of their possession can be held to be no better of that a agent or ex employee who were allowed to use the premises

because of their fiduciary relationship with the company, being ex-Directors. They cannot claim "settled possession"/"adverse possession" in the sense in which the word is used in the case of *Puran Singh (supra)* . Rather they are under obligation to hand over the possession back to the company. Their refusal to do so is culpable and punishable as an offence u/s 630 of Company Act.

20. Learned counsel for the defendants referred to various other authorities which may be taken note of. In the case of *East India Hotels Ltd. Vs. Syndicate Bank*, the suit was filed u/s 6 of the Specific Relief Act for recovery of possession by the licensee whose license had been terminated. The property was burnt in fire accident and the licensor had taken possession on the pretext of carrying out repair work with the assurance that after repairs possession will be handed over to him. But this was not done. So licensee brought a suit u/s 6 of the Specific Relief Act. The suit was decreed by the Bombay High. Appeal in the Supreme Court was heard by N.M.Kasliwal and K.Ramaswamy JJ. N.M.Kasliwal J. upheld the judgment of the Bombay High Court. In his dissenting judgment K. Ramaswamy J., while dealing with the question of due process of law in para 30 of the judgment, observed as under:

21.What is meant by due course of law? Due course of law in each particular case means such an exercise of the powers by duly constituted tribunal or court in accordance with the procedure established by law under such safeguards for the protection of individual rights. A course of legal proceedings according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. To give such proceedings any validity, there must thus be a tribunal competent by its constitution, that is by law of its creation, to pass upon the subject matter of the suit or proceeding; and, if that involves merely a determination of the personal liability of the defendant, it must be brought within its jurisdiction by service of process within the State, or his voluntary appearance. Due course of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right determination of the controversy by proof, every material fact which bears on the question of fact or liability be conclusively proved or presumed against him. This is the meaning of due course of law in a comprehensive sense."

22. In nut shell due course of law appears to mean something done in pursuance of an order passed by competent authority/ court after giving adequate opportunity of being heard in accordance with the procedures established by law. Obviously, it would mean that if in the present case the court after considering the rival contentions of the parties comes to the conclusion that prohibitory injunction as prayed can be issued, it will meet the requirement of " due course of law". Due course of law does not necessarily mean that the plaintiff has to file a suit for possession. If relief of prohibitory injunction suffices, there is no need for plaintiff to file suit for recovery of possession. In the case of *East India Hotels*

Ltd. (supra) Hon"ble Supreme Court held that even a trespasser or licensee whose license has been terminated is entitled to protection of due process of law. This order was passed by Hon"ble Mr.Justice K. Ramaswamy on an action brought by the licensee whose license had been terminated and the possession was taken from him on the assurance that it will be handed over to him after repairs. In the present case, the defendants have already availed their remedy. They have been denied the relief by the Division Bench in FAO (OS) 244/2003 arising out of suit No. 383/2003 and they have themselves give up all the claims for due protection of law by withdrawing suit No. 726/2003 . Obviously, they cannot be allowed to rake up the same issues again and again. Likewise in other decisions cited by the learned counsel for the defendants namely Rattan Lal Vs. Municipal Corporation of Delhi, ; M/s. Anamallai Club Vs. Government of Tamil Nadu and others, ; and Praful Nyalchand Sanghraj Ka Vs. Dr.Prakash Vs. Pradhan-1990 Maharashtra Law Journal 970, the protection of due process of law was given to the licensee whose license had been terminated. Obviously, these decision cannot help the defendants who have already approached the Court in two earlier suits being No. 383/2003 and suit No. 726/2003 and have been denied the relief. Learned counsel for the defendants vehemently emphasized the analogy between this case and the case of Praful Nyalchand (supra) In that case some Doctors had been allowed to carry on profession from the cabins in the hospital by the respondent. The Doctors were being charged some monthly fee for this facility. When the respondent tried to dispossess the doctors, they approached the court and were granted prohibitory injunction restraining respondent from dispossessing them except through process of law. Learned counsel for the defendants contended that the facts and circumstances of the case in hand are similar to those of the case of Praful Nyalchand (supra). From the judgment in that case, it does not appear that there was every sort of fiduciary relationship between the parties so it cannot be said that the Doctors in that case came to occupy the cabins as agent/employee of the defendants. Moreover, the Doctors were paying monthly remuneration for the facility of cabins allowed to them. In the present case, the defendants were not paying any monthly remuneration to the hospital. Rather as already observed, they were Directors of the plaintiff company and were allowed the facility to carry on their medical profession from the space/ chamber from the hospital because of this fiduciary relationship. As already noticed, the possession of agent/ex-employee is in the eye of law, the possession of the owners/employer. Thus the facts in the said case are distinguishable from that of the present case. In the case of R.V. Bhupal Prasad Vs. State of Andhra Pradesh and others, , the apex court had considered the nature of possession of lessee after termination of the lease. Needless to say that there cannot be any analogy between the possession of tenant whose tenancy has been terminated and the possession of the agent/ex-employee whose employment has been terminated.

23. Learned counsel for the defendants contended that order dated 20.6.2003 of the Division Bench in FAO (OS) 244/2003 in suit No. 383/2003 is based on the

decision of Supreme Court in the case of V.B. Rangaraj Vs. V.B. Gopalakrishnan & Ors. (1992) 73 Com Cas 201 but in subsequent decision in the case of Dr. Renuka Dalta Vs. Solvay Pharmaceutical B.V. & Ors. SLP (c) NO. 18035/2000 the Apex Court has observed that the said judgment requires reconsideration. Further contention of the learned counsel for the defendants is that in the case of M.S. Madhusoodhanan and Another Vs. Kerala Kaumudi Pvt. Ltd. and Others, the decision in the case of V.B. Rangaraj (supra) has been distinguished by the Supreme Court with the observation that in V.B. Rangaraj (supra) the apex court did not hold that all agreements between the shareholders if not incorporated in the Article of Association of the company, are not binding on the company. As already observed the order of the Division Bench dated 20.6.2003 passed in FAO (OS) 244/2003 is very much in force as its operation has not been stayed by the Supreme Court in the SLP nor the decision in the case of V.B. Rangaraj (supra) has been reconsidered by the Supreme Court. Therefore, at this stage, it is not open to this court to take a different view in the matter. This argument is Therefore of no avail.

24. Learned counsel for the defendants have referred to some decisions namely Dayalu Narayan Swamy Vs. Kanika Ramaswamy Dora and Others, and Kundan Mal & Ors. Vs. Thikana Siryara- AIR 1959 Rajasthan Page 14 in support of their contention that a party who is out of possession cannot file a suit for injunction implicate without first seeking decree for possession. In the Orissa case the suit was filed by the plaintiff who had purchased the property from the widow of Balram Dora who had also executed a mortgage deed in favor of the defendant. Even after discharge of the mortgage by operation of section 17 of the Orissa Money Lending Act, defendant continued to be in possession of the property. In these circumstances, it was held that mere suit for injunction is not maintainable and the plaintiff should first seek possession. In the Rajasthan Case, the dispute as to the possession was between the land lord and the tenant and Therefore landlord were denied relief of injunction only because he had not sued for possession. Both these decisions have no relevance to the facts of the present case. As already observed the nature of the possession of defendants in this case is that of a ex-employee holding over after termination of employment. They cannot claim any possession in themselves. Their possession will be for and on behalf of plaintiff and Therefore in view of the observation of the Supreme Court in the case of Southern Roadways Ltd., Madurai, Represented by its Secretary Vs. S.M. Krishnan, , there is no need for the plaintiff to file a suit for possession and the defendants can very well be restrained by means of a prohibitory injunction from interfering with the working of the hospital and from creating any hindrance, nuisance, trespass in the hospital premises. A suit for injunction implicate will not lie where an equally efficacious remedy of possession can be obtained. This is clear mandate of Section 41 of Specific Relief Act. But in a case where because of some jural relationship between the parties, the possession in the eye of law has to be deemed to be that of the plaintiff, the requirement of first obtaining decree of possession will not apply. In the case of Hashmat Husain

and Others Vs. Inayatullah and Others, while analysing section 56 of the Specific Relief Act (Old), the Division Bench of Allahabad High Court Held that the Court will not interfere by way of injunction when the plaintiff is out of possession, unless there is some privity between the parties. In the present case there is privity between the parties as defendants came to occupy the chambers/ cabins in their capacity as Directors of the plaintiff company and in the eye of law their possession is now that of an ex-employee who were allowed the facility because of fiduciary relationship. Therefore, possession will be deemed to be of the company which can file suit for injunction implicate without seeking the relief of possession.

25. The next contention of the learned counsel for the defendants was that an injunction cannot be issued which has the effect of changing the status quo and is in the nature of mandatory injunction. Reference was made to the decision in the case of Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, and Spectrum Technologies USA Inc. Vs. Spectrum Power Generation Company Ltd. & Others 2000(56) (Suppl) 405 . An interim injunction which is in the nature of mandatory injunction which has the effect of granting the final relief claimed in the suit cannot be granted. (Essex Farms Pvt. Ltd. & Another Vs. DTC- 1995 4 AD (Delhi) 239. As already observed in the present case, the defendants cannot be said to be in possession of the cabins in their own right or on their own behalf being Ex-Directors. They came into possession of cabins as Directors of the plaintiff company and thus they were in a fiduciary relationship with the company. So with the termination of their Directorship and withdrawal of the permission, their possession is that of an ex-employee whose employment has been terminated and in such cases a prohibitory injunction can be issued as observed by the Supreme Court in the case of Southern Roadways Ltd., Madurai, Represented by its Secretary Vs. S.M. Krishnan, , In the present case the defendant Doctors are not in the occupation of the cabin all the 24 hours. They come every day in the morning and leave in the evenings. So with the termination of their Directorship and withdrawal of the permission by the plaintiff, status quo would mean that possession remained with the plaintiff company and the defendants can not be allowed to disturb the working of the hospital by committing trespass, nuisance after termination of their Directorship and withdrawal of permission. So the question of disturbing status quo does not arise. Ad interim injunction restraining the Doctors from entering the hospital and from committing trespass, nuisance and disturbing functioning of the hospital is not of mandatory nature nor would it amount to decreeing the suit finally because if the plaintiff did not pursue the suit further it will stand dismissed and naturally ad interim injunction shall stand vacated.

26. Apropos to the question of balance of convenience, learned counsel for the defendants submitted that the defendants who are in settled possession of the cabins will be put to greater inconvenience if they are thrown out from the cabins as compared to plaintiff's hospital which can still avail services of Doctors while they carry on medical profession from the cabins in question. Reliance was

placed on the decision of this court in the case of Ram Narain Agarwal and Another Vs. D.D.A. and Others, learned single Judge of this court has observed that ouster from possession of an immovable property has been recognised as causing irreparable loss and injury to the party concerned. The injury or loss referred to in O. 39 R.2 CPC means any invasion or infraction of a legal right giving rise to the right of action at the instance of the party claiming that right. Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of injunction. In the case of G.M.Modi Research & Medical Sciences Vs . Shanker and others . Learned Single Judge of this court restored the order of learned Civil Judge refusing injunction to hutment dwellers who were engaged as laborers by the contractor while executing work in the hospital premises. While dealing with the question of balance of convenience, in para 21 of the judgment it was observed that in such cases the balance of risk of doing injustice would provide the answer to the question of balance of convenience. Learned Single Judge held that the balance of convenience would lie in favor of the hospital as against the hutment dwellers who have absolutely no right whatsoever to occupy the premises in the hospital. Similarly in the case of Delhi Tourism & Transport Development Corporation Ltd. Vs. M/s D.R.Mehra & Sons 1996 1 AD Delhi 229 while dealing with the question of balance of convenience as between the licensor and licensee whose license had been cancelled, same learned single Judge observed that such licensee cannot be allowed to take undue advantage of the situation and thus enrich himself at the cost of defendant. As already observed in the present case the defendant's claim for right of occupancy of the cabins in the hospitals has been negated by the Division Bench in FAO (OS) 244/2003 in suit No. 383/2003. Besides, the legal position is that the possession is in the eye of law with the hospital. Therefore refusal of the injunction as prayed by the hospital would amount to forcing the defendants on the plaintiff hospital thereby enabling them to enrich themselves at the cost of the plaintiff. The legal injury thus caused to the plaintiff hospital will be far greater than that caused to the defendants who have no legal justification to continue to carry on their medical profession and the injury, loss thus caused to the hospital cannot be measured precisely in terms of money. At the time of the argument, learned counsel for the plaintiff contended that some of the Doctors have already started practice from other hospitals and in proof thereof some prescription issued by the Doctors were produced on record. This fact was not seriously disputed by the learned counsel for the defendants. For this reason, I am inclined to hold that the balance of convenience lies in favor of the plaintiff hospital which will suffer irreparable loss, if injunction is refused.

27. In view of my discussion above, the is 7626/2003 (under O.39 R.1 and 2 CPC) is allowed and by means of interim injunction the defendants are hereby restrained from entering hospital premises, from committing illegal trespass/interference in the working of hospital and also from carrying on any professional work there from during the pendency of suit.

28. It was vehement ally contended by learned counsel for the defendants that it is dedication of the doctors which brought laurels to the plaintiff. "Arun Mittal & Co." who are now majority share holders and directors of company are basically builders. A builder can build a magnificent/edific, he can not build an institution. An institution is a dream fructified by people devoted to some academic excellence and social service yielding job satisfaction as well as moral satisfaction at the same time. The defendants in this case permitted Arun Mittal to purchase the shares of Dr. Chander Vir and his wife, thereby allowing him to become the majority share holder, little realizing that in the process they are going to be subjected to the game of numbers. Perhaps their knowledge/understanding of the provision of Company Act and the manipulative potential of the concept of corporate democracy did not measure up to that of Arun Mittal. The agony of the parent being disowned by a foster child is thus understandable.

29. Therefore, while granting the interim injunction as prayed, I direct this order to be effective after one week so as to enable the defendants to approach the Apex Court to seek appropriate relief in the S.L.P.