(2012) 10 BOM CK 0199

In the Bombay High Court

Case No : Appeal (Lodging) No. 412 of 2012 in Notice of Motion No. 51 of 2012 in Suit No. 27 of 2012

Khushnuma Ibrahim Khan and Raghib Ibrahim Khan, through his Natural Guardian Mrs. Khushnuma Ibrahim Khan — APPELLANT

Vs

Shri Asadullah Khan alias Sameer Khan and Others — RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:
Specific Relief Act, 1963 — Section 6, 6(3)

Citation : (2013) 2 ABR 1172 : (2013) 2 BomCR 461 : (2012) 114 BOMLR 3502

Hon'ble Judges : Mohit S. Shah, C.J;N.M. Jamdar, J

Bench : Division Bench

Advocate : P.K. Samdani, with Mr. Mayur Khandeparkar and Mr. Nivit Srivastav and Associates, for the Appellant; G.C. Singh for Respondent Nos. 1 to 4, Mr. G.S. Hegde with Mr. U.V. Singh for Respondent Nos. 5, 8, 9 and 11, Mr. Sukanta Kamarkar with Mr. R.U. Singh for Respondent No. 10 and Mr. P.Y. Ladekar, Court Receiver Present, for the Respondent

Judgement

Mohit S. Shah, Chief Justice

1. This appeal is directed against the order dated 13 April 2012 of the learned trial Judge of this Court declining to grant the appellant-plaintiffs'' prayer for appointment of Court Receiver with a direction to put the appellant-plaintiffs back in possession of the suit premises and the suit office and by which the learned trial Judge has vacated the ad-interim order of appointment of the Court Receiver, passed on 14 and 16 December 2011. During pendency of the appeal, the said ad-interim order of appointment of Court Receiver was continued from time to time. With the consent of the learned counsel for the parties, the appeal was taken up for final disposal.

2. Appellant No. 1 Khushnuma Khan, aged 40 years is the wife (third wife) of deceased Ibrahim Khan and appellant No. 2 Raghib Ibrahim Khan, aged 16 years is the son of Ibrahim Khan through appellant No.1. Ibrahim Khan married

appellant No. 1 on 18 December 1993. In the present suit filed on 12 December 2011, the appellants'' case is that both the appellants had been residing in the suit flat being A-505, Noor-e-Jahan Complex, Pipe Road, Kurla (West), Mumbai-400070 prior to their forcible dispossession between 2nd and 5th December 2011. Appellant No. 1 has been residing in the suit flat since the date of her marriage on 18 December 1993 whereas appellant No.2, aged 16 years since the date of his birth in 1996. It is the case of the appellants that the suit flat was the self acquired property of the deceased purchased under sale agreement dated 6 October 1992 read with deed of confirmation dated 13 May 1998. By a Gift Deed alongwith Affidavit-cum-declaration dated 18 February 1994, Ibrahim Khan had gifted/released all his rights in the suit flat in favour of appellant No. 1 absolutely.

It is also the appellants'' case that since 2007, appellant No. 1 alongwith her husband Ibrahim Khan were in occupation of the suit office being 201/202, 2nd floor in the Big 3 Building, 88, Anandilal Poddar Marg, Marine Lines, Mumbai -400002 from where appellant No. 1 was carrying on her profession of Advocates and Solicitors in the name of M/s. K.K. Associates. It is the case of the appellants that the suit office was also the self acquired property of the deceased Ibrahim Khan and he had executed a general power of attorney dated 14 June 2007 in favour of appellant No.1.

3. The appellants'' further case is that Ibrahim Khan had gone to Delhi on 28 November 2011 to attend the wedding of a friend of his scheduled on 30 November 2011. At around 8.30/9.00 p.m. on 1 December 2011, when appellant No. 1 called on the cell phone of Ibrahim Khan, it was answered by one of his friends Kasim who informed appellant No. 1 that Ibrahim Khan had suffered from brain haemorrhage and was taken to the Sanjivan hospital at Delhi. The appellant took the early morning flight to Delhi on the very next day. However, at around 9.30/10.00 a.m., doctors declared Ibrahim Khan as dead and at the instance of respondent No. 1 (brother of deceased), the body of the deceased was taken to Bhagalpur, Bihar, the native place of the deceased. The appellant also reached Bhagalpur on 4 December 2011 alongwith the body of the deceased and the last rites were performed the same afternoon. On 5 December 2011, appellant No. 1 received a call from her next door neighbor Nadeem that lock of the suit flat was broken and new lock was placed by unknown person after removing her household goods for the last 3 days. Thereupon, appellant No. 1 called up her house aid Niranjan who informed appellant No. 1 that respondent Nos. 2, 3 and 4 had forcibly thrown him out of the suit flat and taken physical possession thereof. When appellant No. 1 contacted her office staff, they also informed her that defendant No. 4 had gone to the suit office and snatched the keys from them and locked the same.

4. On 6 December 2011, the appellants arrived at Mumbai and went to the suit flat, but found that the locks were changed. The appellants immediately lodged the police complaint on 6 December 2011 itself, but no action was taken. Hence, the appellants instituted the present suit against respondent Nos. 1 to 4, being

Suit No. 27 of 2012 on 12 December 2011 u/s 6 of the Specific Relief Act, 1963. On 14 December 2011, the learned Single Judge of this Court passed an order appointing Court Receiver in respect of the suit flat and the suit office. On behalf of respondent Nos. 1 to 4, it was stated that they were not in possession of the suit flat, but respondent Nos. 5, 11 and 12 were. On 16 December 2011, the Court Receiver visited the suit flat and found respondent Nos. 5 to 9 in possession of the suit flat and took over formal possession of the flat. Since the suit office was found locked, the Receiver could not take over possession of the suit office. The learned Single Judge of this Court (Coram: S.J. Vazifdar, J.) allowed the chamber summons for impleading respondent Nos. 5 to 12 as defendants in the suit.

5. The respondent Nos. 1 and 5 filed their affidavits in reply. Affidavit in Rejoinder was filed by appellant No. 1 on 28 February 2012. After hearing learned counsel for the parties, another learned Single Judge of this Court (Coram: S.C. Dharmadhikari, J.) passed the impugned order dated 13 April 2012 rejecting the prayer for appointment of the Court Receiver and the prayer for direction to the Receiver to hand over possession of the suit flat and the suit office to the appellants. However, the learned Single Judge granted the prayer to restrain the respondents from creating third party rights over the suit flat and the suit office.

6. Before narrating the rival submissions, it is necessary to note that the array of parties is as under:-

Appellant Plaintiffs

1. Wife of deceased Ibrahim Khan

2. Son of Ibrahim Khan and Appellant No.1

Vs.

Respondents Defendants

1. Younger brother of deceased

2. Elder brother of deceased

3. Wife of Defendant No.2

4. Son-in-law of Defendant Nos. 2 & 3

5. Son from 1st wife of deceased

6. Brother of Defendant No. 3

7. Mohd. Dayan Khan (unrelated)

8. Wife of Defendant No. 12

9. Miss Rani (unrelated)

10. Son from 2nd wife of deceased-Tabish Ibrahim Khan

11. Son from 1st wife of deceased

12. Son from 1st wife of deceased

7. Learned counsel for the appellants submitted that substantial and unimpeachable documentary evidence was placed by the appellants on record in support of their contention that they were in possession of the suit flat and the suit office immediately prior to their dispossession between 2th and 5th December 2011 when the appellants were in Delhi and in Bihar attending to the last rites upon the sudden death of Ibrahim Khan (husband of appellant No. 1 and father of appellant No.2) in Delhi on 2 December 2011. The respondents had resorted to the most high-handed and malafide act of dispossessing the appellants from the suit flat and the suit office. Inspite of the voluminous evidence placed by the appellants on record, the learned Single Judge has erred in holding that the appellants have not prima facie proved their case and that their version is not consistent.

8. Learned counsel for the appellants has invited our attention to the documents relied upon by the appellants as well as the documents relied upon by the respondents and submitted that when the said documentary evidence is tested on the touch-stone of preponderance of probabilities, the only conclusion possible is in favour of the appellants. Plaintiff has relied upon almost 50 documents in respect of the suit flat. While first four documents are of the year 1992 to 1998, three documents are of the year 2008, seven documents are of the year 2009 and 23 documents are of the years 2010-2011 prior to the date of dispossession in December 2011 and the remaining documents are of the year 2012 which support the appellants'' case that in the year 2011 or prior thereto, the appellants had given their address of the suit flat.

Similarly, the appellants have relied upon 31 documents in support of their case that the appellants were in possession of the suit office.

9. Learned counsel for the appellants has relied upon the following documents:-

(A) It is submitted that appellant No. 1 being a practicing advocate had found it more convenient for making the arrangement of appellant No. 2 son as a young child studying in a school near her father''s place at Mira Road, so that her parents can look after the young boy but after the son passed 10th standard examination, he was admitted to the 11th standard (FYJC) in HR College of Commerce and Economics at Dinshaw Wachha Road, Churchgate, Mumbai-400020 which is close to the suit office of appellant No.1. On 11 August, 2011, the deceased himself had signed the application form of appellant No. 2 for admission to Junior College (11th Standard) in commerce faculty of HR College of Commerce and Economics near Churchgate. In the said application form, the following two addresses were given:-

Address in Mumbai - The suit office address and

Hometown address - the suit flat address of Kurla (West), Mumbai being A-505, Noor-e-Jehan Complex, Pipe Road, Kurla (West), Mumbai-400 070.

It is submitted that the said application form obtained from the HR College of Commerce and Economics where appellant No. 2 has been studying since August 2011 is more than sufficient to clinch the issue in favour of the appellants.

(B) It is also submitted that when the Court Receiver prepared the list of items lying in the suit flat on 16 December 2011, the electronic items lying in the suit flat were those which were purchased by appellant No. 1 on 28 February 2008 from Gala Electronics with the address of the suit flat indicated in the invoice (Exhibit 4-page 211).

(C) It is submitted that respondent No. 1 (younger brother of deceased) had borrowed a sum of Rs. 10 lakhs from appellant No. 1 on 7 and 9 June 2011 and he had also given acknowledgment dated 9 June 2011 in favour of appellant No. 1 with the address of the suit flat. It is submitted that when respondents themselves acknowledged that appellant No. 1 was residing in the suit flat on 9 June 2011, the appellants'' possession on the date of dispossession between 2nd and 5th December 2011 is required to be believed especially when the appellants had lodged a complaint to the police immediately on arrival in Mumbai on 6 December 2011.

(D) Strong reliance is placed on several documents including-

In October 2009, Regional Passport Authority issued passports of the appellants endorsing the address of the suit flat. HDFC Bank statements and correspondence in the year 2010 and 2011. ICICI Bank Credit Card statement of 2010-2011 also show the name of appellant No. 1 at the suit address.

10. The learned counsel for the respondents have objected to maintainability of this appeal.

11. It is the specific case of the respondents that prior to 2009, the appellants were residing in the suit premises but the appellants left the suit flat in the middle of 2009 upon separation of appellant No. 1 from the deceased and thereafter, the appellants were never in possession of the suit flat. It is the specific case of the respondents that the appellants have been residing at the premises of the father of appellant No. 1 at Mira Road, that appellant No. 2 (son of the deceased) is also studying in a school at Mira Road. It is the specific case of the respondents that the deceased was residing in the suit flat alongwith Mohd. Mehtab Khan (respondent No. 5) who is the son of the deceased from the first wife, that the respondents have inherited the suit flat upon the death of Ibrahim Khan. If at all the appellants are seeking possession of the suit flat and the suit office, it can only be done by filing the suit for administration of the suit property or suit for partition by the heirs left by the deceased.

12. Learned counsel for the respondents have relied upon the following documents in support of their case that the appellants were not residing in the

suit flat after they left the suit flat in 2009:-

(i) Copies of LIC renewal premium receipts from 2009 to 2010 having the address at A/101, Siddique Apartment, Naya Nagar, Mira Road (East), Dist. Thane. (address of father of appellant No.1)

(ii) Mark sheet issued by the Council for ISCE, New Delhi with the Mira Road address of appellant No.2.

(iii) On-line submission form of appellant No. 2 for admission to FYJC for the year 2011-2012.

(iv) Copies of visiting card of appellant No. 1 with address Ashoka Centre, Shop No. 3 2/33, 2nd floor, L.T. Marg, Mumbai-1.

(v) Election papers:-

(a) Election nomination form.

(b) Election identity card of appellant No. 1 at the Mira Road address.

(c) Extract for the voters'' list showing the address of appellants at Mira Road.

(d) Copy of pamphlet for the elections of Mira-Bhayandar Municipality showing that appellant No. 1 had contested the said election to Mira Bhayandar Municipality.

(di)

13. In rejoinder, learned counsel for the appellants has submitted that since appellant No. 1 was residing with her parents at Mira Road prior to marriage, her name was entered in the electoral list of Mira Road and that after her dispossession from the suit flat in Kurla in December 2011, the appellants had no other alternative but to go back to her parents'' place at Mira Road and she was persuaded to contest Municipal elections for the city of Mira Bhayandar constituency reserved for women which elections were held on 12 August 2012, as per the affidavit dated 13 September 2012 of appellant No.1. It is also submitted that in the rejoinder affidavit dated 28 February 2012 of appellant-plaintiff No.1, the appellants have given explanation for each of the documents relied upon by the respondent-defendants.

14. Having heard the learned counsel for the parties, we have given anxious consideration to the rival submissions.

15. We may first deal with the preliminary objection raised by learned counsel for the respondents about maintainability of this LPA. It is submitted that in view of the bar created by subsection (3) of section 6 of the Specific Relief Act, 1963, the present appeal is not maintainable. Sub-section (3) of section 6 reads as under:-

6(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

16. In Vinita M. Khanolkar Vs. Pragna M. Pai and Others, , the Supreme Court has held that when a Single Judge of the Bombay High Court passes an order in a proceeding u/s 6 of the Specific Relief Act, notwithstanding the bar u/s 6(3) of that Act, the appeal to a Division Bench from such order, is maintainable under clause 15 of the Letters Patent of the Bombay High Court which is a special law for this Court and which must prevail in case of conflict between a special law and a general law. The said decision has been approved by a Constitution Bench of the Supreme Court in P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others, .

In view of the aforesaid decisions of the Apex Court, we have no hesitation in holding that the present appeal is maintainable under clause 15 of the Letters Patent

17. Coming to merits of the controversy between the parties, the respondents have not disputed the appellants'' case that on 28 November 2011, deceased Ibrahim Khan had gone to Delhi for attending the wedding of his friend, scheduled on 30 November 2011 and that on 1 December 2011 Ibrahim Khan was rushed to a hospital in Delhi as Ibrahim Khan had suffered brain haemorrhage. The respondents have also not disputed the fact that the appellants had rushed to Delhi in the early morning hours of 2 December 2011 and that Ibrahim Khan was declared dead by doctors at around 9.30/10.00 a.m. on 2 December 2011 itself. The respondents have also not controverted the appellants'' case that at the instance of respondent No.1, the body of the deceased was taken to Bhagalpur in Bihar and the appellants had gone to Bihar with the body of the deceased for the last rites which took place in the afternoon of 4 December 2011. It is an admitted position that when the alleged dispossession took place between 2nd and 5th December 2011, both the appellants were far away from the suit flat and the suit office and that after returning to Mumbai on 6 December 2011, the appellants had lodged the police complaint (Exhibit "K", page 472).

18. The aforesaid undisputed facts are further required to be seen in light of the following documents:-

(i) When the Court Receiver appointed by the learned Single Judge by order dated 14 December 2011, visited the suit flat on 16 December 2011 and found the suit flat in possession of respondent Nos. 5 to 9, upon inspection the suit flat was found to be having electronic items for which appellant No. 1 produced the invoice No. 492 dated 28.11.2008 issued by Gala Electronics in the name of appellant No. 1 for purchase of those electronic items lying in the suit flat. The said bill was for the following electronic gadgets:-

The bill dated 28 February 2008 gave the address of the suit flat as address of appellant No. 1.

19. We find considerable substance in the submission made on behalf of the appellants that when appellant No. 1 had purchased the electronic gadgets of the

value of Rs. 1,17,500/-, the appellants would not have left those gadgets in the suit flat, if at all she had separated from the deceased and left the matrimonial home in 2009.

20. Secondly, the appellants have relied upon the document dated 9 June 2011 signed by Sameer Nurrullah Khan, proprietor of M/s. Faizal Management Services. Sameer is the alias name of respondent No. 1 Asdullah Khan who is younger brother of the deceased. The said letter dated 9 June 2011 is written by respondent No. 1 to appellant No. 1 at her address of the suit flat acknowledging receipt of Rs. 10 lakhs vide two cheques of Rs. 5 lakhs each bearing Nos. 345569 and 3455670 dated 7 June 2011 and 9 June 2011 respectively drawn on Konkan Mercantile Co-operative Bank Ltd. Respondent No. 1 had taken the said amount as loan for the purpose of investment in his business and the said amount was to be repaid on/or before 9 December 2011 with interest of Rs. 1 lakh per quarter.

21. Since, according to learned counsel for respondent No. 1, respondent No. 1 (younger brother of deceased) has disputed his signature on the aforesaid acknowledgment dated 9 June 2011, in order to show that appellant No. 1 had given the cheques dated 7 and 9 June 2011 for Rs. 5 lakhs each and that the said Account Payee cheques were debited in her account for payment to respondent No. 1, appellant No. 1 has produced a Photostat copy of the relevant extract of the cheque slip as well as the photostat copy of the relevant extract of the pass-book of appellant No. 1 for the savings account with Konkan Mercantile Bank Ltd. There are two clear entries of 9 and 10 June 2011 indicating that by cheque Nos. 345569 and 345570 respectively, two amounts of Rs. 5 lakh each were paid to Faisal Management Services, which is admittedly the sole proprietory firm of respondent No.1. These pass-book entries, therefore, support the appellants'' case that defendant No. 1 had taken Rs. 10 lakhs from appellant No. 1 in June 2011.

22. While admitting receipt of Rs. 10 lakhs by the aforesaid cheques in June 2011, the learned counsel for respondent No.1, however, sought to contend that the said amounts were not given by appellant No. 1 to respondent No. 1 by way of loan, but by way of repayment of loan taken by appellant No. 1 from respondent No. 1 in April 2011. In support of this contention, reliance is placed by respondent No. 1 on the ICICI Bank statement for April 2011 for the account of respondent No. 1 (in the name Faisal Management Services), particularly entry showing that by cheque No. 706691, a sum of Rs. 11 lakhs was paid from the said account of respondent No. 1 to appellant No.1, which was debited in the bank account of respondent No. 1 on 26 April 2011.

23. On behalf of appellant No. 1, however, it is pointed out that the relevant extract of passbook of appellant No. 1 with Konkan Mercantile Bank Ltd. itself shows that appellant No. 1 had paid Rs. 10 lakhs to respondent No. 1''s proprietory firm Faisal Management Services by cheque No. 345568 and, therefore, respondent No. 1 had returned the said amount to appellant No. 1 in April 2011, alongwith quarterly interest of Rs. 1 lakh per quarter as per similar

arrangement recorded in the letter dated 9 June 2011 for the subsequent loan given by appellant No. 1 to respondent No. 1 in June 2011.

24. The learned counsel for respondent No. 1, thereupon vehemently submitted that no amounts were due from respondent No. 1 to appellant No. 1 and that it was beyond the scope of the present suit u/s 6 of the Specific Relief Act to raise any such contentions about the alleged liability of respondent No. 1 to appellant No. 1.

25. The submission is misconceived. Though we are obviously not deciding any money suit between the parties, what is relevant is that learned counsel for respondent No. 1 in terms admitted that there were monetary transactions between respondent No. 1 and appellant No. 1 in the year 2011. We do find from the above documents that on 22 January 2011, an amount of Rs. 10 lakhs was paid from the account of appellant No. 1 to Faisal Management, of which respondent No. 1 is the sole proprietor. Thereafter, in last week of April 2011, respondent No. 1 paid Rs. 11 lakhs to appellant No. 1 which amount was debited in the ICICI Bank Account of respondent No. 1 on 26 April 2011. Again appellant No. 1 paid Rs. 10 lakhs to respondent No. 1 by two cheques (rupees 5 lakhs each) in June 2011. This admitted position about monetary transactions between respondent No. 1 and appellant No. 1 not only falsifies the case of the respondents about the alleged separation of appellant No. 1 from deceased Ibrahim Khan in the year 2009 but also substantiates the appellants'' case that it was natural for respondent No. 1 to indicate the address of the suit flat as the address of appellant No. 1 in June 2011 when two cheques of Rs. 5 lakhs each were admittedly taken by respondent No. 1 (younger brother of deceased Ibrahim Khan and sole proprietor of Faisal Management) from appellant No. 1 (wife of deceased Ibrahim Khan) in the life-time of Ibrahim Khan.

26. Much is argued by the respondents about appellant No. 2 studying in a school at Mira Road. Appellant No. 1 had specifically stated in her rejoinder affidavit of 28 February 2012 that in 2001 when appellant No. 2 was a young child and appellant No. 1 was practicing as an advocate, appellant No. 1 and her husband had found that there were no good schools near the suit flat in Kurla area or nearby locality at that time and that there was nobody to take care of the child when appellant No. 1 would be away for her professional work and the deceased husband was busy with his business, political and social activities and used to travel abroad and other places in India and, therefore, they thought necessary to put the child in a good school near her parents place at Mira Road being Ramaben Bahubhai Kanakia School, I.C.S.E. Board, Beverly Park. Hence, for the purpose of local guardian, the address of the house of parents of appellant No. 1 was mentioned as the address of the son. On week days, the son would study in the school and stay with the grand parents and every week end appellant No. 1 and her husband used to bring appellant No. 2 for stay in the suit flat, but when the son (appellant No.2) passed his I.C.S.E. examinations in March 2011, thereafter in August 2011, appellant No. 2 secured admission in HR

Commerce College in FYJC and continued to reside with appellant No. 1 and the deceased in the suit flat. The deceased used to drop appellant No. 2 at the said college everyday before coming to the suit office and after his college hours, appellant No. 2 would be at the suit office for his tuition, from where all three used to go to the suit flat together.

We can barely visualize the difficulties of a woman trying to do fine balancing between her roles as career woman, mother, wife, daughter-in-law, daughter and woman per se - and not necessarily in that order.

27. At the hearing of the appeal, the appellants have produced a photostat copy of the application form given to the H.R. College at Churchgate, Mumbai which was signed by the deceased on 11 August 2011. This document also, therefore, not only falsifies the case of the respondents about alleged separation of the appellants from Ibrahim Khan, but also the allegation that appellant No. 2 son was studying in a school at Mira Road. The application gave the address of the suit flat at Kurla as home address and the address of suit office near the Junior College at Churchgate as Mumbai address.

28. Since it is the case of the respondents that appellant No. 1 wife went to reside with her parents at Mira Road in middle of 2009, it is necessary to consider the following twenty unimpeachable documents of the years 2009 (after June 2009), 2010 and 2011 produced with the plaint or with the rejoinder affidavit dated 28 February 2012 of appellant No.1:-

29. The learned counsel for the respondents submitted that the documents being relied upon by the appellants could not have been carried by them to Delhi or elsewhere and that such documents normally would be lying in the suit flat, if at all, the appellants were in possession of the suit flat immediately prior to their going to Delhi on 2 December 2011. It is, therefore, vehemently submitted that admittedly when the appellants had no access to the suit flat from 5 December 2011 onwards when they returned to Mumbai till the date of filing the affidavit on 28 February 2012, the documents cannot be treated as genuine.

30. The learned counsel for the appellants has thereupon pointed out that some of the documents were sent by the bankers of appellant No. 1 through e-mails (rejoinder para 16), some were discarded and given to an office peon (rejoinder para 20) and the other documents were lying in the files of appellant No. 1 which were lying with D.C. Tejpal & Co., Chartered Accountants. The said Chartered Accountants are filing the income tax returns of appellant No. 1 as certified by their certificate dated 3 October 2012. The learned counsel has also invited our attention to the statement made on oath in para 20 of the rejoinder dated 28 February 2012 that some of the files and documents during the renovation of their premises were removed. In fact, one of the documents relied upon by the appellants is facebook excerpts of appellant No.2- son sharing the pictures of the newly renovated suit flat.

31. We find considerable substance in the submission made on behalf of the

appellants that the documents like challan of professional tax, insurance policies, HDFC bank''s statements, HDFC bank''s correspondence, ICICI Bank''s post for the credit card etc. during the period June 2009 and June 2011 would naturally be lying in the accounts file of appellant No. 1 which was lying with the Chartered Accountant and therefore, they would not be in the suit flat.

32. The passports of both the appellants were issued by the Regional Passport Authority in October 2009 endorsing the address of the suit flat as their residential address. This is weighty documentary evidence in favour of the appellants. It is the case of the respondents that appellant No. 1 resided in the suit flat till middle of 2009 and thereafter left the suit flat and started residing with her parents at Mira Road and thereafter she had never resided in the suit flat. However, the passports of appellants were delivered in October 2009 at the suit flat. There is nothing on record to indicate that appellant No. 1 had separated from the deceased in 2009. On the contrary, the application made by the deceased father for admission of appellant No. 2 in the Junior College on 11 August 2011 with address of the suit flat and the office address as the address near the college belies the case of the respondents about the alleged separation.

33. We may now refer to the documents relied upon by the respondents in support of their case that the appellants were residing at Mira Road in Mira-Bhayandar Municipality.

34. As regards the election papers of appellant No. 1, we find considerable substance in the explanation given on behalf of appellant No. 1 that since appellant No. 1 was residing with her father at Mira Road prior to her marriage, her name was included in the voters'' list right from the beginning and that generally a lady would not bother to get her name removed from the voters'' list in Mira Bhayandar Legislative Assembly constituency to get it included in Kurla constituency. Similarly, her contesting for election to Mira Bhayandar Municipality in August 2012 is not inconsistent with her being in possession of the suit flat till 4 December 2011, because after the death of her husband on 2 December 2011 and after her dispossession from the suit flat thereafter in the first week of December 2011, she had no other alternative but to go to her parents'' place at Mira Road within the municipal limits of Mira-Bhayandar Municipality.

35. The respondents have produced copies of the LIC renewal intimations and payment receipts produced by respondent No. 1 (younger brother of the deceased) and by respondent No. 5 (son from 1st wife of deceased) with their respective affidavits. Since these receipts show the address of appellant No. 1 at Mira Road, that is her father''s address, the respondents have vehemently submitted that these documents support the case of the respondents and negative the case of the appellants.

36. We find that appellant No. 1 has pointed out in her affidavit-in-rejoinder that the LIC renewal intimations and receipts are in respect of LIC Policy which was taken by her father in or around 2003 in her name. The very fact that

respondent No. 1 has produced these receipts shows that the documents have been obtained by the respondents by breaking open her cupboard in the suit flat. Respondent Nos. 1 to 5 have failed to explain as to how these documents have come into their possession.

37. The respondents have also relied upon copy of the statement of marks issued by the school at Mira Road and on-line admission registration form. The explanation given by appellant No. 1, which is already discussed hereinabove, is quite convincing that when appellant No. 2 was a young child in the year 2001 and was to be admitted to standard I in a school, on account of her professional engagements as a lawyer, appellant No. 1 and her businessman husband found it convenient to get the son admitted to the ICSE school at Mira Road and that after the son passed his ICSE examination in March 2011, in August 2011, appellant No. 1 and the deceased husband secured admission of the son (appellant No. 2) in the Junior College at H.R. Commerce College near Churchgate for which the application form was also signed by his father (Ibrahim Khan) on 11 August 2011. The statement of marks issued by the school for the period during which appellant No. 2 studied in the school at Mira Road near his grand parents house prior to June 2011 cannot, therefore, advance the respondents'' case.

38. As regards the on-line registration form filled in June 2011, it is the appellants'' case that the Government policy is to give preference to the students who have passed out from the school in the same area and, therefore, since appellant No. 2 had passed his ICSE examination from RBK School at Mira Road, appellant No. 2 had given the help centre name as RBK School at Mira Road, Mumbai and guidance centre was also shown as Science and Commerce Junior College, Mira Road. it would be easier to get admission to a junior college at Mira Road if the correspondence address is also shown as Mira Road. The online registration form was submitted on 24 June 2011 but thereafter the admission was obtained in the college near Churchgate, Mumbai as per the application submitted by appellant No. 2 and deceased father Ibrahim Khan on 11 August 2011.

39. Defendant No. 5 has produced a copy of the bank slip dated 4 April 2011 to show that the bank slip is purportedly issued by the Branch Manager of State Bank of India in April 2011 in respect of the bank account of respondent No. 5 with address of the suit flat.

The appellants have submitted that respondent No. 5 has not placed anything on record to show as to who had introduced respondent No. 5 for opening of the alleged bank account and that respondent No. 5 has managed to create an account with the address of the suit flat.

We had also called upon the respondents to show the original pass-book from which the slip in question is shown as a copy. We found that after 28 April 2011, when the pass-book was first issued, there were hardly any significant transactions till December 2011 when the dispossession of the appellants from the suit flat took place. This fact also, therefore, lends credence to the case of the appellants.

40. Learned counsel for the respondents have also relied upon a visiting card showing the address of the house of the parents of appellant No.1. Appellant No. 1 has in her rejoinder specifically stated that she has never put her parents'' address anywhere and the alleged visiting card is a fabricated and got up document. In para 19 of the rejoinder, it is stated that even when the suit office was being renovated, in April - May 2011, appellant No. 1 and her husband had temporarily shifted to a small office at Ashoka Centre, L.T. Marg, Mumbai. However, they shifted back to the suit office in November 2011.

41. In these proceedings, it is the specific case of the respondents that appellant No. 1 was residing with the deceased till 2009 when there was separation between them. However, in his statement in C.R. report dated 16 December 2011 of the police, respondent No. 5 stated that he was residing in the suit flat since last 14 to 15 years with respondent Nos. 6, 7, 8 and 9 (page 176 of the paper-book).

42. On the basis of averments in the affidavit dated 15 September 2012 of respondent No. 5, it was contended that on 20 July 2010, appellant No. 1 purchased a car giving the Mira Road address as her address, as reflected in the Car Registration Book. Mira Road address is admittedly the address of father of appellant no. 1. The submission is that if appellant No. 1 was residing in the suit flat in Kurla within the limits of Mumbai Municipal Corporation, she could not have given the address of her father''s flat within limits of Mira Bhayandar Municipality. The submission proceeds on the premise that if her matrimonial home is in Kurla, she would have no right in her father''s flat in Mira Road. The premise is misconceived. Even after marriage, the daughter can call her father''s home as her own house. Case of appellant No. 1 is that besides residing with her husband in the Kurla flat she was also going to her father''s flat at Mira Road where her son was studying till March 2011. Assuming worst against appellant No.1, may be, she might have given her Mira Road address to RTO for the benefit of lower octroi rates in Mira-Bhayandar Municipality, but that is a matter for the concerned authority to consider. But brazen and forcible dispossession of the appellants by sheer muscle power cannot be justified on the basis of such a document.

43. Respondent No. 5 has also relied upon certificate dated 13 February 2012 of Secretary of Noor-e-Jahan Complex Cooperative Housing Society Ltd. (page 167) stating as under.

This is to certify that flat A-505 is in the name of Mr. Ibrahim Noorullah Khan, who was a Member of our society since 1994 and was residing in Flat No. 505-A of the Building Noor-e-Jehan Complex-I of the society, along with the following member of his family:

This certificate is issued as per the request of the above named son

The certificate purportedly issued or signed by the Secretary of the society, is expressly issued at the instance of respondent No. 5 as mentioned in the letter itself. In fact, the Secretary of the society had issued the following certificate dated 26 August 2009 during the lifetime of Ibrahim Khan (Exhibit E-4 to the plaint) (page 449).

This is to certify that Mr. Ibrahim Noorullah Khan is a Member of our society for several years and is occupying and residing in Flat No. 505/A of the Building Noor-e-Jahan Complex of the society. He is residing with his family consisting of his wife and son whose names are as under:

This certificate is issued as per the request from Ibrahim Noorullah Khan.

There was no dispute between the parties when the above certificate was issued in August 2009.

44. The respondents have placed reliance upon affidavit of Badre Alam Shaikh (father of Nadeem Shaikh), affidavit of Sayed Mohsin and the affidavit dated 15 September 2012 of Nadeem Shaikh, aged 25 years, in support of their case. However, we are of the view that the oral version of the neighbours around the suit flat would not be of any significance when voluminous unimpeachable documentary evidence is produced by the appellants in support of their case and the documentary evidence relied upon by the respondents has not been found to be supporting the case of the respondents. It is obvious that the exercise of examining these affidavits of the neighbours would be utterly futile, because the very fact that the respondents made the Secretary of the Co-operative Housing Society to issue second certificate in favour of respondent No. 5 in February 2012 which is diametrically opposite to the certificate issued by the Secretary in favour of the appellants in August 2009 speaks volumes about the fear which the respondents have succeeded in generating amongst the neighbours. Nadeem aged 25 years who informed appellant No. 1 on telephone on 5 December 2011 about the trespass committed by some of the respondents over the suit flat (as mentioned in the complaint lodged before the police on 6 December 2011 (page 473) and in the plaint filed on 12 December 2011,) has virtually backtracked in his affidavit dated 15 September 2012 obviously under pressure of the respondents.

45. It is also pertinent to note that the learned counsel for the appellants had time and again submitted that the passports of respondent Nos. 5 to 9 do not have the suit address as the residential address. Inspite of the repeated submissions to that effect, respondent Nos. 5 to 9 have not produced copy of any of the passports in support of their case that they have been residing in the suit flat prior to December 2011. As against that, the passports of both the appellants were delivered at the suit flat in October 2009 with the address endorsement for the suit flat.

46. It is submitted by learned counsel for the respondents that according to the appellants'' case in the plaint, they were dispossessed by respondent Nos. 1 to 4 on 5 December 2011, but respondent Nos. 3 and 4 (defendant Nos. 3 and 4) left Mumbai on 3 December 2011 and returned to Mumbai on 14 December 2011 and respondent No. 1 was also with the deceased from 1 December 2011 till the final rites. When the Court Receiver went to take possession on 16 December 2011, respondent Nos. 5 to 9 were found to be in possession of the suit flat. Hence the appellants have come with a false case.

47. Having regard to the fact that respondent Nos. 1 to 4 and 5, 6, 8 and 9 are related to each other, being brothers of the deceased or children of the first or second wife of deceased Ibrahim Khan, we are of the view that this argument does not carry the respondents case any further. It is clear that after the appellants left for Delhi in the morning of 2 December 2011 and before they returned to Mumbai on 6 December 2011, some of the respondents forcibly opened the suit flat and took over possession of the suit flat, when the appellants were busy attending to the dead body of Ibrahim Khan and performing the last rites in Bihar where the dead body was taken, at the insistent of respondent No. 2 against the desire of appellant No. 1 to bring the body of Ibrahim Khan to Mumbai for the last rites.

48. Having carefully considered the documentary evidence on record, we have no hesitation in coming to the conclusion that the appellants were residing in the suit flat till they left for Delhi in the morning of 2 December 2011 and that it was when they were far away in Delhi and later in Bihar for performing the last rites of deceased Ibrahim Khan that they were illegally dispossessed in their physical absence.

49. Now, coming to the dispute about possession of the suit office, the appellants have relied upon as many as 31 documents in support of the case that appellant No. 1 was in possession of the suit office till dispossession in December 2011. While six documents are of the period 14 June 2007 to 15 January 2009, we do not propose to refer to the same because it is the case of the respondents that the separation between appellant No. 1 and deceased Ibrahim Khan took place in middle of 2009. However, as many as 16 documents produced by appellant No. 1 for the period from 15 September 2009 to 2012 support her case that appellant No. 1 was in possession of the suit office. There are electricity bills, MTNL Telephone bills, HDFC bank statements and HDFC bank correspondence in the name of Law Firm of appellant No. 1 at the address of the suit office and all such bank statements and bank correspondence were delivered to appellant No. 1 at the address of the suit office. Even on 15 December 2011 (Exhibit "X" to the plaint), this Court on the administrative side issued a certificate in the name of the Law Firm of appellant No. 1 endorsing the address of the suit office. These documents produced by appellant No. 1 from her file lying with her chartered accountant are documents found from natural custody.

50. It is only respondent No. 10 who claims to be in possession of the suit office.

Respondent No. 10-Tabish Ibrahim Khan is aged about 22 years and no explanation is forthcoming from the respondents as to why out of all other family members, only respondent No. 10 was given the suit office by the deceased. Only because at the time of visit by the Court Receiver, respondent No. 10 produced the key of the office premises cannot be said to be tilting the balance in favour of the respondents, because it is the specific case of the appellants that after the respondents took over forcible possession of the suit flat, they had gone to the suit office and threatened the office staff to hand over the keys of the suit office.

51. Having come to the conclusion that the appellant-plaintiffs were in possession of the suit flat and the suit office till they went to Delhi in the early morning of 2 December 2011, after they came to learn late in the night of 1 December 2011 that the deceased had suffered from brain haemorrhage and was taken to the hospital where the deceased was declared dead by the doctors on 2 December 2011, the question is what orders should be passed in the notice of motion which has been rejected by the learned Single Judge.

52. In a suit for possession u/s 6 of the Specific Relief Act when a Court comes to the conclusion at the interim stage that the plaintiff was forcibly dispossessed from the suit flat, appropriate interim orders are required to be passed in light of the settled legal position. Our attention has been invited to the following decisions of this Court as to what orders should be passed at the interim stage in a suit u/s 6 of the Specific Relief Act, 1963,

In Cian De Souza Vs. Arun Gunjal and Mrs. Vimal Arun Gunjal, , Hon''ble Mr. Justice R.M. Lodha speaking for a Division Bench of this Court (as His Lordship then was), held that when the material on record, prima facie, indicates that the plaintiff was forcibly dispossessed from the suit flat, the proper interim order would be to appoint the Court Receiver for the suit flat and to direct the Court Receiver to appoint the plaintiff as an agent of the Court Receiver.

Similarly, in Deepak Eknath Dhavan v. Anwar Faramosh Khan and another, 2004 (4) Mah. L.J. 1, another Division Bench of this Court speaking through Hon''ble Mr. Justice H.L. Gokhale (as His Lordship then was), held that once the Court comes to the conclusion even at the interim stage that the plaintiff had been dispossessed within six months prior to the date of filing of the suit, the suit would take many years to reach for final hearing and, therefore, the Court would be right in passing the mandatory order of appointing the Court Receiver for the suit premises with further direction to the Court Receiver to hand over possession to the plaintiff. The Court further observed that the manner in which the police authorities had acted in the case in not rendering the assistance as claimed by the plaintiff was most disturbing.

Similar observations must be made in the facts of the present case that inspite of the complaint filed by appellant No. 1 before the police authorities on 6 December 2011, the police authorities did not take any steps.

In Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, the Supreme Court has held that the orders in the nature of mandatory injunction can be passed even at the interlocutory stage.

53. Having considered the rival submissions and the evidence on record, we have no hesitation in coming to the conclusion that the appellant-plaintiffs came to be dispossessed forcibly by the respondents between 2 and 5 December 2011 without their consent and without following the due process of law. This was a brazen act of dispossession and in the facts and circumstances of the case calls for grant of mandatory interim relief which was also granted in the aforesaid two cases decided by two Division Benches of this Court.

We, therefore, find this to be a fit case for granting the mandatory interim orders prayed for in the notice of motion.

ORDER

54. Accordingly, this appeal is allowed. The order dated 13 April 2012 of the learned Single Judge in notice of motion No. 51 of 2012 is set aside. The said notice of motion is allowed. Order dated 14/16 December 2011 appointing the Court Receiver, Bombay High Court as the Receiver for the suit flat being A-505, Noor-e-Jahan Complex, Pipe Road, Kurla (West), Mumbai- 400070 and the suit office being 201/202, 2nd floor in the Big 3 Building, 88, Anandilal Poddar Marg, Marine Lines, Mumbai -400002, is confirmed. The Court Receiver shall continue to have possession of the suit flat and the suit office and the Court Receiver shall immediately put the appellant-plaintiffs in possession of the suit flat as agents of the Court Receiver and put appellant No. 1 in possession of the suit office as agent of the Court Receiver, without security and without payment of any royalty charges or fee in respect thereof. The Notice of Motion is accordingly allowed in terms of prayer clauses (a) and (b).

55. For ensuring compliance with the above directions, the Court Receiver shall also take assistance of the police authorities. The Police Commissioner, Mumbai city is directed to provide all necessary assistance to the Court Receiver. Having regard to the manner in which the complaint lodged by the appellant No. 1 on 6 December 2011 has been dealt with so far by the police officer in charge of the police station at Vinoba Bhave Nagar, Kurla, the Police Commissioner shall not rest content with forwarding a copy of this judgment to the said police station, but shall ensure that the directions of this Court are complied with in letter and in spirit and shall direct the concerned police officers to submit compliance reports to the Registrar (O.S.) and Prothonotary & Senior Master of this Court. The Police Commissioner shall also direct the concerned police officer to conduct investigation in respect of the offence alleged in complaint lodged by appellant No. 1 on 6 December 2011.

The parties to act on a copy of this judgment duly authenticated by the Court Associate.

56. After the judgment is pronounced, the learned counsel for respondent No. 1 prays for stay of operation of this judgment for some time.

57. Even before the learned Single Judge, the case of the respondents was that respondent Nos. 5 to 12 were in possession and not respondent No.1. It is, therefore, surprising as to why respondent No. 1 is praying for stay of operation of this judgment. The prayer is, therefore, rejected.

58. The learned counsel for respondent No. 5 also makes a similar prayer and prays that the operation of the judgment be stayed for some time.

59. We have found that respondent No. 5 has not placed any document on record to show his possession of the suit flat before December 2011, except the certificate dated 13 February 2012 of Secretary of the Co-operative Society wherein the suit flat is situated. However, the Secretary of the society had issued certificate dated 26 August 2009 during the life time of Ibrahim Khan (husband of appellant No. 1 and father of appellant No.2) certifying that deceased Ibrahim Khan was staying in the suit flat alongwith his wife i.e. appellant No. 1 herein and the son, appellant No. 2 which is reproduced in para 44 of the judgment. We have, therefore, disbelieved the aforesaid case of respondent No. 5.

60. In view of the findings already given in this judgment about the forcible dispossession of the appellants from their residence and the suit office, we do not find this to be a fit case for granting stay of operation of this judgment. The prayer is, therefore, rejected. We also cannot help observing that the issue raised in this appeal is not merely a private dispute between two parties but about the respondents having taken law in their own hands and physically ousted a woman and her minor son from her residence and office, when they were away in Delhi and Bihar attending to the last rites of her husband. The issue is about maintenance of Rule of Law and therefore, also the prayer for stay of operation of this judgment is refused.

The parties to act on a copy of this judgment duly authenticated by the Court Associate.

