

(2015) 04 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition Nos. 8847 and 8835 of 2003

Madhavlal N. Pittie

APPELLANT

Vs

Shekhar N. Shetty and Others

RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A, Order 39 Rule 2A, Order 43 Rule 1

Citation : (2015) 04 BOM CK 0028

Hon'ble Judges : N.M. Jamdar, J

Bench : Single Bench

Advocate : Hiralal Thacker, Senior Advocate and Dhun Chhappagar i/b D.J. Kamdin and Co., for the Appellant

Final Decision : Disposed off

Judgement

N.M. Jamdar, J.

1. The parties and the issues raised in these two petitions being common and interlinked, they were heard and are being disposed of by this common Judgment.

2. The Petitioner has challenged the judgments and orders passed by the Appellate Bench of Small Causes Court, Mumbai partly allowing the appeals and setting aside the orders of committing the Respondent No. 1 to Civil prison for 15 days, after holding that the Respondent No. 1 is guilty of disobedience of the orders of injunction.

3. The Petitioner is appointed as a receiver in respect of various immovable properties, pursuant to order dated 21 July 1967, in Suit No. 224 of 1961, by this Court. One of the properties of which Petitioner is a receiver, is a property situated at the junction of Bellasis Road and Lamington Road, Mumbai Central. The property is known as Shivalal Motilal Mansions/Compound.

4. The Petitioner filed R.A.E Suit No. 1569 of 1997 in the Small Causes Court,

Mumbai in which the Respondents are Defendants. In the said suit, the Petitioner sought an order of injunction restraining the Respondent Nos. 2 to 8 (Agarwals) from creating any third party rights in respect of room No. B, C and D of Flat No. D-16 and for inducting any third party. On 30 June 1997, the Petitioner took out an Injunction Notice No. 2860 of 1997 seeking the direction to restrain the Agarwals from parting with the possession of suit premises. On the same day the learned Judge, issued a notice making it returnable on 1 July 1997. When the notice came up for hearing before the Small Causes Court, on 22 July 1997, the Respondent No. 2 filed an affidavit stating that notice has become infructuous as they have already transferred the possession of the suit premises. It was alleged by the Petitioner that they learnt that on or about 21 July 1997, the Agarwals, in disregard of the Injunction Notice issued against them, parted with possession of the suit premises in favour of the Respondent No. 1. The Petitioner thereafter filed two eviction Suits on 12 August 1997. One suit being R.A.E Suit No. 1571 of 1997 against the original tenant i.e. M/s. Kohinoor Traders Private Limited and Respondent No. 2 and the Respondent No. 1 seeking a decree of eviction in respect of Room No. B and D of Flat No. D-16 in building No. 303. Another R.A.E Suit No. 1569 of 1997 was filed seeking decree of eviction in respect of Room No. C of Flat No. D-16.

5. The Petitioner took out Injunction Notice in both the suits i.e. Injunction Notice No. 3872 of 1997 in R.A.E Suit No. 1569 of 1997 (in respect of Room No. C) and Injunction Notice No. 3873 of 1997 (in respect of Room No. B and D) against the Defendants including the Respondent No. 1. The injunction was sought to restrain the Respondent No. 1 from changing user of the premises and carrying out alterations and additions in the premises. The Petitioner also prayed for appointment of Court Commissioner. The learned Judge, Small Causes Court, on 13 August 1997 passed orders appointing Court Commissioner. The learned Judge also directed the parties to maintain status-quo.

6. An Advocate was appointed as a Court Commissioner. The Court Commissioner accordingly visited after giving notices to the parties, however found that the premises were locked. The Court Commissioner made his report of the visit to the premises on 13 August 1997 and the order of status-quo was extended.

7. The Petitioner made a grievance to the learned Judge, that the Respondent No. 1 was carrying out work behind closed doors inspite of the orders of the Court. On 18 October 1997, the learned Judge, directed the Commissioner to visit the premises again. The Court Commissioner thereafter filed a report dated 20 November 1997. The Petitioner again applied for appointment of a second Court Commissioner which application was granted on 25 November 1999 and the second Commissioner was appointed to visit the premises.

8. The Respondent No. 1 filed a Writ petition No. 47 of 2000 in this Court challenging the order of appointment of second Court Commissioner. Pending admission the order was stayed, thereafter the petition was dismissed on 11 February 2000. The Court Commissioner thereafter visited the premises and

submitted his report on 29 March 2000 about his visit on 6 March 2000, along with photographs.

9. Based on the reports the Petitioner took out two separate notices under provisions of Order 39 Rule 2A against Respondent No. 1 on 3 May 2000. One being Contempt Notice No. 2311 of 2000, in the Petitioner's said Injunction Notice No. 3872 of 1997, in the said R.A.E Suit No. 1569 of 1997, inter alia, (in respect of Room C) and the other being Contempt Notice No. 2310 of 2000, in Injunction Notice No. 3873 of 1997, in the said R.A.E Suit No. 1571 of 1997 (in respect of rooms B and D).

10. The Notices were heard. The learned Judge, considered the material on record and the arguments of both the sides. The learned Judge, of the Court, after considering the reports of the Commissioner, came to the conclusion that the Respondent No. 1 carried out material changes in the suit premises inspite of the order of status-quo, and the way in which the order of status-quo was flouted, the intention of the Respondent was clear. The learned Judge, rejected the apology tendered by the Respondent No. 1 and by order dated 19 January 2002 made the notices absolute and directed that the Respondent No. 1 to be detained in Civil prison for 15 days and that movables of Rs. 20,000/- be attached.

11. The Respondent No. 1 filed Appeal No. 200 of 2002 in Contempt Notice No. 2311 of 2000 and Appeal No. 266 of 2002 in Contempt Notice No. 2310 of 2000. The Appellate Bench confirmed that the finding of the learned Judge, Small Causes Court that the Respondent No. 1 had breached the order. It was argued on behalf of Respondent No. 1 that the order committing Respondent No. 1 to Civil prison was very harsh order, and the Respondent No. 1 tendered an apology. The Appellate Bench set aside the order of imprisonment and maintained the order of attachment of movables amounting to Rs. 20,000/- in Injunction Notice No. 1303 of 2002. The appeals were partly allowed by order dated 15 October 2003. Thereafter the present petitions were filed. The petitions were admitted on 14 March 2005.

12. I have heard Mr. Hiralal Thacker, learned Senior counsel for the Petitioner and Mr. Shardul Singh, learned counsel for the Respondent No. 1.

13. The finding that the Respondent No. 1 had committed the breach of the order of injunction has been maintained by both the Courts. This finding has not been challenged by the Respondent No. 1, inspite of the fact that the petition has been pending in this Court since the year 2003. The only question therefore remains is whether setting aside the order of imprisonment was justified.

14. The Respondent No. 1 had demolished the bathroom. The user of the room was changed from residential to commercial purpose. Mirrors were put up. Wooden paneling was made. Southern wall was removed and new wall was constructed. New tiles in bathroom were fitted and entrance was created for the newly constructed toilet. New door was put up. The additional third door was put

up in common passage. Collapsible grill was erected at the rear entrance. In short, the Respondent No. 1 altered the very nature of the premises and put it to a different use. All this was done with full knowledge of the order of the status-quo. These were not minor repairs out of necessity. Even for those the Respondent No. 1 had to take permission of the Court.

15. The Respondent No. 1 proceeded as if the order of the Court did not exist. He showed scant regard for the order. Respondent No. 1 virtually took the law in his own hands and breached the injunction at will. The learned Judge, trial Court rightly took a serious view of the matter. He did not accept the apology as he found that it was not bonafide and imposed the maximum punishment provided under Order 39 Rule 2-A. The Appeal Court in one paragraph reasoning set aside the order of punishment. The Appellate Court accepted the apology without considering whether it was bonafide or not and allowed the appeals by attaching movable property to the extent of Rs. 20,000/-.

16. Once it was established that Respondent No. 1 had flouted the orders of the Court without showing any regard whatsoever, it was not matter of pure discretion of the Appellate Court to set aside the order of punishment. When there is a violation of the order of the Court, action has to be taken, as it is the duty of the Court, as a policy, not to allow perpetuation of wrong doing and to uphold the rule of law. The proceedings under Order 39 Rule 2A are meant to maintain dignity of the Court in the eyes of public and to deter unscrupulous elements from flouting the orders of the Court. Unfortunately, the Appellate Court has failed to exercise it's duty and has treated the imposition of punishment in a casual manner. The approach of the Appellate Court is therefore, fundamentally flawed. The grant of Rs. 20,000/- as a fine is hardly a deterrent for the Respondent No. 1. The Appellate Court accepted the apology which was rejected by the trial Court and has set aside the punishment and virtually let Respondent No. 1 to go scot free. The apology tendered hardly matters because Respondent No. 1 had achieved what he set out to do. There was also no direction by the Appellate Court to the Respondent No. 1 to restore what he had done. The apology therefore, was merely a lip service without any remorse. Even today the learned counsel for the Respondent No. 1 has repeated the apology but I do not find any reason whatsoever to accept the same. No litigant should get an impression that he can disregard the orders of the Court with impunity and then get away by merely tendering apology.

17. It was urged by Mr. Thacker, learned Senior counsel for the Petitioner that the Appellate Court had no jurisdiction to entertain the appeal. Mr. Shardul Singh, learned counsel for the Respondent No. 1 submits that the appeal is maintainable. The Appeal from the order passed under Order 39 Rule 2A lies under Order 43 Rule 1 of the Code.

18. If the petition is to be allowed and the order of the Appellate Bench is to be set aside, the order passed by learned Judge, Small Causes Court of detention of Respondent No. 1 for 15 days in Civil prison will revive. The powers under Order

39 Rule 2A are quasi criminal in nature as it directs detention of the offender in a Civil prison. Therefore, various parameters would arise for consideration while detaining what punishment should be imposed on the Respondent No. 1 as of now. It is not the case that the Appellate Bench had confirmed the punishment imposed by the trial Court and that Respondent No. 1 had invoked supervisory jurisdiction. The order passed by Appellate Bench whereby punishment has been set aside is in favour of the Respondent No. 1. If I have to set aside that order and direct punishment to be imposed, I cannot be oblivious of the passage of time. The incident has occurred 18 years back. The Writ petition itself has reached for final hearing after 12 years. At this stage, after 18 years to send the Respondent No. 1 who has now advanced in age and in life, would be unduly harsh. While upholding majesty of law, balance will have to be struck between strictness and reasonableness.

19. I am of the opinion therefore, that the punishment should be reduced to one day. The Applicant was directed to remain present. He reported in the morning and has remained in the Court room throughout the day, which fact is not disputed by the learned counsel for the Petitioner. The matter was taken up for hearing at the end of the day. The sentence shall therefore be for one day i.e. till rising of the Court and fine should be increased. This is not to say that the increase in fine is to offset the reduction in imprisonment, but imprisonment at this stage, after 18 years does not appear to be fair and reasonable.

20. I am informed that the suit has proceeded, decree has been passed against Respondent No. 1 to hand over the possession of the premises.

21. As regards the fine is concerned, the amount of Rs. 20,000/-retained by the Appellate Bench is hardly a fine at all considering the status of the Respondent No. 1. The fine must act as a deterrent. In my opinion amount of Rs. 3,00,000/- in each of the matter would provide additional deterrent, apart from the sentence of one day. The Appellate Bench has permitted the Petitioner to withdraw half of the fine deposited. I do not see any reason to disturb this arrangement.

22. Accordingly, the Writ petitions are disposed of as under -

"i. The impugned orders passed by the Appellate Bench dated 15 October 2003 are quashed and set aside.

ii. The orders passed by learned Judge, Small Causes Court, Mumbai, dated 19 January 2002 are modified as under :

(a) The Respondent No. 1 having been found guilty of disobedience of order of status-quo dated 13 August 1997 is sentenced for one day i.e. till the rising of the Court today.

(b) The Respondent No. 1 shall deposit an amount of Rs. 3,00,000/- in the registry of this Court for each of these matters (totally Rs. 6,00,000/-) within a period of five weeks from today.

(c) The Petitioner will be entitled to withdraw the amount of Rs. 1,50,000/- in each of the matters (total Rs. 3,00,000/-) and the remaining amount shall be deposited in the concerned Government account. Registry shall take follow up action thereupon."