

(2008) 04 CAL CK 0101

In the Calcutta High Court

Case No : C.P.A.N. 1103 and 1265 of 2006 with C.A.N. No. 6267 of 2006 Arising out of C.O. No. 2212 of 2006 and C.O. 2212 of 2006 with C.A.N. 955 of 2007

Pratik Marketing Pvt. Ltd.

APPELLANT

Vs

Pratap Properties Ltd. and Others

RESPONDENT

Date of Decision : 30-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151
Constitution of India, 1950 — Article 227
Contempt of Courts Rules, 1980 — Rule 17, 4
Criminal Procedure Code, 1973 (CrPC) — Section 144
Specific Relief Act, 1963 — Section 14(3)(C), 42

Citation : (2008) 3 CALLT 372

Hon'ble Judges : Pranab Kumar Deb, J

Bench : Single Bench

Advocate : A.K. Mitra, Joydip Kar, Aniruddha Chatterjee, A.K. Ghosh and Prabir Banerjee, in C.P.A.N. 1103 and 1265 of 2006 and C.A.N. 6267 of 2006 and S.P. Roy Chowdhury, Ashok Banerjee, J.L. Be, Shyamal Sarkar, Debasish Roy and B.K. Jain, in C.O. 2212 of 2006 with C.A.N. 955 of 2007, for the Appellant; S.P. Roy Chowdhury, Ashok Banerjee, J.L. De, Shyamal Sarkar, Debasish Roy and B.K. Jain for Respondents Nos. 1 to 4 and 10 in C.P.A.N. 1103 and 1265 of 2006 and C.A.N. 6267 of 2006, Subrata Mukherjee and Basabi Roy Chowdhury for Respondents 12 to 14 in C.P.A.N. 1103 and 1265 of 2006, Jiban Raton Chatterjee and Joy Sana for Respondent No. 15 in C.P.A.N. 1103 and 1265 of 2006 and Surajit Nath Mitra, Arindam Mukherjee and Nilay Sengupta for Respondents 6, 7, 8 and 11 in C.P.A.N. 1103 and 1265 of 2006 and for Respondent 2 in C.O. 2212 of 2006 with C.A.N. 955 of 2007 and A.K. Mitra, Joydip Kar, Aniruddha Chatterjee, A.K. Ghosh and Prabir Banerjee for Respondent No. 1 in C.O. 2212 of 2006 with C.A.N. 955 of 2007, for the Respondent

Final Decision : Dismissed

Judgement

Pranab Kumar Deb, J.—The dispute has a long chequered history. Genesis of the dispute between the land owner and the developer can be traced back to the mid

eighties. M/s. Pratap Properties Ltd., being the owner of 210 cuttachs of land situated at Kishenlal Burman Road, Salkia, Howrah, had mortgaged the prime property to M/s. Morgan Walker & Co. Ltd. in the year 1977. On the failure of the mortgagor to pay the dues, the mortgagee namely M/s. Morgan Walker & Co. Ltd., filed the mortgage suit being Title Suit No. 12 of 1986 before the learned Court at Howrah. On 23/08/1986 the trial Court appointed a person as Receiver. The learned trial Court accorded liberty to the Receiver to appoint Darwan for protection of the property. The learned Receiver was also directed to submit a list of the tenants/occupiers residing therein. Meanwhile, M/s. Morgan Walker & Co. Ltd. assigned its mortgage right to Salkia Estate Development Pvt. Ltd. Following an application made by Salkia, the learned trial Court allowed the prayer for substitution made on behalf of Salkia Estate Development Pvt. Ltd. Another interesting development had taken place in the intervening stage with M/s. Pratap Properties Ltd. and M/s. Pratik Marketing Pvt. Ltd. entering into two agreements for development of the property covering 210 cuttachs of land. On 21/04/1999 the owner called Pratap Properties Ltd. cancelled the two development agreements by a notice, forfeiting the earnest money. In the wake of cancellation of the development agreement by M/s. Pratap Properties Ltd., the developer namely Pratik Marketing Pvt. Ltd. filed Title Suit No. 66 of 1999 against Pratap Properties Ltd., praying for decree for permanent injunction, restraining the owner called Pratik Marketing Pvt. Ltd. from entering into agreement with the third party. On the same date an application for injunction was moved. The Court passed an ex-parte order of injunction with a direction upon the parties to maintain status quo in respect of the disputed property.

2. Meanwhile. M/s. Sulkia Estate Development Pvt. Ltd. made an application in the mortgage suit for restraining Pratap from encumbering, dealing with or inducing any outsider or from changing the nature and character of the suit property. The developer called Pratik also filed an application in mortgage suit for being impleaded as a party. On 16/09/1999 the learned Court in mortgage suit passed an order of status quo in respect of the possession of the suit property, restraining the parties from changing the nature and character of the suit property by way of developing or raising multi-storied building or from encumbering or inducing any outsider till disposal of the suit.

3. The prayer of the developer for being impleaded in the mortgage suit was, however, rejected by the trial Court. In his report submitted before the Court, the learned Receiver mentioned that on 25/08/1999 he had visited the property and affixed some Boards. He had also mentioned that a portion of the vacant land had been hemmed by brick-wall with iron gate. In his subsequent report the Receiver reported that the name of the developer namely Pratik Marketing Pvt. Ltd. had been painted on the iron gate. Some security guards deployed by Pratik were also found moving in and around the vacant portion, as reported. On 03/09/1999 the Receiver made a complaint to the police that such painting had been done in his absence. On 08/09/1999 the Receiver filed an application in the mortgage suit, praying for necessary direction for preservation and protection of

the suit property. In disposing of such application, the trial Court in mortgage suit observed that the learned Receiver should take care for the protection and preservation of the suit property. Direction was given to wash out the paintings made In the name of the Pratik Marketing Pvt. Ltd. and to take Charge of the vacant land in the suit properties. Local police was directed to remove the security guards deployed by Pratik and also to remove the boards and paintings from the mortgage property. On receipt of the information contained in two letters dated 09/09/1999 and 10/09/1999 written by Mr. R. N. Dey on behalf of Pratik as to the existence of the order of injunction, the learned Receiver for necessary direction from the learned Court in seisin of the mortgage suit. Entertaining such application, the learned Court directed the learned Receiver to follow the order No. 200 dated 09/09/1999. Direction was once more given to remove the painting made in the name of Pratik and to remove the security guards. The learned Trial Court made it clear that police help would be provided if it was so required. The order dated 09/09/1999 and 13/09/1999 passed in mortgage suit were challenge in appeal by Pratik which was eventually dismissed for non-prosecution.

4. The order of the trial Court whereby the prayer of Pratik for being impleaded as a party in the mortgage suit was rejected was challenged in revision. The revisional application, however, was dismissed, SLP (civil) No. 1065 of 1999 being filed by Pratik had similar fate.

5. Following the rejection of the application filed by Pratap for vacating the order passed an injunction suit whereby temporary injunction was granted, restraining Pratap from entering into any agreement or contract with any third party or stranger for the purpose of making construction and not to give effect to the cancellation, Pratik filed an appeal being Misc. Appeal No. 46 of 2006. The order passed by the learned trial Court was affirmed in appeal. Challenging that order, the revisional application being 2212 of 2006 was filed. On 21/06/2006 an order of maintenance of status quo as to possession was issued. On 11/07/06 the order of status quo was extended. Alleging forcible dispossession from the suit property by the respondents, M/s. Pratik Marketing Pvt. Ltd. filed an application being C.P.A.N. 1103 of 2006 for drawing up contempt proceeding against the respondent No. 1 to 14. Another contempt petition was filed in view of alleged construction being made during the subsistence of order of status quo. A separate application was also filed for restoration of possession.

6. Appearing on behalf of M/s. Pratik Marketing Pvt. Ltd., Mr. Anindya Mitra, learned senior counsel, has made a strong plea for initiation of contempt proceedings against the respondents for flagrant violation of the order of status quo in respect of the possession of the property. Mr. Mitra has also urged for immediate restoration of the said property in favour of M/s. Pratik Marketing Pvt. Ltd, in view of their illegal dispossession from the suit property by the respondents. It is submitted by Mr. Mitra that following the execution of two agreements for development of the land covering 220 cuttahs of land, M/s. Pratik

Marketing Pvt. Ltd. persuaded the tenants residing therein to vacate their respective possession of the suit land. Acting on such settlement, five deeds of assignment were executed by the tenants in favour of Pratik Marketing Pvt. Ltd., in between 18th August, 1996 and 3rd December, 1996. Smt. Sabitri Devi Chamaria, mother of Mr. Vinod Chamaria, figured as one of the confirming party of the deed dated 3rd December, 1996. The factum of delivery of possession in favour of M/s. Pratik Marketing Pvt. Ltd. was reflected in such agreement, as contended by Mr. Mitra. That there was delivery of possession in favour of M/s. Pratik Marketing Pvt. Ltd. was also acknowledged by Vinod Chamaria and Vijoy Chamaria in clause 4 of the agreement dated January 22, 1997.

Mr. Mitra has referred to certain documents to vindicate his stand that Pratik was in lawful possession of the disputed portion covering 70 cuttachs of land on the date of the incident that is on 06/08/2006 and 07/08/2006. Referring to the telephone bill, as listed in Page 45 of the contempt petition being 1103 of 2006, Mr. Mitra has submitted that the telephone in the name of Pratik installed in the office room on the vacant suit land bears ample testimony to the actual and effectual possession of Pratik Marketing Pvt. Ltd, over that 70 cuttachs of land.

7. Drawing the attention of the Court to the police reports dated 10th May, 1999 and 14th, May, 1999, it is submitted that reports were called for by the Court following initiation of proceedings u/s 144 Cr PC in the aftermath of dispute between Pratik Marketing Pvt. Ltd. and Salkia Estate Development Pvt. Ltd. In the two reports it was categorically mentioned that possession of the land in question had been with M/s. Pratik Marketing Pvt. Ltd.

8. Relying on the reports of the learned receiver, it is submitted that the learned receiver in his application before the learned Court had acknowledged that Pratik had posted some of its guards on the vacant land. On 09/11/1999 the learned Court in seisin of the mortgage suit issued an order directing the learned receiver to remove the security guards posted by M/s. Pratik Marketing Pvt. Ltd. and wash out the paintings and the hoardings where the name of Pratik Marketing Pvt. Ltd. was displayed. The learned Court also directed O.C., Golabari Police Station to render assistance for removal of security guards posted by Pratik Marketing Pvt. Ltd. The reports submitted by the learned Receiver did reveal that. M/s. Pratik Marketing Pvt. Ltd. had been in effective possession of the land in question right upto 06/08/2006. The factum of possession of M/s. Pratik Marketing Pvt. Ltd. over the land in question had also been reflected in the order dated 09/11/1999 in Suit No. 12 of 1986, as contended by Mr. Mitra. In his report dated 21/08/2006, the learned Receiver mentioned that O.C., Golabari Police Station had intimated to him that on 06/08/2006 police help would be rendered for implementation of the orders No. 200 and 201 passed by the learned single Judge (Senior Division) in connection with Title Suit No. 12 of 1986. In the A/O filed by O.C, Golabari Police Station the factum of ouster of M/s. Pratik Marketing Pvt. Ltd. from the land in question on 06/08/06 has been acknowledged, as submitted by Mr. Mitra.

9. Mr. Mitra has referred to following cases namely Satish Chandra Maity Vs. Sm. Saila Bala Dassi and Others, , Sujit Pal Vs. Prabir Kumar Sun and Others, Lakshmikutty Amma Retnamma Vs. P.N. Krishna Pillai and Others, , State of Orissa and Another Vs. Aswini Kumar Baliarsingh, Prestige Lights Ltd. Vs. State Bank of India, and Delhi Development Authority Vs. Skiper Construction Company (P) Ltd. and another, , to impress upon the Court, that when the respondents violating the order of the Court dispossessed the petitioners from the suit property during the pendency of the proceeding, the Court has the authority and duty to restore possessions to the petitioners by evicting the respondents, the "wrong-doers", u/s 151 of the Code of Procedure. The Court should exercise its inherent power to prevent abuse of the process of Court and to do Justice by Immediate intervention under the circumstances which do require such immediate intervention by the Court.

10. Commenting on the dispossession of the petitioners M/s. Pratik Marketing Pvt. Ltd. from 70 cuttaks of land, Mr. Mitra has submitted that in view of the illegal dispossession of the petitioners M/s. Pratik Marketing Pvt. Ltd. from the land in question on 06/08/2006, as borne out from the reports of the O.C., Golabari Police Station and the learned Receiver, the wrong-doers should be penalised. Possession having been obtained through illegal means, the Court should immediately intervene, directing the restoration of the property in favour of M/s. Pratik Marketing Pvt. Ltd. Mr. Mitra has cited the case of All Bengal Excise Licensees Association Vs. Raghabendra Singh and Others, , to underline the aspect that once it is found that the respondent had disobeyed the specific order passed earlier by the Court, the High Court should direct the contemnors to undo the wrong committed by them which was done in clear breach of the order of the Court by restoring the status quo ante. The wrong perpetuated by the wrong-doers in utter disregard of the order should not be permitted to persist.

11. Defending the actions of the Receiver, Mr. Jiban Ratan Chatterjee, learned senior counsel, has submitted that since no allegation has been levelled against the Receiver, there is no question of drawing up contempt proceedings against the learned Receiver. Referring to the paragraph 26 of the contempt petition, Mr. Chatterjee has submitted that the petitioner had claimed that the alleged act of dispossession had been done by the Directors of M/s. Salkia Estate Development Pvt. Ltd. and Directors of M/s. Pratap Properties Ltd. in connivance with the police personnel of Golabari P.S. Mr. Chatterjee has also drawn the attention of the Court to the averments made in paragraph 34 of the contempt petition to stress his stand that the petitioner had acknowledged that it had reason to believe that Pratap Properties Pvt. Ltd. and Salkia Estate Development Pvt. Ltd., who figured as respondents 1 and 2, in the contempt petition, did not inform the Receiver of the order of status quo passed by this Court. It is submitted by Mr. Chatterjee that had the learned Receiver been informed of the order of status quo issued by this Court, the learned Receiver would have taken note of it before proceeding further. The learned Receiver having been kept in the dark, he should not be held responsible for what had been done behind his back.

12. Refuting the claim that possession of 70 cuttaha of land was with M/s. Pratik Marketing Pvt. Ltd., Mr. Chatterjee has submitted that collection of rent right from 1987 would indicate that Receiver was in effective possession of land in question. The Receiver, as contended by Mr. Chatterjee, visited the land in question from time to time and put up sign boards therein for conveying the fact to all and sundry that the property was lying with the Receiver. The Receiver approached the trial Court for protection of the property in view of some persons straying into the covered area. In the wake of some guards being posted by M/s. Pratik Pvt. Ltd., direction was sought for from the trial Court. The trial Court also accepted the position that the petitioner called M/s. Pratik Marketing Pvt. Ltd. had not been in possession of the land in question on 25/08/1999. Accordingly, the Court directed the learned Receiver to retain his possession of the suit property. Challenging the aforesaid order, leave was sought for to prefer appeal. It was subsequently withdrawn. All these facts and circumstances will negate the contention that effective possession of the land in question had always been with the petitioner M/s. Pratik Marketing Pvt. Ltd. as urged by Mr. Chatterjee. To demonstrate his right of possession, the learned Receiver posted his own security guards, put up sign boards and went on realising rents. These are clear manifestations of exercise of effective possession of the land in question by the Receiver, as contended by Mr. Chatterjee.

13. Disowning the claim that the tenants had delivered possession in favour of M/s. Pratik Marketing Pvt. Ltd. by executing certain deeds, Mr. Chatterjee has argued that since the Receiver was in possession of the property and was exercising his rights by collecting rents, no tenant could interfere with the right of the Receiver. As the learned Receiver was authorised by the Court to retain possession of the land in question, nobody could interfere with the possession of the suit property lying with the Receiver.

14. Supporting the stand taken by the respondents 12, 13 & 14 in contempt proceeding, Mr. Subrata Mukherjee has submitted that whatever the police personnel did was done in accordance with the direction of the trial Court. It is submitted that since the possession of the suit in question was lying with the learned Receiver, Golabari Police Station rendered assistance to him for protection of the aforesaid property in terms of the direction of the Court. Such action, it is submitted, was not done in total disregard to the Order of the Hon"ble Court.

15. Claiming that the nature of violation has not been explained, Mr. Mukherjee has sought for straightway rejection of the application for initiation of proceedings against the police officers. It is also contended that full names and particulars of the contemnors/respondents 12, 13 & 14 not having been given, Rules 4 and 17 of the Contempt of Courts act cannot be said to have been followed.

16. Representing M/s. Salkia Estate Development Pvt. Ltd., Mr. Surajit Nath Mitra, learned Counsel, has submitted that since no notice of revisional

application was ever served on Salkia Estate Development Pvt. Ltd., it had no idea as to the order of status quo. Challenging the contention that the vacant possession had been delivered to M/s. Pratik Marketing Pvt. Ltd., Mr. Mitra as the godowns were gutted long way back and there being no existence of such godowns, handing over possession in such near impossibility. What portion of the land was actually delivered had not been clarified either. Execution of the agreements of assignments does not establish that delivery of possession in favour of M/s. Pratik Marketing Pvt. Ltd. had been made by the erstwhile tenants. It is submitted that being no documents has been filed on behalf of Pratik Marketing Pvt. Ltd. to establish that it had erected boundary walls in and around 70 cuttachs of land and installed iron gate therein. Similarly by going through the contents of telephone bill, one cannot have an idea as to in which portion of the land or building in 25, Kishenlal Burman Road such telephone had been installed. Making a dig at the police reports, Mr. Mitra has submitted that such a report does not give any indication as to when and what time the land in question was visited by the police personnel. It is submitted that the police officer formed his opinion that M/s. Pratik Marketing Pvt. Ltd. had been in exclusive possession of the land in question after collecting the information from the so-called employees of the petitioners. It is argued that that the observation of the police officer that possession had been handed over to M/s. Pratik Marketing Pvt. Ltd. was not based on any document. In doing so, the police officer conducting the enquiry in the proceeding u/s 144 Cr PC did not venture to ascertain as to whether the possession had been lying with the learned Receiver. The Police Officer conducting the enquiry did not disclose the names of the persons examined by him for ascertaining the factum of possession. The reports submitted in connection with proceedings u/s 144 Cr PC, according to Mr. Mitra, should not be given any importance and weightage in coming at a decision as to who was in actual possession of the land in question at the time of the alleged incident on 06/08/2006.

17. On the question of admission made on behalf of Pratap Properties Ltd., as recorded in annexure P-6 of the contempt proceeding, Mr. Surajit Mitra has submitted that no reliance whatsoever should be placed on the letter, inasmuch as the authenticity of the letter has been challenged in another suit. Till authenticity of a letter is established, it should not be taken into consideration for forming an opinion.

18. Reiterating that possession had all along been with the learned Receiver, Mr. Surajit Mitra has submitted that the fact that liberty was given to the learned Receiver to appoint darwans to protect the properties itself gives a fair indication that the learned Receiver continued to lord over the properties in question with none else having any semblance of possession over the land in question. In its application under 1, Rule 10 CPC M/s. Pratik Marketing Pvt. Ltd. never claimed that it had been in possession of the land in question. Had Pratik Marketing Pvt. Ltd. been in effective possession of the land in question, it could have stamped its claim in its application under Order 1, Rule 10 CPC. In

disposing of the Misc. Appeal No. 46 of 2006, the learned Court also did not record that M/s. Pratik Marketing Pvt. Ltd. had been in possession of the land in question.

19. Drawing the attention of the Court to the report of the Receiver, as reflected in Page 12 of A.O. of M/s. Salkia Estate Development Pvt. Ltd., Mr. Surajit Mitra has submitted that the reports will indicate that the name of Pratik Marketing Pvt. Ltd. was not displayed anywhere in the open vacant space when the Receiver visited there on 25/08/1999. It clearly shows that there was no presence of Pratik Marketing Pvt. Ltd. in the land in question at the relevant point of time. The Receiver, on his part, fixed some sign boards displaying openly that the property in question had been taken over by the Receiver under the order of the Court. On 30/08/1999 attempts were made by M/s. Pratik Marketing Pvt. Ltd, to intrude into the property by fixing some boards displaying its name. It also posted some persons in and around the covered area. Such act does not constitute possession of the land, as submitted by Mr. Mitra. In entertaining the prayer of the Receiver, the trial Court in mortgage suit directed the learned Receiver to appropriate step for protection and preservation of the property. The local police was further directed to render assistance to the learned Receiver to secure the ouster of intruders. All these facts will go to attest the assumption that possession had all along been with the learned Receiver and such act of ouster of intruders would not constitute an act of contempt.

20. Contending that the disputed property is still in custodia legis managed by the Receiver appointed by the Court, Mr. S.P., Roy Chowdhury, learned senior counsel, has submitted that without leave of the Court appointing such Receiver, no proceedings can be initiated against him. It is contended that the moment the Receiver is appointed, the Court appointing such a Receiver takes custody of the property. Whatever the Receiver does is done as an agent of the Court. In the instant case also, there was execution of the order of the trial Court. Such action, it is contended, does not amount to contempt. Mr. Roy Chowdhury has referred to the case of Banwarilal Agarwalla, Tenant v. Sudhamoy Basu, Receiver reported in 59 CWN 481, to underline his contention that when the Court appoints a Receiver over a particular property, it is the Court which really takes charge of the same. It is submitted that it is imperative for the maintenance of the dignity of the Courts and respect for the judiciary that the property or any rights therein should not be allowed to be affected or interfered with, without the leave of the appointing Court and the persons desiring to take any step which might affect the said property or any rights therein should obtain that Court's leave in that behalf. The case of Everest Coal Company (P) Ltd. Vs. State of Bihar and Others, has also been cited to impress that when a Court puts a Receiver in possession of the property, the property comes under Court's custody with the Receiver being merely made an officer or agent of the Court. Any obstruction or interference with the Court's possession sounds in contempt of that Court.

21. Claiming, that whatever the Receiver did was done in execution of the order

of the trial Court in seisin of the mortgage suit, Mr. Roy Chowdhury has argued that such act on the part of the Receiver cannot be construed as wilful violation. Mr. Roy Chowdhury has referred to the case of Jiwani Kumari Parekh Vs. Satyabrata Chakravorty, Managing Director and Chief Executive of the West Bengal Handicraft Development Corpn. Ltd., , to put emphasis on his submission that unless there is wilful and deliberate disobedience of the Courts order, such act cannot be classified as contempt. It is submitted that in deprecating the practice of ignoring or by-passing the order passed by the Courts or Tribunals, the apex Court in V.G. Nigam and others Vs. Kedar Nath Gupta and another, has made it clear that it would be too hazardous to sentence in exercise of contempt jurisdiction on mere probabilities. The willful conduct is the primary and the basic ingredient of such an offence. The land in dispute being in custodia legis, action on the part of the Receiver cannot be called contemptuous. Whatever he did was done as an agent of the Court and, as such, no contempt proceeding would lie against the Receiver. Since there was no covert or overt act on behalf of the respondents Nos. 1 to 14, there should be outright rejection of the application for drawing up of contempt proceeding against them, as urged by Mr. Roy Chowdhury. The name of the Receiver not having surfaced as contemnor and no action against the Receiver having been sought for, contempt petition is liable to be rejected.

22. Mr. Roy Chowdhury has taken the stand that the question of possession cannot be decided in a contempt application or in an interlocutory application in connection with the revisional application. It is argued that the question of possession cannot be decided without a proper trial on evidence. Since the Court dealing with the revisional application has a limited role to play, such question of possession is required to be decided by the Court in seisin of the matter. In filing the supplementary affidavit annexing the judgment, it is brought to the notice of the Court that in dealing with the question of injunction in G.A. No. 2625 of 2006 and in deciding the question of restoration of property in pro interesse suo being G.A. No. 2713 of 2006, the trial Court has made a positive finding that M/s. Pratik Marketing Pvt. Ltd. had failed to establish on a test of balance of probabilities in summary proceeding that it was in possession and that it was the Receiver who had dispossessed it. The controversy, according to Mr. Roy Chowdhury, has been set at rest with the finding made in the aforesaid judgment.

23. It is contended by Mr. Roy Chowdhury that the factum of collection of rents by the Receiver from the erstwhile tenants in the disputed property is itself clear manifestation of exercise of effective control over the land in dispute by the Receiver. Mr. Roy Chowdhury submits that the reports submitted by the Receiver from time to time tend to indicate that the Receiver had exercised his authority over the land in question. Taking a cue from the report of the Receiver, Mr. Roy Chowdhury submits that when the Receiver visited the property on 25/08/99 he did not find anybody loitering there. However, on 30/08/1999 the name of Pratik Marketing Pvt. Ltd. had been found painted on the gate. Some security guards were also found moving in and around the land in dispute. To secure the ouster

of the rank intruders, the learned Receiver approached the Court for direction. The order of injunction notwithstanding, the trial Court directed the Receiver to take effective steps for protection of the property. Direction was also given to the police to render assistance for removal of the security guards of Pratik Marketing Pvt. Ltd. and also for removal of the boards and paintings from mortgaged property. It is argued that mere hovering of some security personnel would not tantamount to ouster of possession of the Receiver.

24. Relying on the case of Kishore Kumar Khaitan and Anr. v. Praveen Kumar Singh reported in (SC, Suppl.) 2006 (3) CHN 27, Mr. Roy Chowdhury has submitted that the apex Court has laid down in clear terms that interim mandatory injunction is an order which can be passed only when the circumstances are clear and the prima facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demand that the status quo ante should be restored by way of an interim mandatory injunction. Since there is no satisfactory material indicating that the petitioner M/s. Pratik Marketing Pvt. Ltd. was in actual possession of the land in dispute at the relevant time that is on 06/08/06, no order of mandatory injunction by way of restoration of property can be issued. What is before the Court is existence of custodia legis. Nobody having any right to dislodge the Receiver from the property in question, the prayer for restoration of property in the hands of Pratik Marketing Pvt. Ltd. should not be entertained at all, as submitted by Mr. Roy Chowdhury.

The question of possession assumes utmost importance in the face of conflicting claims of possession being made on behalf of the Receiver and M/s. Pratik Marketing Pvt. Ltd. Possession is the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world or against all the world except certain persons. There must be actual or potential physical control. Physical control is to be accompanied by intention. Furthermore, the intention must be visible or evidenced by external signs.

Corpus possessionis and animus possidendi constitute possession. Complete absence of power is indicative of lack of possession. Power of excluding other people from the property is one of the criteria for assessment of control. Unless there is equivocal abandonment of possession, the legal possession may still remain with the person. Lack of exercise of control may not be sufficient as to constitute abandonment of possession.

25. The Receiver, as the record indicates, was appointed in the mortgage suit way back in 1987. In the writ itself it was made clear that he was to take charge of the property for realisation of rents from the tenants. The Receiver went on realising rents. He frequented the land in dispute, as borne out by the orders dated 09/09/1999 and 13/09/1999 made in connection with mortgage suit being T.S. 12 of 1986, now renumbered as E.O.S. No. 18 of 2006. The, Receiver, no doubt relapsed into temporary taciturnity. He stirred into activities in 2006. That itself is not indicative of his losing control or sway over the land in question at

any point of time. The materials on record do not indicate that he ever lost control and hold over the land in dispute. Possession of the property by Receiver appointed by the Court is possession of the Court. Nobody can interfere with the possession of the Receiver. Attempt to disturb that possession without the leave of the Court may constitute an act of contempt of Court. As observed in *Hiralal Patni Vs. Loonkaram Sethiya and Others*, , if a Receiver is appointed in the suit, without his tenure being expressly defined, he will continue to be Receiver till he is discharged. The materials on record do not vindicate that the Receiver ever evinced his intention to abandon his right of possession over the land in question. Collection of rent, frequent visit to the land in dispute, fixing of hoarding and seeking directions from the Court from time to time are clear manifestations of its intention to retain the property in question as an agent of the Court.

26. Every possessor is entitled to retain possession. A wrong-doer is also entitled to have the property recovered simply on the ground of his having effective possession. It is contended on behalf of M/s. Pratik Marketing Pvt. Ltd. that it was in actual physical control over the land in dispute till its illegal dispossession on 6th August, 2006. Certain facts and circumstances have been presented before the Court to prove its stand that M/s. Pratik Marketing Pvt. Ltd. had been in actual possession of the land in dispute after the surrender of tenancy by the erstwhile tenants. Five deeds of assignment executed by the tenants in between 16th August, 1996 and 3rd December, 1996 have been filed. There was recital of handing over of possession of their respective, properties in favour of Pratik Marketing Pvt. Ltd. Sabitri Devi Chamaria, who was one of the Director of M/s. Pratap Properties Pvt. Ltd., was one of the confirming party to the execution of such deed. The admissions made by Vinod Chamaria and Vijay Chamaria in Clause -IV of the agreement dated January 22, 1997 to the effect that M/s. Pratik Marketing Pvt. Ltd. got the tenants vacated have been cited as proof of Pratik's possession over the land in question. It finds reference in the affidavit-in-reply of Asis Ruia. The installation of telephone in the office room is also shown as an instance of M/s. Pratik Marketing Pvt. Ltd. having effective control over the land in dispute. The police reports dated 10th May, 1999 and 14th September, 1999 submitted in proceedings u/s 144 Cr PC have been referred to espouse the stand that M/s. Pratik Marketing Pvt. Ltd. was in possession over the land in question. The reports submitted by the Receiver and the Officer-in-Charge of the Golabari P.S. have also been relied on to support the contention that possession had all along been with M/s. Pratik Marketing Pvt. Ltd.

27. From the documents placed before the Court the location of the so-called office room cannot be ascertained. There is no convincing material which gives the impression that an office room was constructed on the land in dispute. Where the telephone was installed is also not known. The authenticity of the document (annexure-P 6 of contempt petition) has been challenged. The orders issued in the proceeding u/s 144 Cr PC have not been filed. The Receiver was not made a party in the proceedings either and as such, he is not tied down by such reports,

nor his right to possess can be disturbed by admission made by one of the Directors of Pratap Properties Ltd. Elements of corpus possessions and animus possidendi cannot be formed by mere deployment of security personnel. The materials placed on behalf of M/s. Pratik Marketing Pvt. Ltd. do not support its contention that it was in effective and complete control over the land in dispute. The Receiver continued to have his hold and sway over the land in question. He never evinced his intention to abandon his right of possession over the land in dispute. He did exercise his right of possession from time to time by specific acts. The Receiver having been in actual possession and the ouster of the Receiver from the land in question not having been established, I am afraid the prayer for restoration of the property in favour of M/s. Pratik Marketing Pvt. Ltd. cannot be accepted.

It is on record that some security personnel deployed by M/s. Pratik Marketing Pvt. Ltd. were forcibly evicted from the land in question on 06/08/06. The hoardings displayed by M/s. Pratik Marketing Pvt. Ltd. were also removed. Materials placed before this Court do not indicate that the Directors of Salkia Estate Development Pvt. Ltd. and Pratap Properties Pvt. Ltd. were instrumental in having the security personnel of M/s. Pratik Marketing Pvt. Ltd. evicted from the land in question. Everything had been done at the Instance of the Receiver. The Receiver, however, has not been made a contemnor. No prayer for initiation of action against the Receiver has also been made. What was placed before the police personnel was the order issued by the trial Court in T.S. 12 of 1986. The police personnel were not apprised of the order of status quo issued by this Court on 21/06/06 and the subsequent order of extension. The execution was done by the police personnel of Golabari P.S. to implement the order of the trial Court in the mortgage suit. Such being the state of affairs, issuance of rule of contempt against the respondents Nos. 1 to 14 is not warranted. There is no material indicating that construction was made during the subsistence of order of status quo either.

28. Judging all these aspects, the prayers for issuance of contempt rule and direction for restoration of possession in favour of M/s. Pratik Marketing Pvt. Ltd. as made in C.P.A.N. 1103 of 2006, C.P.A.N. 1265 of 2006 and C.A.N. 6267 of 2006 are dismissed.

29. The main revisional application has been directed against the order dated June 16, 2006 passed by the learned Additional District Judge, 1st Court, Howrah in Misc. Appeal No. 46 of 2006, whereby the order dated January 21, 2006 passed by the learned Civil Judge (Senior Division), 2nd Court, Howrah in Title Suit No. 66 of 1999 was affirmed.

30. M/s. Pratap Properties Ltd. and M/s. Pratik Marketing Pvt. Ltd. entered into two agreements on May 15, 1987 for development of the two properties: one measuring 201 cuttachs and the other measuring 9 cuttachs 12 chotacs of land. The said agreements provided, inter alia, the following conditions:

- a) The agreement would be valid for fifteen years (clause 4 (c)).
- b) The agreement was terminable by either party by thirty days notice.
- c) The Opposite Party No. 1 was to pay a sum of Rs. 25.00 lakhs for payment to the mortgagee.
- d) The petitioner was to make a portion of premises free from mortgage.
- e) The Opposite Party No. 1 would be liable to have plans prepared for construction and development within three months and to get the building plan sanctioned within three months.
- f) During the continuance of the agreement, the owner would not without the prior consent of the developer enter into any agreement for sale except in respect of owner's area or otherwise deal with the property.

31. Claiming that there had been breach of the provisions contained in the agreement, M/s. Pratap Properties Ltd. by a notice dated 21/04/1999 addressed to M/s. Pratik Marketing Pvt. Ltd. cancelled the two agreements dated 15/05/1987 and also forfeited the earnest money of Rs. 3.15 lacs. The power of attorney dated May 25, 1987 was cancelled/revoked. In the wake of cancellation of such agreements, M/s. Pratik Marketing Pvt. Ltd. filed the Title Suit No. 66 of 1999 before the Civil Judge (Senior Division), 2nd Court at Howrah praying, inter alia, for decree for permanent injunction, restraining the defendant or their agents from entering into any agreement with any stranger or third party until and unless the deeds of agreement dated 15/05/1987 either cancelled or revoked by any decree of a Court of Competent Jurisdiction.

32. A separate application under Order 39, Rules 1 and 2 read with Section 151 CPC was also filed on behalf of the plaintiff M/s. Pratik Marketing Pvt. Ltd. On 05/05/1999 the learned Civil Judge (Senior Division) passed an interim order of injunction, restraining the defendants and its agents and representatives from entering into any agreement or contract with the third party or stranger for the purpose of making any construction on any portion of the properties as mentioned in the schedule of the agreement. On 07/06/1999 the learned Court directed maintenance of status quo as on the date in respect of the possession of the suit property till the disposal of the application. In rejecting the application under Order 39, Rule 4 CPC and in disposing of the application under Order 39, Rules 1 and 2 CPC, the Court passed an order of temporary injunction, restraining the defendants and its men and agents from entering into any agreement or contract with any third party or stranger for the purpose of making construction on any portion of the suit property as mentioned in the schedule on the plaint and in the agreement dated 15/05/1987. Challenging the order, M/s. Pratap Properties Ltd. preferred an appeal. In disposing of the Misc. Appeal No. 46 of 2006, the learned Additional District Judge affirmed the order dated 21/01/06 passed by the learned Civil Judge (Senior Division) in Title Suit No. 66 of 1999. Challenging, the aforesaid order, this revisional application under Article

227 of the Constitution has been filed.

33. Assailing the order of the appellate Court, Mr. S.P. Roy Chowdhury, learned senior counsel, has submitted that in upholding the order of the trial Court, the learned appellate Court has failed to appreciate that a suit at the instance of a developer is not maintainable in view of incorporation of Section 14(3)(C) of the Specific Relief Act. Citing the case of Vipin Bhimani and Anr. v. Sunanda Das and Anr. reported in 2006 (2) CHN 396 and State of West Bengal and Ors. v. Anil Kumar Bhuiya reported in 1982 (1) CHN 377, Mr. Roy Chowdhury has sought to emphasise his stand that a suit for specific performances of a development agreement at the instance of a developer is clearly hit by the provisions contained therein. Only a suit for specific performance of such agreement at the instance of the owner of the building would be maintainable if possession is already handed over to the developer and clauses (i) and (ii) of Section 14(3)(C) are complied with. It is thus well settled that a contract for construction work is not specifically enforceable except in exceptional cases no exception having been made out to make it specifically enforceable, there can be no order of injunction in support of such performance. Mr. Roy Chowdhury has also relied on the case of Purna Chandra Das Vs. Warren Industrial Ltd. and Another, to reinforce his stand that when the suit for specific performance of a contract for development is not maintainable, there cannot be any question of granting interim injunction till disposal of the suit.

34. It is urged by Mr. Roy Chowdhury that since the similar prayer for injunction was rejected in the suit for specific performance of contract being T.S. 168 of 1999, the identical prayer for issuance of temporary injunction cannot be made in a roundabout way. It is submitted that on examination of all the papers relating to the execution of the contract and having regard to the principles as to the grant of injunction, the trial Court in Title Suit No. 168 of 1999 rejected the prayer for injunction. The appellate Court missed this aspect in upholding the order of grant of temporary injunction in favour of the opposite party in Title Suit No. 66 of 1999, as contended by Mr. Roy Chowdhury. It is the stand of the petitioner.

35. Since the property had all along been in possession of the Receiver, the property in possession of the Court cannot be the subject-matter of injunction in another suit. It is also submitted that prior permission from the mortgagee not having been obtained, it resulted in violation of the order dated 27/11/1991 passed by the Hon'ble High Court in T.S. No. 85 of 1984. In view of the direction for maintenance of status quo in respect of possession, there cannot be change of the nature and character of the property till the disposal of the mortgage suit.

Mr. Roy Chowdhury has argued that the appellate Court failed to appreciate the fact that the opposite party No. 1 M/s. Pratik Marketing Pvt. Ltd., a developer was only interested in making profit by nomination and such monetary loss could be well compensated in money. In affirming the order of temporary injunction, the appellate Court did not consider the principle of granting injunction, as

contended by Mr. Roy Chowdhury.

36. Commenting on the propriety of grant of injunction, Mr. Roy Chowdhury has submitted that the trial Court failed to appreciate that serious breach of the provisions in the contract prompted cancellation of the agreements. The value of the property having increased manifold, continuation of the order of injunction will prolong the sufferings and agony of the mortgagor and mortgagee.

37. Appearing on behalf of M/s. Pratik Marketing Pvt. Ltd., Mr. Anindya. Mitra, learned senior counsel, has submitted that in granting temporary injunction in favour of M/s. Pratik Marketing Pvt. Ltd., the trial Court as well as the appellate Court rightly applied the principle of injunction. Both the Courts were convinced that there existed a prima facie case in favour of M/s. Pratik Marketing Pvt. Ltd. The balance of inconvenience also weighed very much in favour of M/s. Pratik Marketing Pvt. Ltd. An extensive project having been launched, the loss could not be compensated by awarding damages either.

38. Referring to the provisions of the agreement, Mr. Mitra has submitted that the agreement stipulated that it would continue for 15 years. Discharge of the contract could not be effected on flimsy grounds. The owner, however, went for a fresh agreement with a third party in order to make illegal gain by rescinding the contract. Such being the ulterior design of the owner, the trial Court as well as the appellate Court had rightly restrained it from entering into a fresh contract with the third party.

39. In order to get relief of temporary injunction, the party making the prayer is to make out a prima facie case. In order to find out whether there exists prima facie case, it is also to be shown that the petitioner has a legal right and that legal right has been threatened by the acts of the opposite party. It must be shown that the balance of inconvenience is on the petitioner's side and refusal to grant of injunction would result in the petitioner sustaining irreparable loss which cannot be compensated by way of damages.

40. Allowing the prayer for temporary injunction, the trial Court as well as the appellate Court took into consideration that the agreement for development was for a period of 15 years commencing from the date of the execution of the agreement. In executing the agreement the developer had invested nearly Rs. 75 lacs. The developer also persuaded the tenants to vacate their respective possession. Other projects connected with the development of the building had also been undertaken by the developer. There was nothing on record to show that the developer had committed any breach of the agreement at that stage. Judging all these aspects, the trial Court as well as the appellate Court viewed that cancellation of the agreement had not been in a bonafide manner. The cancellation of the agreement was also considered to be prematured, justifying intervention of the Court. Both the Courts below also took the right view that the loss and sufferings sustained by the developer could not be compensated by awarding damages either.

41. In *Vipin Bhimani and Anr. v. Sunanda Das and Anr.* (supra) and *State of West Bengal and Ors. v. Anil Kumar Bhuiya* (supra), it has been held that suit for specific performance of a development agreement at the instance of a developer is clearly hit by the provisions contained therein. It has also been held that a construction work is not specifically enforceable except in exceptional cases. Unless it is shown to be exceptional, there cannot be any order of injunction in support of such performance. Here I would like to mention that the order of temporary injunction was granted by the Courts below in a suit for injunction and not in a suit for specific performance of contract. Challenging the illegal termination of the contract, the developer came up before the trial Court for issuance of temporary injunction. On being convinced that the legal right of the developer had been threatened by the alleged termination of the contract, the appellate Court upheld the order of grant of temporary injunction in favour of the petitioner. Substantial investment had been made to implement the contract for development. Much headway was made for implementation of the project. It has been alleged that the owner called M/s. Pratap Properties Ltd. was all set to enter into an agreement for development of the land with a third party. As underscored in the case of *Ananda Prakash Agarwalla v. Tarakeshwar Prasad and Ors.* reported in (2001) SCC 568, it may not be appropriate for any Court to hold a mini trial at the stage of grant of temporary injunction. However, the trial Court as well as the appellate Court took the pain of going through the relevant documents to find out whether there existed a prima facie case in favour of the developer. The factum of balance of inconvenience was also taken note of. The appellate Court concurred with the view of the trial Court that the loss suffered by the developer could not be compensated by payment of damages.

When the covenants contained in the contract are negative in character, the proper remedy is to seek injunction for the purpose of restraining the other period committing breach of the contract. As provided in Section 42 of the Specific Relief Act, when the contract contains a negative agreement, expressed or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform, the negative agreement. The Court is required to look at the nature of the contract between the parties. If the contract is the subject of equitable jurisdiction, injunction may be granted, whether it contains a negative stipulation or not. Where the damages are not considered adequate remedy, the opposite parties can be restrained by an injunction. Judging all these aspects, the appellate Court affirmed the order of temporary injunction granted by the trial Court. Order issued on appreciation of evidence should not be normally interfered with in revision. Furthermore, the case is now ripe for final disposal. Viewed these aspects, I do not find any justification for interfering with the well reasoned orders passed by the Courts below.

42. In the result, the revisional application under Article 227 of the Constitution of India is dismissed with the direction upon the trial Court in seisin of the case being T.S. 66 of 1999 to hear out the pending applications and to dispose of the

suit expeditiously. preferably within a period of four months from the date of communication of the order.

The prayer for appropriate order for early hearing In C.A.N. 955 of 2007 is also thus disposed of.

Considering the nature of the case, there will be no order as to costs.

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