

**(1988) 11 BOM CK 0003**

**In the Bombay High Court**

**Case No :** Appeal from Order No. 223 of 1988 with Civil Application No. 1278 of 1988

Ramdularidevi Vishwanath Dubey and another

APPELLANT

Vs

Ramtej Shiridutt Mishra

RESPONDENT

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**Date of Decision :** 01-11-1988

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 144  
Specific Relief Act, 1963 — Section 6

**Citation :** (1989) MhLj 930

**Hon'ble Judges :** H. Suresh, J

**Bench :** Single Bench

**Advocate :** D.K. Jha and Upendra D. Shukla, for the Appellant; G.S. Bhatt and R.B. Singh, for the Respondent

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## **Judgement**

H. Suresh, J.—On January 13, 1987 the respondent (the defendant) in collusion with one Mr. Pandit Brahmdutt Awasthi, claiming to be the landlord of the suit chawl, filed a suit in the Court of Small Causes at Bombay being R. A. Declaratory Suit under Stamp No. 222 of 1987, for a declaration that he is the tenant of the suit premises viz., Room No. 4 in the said chawl and that his possession is being disturbed by the said Pandit Brahmdutt Awasthi and the present appellant No. 2. Relying on the statement made by the respondent, the Court of Small Causes at Bombay granted an order of injunction restraining the defendants in the said suit viz. Pandit Brahmdutt Awasthi and appellant No. 2 from dispossessing the present respondent from the suit premises otherwise than by due process of law. In fact, the present respondent was not in possession of the premises at all. On that day, the present appellant No. 2 was in possession of the premises. This order of injunction was obtained on January 15, 1987 on an interim application in the said suit. Thereafter on January 21, 1987 present appellant No. 2, was dispossessed from the premises. He had not been served with the order of injunction. He went to the Police station complaining about his dispossession. The present respondent was thereafter arrested by the

police. On January 22, 1987 the order of ad interim injunction was served on the present appellant No. 2. He then moved the Court of Small Causes for vacating the order of injunction. The Court of Small Causes by its order dated July 15, 1987 after hearing both the parties and by a reasoned order\\ vacated the order of injunction. The learned Judge came to the conclusion that as on the date of the filing of the suit and on the date when the order of injunction was granted, the present respondent (the plaintiff in the said suit) was not in possession of the suit premises at all. He also came to the conclusion that the present appellant No. 2 (defendant No. 2 in the said suit) was in possession of the suit premises on that day. The learned Judge further came to the conclusion that it was a collusive suit, collusion being between the said Pandit Brahmdutt Awasthi (defendant No. 1 in the said suit) and the present respondent, apparent.

2. At that stage, the present appellant No. 2 made an application that since he was dispossessed from the suit premises on January 21, 1987, his possession should be restored and an order to that effect should be passed. The learned Judge somehow came to a very strange conclusion viz., that defendant No. 2 i.e. the present appellant No. 2, was not dispossessed from the suit premises in pursuance of the order of the Court and, therefore, it is on that assumption he felt that he was unable to give any relief to the the present appellant No. 2 in that behalf. Though, the learned Judge categorically stated that the order of injunction was obtained by suppressing material facts which were within the knowledge of the plaintiff in the said suit and though he awarded heavy costs in favour of the present appellant No. 2, he was unable to do justice in the matter.

3. Against this judgment, the respondent herein filed an appeal before the Bench of two Judges of the Court of Small Causes being Appeal No. 368 of 1987. While confirming the finding given by the learned trial Judge of the Court of Small Causes, the Appeal Court dismissed the appeal on the ground that the dispute, in fact, was not a dispute between a landlord and a tenant inasmuch as the landlord was openly colluding with the plaintiff therein and it is on that ground the appeal was dismissed. In the result, the order passed by the learned trial Judge dated July 15, 1987 stood confirmed. That order is still in force. But possession was not restored.

4. Since the learned Judge was not giving an order for possession back to the present appellants, the appellants were advised to file a suit in the Bombay City Civil Court. The appellants accordingly filed a suit in the Bombay City Civil Court being suit No. 5431 of 1987 u/s 6 of the Specific Relief Act. After filing the suit, the plaintiffs (the present appellants) took out a notice of motion for an order of appointment of Court Receiver and for restoration of possession of the premises and for certain other reliefs. The learned Judge by his order dated December 18, 1987 granted a limited relief in terms of prayer (d) which only restrained the present respondent from transferring or parting with possession and/or dealing with the suit premises, but, the learned Judge would not restore possession. It is against this order the appellants have filed the present appeal.

5. The learned Judge of the Bombay City Civil Court came to the conclusion that the plaintiffs have a prima facie case of having been in possession of the suit premises from December 10, 1986 till the dispossession on January 21, 1987. However, he declined to grant the relief of restoration of possession on the ground that there was no satisfactory evidence on the part of the plaintiffs having been in actual possession of the suit premises on January 21, 1987 inasmuch as a certain ration card of the date December 2, 1986 had shown the address of the present appellants at some other place. The learned Judge failed to realise that the issue of possession was res judicata as between the parties.

6. There are one or two things which I would like to clarify at this stage. It is my experience in the City Civil Court as also in this Court that quite often, parties file bogus suits relating to possession of certain premises and obtain ad interim ex parte injunction from the lower Courts on the basis that they are in possession, while in fact the truth is otherwise and the other party is in possession, with the result the order of injunction so obtained will have the effect of virtually ousting the persons who are in actual possession of the premises. In all such suits, what normally happens is that at the time of final hearing of the application for injunction, the Court comes to the conclusion that the Court ought not to have granted such an interim relief. However, I have seen in most of the matters, the Courts have declined to grant any relief of restoration of possession to the party who has been ousted as above. In the result, though the party concerned succeeds in establishing that he has suffered injustice by virtue of an order of injunction granted ex parte by the Court on a misrepresentation of facts, yet, no justice is done to him. This is not proper. It is not that the Court is so helpless. It is not so much a principle of restitution within the meaning of section 144 of the Civil Procedure Code, as is a matter of doing justice between the parties. The principle is this : If the Court had been made aware of the real facts, the Court would not have granted such an ad interim injunction. If, therefore, by virtue of such an ad interim injunction, the party, who was not in possession of the premises, gains any advantage, it becomes the duty of the Court to see that it is undone. *Actus Curiae Neminem Gravabit* : An Act of the Court shall prejudice no man. *Nullus Commodum Capere Potest De Injuria Sua Propria* : No man can take advantage of his own wrong. If the order has been obtained by suppressing material facts, it is nothing but fraud on the Court itself. The proper thing in all such cases would be that the Court should pass an order for restoration of the possession forthwith.

7. If any such order for restoration of possession is not passed, the party, even though, loses on merits, still, gets an advantage of being in possession, and the suit, thereafter becomes a meaningless affair. This is what has happened in the present case. On January 13, 1987, the present respondent could not have filed a collusive suit and he could not have obtained an order of injunction on that basis. Being sure of the order of injunction, the present respondent could dispossess the present appellants from the suit premises, which he did on January 21, 1987. When the application was dismissed and the order of

injunction was vacated on July 15, 1987, the learned Judge ought to have noticed that that was not enough to do justice in the matter. In the present case the order of injunction was used as a shield to protect possession obtained by force, after securing an ex parte order of injunction from the Court. In all such circumstances, where the order of injunction is used as a weapon to oust the other party who would not have been so Ordered to be ousted if he had been heard, or where the order of injunction is used as a shield to retain forcible possession obtained just before or after filing the suit, good sense and justice demand that the mischief is undone and status quo ante is restored. In the present case, if the Court of Small Causes had restored possession, the present litigation and the resultant acrimonious proceedings could have been wholly avoided.

8. In the City Civil Court, the learned Judge misdirected himself when he went into the question whether the plaintiffs have produced any evidence of possession or not. The learned Judge further misdirected himself when he sought evidence as to the ration card of the plaintiffs for the purpose of establishing that they were in possession of the suit premises on January 21, 1987. In fact that question of possession is res judicata between the plaintiffs and the defendants in the City Civil Court. The finding given by the Court of Small Causes is binding on the respondent, the defendant, and the learned Judge ought to have granted the relief as asked for.

9. It is true that the learned Judge has observed in his order that in a suit u/s 6 of the Specific Relief Act, 1963, the Court may not necessarily restore possession at the interim stage. The Court need not necessarily appoint Receiver at the interim stage. It all depends upon the facts and circumstances of each case. In the present case, it was necessary for the Court to grant the relief of possession to the appellants, as the respondent had dispossessed the appellants from the suit premises by practising fraud on the Court. In any event, the plaintiffs had only asked for appointment of Court Receiver and through Receiver they be put in possession. In fact, the Court could have passed a mandatory order to restore possession without the intervention of the Court Receiver. In any event, the order of granting an injunction, directing the respondent not to part with possession or not to create any third party rights in respect of the suit premises, was no relief at all.

I, therefore, pass the following order :

To the extent that the learned Judge has declined to grant other reliefs, other than prayer (d) of the notice of motion, the order is set aside.

I appoint the Court Receiver as Receiver with the following directions :

The Court Receiver shall take steps to dispossess the present respondent and his family members and any other person found in the suit premises, if necessary, with the help of the police.

After taking possession of the suit premises, the Court Receiver to appoint the present appellants as the agents of the Court Receiver without security or deposit or royalty, but subject to the usual terms and conditions as agents of the Court Receiver.

The responsibility of the payment of rent will be that of the present appellants.

Till such time, the Court Receiver takes possession and carries out the above order, the order passed by the learned Judge in terms of prayer (d) of the notice of motion will continue to be operative.

At the request of Mr. Bhatt, I direct that the Court Receiver shall take possession as aforesaid on any day after November 30, 1988.

Court Receiver's costs shall be initially borne by the appellants, however, the same will ultimately be an item of costs in the suit.

As far as the costs of the appeal are concerned, the same will also be the costs in the cause.