(1986) 04 GUJ CK 0013

In the Gujarat High Court

Case No : A.F.O. No. 406 of 1985

Shivram Antaiah Shetty APPELLANT

Vs

Chimanlal Ambalal Trivedi and Others RESPONDENT

Date of Decision : 21-04-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4

Citation : AIR 1987 Guj 30

Hon'ble Judges : A.S. Qureshi, J

Bench : Single Bench

Advocate : R.V. Deshmukh, for the Appellant; D.M. Thakkar, K.G. Sheth and P.V. Nanavati, for the Respondent

Judgement

1. This is an appeal under 0. 43, Civil P.C. against the interlocutory order passed by the learned Judge of the City Civil Court, Ahmedabad, whereby he vacated the ex parte ad interim injunction granted by it earlier while confirming other part of the interim relief. The dispute pertains to a shop called New Mysore Cafe, situated as Ellisbridge, Opposite Main Gate of Gujarat College at Ahmedabad. For the sake of convenience, the parties in this appeal well be referred to as plaintiff and defendants. Originally the suit shop belonged to defendant 6 who is said to have transferred the suit shop to the defendant 1. It is the case of the plaintiff that defendant 1 transferred the suit shop to the plaintiff in December 1981 for a consideration of Rs. 20.000/-. There was no writing executed between parties to record such an agreement. It is further the case of the plaintiff that under an oral agreement, the plaintiff paid Rs. 20,000/- to defendant 1 in December 1981 and defendant I handed over the possession of the suit shop to the plaintiff to run the business in the suit shop in his own name for his own benefit. According to the plaintiff, he started his own business in the suit shop on and from 8-1-1982 with a formal opening ceremony. According to the plaintiff, he applied to the Ahmedabad Hotel Owners Association to become a member of the Association. He was duly enrolled as a member on payment of requisite entrance fee and annual subscription. The plaintiff further stated that he purchased necessary

furniture, utensils and other articles for the suit shop. He also made purchases from time to time from different shops to buy materials such as food grains, vegetables, oil, coal, soft drinks and other things required for running the, business in the suit shop. According to the plaintiff, when the business picked up, defendant I became envious and he tried to take back the suit shop from the plaintiff. Defendant I employed all available means to take back the suit shop from the plaintiff including intimidation and forceful dispossession. It is further the plaintiffs case that defendant 1 employed professional gundas who had beaten up the plaintiff and forcibly taken possession of the suit shop. The plaintiff also stated that on account of highhanded behaviour of defendant 1, the plaintiff filed a chapter case before the Sub Divisional Magistrate, Ahmedabad, who by his order sealed the suit shop. The plaintiff has also stated that prior to the Sub-Divisional Magistrate had sealed the suit shop, defendant I had forcibly taken away the furniture, utensils and other articles including his bank account pass book from the suit shop, which led to criminal proceedings before the Metropolitan Magistrate, Ahmedabad. The said furniture, articles and other goods were restored to the plaintiff by the order of the Court.

2. It is further case of the plaintiff that defendant 1 and defendant 6 have colluded with a view to oust him from the suit shop. According to him, originally the suit shop belonged to defendant 6, but he had transferred to defendant I who was accepted as a direct tenant by the subsequent landlord Sabar Hotel Ltd., who purchased the property from the previous landlady. Therefore it is common ground between the plaintiff and defendant I that the latter was direct tenant and that defendant 6 had no tenancy rights or any right, title or interest in the suit shop. Finally, according to the plaintiff, defendant I has lawfully transferred the suit shop to the plaintiff to run the hotel business by the plaintiff in his own name as a Proprietor and that defendant 1, who had purposefully not executed any writing with regard to the transfer of the business in the suit shop, wants to take unfair advantage of the fact that there is no writing with regard to the transfer of the business in the suit shop.

3. Defendant 1 does not dispute that the plaintiff was running the business in the suit shop since January 1982, but contends that the plaintiff is running the said business as a Manager of defendant 1. Thus, the only dispute between the plaintiff and defendant I is whether the plaintiff runs the suit business on his own behalf as a, proprietor or whether he is running the business as servant, agent or manager of defendant 1. To deal with this question, it is necessary to look at the documentary evidence produced by the parties on the record of this case. The plaintiff has produced Exs. 18/1 to 18/19 which are bills, vouchers, receipts, circular letter, etc. All these documents are in the name of the plaintiff and the name of the shop is stated to be New Mysore Cafe, i.e., the suit shop. The said bills, vouchers etc., are in respect of food grains, vegetables, spices, crockery, coal, oil, soft drinks, etc., which were used in running the hotel business in the suit shop. Ex. 18/18 is a receipt issued by Ahmedabad Hotel Owners Association in the name of the plaintiff and is in respect of the suit shop. It is a receipt of Rs.

132/- comprising of Rs. 101/as entrance fees and Rs. 31/- as annual membership subscription. It is dated 18-9-1982. Ex. 18/19 is a circular letter dated 1-12-1982 addressed to the plaintiff sent at the address of the suit shop informing him that the annual general meeting of the Association was to be held at Picnic House, Kankaria, Ahmedabad, on 22-12-1982 at 4.00 p.m. The plaintiff has also relied on Exs. M/20 to M/26 for the purpose of showing that he (plaintiff) was running the business in the suit shop as a proprietor. The plaintiff has also produced on the record of the case a medical certificate dated 2-8-1983 showing that the plaintiff was beaten up with fists causing him numerous injuries referred to in the said certificate to show that defendant 1 had got the plaintiff beaten up and forcibly removed from the suit shop. The plaintiff has also relied on the circumstance that defendant 1 had taken away utensils, furniture and other articles including the bank pass book of the plaintiff from the suit shop. Ultimately all these articles were restored to the plaintiff by the order of the Court in the criminal proceedings which the plaintiff took against defendant 1. The plaintiff has also relied on the affidavits of the shopkeepers who have stated that the plaintiff used to come to purchase vegetables, food grains, spices and other articles from their respective shops for the purpose of using those articles in the suit shop.

4. While the plaintiff has produced all these materials to show that he was running the business in the suit shop as a proprietor, defendant I has not been able to adduce any cogent and reliable evidence to show prima facie that the plaintiff was running the suit hotel as a Manager of defendant I and not as proprietor. Mr. D. M. Thakker, learned Counsel for defendant I has relied on the bank passbook of the plaintiff, in which the occupation of the plaintiff is shown as service. From this, Mr. Thakker wants this Court to draw an inference that the plaintiff was working as a Manager in the suit shop on behalf of defendant 1. The submission of Mr. Thakker is untenable and must be rejected. From a mere mention in a pass book of the plaintiff that his occupation was service, it does not make out even a prima facie case that he was serving with defendant in the suit shop. To make out a prima facie case, defendant I must produce some cogent and reliable documentary evidence which would clearly show that the plaintiff was running the business in the suit shop as a Manager and not as a proprietor. The first defendant could have done that easily by producing the pay register of the employees working in the hotel with their signatures and/or thumb marks for having received their salary/wages. It is admitted by defendant 1 that he does not have any such register. This fact very clearly shows that he did not run the said business. Hence there is no question of his having employed the plaintiff as a manager. Mr. Thakker has laid some stress on the fact that the licences of the suit shop are in the name of defendant 1. This circumstance also does not prima facie show that defendant I was running the business. It seems to be a part of strategy of defendant I that not only he did not execute any writing in favour of the plaintiff regarding the transfer of business in the suit shop, but also he kept the licences in his own name. This argument does not

advance the case of defendant I any further. There is considerable force in the submission of Mr. Deshmukh that defendant 1 has taken unfair advantage of his own wrong in not executing any writing regarding the transfer of business in the suit shop to the plaintiff, and not passing receipt for Rs. 20,000/received and keeping the licences in his own name. Mr. Deshmukh has also urged that defendant 1 has resorted to all illegal and foul means to deprive the plaintiff of his possession of the shop including getting the plaintiff beaten up physically and forcibly taking away furniture, utensils and other articles. This circumstance of defendant 1 taking away the articles from the suit shop goes strongly against him and clearly shows that he was not in possession of the suit shop as he alleged. If defendant was really in possession of the suit shop, there was no need for him to carry away all those articles. This circumstance very convincingly proves that defendant I was not in possession of the suit shop and that he was not running the business therein.

5. It is surprising that the trial court has vacated the ex parte ad interim injunction and refused to grant the interim relief on the ground that such a relief, if granted to the plaintiff, would be in conflict with the order passed by the Small Cause Court, Ahmedabad, ordering the possession of the suit shop be given to the Receiver in the suit between defendant I and defendant 6. The present plaintiff was not a party to that suit between the said two defendants. Hence the plaintiff is not bound by the order passed by the Small Cause Court ordering possession being given to the Receiver. The learned trial Judge should have granted the interim relief prayed for by the present plaintiff without being unduly worried about the fact of the order of the Small Cause Court because the present plaintiff was not a party to that suit and therefore he cannot be denied the relief which he is entitled to in the present suit. The Court must be guided by the considerations in the suit before it and must not allow extraneous considerations such as some order passed in some other matter while granting or refusing the relief which it considers appropriate in the facts and circumstances of the case before it. It is also surprising that the Court below has taken a very facile view on the question of the possession of the suit shop on the basis of licences and other documents being in the name of defendant 1. The Court must not restrict itself to the statements in documents while deciding the question of possession. It may be that the document may show possession of one party on papers, whereas the actual physical possession may be with some other party. While deciding the question of actual physical possession, the Court must not allow itself to be misled only by entries in documents and must examine all the evidence on the record. The Court must take special care to discover concealed frauds and camouflaged illegalities by having a close look at the material placed before it. The court is under a duty to uncover such carefully laid out frauds and illegalities. In this case, there is no doubt that defendant I has, tried to take advantage of his own wrong in not executing a proper document of transfer and keeping licences in his own name. Moreover, defendant I has resorted to all possible means fair and foul to throw out the plaintiff from the suit shop by

getting him physically beaten up and furniture and other articles removed from the suit shop in the most flagrant violation of law and civilized behaviour. His contention that the plaintiff was working as his manager is prima facie untenable. From the material before the Court at this stage this is only a prima facie finding. It will be open to the parties to lead evidence and to prove their respective contentions. Therefore the observations made hereinabove will not be taken to have given any finding of fact. At this stage, only the question of the prima facie case made out by the parties is gone into.

6. Mr. Deshmukh has contended that prima facie the plaintiff has been able to establish that he was lawfully conducting the business in the suit shop under an oral agreement and that he was forcibly dispossessed. Subsequently the possession was ordered by the Small Cause Court to be given to the Receiver. Hence, today the suit shop is in possession and custody of the Receiver appointed by the Small Cause Court in the suit between defendant 1 and defendant 6. According to Mr. Deshmukh, although the possession of the suit shop is with the Receiver the plaintiff is entitled to obtain possession thereof as the possession of the Receiver is custodia legis. He has therefore contended that although he has specifically not prayed for possession in the application for interim relief before the trial Court, he is entitled to get that possession as the possession is in custodia legis. Mr. Deshmukh has also gave an application for granting permission for amending the plaint and notice of motion. Mr. Thakker and Mr. P. V. Nanavati learned Counsel for respondents 6/1 to 6/5 have both strongly opposed the amendment being allowed. Both the learned advocates are heard on the amendment application. But it is not necessary to decide that question at this stage. It is open to the plaintiff to make an application for amending the plaint suitably before the trial Court. Hence no order is passed at present on the application for amending the plaint. However. it is held that the plaintiff is entitled to claim possession of the suit shop at this stage. The suit shop being in custodia legis, it is open to the Court to order restoration of possession to the plaintiff although there is no specific prayer for possession on the basis that the plaintiff has been able to establish that he was actually in possession and that he was forcefully deprived of possession. The first defendant cannot be allowed to take advantage of his own misdeeds and prevent the plaintiff from running the suit shop as per the oral agreement during the pendency of the present suit.

7. The Receiver is impleaded herein. He is respondent 5, who is represented by Mr. K. G. Sheth. Mr. Sheth has rightly abstained from taking sides as it is not open to the Receiver to take sides. He is only the officer of the Court and has to obey the directions of the Court. In the circumstances of the case, the appeal is partly allowed - The order of the learned trial Judge vacating the ex parte interim injunction granted by him earlier is set aside. The ex parte injunction granted by the trial Court earlier is restored. The Receiver (respondent 5) is directed to hand over the possession of the suit shop to the plaintiff forthwith. In the circumstances of the case, there shall be no order as to costs.

8. At this stage, Mr. Thakker and Mr. Nanavati request that the operation of this order be stayed for a period of three weeks from today as they wish to carry the matter further. The request is reasonable and is granted. The operation of this judgment and order is stayed for a period of three weeks from today. Order accordingly.

9. Appeal partly allowed.