
(1983) 02 BOM CK 0039

In the Bombay High Court

Case No : Civil Revision Application No. 439 of 1982

Smt. Suryaben Vinodbhai Shah

APPELLANT

Vs

Shri B.K. Jhala

RESPONDENT

Date of Decision : 21-02-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1983) 85 BOMLR 364

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sharad Manohar, J.—This is a revision application filed by the original plaintiff against that part of the order of the trial Court by which it refrained from passing any order to the effect that the possession of the flat for which receiver was appointed at her instance should be given to her as the receiver's agent. As will be presently pointed out, this prayer of the petitioner/plaintiff has practically no answer either in law or equity except perhaps in the technical contention of the pleadings and hence the revision application has got to be allowed.

2. The facts as are relevant for the purpose of this petition may be stated as follows:

(a) The plaintiffs' contention in the plaint which does not appear to be seriously disputed is that there is a colony called "Mayur Corporation Colony" at village Kothrud in the city of Pune, In the said colony, there are various residential plots. Plot No. 7 out of the same belonged at all the material times, to one Mrs. Madhuri Madhav Sheode, who is defendant No. 2 in the suit out of which the present revision application arises. Defendant No. 1 who is the present opponent is a partnership firm of builders engaged in the business of constructing buildings and selling the flats therein. For the sake of convenience, the parties will be referred to hereafter with reference to their position in the trial Courts as

"plaintiff" and "defendant" as the case may be, "Defendant No. 1 entered into an agreement dated June 4, 1979 with defendant No. 2, Mrs. Sheode, for purchase of said Plot No. 7 situate in the "Mayur Corporation Colony." The land was to be purchased by him for construction of a building thereon consisting of various flats. The flats were to be sold to various flat owners who were to be the members of the co-operative housing society to be formed by them. The sale-deed in respect of the flats was to be executed in favour of the society, but the individual flat owner had to be a member of the society. In other words, this is the usual kind of builder's agreement with the intending purchasers of flats, which purchasers form the co-operative society and become the owners of the flat in somewhat loose sense of the word. It is not disputed that defendant No. 1 entered" into an agreement with various persons for purchase of the various flats in the building, all of whom formed a co-operative society. The plaintiff, the petitioner before us, was one such member of the society. In fact she claims to be the founder-member of the society. She and the other intending flat purchasers formed a co-operative society called "Panchasheel Co-operative Housing Society." The society was registered under the Co-operative Societies Act. Just as the other members, the plaintiff entered into an agreement with defendant No. 1, the builder, for purchase of one flat in the building to be constructed by the builder, the flat consisting of ,three rooms and totally admeasuring 568 sq. ft. on the second floor of the building. The purchase price agreed was Rs. 56,000. The above were the averments in the plaint. I may mention here that the identity of the flat is not in dispute and may refer to one of the averments the veracity of which is no longer in dispute. The averment is that on June 29, 1979, the plaintiff paid a sum of Rs. 10,000 to the builder, defendant No. 1 as part payment of the price of Rs. 56,000 for the said flat and defendant No. 1 executed a receipt in her favour in that behalf.

(b) The grievance of the petitioner/plaintiff is that defendant No. 1 was to execute a written agreement as regards the transaction of sale and was to hand over the possession of the flat to her in pursuance of the agreement after the receipt of the balance of the sale price, but the defendant started giving indications of resiling from the agreement. Probably as a step towards this, he is abstaining from executing a written agreement as required by law. He has completed the construction of the entire building and in fact the possession of the remaining flats has already been handed over to the other flat-purchasers; but only the plaintiffs flat is retained by the defendant.

(c) Some correspondence ensued between the parties in culmination of which a notice dated October 13, 1980 was given by the plaintiff to defendant No. 1 calling upon him to execute ,the necessary written agreement and to register the same as required by law. In the notice it was stated that she was prepared to pay the balance of the price and to take the possession of the flat at any time. Her grievance is that instead of performing his part of the agreement, defendant No. 1 has given every indication of his intention to resile from the agreement. As a matter of fact, she has learnt that he was trying to sell the same flat to some

other person, thus causing loss and damage to her. The plaintiff, therefore, raised a dispute before the co-operative court against defendant No. 1 in this connection. But the co-operative court had no jurisdiction in that behalf. Hence she withdrew the said dispute from the co-operative court and filed the instant suit for specific performance of the agreement of sale of the flat in question. In the suit she has also asked for mandatory injunction requiring defendant No. 1 to obtain the requisite completion certificate from the municipal corporation and to put the plaintiff in possession of the flat after securing the completion certificate. She also asked for a permanent injunction restraining defendant No. 1 from dealing with the flat either by transferring the possession of the same or by alienating the same or by dealing with the same in any other manner which will in any way affect the plaintiffs' right to have the flat conveyed to her together with its possession.

(d) Immediately after the filing of the suit the plaintiff also made an application for appointment of receiver for the flat in question. In the application she referred to the various above mentioned pleas and also contended that the defendant was likely to dispose of the flat in favour of some unknown person and contended that in that eventuality she would suffer irreparable loss. By an application she prayed for an appointment of receiver for the flat in question with a further prayer that the possession of the flat be taken by the receiver and that the flat should be looked after by the receiver himself.

(e) Defendant No. 1 opposed the said application. The gravamen of his contention is that the plaintiff is not entitled to purchase the flat because she is already the owner of another flat in a building belonging to a society called "Jhala Co-operative Housing Society" of which she is still a member. He contended that it was the condition precedent for agreement of sale of the flat in the Panchsheel Co-operative Housing Society between defendant No. 1 and the plaintiff, that the plaintiff should dispose of her flat in the Jhala Co-operative Housing Society. Defendant No. 1 contended that the plaintiff had assured her that she would give up her membership in the Jhala Co-operative Housing Society and would dispose of the flat before purchasing the flat in the Panchsheel Co-operative Housing Society. It was contended that defendant No. 1 entered into an agreement with the plaintiff on this specific condition. He also raised various other contentions which are of no relevance for the purpose of this revision application. But one averment made in reply to the application for appointment of receiver may be mentioned here. In para. 11 of the reply, it was stated by defendant No. 1 that defendant Nos. 1 and 2 sold and handed over the suit flat to one Mrs. Lalita Wandekar. The contention was that this was done long before the filing of the present suit. However, significantly enough, nowhere in the reply it is mentioned that said Mrs. Lalita Wandekar had become the member of the co-operative housing society to whom the flat was to be sold ultimately by defendant Nos. 1 and 2. It was contended that since the flat was not in the possession of defendant No. 1 and since the same was in possession of the third party, meaning thereby, Mrs. Lalita Wandekar, the Court had no jurisdiction to appoint a

receiver in respect of the flat in question.

3. The learned Judge carefully examined the entire question, heard the parties and perused such evidence as was brought before the Court for deciding the prima facie truth regarding the case made out by each of the parties and came to the conclusion that the plaintiff had made out a strong prima facie case for appointment of receiver. Hence the order was passed by the Court directing appointment of the receiver in respect of the flat in question. It appears, however, that there was no specific plea in the application for appointment of receiver that the plaintiff should be appointed as the receiver's agent to remain in possession of the flat in question. Presumably it was on this account no order to the above effect was passed by the learned Judge.

4. Against the said order appointing the receiver, A.C. No. 412 of 1982 was filed by defendant No. 1 to this Court. The same came up for hearing before me on July 12, 1982, A caveat was filed on behalf of the plaintiff at the time of hearing itself and Mr. A.C. Agarwal appeared on her behalf. I examined the entire evidence of both the parties in support of their case. I was satisfied that the pleas and contentions sought to be raised by defendant No. 1 did not have a ring of truth, having regard to the evidence that was sought to be produced before the Court by defendant No. 1 at the stage. I was of the opinion that the agreement between the plaintiff and defendant; No. 1 was, in fact, an admitted fact and that the excuse for not performing the agreement set-up by defendant No. 1 was just a ruse for getting rid of the agreement with a view to secure higher bid which was bound to be received by defendant No. 1 having regard to the escalation of prices within the period of about 2 years. By my order dated July 12, 1982, therefore, I rejected the appeal summarily after giving hearing to both the sides. I was also intending to pass a speaking order in that behalf, but Mr. Dalvi, the learned Advocate appearing for the appellant, made a statement before me that he had no intention to file any appeal against the said order since no Letters Patent Appeal was competent and since he was not inclined to approach the Supreme Court in this matter. I, therefore, made a specific observation to that effect in my order dated July 12, 1982 and dismissed the said appeal summarily. However, at the time of the dismissal of the appeal, Mr. Agarwal, the learned Advocate who had filed caveat for the plaintiff made an application before me on behalf of the plaintiff that since the receiver had already recovered possession of the suit flat and was very much in possession of the same, pursuant to the order against which defendant No. 1 intended to file no appeal, there is no reason why this Court should not direct that the plaintiff should be put in possession of the flat in question as the receiver's agent. Mr. Agarwal contended that the hearing of the suit may take a long time and having regard to the defendant's present attitude he would not rest content with the decision of the trial Court if the decree was against him. On the other hand, if the suit was dismissed for any reason, the plaintiff was bound to file an appeal against the same. All this meant that litigation would continue for a long time and during all that period the flat would remain unoccupied in possession of the

receiver. He contended that if the plaintiff had made out a prima facie case for appointment of receiver it meant that she had made out a prima facie case to succeed in the suit itself and, hence, had also made out a prima facie case for getting into immediate possession of the flat at least as the receiver's agent. No loss would be caused to the defendant if the plaintiff went into the possession of the flat because she would after-all be in possession only as the receiver's agent and if the defendant's contention is ultimately accepted by the Court and the plaintiff's suit, is dismissed, the defendant would get back the possession from the plaintiff because the defendant would be sufficiently protected by the undertaking to be given by the plaintiff to the Court to hand over possession back to the receiver and ultimately to the defendant if no decree for possession was passed in her favour for any reason.

5. I, however, pointed out to Mr. Agarwal that he was at liberty to take independent proceedings by way of the revision application against the order of the learned Judge, if he so desired, but in the Appeal from Order filed by the appellant I would not be justified in passing a substantive order in favour of the plaintiff other than the order of dismissing the appeal.

6. It was thereafter that Mr. Agarwal filed the present revision application on behalf of the plaintiff. His grievance in the revision application is that while passing the order for appointment of receiver, the learned Judge should have also made an incidental order to put the plaintiff in possession of the flat after directing her to pay the balance of the purchase money and after securing the completion certificate from the municipal authorities. Mr. Agarwal's contention in the revision application is that in these days of acute housing shortage, it is a prodigious social waste that flats should remain unoccupied even when the claimant has made out a strong prima facie case for title to and possession of the same. Mr. Agarwal contended that even though no specific prayer in that behalf was made in the trial Court in the application for appointment of receiver, the above mentioned relief is an incidental relief which the Court should give as a master of course with a view to avoid social waste.

7. After rule was issued in the said revision application, Mr. Dalvi on behalf of defendant No. 1 answered the Rule. His contention was that the completion certificate for the flat was not yet received and in the absence of the completion certificate, it would not be open for the plaintiff to ask for the possession of the flat in question. Mr. Agarwal, however, contended that the plaintiff had obtained the completion certificate in respect of the entire building excepting only the suit flat. He stated that there was no reason why the receiver will not be able to apply for the completion certificate and secure the completion certificate from the authority when the completion certificate for the other flats is already given by the municipal authority. I called upon Mr. Agarwal to file the necessary affidavit in that behalf and gave time to Mr. Dalvi to file his client's affidavit-in-reply, if he so desired. Accordingly Mr. Agarwal filed an affidavit stating therein the fact that the defendant had refrained from obtaining the completion

certificate only in respect of the suit flat while he had already obtained the same in respect of the remaining flats in the building. He also pointed out that all other flat owners have even entered into the possession of the flat and that only the suit flat was kept vacant by defendant No. 1 evidently with a view to prevent the plaintiff from claiming immediate possession of the same. A reply-affidavit was filed by defendant No. 1 on February 21, 1983. In the affidavit it was specifically admitted that the completion certificate in respect of all other flats was taken by defendant No. 1. There was no denial that the other flat owners had entered into possession of the remaining flats. He has not explained as to why only the suit flat was singled-out for the purpose of not taking the completion certificate. His contention in the said affidavit is not that the construction of the said flat is in any way incomplete. It really beats imagination as to why and in what circumstances the municipal corporation was persuaded to give certificate for the entire building except the suit flat when it is nobody's contention that the construction of the said flat is not complete as per any of the corporation rules.

8. In the reply-affidavit it is further contended that the possession of the suit flat was "handed over to Mrs. Wandekar as she was shelter less and required urgent possession." It is further stated that

she took possession of the flat in dispute even though no completion certificate was obtained because she had no accommodation and therefore had no choice.

It is further stated that

after the receiver took over possession, the opponent did not obtain the completion certificate in respect of the said flat because of his pending dispute.

9. It is unnecessary to refer to the other part of the affidavit-in-reply to detail.

10. At the time Of hearing of the revision application, Mr. Dalvi advanced five arguments on behalf of defendant No. 1, His first contention was that the present revision application was not competent. Secondly, he contended that the present application should be made to the trial Court. Thirdly, he contended that if at all a person is to be appointed as receiver's agent it should be the defendant not the plaintiff. Fourthly, he contended that this is a case where rights of the third party are involved and hence no order for possession to the plaintiff as receiver's agent should be passed. Lastly, it is contended that defendant No. 1 is prepared to deposit the amount of Rs. 10,000 received from the plaintiff and that on that condition the present revision application should be dismissed.

11. I do not think that any of the arguments of Mr. Dalvi can be accepted. To my mind, the only plausible plea that Mr. Dalvi can be said to have made is that the present revision application is not competent because there exists no order by which the plaintiff can be said to be aggrieved, I will, therefore, deal firstly with that part of his argument.

12. It is true that in the original application filed by the plaintiff there is no specific prayer for appointing the plaintiff as receiver's agent. It is also ,true that

the trial Court has granted the plaintiff's application for appointment of receiver in toto, as it stood. All the same, to my mind, it is the bounden duty of every Court to pass an incidental order in connection with the management of the property in the custody of the receiver. To my mind, Mr. Agarwal is quite justified in raising the contention that in these days of acute housing shortage the Court should have its face set against giving rise to such a situation that the plaintiff who has made out a strong prima facie case for possession goes without possession for years together while the flat in question remains unoccupied simultaneously. While passing the order for appointment of receiver, it was the duty of the Court to pass incidental orders for management of the flat and one of the method of management is to put an appropriate person in possession of the flat, who can use the flat in a reasonable manner, as the receiver's agent. Such an order should be passed by the Court during the pendency of the suit even if no prayer in that behalf is made by either side, I do not mean to suggest that in every case the Court must pass an order directing that the plaintiff should be put into possession as the receiver's agent. It may be that in a given circumstance the defendant would be legitimately entitled to continue with the possession as the receiver's agent. But obviously, the present case is not one of them. Defendant No. 1 does not want to go into possession of the suit flat for itself. The question can generally arise only between the plaintiff and defendant No. 1 and in between the two only the plaintiff will be entitled to go into possession of the flat as the receiver's agent. To my mind, therefore, the Court can be said to have failed in its duty towards not only the plaintiff but towards the society as a whole when it ignored its obligation to make arrangement for possession of the flat in favour of an appropriate person. As is well known, there are occasions when the Court even appoints other persons as agents so that the suit property is not wasted. In the instant case, evidently no third party can be brought into possession and at the same time the flat should not be allowed to remain vacant for years together because such a situation would inevitably result into what, in the eyes of law is a "waste". As a matter of fact, the entire rationale for appointment of receiver is the avoidance of waste and the concept of waste must vary and is bound to assume new dimensions by the march of time and progress of society.

13. I must, therefore, hold that even though there was no prayer as such in the plaintiff's application (for appointment of receiver) of appointing the plaintiff as the receiver's agent to go into the possession of the flat, the trial Court should have passed an order to that effect suo motu. The failure on the part of the trial Court to pass an order, to my mind, is a material irregularity in the exercise of its jurisdiction within the meaning of Section 115 of the CPC and hence it cannot be said that the present revision application is not competent.

14. The second objection raised by Mr. Dalvi is that the application for the present should be appropriately made to the trial Court. I do not see any reason why this plea should be accepted. Nothing was brought to my notice on the strength of which it could be said that the trial Court would be better equipped to

pass an order which I intend to pass in the present revision application. The only two persons who can legitimately compete for being appointed as the receiver's agent are the plaintiff and defendant No. 1 and since defendant No. 1 has no equity in his favour because admittedly defendant No. 1 does not require the accommodation at all for its own purpose, the only person entitled to be inducted into the possession as receiver's agent is the plain alt who is in dire need for the accommodation.

15. This observation of mine also answers Mr. Dalvi's third contention that it is the defendant who should be appointed as the receiver's agent.

16. Mr. Dalvi's next contention was that in the instant case the third party's interest is involved. In this connection, he relied upon the interest created in favour of Mrs. Wandekar. He invited my attention to his averment in paras. 4 and 5 of the said affidavit and contended that Mrs. Wandekar had made an application (exh. 50) in the trial Court stating that the receiver had taken possession of the suit flat from per and contended that she was a necessary party as regards the question whether the plaintiff should be put into possession of the suit flat. It is stated in para. 4 of the affidavit that the said application was rejected by the trial Court on January 28, 1983. A reference is made in para. 5 of the said affidavit about an application of the third party, namely, Mrs. Wandekar I exh. 57) dated December 2, 1982. It is mentioned in the said para, that copies of the said application are being produced alongwith the affidavit Neither the copy of any of the applications nor the copy of the order passed by the court thereon is, however, produced alongwith the said affidavit. A zerox copy of the order purporting to have been passed by the Court was flourished by Mr. Dalvi before me. But surprisingly enough, it was not tiled in the Court at all. Even from the zerox copy which purported to be the order passed by the Court, all that could be gathered by me was that a prayer was made by the applicant to the effect that the plaintiff should be directed to deposit the entire balance purchase money. It also appeared from the order that an alternative prayer was made for a direction that the third party should be put in possession. But it appeared that the principal prayer was the direction that the plaintiff should be ordered to deposit ,the balance of the purchase money in the Court.

17. But the most intriguing part of the matter is that the Rule in the present revision application was granted as early as on July 27, 1982. By the revision application, defendant No. 1 was required to show cause as to why an order should not be passed directing the plaintiff to be appointed as ,the receiver's agent for the purpose of the possession. Curiously enough, the application by way of reply to the plaintiff's plea for possession was filed by the third party not before me but in the trial Court! The order on the said application is alleged to have been passed by the trial Court as early as on January 28, 1983. Neither any revision application is filed against the said order till the date of the present order nor any application is made by said aggrieved third party, Mrs. Wandekar, to be impleaded in this revision application to oppose the plaintiff's prayer for

being appointed as the receiver's agent. Mr. Dalvi contended that no application could be made on behalf of the third party in this Court because the third party is not a party to the revision application. The answer really surprises the Court because every-day persons who are being affected by the Court's order are making application in this Court to get themselves impleaded in the proceedings in this Court so as to protect themselves from any order which may have some adverse effect on them, In the instant case, Mrs. Wandekar is the person directly to be affected by the order. It is not contended by Mr. Dalvi that she could not be aware of the present revision application. The application was filed by her in the trial Court long after the Rule in the present revision application and Mr. Dalvi himself stated before the Court that the learned Judge rejected the application because of the pendency of the revision application. In these circumstances, it really beats the Court's imagination as to why the third party was at all advised to file an application in the trial Court. Any Advocate of experience would know that when the application by the plaintiff for being put in possession of the suit flat as receiver's agent is pending in the High Court, no trial Court would pass an order that a third party should be put in possession knowing full well that the plaintiff's application for similar relief is pending in the High Court. In spite of the awareness of this position, the third party was persuaded to make an application in the trial Court and when the trial Court passed an adverse order dismissing the application in view of the pendency of the application before this Court, no effort is made by the third party to approach this Court for appropriate relief. To my mind, this clearly indicates that the third party is nothing but a stooge or puppet set up by defendant No. 1 itself. I asked Mr. Dalvi as to how it was that the said Mrs. Wandekar was put into possession of the said flat when admittedly no completion certificate was obtained by defendant No. 1 in respect of the flat, Mr. Dalvi's contention was that this was done illegally and he further admitted that this will even constitute an offence within the meaning of municipal law. His only contention by way of defence, however, was that even an offence is a fact and if the fact is complete, it cannot be altered by the Court without hearing the party concerned. As a broad proposition of law Mr. Dalvi may be right. If the said third party approaches this Court for suitable relief, the Court may consider that application on its own merit, but the point today is that so far as defendant No. 1 is concerned he has neither law nor equity in his favour. Defendant No. 1's only interest is in the balance of purchase money and since the petitioner is herself contending that she should be given possession after payment of the entire purchase money, defendant No. 1 cannot nourish any grievance against such interlocutory arrangement. His interest is fully protected by virtue of:

- (a) the deposit of balance of purchase money in the Court by the plaintiff; and
- (b) the undertaking to the Court by the plaintiff.

18. Mr. Dalvi's last contention need not detain me very long. He contends that defendant No. 1 is prepared to deposit the amount of Rs. 10,000 admittedly paid

by the plaintiff to the firm. I fail to see the propriety of such a plea. The order appointing the receiver as prayed for by the plaintiff has become final. "This means that the plaintiff has made out a prima facie case to succeed in the suit. To allow the defendant to pay the amount of Rs. 10,000 which the defendant enjoyed for three years without payment of interest and to require the receiver to continue with the possession all by himself on that account would be meaningless exercise, conferring the benefits on neither of the parties.

19. In the circumstances, I pass the following order:

20. The revision application filed by the petitioner is allowed. The Rule earlier issued is made absolute.

21. The trial Court is directed to pass suitable order appointing the present petitioner as the receiver's agent and to be put into possession of the flat which is the subject-matter of the suit after requiring her to execute the appropriate agreement in that behalf containing the necessary undertaking in that behalf. However, the order to be passed by the trial Court shall provide:

(a) that the present petitioner shall not be entitled to be put into possession of the flat in question until the balance of the amount of sale price fixed as per the agreement between the petitioner and the defendant for sale of the flat to the petitioner is deposited by the petitioner in the Court.

(b) that the requisite completion certificate or the occupation certificate, as the case may be, for the flat in question, is received by the receiver from the municipal corporation.

22. The Court shall direct the receiver to make immediately an application to the corporation for the requisite completion or occupation certificate for the flat in question. If any expenditure is required to be incurred in that behalf, the same shall be defrayed by the petitioner in the first instance. The Court shall pass suitable orders directing the receiver to do everything needful for the purpose of securing the necessary completion certificate or occupation certificate in order to enable the petitioner to occupy the flat in question.

23. Costs shall be the costs in cause. Liberty to the parties to apply.