

(2009) 11 BOM CK 0131

In the Bombay High Court

Case No : Appeal No. 234 of 2009 in Notice of Motion No. 1922 of 2008 in Suit No. 1697 of 2008

Vishnu Damodar Salonkar

APPELLANT

Vs

S. Purandara Lakshmi Janardana Joisa

RESPONDENT

Date of Decision : 21-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Specific Relief Act, 1963 — Section 6

Citation : (2010) 2 ALLMR 372

Hon'ble Judges : R.C. Chavan, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : R.D. Soni, N.M. Sakhardande and B.S. Nayak, for the Appellant; Rajani Iyer and Y.V. Divekar, instructed by Divekar and Co. and S.A. Vichare, representative of the Court Receiver, for the Respondent

Judgement

P.B. Majmudar, J.—This appeal is directed against the judgment and order passed by the learned Single Judge dated 20th February, 2009 in Notice of Motion No. 1922 of 2008. By the impugned order, the learned Single Judge passed an order of appointment of Court Receiver and permitted the plaintiff to act as an agent of the Court Receiver. The appellant is the original defendant of Suit No. 1697 of 2008. The appellant owns the suit premises. The case of the plaintiff is that he was occupying the suit premises i.e. one room, situated at Charkop, Mumbai, on leave and licence basis from 2001 to 2004. In the year 2004, the defendant entered into an agreement for sale of the very room, which the plaintiff was occupying as a licensee. The total consideration fixed was Rs. 4,00,000/and at the time of execution of the document, a sum of Rs. 50,000/was paid in cash. It is the case of the plaintiff that on the basis of aforesaid agreement to sale, he was permitted to occupy the suit premises and was not required to pay any licence fee thereafter. According to the plaintiff, defendant assured the former that the sale deed will be executed, the moment the flat which was mortgaged with MHADA, is released from the said mortgage. It is the case of the plaintiff

that thereafter, he requested the defendant to comply with the agreement. As the defendant did not take steps towards executing the sale deed, the plaintiff served a notice dated 09012007 through Advocate, requesting the defendant to execute the sale deed. As per the said notice, plaintiff requested the defendant to take appropriate action for executing the sale deed. In para No. 2 of the said notice, it is stated by the plaintiff that it was agreed by the defendant to sell the suit premises for a sum of Rs. 4,00,000/and an amount of Rs. 50,000/was already paid, out of which Rs. 20,000/was paid in cash and Rs. 30,000/by way of a cheque No. 183525 dated 10112004. But, the defendant never turned up, nor made any attempts to handover the necessary document regarding title. Thereafter, no development took place in the matter. Subsequently, the plaintiff filed the aforesaid suit on 22052008, praying for specific performance of the said agreement, as well as, further praying that the defendant may be restrained by injunction from dispossessing the plaintiff from the suit property and from creating third party interest in the suit property, as the plaintiff apprehended that defendant may dispossess him from the suit property.

2. In the aforesaid suit, plaintiff moved a notice of motion with a prayer that the defendant may be restrained from disturbing the peaceful possession of the plaintiff in the suit property. The suit and the notice of motion have been resisted by the defendant on various grounds. It is the case of the plaintiff that during the pendency of the notice of motion, he was forcibly dispossessed from the portion of the property and according to the plaintiff, defendant has tried to put some of his goods, When the plaintiff resisted the same, the defendant could not take the possession of the entire portion, but defendant's goods were lying in part of the premises i.e. the room in question. The back side portion is occupied by the plaintiff, which is a small portion, wherein he was compelled to stay along with his three family members.

3. While opposing the notice of motion, it is the contention of the defendant that the plaintiff had voluntarily handed over the possession of the disputed property to him sometime in April 2008, and subsequently, the plaintiff again trespassed upon a portion of the suit property and that is how, the plaintiff is in occupation of the back side portion of the room i.e. Kitchen. It is the case of the defendant that the plaintiff was allowed to occupy the said room for the period between the years 2001 to 2004, but, he induced the defendant to execute a writing dated 10112004, though he had not shown any willingness to give the aforesaid property to the plaintiff. It is the case of the defendant that the leave and licence agreement expired in 2004 and thereafter, plaintiff's occupation in the suit property was unauthorized. He denied the say of the plaintiff that he forcibly sought to enter into the premises on 19th May, 2008. It is the case of the defendant that at the end of April 2008, plaintiff had vacated the suit premises and thereafter, the plaintiff again trespassed upon the portion of the suit property. According to the defendant, the kitchen room, is in occupation of both the plaintiff as well as the defendant.

4. The learned Single Judge after hearing both the sides, came to the conclusion that prima facie, it was established that agreement of sell was executed by the parties and that the defendant tried to forcibly evict the plaintiff from the suit property and, The learned Single Judge ultimately disposed of the notice of motion by directing the plaintiff to deposit the remaining amount of Rs. 3,50,000/ in the Court on or before 16032009. The Court Receiver was appointed to take possession of the flat and to evict the defendant and his family members and the plaintiff was appointed as an agent of the Court Receiver. It is the aforesaid order which is impugned at the instance of the original defendant.

5. We have heard the learned Counsel for the appellant and the learned senior Counsel for the respondent at length and have gone through the proceedings of the case as well as the order passed by the learned Single Judge.

6. The learned Counsel for the appellant/original defendant vehemently submitted that the learned Single Judge gravely erred in passing the order of appointment of the Court Receiver. He submitted that plaintiff has filed the present suit for specific performance of the agreement and unless the suit is decreed, at this stage, there is no question of appointment of Court Receiver or asking the plaintiff to be in possession as agent of the Court Receiver. It is submitted by the learned Counsel for the appellant that after executing the agreement to sale, for a considerable time, plaintiff has never shown his willingness to act on the basis of the said agreement to sale and therefore, it cannot be said that the plaintiff is ready and willing to perform his part of the contract. The learned Counsel for the appellant further submitted that even otherwise, plaintiff was occupying the premises as a licensee and after the license period was over, he voluntarily surrendered the possession in April 2008. It is submitted by the learned Counsel for the appellant that thereafter the plaintiff tried to forcibly enter into the premises in June 2008 i.e. after the suit was filed. He contended that even otherwise, this is not a case in which the plaintiff has claimed protection of his possession in part performance of the contract by saying that he was put in possession in pursuance of the agreement to sale. If the plaintiff was dispossessed even in a wrong manner, his remedy was to approach the Court by way of separate proceedings u/s 6 of the Specific Relief Act, but the possession could not have been restored in his favour. It is submitted by the learned Counsel for the appellant that in any case, prayer made in the notice of motion is for injunction restraining the defendant from dispossessing the plaintiff. Plaintiff was occupying only back portion of the suit flat and therefore, at the most, the learned Single Judge should have granted injunction restricted to that portion only. Prayer regarding appointment of Court receiver is not made in the motion. It is submitted by him that the order of the learned Single Judge in respect of the appointment of the Court Receiver is without jurisdiction. The learned Counsel for the appellant further contended that he has no objection if the injunction prayed for in the notice of motion is granted, whereby the defendant may be restrained from dispossessing the plaintiff from the portion, which the plaintiff has occupied. To evict the defendant from

remaining portion, would be a very harsh order and will put the defendant in a difficult situation, as the mother of the defendant who is residing in the premises, is suffering from Cancer and she is required to take medical treatment nearby the premises. It is submitted by the learned Counsel for the appellant that both the sides may be directed to maintain status quo and the hearing of the suit may be expedited.

7. Ms.Rajani Iyer, learned senior Counsel appearing for the respondent/original plaintiff submitted that this is not a case in which any sympathy is required to be shown to the present appellant, as the appellant has taken law in his hand and taken away half of the portion of the premises in a high handed manner. As a result of it, today, plaintiff is obliged to occupy a small portion wherein he is residing with his three family members. The learned Counsel for the respondent strongly submitted that during the proceedings of the notice of motion, the defendant illegally entered upon the premises and forcibly took away the possession of half portion by putting his luggage. Under these circumstances, the learned Single Judge was perfectly justified in passing the impugned order. It is submitted by her that at the time when the suit was filed by the plaintiff, he was occupying the entire room, which includes Kitchen also, and because of defendant entered in an illegal manner, the respondent is pushed back in a kitchen with his three family members. It is submitted that the appeal is required to be dismissed.

8. Considering the rival submissions and the facts and circumstances of the case, following factual aspects are not in dispute or cannot be disputed. (1) Respondent/original plaintiff was put into possession of entire portion of the room on leave and licence basis in the year 2001. (2) He occupied the said premises on the leave and licence basis upto the year 2004. (3) On 10112004, plaintiff and defendant entered into an agreement by which defendant agreed to sell the said tenement to the plaintiff for a sum of Rs. 4,00,000/-. (4) Plaintiff paid Rs. 50,000/at the time of executing the said document. (5) After the agreement in the year 2004, plaintiff was all throughout occupying the portion undisputedly till April 2008. (6) In the first affidavit in reply filed on 14072008 in Para No. 8, the appellant categorically stated as under:

8. I further say that the present proceedings is an abuse of the process of law, the plaintiff has no locus to file the present suit for specific performance of an alleged illegal and invalid contract as the said property belongs to the defendant as owner thereof coupled with the lien with MHADA and is of his exclusive ownership thereof and which has always been in his possession. I say that after the expiry of the leave and licence period, the plaintiff ought to have returned the same to the defendant, but instead he has trespassed the kitchen of the suit property though he has no legal right to be on the suit property. I say that the plaintiff has abused the process of law to suit his own ulterior motives and that on the basis of his conduct alone the plaintiff has disentitled himself to any discretionary reliefs of injunction as prayed for by him. I therefore, say that on

this count also, the aforesaid notice of motion and the suit ought to be dismissed with costs. This implies that appellant admitted that plaintiff continued in possession (7) In his sur rejoinder dated 23092008, the appellant came up with the case of plaintiff having vacated the premises in April 2008 and reentered (trespassed upon) part of the premises in June 2008.

9. The aforesaid factual aspects are not in dispute. Considering the said factors, it is required to be considered as to whether plaintiff was in possession of entire disputed property as on the date on which the suit was filed and as to whether he has voluntarily handed over the possession of suit premises to the defendant, as contended by the defendant.

10. In this connection, it is required to be noted that the plaintiff is earning his livelihood by rendering work as a Pujari in a temple. It is therefore, to be presumed that his financial condition is not so strong. Plaintiff was allowed to occupy one room on leave and licence basis and was paying licence fee at the relevant time. In the year 2004, when the defendant agreed to sale the property to him, he paid a sum of Rs. 50,000/, but there were certain conditions which were to be performed by the defendant as the flat was under the mortgage of MHADA. The mortgage was required to be redeemed and thereafter, plaintiff was to pay remaining balance of Rs. 3,50,000/, on being satisfied that the title is cleared

11. Prima facie, it has to be held that the defendant had neither obtained necessary permission from MHADA, nor gave documents in this behalf to the plaintiff. In these circumstances, naturally plaintiff was hoping that defendant will act accordingly. It is required to be noted that plaintiff gave a registered notice to the defendant on 09012007, requesting the defendant to perform his part of the contract. Thereafter, he was constrained to file the suit for specific performance. At no point of time, defendant ever denied the execution of an agreement with the plaintiff or alleged that plaintiff is a defaulting party so far as the performance of the contract is concerned. In spite of the same, in the suit, defendant took a plea that he was induced to execute a document. It is pertinent to note that defendant is a Sales Tax Officer and a well qualified man. It is not possible to believe that he entered into an agreement on the basis of inducement on the part of the plaintiff.

12. It is true, as contended by the learned Counsel for the appellant that in the agreement there is no reference to the effect that plaintiff is in possession of the property. Therefore, one cannot come to the conclusion that possession was given to the plaintiff by virtue of the agreement to sale. The argument advanced by Mr.Soni is attractive to the effect that if the plaintiff is not put in possession by virtue of the agreement, the defendant was entitled to remove him from the possession and he cannot protected his possession in a suit for specific performance and is required to seek remedy elsewhere by filing a suit u/s 6 of the Specific Relief Act or any other proceedings.

13. It is no doubt true, as argued by Mr.Soni, that neither in the agreement to sale, nor in the plaint, the plaintiff has pleaded his case that he was put in possession of the property by virtue of an agreement to sale. However, the case is required to be examined from a different angle i.e. it is not the case in which plaintiff has asserted his right to the effect that he was put in possession for the first time, on the basis of an agreement for sale. Plaintiff was occupying the suit property since the inception of the leave and licence agreement i.e. 2001. He continued to occupy the suit premises even after 2004 and at the time of execution of the agreement of sale, though licence period was over, then also, he was occupying the portion of the premises all through out. In such an eventuality, it can be presumed that he was allowed to occupy the premises only on the basis of agreement of sale and there was no reason to continue plaintiff's possession even after licence period had come to an end. If that be so, the action of the defendant dispossessing the plaintiff from the suit property, during the pendency of the proceedings, in such a manner, in our view, is absolutely improper. No one can take law in his hand.

14. Even thereafter, though licence period was over, defendant allowed the plaintiff to continue with the possession all throughout till the year 2008 when the suit was filed by the plaintiff. In fact, even the maintenance charges were paid by the plaintiff at the rate of about Rs. 2,000/per month to the Society. In his affidavit in reply dated 14072008 in Para 14, the appellant categorically stated that maintenance charges were accepted by the society from the plaintiff, through receipt was issued in appellant's name. The appellant cannot therefore, take advantage of receipt dated 19032008 in respect of maintenance charges from May 2008 to February 2009. In any case, if appellant claims that plaintiff gave up possession only in April 2008, it is enigmatic as to what prompted him to pay maintenance charges in March 2008 in anticipation. Subsequently, when the plaintiff apprehended his dispossession/removal from the suit property, he filed the suit and asked for an injunction.

15. At this stage, it is required to be noted that it is not in dispute that after the agreement, the plaintiff was occupying the entire premises. Defendant never objected to his remaining in the possession, though the defendant knew that the licence agreement was not renewed since the year 2004. It seems that after the licence agreement came to an end, defendant had not evicted the plaintiff, as the agreement for sale was executed in favour of the plaintiff and the plaintiff was allowed to remain in possession of the suit property. In fact, plaintiff also gave a notice through his Advocate in the year 2007, asking the defendant to perform his part of the contract, and at that time, he was in possession of the suit premises. Considering the said aspect, it is not possible to believe that even though the plaintiff was trying to assert his right in the suit property, he would voluntarily hand over disputed portion to the defendant, as claimed by the defendant in his defence. When the plaintiff paid Rs. 50,000/towards part consideration and was paying society charges towards maintenance and even he gave notice through Advocate, he would not hand over possession to the

defendant without any reason. There is nothing on record to show that he tried to give up his right for specific performance of the suit property, and in fact, he filed a suit also. Considering the said aspect, it is crystal clear that defendant subsequently, forcibly took away possession and entered upon part of the portion, which is now occupied by the defendant. The aforesaid dispossession has taken place during the pendency of the suit on 03062008, when the notice of motion was filed. As discussed earlier, it is not possible for us to accept the say of the defendant that plaintiff voluntarily handed over the possession to him. So far as the dispossession is concerned, we accept the order of the learned Single Judge and the reasoning of the learned Single Judge that the plaintiff was subsequently dispossessed from the suit property.

16. The next question which arises for consideration is as to whether the learned Single Judge is justified in appointing the Court Receiver, especially when plaintiff had not amended the notice of motion by asking for such relief, as the original relief asked for in the notice of motion is that the defendant may be restrained from disturbing the possession of the plaintiff. In this behalf, Mr.Soni, learned Counsel for the appellant, has placed a strong reliance in the case of Sri Narayana Dossju Varu, the Mahant of Sri Hathiramjee Mutt Vs. The Madras Hindu Religious Endowments Board, , wherein a view has been taken by the Madras High Court that if no specific prayer for appointment of Receiver is made, the Court cannot appoint receiver.

17. At this stage, reference is required to be made to the decision of the learned Single Judge of this Court (R.M. Lodha, J. as His Lordship then was), in the case of Mulji Umershi Shah and etc. Vs. Paradisia Builders Pvt. Ltd. and Others, , In the said case, it is held that in view of the provisions of Order 40 Rule 1, in a given case the Court on its own can appoint court receiver if the facts and circumstances of the case so demand. The relevant observations in this regard, reads as under:

19. In my view, in suitable cases, the Court is not powerless to pass appropriate order for appointment of receiver without any application by any of the parties while rejecting the application for temporary injunction. Such power of course has to be exercised sparingly and in exceptional cases, where dismissal of an application for grant of temporary injunction may lead the parties to take law in their own hands and use their own devices either for protection of unlawful possession of recent origin or for gaining possession of such like circumstances. There is no impediment put by the Code of Civil Procedure, in passing such order to prevent the ends of justice being defeated. Such order may be imminently required to be passed also so that possession may be made over to that party who is prima facie entitled to possession but is deprived by unlawful conduct or illegal act of the other party. An appointment of Receiver can be made on the application of either parties to the litigation as well as suo motu and therefore, absence of application shall not preclude the court from passing such order it is just and convenient. The cases may be varied and many. A party may not have

any right to the property and still comes in possession of the property unlawfully and illegally which may be of recent origin and on that basis, may seek to protect his possession by filing suit for injunction and by making an application for temporary injunction. The Court may find that such person has no title, right or interest in the property and is not in lawful possession and therefore, is not entitled to grant of any temporary injunction. To avoid grave situation where the parties may take law in their own hands even while temporary injunction has been refused, in the absence of any application, the Court may make an order of appointment of receiver. Such exceptional order is permissible under law to prevent larger mischief if it is just and convenient in the facts and circumstances of the case. There is nothing wrong if by taking such recourse the plaintiff who has unlawfully come in possession recently is dispossessed during pendency of suit. In suitable and appropriate case, if the trial Court appoints the receiver while rejecting the application for temporary injunction, it cannot be said that such power is without jurisdiction. I find myself in respectful disagreement with the abstract proposition of Madras High Court in *Sri Narayana Dossju Varu, the Mahant of Sri Hathiramjee Mutt Vs. The Madras Hindu Religious Endowments Board*, that in a suit for injunction it is not open to the Court to appoint a receiver. The view of Allahabad, Travancore, Cochin and Andhra Pradesh High Courts in the cases referred hereinabove, appear to be more sound and to which I fully agree.

18. We see no reason to take a different view. The Division Bench of the Karnataka High Court in the case of *Ishwara Joisha v. Saraswathi Amma and Ors.* AIR 1959 Mysore 35, has also considered the judgment of the Madras High Court in the case of *Narayan Dossju Varu (Supra)* and has distinguished the same, by holding that "if the Court comes to the conclusion that it is just and convenient to appoint a Receiver to take possession and manage the properties in dispute, the Court can appoint a Receiver suo motu. No application in that behalf from the parties would be necessary".

19. It is no doubt true as argued by Mr.Soni that there was no prayer for appointment of the Court Receiver, as the only prayer was for injunction. However, it is required to be noted that at the time of deciding the notice of motion, certain facts came on record to the effect that plaintiff has been dispossessed from the portion of a room and half of the portion in front was occupied by the defendant and back side portion was in the possession of the plaintiff. Under these circumstance, the learned Single Judge passed an order of appointment of Receiver and the plaintiff is allowed to act as an agent of the Court Receiver. When the notice of motion was pending and when the plaintiff was occupying the premises all through out, it was not proper on the part of the defendant to encroach upon the portion of the premises and dispossess the plaintiff. In a given case, the Court has a power to grant mandatory temporary injunction, if it is noticed that the party has taken the law in hand. As stated above, it is clear that plaintiff was occupying the premises and subsequently, he was dispossessed by way of high handed action of the defendant. The learned

Single Judge has rightly ordered the plaintiff to be put in possession of the portion from which he was dispossessed during the pendency of the notice of motion.

20. It is true that there is no prayer for appointment of Receiver. But we are in agreement with the view taken by the learned Single Judge of this Court that in order to do justice, the Court can appoint Receiver on its own. It is required to be noted that as stated earlier, even till plaintiff filed a suit, defendant had never tried to evict the plaintiff from the premises, but it is only after the plaintiff sent a notice through Advocate and subsequently, filed the suit, that he was dispossessed from the portion of the suit premises. As discussed earlier, it is not possible for us to believe that plaintiff on his own, handed over the portion to the defendant and the said defence of the defendant is not plausible in view of the circumstances of the case, as indicated above.

21. At this stage, a submission of Mr.Soni, is required to be considered to the effect that the learned Single Judge has not put to the notice of the defendant that the Court is likely to pass an order of appointment of the Court Receiver. If it was brought to the notice of the defendant, then the defendant could have led appropriate evidence in this behalf, pointing out that there was no necessity to appoint Receiver or that defendant should be appointed as Court Receiver. According to him, this is not a case in which the Court Receiver is required to be appointed. On this aspect, we have heard the learned Counsel for the appellant at length, as to whether the Court Receiver is required to be appointed or not. We see nothing in the appellant's arguments which could have altered the course adopted by the learned Single Judge. In fact, looking to the facts and circumstances of the case, especially when defendant took law in his hand and forcibly dispossessed the plaintiff from the portion of a room, ultimately, the learned Single Judge has passed the impugned order and which order, in our view, is perfectly justified. Though, we have heard Mr.Soni on the point as to whether Receiver was required to be appointed or not, in our view, this is a fit case in which plaintiff is required to be put again in possession of the portion, from which he was high handedly dispossessed. The plaintiff becomes agent of Receiver rather than being simply ordered to be put in possession by a mandatory injunction. Considering the facts and circumstances of the case, merely because at the relevant time, a specific attention was not drawn in respect of the appointment of the Court Receiver, the impugned order is not required to be interfered with by this Court. We are satisfied that the plaintiff is required to be put in possession as an agent of the court receiver, as all throughout he was occupying the premises for a long time and only during the pendency of the suit or just before filing of the suit, he was dispossessed and the said portion is occupied by the defendant in a high handed manner. The majesty of law is required to be upheld. No party can take possession in such a manner when the court is seized of the matter. We do not approve the conduct of the defendant.

22. In our view, the impugned order of the learned Single Judge is not required

to be interfered with, considering the facts and circumstances of the case, as even the plaintiff is finding very difficult to accommodate himself and his family members, in a small portion which he is occupying today. We are not in a position to accept the say of Mr.Soni that plaintiff and defendant should be allowed to occupy the respective portion which they are occupying as on today. Giving such relief would amount to adding insult to the injury, as, looking to the conduct of the defendant, in our view, he must first get out from the portion which he has unauthorizedly occupied and he may wait till the decision in the suit. We however, accede to the submission of Mr.Soni that in view of the peculiar facts and circumstances of the case, the suit is required to be heard expeditiously. Accordingly, we request the learned Single Judge to dispose of the suit within a period of one year from today.

23. At this stage, Mr.Soni submitted that the mother of the defendant is 75 years of age, who is a patient of cancer and she is taking regular treatment of a doctor, who is residing nearby the suit premises. However, it is explicitly clear from the record that defendant's mother is occupying the premises at Malad, while the suit premises is located at Kandivali. However, this submission appears to be de hors the record and is not correct. Considering the foregoing reasons, the appeal is dismissed.

24. The learned Counsel for the appellant requested that till the suit is decided, the present status quo may be directed to be maintained. However, as we have stated above, defendant cannot be allowed to continue with the possession. The learned Counsel submitted that Court Receiver may be directed not to take possession from the defendant and not to act on the basis of the order of the learned Single Judge for a period of 8 weeks from today, in order to enable the appellant to approach the Hon'ble Supreme Court against this order, we direct that the Court Receiver may not take possession from the defendant for a period of 8 weeks from today.