Harishchandra Narayan Maurya vs Rajendraprasad Dargahi Varma on 19 July, 1996

Equivalent citations: 1997(1)BOMCR28, 1997 A I H C 2588, (1997) 2 CIVILCOURTC 391, (1997) 3 MAH LJ 437, (1996) 4 ALLMR 538 (BOM), (1998) 1 ICC 795, (1998) 1 MAHLR 93, (1998) 1 CIVLJ 787, (1997) 1 BOM CR 28

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Bench: R.M. Lodha

JUDGMENT

R.M. Lodha, J.

1. Original plaintiff Harishchandra Narayan Maurya is the appellant in this appeal and is aggrieved by the order dated 19-10-1993 passed by the City Civil Court, Bombay dismissing two notices of Motion viz. Notice of Motion No. 3388 of 1992 and Notice of Motion No. 3986 of 1992.

2. The bare and essential facts are that the appellant herein (original plaintiff) filed a suit against the respondent herein (original defendant) in the City Civil Court, Bombay praying therein that the defendant be permanently restrained by an order of injunction from dispossessing the plaintiff from the suit premises and/or entering into the suit premises that is Room No. 21, Kach Karkhana, G.D. Ambedkar Marg, Wadala Road, Bombay. The plaintiff averred that the suit premises were purchased by him from the defendant on 10-2-1992 for a consideration of Rs. 2 lakhs. The transaction is said to be evidenced by the affidavit of the defendant dated 10-2-1992 and the receipt of the even date. Upon payment of the entire consideration of Rs. 2 lakhs plaintiff asserts that he came in exclusive possession of the suit premises. According to him in the last week of May, 1992 when he returned from his native place, defendant started demanding more money for the suit premises and threatened that he would forcibly dispossess him. The plaintiff alleges that on 4-6-92, the defendant came to the suit premises with four unknown persons and began to threaten the plaintiff to vacate the suit premises. This act and threat of defendant necessitated plaintiff to file the present suit on 15-6-92. In the said suit, the plaintiff took out Notice of Motion which was registered as Notice of Motion No. 3388 of 92 praying therein that defendant, his servants and hirelings be restrained from dispossessing the plaintiff from the suit premises and/or entering into the suit premises. It appears that ad interim order was passed in terms of prayers-Clause (a) on 24-6-1992.

3. According to the defendant after the ad-interim injunction was obtained by the plaintiff from the trial Court on 24-6-92, the plaintiff forcibly dispossessed the defendant on 8-7-92 at about 3 p.m. The defendant lodged the complaint before the Senior Inspector of Police, Matunga Police Station,

Kings Circle, Bombay on 8-7-92 and, his lawyer also moved the Inspector of Police on 11-7-92. The defendant took out separate notice of Motion bearing No. 3986 of 92 praying therein that the ad interim stay order passed by the Court be vacated and he be restored possession.

4. The trial Court took both the notices of Motion together. Plaintiff in support of his case produced the affidavit and receipt dated 10-2-92, and xerox copies of two certificates dated 23-7-92 and 28-7-92 issued by Apna Sahakari Bank Limited. On the other hand, defendant produced the duplicate copy of ration-card issued to him on 29-6-92, some correspondence, electricity bills, medical papers of his treatment in Sion hospital on 8-7-92, and, one note left by bogus Rationing Officer.

5. After hearing the learned Counsel for the parties, the trial Court did not find any merit in the case of the plaintiff and rather found that the documents produced by the plaintiff were fabricated and there was no material to show that he came in possession of the disputed property on 10-2-92. The trial Court was also of opinion that defendant was in possession on the date of suit and under the guise of injunction order he was forcibly dispossessed by the plaintiff. Accordingly, the trial Court dismissed notice of Motion taken out by the plaintiff with compensatory cost of Rs. 1000/- and allowed the notice of Motion taken out by the defendant and made it absolute in terms of prayer-Clauses (a), (b), (c), (d).

6. Assailing the order passed by the trial Court Mr. P.N. Joshi, learned Counsel for the appellant contended that the affidavit and receipt dated 10-2-92 prima facie showed that plaintiff was put in exclusive possession of the suit property and the said material was sufficient to demonstrate prima facie possession of the plaintiff since 10-2-92 and, therefore, trial Court was not justified in dismissing the notice of Motion taken out by the plaintiff. Mr. Joshi also contended that the entire approach of the trial Court while considering notice of Motion was misconceived since it examined the documents as if it was deciding the suit. Lastly Mr. Joshi, learned Counsel contended that trial Court was not justified in directing restoration of possession to the defendant and granting notice of Motion taken out by the defendant in the plaintiffs suit which was not permissible under law. In support of his contention, Mr. Joshi relied upon Nanasaheb s/o Sakharam Bhalekar, petitioner v. Dattu s/o-Dhondiba Bhalekar and others, respondents, .

7. On the other hand Mr. Govilkar, learned Counsel for the respondent supported the order passed by the trial Court and submitted that it was one of those cases whether plaintiff after obtaining the order of ad interim injunction by use of muscle and force dispossessed the defendant and, therefore, trial Court was justified in making the notice of Motion taken out by the defendant/appellant absolute in terms of prayer-Clause (a), (b), (c), (d).

8. The plaintiff's case set-out in the plaint as well as during the course of arguments in the notice of Motion before the trial Court was that the suit property belonged to defendant and on 10-2-92 on receipt of Rs. 2 lacs the defendant handed over possession of the suit property to him and he came in exclusive possession of the suit property as owner. Admittedly there is no registered conveyance-deed evidencing transfer and plaintiff bases his right on the affidavit and the receipt. The affidavit is of 10-2-1992 and so is the receipt of the even date. In the affidavit the

deponent-defendant has shown to have stated that he had handed over the exclusive possession of the suit room to the plaintiff. The defendant has denied execution of affidavit and receipt and according to him both documents are fabricated and forged. In this background of the rival case set-out by the parties, it is to be seen whether plaintiff has been able to show prima facie about the transaction and that whether he came in exclusive possession of the suit property on 10-2-92. According to plaintiff consideration of transaction Rs. 2 lakhs. There is no convincing evidence on record to show that on 10-2-92 plaintiff was in possession of Rs. 2 lacs. Rather it appears from the perusal of the impugned order that the trial Court wanted to know from the plaintiff as to how he came in possession of Rs. 2 lakhs and paid the same in cash to the defendant and in answer to the Court's query plaintiff relied on two certificates dated 23-7-92 and 28-7-92. The said two certificates which have been considered at length by the trial Court and in my view rightly that these documents do not at all show that plaintiff was possessed of Rs. 2 lakhs on 10-2-92. Pertinently the certificate dated 23-7-92 only shows that a cheque of Rs. 1,50,000/- was encashed by the plaintiff on 24-4-92. If the cheque was encashed on 24-4-92 how could it be shown that by that encashment, the plaintiff came in possession of that amount on 10-2-92. The second certificate does not relate to any encashment of amount by the plaintiff but only shows that an amount of Rs. 50,000/- was sanctioned by the Bank in favour of the plaintiff. I fail to understand how these 2 documents could show that plaintiff was in possession and in position to pay Rs. 2 lakhs to the defendant on 10-2-1992. This creates lot of suspicion and doubt about the plaintiff's case that he purchased the property for consideration of Rs. 2 lakhs from the defendant and though there was no registered document, the transaction was evidenced by the affidavit and the receipt. Moreover, according to plaintiff he came in possession of the suit property on 10-2-92 and it was only in the last week of May and first week of June that the defendant sought to demand more money towards transaction, and threatened the plaintiff to dispossess, but, there is no material whatsoever to show that for the period from 10-2-92 till the dispute arose between the parties that the plaintiff was in possession of the suit room. The learned Counsel for the plaintiff admitted before me that the said room had electric connection. If the plaintiff was in exclusive possession of the room since 10-2-92 obviously he must have received electricity bills and paid the same but no such document has been produced by the plaintiff. There is absolutely not an iota of material to show that on and after 10-2-1992, the plaintiff was in possession. It is admitted case of the plaintiff that prior to 10-2-92 the defendant was in possession and he handed-over possession to him. Since there in no evidence to show that defendant handed-over possession to him on 10-2-92 or plaintiff ever came in possession, apparently and obviously the defendant continued to be in possession. It may also be seen that on 8-7-92 itself immediately on his dispossession the defendant lodged the complaint before the Senior Inspector of Police, Matunga Police-Station, Kings Circle, Bombay and set-out the details of his forcible dispossession. Thereafter there is a communication by his lawyer to the Inspector of Police on 11-7-1992. Then on 13-7-1992 the defendant's Counsel also moved the Rationing-Officer for obtaining duplicate copy of ration-card. Preponderance of probability therefore, clearly leads to the conclusion at this stage on the basis of rival case of the parties and material placed that the plaintiff never came into possession on 10-2-1992 as alleged by him and that defendant who was in possession admittedly prior to 10-2-1992 continued to be in possession and appears to have been forcibly dispossessed on 8-7-1992. It is thus clear that the plaintiff obtained ad-interim injunction against the defendant on 24-6-1992 when he was not in possession of the disputed property and after the injunction order was obtained he forcibly dispossessed the defendant on 8-7-1992.

9. In this view of the matter, the first two contentions raised by the learned Counsel for the appellant cannot be said to have any merit and the trial Court cannot be said to have committed any error in dismissing the notice of Motion taken out by the plaintiff.

10. Coming to the last contention raised by the learned Counsel for the appellant that in the suit filed by the plaintiff/appellant, the trial Court was not justified in granting temporary injunction in favour of defendant; and in making rule absolute directing restoration of possession to the defendant, it may be observed that the mischief to be prevented by temporary injunction in respect of suit under Clause (b) and (c) of Rule 1 and under Rule 2 of Order 39 should be that of defendant alone and no temporary injunction can be granted in favour of defendant and against the plaintiff under Clauses (b) and (c), of Rule 1 as well as under Rule 2 of Order 39. In Nanasaheb's case (supra) 1991 Mh.L.J. 685, the learned Single Judge of this Court on consideration of provisions of Order 39, Rules 1 and 2 held thus ---

> "7. Mischief to be prevented by the temporary injunction in respect of situation under Clause (b) and (c) of Rule 1 and under Rule 2 should be that of the defendant. However, mischief to be prevented by the temporary injunction in situations under Clause (a) of Rule 1 can be from either of the parties. A clear distinction appears to have been deliberately made in framing this rule by authorising in respect of the situations listed in Clause (a) of Rule 1 on one hand and Clauses (b) and (c) of Rule 1 and Rule 2 on the other hand. In respect of situations covered by the First Clause, injunction can be granted in favour of either of the parties whereas in respect of situations covered by other clauses injunction can be granted only in favour of the plaintiff and not in favour of the defendant. It is the submission of Shri Kulkarni that since inherent powers as are declared under section 151 and the general powers specifically given under section 94(c) are not limited by Order 39, Rules 1 and 2 trial Judge was competent to grant an injunction in favour of the defendant restraining the plaintiff from obstructing the enjoyment of the suit well. Shri Kulkarni mainly relied on the judgement of the Supreme Court in the case of Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, . Noting the difference of opinion between the various High courts on the question whether Court can issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code, Supreme Court held that there is no prohibition in section 94 to issue a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code. Supreme Court observed ---
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> "It is well settled that the provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of section 94 were not there

> in the Code, the Court could still issue temporary injunction, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power."

Relying on its own observations in the case of Padam Sen v. State of Uttar Pradesh, , it went to observe further ---

> "These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in section 151 itself. But those powers are not be to exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice."

Thus, Supreme Court, in this case was of the opinion that the provisions of the Code of Civil Procedure are not exhaustive and the Court has an inherent power to grant an injunction in circumstances which are not covered by the provisions of Order 39 of the Code of Civil Procedure, . It was of the opinion that inherent powers of the Court which are merely declaration by section 151 are not controlled by any of the provisions of the Code as has been specifically stated in the section itself. But those powers are to be exercised only when such an exercise is not in conflict with what has been expressly provided by the Code. J.C. Shah, J., who held a minority view and gave a dissenting judgement was of the opinion that :---

> "Power to issue an injunction is restricted by section 94 and Order 39, and it is not open to the Civil Court which is not a Chartered High Court to exercise that power ignoring the restriction imposed thereby, in purported exercise of its inherent jurisdiction."

In respect of the exercise of inherent powers Shah, J., further observed :---

> "Inherent jurisdiction of the Court to make orders ex debito justice is undoubtedly affirmed by section 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive."

So far as the exercise of inherent jurisdiction is concerned, the limitation that it should not be in conflict with or to nullify what has been expressly provided for was the view shared by majority Judgement. There were no divergent views on this point. The difference of opinion was in respect of

point whether temporary injunction can be granted in respect of cases not covered by Order 39. The majority view was that a temporary injunction can be granted by the Court even in circumstances which are not covered by provisions of Order 39 and the dissenting view was that it cannot be so."

11. However, present case is not a case where the defendant was seeking a temporary injunction against the plaintiff under Clauses (b) and (c) of Rule 1, Order 39 and Nanasaheb's case (supra) has no application wherein the plaintiff on mis-statement of facts or mis-representation of facts obtain a order of temporary injunction from the Court against the defendant and in the guise and garb of that injunction order seeks to dispossess the defendant and in fact dispossesses the defendant. In such situation, and once it is found that in the garb of Court's order; the plaintiff has taken law in his own hand and by use of his muscle and power dispossessed the defendant, the Court in exercise of its inherent power could always pass an order of restoration of possession to the defendant to meet the ends of justice. Such power of the Court could be traced in section 94 as well as section 151 of the Code of Civil Procedure. As observed by the Apex Court in Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth HiraLal, , that Order 39, Rules 1 and 2 is not exhaustive and the situations not covered by Order 39, Rules 1 and 2 of the Code of Civil Procedure could be met by passing suitable orders in fit cases under sections 94 and 151 of the Code of Civil Procedure. Of course, such power is sparingly used and cannot be claimed as a matter of right but in deserving cases and where it is imminently required, the Court is not powerless and may pass appropriate order of temporary injunction at the instance of defendant in the interest of justice. The Court cannot be mute and silent spectator to the illegal act and exercise of force by the plaintiff in dispossessing the defendant, in the garb of Court's order of ad-interim injunction and once the Court finds that the plaintiff has taken the law in his own hand and by abusing the process of Court has sought to dispossess the defendant, the Court may not only pass an appropriate order for restoration but also it becomes bounden duty of the Court to ensure that the defendant who has been dispossessed by force is restored back his possession. Such order by the Court may be an exercise of its inherent powers under section 151 of the Code of Civil Procedure or under section 94 of C.P.C. and need not be covered under Clause (b) and (c) of Rule 1, Order 39, of the Code of Civil Procedure. In this background and legal position, the order of the trial Court in my view is expedient and meets the ends of justice. The impugned order is also imminently just and proper warranting no interference by this Court.

12. For the foregoing reasons, the appeal has no merit and is accordingly dismissed with costs.

13. On dismissal of the appeal, the interim-stay order passed by this Court stands vacated.

14. Certified copy expedited.