

(2012) 02 BOM CK 0040

Bombay High Court (Goa Bench)

Case No: Writ Petition No. 821 of 2011

Morries Housing Private Limited

APPELLANT

Vs

Kumbla Abdulla Merchant,
through his Power of Attorney
Mohammed Ismail, Trust House
Hotel and Investment Private
Limited (deleted) and Canara
Bank

RESPONDENT

Date of Decision: Feb. 23, 2012

Acts Referred:

- Constitution of India, 1950 - Article 227

Hon'ble Judges: F.M. Reis, J

Bench: Single Bench

Advocate: S.S. Kantak, with Mr. P.S. Rao, for the Appellant; A. Kakodkar, Advocate for Respondent No. 1 and Shri M. Amonkar, Advocate, for the Respondent

Judgement

F.M. Reis, J.

Heard Shri S.S. Kantak, learned Senior Counsel appearing for the petitioner, Shri A. Kakodkar, learned Counsel appearing for respondent no.1 and Shri M. Amonkar, learned Counsel appearing for respondent no.3.

2. Shri S.S. Kantak, learned Senior Counsel seeks leave to delete respondent no.2 from the cause title. Request granted. Respondent No.2 stands deleted at the risk of the petitioner.

3. Rule. Heard forthwith with the consent of the learned Counsel appearing for the parties. Learned Counsel appearing for the respondents waive service.

4. The above Writ Petition challenges the order passed by the learned lower Appellate Court dated 26/09/2011, whereby after allowing the appeal preferred by the respondents, the learned Judge directed the appellants and the respondent no.3

not to dispossess the appellants till disposal of the application for temporary injunction before the learned trial Court.

5. Shri Kantak, the learned Senior Counsel appearing for the petitioner has assailed the impugned order essentially on the ground that this Court by an order dated 27/04/2010 while disposing of Writ Petition No.191/2010 had inter alia directed at clause "c" of the said order that all contentions of the parties are kept open, and the parties undertake to maintain status quo as of today till the application for temporary injunction is decided. The learned Senior Counsel further pointed out that the appeal preferred before the lower Appellate Court challenging the orders on the application filed by the petitioner for rejection of the plaint came to be allowed, the lower Appellate Court set aside the said judgment and remanded the matter to the learned trial Judge to decide the suit on merits. Learned Senior Counsel further pointed out that once the suit was remanded for fresh decision, orders passed in the temporary injunction application by this Court came to be revived and, as such, the question of passing any directions to restrain the appellants not to dispossess the respondent no.1 would not arise. Learned Senior Counsel further pointed out that the impugned order is in excess of its jurisdiction and, as such, this Court has to set aside the impugned order in exercise of its power under Article 227 of the Constitution of India. Learned Senior Counsel has taken me through the material on record and pointed out that according to the petitioner, the respondent no.1 is not in possession of the suit premises. Learned Senior Counsel further pointed out that the petitioners have not changed the status quo at the site and, as such, the question of passing the impugned order by the lower Appellate Court would not arise.

6. On the other hand, Shri A. Kakodkar, the learned Counsel appearing for respondent no.1 has supported the impugned order. Learned Counsel further pointed out that when the plaint came to be rejected all orders passed in the temporary injunction application came to an end. Learned Counsel further pointed out that in the appeal preferred by the respondent no.1 before the lower Appellate Court an application for interim relief came to be filed and the lower Appellate Court by order dated 7/06/2010 directed not to dispossess the respondent no.1 from the suit premises. Learned Counsel further pointed out that at the oral request of respondent no.1 the learned Judge had extended the said order by passing the impugned order. Learned Counsel further pointed out that in view of the incidents which occurred at the site there was absolute necessity for the respondent no.1 to approach the learned Judge to obtain such order and, as such, the question of interfering in the impugned orders would not arise.

7. Shri M. Amonkar, learned Counsel appearing for respondent no.3 has pointed out that according to the respondent no.3 they are in possession of the suit premises from 22/05/2007.

8. Upon hearing the learned Counsel and on perusal of the record, I find that once the learned Judge has set aside the order rejecting the plaint the suit itself came to be restored and consequently all ad interim orders which were in operation stood revived. This position is accepted in the judgment of the Apex Court reported in [United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. and Others](#), wherein it has been held at para 16 thus:

16. But, it is now well settled that an order of remand by the appellate court to the trial court which had disposed of the suit revives the suit in full except as to matters, if any, decided finally by the appellate court. Once the suit is revived, it must, in the eye of the law, be deemed to be pending - from the beginning when it was instituted. The judgment disposing of the suit passed by the Single Judge which is set aside gets effaced altogether and the continuity of the suit in the trial court is restored, as a matter of law. The suit cannot be treated as one freshly instituted on the date of the remand order. Otherwise serious questions as to limitation would arise. In fact, if any evidence was recorded before its earlier disposal, it would be evidence in the remanded suit and if any interlocutory orders were passed earlier, they would revive. In the case of a remand, it is as if the suit was never disposed of (subject to any adjudication which has become final, in the appellate judgment). The position could have been different if the appeal was disposed of once and for all and the suit was not remanded.

9. As such, the lower Appellate Court was not justified to pass the impugned order not to dispossess the respondent no.1. But however, considering the allegations made by the rival parties with regard to the alleged possession of the suit property, I find that the order passed by this Court dated 27/04/2010 to the extent of the undertaking to maintain status quo as on today till the application for temporary injunction is decided would stand revived.

10. The learned Counsel appearing for the respective parties point out that the dispute is pending for a long period of time and it would be appropriate that the application for temporary injunction filed by the respondent no.1 be decided as expeditiously as possible. Considering the facts and circumstances of the case and taking note of the rival contentions, I find it appropriate in the interest of justice that the learned Civil Judge Senior Division at Panaji be directed to decide the application for temporary injunction as expeditiously as possible and in any event on or before 31/03/2012.

11. In view of the above, I pass the following order:

O R D E R

(i) The impugned order dated 26/09/2011 to the extent it directs the appellants not to dispossess the respondent no.1 till the disposal of the application for temporary injunction by the learned Trial Court stands quashed and set aside.

(ii) The parties are directed to maintain status quo as of today until disposal of the temporary injunction application in accordance with the orders passed by this Court dated 27/04/2010.

(iii) All contentions on merits of both the parties are left open.

(iv) The learned Judge shall independently decide the application for temporary injunction without being influenced by any observations made by this Court.

(v) The learned Judge shall decide the application for temporary injunction on or before 31/03/2012.

(vi) Liberty to the respondent no.1 to file an application for amendment if he so desires. In case such application is filed the same shall be dealt with in accordance with law.

(vii) Parties are directed to appear before the learned Civil Judge, Junior Division, Panaji on 5/03/2012 at 2.30 a.m.