
Mina Srinivasan Krishnan Vs Arun Bhaskar Adarkar

Appeal (L) No. 68 of 2014 with Notice of Motion (L) No. 292 of 2014 with Notice of Motion (L) No. 670 of 2014

Court: Bombay High Court

Date of Decision: Sept. 24, 2014

Acts Referred:

Constitution of India, 1950 – Article 136#Maharashtra Rent Control Act, 1999 – Section 7(15)#Societies Registration Act, 1860 – Section 6(3)

Citation: (2014) 6 ABR 738

Hon'ble Judges: S.C. Dharmadhikari, J; G.S. Kulkarni, J

Bench: Division Bench

Advocate: D.D. Madon, Senior Advocate, Birendra Saraf, Farid Karachiwala, Sahil Saiyed, Shreema Doshi and Juhi Mathur i/b. Wadia Ghandy and Co, Advocate for the Appellant; Virag Tulzapurkar, Senior Advocate, Shrikant Doijode, Rashne Mulla-Feroze and Taruna Nagpal i/b. Doijode and Asso, Advocate for the Respondent

Final Decision: Allowed

Judgement

S.C. Dharmadhikari, J.

This Appeal under clause 15 of the Letters Patent is directed against the order passed by the learned Single Judge

on an Interim Application/Notice of Motion No. 1548 of 2011 in the above suit. By the impugned order dated 20th January, 2014, the learned

Single Judge has allowed this Notice of Motion and made it absolute in terms of prayer clause (a) thereof. Prayer clause (a) of the Notice of

Motion reads as under:-

(a) That pending the hearing and final disposal of the Suit, the Defendants, their servants and agents be restrained by temporary order and

injunction of this Court from entering upon or remaining on the Suit Flat viz. Flat No. 5, Second Floor, Goolestan, 37, (East) Wing, Cuffe Parade,

Bombay 400 005, or any part thereof without the permission of the Plaintiff.

2. That was a Notice of Motion which was moved by the Respondent-original Plaintiff in the above suit. The Appellants before us are the original

Defendants and they are restrained by the temporary order and injunction from entering upon or remaining on the suit flat being flat No. 5, Second

Floor, Goolestan, 37, (East) Wing, Cuffe Parade, Bombay 400 005, or any part thereof. This flat shall be referred to as the ""suit flat"".

3. The Suit has been filed by the Respondent-Plaintiff in the following circumstances:-

The Respondent-Plaintiff filed the Suit No. 1173 of 2011 in this Court challenging that he is a senior citizen and is physically handicapped. He had

Polio at the age of one year, which considerably weakened both his legs and his right arm. He has pointed out that this has affected his mobility.

The Appellant No. 1 is the original Defendant No. 1. She is younger married sister of the original Plaintiff. The Appellant No. 2 is husband of the

Appellant No. 1.

4. The Respondent/Plaintiff stated in paragraph 1 of the plaint that he is a resident of Washington D.C., United States of America. He is a tenant of

and in lawful and juridical as well as physical settled possession of Flat No. 5, Second Floor, Goolestan, 37, East Wing, Cuffe Parade, Mumbai-

400005. He is approaching this Court seeking permanent injunction against the Appellants, their servants and agents from interfering with his

possession over the suit flat. It is alleged that the Appellants have trespassed into the suit flat on 23.04.2011 and disturbed peace and right of the

Respondent/Plaintiff therein.

5. In paragraph 3 of the plaint, it is alleged that the Appellant No. 1 and original Plaintiff resided in the suit flat with their parents Bhaskar Namdeo

Adarkar and Mrs. Sarla Bhaskar Adarkar and brother Vivek Bhaskar Adarkar since December, 1965. The suit flat was then owned by M/s.

Patel Volkart and leased to the Reserve Bank of India where the Respondent's father was Deputy Governor. The father of Respondent became a

tenant of the suit flat in or about 1969 and was paying monthly rent to Patel Volkart. The ownership of suit flat was transferred by Patel Volkart in

or about 1983 to M/s. Ruchi Properties Ltd. now renamed as Isha Infratech Private Limited along with the tenancy of the Respondent's father.

6. The Respondent/Plaintiff stated as to how he was working with Asian Development Bank. As a part of his employment, he was posted outside

India. The Respondent subsequently joined the services of International Monetary Fund in January, 1992 and continued to be posted outside

India. He is a person of Indian origin and holds a P.I.O. Card issued by Indian Embassy at Washington D.C.. He has also referred to certain

diplomatic passports issued to him and which stated in the column of permanent address, the details of the suit flat.

7. The Respondent/Plaintiff has narrated as to how he married one Meenalaxmi Sanzgiri on 22.05.1966 and from this marriage he has a son and a

daughter. The said Meenalaxmi Sanzgiri expired on 04.08.1993.

8. It is alleged that the Appellant No. 1 married the Appellant No. 2 in or about 1970 and left the suit flat. Since the time of Appellant No. 1's

marriage, she has been residing with her husband (Appellant No. 2) and not in the suit flat. It is alleged that the Appellant Nos. 1 and 2 are residing

at the address mentioned in the cause title of the plaint. They are staying in a duplex flat which is in the name of a Private Limited Company,

namely, Lotus Learning Private Limited which is believed to be owned and controlled by the Appellants.

9. It is then alleged that the Respondent/Plaintiff married one Ms. Fiona Shrikhande in November, 1996. Ms. Fiona Shrikhande has a daughter by

name Ms. Marisha from her first marriage to one Mr. Jayant Kirtane. Ms. Fiona Shrikhande and Mr. Kirtane were divorced in 1983 and custody

of daughter Ms. Marisha was, therefore, handed over to Ms. Fiona Shrikhande. After the Respondent's marriage with Ms. Fiona, Ms. Marisha

also lives with the Respondent. The Respondent/Plaintiff's children from first marriage are now settled abroad and living independently. They are

married and residing with their respective families in the United States of America.

10. In paragraph 8 of the plaint it is alleged that the Respondent/Plaintiff's father expired in Mumbai on 20.03.1998 leaving behind the Plaintiff's

mother, Plaintiff, Appellant No. 1 and one brother of Plaintiff, namely, Vivek Bhaskar Adarkar as the heirs. In terms of wishes of the father, the

tenancy of suit flat was transferred to the mother of Appellant No. 1 and Plaintiff. The landlord, however, continued to issue rent receipts in the

name of deceased father. The assertion of Respondent/Plaintiff is that he paid rent to the landlord in respect of the suit flat after his father's demise

and he continues to pay the same till the date of filing of the Suit.

11. The mother of Respondent expired at Mumbai on 28.08.2001 leaving behind the Appellant No. 1, Plaintiff and their brother Vivek as the

heirs. A reference is made to the Will left behind by the mother dated 26.02.1985 in respect of which the Probate was obtained by the

Respondent/Plaintiff on 22.12.2005. It is alleged that at the time of the death of mother only the Respondent and his wife were residing with her in

the suit flat. The Appellant No. 1 was not residing at the suit flat, but at her matrimonial home at Bandra. In paragraph 9 of the plaint these

assertions are to be found and it is further alleged that since death of the mother of Respondent in 2001, the Respondent succeeded to the tenancy

of the suit flat. He has been in juridical and settled possession of the suit flat. It is the Respondent who has been regularly paying rent to the

landlord. The brother of Appellant No. 1 and Respondent/Plaintiff, namely, Vivek Adarkar was residing in Borough of Queens, New York, USA.

He was bachelor and expired in New York on 19.08.2009. The specific assertion in the plaint is that as the Respondent and his mother were

residing with the Respondent's father in the suit flat at the time of his death and thereafter, the Respondent was residing in the suit flat along with his

mother at the time of her death, he became a tenant of the suit flat in accordance with the provisions of law. In any event, the Appellant No. 1 was

not residing with the father or mother in the suit flat at the time of their death. This assertion coupled with moving out of the suit premises by the

Appellant No. 1 since her marriage is reiterated in paragraph 10 of the plaint.

12. In paragraph 11 of the plaint, it is alleged as to how at the time of father's death in 1998, the mother of Appellant No. 1 and Respondent was

suffering from Alzheimer's disease in an advanced stage. The responsibility of paying monthly rent was taken over by the Respondent/Plaintiff. The

Respondent paid monthly rent to the landlord which the landlord agreed to receive, but rent receipts were not issued in the name of the

Respondent, but his deceased father. Reliance is placed upon a sample rent receipt. It is asserted that the rent is being paid by the Respondent

alone since his father's death in 1998. In paragraph 12 of the plaint it is alleged as under:-

12. The Plaintiff states that though Defendant No. 1 does not have any right, title and interest in the Suit Flat, she being the Plaintiff's sister, the

Plaintiff voluntarily and out of love and affection towards his sister, offered to pay her certain amount if the Plaintiff decided to surrender the

tenancy of the Suit Flat. The Plaintiff, however, did not wish to surrender or transfer tenancy of the Suit Flat. Hereto annexed and marked Exhibits

E-1"" to ""E-6"" are the copies of the emails recently exchanged between the Plaintiff and Defendant No. 1 in this regard.

13. Thereafter, in paragraphs 14 to 19 of the plaint it is alleged as under:-

14. As aforesaid, the Plaintiff is physically handicapped and unable to freely walk without support. Due to his physical condition, certain

alterations and changes were made in the bathroom attached to the bedroom occupied by the Plaintiff in the Suit Flat. All the furniture, fixture and

other items in the Suit Flat were inherited and/or purchased by the Plaintiff and his family and therefore belong to the Plaintiff. There were three sets

of keys to the Suit Flat. One remained with the Plaintiff, one with the Plaintiff's daughter Marisha, and one with the Plaintiff's cousin Ms. Priya

Adarkar who resides in Hyderabad and visits Mumbai frequently and stays in the Suit Flat with the Plaintiff's knowledge and consent. The

Plaintiff's full time servant Shashikant Solkar had a key to the rear door to the Suit Flat. The said Solkar has been looking after the Suit Flat since

2006 and resides in the said Flat with the Plaintiff. Even in the absence of the Plaintiff and his family members, the said Solkar stays in the Suit Flat.

As such, the keys to the back door of the Suit Flat were with the said Solkar.

15. On 23rd April, 2011 when the Plaintiff and his wife Ms. Fiona had just returned to Washington DC from a 19 day sea voyage and the said

daughter Ms. Marisha, who was otherwise residing in the Suit Flat, was on vacation in Europe, the Defendants rung the door bell at about 12.30

p.m. The said Solkar answered the door bell and looked out of the peephole on the door and saw the Defendants. But he had never seen them

before and therefore did not recognize them. At that time Solkar was alone at home. When Solkar opened the door, the Defendants pushed their

way into the Suit Flat. Defendant No. 1 informed Solkar that she was the Plaintiff's sister and the man accompanying her was her husband, Mr.

Krishnan. The Defendants told Solkar that Defendant No. 1 also has rights in the Suit Flat. The Defendants then made a phone call from their

mobile phone, and shortly after that a locksmith arrived and proceeded to change the lock of the front door. Solkar was frightened by the

Defendants' behaviour as they were very aggressive. Defendant No. 2 demanded from Solkar his key to the back door which Solkar handed over

to him.

16. Solkar thereafter retreated to the kitchen and made a phone call to Ms. Priya Adarkar, the Plaintiff's cousin who had visited Mumbai from

Hyderabad and had been staying in the Suit Flat till the previous day, and informed her about what had happened. Ms. Adarkar asked Solkar to

call Shailesh Patkar, a friend of the Plaintiff and also inform him about what had happened. Accordingly, Solkar informed Patkar about the same.

17. The Plaintiff was informed by Solkar that after about 2 hours i.e. at about 3.00 p.m. a few policemen arrived at the Suit Flat. The said

policemen asked Solkar how long he had been working for the Plaintiff in Goolestan. Solkar replied that he was with the Plaintiff for six years. The

policemen also enquired with Solkar whether he recognised the Defendants. Solkar told the policemen that he had never seen the Defendants

before. The police then left the Suit Flat.

18. Defendant No. 2 then demanded to know who had informed the police and who had given Solkar the authority to make a phone call. Solkar

told the police that he had called Ms. Priya Adakar and then Patkar as instructed by Ms. Priya Adarkar.

19. Defendant No. 2 was very upset with Solkar for informing Ms. Priya Adarkar and Patkar about the Defendants' entry into the flat. Defendant

No. 2 then told him to pack all his belongings and leave the Suit Flat immediately. Defendant No. 2 thrust Rs. 7,500/- at Solkar and threatened

Solkar by saying it was in his best interest to leave. Solkar left as he was scared by the Defendants' behaviour and went to the next door

neighbours Mrs. and Mr. Malegam and told them what had happened. The neighbours said they would call the Plaintiff and asked Solkar to stay at

their house. Solkar has been staying there since.

14. In paragraph 20 it is alleged that the Respondent/Plaintiff had to interrupt his medical treatment due to a serious fall. He, therefore, came to

Mumbai with his wife on 25.04.2011 in order to deal with the situation created by the Appellants' illegal and forceful entry in the suit flat. The

Appellants also tried to bring in certain articles to show their presence in the flat. It is then alleged that the Appellants are presently occupying the

Respondent's bedroom in the suit flat as a result whereof the Respondent is using another bedroom and is finding it extremely difficult to use that

and other bathrooms which are not convenient for the use of a handicapped person. He has to, therefore, stay at a hotel and club. He has, thus,

narrated as to how he and his family are uprooted in a way. There has been reference made in subsequent paragraphs to the complaints to the

Police. The Respondent/Plaintiff asserts his settled and lawful possession by relying on certain documents referred to in paragraph 22 and finally it

is submitted that attempts were made to resolve the dispute between brother and sister amicably, but they could not succeed. With all these and

such allegations including the claim for damages that the suit has been filed in this Court with other usual averments on 11.05.2011. The prayers in

the Suit read as under:-

(a) that the Defendants be ordered and decreed to jointly and/or severally pay to the Plaintiff a sum of Rs. 6,69,982/- (Rupees Six Lakhs Sixty

Nine Thousand Nine Hundred Eighty Two only) as per the Particulars of Claim (being Exhibit ""I"" hereto) and interest thereon at the rate of 18%

per annum from the date of filing of the Suit till payment or realisation thereof;

(b) that this Hon"ble Court be pleaded to permanently restrain the Defendants, their servants and agents by an order and injunction from entering

upon or remaining on the Suit Flat viz. Flat No. 5, Second Floor, Goolestan, 37, (East) Wing, Cuffe Parade, Bombay 400 005, or any part

thereof without the permission of the Plaintiff;

(c) that pending the hearing and final disposal of the Suit, the Defendants, their servants and agents be restrained by temporary order and injunction

of this Hon"ble Court from entering upon or remaining on the Suit Flat viz. Flat No. 5, Second Floor, Goolestan, 37, (East) Wing, Cuffe Parade,

Bombay 400 005, or any part thereof without the permission of the Plaintiff;

(d) for ad-interim relief in terms of prayer clause (c) above.

15. In furtherance of the final reliefs the Respondent/Plaintiff applied for interim reliefs by moving the above referred Notice of Motion. The interim

prayer has also been reproduced by us above.

16. Upon being served with the papers and proceedings, the Appellants-Original Defendants filed their Affidavit in reply. In the two affidavits

which were filed firstly to oppose any ad-interim reliefs and thereafter the interim reliefs, what the Appellants contended was that firstly this Court

has no jurisdiction to entertain and try the suit. Alternatively and without prejudice, it was urged that the Appellant No. 1 Mrs. Mina Srinivasan

Krishnan, is a tenant in the suit flat along with the Respondent. She does not require any permission of the Respondent to enter into or remain in the

suit flat. It was urged that the Respondent with malafide intention has wrongly disputed the Appellant No. 1's right as a tenant in respect of the suit

flat. He is falsely seeking to claim exclusive tenancy rights in respect of the suit flat. There is no such sole tenancy right. It is submitted that

Appellant No. 1 is a daughter of the deceased and she has enjoyed uninterrupted access, use and enjoyment to the suit flat since 1965. Similarly,

the Respondent enjoyed such access being the son of the deceased tenant. The Appellants denied of having trespassed into the suit flat on 23rd

April, 2011 and/or having disturbed the peaceful rights of the Respondent-Plaintiff. It has been urged that there is no illegal or forceful attempt to

enter the suit flat. Similarly, it is incorrect to urge that the Appellant No. 1 unlawfully attempted to claim possession of the suit flat. She stated that

she is one of the surviving heirs of the deceased parents. She is the sister of the Respondent and, therefore, has a legal right to the tenancy of the

flat. She claimed that she is not interfering with the Respondent's peaceful possession of the suit flat.

17. In para-6 of the affidavit in reply filed on 14th June, 2011 to oppose ad-interim relief, this is what is stated :-

I say that however, the Plaintiff had my name plate on the front door of the suit flat removed. I say that this is evident from my email to the Plaintiff

(Exhibit E-3 at page 54 to the plaint to the present suit). I say that on 23rd April, 2011, servant Mr. Solkar indicated to me several people and

keys to the suit flat which were provided by the Plaintiff. I say that on hearing this I summoned a locksmith and had the lock to the front door

changed. I say that hence for security reasons, I changed the lock on the front door on April 23, 2011, and promptly gave Plaintiff the new key on

his arrival in the suit flat on the morning of April 25, 2011. I say that the Plaintiff has suppressed this fact.

I say that the Plaintiff and his wife Ms. Fiona have used the key to gain access to the suit flat repeatedly since then. I say that the Plaintiff has

himself chosen not to stay in the suit flat, and has trumped up false reasons as to why he is unable to live there. I say that Plaintiff has falsely claimed

that all the furniture, fixture and other items in the suit flat belong to him and his family. I say that even by the Probated Will of our mother it is

provided by our mother that ""I direct that my sons Arun and Vivek and daughter Mina shall have equal shares in my movable estate."" Since Vivek

is now deceased, I say that I have an equal share with Plaintiff as regards the furniture, fixture and other items in the suit flat.

18. It has been claimed that most of the major pieces of furniture in the flat had been provided by the Appellant No. 1 to the parents over the years

and those were also enlisted in this Appeal.

19. The contents of the affidavit of Shashikant Solkar were denied and that version was also challenged. Similarly, from para-9 onwards the case

of the first Defendant has been extensively set out. It is stated that the Respondent has suppressed the fact that he is a permanent resident and

citizen of United State of America (for short ""U.S.A.""). The Respondent-Plaintiff does not reside at Mumbai and/or in the suit flat. The

Respondent-Plaintiff was not living in the suit flat with the father and/or mother before his/her demise, or afterwards. It was asserted that the

Respondent-Plaintiff left India for U.S.A. in 1992 and became a permanent resident of the said country. Thereafter, he became a citizen of United

States of America and from or about the year 2000, acquired a U.S.A. Passport and surrendered his Indian Passport. Reliance was placed on

Annexure-B (pages 21 and 22) to the plaint in the present suit which according to the Appellant No. 1 showed that the Respondent's Indian

Passport has been cancelled. In para-9 of this affidavit, this is what is stated :-

I say that the Plaintiff acquired a U.S. Passport No. 01618474 issued at Washington D.C. On 19th September, 2000. This is evident from the

affidavit dated 26th July, 2005 in support of the Judges order in Probate Petition No. 39 of 2005 filed by the Plaintiff before this Court (page 7)

which is affirmed at the Indian Embassy, Washington D.C. on July 26, 2005. Annexed hereto and marked as Exhibit ""A"" is a copy of the affidavit

dated 26th July, 2005 in support of the Judges Order in support of the said Probate Petition No. 39 of 2005. I say that the Plaintiff's latest U.S.

Passport number is 467035831 issued by the State Department, and valid till March 1, 2020. This is evident from Exhibit ""A"" page 19 of the

Plaint to the present Suit No. 1173 of 2011 showing Plaintiff's PIO card and US Passport Number and date of expiry.

20. Thereafter, it was stated that there is another brother of the Respondent and the Appellant No. 1 Vivek Bhaskar Adarkar, who expired

issueless and as a bachelor in the year 2009. Therefore, it was denied that the Respondent is using and residing at the suit flat with his second wife

Ms. Fiona and daughter Ms. Marisha. This was sought to be supported by the affidavit dated 26th July, 2005 verified at the Indian Embassy in

Washington D.C. which formed part of Probate Petition No. 39 of 2005 filed in this Court. The contents of this Probate Petition are referred to in

para-11 of the affidavit. Then, it is stated that the mother Sarala Adarkar passed away on 28th August, 2001. In other words, it was stated that

the Respondent's case is that he left for U.S.A. in mid September 2001 or thereabouts. However, this is totally false. He did visit Bombay very

briefly a few times but was never living and residing much less exclusively in the suit flat. From 1967, 1968 to 1970 the Respondent lived in U.K.,

from 1970 to 1975 he lived in Delhi in a flat at Maharani Baug, from 1975 to 1990, the Respondent-Plaintiff lived in Manila, and from 1990 till

date he has been a permanent resident in Washington D.C., U.S.A. Thus, he is a intermittent visitor to the suit flat, coming there only on leave and

for holidays. He visited Bombay only in connection with the funeral of the parents. After every such visit, he returned to U.S.A.

21. Thus, the conduct of the Respondent-Plaintiff is unfair. He has not approached the Court with clean hands. In para-16 of the affidavit, it has

been stated that Appellant No. 1 lived in the suit flat on several occasions for extended periods i.e. from 1972 till her daughter Ayesha was born,

after various surgeries in 1970's, 1980's and 1990's and when her flats at Girgaum, Nepean Sea Road and Bandra were being renovated. She

also resided to look after the parents on various occasions as they were old and infirm. It has also been stated that her daughter Ayesha was the

only grand child living in Mumbai and had spent almost every weekend and a considerable portion of vacation in the suit flat from 1992 to 2001.

Thus, the Appellant No. 1 claimed that she has stayed at the suit flat during the lifetime of her parents on many occasions and at that time no

complaint of trespass was filed by the Respondent-Plaintiff. Further, it was denied that the Respondent-Plaintiff and his family are in lawful, juridical

and/or physical settled possession of the suit flat. It is denied that the Respondent's wife who is in fact second wife (Ms. Fiona) was living in the

suit flat. It is stated that she resides with the Plaintiff in Washington D.C. The step daughter of the Respondent-Plaintiff has also not been residing in

the suit flat and further that she is also a U.S.A. citizen.

22. Thus, the claim was that the father of Respondent-Appellant No. 1 late B.N. Adarkar was a tenant in respect of the suit flat and that the

tenancy of the flat was never transferred to the mother after the demise of the father or after her demise to the Respondent-Plaintiff. Even the rent

receipts continued in the name of the deceased B.N. Adarkar.

23. It was next contended and in para-19 of the affidavit that the Respondent-Plaintiff has mixed his personal assets with the assets of the

deceased parents. The Respondent-Plaintiff has been paying rent to the landlord as an executor of the estate of the parents. The Respondent was

paid the amount by cheque and cash by the Appellant No. 1 so as to defray the expenses in relation to the suit flat including the rent thereof.

However, no accounts have been submitted by the Respondent-Plaintiff and, therefore, a Misc. Petition has been filed in this Court seeking

direction to the Respondent as an executor of the estate to render accounts.

24. After setting out as to how the tenancy rights of the father would devolve on the heirs by virtue of section 7(15) of the Maharashtra Rent

Control Act, 1999, it has been stated that a suit has been filed being R.A.D. Suit (Stamp) No. 2242/2011 in the Court of Small Causes at

Bombay for a declaration that the Appellant No. 1 is a tenant in the suit flat and the tenancy is protected by virtue of the Maharashtra Rent Control

Act, 1999. The reliefs claimed by the Appellant No. 1 in the plaint filed in the Small Causes Court are, then, referred.

25. Thereafter, the Appellants denied that the Appellant No. 1 is occupying the Respondent's Bed room. They referred to the location of the bed

rooms and submit that the Appellant No. 1 is occupying her own bed room. The bath rooms have been modified so as to be accessible for the

elderly and handicapped. The Appellants made an allegation that the Respondent has locked up two of the bed rooms in the four bed room flat.

The plea of being handicapped is invoked in order to deprive Appellant No. 1 of her own bed room. It has been stated that the offer was made to

install air-conditioner in the Respondent's bed room on his arriving in Mumbai but that offer has been rejected. It has been alleged that the

Respondent has chosen to live in luxury in 5 Star Hotels/clubs on his own volition. On this basis, the legal right to enter, use and occupy the flat as

one of the surviving heirs of the Appellants has been asserted. There are various allegations made of intimidation and assault. The area of the flat

has been mentioned as 4000 sq. ft. and, therefore, all the allegations in so far as the claim of damages is concerned, are denied.

26. An affidavit in re-joinder has been filed so as to deal with the contents of the affidavit in reply dated 14th June, 2011 and the contents of the

documents. We are now not concerned with the issue of jurisdiction of this Court because that is already dealt with and decided by us by our

judgment and order in Appeal No. 312 of 2012 decided on 16th June, 2014.

27. In the affidavit in re-joinder, the Respondent claims that there are admissions with regard to the settled possession of the Respondent in respect

of the suit flat. The Respondent states that the Appellant No. 1 has admitted that whenever the Respondent was in Mumbai, he resides at the suit

flat. The visits are referred and what is crucial according to the Respondent, is the admission, that the keys to the suit flat prior to 23rd April, 2011

were with the Respondent and not with the Appellant No. 1. Therefore, the claim of exclusive possession is admitted. Then, Exhibit E-5 to the

plaint is the email sent by Appellant No. 1 in which the Appellant No. 1's admitted that the Respondent had free and unrestricted use of the suit

flat. There is an admission, further, that after marriage with the Appellant No. 2 in 1971 an Appellant No. 1 has left the suit flat and not residing

therein. These extensive references to the pleadings have been made in paragraph 4(c) of the affidavit in re-joinder.

28. Thereafter, it is asserted that the Respondent is in settled possession and the suit is based on the exclusive and settled possession of the

Respondent. In such circumstances and asserting that the Respondent has been deprived of effective enjoyment of the suit flat, for the reasons

which are set out in para 4(g) that the re-joinder reiterates the case of the Respondent. It also reiterates the plea that the Respondent has been

paying rent to the landlord since the death of his father, namely, from 1998. The other expenses have also been incurred by the Respondent. We

need not refer to the denials in the re-joinder except the position with regard to the bedrooms and the bathrooms set out in para-25 of the re-

joinder.

29. This affidavit was filed in August 2011. There is another affidavit-in-reply filed on 30th September, 2011 by the Appellants but it reiterates the

stand taken earlier.

30. It is pertinent to note that on this Notice of Motion, an ad-interim order was passed by this Court on 15th June, 2011. That order reads as

under:-

1. The learned counsel appearing on behalf of the defendants confirms that the plaintiff is in exclusive occupation and possession of two bedrooms

in the suit premises the balcony and the bathrooms shown in red hatch lines on the floor plan, tendered in Court, taken on record and marked "X".

Rest of the flat other than one bedroom is, even according to the defendants used in common by the parties.

2. Mr. Kotwal states that these bedrooms are in very poor condition and that the plaintiff cannot live in the same.

The Prothonotary & Senior Master shall appoint an officer of this Court to inspect the suit premises and make a report. The report shall furnish the

condition of each of the rooms. The officer shall be entitled to avail of the assistance of a photographer. The costs of the officer shall initially be

paid equally by the plaintiff on the one hand and the defendants on the other and shall be subject to the final orders.

Stand over after two weeks.

31. Then, the report of the Court Commissioner has been placed on record and the same reflects that there are bedrooms with attached

toilets/bathroom and a bathroom which has been indicated in the report, has the amenities and facilities for the purposes of usage by a physically

handicapped person. There is also a floor plan and which is an Annexure of the report (Annexure-III). This shows the bedrooms which have been

used by the Appellants and the Respondents. It shows the other amenities in the suit flat.

32. It is, on this material, that the Notice of Motion was placed for hearing and final disposal before the learned Single Judge of this Court and by

the impugned order he has allowed it.

33. Aggrieved and dissatisfied with this order, the present Letters Patent Appeal has been filed.

34. Mr. Madon, learned Senior Counsel, appearing in support of this Appeal submitted that the impugned order is contrary to law. It is completely

erroneous inasmuch as the suit itself is decreed at the interlocutory stage. Mr. Madon, has invited our attention to our judgment on the point of

jurisdiction and particularly para-79 thereof to urge that the suit has been labeled as not based on the residence of a member of the family with the

original tenant at the time of his/her death and to the exclusion of other members. The learned Single Judge while answering the issue of jurisdiction

had held that this case is of a dispute between two heirs of the deceased tenant and both claiming the tenancy rights to the exclusion of the other. In

other words, this is an assertion of succession to the tenancy rights in respect of the said suit flat by one heir to the exclusion of other. This is an

inter-se dispute between two persons who are the heirs of the deceased tenant and not agreeing as to who amongst them or one of them would

succeed to the tenancy rights.

35. Mr. Madon submits that such observations have been made by us in para 79 and 80 of our judgment. He submits that para 102 of our

judgment would also be relevant on this aspect.

36. Mr. Madon submits that learned Single Judge in passing this impugned order and making the Notice of Motion absolute in terms of prayer

clause (a) has lost sight of this vital aspect. In that regard, our attention is invited to paragraph No. 8 of the impugned order by Mr. Madon. He

submits that the observation in paras 8, 12 and the operative part in the learned Single Judge's order, would demonstrate that today the

Appellant's stand completely excluded from the suit flat. Now, even after there is a dispute with regard to the succession to tenancy rights between

two heirs, the Appellants admittedly being heirs have been restrained from entering upon, remaining or using the suit flat. The Commissioner's

report indicates that there are 2 bedrooms with attached bathrooms, there is a pooja room and there is a common area. In such circumstances,

and when the learned Judge has not gone into the question as to who amongst the Appellants and the Respondents would prima facie succeed to

the tenancy rights, then, the impugned order cannot be sustained. Mr. Madon has taken us through the plaint averments to support his arguments

about the frame of the suit. He submits that if such vital issues are left unanswered by the learned Single Judge, then, the impugned order must be

set aside or alternatively, the Notice of Motion must be decided again.

37. Alternatively and without prejudice to the above submissions, Mr. Madon submits that the Respondent-Plaintiff has failed to make out a strong

prima facie case of his settled and exclusive possession. He submitted that the learned Judge could not have granted any relief in the suit of the

present nature and in the absence of strong prima facie proof, a final relief cannot be granted at an interlocutory stage. He submits that if the

prayers in the suit are considered, then, no temporary injunction or relief in aid of the final relief can be granted. This is not a case of the

Respondent-Plaintiff being allegedly dispossessed and wrongfully. If the suit claim is essentially of damages, then, the reliefs as prayed cannot be

granted at an interlocutory stage. Mr. Madon submits that prayer clause (a) of the Suit is for damages and that is a money claim. Prayer clause (b)

is for a permanent injunction but there is no declaration claimed preceding the same. If prayer clause (b) is the final relief in the plaint, then, that

cannot be granted at an interlocutory stage unless there is a prima facie case and the balance of convenience is wholly in favour of the Respondent-

Plaintiff and that grave and irreparable harm and injury will be caused in case such a relief is not granted. Mr. Madon submits that the claim of the

Respondent-Plaintiff in the suit could have been protected by an appropriate arrangement at an interlocutory stage so as not to oust the parties

from the suit flat. During the pendency of the suit, the subject matter thereof could have been protected by such arrangement as was permissible in

law including preventing the alienation of the flat or its disposal by the parties. However, a mandatory order and injunction that is granted has non-

suited the Appellants completely.

38. Mr. Madon has, then, taken us through the documents relied upon by the Respondent-Plaintiff to demonstrate his settled and exclusive

possession. Mr. Madon submits that no rent is paid in respect of the suit flat by the Respondent to the exclusion of the Appellant No. 1. There is

absolutely no case of exclusive residence as well. A servant is stated to be residing in a portion of the flat and allegedly to take care of it. The

possession of the servant cannot be said to be exclusive in such circumstances, even if, that servant is engaged or employed by the Respondent.

The Respondent himself is not an Indian citizen. He is permanently residing in U.S.A. His intermittent visits to the flats and India cannot, therefore,

be said to be proving his exclusive settled possession. In fact, the documents such as bank account extract, the telephone bills, electricity bills

which are produced would show that the learned Judge could not have relied upon them at an interlocutory stage as the same carry the name of the

deceased tenant B.N. Adarkar and not of the Respondent-Plaintiff. The rent receipts were not transferred in the name of the Respondent-Plaintiff

though he claims who have been paying the rent in respect of the suit flat. The claim of the Respondent-Plaintiff to settled possession is belied by an

affidavit filed by him seeking a probate of the will of the late mother of the Appellant No. 1 and Respondent. In that, it is admitted by the

Respondent that he resides in U.S.A. He is an executor of the estate of the deceased. The rent has been paid by him in this capacity. The Probate

Proceedings are contested. In these circumstances and when there is no document produced which would conclusively demonstrate such claim of

settled possession, then, the learned Judge should have refused the prayer and rather continued the ad-interim order which was passed by this

Court on 15th June, 2011.

39. For all these reasons, Mr. Madon submits that the impugned order deserves to be quashed and set aside. Mr. Madon has relied upon the

compilation of documents which was produced before the learned Single Judge. Mr. Madon also submits that the email relied upon should be read

in its entirety and not picking one or two sentences therefrom. In fact, the emails from the Respondent would show that they are not emanating

from the address of the suit flat. The email that has been produced at page 345 of the paper book would show that the Respondent has been

coming to Bombay only on a few occasions. He was not a regular visitor to Bombay leave aside being such visitor to the flat. In such

circumstances and when the claim of the Appellant No. 1 as being a tenant of the flat property, has been admitted, then, this Notice of Motion

should have been dismissed. The impugned order, therefore, must be set aside. Mr. Madon relies upon the following judgments and decisions in

support of his above contentions:-

- 1) M/s. Mahavir Associates Vs. Shri Anthony John D'Souza and Others,
- 2) Dorab Cawasji Warden Vs. Coomi Sorab Warden and others,
- 3) Mohd. Mehtab Khan And Others V/s. Khushnuma Ibrahim Khan And Others; and
- 4) Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others,

40. On the other hand, Mr. Tulzapurkar, learned Senior Counsel, appearing on behalf of the Respondent-Plaintiff submitted that the Appeal should

be dismissed. He submits that the view taken by the learned Single Judge is a plausible and possible view. It does not require any interference in

this Courts further appellate jurisdiction. He has invited our attention to paragraphs 8 and 9 of the impugned order. He submits that this finding is

inconsistent with the pleading and particularly paragraph 10 of the plaint at page 290. The case pleaded thus, is not only of tenancy but that the

Respondent-Plaintiff is the only person entitled to succeed to the same, is the position emerging from certain undisputed events. Mr. Tulzapurkar

submits that a proper and fair reading of the plaint would disclose that the Respondent-Plaintiff pleaded his settled possession and to the exclusion

of the original Defendant No. 1-Appellant No. 1 before this Court. Mr. Tulzapurkar submits that at an interlocutory stage, learned Judge was not

called upon to express any prima facie opinion much less render any conclusive finding on the issue of succession to the tenancy rights. That cannot

be decided at the interlocutory stage. The learned Judge has not ignored the case of Appellant No. 1 as set out in the affidavits. However, the

argument was that the Defendant No. 1 barged into the premises, namely, suit flat. She was never in possession of the suit flat after the death of the

mother. She has failed to show even, prima facie, that she retained control or was in possession of the premises which are subject matter of the

suit. Mr. Tulzapurkar has invited our attention to certain documents from the compilation tendered by the original Defendants and particularly

pages 85 and 88 thereof. He has submitted that the requisite tests which enable the Court to pass the interim order in this form and manner are

satisfied and in that regard he relies upon the pages 347 and 348 of the paper book and which would indicate that the possession as also the

control of the suit flat with the Respondent No. 1. In these circumstances and when the Appellant No. 1 is not disputing joint tenancy of the

Appellant No. 1 and the Respondent in respect of the suit flat, then, the Notice of Motion was rightly made absolute. Mr. Tulzapurkar submits that

the Defendant No. 1 entered the suit flat for the first time in the month of April 2011. She had left the premises and that is apparent from the

contents of the affidavit particularly page 95 of the paper book. Then, our attention is invited to the fact that the Defendant No. 1 never resided in

the suit flat. The intermittent visits also stopped after the death of the parents. In such circumstances, when the Respondent No. 1 is in juridical

possession and which is to the knowledge of the Appellant No. 1, then, the learned Judge's order cannot be faulted. The Appeal, therefore,

should be dismissed. Mr. Tulzapurkar has also relied upon the supporting affidavit of Mr. Y.H. Malegam and even the letter, copy of receipt of

which is at Annexure-H, page 355 of the paper book.

41. In support of the above contentions, Mr. Tulzapurkar has relied on the following judgments:-

- 1) Krishna Ram Mahale (Dead), by his Lrs. Vs. Mrs. Shobha Venkat Rao,
- 2) Rame Gowda (D) by Lrs. Vs. M. Varadappa Naidu (D) by Lrs. and Another,

3) Variegate Realestate Private Limited Vs. Tehmul R. Irani and Mehervan R. Irani,

4) Order of Hon"ble Supreme Court dated 10th December, 2010 in the case of Tehmul Rustom Irani & Anr. V/s. Variegate Real Estate P. Ltd.;

and

5) T. Lakshmipathi and Others V/s. P. Nithyananda Reddy and Others reported in (2003) 5 Supreme Court Cases 150.

42. With the assistance of the learned Senior Counsel, appearing for parties, we have perused the Appeal paper book including the affidavits filed

in reply, re-joinder and further affidavits of parties. We have perused the relevant documents from the compilation. We have also perused the

impugned order.

43. The learned Judge has proceeded to grant interim reliefs in terms of prayer clause (a) and which is widely worded. The prayer is to grant an

injunction against the Appellants from entering upon or remaining on the suit flat or any part thereof without the permission of the Respondent-

Plaintiff. This prayer is identical to prayer clause (b) of the plaint (see page 303). Thus, a permanent injunction is claimed in the above terms in the

plaint and in the Notice of Motion for interim reliefs a temporary injunction in identical form is prayed. The suit is in effect for possession of the suit

flat and to be exclusion of the other heir of the deceased tenant. A prayer of the nature made, prima facie, is to obtain such exclusive possession

though couched in the form of a mandatory injunction. If the Respondent establishes finally that he is the only heir entitled to succeed to the tenancy

rights, then, alone he can obtain the above relief. That inquiry and adjudication will be duly at the Trial. Today, when the Respondent is also prima

facie pleading a case of joint tenancy, then, he cannot oust the other heir, his real sister from the suit flat at an interlocutory stage. More so, when

the inquiry as above is yet to be held. Further, the settled possession as claimed and to the exclusion of the Appellant No. 1 must also be seen in

this light and the admitted circumstances of both parties residing and independently far away from the suit flat. The Respondent is not residing

therein continuously. He does not work for gain in Bombay. Some visits to Mumbai and in connection with the affairs of the Estate, prima facie,

does not amount to continued, settled possession of the suit flat much less to the exclusion of the Appellant No. 1. While there is no impediment in

law in granting a mandatory injunction at an interlocutory stage or a temporary injunction in a mandatory form, yet, such reliefs should be granted in

exceptional circumstances. Both sides have placed reliance on the judgment of the Hon"ble Supreme Court in the case of Dorab Cawasji Warden

(supra). Having perused that judgment carefully, we are of the opinion that the Hon"ble Supreme Court has referred to the tests which have to be

applied and which must be satisfied before such a relief is granted. The tests are laid down in para 16 of the judgment in the case of Dorab

Cawasji Warden (supra). Thus, the discretion has to be exercised judiciously and bearing in mind these guidelines.

44. We have considered this matter in the backdrop of these very tests and guidelines laid down by the Hon"ble Supreme Court. We are also

quite aware of the other set of principles laid down by the Hon"ble Supreme Court and which are reiterated in the recent decision in the case of

Mohd. Mehtab Khan and Others Vs. Khushnuma Ibrahim and Others, An Appellate Court must be slow to interfere with a discretionary order of

the trial Court granting temporary injunction. The order must not be interfered with only because another view of the matter is possible. The order

must be interfered with only if the exercise of discretion by the learned Judge was found to be palpably incorrect or untenable. The Hon"ble

Supreme Court, therefore, has cautioned that the Appellate power is not to be exercised as a matter of course but the tests in that behalf have

been referred to in para 17 of this judgment.

45. We have, therefore, cautiously and carefully perused the order of the learned Single Judge. We are aware that a learned Single Judge of this

Court in exercise of the original jurisdiction of this Court, has considered the prayer for interim relief. However, for the reasons that we indicate

hereafter, we are unable to agree with the learned Single Judge. In our opinion, the learned Single Judge has lost sight of the tests and legal

principles in granting such a wide relief. That relief virtually decrees the suit itself. While the Hon"ble Supreme Court does not hold that grant of a

final relief at an interlocutory stage is totally prohibited but what the Hon"ble Supreme Court indicates is that such relief should be granted when the

same is in aid of the final relief. If the subject matter of the suit or the proceedings can be preserved and protected by the interim arrangement

which would balance the case of both sides, then, this is an exercise which should be carried out. Granting of virtually the final relief at an

interlocutory stage, without a trial, without an opportunity to the party to lead oral and documentary evidence is, therefore, not justified.

46. In the present case, Mr. Madon has rightly placed reliance on the foundation or basis of the Respondent"s grievances in the plaint. The

Respondent admittedly is not residing permanently in India. He has obtained and has been granted a citizenship of the United States of America.

He is a person who was in service and on account of which he had to travel and settle down in the above referred countries. That his father was a

tenant in respect of the suit flat is not disputed. That his father died in the year 1998 and thereafter the affairs in relation to the property were

looked into and managed by the Respondent-Plaintiff is not disputed either. That the mother resided in the suit flat till her death but what the

Respondent-Plaintiff has essentially pleaded is not a claim of tenancy on the footing of his residence with and at the time of the death of the original

tenant, namely, his father and mother. He has pleaded that he is one of the heirs of the parents. In preference to other heir of his parents, namely,

his real sister, Appellant No. 1, it was the wish and desire of his parents that he must succeed to the tenancy rights. That is the basis on which the

plaint proceeds and, therefore, the dispute is as to who succeeds to the tenancy rights in respect of the suit flat after the death of the original tenant.

In such a suit, if the injunction as claimed, has to be granted, then, the Respondent-Plaintiff ought to have placed before the Court enough material

to indicate that his possession in the suit flat was exclusive and not intermittent. That he visited and resided in the suit flat on more occasions than

the Appellant No. 1 is, thus, prima facie not conclusive. The Appellant must have produced a strong prima facie proof of his possession of the suit

flat and to the exclusion of the Appellant No. 1. That material is found to be lacking, prima facie. In that regard, the learned Single Judge has relied

upon the rent receipts from the time of the mother's death in August 2001 till the date of the alleged trespass by the original Defendants. These

according to the learned Judge show that for the last more than 10 years, it is the Respondent-Plaintiff who has paid the rent by cheque and rent

receipts have been issued to him by the landlord, though in the name of his deceased father. In that regard, what we find from perusal of these bills

is that they have been issued in the name of the deceased father. Each of these bills and which have mentioned the cheque number and the date and

the period indicate the name of Mr. B.N. Adarkar. If, these rent receipts from Annexures C-I onwards are carefully perused, they do not in any

manner indicate that the rent receipts have been transferred after the death of the father either in the name of the mother or thereafter in the name of

the Respondent-Plaintiff. In fact, no document has been placed on record making such a request and emanating from the Respondent-Plaintiff.

Thus, the monthly rent receipts and payment made by cheque, by the Respondent-Plaintiff, are not enough to show the settled and exclusive

possession. The bank account of the Respondent-Plaintiff may show the address of the suit flat and equally the telephone bills and electricity bills

but they do not indicate his exclusive and settled possession. That there are certain documents in the form of communications and letters would

only show that the Respondent-Plaintiff indicated the address of the suit flat for the purposes of correspondence and communication with him. That

is to indicate the place where he can be contacted and communicated in India. However, in the backdrop of his own case as set out in the plaint,

this material can never be said to be decisive and even prima facie. In that regard, what we find from a reading of the plaint itself is that the parents,

the Defendant No. 1 (Appellant No. 1) and the Respondent-Plaintiff together with their brother Vivek B. Adarkar resided in this flat since

December 1965. The Respondent's-Plaintiff's father was a Deputy Governor of the Reserve Bank of India. That the tenancy dates back to 1969

is set out in para 3 of the plaint.

47. We have referred to the plaint averments in extenso in the foregoing paragraphs of this judgment only to satisfy ourselves as to whether any of

the materials referred to by the learned Single Judge can be said to be prima facie conclusive and to establish exclusive and settled possession as

claimed by the Respondent-Plaintiff. Upon these materials at best, it can be inferred that the Respondent-Plaintiff was taking care of and managing

the property after the death of his parents. By paying the amounts such as rent, maintenance and salaries of the servant and staff so also paying

visits, the Respondent-Plaintiff was safeguarding and protecting the rights claimed in the suit flat. That he had a set of keys for the purpose of

accessing the flat and which were retained by him does not mean that he was in exclusive possession. His possession, therefore, cannot be said to

be of the nature and character claimed by him.

48. Apart therefrom, when we understand the controversy between the parties to be of the nature noted above, namely, succession to tenancy

rights after the death of the parents, then, it is really immaterial as to whether the Respondent-Plaintiff is in possession of the suit flat and after the

marriage of the Appellant No. 1 and her departure therefrom. We have noted that this controversy is not as to who was residing with the deceased

tenant at the time of the death but amongst several heirs who would succeed to the tenancy rights. Until and unless that issue is decided and at the

trial all that was required to preserve the subject matter of the dispute. With respect, the learned Judge has clearly missed this point. Moreover, we

also find that the reliance placed by the learned Judge on the affidavit of the servant Shashikant Solkar is entirely misplaced. The learned Judge

himself has referred to the contents of this affidavit. The affidavit indicates that the servant was employed by Respondent-Plaintiff since June 2006.

He resides in the suit flat with his family. That affidavit has been carefully perused by us and we do not find that the same can establish the

continued and exclusive possession of the Respondent-Plaintiff. The affidavit of the neighbour cannot be said to be conclusive at this prima facie

stage and in the teeth of the case of the Respondent-Plaintiff as set out in the plaint. The Respondent-Plaintiff himself has not disputed his

employment and his engagement and service rendered abroad throughout. He has not disputed the acquisition of citizenship of United States of

America. Having only visited the flat during the lifetime of his parents and thereafter intermittently does not prima facie mean that the settled and

exclusive possession is established by any means. There is no necessity than to see whether the Appellant No. 1 resided in the flat. That she has

been visiting her parents is clear from the assertions in the plaint. Further, we find that her reliance placed on the contents of the Probate Petition is

appropriate. The acquisition of the U.S. Passport and citizenship is established by the fact that the Respondent-Plaintiff states therein that he left

India for U.S.A. in 1992 leaving his parents who were residents of Mumbai. Since then, he has been a permanent resident of U.S.A. It has been

stated in para 3 of this affidavit dated 26th July, 2005 verified at the Indian Embassy in Washington D.C. which formed part of Probate Petition

No. 39 of 2005 that after being informed of the imminent demise of the mother, the Respondent visited Mumbai in August 2007 for the funeral and

other obsequial ceremonies pertaining to the deceased. The mother passed away on 28th August, 2001. Then, it is stated in this affidavit that the

Respondent-Plaintiff left for U.S.A. in mid September 2001 or thereabouts. He visited Mumbai very briefly few times and during his brief stays he

could not obtain legal advice and only when he visited Mumbai in September 2004 he consulted the advocate regarding formalities of obtaining a

probate. Thus, when the Respondent-Plaintiff does not dispute that from 1967, 1968 to 1970 he lived in U.K., thereafter in Delhi, thereafter on

several assignments firstly in Manila, Philippines and thereafter in U.S.A., any occasional or intermittent visit, therefore, could not be said to be

establishing the settled possession prima facie. Apart therefrom, the case of trespass by the Appellant No. 1 is not established in this case as being

a heir of the deceased tenant and whose joint tenancy is also admitted prima facie, it cannot be said that she is a rank trespasser. That she entered

the suit flat after a long duration and on account of some differences and disputes cannot, therefore, give a right to the Respondent to exclude her

from possession at an interlocutory stage. He cannot, on the case as summarized by us above, be entitled to a temporary injunction in mandatory

form particularly in terms of the prayer clause (a) reproduced above.

49. In the above circumstances, we are of the opinion that the learned Single Judge was in clear error in allowing the Notice of Motion.

50. The reliance placed by the learned Single Judge on the judgments for granting the above prayer is some what misplaced. In para 13 of the

order under challenge, the learned Judge who was aware of the decision on the preliminary issue proceeds to term the Appellants possession as

wrongful. The learned Judge has accepted the case of trespass by Appellants and as pleaded by the Respondent. The learned Judge has

proceeded to hold that the Respondent is in exclusive possession. Once the Respondent was not able to establish a prima facie case of settled and

exclusive possession, then, the reliance placed on the judgments and noted in paragraphs 11 to 14 was not appropriate. The reliance placed by the

learned Judge on the judgment of the Supreme Court in the case of Rame Gowda (D) by Lrs. Vs. M. Varadappa Naidu (D) by Lrs. and Another,

was not appropriate. In the case of Rame Gowda (supra) the facts were that a suit was filed alleging title so also possession over the disputed

piece of land. The trial Court found that although the Plaintiff had failed to prove his title, he had succeeded in proving his possession over the suit

property which he was entitled to protect unless dispossessed therefrom by due process of law. On this finding, the injunction was issued against

the Defendant restraining him from interfering with the peaceful possession and enjoyment of the Plaintiff over the suit property. The Defendants

Appeal has been dismissed throughout. It is in that regard that the Hon"ble Supreme Court refers to some tests which have been evolved over a

passage of time. In the case of Rame Gowda (supra) the possession was undisputed. Paragraphs 8 and 9 on which reliance was placed laid down

the principle that the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use

reasonable force to keep out a trespasser. We do not see how any assistance can be derived from these observations and conclusions for the

Hon"ble Supreme Court itself clarifies that the possession must be settled possession, extending over a sufficiently long period of time and

acquiesced to by the true owner. In the present case, this test has not been satisfied for the Appellant No. 1, cannot be said to be a trespasser.

Secondly, by not asserting her right as a heir of the deceased tenant, she could not have prima facie acquiesced in the position, as claimed by the

Respondent. The possession of the Respondent was not settled inasmuch as the Hon"ble Supreme Court itself clarifies that an occupation of the

property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The physical

possession in this case even applying these standards was not settled.

51. Once this aspect is clarified, then, no assistance can be derived from the order of the Division Bench in the case of Variegate Realestate

Private Limited Vs. Tehmul R. Irani and Mehervan R. Irani, It is in these circumstances that we find that there was substance in the objection

raised by the Appellants that an interim order which practically amounts to granting a final relief at the interim stage should not be passed. In this

regard, a reference can be made to the judgment of the Hon"ble Supreme Court in the case of Mohd. Mehtab Khan and Others Vs. Khushnuma

Ibrahim and Others, There, the Hon"ble Supreme Court held thus:

17. While the bar u/s 6(3) of the SR Act may not apply to the instant case in view of the initial forum in which the suit was filed and the appeal

arising from the interim order being under the letters patent issued to the Bombay High Court, as held by a Constitution Bench of this Court in P.S.

Sathappan V/s. Andhra Bank Ltd., what is ironical is that the correctness of the order passed in respect of the interim entitlement of the parties has

reached this Court under Article 136 of the Constitution. Ordinarily and in the normal course, by this time, the suit itself should have been disposed

of. Tragically, the logical conclusion to the suit is nowhere in sight and it is on account of the proverbial delays that have plagued the system that

interim matters are being contested to the last Court with the greatest of vehemence and fervor. Given the ground realities of the situation it is

neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit,

should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the Courts is neither feasible nor

practicable. Courts, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full

trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the

Courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped

within any straitjacket formula or any precise laid down norms. The Courts must endeavour to find out if interim relief can be granted on

consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final

disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the

plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the Court in every given case.

Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though experience has shown that observations and

clarifications to the effect that the findings recorded are prima facie and tentative, meant or intended only for deciding the interim entitlement of the

parties have not worked well and interim findings on issues concerning the main suit has had a telling effect in the process of final adjudication it is

here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the

orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that

may have a close connection with those arising in the main suit.

18. There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the appellate Bench of

the High Court in the present case is a mandatory direction to hand over possession to the plaintiffs. Grant of mandatory interim relief requires the

highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the

governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in *Dorab Cawasji*

Warden V/s. Coomi Soran Warden has come to be firmly embedded in our jurisprudence.

52. Though both sides have relied on this judgment for different reasons, what we find is that the Hon'ble Supreme Court has emphasized the

principle that the Courts do not as a matter of course venture to decide interim matters on consideration of issues that are best left for adjudication

in the full trial of the suit. There is an inherent risk in the same and, therefore, such issues can be kept out of consideration and the prayer for interim

relief considered and granted on other issues. Meaning thereby, leaving out those which require adjudication in the full trial of the suit. The Courts

must endeavour to find out whether partial interim relief would satisfy the ends of justice till final disposal of the matter. A balancing has to be done

and as has been held in the aforesaid paragraphs by the Hon'ble Supreme Court.

53. We are of the opinion that this is not a case where we are interfering with a discretion exercised by the learned Single Judge only because

another view is possible. We have found that the discretion has not been exercised by applying the settled principles of law. The materials have not

been reassessed in order to reach a conclusion different from the learned Single Judge but to find out as to whether the discretion could have at all

been exercised in favour of the Respondent-Plaintiff. Since the materials before the learned Single Judge do not lead to a prima facie conclusion of

the Respondent's settled possession and given the nature of the controversy and dispute, the learned Single Judge was not justified in granting such

a wide and broad interim relief, that we are constrained to interfere in our appellate jurisdiction. There is a serious doubt as to whether such a

interim injunction could have been granted. In the given facts and circumstances, the view taken by the learned Single Judge cannot be termed as a

possible one. Therefore, we are not in agreement with Mr. Tulzapurkar that the appellate jurisdiction cannot be exercised to upset or reverse the

impugned order. We are of the opinion that the learned Single Judge could have disposed of the Notice of Motion by maintaining the position as

emerging from the report of the Court Officer. The report of the Court Officer indicates the area of the flat, its division into living room, kitchen,

dinning area/room and bed rooms with attached bathrooms. They were enough for the purposes of use by the parties during the pendency of the

suit. The learned Judge could have, therefore, directed that the said position be maintained till the disposal of the suit by both sides and by

additionally restraining them from creating any third party right or inducting any third party in possession in any manner till the disposal of the suit.

While setting aside and quashing the impugned order and allowing the Appeal, we direct as under;

(A) Notice of Motion No. 1548 of 2011 is disposed of with a direction that the parties shall, in terms of the Annexure III to the report of the

Court Officer, use and occupy the bed rooms. The bed rooms which are indicated therein can be used with attached bathroom and with facility for

the disabled. They can be used by the respective parties. The Respondent is allowed to use and occupy the bed room with attached Toilet

containing facility for a disabled or physically incapacitated person.

(B) The ad-interim order passed on 15th July, 2011 is, thus, directed to be continued till the hearing and final disposal of the suit. The Respondent-

Plaintiff can use and occupy two bed rooms in the suit premises, the balcony and bathroom shown in red hatch lines on the floor plan, tendered in

Court, taken on record and marked "X". The other bed room as marked on the plan shall be used by the Appellants and with the attached

bathroom. In order to enable them to access the flat, the set of keys to the main door be made and retained by both sides. They can place their

own locks on the bed room earmarked for their use. However, the common area can be accessed by both.

(C) The Appeal is allowed accordingly. No costs.

(D) We clarify that our order shall not be held to be binding on the learned Single Judge trying the suit. All observations are tentative and prima

facie. The Suit be decided uninfluenced by the same. Since parties are senior citizens, the hearing of the Suit is expedited.