(1977) 12 BOM CK 0023

Bombay High Court

Case No: Appeal from Order No. 83 of 1977

Misrilal Misra		APPELLANT
	Vs	
Ikram Husein and Co.		RESPONDENT

Date of Decision: Dec. 12, 1977

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 94
- Easements Act, 1882 - Section 63
- Specific Relief Act, 1963 - Section 38, 39

Citation: (1978) 80 BOMLR 659

Hon'ble Judges: Naik, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Naik, J.

[After narrating facts, not material to the report, his Lordship proceeded.] It was argued by Mr. Keshavdas that the Court has no power to grant temporary mandatory injunction and that in any event mandatory injunction could be granted only to maintain the status quo as on the date of the suit, for special reasons after proof of the prima facie case and the balance of convenience. In support of his submission that the Court has no power to grant inter-locutory mandatory injunction he has relied upon the observations of Bea-man J. which are made in Rasul Karim Vs. Pirubhai Amirbhai, . Beaman J. who formed a division Bench with Shah J., no doubt observed as under (p. 291):

...It has always been, in my opinion, a very open question whether in strictness a mandatory injunction can properly be made on interlocutory applications. In England whatever doubts may have existed on this point may be said to have been removed by Section 25 of the Judicature Act, and it has long been a common place in the text-books that the Courts indubitably have the power to make mandatory

injunctions on interlocutory motions.

2. The learned Judge further observes (p. 293):

An examination of this and many other cases which I have gone through, however, leaves me unshaken in the opinion that in strictness no mandatory injunction upon an interlocutory proceeding can ever be temporary.

3. Further the learned Judge at p. 295 expressed his doubts as under:

If we turn to Order XXXIX, Rules 1 and 2, which govern all the Courts of the Mofussil in India, it will be observed that the issue of injunctions upon interlocutory applications is designedly confined to temporary injunctions, and, speaking for myself, I do entertain some doubt whether the Courts in India have any right to assume that in this respect they are on the same footing as the Courts in England, and have the power and a discretion to issue mandatory injunctions upon interlocutory applications.

4. In the first place, the doubt expressed by Beaman J. was not shared by Shah J., who formed the Bench with him, inasmuch as in terms he observes at p. 297 that he does not desire to decide the general question argued on that application, viz., whether the Courts have power under Order XXXIX, Rule 2, to make an order restraining a defendant from committing the injury complained of, which may render it necessary for him to undo what may have been done by him before the suit. He further observes that there can be no doubt that the English Courts have the power to grant mandatory injunctions on interlocutory applications and added, he was not sure that the Indian Courts have not similar powers under Rule 2 of Order XXXIX.

5. In fact though those observations do not appear to have been brought to the notice of another division Bench in the case reported in Champsey Bhimji and Co. Vs. The Jamna Flour Mills Co., Ltd., , the division Bench consisting of Dinshaw D. Davar, Ag. Chief Justice and Heaton J., have rejected the contention that a mandatory injunction could not issue pending the suit.

6. Davar Acting C.J. has observed as under (p. 570):

Having regard to the very clear wording of Order XXXIX, Rule 2, and to the fact that this Court has always exercised the power of remedying an injury or wrong by a mandatory injunction on an interlocutory application, I have no doubt whatever that this Court has power to make a mandatory order on an interlocutory application. If the Court had no such power it would be in the power of a party to cause insufferable inconvenience and grave injury to another during the whole time that would elapse between the commission of the wrongful act and the hearing of the suit filed to remedy the wrong and redress the injury.

7. Heaton J. observed that whatever view may be taken of the general question of mandatory injunctions under Order XXXIX, Rule 2, this injunction must be maintained. He took the view that that injunction is in form a restraining injunction and though in effect it may require the defendant to undo some part of that which he has already done, the learned Judge did not think its effect was such as to pass outside the kind of relief which he believed, was intended to be given by Rule 2 of Order XXXIX.

8. Mr. Keshavdas submitted that even in England till the Judicature Act was passed as appears from the observations of Beaman J., Courts had a difficulty in granting temporary mandatory injunctions and worded the. injunctions as if they were injunctions intended to restrain a party from continuing a trespass. Ho drew my attention to the provisions of Section 25(8) of the Supreme Court of Judicature Act of 1873 and pointed out how the wording of that sub-section is much wider than the wording of Order XXXIX, and in particular he pointed out that under that provision a mandamus or an injunction may be granted or a receivei1 appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made. He particularly drew my attention to the fact that that expression "just or convenient" do not occur in Order XXXIX, as they occur in Order XL, Rule 1 dealing with the appointment of Receivers.

9. The matter is no more res Integra inasmuch as a division Bench of this Court consisting of Beaumont C.J. and Blackwell J., in Ramdas v. Atlas Mills Co. (1930) 33 Bom. L.R. 19, has already taken the view that the Courts in India have the same power which the Courts in England have to grant temporary injunctions. Beaumont C.J. in this connection has observed as under (p. 23):

Now the way the learned Advocate General puts the case is this. He says : ''Assume that my arbitration proceedings are entirely futile and entirely unnecessary, nevertheless the Court has no jurisdiction to restrain such proceedings.'' He put his case first of all on the Specific Relief Act, and he said that the injunction asked for in this case is not justified by Section 54. He further says that the Specific Relief Act is exhaustive, and for that he relies on the decision of the Court of Appeal in Calcutta in Ram Kissen Joydoyal v. Pooran Mull ILR(1920) Cal. 733. I am not prepared to accept the view that the Specific Relief Act is exhaustive. I rely on the nature of the Act and on the preamble which is in very similar terms to the preamble of the Indian Contract Act, which Act the Privy Council has held is not exhaustive. I should be sorry to hold that the power of this Court, which is derived from the old Court of Chancery, to grant injunctions wherever just and convenient, as those words have been construed in England, has been taken away by an Act of Parliament. I think, therefore, that we are bound to look outside the Act, and to consider the English cases on the subject.

10. This is an authority for the proposition that the Courts in India could also grant injunctions wherever it is just and convenient as those terms have been construed in

England, after the passing of the Judicature Act. It would thus appear that the view of Beaman J. was not shared by Shah J., who formed the Bench with him and a contention of that sort was not accepted by another Bench in Champsey Bhimji''s case and what is more the division Bench in Ramdas''s case has already taken the view that in appropriate cases where it is. just and convenient, Courts could issue temporary mandatory injunction. Therefore the first submission of Mr. Keshavdas does not appear to be correct.

11. His second submission that mandatory injunction could be granted only for maintaining the status quo as at the date of the suit and that too for special reasons appears to be well-founded.

12. Section 94(e) of the CPC provides that in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, make such other interlocutory orders as may appear to the Court to be just and convenient.

13. Order XXXIX, Rule 1(c) which is material for our purpose provides that:

Where in any suit it is proved by affidavit or otherwise-

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

14. Order XXXIX, Rule 2 provides that:

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain, the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

15. Reading these provisions it would appear that temporary injunctions could be granted in appropriate cases to maintain the status quo as when the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff to use the language of Order XXXIX, Rule 1(c), or appears from the opening provisions of Section 94, which open with the words, "In order to prevent the ends of justice from being defeated...." That mandatory injunctions in appropriate cases could be granted to maintain the status quo as on the date of the suit appears to be consensus opinion of all the Courts in India and that is also the established practice. The existence of such power is recognised by Davar, Acting Chief Justice in

Champsey Bhimji''s case.

16. In Nandan Pictures Ltd. Vs. Art Pictures Ltd. and Others, , Chakrivartti C.J. delivering the judgment of the division Bench has observed as under in para. 4 of the judgment (p. 429):

...I consider it sufficient to point out that it is only in very rare cases that a mandatory injunction is granted on an interlocutory application and instances where such on injunction is granted by means of an ''ad interim'' order pending the decision of the application itself are almost unknown.... Injunctions are a form of equitable relief and they have to be adjusted in aid of equity and justice to the facts of each particular case. No Court, therefore, ought to lay down absolute propositions when such are not necessary and forge fetters for itself. At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state which existed at the date whew the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff''s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiffs suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit. As far as I have been able to find, even such an order has been made only when the application for an ad interim injunction pending the disposal of the suit is finally disposed of and not during the pendency of the application itself as made in the present case.... The order was not made on the basis of anything done by the appellants since the institution of the suit and with notice of the plaintiff''s claim and, therefore, the basis on which ad interim injunctions of a mandatory character are generally granted under the approved practice was lacking.
(Italics supplied).

17. The important point to remember is that the accepted practice is, if a mandatory injunction is to be granted at all it is to be granted only to restore the status quo as at the date of the suit and not to establish a new state of things differing from the state which existed at the date when the suit was instituted.

18. Similar view is expressed in Mall Suranna Vs. Kalla Somulu and Others, . Similar view is also expressed in B.F. Varghese v. Joseph Thomas AIR[1957] Trav. Co. 286, and that too in favour of the defendant as the plaintiff had made some changes in the suit property pending the suit itself. The position therefore appears to be that there is an established practice of the Courts in India to issue mandatory injunctions in appropriate cases for special reasons in the ends of justice solely for the purpose of maintaining the status quo as at the date of suit. It may be also noted that it is established practice of all the Courts, in cases of injunctions restraining the defendant from doing an act to settle the first issue for decision as to whether the plaintiff is in possession of the property at the date of the suit and that if that finding is against the plaintiff, irrespective of the question of title being found in favour of the plaintiff, the plaintiff will be non-suited. In other words in cases of injunctions whether perpetual or temporary the Courts would be concerned with the possession at the date of suit. It is only to maintain that position or Status quo that injunctions could be granted pending the disposal of the suit.

19. Mr. Meghani has not been able to cite a solitary authority or decision of the Indian Courts where by issuing a mandatory injunction pending the disposal of the spit the Court by disregarding the status quo as at the date of suit, has granted a mandatory injunction to restore the status quo ante as existed at the time of alleged trespass prior to the institution of the suit. It is true that he has succeeded in bringing to my notice a decision of Court of Appeal in Thompson v. Park [1944] 2 All E.R. 477.

20. The facts in that case were briefly these : The plaintiff and the defendant were schoolmasters and each had a preparatory school. By an agreement in writing the two schools were amalgamated, as from the beginning of the autumn term, 1942, and carried on in the building owned by the plaintiff. Differences arose and notice to terminate the agreement was given by the defendant and accepted by the plaintiff. The defendant failed to leave by the end of the Christmas term, 1943, and his furniture was removed from the premises by the plaintiff. Maintaining that he still had a right to enter under the agreement, the defendant and some others forced their way into the plaintiff''s house on January 15, 1944. The plaintiff sought an interim injunction to restrain the defendant from trespassing and continuing to trespass on the plaintiff''s premises. It was held that as the defendant was a licensee on the premises and the plaintiff had revoked the licence, when the defendant re-entered the premises as a trespasser, the plaintiff was entitled to an injunction.

21. The precise observations concerning the status quo relied upon by Mr. Meghani are made by Goddard L.J., at page 479:

Having got back into the house, to use the words of the statute, 5 Richard II, c. 7, ''with strong hand and with multitude of people,'' he has established himself in the house, and he then says:

I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and, therefore, I want the status quo preserved.

22. Then follow the important observations on which reliance is placed. That are (p. 579):

The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction. The strength of the argument which was put forward by counsel on his behalf was that, assuming that there had been a breach of contract on the part of the plaintiff-it was said that we ought to assume for this purpose that at any rate it was not proved that there had not been one-the defendant had a right to be where he was. That is an entire misconception of the legal position, which was that the defendant was a licensee on these premises. That licence has been withdrawn. Whether it has been rightly withdrawn or wrongly withdrawn matters nothing for this purpose. The licensee, once his licence is withdrawn, has no right to re-enter on the land and say ''I will stay there''. If he does, he is a common trespasser. The law is, I believe, quite properly laid down in the passage in Salmond on Torts, 9th Edn., at p. 258,...

23. From the above observations Mr. Meghani submits that the status quo in the instant case is not the status quo as at the date when the plaintiff filed the suit in the City Civil Court but the status quo as on August 24, 1976 when as found by the learned Judge of the City Civil Court that the defendant made a forcible entry in the premises, on the strength of the ad interim injunction he had secured from the Court of Small Causes on August 20, 1976, by filing a suit on August 19, 1976.

24. There is no denying that on the peculiar facts of that particular case, Goddard L.J., observed that the status quo that could be preserved was the status quo that existed before the illegal and criminal acts on the part of the defendant. But the question which I have to consider is whether having regard to the established practice of the Courts in India and the provisions of law, that the status quo which is to be maintained by the Courts is a status qua as at the date of the suit as has been observed by Chakravarti C.J., in Nandan Pictures v. Art Pictures, it would be permissible for this Court to issue a mandatory injunction to preserve the status quo which existed prior to the filing of the suit, Having regard to the settled practice of the Courts in India and the provision of Order XXXIX and Section 94 of the Civil Procedure Code, in my opinion, it is not permissible for Courts in India while considering the question of an issue of a mandatory injunction to consider the status quo which existed prior to the filing of a suit. Since the view expressed by Goddard L.J., in Thompson''s case is contrary to the procedure and accepted practice in India which has been settled for ages, it would not be permissible for the Court to

consider the status quo which existed prior to the institution of the suit and try to restore that by granting a mandatory injunction as has been done by the Court below.

25. In this connection it may also be mentioned that Mr. Keshavdas drew my attention to the observations of the Supreme Court in Ram Dial Vs. Sant Lal and Others, , where the Supreme Court has observed that the decisions of the English Courts, based on the words of the English statute, which are not strictly in pari materia with the words of the Indian statute, cannot be used as precedents in this country. This argument is met by Mr. Meghani by drawing my attention to the observations of Beaumont C.J., in Ramdas''s case at page 23, where the learned Chief Justice has observed that he should be sorry to hold that the power of this Court, which is derived from the old Court of Chancery, to grant injunctions wherever just and convenient, as those words have been construed in England, has been taken away by an Act of Parliament and that therefore the Court is bound to look outside the Act, and to consider the English cases on the subject. But the fact remains that as I have endeavoured to show that so liar as the question as to what is meant by status quo is concerned, the established practice of the Courts in India for ages has been the status quo as it existed at the date of the suit and not subsequent to the filing of the suit, and, therefore, it is not possible to agree with the Court below or with the submission of Mr. Meghani that the Court could give a mandatory injuction to maintain the alleged status quo as it existed on the alleged dispossession by the forceful entry of the defendant on August 24, 1976 which was any day much prior to the filing of the suit giving rise to this appeal on September 30, 1976.

26. Mr. Keshavdas also submitted that the power of the Courts to grant injunctions is governed by the provisions of Sections 38 and 39 of the and also by the provisions of Section 94 and Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure. He maintained that from the averments of the plaint itself since the defendant is alleged to have handed over possession of the property to the plaintiff on the date of the alleged deed of assignment viz. June 5, 1973 and he had also asked the licensee Mohamed Badshah to attorn to the plaintiff there was no subsisting obligation which was to be discharged by the defendant and consequently there was no question of the breach of the obligation by the defendant and, hence argues Mr. Keshavdas neither Sections 38 and 39 of the Specific Relief Act, nor the provisions of Section 94 and Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, were attracted, therefore, argues Mr. Keshavdas, no mandatory injunction could have been issued. I am afraid I cannot agree with these submissions.

27. In the first place, Order XXXIX, Rule 1 which empowers the Court to grant a temporary injunction to restrain such an act or make such order is wide enough to clothe the Court with powers to issue injunctions including a mandatory injunction.

So also the provisions of Section 94(e), Civil Procedure Code, empowers the Court to make such other interlocutory orders as may appear to the Court to be just and convenient. As I have already pointed out, Beaumont C.J., in Ramdas''s cases, has taken the view that the Courts in India have the same powers which the Courts in England have to grant temporary injunctions.

28. Even apart from these provisions, the Court has inherent powers to grant temporary injunctions in appropriate cases for special reasons depending upon the peculiar facts and circumstances of the case to maintain the status quo as at the date of the suit. (Vide the majority judgment in Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, In paragraph 18, Raghubar Dayal J., speaking for himself, Wanchoo and Das Gupta JJ., has observed as under (p. 532):

...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 injunctions, 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.

29. It would thus appear that as observed by the Supreme Court, the Court has inherent power to issue temporary injunction when it considers it absolutely necessary, for the ends of justice to do so. It is while exercising such inherent power that in B.F. Varghese v. Joseph Thomas, the Court in the exceptional circumstances of the case before it held that it has jurisdiction to grant injunction in favour of the defendant and against the plaintiff.

30. Mr. Keshavdas, however, drew my attention to the decision of the Supreme, Court in Union of India (UOI) Vs. Ram Charan and Others, , where it is held that having regard to the exhaustive provisions, of Order XXII of the Civil Procedure Code, the Court had no inherent powers to add legal representatives.

31. He has also drawn my attention to the decision in Arjun Singh Vs. Mohindra Kumar and Others, . In paragraph 19, while dealing with the question as to whether the Court has inherent power to set aside an ex parte decree after pointing out the

elaborate provisions of Order IX, the Supreme Court has observed (p. 1003):

...It is sufficient if we proceed on the accepted and admitted limitations to the existence of such a jurisdiction. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.

32. After examining the detailed provisions of Order IX, their Lordships observed (p. 1004):

...Thus every contingency which is likely to happen in the trial vis-a-vis the non-appearance of the defendant at the hearing of a suit has been provided for and Order IX Rule 7, and Order IX Rule 13 between them exhaust the whole gamut of situations that might arise during the course of the trial. If, thus provision has been made for every contingency, it stands to reason that there is no scope for the invocation of the inherent powers of the Court to make an order necessary for the ends of justice.

33. These two authorities of the Supreme Court relied upon by Mr. Keshavdas could have no application to the exercise of the inherent powers of the Court to grant temporary injunctions under its inherent jurisdiction! when the Court considers it absolutely necessary for the ends of justice to do so inasmuch as observed by the Supreme Court in Manohar Lal''s case, 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. Mr. Keshavdas therefore is not right when he says that the Court has no inherent power to grant temporary mandatory injunctions or that there is no such provision in Order XXXIX or Section 94 of the Civil Procedure Code. Apart from the provisions just pointed out, the Court has inherent jurisdiction to grant injunctions when it is absolutely necessary for the ends of justice to maintain the status quo as at the date of the suit. It would therefore appear that in appropriate cases the Court could grant temporary injunctions when it is absolutely essential for special and adequate reasons for maintaining the status quo as at the date of the suit.

34. Applying these provisions to the facts of our case let us examine the correctness of the reasoning adopted by the trial Court in granting the mandatory injunction. At the early stage of this judgment, I have already set out the substance of his reasoning in paragraph 12, but for appreciating the point involved it may be set out

here for ready reference.

35. The learned Judge having held that the defendant had already put the plaintiff in possession of the premises, and having further held that it is only on the strength of the temporary injunction secured by him from the Small Causes Court by filing a suit that the defendant made a forcible entry on August 24, 1976, observed as under in paragraph 12 of his judgment:

...This is a case where on the face of it, the defendant was not in possession of these premises at all. He manoeuvres certain things such as a revival of charcoal licence on or about 20.7.1976, and with the help of such a thing, he comes to the Court of Small Causes, obtains an Order of ad-interim injunction, and with the help of that injunction, he enters upon the premises. If I were the Court at that stage, and if I was convinced that the defendant had entered upon the premises by virtue of a process of the Court, I would have directed him to go out of the premises.

36. The learned Judge proceeds to observe, "That is what I am actually doing at this stage."

37. Continuing, the learned Judge observes:

If per chance the defendant had come to this Court, and had obtained an ad-interim injunction without his being in possession of the premises, and thereafter he sought to perpetuate that possession by virtue of the process of the Court on the dismissal of the motion, I would have again directed the defendant to go out of the premises. Therefore, by granting an interim mandatory injunction, I am not doing anything, excepting letting right the abuse of the process of Court of Small Causes with the help of which the defendant entered upon the premises.

38. Applying the test laid down by the decided cases and the established practice of the Courts in India, it would appear that on the very reasoning of the learned Judge, he is not granting the mandatory injunction for maintaining the status quo as at the date of the suit. What he is in effect doing is to throw out the defendant who is admittedly in possession as at the date when the suit was filed in the City Civil Court. The learned Judge does not stop with making the notice of motion absolute to the extent that it seeks for a mandatory injunction directing the defendant to remove himself, his agents and servants and his belongings but goes on to direct that in case the defendant fails to comply with that order the Sheriff to carry out the order by removing the defendant and the members of his family and servants and agents and belongings with the aid of the police if necessary. Surely so far as the decided cases go and I am aware, there is no precedent for such an order of issuing a mandatory injunction against the defendant for restoring the status quo as it existed much prior to the suit in which the mandatory injunction is sought. What the learned Judge is actually doing is that having assumed that the defendant has entered upon the premises by abusing the process of the Small Causes Court on the analogy that the Small Causes Court itself could have set at right that wrong

pending the suit, it was open to him to exercise that right in the instant suit. I am afraid that this is not permissible.

39. The second part of the observation of the learned Judge to the extent that if the injunction were sought from his Court and on the strength of that the defendant had dispossessed the plaintiff pending the instant suit and had sought to perpetuate that unlawful possession even after the notice of motion was dismissed he could have directed the defendant to go out of the premises is undoubtedly sound and no exception can be taken to it, even so the first part of the observation that is the Small Causes Court seized of the matter were to find in the case to the contrary that the defendant had entered upon the premises by abusing the process secured by him from that Court, that Court could have righted that wrong cannot be also taken exception to. But I fail to see how in the instant suit which is filed long after that trespass albeit as assumed by the learned Judge on the strength of the temporary injunction secured from the Small Causes Court, the City Civil Court could issue a mandatory injunction. Mr. Meghan could not cite any authority in support of the correctness of the view taken by the learned Judge. All that is submitted was that the Court in the instant case has not taken into consideration the usual questions like prima facie case and balance of convenience which are taken into consideration while granting temporary injunction pending the disposal of the suit. According to Mr. Meghani, the learned Judge was evidently oppressed by the fact that the defendant has entered into possession by abusing the process of the Small Causes Court and, therefore, he had inherent jurisdiction to set right that mischief. As I have pointed out the inherent jurisdiction which is vested in the Court is to maintain the status quo as at the date of suit till the disposal of the suit. It is not to disturb the status quo as on the date of the suit. On that grounds also even if we hold that the learned Judge was right in the view he has taken on the question of fact, his order granting the mandatory injunction cannot be supported by any authority.

40. The next question which arises for decision in this case is whether on the facts and circumstances of the case a suit for mandatory injunction directing the defendant, his servants and agents to remove themselves and their belongings from the shop in question with a declaration that the defendant has on June 5, 1973 by a deed of assignment of the same date conveyed all his right, title and interest in shop in question to the plaintiffs and that after the said assignment the defendant has no right, title or interest of whatsoever nature in the said shop, is competent. Mr. Meghani submitted that even if on the facts and circumstances of this case the relief of mandatory injunction in para. 23(b) construed to be a relief for possession, and the suit is construed as a suit for possession, all that the Court can do is to call upon the plaintiff to pay the Court-fees, inasmuch as it is not a case where the jurisdiction of the civil Court would be ousted, having regard to the fact that the deed of assignment is for Rs. 10,000 and Rs. 5,000 have been paid to Mohamed Badshah for surrendering his interest in the front portion of the shop. Even on that assumption he says a temporary mandatory injunction could be issued. In support

of his submission, he relied upon the judgments of this Court is Lakhiram Ramdas Vs. Vidyut Cable and Rubber Industries, , and Aninha D''Costa v. Parvatibal (1963) 66 Bom. L.R. 744, the decision in which was confirmed in Aninha D''Costa v. Parvatibai (1964) 67 Bom. L.R. 452.

41. In all these cases it has been held that if on a fair construction the Court could arrive at the conclusion that what was really intended by the plaint was a claim to possession, then the suit ought not to be dismissed only on the ground that Court-fee had been paid as on an injunction. But then I do not see how these authorities could be of any assistance to Mr. Meghani for securing an ad interim mandatory injunction of the nature sought by him pending the disposal of the suit, if the suit is in fact to be treated as one for possession. Actually when the suit is one for possession, it is unthinkable that the temporary mandatory injunction could issue pending the final decision of the suit.

42. Mr. Meghani thereafter submitted that on the facts of this case it was open to the plaintiff to sue for mandatory injunction rather than to sue for possession. In support of that submission he relied upon certain observations of Patel J. in Lakhiram''s case. Those observations are as under (p. 607):

In our view the principles are well settled and do not admit of doubt. The Court has to see the substance of the plaint and not to go by the mere form. Now, the substance of the plaint though cleverly drafted is that the defendants should remove themselves from the premises and should not thereafter interfere with the plaintiff''s possession either by entering or interfering with the same. This is merely putting in a very ingenious form the substantive prayer for possession and cannot be regarded as merely a prayer for injunction. The plaintiff being out of possession can only ask for possession and his being in constructive possession as a landlord or a mortgagor or an owner, where a trespasser is squatting on his property cannot avail. What, in effect, he wanted was removal of the defendants which amounts to eviction and actual possession which the defendants were not to be allowed to disturb. . It depends upon the nature of trespass. Where a trespasser does not hold possession of the property but commits sporadic acts of trespass, prayer for injunction is the proper relief. But if the trespasser is in physical occupation of the property then possession is the only proper remedy.... In our view, where a licensee is in exclusive possession, the plaintiff must ask for possession and not injunction. It is the only efficacious relief which the licensor is entitled to.

In every case, therefore, the Court who is called upon to hear a suit must initially consider the relationship of the parties. It is not as if that in every case the licensor must ask for possession. There are a large number of cases where the licensor continues to remain in not only juridical possession, but in physical possession along with the licensee, and in such a case in terms of Section 63 of the Indian Easements Act it is sufficient if he asks for removal of the licensee and a permanent injunction against him restraining him from re-entering the premises, because in

that case there is no question of his asking for ''equally efficacious relief.'' But the same considerations cannot apply where he is not in physical possession of the property, but is in mere juridical possession as any other owner with subsisting title is. If the Court comes to the conclusion on reading the cause of action that the plaintiff has only asked for a mere injunction to which he is not entitled it must reject the plaint, or dismiss the suit as required by the provisions of the Civil Procedure Code. In some cases the Court may find that the prayer clause is cleverly worded as in the present case but in effect it amounts to a prayer for possession, in which case it is its duty to see that the requisite court-fees are paid, and if not, to call upon the plaintiff under the Court-Fees Act to pay the court-fees.

43. Relying particularly on the observations that there are a large number of cases where the licensor continues to remain in not only juridical possession, but in physical possession along with the licensee, and in such a case in terms of Section 63 of the Indian Easements Act it is sufficient if he asks for removal of the licensee and a permanent injunction against him restraining him from re-entering the premises, because is that case there is no question of his asking for "equally efficacious relief", Mr. Meghani submits that since it is the plaintiff''s case that the defendant has made a forcible entry in the premises, he could sue for an injunction and he could not sue for possession.

44. That takes me to the pleadings and the affidavits. The plaintiff has alleged in paragraph 14 of the plaint as under:

The defendant armed with the said ad-interim injunction on or about 24th August 1976 at about 6 a.m. came with a bag of charcoal over his head and two ladies, one charpoy and 5 or 6 hirelings and attempted to forcibly enter the said shop when the plaintiffs'' employee the aforesaid Khalil Ahmed resisted the said attempted forcible entry. The defendants with the aid of the said 5 hirelings overpowered the aforesaid Khalil Ahmed and in the process hit and injured him with a lathi. The defendant thereafter along with the help of the said 5 hirelings and 2 ladies forcibly entered the rear portion of the said shop and kept his coal bag and charpoy and put up his two ladies inside the said rear portion. The said Khalil Ahmed immediately informed Fakir Husein the present managing director of Messrs. Ikram Husein & Co...about the forcible entry in the said rear portion of the shop effected by the defendant.

45. In para. 16 of the plaint, it was alleged as under:

The plaintiffs further submit that the defendant has obtained forcible entry in the said shop in the circumstances set out hereinabove, and the defendant is not entitled to continue in possession use or occupation of any portion of the said shop.

(Italics supplied).

46. Turning to the affidavits filed by the plaintiff in support of the suit and the notice of motion, in the first affidavit of the plaintiff, Fakir Husein in paragraph 2, it is

alleged that:

...the said injunction (injunction issued by the Small Causes Court) should not come in the way of getting relief prayed for by me under the notice of motion as the said relief is based on his transfer of his right, title and interest to me on 5th June 1973, delivery of possession to me of the shop on that day and forcible entry on 24th August 1976.

47. In paragraph 3, it is alleged:

...The defendant meanwhile continues to be in a criminal possession of a portion of the shop in suit.

48. Khalil Ahmed, the servant of the plaintiff in his affidavit in paragraph 5, states as under:

On 24th August 1976 at about 6 a.m. Misrilal came with a bag of charcoal over his head and two ladies, one charpoy and 5 or 6 hirelings and forcibly entered the shop, in suit. Misrilal with the aid of the said 5 hirelings got hold of me and Misrilal hit and injured me with a lathi. Misrilal thereafter along with the help of the said 5 hirelings and two ladies forcibly entered the rear portion of the shop in suit and kept his coal bag and charpoy and put up two ladies inside the said rear portion. I immediately informed defendant No. 2 about the said forcible entry in the said rear portion of the shop by Misrilal.

49. The affidavit of Mohamed Badshah is not relevant for this discussion.

50. It would appear from the allegations in the plaint, the prayer clauses and the affidavits of Fakir Husein, the plaintiff and his servant Khalil Ahmed that the defendant having made a forcible entry in the rear portion of the shop with the help of 5 hirelings has continued in criminal possession of the same along with members of his family and belongings since August 24, 1976. There is absolutely no allegation that that potion is in the joint possession of the plaintiff and the defendant. No such plea is to be found in the pleadings. Mr. Meghani however, drew my attention to the allegations in para. 4 of the affidavit of Fakir Husein, the plaintiff and wanted me to spell out from, that, that what the plaintiff alleges is a case of joint possession. That averment is to this effect:

I say that the defendant is gradually extending his occupation and it has become increasingly difficult for the plaintiffs to carry on their business in the shop in suit.

51. It is not possible to accept the interpretation put on by Mr. Meghani on this averment. After all it is an admitted position that the front portion is a shop or a biscuits and bakery shop or a provision and grocery shop and it is the rear portion with which we are really concerned inasmuch as the defendant is not really interested in disputing the fact that the plaintiff is in possession of the front portion called the bakery shop or the grocery arid provision store. Apart from that the

authorities relied upon by Mr. Meghani are in respect of licensors and licensees. The very observations of Patel J., in Lakhiram''s case on which Mr. Meghani wants to rely are in respect of a joint possession of the licensor and licensee. It is nobody''s case that the plaintiff is a licensor and the defendant is a licensee. Therefore, in the view I am taking, what should have been in fact a suit for possession has been ingeniously drafted to make it appear that it is a suit for injunction. I am, therefore, of the view that judged from any point of view, the order of the learned Judge granting the mandatory injunction cannot be sustained and must be set aside.

52. The appeal is allowed. The order of the City Civil Court dated February 16, 1977 on the plaintiff''s Notice of Motion in Suit No. 6257 of 1976 is set aside. The Notice of Motion taken out by the plaintiff is dismissed with costs, in both the Courts.

53. No order on Civil Application No. 584 of 1977.