

**SUPREME COURT OF INDIA**

Behram Tejani & Ors.

Vs.

Azeem Jagani

C.A.No.150 of 2017

(Pinki C.Ghose and Uday Umesh Lalit,JJ.,)

06.01.2017

**JUDGMENT**

**Uday Umesh Lalit,J.,**

SLP(Civil)No.35464 of 2013

1. Leave granted.

2. This appeal challenges the judgment and Order dated 17.09.2013 passed by the High Court of Bombay in Appeal from Order (ST) No.15590 of 2013 quashing and setting aside the Order dated 29.04.2013 passed by the Bombay City Civil Court in Notice of Motion No.344 of 2013 in Suit No.408 of 2013.

3. On 4.02.2013, aforesaid Suit No.408 of 2013 was filed by the respondent submitting inter alia:-

“The Plaintiff along with his Maternal grand-mother Mrs. Noorbanoo Mohammed Ali Tejani are in use, occupation and possession of the premises known as Tej Kunj, 1st Floor, Plot No.212 D, Byramjee Jeejeebhoy Road, Bandstand, Bandra (West), Mumbai 400050, hereinafter referred to as ‘the suit premises’ The Defendant Nos.1, 2, 3 and 5 are the Paternal uncles of the Plaintiff’s mother i.e. Mrs. Zeenat S. Jagani viz. the brothers of deceased father named Mohammed Ali H. Tejani (since deceased) and Defendant No.6, is a son of the Defendant No.5 and Defendant No.4 is the sister of Defendants 1,2,3 and 5 Mohammed Ali H. Tejani (called the said Deceased) was a Co-owner along with Defendant Nos.1 to 5 in respect of a Plot of Land bearing Plot No.202-D, along with the building comprising of ground with one upper floor standing thereon and known as Tej Kunj The said deceased executed a Will dated 28th September 1991 under which the deceased bequeathed his 1/7th share in the plot of land in favour of the Defendant Nos.1 to 5. The said Will is probated in the High Court T & I.J. Petition No.856 of 2003 as per the Prabate granted on 6th December 2006.”

The respondent-plaintiff then adverted to Will dated 28.09.1991 and Clause 7 thereof in particular. It was averred:-

“The said deceased during his life time resided along with his wife namely the said Smt. Noorbanoo Mohammed Ali Tejani and the family members on the entire First Floor of the said property including the plaintiff herein. The said deceased died on 22nd March, 2003 and since then the said Noorbanoo Mohammed Ali Tejani and the plaintiff resided in the said flat.”

The respondent prayed, inter alia, for following reliefs:-

“a) That this Hon’ble Court be pleased to grant permanent order and injunction restraining the defendants, their respective servants, agents and person or persons claiming through or under them from in any manner dispossessing the plaintiff from the suit premises without following due process of law.

b) That pending hearing and final disposal of the above suit, this Hon’ble Court be pleased to grant temporary order and injunction restraining the defendants, their respective servants, agents and person or persons claiming through or under them from in any manner dispossessing the plaintiff from the suit premises without following due process of law ”

4. By Will dated 28.09.1991 which was referred to by the respondent, The testator had appointed his brother Amirali Huseinali Tejani and his daughter Zeenat Shafique Jagani as the executors and trustees. The principal bequests made by the testator in the Will were:

“5. I give, devise and bequeath all types of investments and assets which are in the form or nature of moveables and which are in my own and beneficial name or my four married daughters namely 1) Mrs. Nasreen I. Fazal, 2) Mrs. Zeenat S. Jagani, 3) Mrs. Shahnaz R. Butt and 4) Mrs. Tina D. Gai in equal shares.

7.I own and hold undivided one half share right title and interest in the immovable property known as “Fatmabai Building’ on Plot No. 115 at Nowroji Hill Road No.2, Nowroji Hill Estate, Bombay 400 009, one seventh share right title and interest in “Tej-Kunj” Building on PlotNo. 96 at Nowroji Hill Road No.5, Bombay 400 009 and also one seventh share right title and interest in a small residential Building “A” on Plot No.212-D (CTS No. B-764) at B.J. Road, Band Stand, Bandra, Bombay 400 050. I give devise and bequeath all my aforesaid fractional shares in the abovementioned immovable properties to my brother Amirali H. Tejani, Behram H. Tejani, Nasir H. Tejani and Feroze H. Tejani absolutely in equal shares. However, my brother Amirali H. Tejani will administer the affairs of and deal with the aforesaid properties or any part thereof in his absolute discretion and as he deems fit and proper seeing to the prevailing conditions and circumstances. The 2nd floor flat in the aforesaid Building “A” at Bandra is in use and occupation of my brother Amirali and his family and they

can continue to use, occupy and maintain the same without any question or disturbance and hindrance from anyone and so also the other co-owners thereof.”

5. As stated in the aforesaid suit, the Will was probated on 06.12.2006 in Petition No.856 of 2003 and one of the executors was Zeenat Shafique Jagani i.e. mother of the respondent. It appears that the testator was residing on the first floor and after his death his wife continued to be in occupation of said first floor. The respondent-plaintiff asserted that he was also in use, occupation and possession of said first floor alongwith his maternal grand-mother and thus prayed for aforesaid reliefs in the suit. He also preferred Notice of Motion No.344 of 2013 praying inter alia for grant of temporary injunction restraining the defendants from dispossessing the respondent- plaintiff from the suit premises without following due process of law.

6. In the affidavit in reply filed on behalf of the defendant-appellants herein, it was submitted inter alia that after the death of the testator, the maternal grand-mother of the respondent was merely allowed to use and occupy the suit premises by the defendants out of love and sympathy without any fees or compensation; that the suit premises belonged to the defendants as co-owners; that the testator had bequeathed his right, title and interest in the building “Tej Kunj” to his four brothers namely defendants Nos.1, 2, 3 and 5 and that the plaintiff and his grand-mother were fully aware that no right, not even provision for residence was created under the Will in her favour. It was further submitted:-

“Nonetheless, out of sympathy, close blood relationship and out of filial love and affection, Mrs. Tejani has been allowed to use the suit premises. I say that since she has no right, title or interest in the suit premises she could have no right to permit any other person much less the Plaintiff to interfere with the ownership right of the co-owners. I say that it is on record that since the co-owners including myself came to learn that Mrs. Tejani is wrongfully and without any such authority from the Defendants allowing the members of Jagani family, the Defendants by their Advocates’ letter dated 12th January, 2013 addressed to Mrs. Tejani pointed out her deliberate acts of commission and omission and called upon her not to interfere with the valuable rights of the defendants qua the suit premises. By the said letter, it was pointed out that Mrs. Tejani should not illegally deal with the said premises in any manner whatsoever as long as she is freely allowed to reside therein and called upon here to let the Defendants know as to why and under what circumstances and under whose authority, she has been intermeddling with the absolute ownership rights of the defendants qua the suit premises and requested not to create any encumbrances of any nature whatsoever to the detriment of the interests of the defendants. No reply has been sent to the said letter. It is thus evident that the members of Jagani family including Mrs. Zeenat Jagani or the Plaintiff could have no right in the suit premises.”

With the aforesaid averments the defendants-appellants opposed grant of any interim relief.

7. Said Notice of Motion No.344 of 2013 was dismissed by Bombay City Civil Court vide Order dated 29.04.2013. While rejecting the prayer it was observed as under:-

“It is specific submission of defendant that Noorbanoo herself has no right in this premises. Only on sympathetic ground she is allowed to occupy the premises. If such is fact, when plaintiff is coming before Court claiming equitable relief like injunction, he has to prima facie show some rights to claim relief. If protection is asked for, one must clearly seek ascertaining his legal rights. Defendant has rightly pointed out that plaintiff is not submitting his legal right to possess the suit premises. He is merely claiming that he is residing with Noorbanoo and if Noorbanoo herself is not having right in the property, I am of the view that such type of protection cannot be granted in favour of plaintiff. Neither Noorbanoo is made party to the suit, nor there is sufficient material to indicate that Noorbanoo has any legal right to allow plaintiff to reside with her in the suit property for and on behalf of her. I am of the view that there is no any substantial right made out on behalf of plaintiff to entitle him for such equitable relief like injunction.”

8. The order of dismissal of Notice of Motion was challenged by filing Appeal from Order No.15590 of 2013 in the High Court of Bombay which was allowed by judgment and Order dated 17.09.2013 and which is presently under appeal. It was observed by the High Court in Paragraphs 10 and 11 of its judgment as under:-

“10. The learned Judge, in view of the above position on record, wrong in rejecting the motion on a foundation of ownership of the Defendants, even by accepting the submission of the Defendants-Respondents that Mrs. Noorbanoo Mohammed Ali Tejani maternal grandmother herself has no right in the premises. The legal right of possession as even observed by the Supreme Court in a case of Rame Gowda (Supra) just cannot be the basis unless adjudicated, to overlook the “settled possession”. The requirement is the physical possession of the property of the occupant/person like Appellant who is seeking the protection of his possession, though there is no claim and/or submission even made by the Appellant that he is the owner and/or right in the property in question at least in the present case. While deciding the possession right of the Appellant, the learned Judge has actually given finding against the maternal grandmother and decided even that she has no right to occupy the premises and therefore no question of permitting the Appellant to reside therein. The concept of “settled possession” cannot be equated with in all matters-“legal possession”. It depends upon facts and circumstances of case, as recorded in the present case.

11. The leaned Judge has committed an error by relying upon wrong footing of law that the possession can be granted only to the person who has a legal right to occupy the premises and no other one. In view of the reasons so given in above paragraphs, the learned Judge has committed wrong even invoking the principle of equity against the Appellant-Plaintiff. Let the due course of law with a foundation to dispossess the person in possession of the premises be only after due trial. In view of above, I am inclined to observe that the order passed by the learned Judge deserves to be interfered with, as it is against the settled principle of law with regard to the possession of the property. It is made clear that we are dealing with the protection of

the possession of the premises and not ownership and /or title of Mrs. Noorbanoo Mohammed Ali Tejani maternal grandmother. All points are kept open, including the observations given by the learned Judge regarding ownership/title of the maternal grandmother.”

9. Appearing for the defendants-appellants Mr. Dushyant Dave, learned Senior Advocate submitted that the High Court had erred in granting interim relief in favour of the respondent. He submitted that the reliance on *Rame Gowda (Dead) by LRS. v. M. Varadappa Naidu(Dead) by LRs. and Anrs*<sup>1</sup>) was completely erroneous; that the respondent, at best, was a relative staying with a gratuitous licensee; and that the case was covered by the decision of this Court in *Maria Margarida Sequeira Fernandes and others v. Erasmo Jack De Sequeira*<sup>2</sup> (Dead) through LRS. Ms. Indu Malhotra, learned Senior Advocate appearing for the plaintiff-respondent submitted that the respondent had been in settled possession and as such was entitled to protection. In her submission, the matter was fully covered by the decision of this Court in *Rame Gowda* (supra).

10. The Will adverted to in the plaint bequeathed the entire interest that the testator had in the building in favour of his brothers. The Will further appointed mother of the respondent as one of the executors and trustees. It is not the case of the respondent that either he or his grand-mother have any right independent of the Will or that the Will had bequeathed any interest in respect of the premises in question in their favour. In fact the suit does not claim any independent right either of his grand-mother or of the respondent himself.

11. Having gone through the record, the submission of the appellants that the grand-mother of the respondent though did not have any right qua the premises was permitted to occupy purely out of love and affection is not without merit. The status of the grand-mother is thus of a gratuitous licensee and that of the respondent is purely of a relative staying with such gratuitous licensee.

12. *Rame Gowda* (supra) was a case in which two adjoining owners were claiming independent right of ownership in respect of a strip of land in between their holdings. That piece of land was in possession of the plaintiff and as such while dealing with the controversy, this Court held that a person in peaceful possession is entitled to retain his possession. However, while dealing with the concept of “settled possession” it was observed in paragraph 9 as under:

“The “settled possession” must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase “settled possession” does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a straitjacket. 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.”

13. The matter was further elaborated in subsequent decision of this Court in *Maria Margarida* (Supra) as under:

“97. Principles of law which emerge in this case are crystallized as under:

- (1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
- (2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
- (3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
- (4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.
- (5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”

14. Thus, a person holding the premises gratuitously or in the capacity as a caretaker or a servant would not acquire any right or interest in the property and even long possession in that capacity would be of no legal consequences. In the circumstances City Civil Court was right and justified in rejecting the prayer for interim injunction and that decision ought not to have been set aside by the High Court. We therefore, allow the appeal, set aside the judgment under appeal and restore the Order dated 29.04.2013 passed by the Bombay City Civil Court in Notice of Motion No.344 of 2013 in Suit No.408 of 2013.

15. The matter having come up before this Court from an interim order and since the main suit itself is pending, any observations made by us shall not be taken as concluding the controversy and the merits of the matter will be gone into by the Court at the appropriate stage without being influenced by any observations made by us.

16. Contempt Petition (Civil) No.368 of 2014 was filed by the appellants submitting inter alia that the interim order passed by this Court on 10.02.2014 was disobeyed by the respondent. No notice was issued in this contempt petition. As we have decided the main matter no separate orders are called for in the contempt petition and the same stands disposed of.

17. No order as to costs.

Judgment Referred.

<sup>1</sup>(2004) 1 SCC 0769  
<sup>2</sup>(2012) 5 SCC 0370