

Bombay High Court (Smt.) Smita Pandurang Dalvi, Of ... vs Ratnakar Datatraya Patade, Of ... on 26 February, 2002 Author: C Thakker Bench: C Thakker, S Radhakrishnan JUDGMENT C.K. Thakker, C.J. 1. The present Letters Patent Appeal is instituted by the appellants against an Order passed by the learned Single Judge on November 9, 2001 in Civil Application No.8475 of 2001 with Civil Applications 7265 of 1999 and 1101 of 2001 in First Appeals 386 and 387, both of 2001. By the said order, the learned Single Judge held that the appellants-contesting defendants, under common understanding and in furtherance of their intention, made illegal entry in the suit flats without the prior permission of the Court. They were, therefore, guilty of contempt of the Court. Mr.V.S.Sawant (defendant No.5), over and above committing contempt of Court, along with other defendants, also made him liable by writing a letter, dated August 2, 2001, to the Receiver making allegations against him. He was, therefore, directed to withdraw the said letter. Considering the extenuating factors, however, particularly that the defendants parted with substantial amount as consideration, and forcible entry was made by them in an anxiety to occupy the flats, the learned Single Judge thought it fit to impose a nominal fine of Rs.250 on each of them, to be paid within a period of three weeks from the date of the order. In default, they were directed to suffer simple imprisonment for a period of three days. 2. To appreciate the controversy in the Letters Patent Appeal, few facts relevant to the question, as narrated in the order passed by the learned Single Judge, may now be stated: Respondent No.1-original plaintiff filed a suit in the Bombay City Civil Court at Bombay for permanent injunction against defendants 1 to 38 (appellants 1 to 34 and respondents 2 to 5), inter alia, alleging that the plaintiff was in exclusive use, occupation, possession and enjoyment of land bearing Survey No.15, Hissa No.1(P), C.T.S.No.124, 124/1 to 124/3, 120/3 and 123/1 of Village Eksar Original Plot No.178 of the Town Planning Scheme Borivli (Final) admeasuring about 2044 sq.yds., situate at Gaothan Road, Babhai Naka, Thakurwadi, Borivli (West), Mumbai (hereinafter referred to as "the suit property"). It was his case that Smt.Parvati Shankarrao Thakur and three others were the owners of the property. By an Agreement dated November 18, 1980, the owners agreed to sell the property to one M/s.Sainath Enterprises, a partnership firm (defendant No.39) on the terms and conditions mentioned in the Agreement. In pursuance of the said Agreement, defendant No.39 was put in actual and physical possession of the property in part performance of the Agreement. According to the plaintiff, the partners of defendant No.39 were known to him and by a Memorandum of Understanding, dated October 14, 1983, the plaintiff was asked to develop the suit property and to carry out various acts, deeds and things relating to the suit property. The plaintiff did necessary acts for making construction over the suit property after obtaining approval from the Bombay Municipal Corporation and constructed three buildings consisting of 49 flats. The plaintiff also entered into individual agreements with defendants 1 to 38 to whom he had agreed to sell those flats. It was asserted by the plaintiff that he had completed about 90% of construction work. He, therefore, called upon the defendants to pay arrears of instalments, so that the construction work could be completed and possession be handed

over to them. The defendants, however, failed to pay the remaining amounts, as also regular instalments, and the plaintiff had to spend some amount from his own pocket. A criminal complaint was filed by defendant No.1 against the plaintiff alleging various illegal and unlawful acts. 3. On summons of suit being served, the defendants appeared, and filed Written Statement, denying all the facts stated, averments made and allegations levelled against them. It was their case that they were the promoter-members of the Society, known as “Ratna-Vijay Co-operative Housing Society (Proposed), Mumbai”, formed in the year 1983. For various reasons, however, the Society could not be registered. Their case was that they acquired the suit property from their joint contribution. The plaintiff was also one of the employees of E.S.I.S. Hospital, Mumbai, where some of the defendants were serving. He was, therefore, elected as the Chief Promoter of the proposed Society only for the purpose of acquiring the suit property in his name and for the development as the Chief Promoter, and the plaintiff did not acquire the property in his individual or personal capacity. He was merely a trustee or representative of the contesting defendants. It was also the allegation of the defendants that a sizeable amount has been paid by them to the plaintiff. According to them, the original estimated cost of the whole project was about Rs. 28 lacs, and even though an amount of Rs.46 lacs was paid to the plaintiff, an additional amount was claimed by the plaintiff from the defendants, which was illegal and unlawful. The defendants also demanded accounts from the plaintiff, but the plaintiff did not render accounts. On the contrary, the plaintiff had invested huge amount in other projects, though he had no authority to do so. 4. The defendants also preferred a Counter claim against the plaintiff, contending therein that the plaintiff was bound to follow the provisions of the Maharashtra Ownership Flats Act, 1963, but he failed to act in accordance with the provisions of the said Act. The defendants were, therefore, entitled to specific performance of the agreement. 5. It may be stated, at this stage, that by an Order dated September 30, October 1/4, 1993 in Notice of Motion Nos.6965 of 1992 and 1291 of 1993 in S.C.Suit No.442 of 1992, the Bombay City Civil Court appointed the Court Receiver, High Court of Bombay, as Receiver with direction to take possession of the flats on or after October 31, 1993. It was also directed that the Receiver would call upon the plaintiff and defendants to suggest the names of Architects and/or the parties themselves may suggest the names of their Architects, so that the Court Receiver may instruct such Architects to inspect each of the flats in the building, and to prepare the list of items remained to be completed. It was further observed that the Court Receiver, after ascertaining the cost of construction, dues payable by each of the defendants, and on receiving the amount payable by them, may hand over possession of respective flats to the defendants. It was then stated: “The Court Receiver after handing over possession of the flats to the defendants shall submit his detailed report including the amount so received by him and incurred by him to this Court within one month, after handing over such possession to the Defendants. The plaintiff is entitled to receive the balance amount from the Court Receiver on settlement of the accounts. Each of the party is at liberty to move this Court for any clarification at any time by giving notice to the other

side.” 6. It was the allegation of the plaintiff that disregarding the order passed by the Court and by taking law in their hands, the defendants made forcible entry in the flats, which were in the possession of the Receiver as custodia legis. The Receiver submitted a report on September 4, 2001, stating therein that the contesting defendants had forcibly entered the flats by breaking open locks and by putting their own locks without the prior permission of the Court Receiver or of the Court. The Receiver, therefore, submitted her report for the following directions:- “a) Whether the Court Receiver, High Court, Bombay should proceed to take back actual physical possession of the flats mentioned in the Court Receivers letter dated 16th May 2001 addressed to the Officer In-charge, Borivali Police Station, from whomsoever found in possession, by breaking open the lock/s, if necessary, with the help of police and thereafter lock and seal the same.”b) If the answer to prayer (a) is answered in affirmatively, the concerned Police Station may be directed to provide necessary Police assistance to the Court Receiver for executing the order. “c) The Defendants herein may be directed to deposit in the Office of the Court Receiver a sum of Rs.3,77,200/- being the amount of arrears towards security charges @ Rs.4,600/- per month for a period from October 1994 to 31st July 2001 within a stipulated time as this Honble Court may deem fit to enable the Court Receiver to make payment thereof to the said Security Agency.”d) Mr.Vasant Shankar Sawant, C.A. of the Defendants may be directed to withdraw his letter dated 2nd August, 2001 addressed to the Court Receiver. “e) Any other directions that this Honble Court may deem fit to give to the Court Receiver in the matter.”f) That his cost of and incidental to this application and of the Order to be made thereon be fixed at Rs.1000/- and be directed to come out of the funds lying in his hands as Receiver herein.” 7. The parties to the suit were called upon to file their objections, if any, in support of or against the directions sought by the Court Receiver. The parties accordingly filed the affidavits. 8. The case of the Defendants was that all of them were in possession of the flats, and it was not correct to say that they had committed any illegality by entering the flats when the possession was with the Receiver. According to the defendants, they were already in possession since 1992. Some of them were actually occupying and also staying in the flats, whereas the others had only applied their locks, but they were in lawful possession. When a direction was issued to the Court Receiver to protect possession of the flats, it was understood by all parties, as well as the Receiver, that the possession of the Receiver would be symbolic and formal possession, inasmuch as all the defendants were in possession of the flats. Only thing was that some of them were in actual occupation of flats and were staying therein while others were not in actual occupation. 9. The case of the plaintiff was to the contrary. According to him, the defendants themselves have stated that they were not in possession of the flats, as the construction was not full and complete. The defendants insisted that the plaintiff should carry out the remaining construction, and for that purpose, possession was given to the plaintiff. It was also the case of the defendants that the plaintiff had illegally parted with the possession to third party, which necessitated the defendants to make an application in the Bombay City Civil Court for appointment of Receiver. After the Receiver was

appointed, the defendants could not have entered the flats without the prior permission of the Receiver or without obtaining order from the Court. The said action was, therefore, illegal and unlawful, and the defendants were liable to be dealt with accordingly. 10. The learned Single Judge, after perusing the relevant materials on record, held that it was clearly established from the entire materials that the defendants were not in possession of the flats, except some of them, and in the report submitted by the Receiver, it was so stated. The learned Single Judge also held that most of the defendants had forcibly entered the flats by breaking open locks and by applying their own locks. They thereby interfered with the course of justice. Since the Receiver was holding the property as custodia legis, it was incumbent on the defendants to obtain prior permission of the Court or of the Receiver before taking over possession of the flats. By not doing so, they had interfered with the course of justice and they were liable for the contempt of Court. Accordingly, the learned Single Judge held the defendants liable, and imposed punishment, as stated hereinabove. 11. The said Order is challenged by the appellants in the present Letters Patent Appeal. 12. We have heard the learned counsel for the parties at length. It was strenuously argued by the learned counsel for the appellants that it is not true that the contesting defendants-appellants were not in possession. According to the counsel, all of them were in possession since 1992. The possession of the defendants continued since then. The defendants had to take appropriate proceedings against the plaintiff in a competent Court of law and had to make a prayer for appointment of Receiver, as the plaintiff refused to carry out the work as per the agreement arrived at between the parties. That, however, did not change the position. Possession of the defendants continued to remain with them with a rider that the Receiver was to get the remaining work carried out as per the order of the Court. It, therefore, could not be said that either the defendants were deprived of possession of flats or actual and physical possession was taken over by the Receiver; and the defendants, in violation of the order of the Court, made forcible entry in the flats. It was also stated that the learned Single Judge has not appreciated the documentary and oral evidence in its proper perspective and has committed an error of fact as well as of law in observing that, except few, the rest of the defendants were not in actual and physical possession of the flats and they had made forcible entry. The true position was that whereas some of the defendants were in possession as well as in occupation of the flats, the remaining defendants were in possession, though not in actual occupation of the flats. Thus, when the Receiver was appointed to look after the flats as custodia legis, possession of the defendants continued to remain as such. The defendants, who were in actual occupation of the flats, continued to occupy them. Regarding other flats, though the defendants were in possession, as they were not in occupation thereof, the Receiver remained in symbolic possession. It was incorrect to contend that the Receiver was in possession of the suit flats and the defendants forcibly entered those flats and made themselves answerable to the Court. 13. The learned counsel for the respondents, however, submitted that the report made by the Receiver was self-explanatory. From the said report, it was clearly established that the locks were broken open by the

defendants, and they forcibly entered the suit flats. It is further clear from the report that only few defendants were in actual possession as well as occupation of the flats. It is not even the case of the defendants, submitted the learned counsel for the plaintiff, that before making such entry, the contesting defendants had either applied to the Court or to the Receiver. The Receiver was, therefore, right in submitting that in violation of the order passed by the Court, the defendants made forcible entry in the flats and, hence, they were liable to be dealt with accordingly. He, therefore, submitted that the order passed by the learned Single Judge does not deserve interference. 14. Having heard the learned counsel for the parties, in our opinion, the order passed by the learned Single Judge is legal, valid and is based on materials on record. Keeping in view the entirety of facts, it is clear that the defendants were put in possession in 1992. But it was their case that the construction had not been carried out fully and completely as per the Agreement. A grievance was, therefore, made by the defendants against the plaintiff and the latter was asked to complete the construction work. It was also their case that even though the work was to be carried out by the plaintiff, he had illegally parted with possession of the flats to third party, i.e., M/s.Deshmukh & Associates. It is also clear that as per the order passed by the Bombay City Civil Court, the plaintiff was to hand over possession of the completed flats to the defendants on or before October 30, 1992. Thus, from the evidence on record and from the orders passed, it is established that the defendants were not in possession in 1993 or thereafter. Even from the Order dated September 30; October 1/4, 1993, it was clear that certain directions were sought by the defendants against the Court Receiver to hand over possession of the flats to each of the defendants after getting the work completed. It clearly appears to us that the defendants were not in possession. 15. The learned Single Judge, in our opinion, was also right in relying upon facts stated and averments made by the defendants themselves in Civil Application No.8475 of 2001. In paragraph 18, it was stated by the defendants that Receiver be appointed for the suit property. They also sought possession of their respective flats. In paragraph 24, it was expressly stated that the defendants were in possession of the suit property till July 13, 1992, on which date the learned Advocate for the defendants wrote a letter to the Advocates and Solicitors of the plaintiff that possession would be handed over to the plaintiff in order to enable him to complete the construction work in terms of the consent orders passed by the trial Court on July 1, 1992 and "accordingly the possession was handed over to the Respondent No.1 on 14.7.1992 for the limited purpose of completing the balance construction work on or before 31.10.1992". In paragraph 25 of the application, it was averred that the plaintiff could not complete the construction work before the stipulated time, i.e., October 31, 1992, and, thus, there was contravention of the order passed by a competent Court. Moreover, the plaintiff inducted a third party, viz., M/s.Deshmukh & Associates, on the suit property as a contractor. It was also alleged that the plaintiff had mortgaged the property by entering into an agreement with C.K.P. Co-operative Bank, Dadar, and obtained an amount of Rs.32 lacs approximately. In paragraph 39, it was stated that some of the defendants were in possession of the respective flats since

1988. In paragraph 48, it was their case that they were middle-class people and most of them were without any shelter of their own. In paragraph 50, it was mentioned that the defendants were constrained to file the application, as most of them had suffered mental anguish and torture over the last 17 years, and many of them were without roof despite sizeable payment being made to the plaintiff. It was then stated; " This Civil Application is an attempt to resolve the stalemate created by the dismissal of the proceedings of the rival parties and this will pave the way for giving possession to the homeless Petitioners who are anxiously waiting for their turn for getting their tenement." In paragraph 63, a prayer was made by the defendants to direct the Court Receiver to hand over possession of the respective tenements to the defendants, except those who were in actual possession. A further prayer was made to refund the amount of Rs.30.81 lacs to the defendants so as to enable them to complete the remaining construction. 16. In view of the above pleadings and the orders passed by the Court, there is no doubt in our minds that the appellants-defendants (except the defendants who were actually occupying flats and which fact has been reflected in the report submitted by the Receiver) were not in possession of flats. It is precisely for that reason that an application was filed by the defendants, and a prayer was made to appoint a Receiver. Thereafter, the possession of the flats remained all through out with the Receiver as custodia legis. Obviously, therefore, it was not only expected, but obligatory on the appellants/defendants, if they wanted possession of the flats, either to approach the Receiver and to make demand of possession of flats or to apply to a competent Court for an appropriate direction to the Receiver to hand over possession to them. The appellants/defendants, unfortunately, failed to adopt such legal course. Instead, they took law in their hands and made forcible entry in the flats. The report dated September 4, 2001 submitted by the Receiver makes this position amply clear. The Receiver was also right in making complaint against V.S.Sawant, who had addressed a letter on August 2, 2001 to the Receiver, making allegations against her. The learned Single Judge was, in our view, right in holding him liable for contempt of Court for writing such a letter, in addition to the role played by him along with other contesting defendants/appellants. The learned Single Judge was also right in directing him to withdraw the said letter. It may, however, be stated that V.S.Sawant has filed an undertaking on affidavit in this Court on February 4, 2002 withdrawing the said letter and expressed his sincere apology for writing the letter. The learned Single judge was also justified in directing the defendants-appellants to deposit an amount of Rs.3,77,200.00, being the amount of arrears towards security charges, as the said action was taken by the Receiver at the request of learned advocate for the defendants wherein it was clearly mentioned that the defendants were ready to bear the expenses of security guards but they had failed to pay the amount from October, 1994. 17. It was, no doubt, contended by the learned counsel for the appellants that the defendants had not committed any breach or violation of the order passed by the Court, nor took forcible possession of flats. But even if this Court holds that there was some mistake on the part of the appellants, liberal view may be taken by dropping the proceedings. 18. In this connection, our attention was

invited by learned counsel to a decision of the Supreme Court in Everest Coal Company Pvt.Ltd. v. State of Bihar and Ors. . In that case, a suit against the Receiver was instituted without obtaining prior leave for filing the suit. Though the Court held that leave ought to have been obtained prior to institution of the suit, it was not a case for initiating contempt proceedings. The Court also observed that failure to take prior leave was not so grave a vice that later on leave sought and got before the decree would not purge the so-called contempt. 19. In our opinion, the ratio laid down in Everest Coal Company would not be of any help to the appellants. In the instant case, it was the appellants who prayed for appointment of a Receiver, so that their rights would be protected by her. The prayer was accepted by the Court, and an order was made for appointment of Receiver. The Receiver remained in possession as custodia legis. It was thereafter not open to the appellants/defendants to interfere with the possession of the Receiver without the prior permission of the Receiver or without obtaining an appropriate order from a competent Court. Forcible entry in the flats was, thus, clearly an unlawful act. As observed in Everest Coal Company itself, when a Court puts a Receiver in possession of property, the property comes under the Court custody, and the Receiver is merely an officer or agent of the Court. Any obstruction or interference with the Courts possession sounds in contempt of that Court. 20. In Kanhaiyalal v. Dr.D.R.Banaji & Ors. also, the Supreme Court observed that it is well-settled that no proceedings can be taken in respect of a property which is in possession and management of the Receiver appointed by the Court, without the leave of the Court. When the property is in custodia legis through its duly appointed Receiver, the Court has exercised the power with a view to preserving the property for the benefit of the original owner as judicially determined. Such an order, therefore, will have to be respected and obeyed. 21. By violating the order passed by a competent Court and by entering forcibly in the flats, which were in possession of the Receiver as custodia legis, the appellants had interfered with the course of justice. They were, therefore, liable to be dealt with for the contempt of Court. The learned Single Judge, in our considered opinion, has not committed any illegality in issuing necessary directions and in passing the order, and we see no infirmity or illegality therein. 22. For the foregoing reasons, we see no ground to interfere with the order passed by the learned Single Judge. The Letters Patent Appeal deserves to be dismissed, and is, accordingly, dismissed. In the facts and circumstances, however, there shall be no order as to costs. S. Radhakrishnan, J. 23. The learned counsel for the appellants prays for six weeks time so as to enable the appellants to take an appropriate decision in the matter. The prayer is strongly objected by the learned counsel for respondent No.1. 24. The learned counsel for respondent No.1 further states that if the appellants intend to move the Supreme Court, respondent No.1-original plaintiff may be informed in advance so as to enable him to appear before the apex Court. 25. In the facts and circumstances, let the operation of the judgment be kept in abeyance for a period of six weeks. It would also be appropriate if we direct, and we so direct that the appellants shall give 72 hours notice in advance if they decide to move the Supreme Court.