SHAGUFTA QUTBUDDIN PATHAN
Digitally signed by SHAGUFTA QUTBUDDIN PATHAN
Date: 2026.06.25 15:19:41 +0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.448 OF 2026
WITH
INTERIM APPLICATION NO.3673 OF 2026
IN
APPEAL FROM ORDER NO.448 OF 2026

1. Mr. Pankaj Shashikant Mistry,
aged about 65 years, Indian Inhabitant,
residing at 4, Jambhulwadi (East),
Kalbadevi Road, Mumbai - 400 002.

2. Dr. Tanvi Pankaj Mistry,
aged about 37 years, Indian Inhabitant,
having address at Shop Nos. 48 & 50, Perin
Nariman Street, Borabazar Precinct,
Fort, Mumbai-400 001.
(Original Defendant Nos. 1 and 2) …Appellants

Versus

1. Mrs. Kishabai Sachin Kadam,
aged about 48 years, Indian Inhabitant,
currently at 47, Kennedy Bridge,
Opera House, Girgaum, Mumbai-400 004.
(Original Plaintiff)

2. Dr. Ashish Gosar,
aged about 40 years, Indian
Inhabitant, having address at
Shop Nos. 48 & 50, Perin
Nariman Street, Borabazar Precinct,
Fort, Mumbai-400 001.
(Original Defendant No. 3)

3. Smt. Kapila Mistry,

4. Mrs. S. Hemlata Bhavsar,

5. Ms. Prabha Mistry,
adults, Indian Inhabitants,
residing at Vapi, Gujarat.
(Original Defendant Nos. 4, 5 and 6)

6. Mrs. Nippa Kishan Mistry,
adult, Indian Inhabitant,
residing at Valsad, Gujarat.
(Original Defendant No. 7)

7. The Branch Manager,
Indian Bank, Cuffe Parade
Branch, Mumbai - 400 005.
(Original Defendant No. 8) ....Respondents

Mr. Rohaan Cama a/w Mr. Viraj Parikh, Mr. Aman Sadiwala and Ms. Etika Srivastava and Ms. Feroza Bharucha i/b M/s. Rashmikant and Partners for the Appellants/Applicants

Mr. Suresh Mali a/w Mr. Chaitanya Tandel for the Respondent No.1

CORAM : SHARMILA U. DESHMUKH, J.
DATE :JUNE 25, 2026

JUDGMENT:

1. **Admit.** With consent, the Appeal is taken up for hearing forthwith.

2. The Appeal is at the instance of the original Defendants being aggrieved by the order dated 8th May 2026 passed by the

Trial Court partly allowing the Notice of Motion No. 2473 of 2026 and restraining the Defendants from dispossessing the Plaintiff from the portion of the suit bungalow presently in her use and occupation, situated at 47, Kennedy Bridge, Opera House, Girgaon, Mumbai – 400 004, otherwise than by due process of law.

3. S.C. Suit No. 1072 of 2026 was filed by the Plaintiff *inter alia* seeking a declaration that the threat extended by the Defendants of dispossessing the Plaintiff from the suit property along with the suit bungalow is illegal, unlawful, bad in law, and not binding on the Plaintiff, and for a declaration that the Will dated 23rd February 2024 executed by the deceased Sushilaben Madanlal Mistry is legal, valid, proper, and genuine. The Plaintiff came with the case of being in exclusive occupation and possession of the entire ground floor of the bungalow consisting of ground plus two upper floors, totally measuring 475 sq. meters, situated at Opera House, Girgaon, Mumbai. The Plaintiff has pleaded that the deceased Sushilaben Madanlal Mistry was an aged woman and was not having the support of any of her family members, including the Defendants. In March 2021, she appointed the Plaintiff as a caretaker on a monthly salary of Rs.22,000/- and Rs.3,000/- for her

food and medicines. Till the death of Sushilaben Mistry on 10th February 2026, the Plaintiff was taking proper care of the deceased Sushilaben Mistry as a caretaker with love and affection and the said Sushilaben Mistry was treating the Plaintiff as her daughter. The Plaintiff was permitted to stay along with her two sons in the suit bungalow for availing the 24-hour services of the caretaker due to the old age of the deceased Sushilaben. On 23rd February, 2024, the deceased Sushilaben Mistry, executed a Will on stamp paper of Rs.100/- purchased in her name, which was notarized in the presence of two witnesses, and under the Will, the Plaintiff was bequeathed 25% share out of her 1/3rd share in the property, being the bungalow consisting of ground plus two upper floors, 25% share in the Indian Bank SB Account, and 25% share in the other properties and estate of the deceased.

4. It is pleaded that the Defendant No 1 after expiry of Sushilaben has threatened the Plaintiff to vacate the bungalow. On 29th March 2026, Defendant Nos. 2 and 3, along with Defendant No. 7, visited the bungalow and put a lock on the first floor and rear-side gate of the bungalow and threatened the Plaintiff to vacate the suit bungalow. With this case, the Plaintiff approached

the Trial Court and vide Notice of Motion No. 2473 of 2026, interim injunction was prayed restraining the Defendants from dispossessing her or interfering with her use and occupation.

5. The Trial Court framed the following points for determination:

Sr.No.	POINTS	FINDINGS
01.	Whether the plaintiff proves *prima facie* lawful possession of the suit bungalow so as to seek protection against dispossession otherwise than by due process of law?	Yes
02.	Whether the plaintiff proves *prima facie* entitlement to injunction restraining defendant Nos.1 to 7 from creating third party rights in respect of the suit properties on the basis of alleged Will dated 23/02/2024?	No
03.	Whether the plaintiff proves *prima facie* entitlement to direction against defendant No.8 Bank to furnish account statement and release 25% amount from bank account of deceased Susilaben Madanlal Mistry?	No
04.	Whether the plaintiff proves balance of convenience and likelihood of irreparable loss?	Partly Yes
05.	What order?	As per final order

6. The findings of the Trial Court can be broadly summarised as under:

(a) Plaintiff is in settled possession of portion of suit bungalow.

(b) No rights of the Plaintiff can be recognised under the Will of the deceased Sushilaben.

(c) Adjudication of validity of Will is beyond jurisdiction of Civil Court.

(d) No interim proprietary rights in estate of deceased can be claimed by the Plaintiff.

(e) Serious cloud is raised over title asserted by the Plaintiff.

(f) Residence of Plaintiff in part of suit bungalow needs to be protected against forcible dispossession.

7. The Trial Court held that the Plaintiff has not yet established legal entitlement to the estate of deceased Sushilaben Mistry in accordance with law and, therefore, irreparable injury and balance of convenience exist only to the limited extent of protecting existing possession from forcible dispossession and not for granting broader proprietary relief claimed in the Notice of Motion. With these findings, the restraint order came to be passed against the Defendants from dispossessing the Plaintiff otherwise than by due process of law.

8. Mr. Cama, learned counsel appearing for the Plaintiff, would point out the specific pleading in the plaint that the Plaintiff was appointed as caretaker of Sushilaben Mistry and continued as such till her death. He submits that the Trial Court has noted that the Plaintiff was residing in the bungalow in the capacity of a caretaker and, despite that, has held that the Plaintiff is in settled physical possession over at least part of the bungalow. He submits that a caretaker cannot be said to have any interest in the suit property and cannot exercise any right of possession over the property. He submits that even a long possession does not vest the caretaker with any interest in the property and the possession has to be handed over forthwith on demand. He submits that without approaching the Testamentary Court and seeking Probate of the Will, the Plaintiff has approached the Civil Court seeking a declaration about the validity of the Will. He submits that the Trial Court has recognized that the Plaintiff has not yet established legal entitlement to the estate of deceased Sushilaben Mistry in accordance with law and, in view of this finding, could not have protected the Plaintiff's possession.

9. He would further submit that the Trial Court has restrained

the Defendants from dispossessing the Plaintiff otherwise than by due process of law, which due process is satisfied the moment the rights of the parties are adjudicated by a Court of competent jurisdiction, irrespective of who brought the action before the Court. He submits that it is not necessary that the Defendants, who are the owners of the property, must institute an action in a Court of law for enforcing their rights when the Plaintiff herself has approached the Court seeking the protective remedy of injunction and has failed to prove the same. He submits that in such circumstances, where a judicial determination is made in respect of the protective action claimed, possession can be directed to be handed over to the owner of the property. In support, he relies upon the following decisions:

(i) Rame Gowda (Dead) by LRs. vs. M. Varadappa Naidu (Dead) by LRs. & Anr.[1]

(ii) Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack De Sequeira (Dead) Through LRs.[2]

(iii)Behram Tejani & Ors. vs. Azeem Jagani[3]

10. Mr. Mali, learned counsel appearing for the Respondents, would submit that though the Plaintiff was appointed as a

1 (2004) 1 SCC 769
2 (2012) 5 SCC 370
3 Civil Appeal No.150/2017 (SC) dated 06/01/2017

caretaker of the deceased Sushilaben Mistry, due to the love and affection towards the Plaintiff, Sushilaben has bequeathed 1/3rd share out of her 25% share in the entire property in favour of the Plaintiff. He submits that the Plaintiff will adopt appropriate proceedings for probate of the Will. He submits that the Trial Court has considered that the Plaintiff was in possession since March 2021 as caretaker of Sushilaben Mistry and has therefore rightly restrained the Defendants from dispossessing the Plaintiff, who is in settled physical possession.

11. Rival contentions now fall for determination:

12. The undisputed position is that the Plaintiff was appointed as a caretaker of the deceased Sushilaben Mistry and came to reside in the suit property in her capacity as a caretaker in the month of March 2021. Upon the death of Sushilaben Mistry on 10th February 2026, the Defendants, who are relatives of Sushilaben Mistry, called upon the Plaintiff to vacate the premises and, being the owners of the property, put the locks on the gates of the property, which led to the filing of the suit by the Plaintiff. The Plaintiff admits the fact that she came to reside with Sushilaben in the capacity of a caretaker and now seeks to continue to remain in

possession by claiming rights under a purported Will of Sushilaben Mistry of February 2024.

13. The Trial Court while noting the admitted position that the Plaintiff entered into the suit premises as a caretaker has proceeded to protect the possession by terming the same to be settled possession which cannot be be disturbed otherwise than by due process of law. The expression "settled possession" was considered by the Hon'ble Apex Court in the case of ***Rame Gowda (Dead) by LRs vs M. Varadappa Naidu (dead) by LRs and Another*** (supra). The Hon'ble Apex Court while holding that the person in peaceful possession is entitled to retain his possession, has accepted such entitlement in respect of settled possession or effective possession. It held that 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. It held that the 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 Trial Court has gone far to say that the Plaintiff's physical possession is settled possession, whereas, the Hon'ble Apex Court has held that such possession does not

even constitute actual physical possession.

14. In the case of ***Maria Margarida Sequeira Fernandes and Others Vs Erasmo Jack De Sequiera (dead) through LRs*** (supra), the Hon'ble Apex Court was considering the issue of possession in context of caretaker's possession. In that case the Respondent had filed suit for injunction against the true owner and the Hon'ble Apex Court held in paragraphs 93, 95, 96 and 97 as under:

> **"93.** The respondent's suit for injunction against the true owner, the appellant, was not maintainable, particularly when it was established beyond doubt that the respondent was only a caretaker and he ought to have given possession of the premises to the true owner of the suit property on demand. Admittedly, the respondent does not claim any title over the suit property and he had not filed any proceedings disputing the title of the appellant. (Emphasis supplied)
>
> **"95.** This Court in *Mahabir Prasad Jain (1999)8 SCC 274* has held that the possession of a servant or agent is that of his master or principal as the case may be for all purposes and the former cannot maintain a suit against the latter on the basis of such possession."
>
> **"96.** In *Sham Lal v. Rajinder Kumar* – (1994) 30 DRJ 596, the High Court of Delhi held thus: (DRJ p. 600, paras 12-13)
>
> > *"12.* On the basis of the material available on record, it will be a misnomer to say that the plaintiff has been in "possession" of the suit property. The plaintiff is neither a tenant, nor a licensee, nor a

person even in unlawful possession of the suit property. Possession of servant is possession of the real owner. A servant cannot be said to be having any interest in the suit property. It cannot be said that a servant or a chowkidar can exercise such a possession or right to possession over the property as to exclude the master and the real owner of the property from his possession or exercising right to possession over the property.

13. Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of the law, if the animus be lacking. On the contrary, to be in possession. it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider:

(i) the person possessing.
(ii) the things possessed and,
(iii)the persons excluded from possession.

A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore, merely custody of the thing and not the possession which would always be with the master though the master may not he in actual contact of the thing. It is in this light in which the concept of possession has to be understood in the context of a servant and a master"

The ratio of this judgment in *Sham Lal (1994) 30 DRJ 596* is that merely because the plaintiff was employed as a servant or chowkidar to look after the property, it

> cannot be said that he had entered into such possession of the property as would entitle him to exclude even the master from enjoying or claiming possession of the property or as would entitle him to compel the master from staying away from his own property."
>
> **"97.** Principles of law which emerge in this case are crystallised 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 licence 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."

15. The above quoted decisions establishes that possession of a servant is no possession in eyes of law, which could exclude even the master from enjoying or claiming possession of the property. The admitted position of the Petitioner's possession being in capacity of caretaker, the Trial Court could not have characterized

the Plaintiff's possession since March 2021, in her capacity as a caretaker, as settled physical possession. As the Plaintiff had entered into the suit property as caretaker of the deceased Sushilaben, upon demand made by the original owners, the Plaintiff was bound to hand over possession to the Defendants.

16. As the Plaintiff's rights under the Will of deceased Sushilaben Mistry was not recognised at the interim stage, the possession of Plaintiff was premised on her possession as a caretaker, which could not be termed as settled possession. To continue in possession after the services as caretaker came to an end upon death of Sushilaben Mistry, it was necessary for the Plaintiff to demonstrate some right in the suit property to resist the original owners from claiming possession. The Plaintiff claims right to the estate of the deceased Sushilaben under the Will, which the Trial Court has held cannot be adjudicated in civil court and declined to recognise any rights under the Will. The Trial Court rightly held that the plaintiff cannot claim any proprietary right in estate of the deceased Sushilaben Mistry.

17. There is no declaration of title sought by the Plaintiff and the Trial Court has held that there is a serious cloud raised over the title asserted by the Plaintiff.*Prima facie,* the suit for injunction

without seeking declaration of title, when the title was under a cloud is not maintainable and no interim protection could have been granted.

18. The Trial Court was swayed by the fact that the Plaintiff came to reside in the suit premises since March 2021, which was construed as settled possession, which the Trial Court then sought to protect, while at the same time holding that the Plaintiff has not yet established legal entitlement to the estate of deceased Sushilaben Mistry in accordance with law.

19. In view of the adverse *prima facie* findings as regards the legal entitlement to estate of deceased Sushilaben, the Trial Court could not have thereafter protected the Plaintiff's possession over the portion of the suit bungalow. The impugned order is, therefore, clearly unsustainable in law.

20. The Trial Court has restrained the Defendants from dispossessing the Plaintiff from the premises occupied by her otherwise than by due process of law. In the decision of ***Maria Margarida Sequeira Fernandes*** (supra), the Hon'ble Apex Court held as under:

> **"*79.*** Due process of law means that nobody ought to be condemned unheard. The due process of law means a

person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity to the defendant to file pleading including written statement and documents before the court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated upon by a competent court."

"80. The High Court of Delhi in *Thomas Cook (India) Ltd. v. Hotel Imperial (2006) 88 DRJ 545* held as under: (DRJ p. 566, para 28)

> *"28.* The expressions `due process of law', `due course of law' and `recourse to law' have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed `forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing-ejectment from settled possession can only he had by recourse to a court of law. Clearly, `due process of law' or `due course of law' here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.
>
> Now, this 'due process' or 'due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the `bare minimum' requirement of `due process'

> or "due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e. for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event. the `recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."
>
> We approve the findings of the High Court of Delhi on this issue in the aforesaid case."

21. As the Plaintiff has failed to make out a *prima facie* case for protection of her possession, it is not necessary for the Defendants to thereafter institute legal proceedings for enforcing their right of ownership. In view of the judicial determination as regards the Plaintiff's possession, and particularly considering paragraph 93 of the decision in ***Maria Margarida Sequeira Fernandes*** (supra), that the caretaker ought to have given possession of the premises to the true owner of the suit property on demand, the Defendants could not be compelled to institute their own proceedings for the

purpose of claiming back what was rightfully theirs. As the Plaintiff has *prima facie* failed to establish any right in the suit property and possession has been demanded by the rightful owners, the possession of the suit property to be handed over by the Plaintiff to the Defendants.

22. In light of the above, the following order is passed:

ORDER

(i) The Appeal from Order is allowed.

(ii) The impugned order dated 8th May 2026 passed by the Bombay City Civil Court in Notice of Motion No. 2473 of 2026 in Suit No. 1072 of 2026 is hereby quashed and set aside to the extent of paragraph 1 and 2 of the order.

(iii) The Plaintiff to hand over possession of the suit property to the Defendants within a period of four weeks from today.

23. Interim Application does not survive for consideration and stands disposed of accordingly.

SHARMILA U. DESHMUKH, J.