IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.237 OF 2007
WITH
CAF/4847/2010
WITH
CAF/3056/2013
WITH
CAF/3058/2013

Mohammed Salim Abdul Gafoor Shaikh ... Appellant

Vs.

Ramshiroman Girishdutt Shukla
(since deceased through
1a. Smt.Surjadevi R. Shukla & Ors. ... Respondents

Mr.Bharat Joshi i/b Khan javed Akhtar for the Appellant
Mr.Tejesh Dande i/b Tejesh Dande & Asso. for Respondent Nos.1A, 1B and 3

CORAM: **MRS.MRIDULA BHATKAR, J.**

JUDGEMENT RESERVED ON: **3rd DECEMBER, 2015**
JUDGEMENT DELIVERED ON: **21st DECEMBER, 2015**

JUDGMENT:

1. This appeal is directed against the judgment and order dated 20.10.2006 in R.C.S. No.593 of 1993, wherein the trial Court has decreed the suit and directed the defendant Nos.1 to 9 to hand over the possession of the suit premises to the plaintiffs. The facts of the case are as follows:

The original plaintiff No.1 is deceased and now his legal representatives are prosecuting this appeal. He was in possession of the suit shop since 1976. In 1976, the suit shop was censused and the census No.44-4/4 was given to the suit shop (later, the suit premises was again censused and divided in two parts – front and rear side portion and the rear side was censused as 42-2/2. Admittedly, the suit shop is standing on the land owned by the Central Government. As per the case of the plaintiffs, they were in possession of the suit premises till 1990. However, one Ghanshyam Singh, who is the father of some of the defendants, claimed possession in the suit premises and filed a suit in the City Civil Court for possession bearing Suit No.7019 of 1989 against the original plaintiffs and defendant No.6 filed a collusive suit bearing RAD Suit No.1093 of 1990 against Ghanshyam Singh, however, he was forcibly dispossessed by Ghanshyam Singh by hiring goons on 29.3.1990. The plaintiffs filed the suit against Ghanshyam Singh for injunction. However, during the pendency of these suits, defendant No.6, who was a goon in the area in that locality having muscle power and with his help, filed a collusive suit for injunction against Ghanshyam Singh for possession and interim order was obtained in his favour. By taking advantage of the said order, Defendant No.6, who was actually hired by Ghanshyam Singh, forcibly ousted the original plaintiffs from the suit shop and the possession of the suit shop was taken. However, the suit was dismissed by Small Causes Court on 24.1.1991 and thereafter the present suit i.e., 593 of 1993 was filed. Thereafter, the plaintiffs were defending the other suit filed by Ghanshyam Singh. In the year 1990, the police conducted enquiry under section 145 of the Cr.P.C. in the matter and submitted the report. Thereafter, they filed this present suit for declaration that they are the owners of the suit premises so also for restoration of their possession and thirdly, for injunction against defendant Nos.6 and 9. Defendant No.9, who is the appellant, is at present in possession of the suit premises. He purchased the premises by Deed of Assignment of the year 1992 from Ghanshyam Singh and, therefore, he is made a party to the suit. Ghanshyam Singh died on 28.10.1992 and before that he was put in possession by defendant No.6. As the suit was decreed and defendant No.9 is directed to hand over the possession to the plaintiffs, being an aggrieved person, defendant No.9 has filed this Appeal.

2. The points which arise for determination are as follows:

i) Whether the original plaintiffs have proved they were in possession of the suit premises before 29.3.1999?

ii) Whether the appellant is in possession illegally?

iii) Whether the judgment and decree passed by the learned trial Judge is bad in law?

3. Mr.Bharat Joshi, learned Counsel for the appellant, submitted that the case of the plaintiffs is false. They were never in possession of the suit premises. The judgment and decree is patently bad in law and

erroneous. The trial Court has treated this suit under section 6 of the Specific Relief Act. However, this Suit is filed under section 5 of the said Act. There is a delay in filing the suit. There is a confusion in the date of the cause of action as the original plaintiffs had claimed that the cause of action arose on 29.3.1989 and also they claimed that it arose on 29.3.1990. The suit is filed in the month of January, 1993 and thus, if it is so, it is beyond the period of limitation. The issues are not properly framed and the Court should not have gone into the question of title as admittedly the land is a defence land. There is no evidence to show that the plaintiffs were carrying on business of lime shop and there is confusion in respect of census number of the suit premises. The learned Judge has not properly considered the evidence of the witnesses, especially witness No.3, who was working with the appellant i.e., the original defendant No.9 and he has deposed about the possession of the appellant in the suit premises. He further submitted that the trial Court has committed mistake in relying on the interim order passed in the other suits and also giving importance to the Court Commissioner's report submitted in another suit. He read over the evidence of the witnesses and also pointed out the admissions given by the plaintiffs in the cross-examination. He submitted that the documents produced by the plaintiffs do not prove the possessory title of the plaintiffs. However, the learned Judge has not discussed any document but has only listed the document in the judgment. He submitted that exhibit 54 is a report under section 145 of the Cr.P.C. which is produced by the respondents; so also exhibit 55 is a letter written by the BMC dated 16.9.2003 to Shobhnath Shukla. Exhibit 62 is the FIR dated 24.3.1990 and it was filed by one Iqbal Shaikh that he was assaulted by the original plaintiffs and exhibit 72 is a letter dated 30.3.1990 written by the advocate for the respondents to Vakola police station. However, these documents cannot prove possessory title of the plaintiffs. In fact, the learned Judge ought to have framed issue on the possessory title which is not framed. He argued that the plaintiff was never in possession of the suit premises and so the judgment and decree passed by the trial Court should be set aside and the appeal be allowed.

4. Mr.Dande, the learned Counsel for the respondent, submitted that the appellant, who is defendant No.9, alongwith defendant No.6 and Ghanshyam Singh who was the original defendant, has played a big game on the plaintiffs and they are dispossessed illegally. He submitted that the plaintiffs are in possession of the suit premises, censused prior to 1970. They are having one flour mill, a lime shop and a residential house. This is not a suit under section 6 of the Specific Relief Act. A number of false proceedings were filed by the appellant and Ghanshyam Singh in order to dispossess the plaintiffs and to retain their illegal possession. He submitted that the cause of action arose on 29.3.1990 when the plaintiffs were prohibited to enter the suit premises and they were ousted and thus

they were dispossessed. Prior to that i.e., on 29.3.1990, they were assaulted and the plaintiffs were admitted in the hospital. He relied on the evidence of witness Dr.Uttam Tambe. He relied on the documents filed by the plaintiffs on the point of his possession. He submitted that the plaintiffs have produced a number of documents which are rightly mentioned in the judgment by the learned Judge. These documents disclose that the plaintiffs were in possession of the suit premises prior to 1975 till 1990. he submitted that the electricity bills which are produced at exhibit 20 disclose that these electricity bills pertain to the suit premises 44-4-4 which was censused (old) and now comprises 44-3/4 and 44-2/2. He pointed out that 44-3/4 is for the flour mill and 44-2/2 is for residence. The total area of the premises is 12' x 70'. He further relied on the Commissioner's report in suit No.7019 of 1989 filed by Ghanshyam Singh, wherein it is found that cupboards and the articles of the defendants with the present plaintiffs were lying in the suit premises and the plaintiffs had knowledge of the articles in the cupboards. He submitted that SC Suit No.7019 of 1989 was filed by Ghanshyam Singh against one Ramshiroman Shukla for injunction and he claimed possession. The said suit was dismissed as abated on 18.8.11993. This suit was a collusive suit by Ghanshyam Singh. In the said suit, the respondents appeared and, therefore, the injunction orders were passed on 17.12.1990 not to create any third party interest against Ghanshyam Singh so also the present appellant in the contempt proceedings in the said suit. He submitted that on 28.10.1992, Ghanshyam Singh died. He further submitted that RAD Suit No.1093 of 1990 was filed by Mohd. Shakeel Khan i.e., the original defendant No.6, who was a third person just to get the order and create a situation against the present respondents. He submitted that the original plaintiffs i.e., the respondents in RAD Suit No.1093 of 1990 were impleaded by order dated 12.9.1990 passed by the Small Causes Court. He submitted that Mohd. Shakeel Khan, Defendant No.6, has filed joint written statement alongwith other defendants i.e., legal representatives of Ghanshyam Singh. However, he did not offer himself as a witness. He further submitted that the report under section 145 which was filed i.e., exhibit 54 was filed by the police as they themselves initiated the proceedings against the defendants he submitted that the conduct of defendant No.9 and defendant No.6 was very dubious and they tried another false proceeding before the high Court with a view to frustrate the application made by the plaintiffs for the appointment of Court Receiver. He further argued that he made one application before the trial Court for appointment of the Court Receiver. He pointed out that in the High Court, Mohd. Saleem Shaikh i.e., the appellant filed a suit No.2097 of 1994 against one Pervez Bharucha and in the said proceeding, consent terms were filed and order of appointment of Court Receiver was obtained by playing fraud on the Court just to frustrate the proceedings of the Court Receiver initiated by the plaintiff and therefore the learned Judge of the City Civil Court rejected the application for appointment of the Court Receiver and observed that for the same property, once the High Court has appointed the Court Receiver, two Court Receivers cannot be appointed. He submitted that the plaintiffs thus, were clueless how the various proceedings were filed by the present appellant and his hirelings to stop the lawful entry of the possession of the respondents from the suit premises.

5. On the point of delay, he submitted that the cause of action arose on 29.3.1990. The suit was filed in January 1993 because the original plaintiffs appeared in the suit No.7019 of 1989 filed by Ghanshyam Singh against Ramshiroman Shukla that he should not dispossess him and he claimed tenancy. The plaintiffs appeared in the said suit, moved the contempt and also moved application for restoration of possession with a view to avoid multiplicity of proceedings and was defending his cause in the said suit. However, after the death of Ghanshyam Singh, on 28.10.1992, the plaintiffs took decision to file separate proceedings against the legal representatives of Ghanshyam Singh and the appellant and the other hirelings. Thus, there may be laches but there is no delay in filing the suit. He has therefore submitted that the order passed by the learned Judge of the City Civil Court is to be maintained.

6. This suit is filed for declaration and restoration of possession and perpetual injunction. The land admittedly belongs to the defence force and as per the case of the plaintiffs, the structure on it was constructed in the year 1970. The original plaintiff examined himself as witness. Shobhnath plaintiff No.3, gave evidence on behalf of the other plaintiffs. Shobhnath Shukla entered the box and stated that his two brothers Ramshiroman, Padmakar and he are the plaintiffs. Ramshiroman expired in 1995 and he has stated that the suit premises was constructed prior to 1970 and they all are joint owners of the suit premises admeasuring 12' x 70' plus godown which is in 'L' shape. They started their business as Shukla Lime Depot and it is going on since 1970. The said structure was censused and numbered as HEDF 44-4/4. Adjoining the suit shop, they also started a business of flour mill under the name and style as Shukla Flour Mill. The same was censused as HEDF-44-3/4. The rear side of the suit shop which they were using as residence is censused as 44-2/2. They have obtained electricity connection from the BSES and the electricity bills which were 7 in numbers, were produced and marked exhibits 29 to 34. so also, the plaintiff produced invoices of supply of material which was during the construction i.e., old receipts of purchase of tiles. The plaintiff produced BMC receipts of the period 1986 – 1990 which is exhibit 30 collectively. So also, the receipts for payment of assessment taxes of the years 1983-1984, 1984-1985, 1985-1986 and 1986-1987, which were

produced at exhibit 33 collectively. A licence under Shops and Establishment Act which was issued by the BMC is produced at exhibit 7. He also relied on exhibit 12 and Exhibit 7 in his evidence. The BMC had issued notice dated under section 354A dated 5.5.1980 for carrying out unauthorised work, marked at exhibit 12. So also, a letter from the Collector in respect of licence from Controller of Rationing which is marked exhibit 13 dated 10.1.1983 is also produced. Then, the notice issued on 14.8.1981 addressed to the plaintiff for carrying out unauthorised repairs of the suit shop which is marked exhibit 17. He also relied on the receipts of the year 8.9.1982 issued by the Controller of Rationing which is marked exhibit 22 and exhibit 23. He also produced notices issued by the BMC dated 19.6.1981 and 5.5.1980, which are marked exhibit 36 and 37 respectively. Further, electricity bills and receipts for the period from 1989 to 1996, etc. are also produced.

7. The learned Counsel for the appellant has taken objection that the learned Judge of the trial Court did not discuss the documents produced by the plaintiffs and the documents which are produced herewith in fact do not prove any possessory title over the suit premises of the plaintiff in respect of the said suit. I have perused the documents. The fact of possessory title can be proved in most of the cases on the basis of the documents. Oral evidence can be considered, however, documentary evidence has far better corroborative value. Many documents which are

produced by the plaintiffs disclose the proper address i.e., 44-4/4, Shukla Chawl Dawry Nagar, Nehru Road, Vakola, Santacruz, Mumbai-55 i.e., the suit premises. The documents like invoices of the supply of building material cannot prove that at the relevant time, the suit structure was in existence and in possession of the plaintiff. However, electricity bill exhibit 29(1) discloses the address as 44/4/4 of Nehru Road, Santacruz. There is one more receipt which is marked as exhibit 33 which shows the registration number of employment certificate, payment of tax to the plaintiff Shobhnath and discloses the address as Nehru Road, Santacruz. The notice under section 354A issued by the BMC for unlawful construction also shows the name of Ramshiroman and the address as 44-4/4. This notice was issued in 1980-1981. Exhibit 46 is a licence issued by the State of Maharashtra in favour of Shukla Lime depot where the proprietor is shown as Shobhnath, i.e., one of the plaintiffs and the address of Shukla Lime depot is mentioned as Pandit Jawaharlal Nehru Marg, Dawry Nagar, Vakola, Santacruz and it appears to be the same suit address. This licence was issued on 17.9.1982 for the purpose of purchase and sale of cement and also as a stockist of cement. Further, there is a letter at exhibit 72 given by Mr.Havnur, the advocate of the respondents, intimating the injunction order granted in favour of the respondents in the Notice of Motion No.1682 of 1990 in LC Suit No.7019 of 1989. He had mentioned therein that his articles are removed and stolen from the shop premises and thus, these are the instances of dispossession and proceedings initiated by the police. This shows that in March, 1990, the respondents who were earlier in possession of the suit premises were forcibly dispossessed in March 1990.

8. Thus, there are number of documents produced by the plaintiffs to show that they were in possession of the suit premises. I am of the view that these documents are sufficient to establish possessory title of the plaintiffs and the suit premises. The learned trial Judge has given list of all the documents which he relied on. It is true that he has not discussed each document but it shows that he has taken into account those documents for the proof of possessory title of the plaintiff.

9. The learned Judge has framed an additional issue that whether the plaintiffs are the owners of the suit structure bearing No.44-4/4 admeasuring 12' x 70' and whether they were in possession of the same till 29.3.1990 and the issue is answered in the affirmative. The learned Counsel for the appellant has no ground to object to framing of this additional issue. Settling of this issue was not objected to by him at the relevant time. Moreover, this issue was required to be famed because the burden to show that he is the owner of the suit structure and he was in possession till the date he was dispossessed, is entirely on the plaintiffs and no such issue was famed earlier. The plaintiffs have adduced oral

evidence on the point of possession. So also, invoice of purchase of tiles from Bombay Tiles dated 5.3.1971 are produced. Though there may not be a description of the suit structure because the suit structure was being constructed at the time, it was not censused. Though this documentary evidence itself cannot be considered as a conclusive proof but it is a supportive evidence to certain extent. The fact that he started residing therein and the house was censused in 1976 is a very strong circumstance to hold that he is the owner of the suit structure. Moreover, the respondents did not lead any evidence to disclose who has constructed the suit structure.

10. I have perused the evidence of Dr.Tambe, who has deposed that he has attended the patient i.e., the respondent Ramshiroman on 24.3.1990. On the basis of the FIR, the police have initiated enquiry under section 145 of the Cr.P.C. The learned Counsel for the respondents have pointed out that the manner in which two suits filed by the respondents / Ghanshyam Singh and so also the suit filed by defendant No.6 and then the orders were obtained by way of consent terms and the possession was protected and subsequently the suit was withdrawn, undoubtedly, these are calculated steps taken by the appellants against the respondents, the original plaintiffs to protect their illegal possession by abusing process of law.

11. After considering this evidence, I am of the view that the learned trial Judge has correctly believed the documentary as well as oral evidence of the plaintiffs and the evidence of the defendant has been rightly rejected by the learned Judge. Accordingly, I answer issue Nos.1 and 2 in the affirmative and issue No.3 in the negative. I do not find any justifiable reason to accept the case of the appellant and hence, the appeal is hereby dismissed.

CIVIL APPLICATION NO. 4847 OF 2010 -

11. This Civil Application was moved by the Respondents for appointment of the Court Receiver. However, no Court Receiver was appointed. In view of dismissal of the First Appeal, this Civil Application is disposed of without passing any order.

CIVIL APPLICATION NO.3056 OF 2013 AND 3058 OF 2013

13. These two Civil Applications were filed by the Appellant under Order 41 Rule 27 of the Code of Civil Procedure praying to lead evidence and remanding the matter. However, no arguments were advanced on these points and the applications were not pressed. Hence, both the Civil Applications stand disposed of as such.

CIVIL APPLICATION NO. 3058 OF 2013

14. Mr.Asif Shaikh, the learned counsel for the Appellant, at this stage, submits that the Appellant was initially directed to deposit Rs.10,000/- p.m.

by the order dated 5th March, 2007 and thereafter Rs.30,000/- by the order dated 19th April, 2012. He submitted that the Appellant has deposited the entire amount till December, 2015. The learned counsel for the Appellant submits that the Appellant be allowed to withdraw the said amount (approx. Rs.18 lacs) along with the interest. He further submitted that the Appellant is going to challenge this order and therefore the order be stayed for five weeks.

15. In view of these submissions, the order is stayed for five weeks i.e. till 25th January, 2016 subject to condition that the Appellant shall not create any third party interest or part with the possession of the suit premises or change the nature of the suit property in any manner. The respondents, the original plaintiffs, shall not withdraw the amount till the period of stay i.e., five weeks.

16. Decree be drawn up accordingly. Parties to bear their own costs.

(MRIDULA BHATKAR, J.)