

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.652 OF 1998

Yogeshchandra Nanakchand Agarwal.] ... Petitioner

Versus

Arjun Kanaiya Mogre.] ... Respondent

Mr. Suneet Moholkar for Petitioner.

Mr. S. S. Patwardhan for Respondent.

CORAM :- M. S. SONAK, J.

DATE :- SEPTEMBER 03, 2015

P. C. :-

1. This petition challenges order dated 24/07/1997 made by the Additional District Judge, Pune, reversing the Judgment and Decree dated 06/04/1993 made by the Small Causes Court and dismissing the Petitioner's Civil Suit No.862 of 1988 seeking eviction of the Respondent ('Arjun') from the suit premises.

2. The Petitioner ('Agarwal') instituted Civil Suit No.862 of 1988 against Arjun, alleging that Arjun is the tenant in respect of the suit premises and that he has erected a permanent structure without the consent of Agarwal, acquired alternate suitable accommodation for his own residence, has caused nuisance and annoyance to the neighbours and finally that Agarwal requires the suit premises reasonably and *bona fide*.

3. Arjun filed his written statement denying that he was the tenant respect of the suit premises. Arjun made reference to agreement dated 06/11/1987 entered into by Agarwal with one Krishna Mogre ('Krishna'), Hira Mogre ('Hira') and Arjun and stated that in terms of the same, Hira is the tenant in occupation of the suit premises.

4. On the basis of the pleadings, the Trial Court framed several issues, including the following issue :-

“Does defendant prove that his brother Hira is a tenant of the suit premises ?”

5. Upon consideration of the evidence led and other material produced, the Trial Court, by Judgment and Decree dated 06/04/1993, decreed Agarwal's suit and directed Arjun to deliver possession of the suit premises within 30 days. A direction was also made in the context of mesne profit.

6. Arjun appealed against the Decree dated 06/04/1993 by instituting Civil Appeal No.328 of 1993. By Judgment dated 24/07/1997, the Additional District Judge, Pune, has allowed the appeal and dismissed Agarwal's suit. Hence the present petition.

7. Mr. Suneet Moholkar, learned Counsel for Petitioner, submitted that the impugned Judgment and Decree dated 24/07/1997 is vitiated by both errors of law apparent on the face of

record as well as perversity in the record of findings of fact. Mr.Moholkar submitted that the agreement dated 06/11/1987, which is perhaps the sole basis upon which the impugned Judgment and Decree has been made, was only an executory contract. There is ample material on record which will establish that such contract, at least insofar as induction of Hira and investing of Hira with any tenancy rights in the suit premises, was never executed. Mr.Moholkar, by placing reliance on an extract from the treatise by Mulla on The Transfer of Property Act, submitted that the ingredients sufficient to bring into existence a surrender or for that matter, an implied surrender of tenancy and further, the creation of a new relationship, have not at all been established in the present case. In such circumstances, Mr. Moholkar submitted that there was no question of recording a finding that Arjun is not the tenant in respect of the suit premises or that Hira is the tenant in respect of the suit premises. Mr.Moholkar further submitted that the Appeal Court, having come to the conclusion that there was no relationship of landlord and tenant between Agarwal and Arjun, was not at all justified, rather acted in excess of jurisdiction in recording finding upon various grounds, upon which Agarwal had sought for eviction of Arjun from the suit premises. In regard to such submission, Mr. Moholkar placed reliance upon ruling of the Hon'ble Apex Court in the case of ***Raizada Topandas and another Vs. Gorakhram Gokalchand***¹.

1 AIR 1964 Supreme Court 1348

8. Mr. S. S. Patwardhan, learned Counsel for Respondent, submitted that Arjun, in para 7 of his written statement, had made it clear that he was not the tenant in respect of the suit premises. Further, the Appeal Court, upon appreciation of the material on record, has rightly concluded that Arjun was not the tenant in respect of the suit premises and that it was Hira who was the tenant in respect of the suit premises. Despite Arjun having raised the specific contention in the written statement, Agarwal chose not to implead Hira as a defendant in the suit. Accordingly, the suit was rightly dismissed by the Appeal Court, both for want of jurisdiction as also on merits. Mr. Patwardhan also placed reliance upon the provisions contained in Order 14 Rule 2 of the CPC.

9. Rival contentions now call for my determination.

10. At the outset, it must be noted that in proceedings instituted under Article 227 of the Constitution of India, this Court does not exercise any appellate jurisdiction. Therefore, unless the findings of fact, as recorded by the fact finding Court, are demonstrated to be perverse, there is no question of any interference. In the exercise of such jurisdiction, it is not expected that this Court re-appreciate the evidence on record in order to examine whether some different view is possible. As long as the findings recorded are sufficiently borne from the material on record and the view taken is not manifestly illegal, there is no question of interference.

11. In the present case, the crucial issue is whether Arjun was indeed the tenant in respect of the suit premises. It is well settled that in the absence of any relationship of landlord and tenant, the suit, in the form in which it was instituted, would not be maintainable. As noted earlier, Arjun, in his written statement, had categorically denied that he was either in possession of suit premises or the tenant in respect thereof. The Appeal Court has duly considered the material on record. The Appeal Court has adverted to the agreement dated 06/11/1987 which records sets of mutual obligations undertaken by Agarwal on one hand and Krishna, Hira and Arjun on the other. The obligations, *inter alia*, include vacation of certain premises by Krishna and Arjun. Finally, clause 11 of the Agreement provides that Agarwal shall transfer the suit premises (of Arjun) in the name of Hira on rental basis as per the instructions of Arjun. The Appeal Court, upon a detailed reference to the material on record, has noted that whatever obligations that were undertaken by Krishna, Hira and Arjun, were duly complied with by the said 3 persons and that there were certain admissions on the part of Agarwal to this effect in the course of cross-examination. On this basis, the Appeal Court has proceeded to hold that Agarwal's contention to the effect that Hira was never inducted in possession of the suit premises or invested with the status as a tenant, cannot be accepted. There is really no perversity in the record of such findings of fact.

12. That apart, even if we are not to bother ourselves with the status Hira qua the suit premises, cognizance is required to be taken of

both the plea as well as the evidence led by Arjun to the effect that he had, consistent with the terms of the agreement dated 06/11/1987, performed the obligations which were required of him and in pursuance thereof, surrendered the tenancy in respect of the suit premises with instructions to institute Hira as the tenant thereof. Agarwal's case that such surrender was never accepted or that no fresh tenancy was ever created in favour of Hira, has rightly been rejected by the Appeal Court on the basis of preponderance of probability. The findings recorded cannot be said to be perverse in the sense of being based upon no evidence.

13. In para 22 of the impugned Judgment and Order, the Appeal Court has noted that a Court Commissioner was appointed at the instance of the Petitioner. The Court Commissioner has submitted a report that it is Hira who was found in possession of the suit premises. The Court Commissioner was examined in the Court and in the course of cross-examination, has stated that he noticed one handicapped person in the suit premises. There is record which establishes that the said handicapped person was none other than Hira. In these circumstances, the Appeal Court has rightly observed that it was the duty of Agarwal to have impleaded Hira as the defendant in the suit. The suit, would even otherwise fail for non-joinder of necessary party.

14. The matter can be viewed from yet another perspective. Agarwal has invoked the extraordinary and equitable jurisdiction of

this Court under Article 227 of the Constitution of India. The Appeal Court, in para 16 of the impugned Judgment and Decree, has made reference to several admissions emanating from Agarwal in the context of compliances by Krishna, Hira and Arjun, of the obligations undertaken by them under the agreement dated 06/11/1987. Agarwal, however, claims that though the said three parties may or may not have complied with their part of the obligations, Agarwal has not complied with his part of the agreement and accepted the surrender of tenancy from Arjun or vested Hira with any tenancy rights in respect of the suit premises. Record indicates that Agarwal has obtained delivery of possession of certain premises from Krishna, Hira and Arjun. No case was made out that the three parties failed to withdraw civil and criminal proceedings which they had undertaken to withdraw in terms of the agreement. It is extremely unlikely that the three parties comply with their obligations without Agarwal complying with his obligations. Thus, it appears that Krishna, Hira and Arjun have complied with their obligations and yet, Agarwal's case is that he has not complied with his part of the obligations and on the said basis seeks to draw some advantage from his own conduct. The extraordinary and equitable jurisdiction cannot be exercised in favour of such a petitioner. Even assuming that a petitioner makes out some legal point, it is not obligatory for a Writ Court to exercise its discretionary jurisdiction in favour of such a petitioner, if, by the exercise of such discretionary jurisdiction, just and equitable result may not follow. This is yet another ground on basis of which no relief can be granted to the Petitioner.

15. The Ruling in the case of ***Raizada Topandas and another Vs. Gorakhram Gokalchand*** (*supra*) does not support the proposition advanced by Mr. Moholkar in the context of Appeal Court deciding all the issues, despite holding that the Trial Court lacked the jurisdiction to entertain the suit. In any case, Order 14 Rule 2 of CPC provides that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-Rule 2, pronounce Judgment on all issues. The approach of the Appeal Court was consistent with the principle set out in this provision or in any case, principles analogous to the same. The Appeal Court's finding as to jurisdiction, having been upheld, there is really no reason to comment any further, upon the plea of Mr. Moholkar.

16. For all the aforesaid reasons, it is not possible to grant any relief to the Petitioner in the present petition. Petition is dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)

CERTIFICATE

I certify that this Order uploaded is a true and correct copy
of original signed Order.