

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2057 OF 2016

GITA NITIN CHOUGULE AND ORS. ...Petitioners

Versus

PRAMOD BALWANT PAWAR ...Respondent

....

Mr. Sham V. Walve, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 22nd FEBRUARY, 2016

P.C.

1. Heard Mr. Sham Walve, learned Counsel for the petitioners, at length.

2. By this Petition, under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the judgment and order dated 5.2.2016 passed by learned District Judge-5, Sangli in Misc. Civil Appeal No.122/2015. By that order, learned District Judge allowed the appeal preferred by the respondent, hereinafter referred to as the 'plaintiff' and quashed and set aside the judgment and order dated 1.9.2015 passed by learned Joint Civil

Judge, Junior Division, Sangli below Exh.5 in R.C.S. No.298/2015. Learned District Judge allowed the application Exh.5 taken out by the plaintiff and issued injunction restraining the defendants from disturbing possessions of the plaintiff over the suit premises 10 X 45 square feet on ground floor out of building CTS No.800 situated at Sangli, till final disposal of the suit or till following due procedure of law for obtaining possession by the defendants, which ever is earlier.

3. The plaintiff instituted suit for perpetual injunction restraining the defendants from causing obstruction to the plaintiff's business being carried on in the suit premises. It is the case of the plaintiff that the leave and licence agreement was entered into between the plaintiff and Nitin Chougule, husband of defendant No.1 and father of defendant Nos.2 and 3. said agreement was entered into on 22.7.1995. It is the case of the plaintiff that the tenure of the license was 30 years and is to expire on 21.7.2025.

4. On 18.12.2008, defendant No.1 caused to issue notice through Advocate to the plaintiff calling upon him to hand over possession of the shop premises – CTS No.800 on or before

31.1.2009. This was replied by the plaintiff on 5.1.2009. In para-5 of the said reply, it was asserted that the tenure of the leave and licence agreement was 20 years. Along with reply, the plaintiff also annexed the leave and licence agreement. The leave and licence agreement and in particular clause 3(c) & (d) recorded that the period of leave and licence agreement was 20 years. The plaintiff, however, filed suit praying for injunction restraining the defendants from causing obstruction to his carrying on business in the suit premises. Along with the plaint, he annexed leave and licence agreement. In clause 3(c) and (d) instead of period of 20 years, the period that is mentioned is of 30 years.

5. The learned trial Judge rejected the injunction application. Aggrieved by that decision, the plaintiff preferred appeal which is allowed by the impugned order. It is against this decision, the defendants have instituted the present petition.

6. In support of this Petition, Mr. Walve strenuously contended that in reply dated 5.1.2009 the plaintiff specifically asserted that the period of leave and licence agreement was 20

years before commencement of para-1 as also in para-5. Along with the reply, he also annexed copy of the leave and licence agreement. Even in clause 3(c) and (d), the period of leave and licence was mentioned as 20 years. However, for the first time along with the plaint, the plaintiff annexed copy of the leave and licence agreement and in clause 3(c) and (d) the period of leave and licence is mentioned as 30 years. The period of 20 years is substituted by 30 years and is a clear case of interpolation in document. He further submitted that in fact on 22.7.2015 after expiry of licence period, the plaintiff has voluntarily surrendered the possession to the defendants. In other words, the plaintiff is not in possession of the suit premises and it is the defendants who are in possession of the suit premises.

7. Learned trial Judge referred to the aspect of period of leave and licence agreement in paragraphs-21 and 22 of the order and further observed that as the period of 20 years was completed, the contention of the defendants that the plaintiff handed over possession of his own on 22.7.2015 appears to be probable. Mr. Walve, therefore, submitted that as the learned trial Judge has exercised the discretion judiciously, learned

District Judge was not just in interfering with the order of the learned trial Judge. He, therefore, submitted that the petition requires consideration and the impugned order is required to be set aside.

8. I have considered the submissions advanced by learned Counsel for the petitioners. I have also perused the material on record.

9. Perusal of the material on record and in particular the case made out by the defendants shows that they have contended that the period of leave and licence agreement was 20 years and not 30 years as alleged by the plaintiff. The period of 20 years expired on 21.7.2015. The case made out by the defendants is that the plaintiff surrendered possession of the suit premises voluntarily and since then he is not in possession and the defendants are in possession.

10. Learned trial Judge has accepted this case. As against this, the learned District Judge has considered this aspect in para-17 of the impugned order. In para-17, learned District Judge noted that according to the defendants the period of

document was 20 years and thereafter the plaintiff *suo moto* handed over possession to the defendants. However, except bare contention of the defendants, there is no documentary evidence of handing over possession of the plaintiff to them. It is further observed by learned District Judge that a person (plaintiff) who is fighting against the defendants after receipt of notice dated 18.12.2008 sent by them will not easily hand over possession of the suit premises to the defendants.

11. Apart from that, the learned District Judge also considered condition (F) in the leave and licence agreement which provided that if the defendants fail to refund the security deposit of the plaintiff, in that event, the plaintiff will continue possession of the suit premises, without giving any rent in that regard and the defendants have to pay interest on the security deposit at the rate of 2% per annum.

12. As noted earlier defendant No.1 had issued notice to the plaintiff through Advocate on 18.12.2008. This was replied by the plaintiff on 5.1.2009. If at all according to the defendants, the plaintiff handed over possession to them of his own volition, the defendants would have insisted for obtaining

possession receipt from the plaintiff. Apart from that as per condition (F) of the leave and licence agreement, if the defendants fail to refund the security deposit of the plaintiff in that event, the plaintiff is entitled to continue the possession of the suit premises without giving any rent in that regard to the defendants and the defendants have to pay interest on the security deposit at the rate of 2% per annum. *Prima facie*, Mr. Walve has not shown any material to show that the defendants have refunded the security deposit to the plaintiff.

13. Mr. Walve submitted that the licence fee was Rs.50,000/- per year and there was an agreement between the parties to deduct said amount from the security deposit. Learned District Judge observed that the defendants failed to file copy of any such agreement showing that condition and the leave and licence agreement does not incorporate such condition. In view thereof, it cannot be said that the learned District Judge has committed any error in passing the impugned order.

14. In the case of **In the case of Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC**

727, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

15. In the present case, without there being any material on record, learned trial Judge has observed that the case made out by the defendants that the plaintiff has handed over possession on his own on 22.7.2015, is probable is not supported by any document. This is to be appreciated on the backdrop of the fact that defendant No.1 had issued notice on 18.12.2008 calling upon the plaintiff to hand over possession of the suit premises. This was replied on 5.1.2009. If the tests laid down in the decision of Wander Limited (supra) are applied to the facts of the present case, it has to be held that learned

District Judge was justified in interfering with the discretion exercised by the trial Court as the trial Court has exercised the discretion arbitrarily or capriciously or perversely. The trial Court had also ignored the settled principles of law regulating grant or refusal of interlocutory injunction. The learned trial Judge had not exercised the discretion reasonably and in a judicial manner. Hence no case is made out for invocation of powers under Article 227 of the Constitution of India. The petition fails and the same is dismissed accordingly.

16. At this stage, Mr. Walve submittd that after allowing the appeal, by order dated 6.2.2016 learned District Judge has stayed his own order till 22.2.2016 which is extended till 1.3.2016. He therefore prays for further extension upto four weeks from 1.3.2016. In view thereof on the motion made by Mr. Walve, notwithstanding dismissal of the Petition, the stay granted by learned District Judge shall remain in force upto and inclusive of four weeks from 1.3.2016 with clear understanding that no further extension shall be sought. Order accordingly.

(R. G. KETKAR, J.)