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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2026 OF 2015

Mrs.Parvathi Badrinarayanan
nee Parvathi P.S. and another

.. Petitioners

Vs.

Vasantkumar Ranchoddas Thacker and others .. Respondents

Mr.M.S.Karnik i/b Mr.Kaustubh Marathe, Advocate for the
Petitioners.

Ms.Rajani Iyer, Senior Advocate a/w Ms.Pratiksha Mody i/b
M/s.K.Ashar & Co., Advocate for Respondents No.1 & 2.

Mr.Ajit Hod, Advocate for Respondent No.3.

CORAM : R.G.KETKAR, J.

DATED : 12th JANUARY, 2016

P.C. :

. Heard Mr.M.S.Karnik, learned Counsel for the
petitioners, Ms.Rajani Iyer, learned Senior Counsel for respondents
No.1 & 2 and Mr.Ajit Hod, learned Counsel for the respondent No.3
at length.

2. By this Petition under Article 227 of the Constitution of India,
petitioners have challenged the judgment and order dated
21/11/2014 passed by the Appellate Bench of the Small Causes
Court at Mumbai below Exhibit 10 in (R)Appeal No.34 of 2013 in
R.A.D. Suit No. 1541 of 2004. By that order, the Appellate Bench
has allowed the application filed by the petitioners and stayed the

consent decree dated 20/08/1998 passed in R.A.E. & R Suit No. 1226/3966 of 1981 and issued injunction restraining respondents No.1 & 2 from obstructing possession of the petitioners in respect of Block No. A, Ground Floor, Naran Niwas, Plot No. 56, Bhau Daji Cross Lane, Matunga, Mumbai – 400 019 (for short 'suit premises') till hearing and final disposal of the Appeal subject to the petitioners depositing compensation @ Rs.10,000/- per month from 16/06/2004 i.e. from the date of marriage of the petitioner No.2 till November 2014 on or before 14/01/2015. The petitioners are directed to deposit further compensation from December 2014 regularly on or before 15th day of every succeeding month till the hearing and final disposal of the Appeal. The Appellate Bench also restrained the petitioners from parting with possession or creating third party interest in any manner in the suit premises. Upon depositing the amount of compensation, the Appellate Bench further directed investment in a nationalised bank in a fixed deposit initially for a period of one year.

3. Mr.Karnik submitted that predecessor-in-title of respondents No. 1 & 2 had instituted Suit in the year 1981 against predecessor-in-title of the petitioners. The original tenant K.N.S. Mani died on 01/10/1980 leaving behind two daughters namely Ms.K.S.Shyamala and Ms.K.Meenakshi who are sisters. The petitioners are the legal representatives of Ms.Shyamala. He

submitted that in that Suit, consent terms were filed between the petitioners and their father on one hand and the landlord on the other. On 20/08/1998, defendants No. 1-A, 1-B and 1-C submitted to decree for possession of the suit premises. Defendant No.1A is the father of the petitioners. It inter alia provided that the decree shall not be executable against defendant No.1-A (husband of Ms.Shyamala); decree shall be executable against defendant No. 1-B (daughter of Ms.Shyamala) only after her marriage. The decree shall be executable against defendant No. 1-C (another daughter of Ms.Shyamala) only after her marriage. It is not in dispute that defendant No.1-B married on 10/09/2000. It is also not in dispute that defendant No.1-C married on 16/06/2004.

4. Mr.Karnik submitted that defendant No.2 namely Ms.Meenakshi was not party to the said consent terms and she did not sign those consent terms. In other words, the eviction decree was passed only against Ms.Shyamala and not against her sister- Ms.Meenakshi. Defendant No.2 – Ms.Meenakshi filed Interim Application No. 4297 of 2004 in R.A.E & R. Suit No. 1226/3966 of 1981 praying for injunction restraining plaintiffs from executing consent decree entered into between plaintiffs and defendants No1-A to 1-C. By order dated 20/09/2005, the learned trial Judge of the Small Causes Court at Mumbai issued injunction restraining plaintiffs or any other person on their behalf from executing consent decree

dated 20/08/1998 against defendant No.2 till final disposal of the Suit.

5. He further submitted that on 21/08/2006 as the plaintiff and his advocate remained absent, the Suit No. 1226/3966 of 1981 was dismissed in default. In the meantime, the heirs and legal representatives of Ms.Shyamala instituted Suit R.A.D. Suit No. 1541 of 2004 for declaration that the consent terms dated 20/08/1998 filed in R.A.E.& R. Suit No. 1226/3966 of 1981 are null and void and are otherwise unenforceable in law and the decree passed on the basis of the consent decree is nullity. By the judgment and decree dated 03/05/2013, the Suit was dismissed. Aggrieved by the decision, the heirs and legal representatives of Ms.Shyamala preferred Appeal No. 34 of 2013. Pending that Appeal, they took out Interim Notice praying for injunction restraining respondents No. 1 & 2 from executing and/or otherwise enforcing and/or otherwise acting upon the consent terms dated 20/08/1998. By the impugned order, the Appellate Bench has allowed the application and granted stay as also issued injunction restraining respondents No.1 & 2 from obstructing possession of the petitioners in the suit premises till hearing and final disposal of the Appeal subject to terms.

6. Mr.Karnik submitted that basically, original defendant No.2 was not party to the consent terms. Defendant No.2 has not signed the consent terms. Defendant No.1 and defendant No.2 are

the joint tenants and in possession of the suit premises. In paragraph 14 of the Interim Notice, petitioners specifically contended that tenancy in respect of the suit premises is a joint tenancy. The decree passed in the terms of the consent terms has been set aside against Ms.Meenakshi and as such the decree cannot be executed. In other words, the petitioners contended that since Ms.Shyamala and Ms. Meenakshi are the joint tenants in the suit premises, the Appellate Bench was not justified in directing the petitioners to deposit Rs.10,000/- per month. The petitioners are not in exclusive possession of the suit premises and are in joint possession with Ms.Meenakshi. He also relied upon decisions of the Apex Court in the case of *Atma Ram Properties (P) Ltd. /Federal Motors Pvt.Ltd. (2005) 1 SCC 705* and in the case of *State of Maharashtra Vs. Super Max International Pvt.Ltd. AIR 2010 Supreme Court 722* and in particular, paragraph 45 thereof.

7. On the other hand, Ms.Iyer supported the impugned order. She submitted that Ms.Meenakshi had filed Interim Notice No. 4297 of 2004 in R.A.E. & R. Suit No 1226/3966 of 1981. It was instituted through Vikram Kadam- Constituted Attorney of Ms.Meenakshi. In paragraph 9 of that notice, it was asserted that for last few years, she has been suffering from Asthama and has been advised to keep herself away from Mumbai and settle at some place having dry climate. Defendant No.2, therefore, has settled at

Coimbatore. It is further asserted that defendant No.2 stays in the suit premises as and when she visits Mumbai for brief period. In other words, Ms.Iyer submitted that petitioners are exclusively in possession of the suit premises and therefore, the Appellate Bench was justified in imposing conditions while granting stay to the execution of consent decree as also issuing injunction restraining respondents No. 1 & 2 from obstructing their possession.

8. Mr. Karnik submitted that the Appellate Bench has not considered the submission advanced on behalf of the petitioners that they are in joint possession with defendant No.2- Meenakshi. I do not find any merit in the submission as in paragraph 14 of the Interim Notice, petitioners have averred thus :

“14. I say that the tenancy in respect of the suit premises is a joint tenancy. I say that the decree passed on Consent Terms has been set aside against our aunt K.S.Meenakshi and as such the decree cannot be executed against the applicants. I say that the applicants have very good chance of succeeding in the Appeal on the various grounds stated in Memo of Appeal. I say that it is absolutely necessary and in the interest of justice that the impugned judgment and decree dated 3rd May, 2013 passed in the above Suit be stayed and the interim order passed in Interim Notice No. 3548 of 2004 in above R.A.D. Suit No.1541 of 2004 be revived and continued till the final disposal of the Appeal.”

9. Perusal of this paragraph does not indicate that petitioners contended before the Appellate Bench that since they are in joint possession with defendant No.2, the amount of compensation to be paid by them should be fixed on the basis of

prorata basis. In paragraph 14 what is contended by petitioners is that as the consent terms are set aside against defendant No.2-Meenakshi, decree cannot be executed against the petitioners. That apart, as noted earlier, in the Interim Notice filed by defendant No.2, she specifically asserted that she has settled down in Coimbatore. Thus, prima facie, it is evident that petitioners are in possession of the suit premises and occasionally, as and when defendant No.2 visits Mumbai, she stays in the suit premises.

10. It is also not in dispute that suit premises admeasures 300 sq.ft and is situate in Matunga area. On this count also, I do not find that the compensation fixed by the Appellate Bench @ Rs.10,000/- per month is exorbitant or excessive. In paragraph 45 of the **State of Maharashtra** (*supra*), the Apex Court has observed thus:

“45. In *Atma Ram Properties* the Court viewed the issue exactly in the same way (See paragraphs 6, 8 & 9 of the decision). Further, the decision also answers Mr. Lalit's submission that the tenancy did not come to end on the passing of the decree but would continue until the tenant was actually physically evicted from the premises in execution of the decree. In *Atma Ram Properties* the Court framed two issues arising for consideration as follows:

"This submission raises the following two issues: (i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) up to what point of time is the tenant liable to pay rent at the contractual rate and when does he become liable to pay compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent to the landlord?"

The Court answered the first issue as follows:

"We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy."

The second issue was answered as follows:

"With effect from that date (the passing of the decree of eviction), the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree."

(words in parenthesis added)

We are in respectful agreement with the decision of the Court in *Atma Ram Properties*."

11. Perusal of the above passage shows that in the present case, after passing of the decree, tenancy of the petitioner is, prima facie, terminated. If that be so, the respondents, being the landlords, are not bound by contractual rate of rent from the date of decree. With effect from the date of the passing of the decree of the eviction, the tenant is liable to pay mesne profits or compensation for the use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent

if the tenant would have vacated the premises. That apart, under Order 41 Rule 5 of C.P.C. while granting stay to the execution of the decree, the Court is entitled to impose conditions.

12. Understood thus, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

(R.G.KETKAR, J.)