

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.235 OF 2015

Surendra Baban Mishra

..Applicant

Vs

1. Shri Chandra Singh
Dhansingh Thakur, since
deceased,
1a. Hirachandra Singh Thakur
and Ors.

.. Respondents

Mr. R.P.Ojha, Advocate for Applicant.

Mr.N.J.Samant a/w Mr. Sandeep V. Mahadik, Advocate for
Respondents no.2A,2B, 6,9, 12 and 14.

CORAM : R.G.KETKAR,J.
DATE : 20/06/2016

PC:

1. Heard Mr. R.P.Ojha, learned counsel for the applicant and
Mr. N.J.Samant, learned counsel for the respondents no.2A,
2B,6,9,12 and 14 at length.

2. By this Application under Section 115 of the Code of Civil
Procedure, 1908 (for short, 'C.P.C. '), the applicant, hereinafter
referred to as 'plaintiff ', has challenged the Judgment and decree
dated 10.10.2007 passed by the learned Judge, presiding over
Court Room No. 32, of the Court of Small Causes at Mumbai
(Bandra Branch) in T.E &.R. Suit No.81/98 of 2002 as also the

Judgment and decree dated 8.12.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in Appeal No. 309 of 2007. By these orders, the Courts below dismissed the suit instituted by the applicant, hereinafter referred to as 'plaintiff' for recovery of vacant and peaceful possession of the property, viz. Baban Mishra Compound, admeasuring 1135 sq.yards, situate on Sonawala Cross Road No.2, Goregaon (E), Mumbai. (for short, 'suit premises').

3. In support of this Application, Mr. Ojha strenuously contended that the plaintiff's father- Baban Mishra was landlord of the suit premises. After his death, the plaintiff has become landlord. He submitted that the land was owned by Sonawala Industries Pvt. Ltd (for short 'Sonawalas'). On 2.3.1993, Sonawalas executed Agreement of sale in favour of defendant no.1-Chandrasingh Thakur. In that agreement, there is a recital to the effect that defendant no.1, as a purchaser, has taken the land admeasuring 1341.16 sq.yards, equivalent to 1121.79 sq.mtrs or thereabout and forming part of Survey No. 123(P), 124 (P) and 125 (P) and C.T.S. No.506 (P), more particularly described in the Schedule written therein (for short, 'suit property'), at a monthly rent of Rs.500/- from Baban Mishra. In other words, defendant no.1 was inducted by the plaintiff's father Baban Mishra on payment of monthly rent of Rs.500/-. There is

also recital in the said agreement that Sonawalas as vendors agreed to sell the said property to defendant no.1 on "as is where is basis" and subject to the claim of Baban Mishra, if any. Clause 3 thereof recorded in the agreement that defendant no.1 had agreed to purchase the said property with full knowledge of the alleged claim of Baban Mishra.

4. Mr. Ojha also invited my attention to communication dated 28.10.1992 on the basis of Sonawalas to defendant no.1- Chandrasingh. The said communication recorded that there was discussion between them for sale of portion of the land situate at Goregaon and Sonawalas confirmed that they agreed to sell the said portion to defendant no.1. It also recorded that defendant no.1 is already in occupation of land admeasuring 1321.22 sq.yards or thereabout forming part of Survey No.123 (part) and 125 (part), C.T.S. No.506 (Part) owned by them. The said land was taken by defendant no.1 from one Baban Mishra at a monthly rent of Rs.500/- in or about 1974. It also noted that defendant no.1 was aware that Shri Baban Mishra had claimed the alleged tenancy rights in respect of the land together with other adjoining lands and that they had instituted suit no. 3304 of 1962 against Baban Mishra in the City Civil Court of Bombay which was dismissed, against which they filed First Appeal No.620 of 1964 and decree was passed against Baban Mishra on

18.7.1983 directing him to demolish structures and hand over vacant possession of the suit land in respect of which he had claimed tenancy rights.

5. Relying upon the recitals in the Agreement of sale as also communication dated 28.10.1992, Mr. Ojha submitted that even the owners - Sonawalas recognized rights of the plaintiff's father Baban Mishra. As against this, defendant no.1 executed General Power of Attorney on 6.6.1994 in favour of defendant no.2. On 30.1.1995, defendant no.1 agreed to sell the property admeasuring 1341.16 sq.yards to defendant no.2 and to that effect executed Agreement of sale on 30.1.1995. He submitted that on the strength of these documents, defendant no.2 was inducted by defendant no.1. During the pendency of the suit as also notwithstanding order of injunction, Sonawalas executed lease deed in favour of defendant no.2 and other office bearers of Vijay Industrial Premises Co-op Society Ltd (for short, 'society')

6. Mr. Ojha submitted that the plaintiff instituted suit being T.E.&R.Suit No.18/1998 of 2002 against defendant no.2. In the present suit, the plaintiff and defendant no.1 entered into Consent Terms on 22.7.2003. Under the Consent Terms, defendant no.1 declared that he has no right, title and interest of whatsoever nature. Mr Ojha, therefore, submitted that

defendants no 2 to 21 are claiming through defendant no.1. As defendant no.1 has given up his right, title and interest in terms of the Consent Terms, the Courts below committed error in dismissing the suit. In view of recitals in the Agreement of sale dated 2.3.1993, as also communication dated 28.10.1992, it has to be held that the plaintiff is landlord of the suit premises. He further submitted that the plaintiff has instituted suit in the year 2004 for specific performance of Agreement of sale dated 2.3.1993 executed by Sonawalas in favour of defendant no.1 as defendant no.1 has assigned his right, title and interest in favour of defendant no.1. For all these reasons, he submitted that that the application requires consideration.

7. On the other hand, Mr. Samant supported the impugned orders. He submitted that the Courts below, after appreciating the evidence on record, have concurrently held that the plaintiff has no right, title and interest in the property in dispute in any capacity whatsoever.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Courts below have dismissed the suit after holding that the plaintiff failed to prove that defendant no.1 is his tenant in respect of the suit premises and that the plaintiff further failed to prove that defendants no.

2 to 21 are not entitled to tenancy rights in respect of the suit premises. The Courts below and in particular the Appellate Court held that the plaintiff failed to prove that defendant no.1 was tenant in respect of the suit premises and that defendants no. 2 to 21 are claiming right through defendant no.1. The moot question is whether Baban Mishra and the plaintiff being his son, have any right, title and interest in the suit property.

9. The plaintiff has asserted that he is the owner of the suit property. In the alternate, he claims that he is landlord of the suit property and in any case he is tenant in the suit premises. In order to establish ownership, the plaintiff has not produced any document. The plaintiff has relied upon recitals in the Agreement of sale dated 2.3.1993 and relevant recitals are to the following effect.:

“AND WHEREAS the purchaser has prior to 1974 taken the said property at a monthly rent of Rs.500/- from the said Baban Mishra.”

“AND WHEREAS the vendor has now agreed to sell the said property to the purchaser as on “as is where is basis” and subject to the claim of the said Babn Mishra if any, pending litigation if any at or for the price and on the terms and conditions as hereinafter appearing.”

“3. It is agreed that the purchaser has agreed to purchase the said property with the full knowledge of the alleged claim of the said Baban Mishra.”

The plaintiff also relied upon communication dated 28.10.1992

addressed by Sonawalas to defendant no.1 and relevant portion reads thus:

“This has reference to the discussion which we had with you in our office and have to confirm that we have agreed to sell you portion of our land situate at Goregaon (East) on the following terms and conditions:

(1) you are already in occupation of land admeasuring about 1321.22 sq. yds or thereabout forming part of Survey No.123 (Part), 124 (Part) and 125 (Part); C.T.S.No.506 (Part) owned by us.

(2) The above land was taken by you from one Shri Baban Mishra at a monthly rent of Rs.500/- per month in or about 1974 for carrying on your business of Kadappaladi and also bringing up buffalo. You have put up a temporary shed thereon since then.

(3) You are aware that the said Shri Baban Mishra had claimed the alleged tenancy rights in respect of the said land together with other adjoining lands and that we had filed Suit No.3304 of 1962 against the said Baban Mishra in the City Civil Court of Bombay and the suit was dismissed against which we had filed First Appeal No.620 of 1964 and a Decree was passed against the said Babn Mishra on 18th July 1983 directing the said Baban Mishra to demolish structures and hand over the vacant possession of the said land for which he had claimed alleged tenancy rights. You are also aware that we have taken Chamber summons for removal of the obstruction against the Obstructionists.

10. It is also not in dispute that in the present suit, the plaintiff and defendant no.1 entered into compromise wherein defendant no.1 declared that he has no right, title and interest in the suit property. In view thereof, whether defendant no.1 can be said to have acquired any interest in the suit property so that he can

pass on to the plaintiff. . As noted earlier, Sonawalas entered into Agreement of sale on 2.3.1993 in favour of defendant no.1. Section 54 of the Transfer of Property Act, 1882 defines expression 'Contract for sale" which reads thus:

"Contract for sale- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

Perusal of this definition shows that the contract for sale does not, of itself, create any interest in or charge on such property. No material is produced on record to show that defendant no.1 instituted suit for specific performance of contract against Sonawalas. In the absence of any decree for specific performance of defendant no.1, only on the basis of agreement of sale defendant no.1 cannot claim any interest which can be conveyed or assigned by him in favour of the plaintiff or plaintiff's father.

11. Mr Ojha relied upon the recitals in the Agreement of sale dated 2.3.1993 as also the portion of communication dated 28.10.1992. Perusal of these recitals shows that it is recorded that defendant no.1 had taken the suit premises prior to 1974 at monthly rent of Rs.500/- from Baban Mishra and that he had agreed to purchase the property subject to claim of Mr. Baban Mishra. Perusal of Clause 3 of the Agreement of sale, in fact,

shows that Sonawalas did not accept the claim of Mr. Babann Mishra and, therefore, described it as alleged claim of Mr. Baban Mishra. In fact, perusal of communication dated 28.10.1992 and in particular paragraph 3 thereof, shows that Sonawalas have obtained decree against Baban Mishra on 18.7.1983 directing him to demolish structures and hand over vacant possession of the land for which he had claimed alleged tenancy rights. This also is a pointer to show that Sonawalas did not accept the tenancy rights of Baban Mishra. That apart, during the hearing of this Application, I repeatedly called upon Mr.Ojha to substantiate his claim that the plaintiff Baban Mishra has got interest in the suit property. Except showing the recitals in the Agreement of sale and communication dated 28.10.1992, he was unable to show any other material.

12. It is also evident that the plaintiff has instituted suit in the year 2004 in the City Civil Court for specific performance of Agreement of sale dated 2.3.1993 executed by Sonawalas I in favour of defendant no.1 and the said suit is pending. Thus, prima facie, as of date the plaintiff cannot claim to be either owner, landlord or tenant in the suit premises. After appreciating the evidence on record, the Courts below have concurrently held that the plaintiff is neither owner nor landlord of the suit property and that defendants no. 2 to 21 are claiming on the basis of

Lease Deed dated 12.8.2004 executed by Sonawalas. Mr. Ojha submitted that despite pendency of the suit as also injunction order operating, this Lease Deed was executed. As I have already held that neither the plaintiff nor his father has any right, title and interest in the suit property as also Sonawalas were not made party in that suit, I do not find any merit in the submission. The Courts below, after appreciating the evidence on record, have concurrently held that defendants no.2 to 21 are in occupation of the suit property on the strength of the Lease Deed executed on 12.8.2004 by Sonawalas. The plaintiff was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of material on record, no reasonable person would have come to the conclusions arrived at by the courts below. In the light of the aforesaid discussion, I do not find that the applicant has made out any case for invocation of powers under section 115 of C.P.C. In the result, Application fails and the same is dismissed.

(R.G.KETKAR, J.)