

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5344 OF 2016

Sanjiv Sharad Mhatre ... Petitioner
Vs.
Sindhu Ramdas Nadkarni ... Respondent

Mr. Prashant G. Karande for Petitioner.
Ms Rohini A. Amin for Respondent.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 07, 2016

P.C. :

Heard Mr. Karande, learned Counsel for petitioner and Ms Amin, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the judgment and order dated 22.09.2014 passed by the learned Judge, presiding over Court Room No.40 of the Court of Small Causes at Mumbai below exhibit-18 in R.A.E.Suit No.173/304 of 2013 as also the judgment and order dated 09.02.2016 passed by the Appellate Bench of the Small Causes Court in Miscellaneous Appeal No.56 of 2014. By these orders, the Courts below allowed the application made by the respondent, hereinafter referred to as 'defendant', and directed the plaintiff to keep open the facilities available upon the suit property till the final disposal of the Suit. Plaintiff is restrained from obstructing, interfering, damaging or causing any impediments to the facilities as provided in the suit premises till the final disposal of the Suit. Defendant filed application exhibit-18 praying for direction to the plaintiff to keep open terrace and main gate in the property situate in land bearing CTS No.112 of Village Pahadi-Goregaon, Taluka Borivali, Jaiprakash Road

No.5, Goregaon (East), Mumbai 400 063 (for short 'suit property').

3. In support of this Petition, Mr. Karande strenuously contended that terrace is not let out to the defendant and is not forming part of the tenanted premises. It is also not covered by Section 29 of the Maharashtra Rent Control Act, 1999 (for short 'Act'). He further submitted that the Courts below did not deal with aspect of terrace in the impugned orders.

4. As far as main gate is concerned, he submitted that wicket gate is open and defendant and other defendants are using it for egress and ingress in the building. In other words, as defendant has alternate way for approaching the tenanted premises, the Courts below were not justified in issuing injunction in that regard. In support of this submission, he relied upon the decision of this Court in ***Omprakash Vs. H. J. Leach & Co., 1989 Mh.L.J. 51.***

5. He further submitted that plaintiff has instituted Suit against the defendant for recovery of possession. Defendant cannot maintain application for injunction. In other words, application filed by the defendant itself is not maintainable. The Courts below were not justified in granting the application. He further submitted that without recording any evidence, the Courts below allowed the application. He submitted that the trial Court may be directed to frame issue on this aspect so as to enable the parties to lead evidence.

6. On the other hand, Ms Amin supported the impugned orders. She submitted that defendant is paying Rs.400/- towards cleaning of the terrace. She has invited my attention to the letter dated 22.06.2013 addressed by the defendant to the plaintiff as also cheque issued by her

in favour of the plaintiff on 22.06.2013. She invited my attention to the letter dated 16.06.2014 addressed by the plaintiff to her calling upon her to pay Rs.400/- towards cleaning charges of terrace in cash. She also submitted that defendant has addressed letter dated 23.06.2014 to the plaintiff setting out therein that arrangement is made between the parties and Rs.150/- are charged for cleaning terrace. In other words, she submitted that the said amount was increased to Rs.200/-. She submitted that plaintiff is collecting charges for terrace, and therefore, defendant is entitled to give the terrace. Plaintiff has caused impediment from using the terrace and therefore, defendant was constrained to file application for injunction. She further submitted that as far as injunction in respect of main building is concerned, the Courts below have recorded that defendant is ready and willing to pay her contribution towards the charges of security, and therefore, no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Mr. Karande submitted that application made by defendant itself is not maintainable. I do not find any merit in this submission. Section 94 (c) and (e) of the C.P.C. reads thus,

“ 94. Supplemental proceedings.- In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,-

- (a) ...
- (b) ...
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
- (d) ...
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.”

8. Perusal of these Clauses clearly authorized the Court to grant a temporary injunction as also make such other interlocutory orders as

may appear to the Court to be just and convenient in order to prevent the ends of justice being defeated.

9. Mr. Karande submitted that the Courts below, without recoding evidence, have passed the impugned orders. I do not find any merit in this submission as well. Order 39, Rule 1 of C.P.C. lays down that where in any Suit, it is proved by affidavit or otherwise that any property in dispute in a Suit is in respect of clauses (a) to (c) enumerated therein, the Court may by order grant a temporary injunction. Perusal of Rule 1 of Order 39 shows that if it is proved by affidavit or otherwise, does not mean that parties have to lead evidence which will convert application for temporary injunction into mini trial. In view thereof, I do not find that the Courts below were required to record evidence while deciding injunction application. If the contention of Mr. Karande that without recording evidence, the Court cannot grant interim relief is accepted, it will defeat the very purpose of granting the injunction.

10. Mr. Karande submitted that terrace is not a tenanted premises and is not covered by Section 29 of the Act. Perusal of the correspondence exchanged between the parties prima facie shows otherwise. In paragraph 10, the learned trial Judge has referred to the letter dated 23.06.2014 addressed by the defendant to the plaintiff as also photocopy of cheque towards payment of charges for cleaning terrace. As far as appellate Court is concerned, in paragraph 9, the appellate Court has referred to receipt issued by the plaintiff towards payment of cleaning charges of terrace. The appellate Court held that if the plaintiff is collecting the cleaning charges for the terrace then definitely in the absence of any material on record, at this stage, the contention of the defendant that she was permitted to use the terrace has to be accepted. Thus, the Courts below, after considering the material on record, have

prima facie held that plaintiff was collecting cleaning charges from the defendant, and therefore, she is entitled to use the terrace.

11. As far as the main gate is concerned, the learned trial Judge has considered this aspect in paragraph 12 of the impugned order. The appellate Court has considered this in paragraph 8 of the impugned order. The Courts below have observed that defendant is ready to pay charges of security guard. The Courts below have also noted that defendant is aged about 70 years old and she is in need of auto-rickshaw or in case of medical emergency, of ambulance. If the main gate is closed, she will not be able to have access to the vehicles as the keys are lying with the plaintiff.

12. Mr. Karande relied upon the decision of this Court in the case of **Omprakash** (*supra*). In that case, the plaintiff claimed right of way in a private road, which was leading to his premises by contending that landlord is causing obstruction to the use of private gate which was being used from 1940. During the course of the judgment, the learned Single Judge of this Court noted that in the plaint, it was not spelt out as to what was the exact right claimed. It was not clear whether it was a term of tenancy or whether it was any other right as contemplated under the Transfer of Property Act, 1882 or under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In paragraph 15, it was noted that admittedly another road providing for access from the plaintiff's demised premises to Darukhana, also a public road was available. The said fact was suppressed by the plaintiff.

13. In view thereof, the decision in **Omprakash** (*supra*) is not applicable to the facts of the present case. Apart from this, as noted earlier, the Courts below have concurrently allowed the application

made by the defendant. Thus, the Courts below have concurrently held in favour of the defendant. The Courts below, after considering the material on record, have held that defendant is made out a case for allowing the application exhibit-18. Applying the tests laid down in ***Estralla Rubber vs Dass Estate (Private) Ltd, (2001) 8 SCC 97***, wherein it is held that it is well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or Tribunal has come to.

14. Apart from that, 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. Applying the tests laid down in **Wander Limited (supra)** as also having regard to the fact that this Petition is under Article 227 of the

Constitution of India, in my opinion, no case is made out for interfering with the impugned orders. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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