

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.48/2016
IN
CONTEMPT PETITION NO.323/2014
IN
CIVIL REVISION APPLICATION NO. 716/2013

Ismail Moshinbhai Sham & Ors. ... Petitioners

V/s.

M/s. Damodar Tin Works ... Respondent

And

Mr. Sadguru Vasudeo Vatjee Morajkar Applicant/
Intervenor

Mr. G. S. Hegde i/b. R. A. Singh with Mr. A. S. Yadav for the applicant
Mr. S. Shamim i/b. Shamim & Co. for the petitioner
Mr. U. V. Singh for the respondent in Contempt Petition.
Mrs. Sunita Gholatkar, Section Officer from the office of Court Receiver.

CORAM: K.K. TATED, J.
DATED : APRIL 21, 2016

PC. :

1. Heard the learned counsel for the parties.
2. By this Civil Application, the applicant third party seeks to intervene in the Contempt Petition and to get set aside the order dated 02.04.2016 passed by this court directing the Court Receiver to take possession of the suit premises i.e. open garage at gala No.4, behind Udyog Bhavan, Bulsroy Colony, Vakola Pipeline, Santacruz (E), Mumbai

– 400 055 and handover the possession to the petitioner i.e. Ismail Moshinbhai Sham & Ors.

3. For the sake of convenience, the petitioner i.e. Ismail Moshinbhai Sham & Ors. will be referred to as plaintiff and Mr. Sadguru Vasudeo Vatjee Morajkar as the applicant intervenor.

4. Few facts of the matter, are as under:

The plaintiff filed RAE Suit No.612/2006 against M/s. Damodar Babu Patil, Proprietor of M/s. Damodar Tin Works for eviction from the suit premises on the ground that the Damodar Patil carried out unauthorised construction and made alteration in the suit premises. In that suit, the Damodar (original tenant) filed written statement on 12.10.2006 and resisted the said suit. The Trial Court framed issues. That suit was dismissed by the Trial Court by judgment and decree dated 03.03.2012.

5. Being aggrieved by the said judgment and decree, the plaintiff preferred an appeal before the Appellate Bench of Small Causes Court, which was allowed by judgment and decree dated 12.06.2013 and set aside the order passed by the Trial Court on 03.03.2012. The tenant preferred Civil Revision Application No.716/2013 before this court. This court, after hearing both sides i.e. plaintiff and tenant dismissed the Civil Revision Application on 03.12.2013. Thereafter Mr. Damodar Babu Patil filed an affidavit/undertaking dated 12.12.2013 stating that he will not create any third party right, title and interest in respect of the suit premises for 16 weeks. Paragraph 2 of the said affidavit reads thus:

“2. I hereby undertake and declare as under:

a. I say that I am in possession of the suit premises and nobody else is in possession of the suit premises.

b. I undertake that I will neither create third party interest nor part with the possession in the suit premises.

c. I undertake that I will clear all the arrears of rent of the suit premises.

d. I undertake that I will not apply for further extension of time to vacate the suit premises.

e. I undertake that I will hand over vacant peaceful possession of the suit premises to the respondent within sixteen weeks from the date of order if I am unable to obtain suitable orders from the higher court.”

6. Thereafter the tenant preferred an SLP before the Apex Court, which was dismissed vide order dated 15.04.2014. Thereafter the plaintiff called upon the tenant to hand over vacant and peaceful possession of the suit premises. He also filed an Execution Application in the Trial Court. As the tenant failed and neglected to comply with the undertaking given before this court, the plaintiff filed Contempt Petition No.323/2014 for taking an appropriate action against the tenant under the Contempt of Courts Act, 1971. In the said Contempt Petition, this court, by order dated 23.06.2014 issued notice to the tenant. The Bailiff's report shows that the notice could not be served as the tenant was not available. Thereafter, this court, by order dated 27.01.2015 issued a fresh notice to enable the Bailiff to serve the tenant personally. Hence, the Bailiff again submitted his report about unserved notice. This court, in order dated 08.05.2015 recorded that

the tenant was avoiding service. Thereafter, this court, by order dated 09.07.2015 directed the Registry to issue bailable warrant in the sum of Rs.25000/- against the tenant Damodar B. Patil, returnable on 11.08.2015. Same was not executed. Hence, this court directed the Inspector of Police, Vakola Police Station to execute bailable warrant by order dated 03.12.2015. Thereafter the tenant appeared before this court. In the meantime, the plaintiff made Civil Application No.55/2015 for appointment of Court Receiver to take forcible possession of the suit premises and to handover the plaintiff. Prayer clause (a) of the Civil Application reads thus:

“(a) This Hon'ble Court be pleased to appoint Court Receiver under Order 40 Rule 1 of the Code of Civil Procedure, 1908 to take possession of the suit premises from the respondent herein and/or any other person found to be in possession of the suit premises, then further power to break upon the lock with the assistance of the police authority, after taking the possession, the vacant and peaceful possession of the suit premises to the petitioner herein.”

7. The tenant appeared before this court in Civil Application and filed Affidavit-in-Reply dated 15.03.2016 stating that he did not have any objection if the Court Receiver is appointed to take forcible possession of the suit premises and handover to the plaintiff. This court, by order dated 02.04.2016 allowed the Civil Application No.55/2015 directing the Court Receiver to take possession of the suit premises and handover to the tenant.

8. When the Court Receiver tried to take possession of the suit premises, same was obstructed by the applicant on the ground that he is in possession of the suit premises since long. Hence, the applicant

made the present intervention Application for allowing them to intervene in the Contempt Petition and set aside the order dated 02.04.2016 passed in Civil Application No.55/2015.

9. The learned counsel for the applicant submits that the plaintiff suppressed the material facts from this court for obtaining the order dated 02.04.2016. He submits that the applicant intervenor is in possession of the suit premises for last several years as owner. He submits that in the present proceedings, initially 18 persons filed declaratory suit No.2405/1993 in the Small Causes Court at Mumbai showing the applicant as owner of the suit premises. In that suit, following prayers were made by the tenant.

“(a) It be declared that the threatened action of the defendants to take forcible possession of the suit premises viz. Shed No.2, Unit Nos.1 to 10, Shed NO.1, Unit Nos.2, 6 and 7, open space Opp. Shed 2 and Open space Opp Shed No.1, Shed No.3 Unit Nos.3, 2 & 1 situate at Shree Vinayak Industrial Premises Cooperative Society Ltd., adjacent to Udyog Bhavan, Bulsroyce Colony Road, Vakola Bridge, Santacruz (E), Bombay – 400 055 bearing CTS No.378 (part) Kole Kalyan, is illegal, improper and bad in law.

(b) The defendants by themselves, their servants contractors and agents be permanently restrained by an order and injunction of this Hon'ble Court from taking forcible possession of the suit premises and/or trespassing or occupying or putting obstacles or hindrance and/or dealing with the said suit premises in any manner of whatsoever.

(c) Pending the hearing and final disposal of the suit the defendants by themselves, their servants, agents, contractors be restrained by a temporary order and injunction of this Hon'ble Court from taking forcible possession of the suit premises viz. Shed No.2, Unit Nos.1 to 10, Shed No.1, Unit Nos.2, 6 and 7, open space Opp. Shed No.2 and Open space Opp Shed No.1, Shed No.3 Unit

Nos.3, 2 & 1 situate at Shree Vinayak Industrial Premises Cooperative Society Ltd., adjacent to Udyog Bhavan, Bulsroyce Colony Road, Vakola Bridge, Santacruz (E), Bombay – 400 055 being CTS No.378 (part) Kole Kalyan and/or trespassing or occupying and/or obstructing the plaintiffs ingress and regress to the suit premises by putting any fencing or any other means of obstacles or hindrance.

(d) The plaintiffs be allowed to deposit the arrears of rent in court.

(e) Interim and ad-interim injunction in terms of prayer (c) above.

(f) The cost of the suit be provided.

(g) For such other and further reliefs as the nature and circumstances of the case may require.”

10. The learned counsel for the applicant submits that in the Execution Application No.6/2015, the Bailiff visited the suit premises on 13.02.2015, 15.04.2015 and 18.04.2016 for execution of the decree passed by the Trial Court in RAE Suit No.612/2006. He submits that the Bailiff, in his report specifically recorded the name of the applicant. He relies on those reports which read thus:

“Report dated 13.02.2015

UNSERVED FOR RESPDT :

I went to serve a copy of this notice alongwith copy of the application on the respondent at above address on 13.02.2015 at about 4.50 pm. But any responsible person of the said Respdt were not found. So on my inquiries with Mr. Satguru Vasudeo Wadaji, I was informed that responsible person of the said Respdt has gone out and no fixed time to be found. Hence, returned unserved.

Report dated 15.04.2015**UNSERVED FOR RESPDT :**

I went to serve a copy of this notice along with copy of the Application on the Respdt open garage Gala No.4, udyog Bhavan Bulsroy Colony, Vakola Pipe Line, Santacruz (E), Mumbai – 55 on 18.02.2015 at about 11.50 pm But any responsible person of the Respdt were not found. So on my inquiries with Mr. Raju Servant of the Respdt & Mr. Sadhashiv Suresh Morajkar, they informed me that responsible person of the said Respdt has gone out and no fixed time to be returned. Hence, returned unserved.

REPORT DATED 18.04.2016**By order pasted for Respondent:**

I went to serve a copy of the Notice along with copy of application on the Respondent at open Garage Gala No.4, Near Udyog Bhavan Busory Colony Vakola Pipe Line Santacruz (E) Mumbai – 400 055. On 18.04.2015 at about 11.45 am but any responsible person of Respondent were not found. So on my inquiries with Shri Sadguru Vasudev Wataji Morajkar I was informed that responsible person of the said Respondent has gone out and no fixed time for his return.

So by order of the Hon'ble Court, I this day pasted a copy of the Notice along with application on the conspicuous part of the said at above address in presence of Shri Sadguru Wasudeo Wataji Morajkar.

Court House Pasting:

As per order of the Hon'ble Court, I this day pasted a copy of the Notice along with application on the Notice Board of this court of Small Causes 3rd Floor, A.K. Road Bandra (E), Mumbai on 18.04.2015 at about 4.30 pm.”

11. The learned counsel for the applicant submits that as per the Bailiff reports, it is crystal clear that the applicant is in possession of the

suit premises and therefore, the applicant cannot be dispossessed without following due process of law. He submits that the applicant also filed obstructionist notice No.5/2015 before the Small Causes Court at Mumbai with following prayers:

“(a) This Hon'ble Court may be pleased to allow the present application of the applicant to join as obstructionist.

(b) This Hon'ble Court may dismiss the Execution Application No.6/2015.

(c) Pending the hearing and final disposal of present application, this Hon'ble Court may be pleased to pass an order of stay thereby stay the hearing of execution application No.6/2015.

(d) Interim and ad-interim relief in terms of prayer clause (c) as above.

(e)

(f)”

12. The learned counsel for the applicant submits that unless and until the obstructionist notice is decided on its own merits, there is no question of dispossessing the applicant from the suit premises as per order dated 02.04.2016 in Civil Application No.55/2015 in Contempt Petition No.323/2015. He submits that the applicant has an independent right in the suit premises and that has to be decided by due process of law.

13. The learned counsel for the applicant submits that the tenant Damodar Patil made a statement before this court that they have no objection to handover the possession to the plaintiff, that cannot be

taken into consideration for deciding the present litigation. He submits that the said tenant Damodar Patil himself has handed over possession of the suit premises to the applicant and the applicant is in possession for last several years. On the basis of this submission, the learned counsel for the applicant submits that in the interest of justice, this Hon'ble Court be pleased to set aside the order dated 02.04.2016 passed by this court in Civil Application No.55/2015 directing the Court Receiver to take forcible possession of the suit premises and hand over to the plaintiff. He submits that if the Civil Application is not allowed, irreparable loss will be caused to them only.

14. On the other hand, the learned counsel for the plaintiff submits that the Civil Application made by the applicant is not maintainable in law. He submits that the decree passed by the Appellate Bench of Small Causes Court was confirmed by the Apex Court also. He further submits that the tenant himself filed an affidavit-cum-undertaking before this court stating that he was in possession of the suit premises and he will not create any third party right. He submits that in spite of dismissal of the SLP the tenant failed and neglected to handover possession of the suit premises. Hence, the plaintiff filed execution proceedings in Trial Court as well as filed the Contempt Petition before this court for violation of an undertaking given before this court. He submits that in the said Contempt Petition, the tenant avoided the service, hence, this court issued bailable warrant twice. He submits that the tenant was arrested by the police authority and produced him before this court. He submits that the tenant filed an affidavit in Civil Application No.55/2015 stating that he does not have any objection to

handover possession of the suit premises to the plaintiff. He submits that the applicant in his Civil Application nowhere stated, how and when the tenant Damodar handed over possession to him. This itself shows that the statement made by the applicant in his Civil Application is incorrect. Hence, there is no question of entertaining the Civil Application. Same be dismissed with costs.

15. Heard both sides at length. It is to be noted that in the present proceedings the decree passed by the Appellate Bench of Small Causes Court was confirmed by this court and thereafter the SLP preferred by the tenant stood dismissed. Though the undertaking was given by the tenant before this court, he failed and neglected to handover possession of the suit premises to the plaintiff. Hence, it constrained to the plaintiff to file Contempt Petition and also the Civil Application for appointment of Court Receiver to take forcible possession. In the Contempt Petition, the tenant avoided notice of this court. Hence, this court issued bailable warrant against him. When the applicant appeared before this court, he filed his affidavit stating that he did not have any objection to hand over the possession of the suit premises to the plaintiff. But he failed to handover possession of suit premises to the plaintiff.

16. Hence, this court, passed order dated 02.04.2016 in Civil Application No.55/2015 directing the Court Receiver to take forcible possession of the suit premises and hand over the same to the plaintiff. It is to be noted that in the entire Civil Application the applicant nowhere stated as to how and when he got possession of suit premises

from the tenant Damodar Babu Patil. This itself shows that the applicant made an incorrect statement in his application that he is in possession of the suit premises for last several years. Apart from that even the bailiff report shows that when he made an enquiry at the suit premises, at that time the applicant made a statement that he does not know when the respondent would be available on the suit premises. This itself shows that the applicant was not in possession of the suit premises when the Bailiff visited the suit premises for execution of possession warrant, thrice. In any case, the applicant failed to show his possession and/or interest in the suit premises in his Civil Application. Hence, this is nothing but avoiding execution of the order passed by this court.

17. Considering these facts, I do not find any substance in the Civil Application. Same stands rejected with costs.

(K.K. TATED, J.)