

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 4672 OF 2015

MOHAN RAGHUNATH SURYAVANSHI ...Petitioner
Versus
THE STATE OF MAHARASHTRA AND ANR. ...Respondents

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Mr. Shailendra Pendse, Advocate, for the Petitioner.
Mr. A.R. Motkari, AGP, for respondent No.1 – State.
Mr. A.S. Khandeparkar, i/b. Khandeparkar & Associates, for
Respondent No.2.

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CORAM : R. G. KETKAR, J.

DATE : 1st FEBRUARY, 2016

P.C.

1. Heard Mr. Shailendra Pendse, learned Counsel for the petitioner, Mr. Motkari, learned AGP for respondent No.1-State and Mr.Khandeparkar, learned Counsel for respondent No.2, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and decree dated 26.3.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in (A-1) Appeal No.52 of 2012. By that order, the Appellate Bench partly allowed the appeal preferred

by respondent No.2, hereinafter referred to as the 'plaintiff' and set aside the judgment and order dated 26.4.2012 passed by learned Judge, presiding over Court Room No.17 of the Court of Small Causes at Mumbai in R.A.E. Suit No.1136/1777 of 2005. The Appellate Bench decreed the suit and directed the petitioner, hereinafter referred to as 'defendant' to hand over the vacant and peaceful possession of room Nos. 1, 2, 4 and a room under the stair case, situate on ground floor, Gurukrupa Building No.3, Khetwadi, 4th Lane, Mumbai – 400 004 (for short, 'suit premises') to the plaintiff within sixty days from 26.3.2015. During the said period, the defendants were restrained from parting with possession of the suit premises or creating third party interest in respect thereof.

3. Mr. Khandeparkar has raised a preliminary objection about maintainability of the Petition on the ground that against the impugned order, defendant No.1 has an equally efficacious alternate statutory remedy of revision under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'). Mr. Pendse therefore seeks permission to convert this writ petition into Civil Revision Application. Leave to convert this petition into CRA is granted.

Necessary amendments shall be carried out within one week from today.

4. Mr. Pendse submitted that the plaintiff has instituted a suit against the petitioner herein and one Ms. Vijaya Ashok Suryavanshi, who is sister-in-law of defendant no.1. The suit is instituted *inter alia* alleging that room No.2 and the room under the stair-case are not used without any reasonable cause for the purpose for which they were let out for continuous period of six months immediately preceding the date of the suit; defendant nos.1 and 2 without consent of the landlord erected permanent structure in room No.2; defendant no.1 is guilty of his conduct which is causing nuisance and annoyance to the plaintiff and his family members and other tenants of the building where the suit premises is situate. The plaintiff requires the suit premises reasonably and bonafidely for occupation for him and his family members and that greater hardship would be caused to the plaintiff in case the decree of eviction is not passed.

5. After considering the evidence on record, learned trial Judge dismissed the Suit. Aggrieved by that decision, the

plaintiff preferred appeal which is partly allowed by the Appellate Bench. It is against this order, defendant No.1 has instituted the present proceedings.

6. Mr. Pendse submitted that during pendency of the suit, there was compromise talk between the plaintiff and defendant No.1. The plaintiff represented that he will not proceed with the suit against the defendants. Believing on the representations made by the plaintiff, defendant's Advocate did not participate in the proceedings. The defendant's Advocate did not cross-examine the plaintiff's witnesses. The defendant also did not lead evidence. In other words, he submitted that the Suit was uncontested by the defendants believing on the representations made by the plaintiff.

7. He submitted that as far as the ground of additions and alternations in room No.2 is concerned, the plaintiff's brother made additions and alternations of permanent nature. In other words, the defendants herein have not erected a permanent structure in room No.2.

8. As far as the ground of non-user of room Nos.2 and the

room under the stair-case is concerned, he submitted that all along the defendants are using room No.2 and room under the stair-case. In other words, the plaintiff did not establish non-user of the suit premises for more than six months immediately preceding the date of the suit.

9. Mr. Pendse further submitted that the plaintiff alleged ground of nuisance and annoyance, however, they have not produced any cogent evidence and has produced only Non-Cognizable complaints. In short, he submitted that the plaintiff did not establish the ground of nuisance and annoyance.

10. As far as the bonafide requirement is concerned, he submitted that the plaintiff is in possession of area admeasuring 1270 sq. ft. The need pleaded by the plaintiff is neither reasonable nor bonafide. He, therefore, submitted that the impugned order deserves to be interfered with.

11. On the other hand, Mr. Khandeparkar supported the impugned order. He has invited my attention to paragraph No.11 of the trial Court's judgment as also paragraph-16 onwards of Appellate Court's order. He submitted that basically

the plaintiff was not cross-examined. The defendants did not examine any witness. Though the learned trial Judge observed that evidence of the plaintiff was not challenged by the defendants as also they did not lead evidence, that does not mean that the plaintiff is entitled for decree of eviction against the defendants. He has taken me through the trial Court's judgment as also the Appellate Court's order and submitted that after appreciating the evidence on record the Appellate Court has decreed the Suit on all the grounds. He further submitted that the plaintiff is in possession of one room and kitchen. Kitchen is admeasuring 96 sq. ft. and the room is admeasuring 144 sq. ft. The family of the plaintiff consists of one married son and two sons of marriageable age.

12. I have considered the rival submissions advanced by learned Counsel for the parties. I have perused the material on record.

13. Perusal of paragraph-11 of the trial Court's judgment shows that the learned trial Judge has categorically recorded a finding that all the evidence of the plaintiff is not challenged by the defendants. Not only that the defendants have not adduced

their evidence. The learned trial Judge, however, proceeded to observe that simply because the evidence of the plaintiff has not been challenged by the defendant, it cannot be said that only on that ground, the plaintiff will be entitled for decree of eviction against the defendants. Learned trial Judge thereafter proceeded to observe that the plaintiff is not the sole landlord with regard to the suit premises.

14. As against this, the Appellate Bench of Small Causes Court has considered this aspect from paragraph-16 onwards. The Appellate Bench thereafter considered the ground of non-user from paragraphs-18 to 22. After considering the evidence on record as also decision of the Apex Court in the case of **Smt. Kanta Goel v. B.P. Pathak and others, AIR 1977 SC 1599**, held that one of the co-owners can maintain the suit for eviction. It was further observed in paragraph-22 that when the entire evidence of the plaintiff is unchallenged, there was no necessity for the trial Court to put further conditions upon the plaintiff to establish the same. The Appellate Bench accordingly held that the plaintiff has established ground of non-user.

15. As far as the ground of carrying out additions and

alterations of permanent nature are concerned, this aspect is considered from paragraph-23 onwards. In paragraph-23 the Appellate Bench has given details of the additions and alterations of permanent nature carried out by defendant Nos.1 and 2 without obtaining prior permission of the plaintiff and the corporation. It was further noted that the evidence of the plaintiff remained unchallenged as also there was no evidence of defendants. In paragraph-24 the Appellate Bench observed that the learned trial Judge while disbelieving the evidence of the plaintiff went on to rely upon the statements made in the written statement. The Appellate Bench, therefore, rightly disturbed the finding recorded against this ground as written statement cannot take place of the proof. The Appellate Bench accordingly held that the plaintiff has established additions and alterations of permanent nature without the permission of the plaintiff and the corporation.

16. In paragraph-25, the Appellate Bench considered the ground of nuisance and annoyance and considered two NCs Exhibits-36[1] and 36[5]. Said evidence remained unchallenged. The Appellate Bench, therefore, held that the ground of

nuisance and annoyance is established by the plaintiff.

17. Finally the Appellate Bench considered the ground of reasonable and bonafide requirement in paragraphs-26 and 27. In paragraph-26 it was noted that in his evidence the plaintiff deposed that he has two sons of marriageable age. His younger son is studying Bio-Tech in Elphinstone College, Mumbai and due to insufficient accommodation, he is constrained to go to library for studying. The plaintiffs witness further deposed that he met with an accident in the year 1994 and has become disabled. It is very difficult for him to climb the stair case. As a result thereof, the suit premises on the ground floor will be convenient to him.

18. In paragraph-27 the Appellate Bench noted that in the trial Court's judgment said issue is not at all discussed. Learned trial Judge avoided to discuss on this issue. After considering the evidence on record, the Appellate Bench held that the plaintiff has established that he requires the suit premises reasonably and bonafidely.

19. In paragraph-28 the Appellate Bench held that greater

hardship will be caused to the plaintiff in case the decree of eviction is not passed.

20. After considering the material on record and also after considering the submissions advanced by Mr. Pendse and Mr. Khandeparkar, I do not find that the Appellate Court has committed any error in passing the impugned order. Mr. Pendse did not dispute that the plaintiff's evidence was not challenged by way of cross-examination as also the defendants did not lead any evidence. Mr. Pendse submitted that the plaintiff represented that he will not proceed with the suit against the defendants. Believing on the representations made by the plaintiff, the defendant's Advocate did not participate in the proceedings. It is not possible to accept to this submission for more than one reason. In the first place, defendant No.1 is an estate agent. In other words, he is not a novice. Secondly, the defendants were represented by Advocate. If the plaintiff does not intend to proceed with the suit, naturally the defendant's Advocate would have insisted for disposal of the suit by the trial Court on that ground itself. Mr. Pendse submitted that in any case any order passed in this proceedings will obviously affect

the interest of defendant No.3. Perusal of the Appellate Court's order shows that none appeared for the defendants. Mr. Pendse has not brought to my notice that defendant No.3 has challenged the judgment and decree passed by the appellate Court. In view thereof, I do not find any merit in the submission of Mr. Pendse.

21. In view thereof, no fault can be found with the order passed by the Appellate Bench. Mr. Pendse was not in a position to demonstrate that the impugned order is contrary to the evidence on record or based on no evidence. It cannot be said that the findings recorded by the Appellate Bench are perverse. Merely because another view is possible that itself is no ground for interfering with the impugned order. Hence Civil Revision Application /Writ Petition fails and same is dismissed. Order accordingly.

22. At this stage, Mr. Pendse orally applies for stay of the eviction decree upto 31.5.2016 inclusive of 31.5.2016. He assures that all the adult family members residing with defendant No.1 will file usual undertaking in this Court within one week from today incorporating therein that [i] they are in

possession and nobody else in possession, [ii] so far they have not created third party interest and they will hereinafter neither create third party interest nor part with the possession of suit premises, [iii] they will clear all the arrears within 4 weeks from today, and [iv] in case they are unable to obtain orders from the higher court within this period, they will hand over the vacant and peaceful possession of the suit premises to the plaintiff.

23. Subject to the petitioner filing undertaking in the aforesaid terms within one week from today, the eviction decree should not be executed on or before 31.5.2016. It is made clear that in case the petitioner does not file undertaking within the stipulated period in the aforesaid terms, the stay shall stand vacated without further reference to the Court.

24. Let this Petition be kept for directions on 8.2.2016 for compliance and acceptance of the undertaking.

(R. G. KETKAR, J.)

Deshmane (PS)