

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6873 OF 2016

Balkrishna Dattatraya Galande ... Petitioner
Vs.
Balkrishna Rambharose Gupta and another ... Respondents

Mr. S. M. Gorwadkar, Senior Advocate i/b. Mr. Niranjan A. Mogre for
Petitioner.

Mr. Rakesh Dave for Respondent No.1.

Mr. R. D. Soni i/b. Ram & Co. for Respondent No.2.

CORAM : R. G. KETKAR, J.

DATE : JUNE 23, 2016

ORDER :

Heard Mr. Gorwadkar, learned Senior Counsel for petitioner,
Mr. Dave, learned Counsel for respondent No.1 and Mr. Soni, learned
Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India,
petitioner has challenged the judgment and decree dated 14.08.2014
passed by the learned District Judge-18, Pune in Regular Civil Appeal
No.291 of 2009. By that order, the learned District Judge allowed the
appeal preferred by the respondent No.1, hereinafter referred to as
plaintiff, and quashed and set aside the judgment and decree dated
16.03.2009 passed by the learned Judge, Small Causes Court, Pune in
Civil Suit No.430 of 2004. The learned District Judge decreed the Suit
instituted by the plaintiff and issued injunction restraining the petitioner,
hereinafter referred to as defendant No.1 and respondent No.2,
hereinafter referred to as defendant No.2 or any person on their behalf
from disturbing / obstructing peaceful possession of the plaintiff over
the suit premises consisting of tin sheet, wooden logs and rafters along
with MS pipes, more particularly described in paragraph 1 read with

schedule attached to the plaint (for short 'suit premises').

3. Plaintiff instituted Suit for perpetual injunction restraining the defendants from disturbing the peaceful possession of the plaintiff over the suit premises. Plaintiff came with the case that he was running eating house, a pan shop and was also doing fabrication work in the suit premises. The suit premises were constructed in tin sheet, wooden logs and rafters along with MS pipes. Plaintiff is inducted in the suit premises as a tenant and monthly rent was Rs.55/-. Defendant No.1 is owner and landlord of the suit premises. Plaintiff is inducted in the suit premises in the year 1977. Previously, defendant No.1 had instituted Suit against the plaintiff for recovery of rent and possession. That Suit was withdrawn. Plaintiff repeatedly called upon the defendant No.1 to carry out the necessary repairs. Defendant No.1, however, refused to carry out the repairs. As the defendant No.1 was not willing to effect repairs of the suit premises and wanted plaintiff to vacate the premises forcibly, he applied to the Corporation for effecting the necessary repairs. The Corporation permitted plaintiff to carry out repairs so as to keep the suit premises in tenantable condition. In the month of August 2004, after getting permission from the Corporation, plaintiff started the repairs. On 19.08.2004, defendant No.1 along with some anti-social elements obstructed the plaintiff from carrying out repairs. Plaintiff reported the matter to police. Police did not take any action and it is in these circumstances, plaintiff was constrained to institute the Suit.

4. Defendant No.1 filed written statement at exhibit-31 opposing the Suit. After service of suit summons, defendant No.2 appeared but did not file written statement and suit proceeded 'without written statement' against the defendant No.2. In substance, defendant No.1 contended that plaintiff was in occupation of only one room until the year 1991.

Defendant No.1 instituted Suit for possession against the plaintiff in the Court of Small Causes, Pune. During the pendency of that Suit, settlement was arrived at between plaintiff and defendant No.1 out of Court and plaintiff delivered vacant possession of the suit premises to defendant No.1 and since that time, defendant No.1 is in occupation of the suit premises. The relationship between the parties ceased to exist. Defendant No.1 has executed Development Agreement with defendant No.2. Plaintiff has instituted the present Suit so as to knock out money from the defendants. Defendant No.1, therefore, prayed for dismissal of the Suit.

5. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues and the parties led evidence. After considering the evidence on record, the learned trial Judge dismissed the Suit. Aggrieved by that decision, plaintiff preferred appeal, which is allowed by the impugned order. It is against this decision, defendant No.1 has instituted present Petition.

6. In support of this Petition, Mr. Gorwadkar submitted that earlier, defendant No.1 had instituted Civil Suit No.1004 of 1988 against the plaintiff. During the pendency of that Suit, the parties arrived at settlement out of Court. In pursuance of that settlement, plaintiff handed over possession to the defendant No.1. Defendant No.1, therefore, filed Purshis at exhibit-41 on 23.04.1991 seeking permission to withdraw the Suit. He further submitted that the Suit was disposed of on 26.04.1991.

7. Plaintiff has thereafter instituted the Suit in the year 2004. During the pendency of the present Suit, plaintiff took out application exhibit-5 for injunction restraining the defendants from disturbing his possession. By order dated 17.10.2005, the learned trial Judge rejected the

application. He submitted that the said order was not carried further. In other words, the said order attained finality. He submitted that the learned trial Judge, while dismissing the application, held that plaintiff has not established his possession over the suit premises as on date of the suit. Plaintiff has not established prima facie case. Balance of convenience lies in favour of defendant and irreparable injury or loss will be caused to the defendant in case injunction is granted and no prejudice will be caused to the plaintiff in case the injunction is refused.

8. Mr. Gorwadkar invited my attention to the admissions given by the plaintiff during the course of his cross-examination. In particular, plaintiff admitted that Survey No.37 was included within the limits of the Municipal Corporation in the year 1995. For carrying on business of hotel, two licences are required. He has not taken hotel licence from the Corporation. He has also not obtained licence from the Health Department of the Corporation. He has not produced any licence in the Court. For carrying on business of fabrication, electric connection with phase III is required. However, there is no electric meter. He further admitted that from 1991, plaintiff has not paid rent to the defendant No.1. There is no electricity supply and water supply as also tin shed is not there. He submitted that in paragraph 9, the learned trial Judge has considered these admissions given by the plaintiff. After considering his admissions, the learned trial Judge categorically recorded a finding that probability of the case is that plaintiff is not at all carrying on any business in the suit premises. After the disposal of Civil Suit No.1004 / 1988, he has not paid the rent amount, which establishes the probability in favour of the defendant No.1 that plaintiff has vacated the suit premises and in view thereof, defendant No.1 had withdrawn the Suit. As against this, the appellate Court has glossed over the admissions of the plaintiff during the course of cross-examination.

9. Mr. Gorwadkar further submitted that defendant No.1 has specifically contended that earlier Suit between the parties was settled out of Court as plaintiff handed over possession to the defendant No.1. The relationship between plaintiff and defendant No.1 that of landlord and tenant ceased to exist in 1991. In other words, as defendant No.1 is disputing the status of the plaintiff as a tenant, he should have sought declaration of his legal character. In the absence of any prayer for declaration, Suit for injunction simplicitor is not maintainable. He relied upon the decision of the Apex Court in the case of **Anathula Sudhakar Vs. P. Buchi Reddy, (2008) 4 SCC 594** and in particular paragraph 21 thereof. Mr. Soni supported the petitioner.

10. On the other hand, Mr. Dave supported the impugned order.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute and is rather matter of record that defendant No.1 had earlier instituted Civil Suit No.1004 of 1988 against the plaintiff. In paragraph 3 of the plaint, defendant No.1 specifically asserted that the defendant (plaintiff herein) is a monthly tenant in use and occupation of one room. The tenancy starts from 1st of every English month and ends at the end of the same month. Defendant is monthly tenant @ Rs.55/- per month and other taxes. In other words, defendant No.1 specifically accepted that plaintiff is the monthly tenant of the suit premises.

12. Defendant No.1 has also come with the case that Suit was withdrawn as the controversy between the parties was amicably settled out of Court. Defendant No.1, therefore, withdrew the Suit by filing purshis at exhibit-41 dated 23.04.1991. Perusal of the Purshis shows

that defendant No.1 sought permission to withdraw the Suit unconditionally on the ground that there were some technical defects in the Suit and therefore, he is not interested in prosecuting that Suit. In other words, in the purshis at exhibit-41, defendant No.1 did not come with the case that as plaintiff herein has handed over possession in pursuance of settlement between the parties, he wants to withdraw the Suit. In view thereof, the case made out in the written statement that because of the settlement between the parties, plaintiff herein vacated the suit premises cannot be accepted.

13. Mr. Gorwadkar heavily relied upon order dated 17.10.2005 passed by the learned trial Judge below exhibit-5 in the present Suit. By that order, the learned trial Judge held that plaintiff has failed to establish prima facie case as also balance of convenience does not lie in his favour. Irreparable injury will be caused to the defendant in case injunction is granted. Perusal of this order does not indicate that the learned trial Judge has even remotely referred to Purshis at exhibit-41 filed in Suit No.1004 of 1988. That apart, in paragraph 7, the learned trial Judge thought it appropriate to refer to the Commission Report dated 02.11.1988. However, he did not even bother to consider the circumstances in which the earlier Suit was withdrawn and whether the case pleaded by the defendant No.1 is borne out from that purshis. In any case, the order passed at interlocutory stage in absence of any evidence on record does not advance the case of the defendant No.1.

14. Mr. Gorwadkar submitted that the learned trial Judge has considered the admissions given by the plaintiff in paragraph 9 of the impugned order. With the assistance of the learned Counsel appearing for the parties, I have perused the depositions. The learned trial Judge has considered the evidence of the plaintiff in paragraph 9. However,

the learned trial Judge has totally ignored the admissions given by the defendant No.1 during the course of cross-examination. In particular, defendant No.1 admitted that he has no evidence to substantiate that plaintiff handed over possession to him. As against this, perusal of paragraph 3 of the plaint in Civil Suit No.1004 of 1988 shows that the defendant No.1 herein, who was plaintiff therein, specifically asserted that the defendant (plaintiff herein) is a monthly tenant. Pursis at exhibit-41 filed in that Suit does not indicate that defendant No.1 withdrew the Suit as plaintiff herein vacated and handed over possession of the suit premises to him. Defendant No.1 sought permission to withdraw the Suit unconditionally on the ground that there were some technical defects in the Suit, and therefore, he is not interested in prosecuting that Suit.

15. In paragraph 29 of the impugned order, the learned District Judge has considered the case set up by the plaintiff that he has obtained permission from the Corporation for carrying out repairs. Defendant No.1 though came with the case that plaintiff has abandoned the suit premises, no material is produced to substantiate this plea. In paragraph 9, the learned trial Judge considered the admissions given by the plaintiff during the course of cross-examination. Even if these admissions are considered, at the highest, it will indicate that plaintiff is not carrying on business in the suit premises. It will certainly not substantiate the case of defendant No.1 that plaintiff has abandoned / surrendered suit premises to the defendant No.1. In paragraph 11, the learned trial Judge further observed that the plaintiff vacated the suit premises since the year 1991 and for that reason only, defendant No.1 withdrew Civil Suit No.1004 of 1988. Perusal of the order passed by the learned trial Judge shows that it is totally one sided order without considering the evidence on record. The learned trial Judge also failed

to consider the case made out by the plaintiff while relying upon the so called admissions.

16. As against this, in paragraph 28, the learned District Judge has referred to Purshis at exhibit-41 filed in R.C.S.No.1004 of 1988 and observed that the said document is a crucial document determining the controversy between the parties and that there is nothing on record to reflect that plaintiff has vacated the suit premises in the year 1991 after withdrawal of R.C.S.No.1004 of 1988. Mr. Gorwadkar invited my attention to paragraph 26 of the impugned order to contend that defendant No.1 examined Sandeep Wagh and the learned District Judge has not properly considered his evidence. I do not find merit in this submission. The learned District Judge has considered the cross-examination of this witness wherein he expressed his ignorance in regard to the fact that after the property became dilapidated, plaintiff has obtained permission for its repair from the Corporation. The learned District Judge, therefore, rightly discarded the evidence of Sandeep Wagh. In paragraph 29, the District Court considered the case set up by the plaintiff that he has obtained permission from the Corporation and while carrying out repairs, plaintiff obstructed. In paragraph 36, the learned District Judge also dealt with the evidence of Sandeep Wagh, which was relied by the trial Court.

17. After considering the evidence on record and findings recorded by the Courts below, I do not find that the learned District Judge has committed any error in allowing the Appeal. Mr. Gorwadkar relied upon the decision of the Apex Court in the case of Anathula Sudhakar (supra) to contend that when there is a cloud raised over the plaintiff's title and that he is not in possession, he has to seek declaration as also relief of possession. In other words, the Suit instituted by the plaintiff

for injunction simplicitor is liable to be dismissed. I do not find any merit in this submission as well. As noted earlier, defendant No.1 accepted that plaintiff is a monthly tenant as is evident from paragraph 3 of R.C.S.No.1004 of 1988. I have already dealt with purshis at exhibit-41 filed in Suit No.1004 of 1988 and held that the case made out by the defendant No.1 in the written statement that plaintiff vacated the suit premises in view of the settlement between the parties out of Court is not acceptable. In other words, there is no cloud over the status of the plaintiff and that is sought to be created by the defendant No.1 to suit his convenience. In other words, plaintiff is a tenant. Defendant No.1 has failed to establish that he has vacated the suit premises. Defendant No.1 admitted during the course of cross-examination that he has no proof to substantiate that plaintiff has vacated the suit premises. It is in these circumstances, Suit instituted under Section 38 of the Specific Relief Act, 1963 is perfectly maintainable. The reliance placed by Mr. Gorwadkar on the decision in the case of **Anathula Sudhakar** (*supra*) does not advance the case of the defendant No.1. In the present case, I have already held that defendant No.1 accepted plaintiff as a monthly tenant. In other words, there is no cloud over the status of the plaintiff. Defendant No.1 was not in a position to demonstrate that the findings recorded by the appellate Court are based on no evidence or that they are contrary to the evidence on record. Defendant No.1 was also not in a position to demonstrate that on the basis of evidence on record, no reasonable or prudent person would have reached the conclusions arrived at by the appellate Court. No case is made out by the defendant No.1 for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)