IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7197 OF 2016

Alfred Sebastian D'Aguiar (since deceased)
and othes … Petitioners
v/s
Shri Mohammed Hussain (since deceased)
and another … Respondents

Mr S.A. Jabbar i/b Mr Tanvir Abdul Hamid Shaikh for Petitioners.
Mr Kunal Mehta with Mr S. Iyer i/b M/s Ganesh and Co. for Respondents.

CORAM : RAJESH G. KETKAR, J.

DATE : 24th NOVEMBER, 2016.

P.C. :-

1. Heard Mr Jabbar, learned counsel for the Petitioners and Mr Kunal Mehta, learned counsel for the Respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the Petitioners, hereinafter referred to as the Plaintiffs, have challenged the judgment and order dated 21st April 2016 passed by the learned Judge, City Civil Court, Greater Mumbai in Notice of Motion No.961 of 2016 in S.C. Suit No.2429 of 1995. By that order,

the learned Trial Judge rejected the Motion taken out by the Plaintiffs for striking out paragraph Nos.1, 3, 5 to 25 and 27 referred to in the affidavit in examination-in-chief of Defendant No.2 dated 10th February 2009.

3. The Plaintiffs instituted a Suit against the Respondents (hereinafter referred to as the Defendants) inter alia praying for a declaration that the Defendants are trespassers and for possession of the suit premises. The Plaintiffs came with the case that the suit premises was given to the Defendants for conducting the business of the Plaintiffs. The Defendants resisted the Suit by filing written statement inter alia contending that the suit premises was let out to their father and after the death of their father, they have become tenants in respect of the suit premises. On the basis of pleadings of both the parties, on 21st April 2003, the learned Trial Judge framed the following issues :-

> "1) Whether the plaintiffs prove that the defendants were given the business of the plaintiffs for conducting in the manner set out in the plaint ?
>
> 2) Whether the defendants prove that they had a transaction of tenancy with the plaintiffs as pleaded

by them in the written statement ?

3) Whether the suit such as it is framed is within the jurisdiction of this court ?

4) What relief if any is the plaintiffs entitled to ?

5) What relief, cost and decree ?"

4. By order dated 22nd July 2013 in Notice of Motion No.1568 of 2013, the learned Trial Judge struck out Issue No.2 extracted hereinabove. By order dated 17th June 2015 in Notice of Motion No.4404 of 2014, the learned Trial Judge struck out Issue No.3 extracted hereinabove.

5. By subsequent order dated 6th December 2012, below Exh.34, the learned Trial Judge framed following additional issues :-

"6) Whether the Plaintiffs proved that the Defendants are trespassers in the suit premises ?

7) Whether the Plaintiffs prove that they are entitled to possession of the suit premises ?"

6. The Plaintiffs instituted Writ Petition No.9269 of 2016 in

this Court challenging the orders dated 17th August 2015 and 19th August 2015. During the court of hearing of that Petition, the Plaintiffs prayed for liberty to take out appropriate proceedings for striking out evidence dealing with issue Nos.2 and 3. While disposing of the Petition, accordingly liberty was reserved to the Plaintiffs. Petition was also disposed of after recording the statement of the Plaintiffs that they will cross-examine Defendants on affidavit of evidence Exh.20. The Plaintiffs therefore took out Notice of Motion No.961 of 2016 for rejecting affidavit of examination-in-chief of Defendant No.2 dated 10th February 2009 and in the alternative for striking out paragraphs Nos.1, 3, 5 to 25 and 27 of that affidavit and paragraphs Nos.2, 4 and 26 being irrelevant and inadmissible. On behalf of the Defendants, Defendant No.2 filed reply opposing the motion. The learned Trial Judge has rejected the Notice of Motion. It is against this order that the Plaintiffs have instituted the present Petition.

7. In support of this Petition, Mr Jabbar invited my attention to the issues framed by the learned Trial Judge on 21st April 2003 and more particularly, issue Nos.2 and 3. He also invited my attention to the

order dated 22nd July 2013 striking out issue No.2 and order dated 17th June 2015 striking out Issue No.3. He submitted that by Issue No.2, the burden was cast on Defendant No.2 that they had a transaction of tenancy with the Plaintiffs as stated by them in the written statement. Issue No.3, was framed as to whether the Civil Court has jurisdiction to entertain and try the Suit. He submitted that as the Defendants did not challenge orders striking out Issue Nos.2 and 3, the said orders attained finality. The learned Trial Judge should have allowed the Notice of Motion thereby striking out certain portion of affidavit in examination-in-chief of the Defendants. He invited my attention to paragraph 10 of the Petition as also Order 18 Rule 15 of CPC. In paragraph 10 of the Petition, order dated 5th February 2008 was quoted. Roznama records that Defendant's Advocate is absent throughout for one reason or other and the Plaintiff is present for cross examination, her affidavit and documents goes unchallenged. Case to proceed further. In other words, he submitted that the evidence adduced by the Plaintiffs remained unchallenged. He relied upon the decision of this Court in the case of Rajendra Singh Chhatrasal Singh Kushwaha v/s Jitendra Singh Rajendra Singh Kushwah and others, 2013 (6) Mh.L.J. 802 to contend

that only such evidence which is relevant in support of the issues, the party is bound to prove such issues. Any evidence which is not relevant to the issues involved, can be considered as irrelevant. The Court is empowered to stop parties from leading evidence to the issue which is not relevant for deciding the suit. For all these reasons, he submitted that the impugned order deserves to be set aside.

8. On the other hand, Mr Mehta supported the impugned order. He contended that in view of additional issue No.6, the Defendants are entitled to lead evidence to substantiate pleas raised in the written statement as regards tenancy. He therefore submitted that no case is made out for setting aside the impugned order.

9. I have considered the submissions advanced by the parties. I have also perused the material on record. As noted earlier, Issue No.2 was deleted on 22nd July 2013. Issue No.3 was deleted on 17th June 2015. In the meantime, on 6th December 2012, the learned Trial Judge, the learned Trial Judge framed additional issues extracted hereinabove. By Issue No.6, Plaintiffs have to prove that the Defendants are trespassers in the suit premises. As against this,

in the written statement, the Defendants have specifically pleaded the case of tenancy. By Issue No.7, the Plaintiffs have to prove that they are entitled to possession of the suit premises. It is in this context, the learned Trial Judge has observed in paragraph 14 that even if the burden is cast on the Plaintiffs as regard Issue No.6 to establish that Defendants are trespassers, the burden is on the Defendants to establish their defence viz. of tenancy. On one hand, the Plaintiffs assert that the Defendants were given their business office on the basis of conducting agreement, on the other. The Defendants came with the defence that they are tenants. In that context, the learned Trial Judge observed that even if Issue No.2 casting burden on Defendants to prove tenancy was deleted, they cannot deprive raising defence or counter case of the Plaintiffs so as to rebut the issue framed in favour of the Plaintiffs casting burden on the Plaintiffs to disprove the case of the Plaintiffs. In my opinion, the learned Trial judge was perfectly justified in observing that the Defendants cannot be deprived of leading evidence to substantiate their plea taken in the written statement.

10. Mr Jabbar invited my attention to prayer clause (c) which

reads thus :-

> "(c) that this Hon'ble Court be pleased to exercise its supervisory jurisdiction under Article 227 of the Constitution of India by directing the learned City Civil Court Judge to pass the decree in favour of the Petitioners."

11. Perusal of the extracted prayer shows that the Plaintiffs have sought direction to the learned Trial Judge to pass a decree in their favour. The said prayer cannot be considered while deciding the correctness of the impugned order. Hence no relief in terms of prayer clause (c) can be granted while exercising powers under Article 227 of the Constitution of India.

12. For the reasons recorded in paragraph 14 of the impugned order, no case is made out by the Petitioners for invoking writ jurisdiction under Article 227 of the Constitution of India. Petition fails and is dismissed. No order as to costs.

13. However, it is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as

a ground of objection in the proposed proceedings as contemplated by Section105(1) C.P.C.

(RAJESH G. KETKAR, J.)