

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8421 OF 2014

Maltabai Madhav Sathe (decd) through LR
Shrikrishna Madhav Sathe ... Petitioner
Vs.
Pushpa Moreshwar Patankar and others ... Respondents

Mr. A. A. Kumbhakoni, Senior Advocate a/w. Mr. T. D. Deshmukh for
Petitioner.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 01, 2016

P.C. :

Heard Mr. Kumbhakoni, learned Senior Counsel for petitioner at
length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.1' has challenged the judgment and decree dated 20.09.2006 passed by the learned 2nd Additional Judge, Small Causes Court, Pune in Civil Suit No.333 of 2004 as also the judgment and decree dated 09.04.2014 passed by the learned Extra Joint Ad-hoc District Judge-1, Pune in Civil Appeal No.11 of 2007. By these orders, the Courts below decreed the Suit instituted by the respondent No.1, hereinafter referred to as 'plaintiff', and declared that plaintiff is entitled to premises equivalent to the tenanted premises of 320 sq.ft. area in the property, which is to be constructed in CTS No.504, Narayan Peth, Pune, more particularly described in Schedule I of the plaint among other directions. The parties shall hereinafter be referred to as per their status in the trial Court.

3. Respondent No.1 - plaintiff instituted Suit against the petitioner -

defendant No.1 and respondent No.2 - defendant No.2 and respondents No.3 and 4 - defendants No.3 and 4 respectively inter alia contending that defendant No.1 is the owner of CTS No.504, Narayan Peth, Pune. Defendant No.4 is the owner of CTS No.574. Plaintiff's husband Moreshwar Patankar was a monthly tenant in respect of three rooms admeasuring about 320 sq.ft. (carpet area) on the first floor of CTS No.504, Narayan Peth, Pune.

4. Defendant No.1 wanted to develop the said property and carry out construction of ownership flats. Defendants No.1 and 2 represented to all the tenants including the plaintiff to co-operate with them by handing over possession of their respective tenanted premises and thereby undertook and agreed to provide new premises in the newly constructed building. It was represented that properties i.e. CTS No.504 and CTS No.574 owned by defendants No.1 and 4 would be amalgamated. Defendant No.1 executed Development Agreement on 24.09.1996 in respect of CTS No.504 in favour of defendant No.2 as also executed a Power of Attorney on 07.10.1996. Plaintiff entered into registered agreement with defendant No.2 on 05.09.2002 whereunder defendant No.2 agreed to provide flat No.11-B admeasuring 362 sq.ft.

5. Plaintiff further contended that defendant No.2 entered into the relationship with the defendant No.3, which was not disclosed to the plaintiff. Defendants No.2, 2(a) and 2(b) assigned their rights to the defendant No.3. Plaintiff contended that she is a tenant in respect of 320 sq.ft. carpet area and thus, is entitled to get equivalent tenanted premises. Defendants No.1 to 3 are bound to provide an equivalent premises to the plaintiff. Her tenancy was never terminated and she continues to be a tenant. On these among other grounds, plaintiff filed Suit inter alia for declaration that plaintiff is entitled to premises

equivalent to the tenanted premises of 320 sq. ft. (carpet); for mandatory injunction directing defendants No.1 to 3 to provide an equivalent tenanted premises of 320 sq.ft. (carpet) to the plaintiff as a tenant in the newly constructed building and to earmark the premises equivalent to 320 sq.ft.

6. Defendants No.1 and 4 filed written statement opposing the Suit. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led evidence. After considering the evidence on record, the Courts below decreed the Suit as indicated earlier. It is against these decisions, defendant No.1 has instituted the present Petition.

7. Mr. Kumbhakoni has taken me through the - (i) Development Agreement dated 24.09.1996 between defendant No.1 and defendant No.2. He submitted that defendant No.2 took the responsibility of negotiating and entering into agreements with the tenants including the plaintiff for developing CTS No.504. Defendant No.2 also agreed that in case any dispute arises in future, he will be responsible for the costs and consequences and that under no circumstances, defendant No.1 will be responsible. Defendant No.2 indemnified defendant No.1. The agreement further provided that defendant No.2 undertook entire responsibility of all the tenants and was also authorized to recover rent, to issue a rent receipt, maintain the property and in case need arises, to institute the Suit against the tenants and recover possession thereof. Defendant No.1 will not be responsible in that process; (ii) Special Power of Attorney dated 07.10.1996 executed by the defendant No.1 in favour of defendant No.2 inter alia authorizing defendant No.2 to sign and submit building plan to Pune Municipal Corporation in respect of CTS No.504, Narayan Peth, Pune; to sign and submit the prescribed

necessary application forms and bonds along with the plan to the Pune Municipal Corporation. Defendant No.1 undertook to confirm and ratify the acts of the Power of Attorney; and (iii) agreement dated 05.09.2002 entered into between plaintiff and defendant No.2. He submitted that though the defendant No.1 is apparently made party in the agreement, defendant No.1 has not signed the said agreement. Under the agreement, defendant No.2 agreed to convert the tenancy rights into ownership rights of the tenants and he had assured the tenants that he will obtain building permission as also occupation certificate from Pune Municipal Corporation.

8. Mr. Kumbhakoni also invited my attention to the admissions given by the plaintiff in paragraphs 10 to 12 of the cross-examination, which are to the following effect:

10] ... I had seen development agreement executed in between defendant no.1 & 2. It is true that Mrs. Malathibai Sathe has not executed any agreement with me. It is true that I have filed present suit for possession of flat on the basis of the agreement executed by deft no.2 in my favour. It is true that at the time of my negotiation with deft no.2 Mrs. Malathibai Sathe was not present. It is true that I have no negotiations with deft no.1 as regards my flat.

11] It is true that at the time of negotiation with deft no.2, I have not verified the fact that deft. no.1 has executed power of attorney in favour of deft no.2. It is true that deft no.1 has not made any agreement with me for handing over any flat. It is true that I handed over possession of my tenanted premises to deft no.2. It is true that said transaction took place in between me and deft no.2. It is true that in the present transaction, I have no talk with deft no.1. it is true that I met deft no.1, 8 to 10 years back, before my negotiations with deft no.2. I have no complaint and demand against deft. no.1. It is true that the alternate premises was not provided to me by deft no.1. It is true that deft no.1 has not assured me to give new premises in newly constructed building.

12] I have not read over written statement ready by deft no.1 in the present suit. It is true that deft no.1 had not accepted any kind of liability towards me. It is true that I have not paid any amount to deft no.1. I cannot state that I impleaded deft no.1 in the present suit unnecessarily."

9. According to Mr. Kumbhakoni plaintiff gave fatal admissions.

Relying upon these admissions, he submitted that there is no privity of contract between plaintiff and defendant No.1. Defendant No.1 is not under any obligation to provide alternate accommodation to the plaintiff. It is the entire responsibility of defendant No.2 to comply with the obligations conferred on him by virtue of agreement dated 05.09.2002. Defendant No.1 is not party to the said agreement and consequently, she is not liable to provide alternate accommodation to the plaintiff. Courts below committed serious error in decreeing the Suit against defendant No.1. Courts below were not justified in directing the defendant No.1 along with defendants No.2 and 3 to provide equivalent tenanted premises of 320 sq.ft. to the plaintiff as a tenant in the newly constructed building.

10. Mr. Kumbhakoni submitted that it is impossible for defendant No.1 to comply the decrees passed by the Courts below. He further submitted that perusal of the plaint clearly shows that plaintiff has instituted Suit for specific performance of agreement dated 05.09.2002 to which defendant No.1 is not a party. In view thereof, Small Causes Court will have no jurisdiction to entertain and try the Suit.

11. I have considered the submissions advanced by Mr. Kumbhakoni. I have also perused the material on record. The short question that arises in the present case is whether the tenancy of plaintiff is extinguished after the execution of the agreements and after demolition of the structure standing in CTS No.504. The answer to this question is emphatically in the negative. It is not in dispute that defendant No.1 gave development rights to the defendant No.2 by executing agreement on 24.09.1996. Defendant No.2 undertook to negotiate and enter into agreements with the tenants. On 07.10.1996, defendant No.1 also executed Special Power of Attorney in favour of the defendant No.2

inter alia authorizing him to sign and submit building plan to Pune Municipal Corporation as also to sign and submit necessary application forms and bonds along with the plan to the Pune Municipal Corporation. The Special Power of Attorney also recited that all acts, deeds and things lawfully done by the defendant No.2 for the aforesaid purposes shall be construed as acts, deeds and things done by the defendant No.2. She undertook to confirm and ratify that whatever defendant No.2 shall do or cause to be done by virtue of the Power of Attorney.

12. It is also not in dispute that plaintiff and defendant No.2 entered into agreement on 05.09.2002. Defendant No.1 is also shown as party to the said agreement. Defendant No.2 is referred as 'promoter' which expression shall include "all the partners, their heirs, executors and administrators". Defendant No.1 and defendant No.2 as also M/s. Chandak Ranka More - defendant No.4 were collectively referred as 'landlords'. The expression 'landlord' is to include "their heirs, power of attorney, administrator". The said agreement refers to the development agreements dated 24.09.1996 entered into between defendant No.1 and defendant No.2 as also agreement dated 31.03.1996 entered into between defendant No.2 and owners of CTS No.574. The agreement also refers to Power of Attorney dated 07.10.1996 executed by defendant No.1 in favour of defendant No.2 and agreement dated 19.09.1996 executed by owners of CTS No.574 in favour of defendant No.2. Perusal of this agreement shows that it was agreed between the parties therein that the tenancy rights will be converted into ownership rights. Defendants No.2 and 4 in capacity as promoters agreed and assured that they will complete the construction as per the sanctioned plans and also obtain occupation certificate. Insofar as plaintiff is concerned, it was agreed that plaintiff will be given flat No.11-B having built up area of 34.64 sq.mtrs. on the ownership basis on the second

floor. In particular, clause 6 thereof specifically recorded that till such time plaintiff is allotted flat in the newly constructed building, her tenancy rights will remain unaffected. After plaintiff is handed over possession of new flat, she will become owner of the said flat and her tenancy rights will be extinguished.

13. Defendant No.2 being a power of attorney holder of defendant No.1 is covered by the expression 'landlord'. In view of the recitals of the Power of Attorney dated 07.10.1996, acts of defendant No.2 are to be treated as acts of defendant No.1. Defendant No.1 agreed to confirm and ratify the acts of defendant No.2. The execution of agreement by defendant No.1 with plaintiff and defendant No.4 was in furtherance of Power of Attorney dated 07.10.1996 for development of CTS No.504. Defendant No.1 cannot now turn around and disown the actions of defendant No.2 on the ground that they are not binding on her. She also cannot claim that in view of the agreement dated 24.09.1996 between her and defendant No.2, defendant No.2 alone is responsible to provide alternate accommodation. Defendant No.1 cannot contend that she is not liable to provide alternate accommodation. Defendant No.1 has not established that plaintiff has either surrendered her tenancy rights or that defendant No.1 has obtained eviction decree against the plaintiff. In other words, tenancy rights of the plaintiff are not extinguished. Defendants No.1 to 3 are liable to provide to the plaintiff premises equivalent to the tenanted premises of 320 sq.ft. (carpet) as a tenant in the newly constructed building by earmarking the premises equivalent to 320 sq.ft.

14. In the case of ***Shaha Ratansi Khimji and Sons Vs. Proposed Kumbhar Sons Hotel P. Ltd.***, (2014) 14 SCC 1, the Apex Court has considered the decision in the cases of ***Vannattankandy Ibrayi Vs.***

Kunhabdulla Hajee, (2001) 1 SCC 564 and **T. Lakshmipathi Vs. R. Nithyananda Reddy, (2003) 5 SCC 150**. In paragraph 27, the Apex Court opined that the decision rendered in **Vannattankandy Ibrayi** (*supra*) does not correctly lay down the law and accordingly overruled the said decision and approved the decision in **T. Lakshmipathi** (*supra*). The Courts below have held that the tenancy rights of the plaintiff are not extinguished and are subsisting. These findings are supported by clause 6 of the agreement dated 05.09.2002. Mr. Kumbhakoni submitted that defendant No.1 is not party to the said agreement. It is not possible to accept this submission. Defendant No.1 admittedly given power of attorney to the defendant No.2 on 07.10.1996. She also agreed and ratified the acts of the defendant No.2. Thus, defendants No.1 and 2 are liable to provide alternate accommodation to the plaintiff in the newly constructed building. As the tenancy rights of the plaintiff are not extinguished and are subsisting, the relationship of landlord and tenant subsists. The Court of Small Causes will alone have jurisdiction to entertain and try the Suit. It is also relevant to note that defendants No.2 and 3 did not challenge the order of the trial Court by filing appeal as also order of the appellate Court by instituting Writ Petition in this Court. The Courts below rightly directed defendants No.1 to 3 to provide equivalent tenanted premises of 320 sq.ft. to the plaintiff as a tenant.

15. It also cannot be said that the Suit instituted by the plaintiff was for the specific performance. The Suit was essentially between the landlord and tenant for recovery of possession. In view thereof, I do not find any merit in this Petition. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)