

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11277 OF 2016

Vijaya Ashok Suryavanshi ... Petitioner
Vs.
Mukesh Harilal Shidhpura ... Respondent

Mr. Sachin C. Raje for Petitioner.
Mr. A. S. Khandeparkar a/w. Mr. Prerak Sharma, Mr. Amogh Karandikar and
Mr. Rajdeep Gade i/b. Khandeparkar & Associates for Respondent.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 06, 2016

P.C. :

Heard Mr. Raje, learned Counsel for the petitioner and
Mr. Khandeparkar, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.3' has challenged the judgment and decree dated 26.03.2015 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 Court decreed the Suit instituted by respondent, hereinafter referred to as 'plaintiff', and quashed and set aside the judgment and decree dated 26.04.2012 passed by the learned Judge presiding over Court Room No.17 of the Court of Small Causes, Mumbai in R.A.E.Suit No.1136/1777 of 2005 and directed the defendants to handover the vacant and peaceful possession of rooms No.1, 2, 4 and a room under staircase, situate on the ground floor, Gurukrupa Building No.3, Khetwadi, 4th Lane, Mumbai 400 004 to the plaintiff within 60 days from the date of the order. The appellate Court also restrained the defendants from creating third party interest and parting with possession of the suit premises.

3. In support of this Petition, Mr. Raje submitted that plaintiff had instituted Suit against defendant No.1 - Mohan Raghunath Suryavanshi, defendant No.2- Parvati Raghunath Suryavanshi and defendant No.3- Vijaya Ashok Suryavanshi. Defendant No.1 is a son of defendant No.2. Defendant No.2 had one more son by name Ashok, who died in the year 1999 leaving behind defendant No.3 and daughter Kadambari born on 22.06.1982. Plaintiff instituted Suit in the year 2005 without impleading Kadambari, who was major on the date of filing of the Suit. Suit was dismissed by the trial Court on 26.04.2012. Aggrieved by that decision, plaintiff presented appeal on 25.06.2012. Defendant No.2 Parvati died on 23.07.2012. He submitted that defendant No.2 Parvati died leaving behind other legal representatives namely, Prakash Raghunath Suryavanshi, son of defendant No.2 and Kadambari Ashok Suryavanshi, daughter of defendant No.3. However, they were not brought on record. He submitted that in any case, Kadambari was residing in the suit premises along with her mother i.e. defendant No.3. Plaintiff deleted defendant No.2 on the ground that her legal representatives namely defendants No.1 and 3 are already on record. As the other legal representatives were not impleaded, the appellate Court should have dismissed the appeal. He also relied upon the decision of the Apex Court in the case of ***Ram Sakal Singh Vs. Mosamat Monako Devi, (1997) 5 SCC 192***, and in particular paragraph 12 thereof. He submitted that the appellate Court should have dismissed the appeal on the ground of abatement.

4. On the other hand, Mr. Khandeparkar supported the impugned order. He submitted that pending appeal, plaintiff had filed application at exhibit-8 on 06.03.2013 setting out therein that plaintiff learnt about the death of defendant No.2. He is not aware about legal representatives of defendant No.2. He addressed a letter dated 25.01.2013 to the defendant

No.1 Mohan Suryavanshi by R.P.A.D. and also delivered the same by hand delivery. Defendant No.1 acknowledged the letter, which was sent by the hand delivery. He also signed postal acknowledgment. Till date, defendant No.1 neither sent any reply nor disclosed names and address of heirs and legal representatives of defendant No.2. Plaintiff therefore, prayed for deleting name of defendant No.2 and amending the appeal memo for incorporating Defendant No.2A as unknown and unnamed heir and legal representative of defendant No.2. It was further contended that defendant No.1 is the son of the defendant No.2. He is already on record.

5. Mr. Khandeparkar invited my attention to Bailiff's report dated 22.03.2013. In that report, Bailiff stated that he went to serve copy of the notice along with the copy of the application to the unknown and unnamed heirs and legal representatives of defendant No.2 on 22.03.2013 at about 5.45 p.m. He did not find any unknown and unnamed heirs and legal representatives of defendants No.2. On his inquiries with defendant No.1 Mohan Suryavanshi, Bailiff was informed that there is no unknown and unnamed heirs and legal representatives of defendant No.2 except himself (i.e. defendant No.1).

6. Mr. Raje submitted that the Bailiff had not served copy of the application on defendant No.3. Mr. Khandeparkar submitted that plaintiff thereafter filed application exhibit-10 on 17.10.2014 to the effect that he is not pressing the application at exhibit-8 for amending the appeal memo by deleting defendant No.2 and adding unknown and unnamed heirs and legal representatives of defendant No.2 as defendant No.1 is the son and defendant No.3 is daughter in law of defendant No.2 and they are already on record. He, therefore, submitted that estate of defendant No.2 Parvati is represented by both defendants No.1 and 3.

Apart from that, though appeal was duly served on defendant No.3, defendant No.3 did not enter appearance and point out that apart from defendants No.1 and 3, defendant No.2 died leaving behind other legal representatives. He submitted that as the estate of defendant No.2 is represented by defendants No.1 and 3, it cannot be said that appeal is liable to be dismissed as abated. He also relied upon the order dated 01.02.2016 passed by this Court in Writ Petition No.4672 of 2015. That Petition was instituted by defendant No.1 challenging the very order passed by the appellate Court. By order dated 01.02.2016, after hearing both sides, Petition was dismissed. In pursuance of that order, the matter was placed on 11.02.2016 for reporting compliance. On behalf of the petitioner in that Petition, it was stated that all the adult family members residing in the suit premises are not willing to file undertaking. In view thereof, stay was vacated and plaintiff was at liberty to proceed with the matter in accordance with law.

7. Apart from that, Mr. Khandeparkar submitted that suit premises were let out to Rajaram Raghoji Suryavanshi, since deceased. It is a case of a single tenancy. As against this, Mr. Raje submitted that defendant No.3 issued rent receipts in respect of room No.4 in her individual capacity. Mr. Khandeparkar submitted that these rent receipts were not produced in the Courts below. Mr. Raje did not dispute this position. In view thereof, the rent receipts produced at exhibit-A colly cannot be considered.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit against the defendants for recovery of possession of the suit premises inter alia on the ground of - (i) non-user of room No.2 and the room under the

staircase [Section 16(1)(n)]; (ii) defendants No.1 and 2 have erected permanent structure in room No.2 without consent of the landlord [Section 16(1)(b)]; (iii) defendant No.1 is guilty of conduct which is a nuisance and annoyance to the plaintiff, his family and other tenants of the building [Section 16(1)(c)] as also (iv) plaintiff requires the suit premises reasonably and bonafide for occupation by himself and his family members [Section 16(1)(g)]. Defendant No.3 is in possession of room No.4 out of suit premises.

9. Perusal of the trial Court's order shows that defendants No.1 and 2 filed their joint written statement. Defendant No.3 though was served, did not file written statement. Defendant No.3 did not participate in the trial. The Suit was dismissed by the learned trial Judge on 26.04.2012. Aggrieved by that decision, plaintiff preferred appeal. It is not in dispute that defendants were duly served with the appeal. Despite that, defendant No.3 did not enter appearance and also did not participate before the appellate Court. Appeal was preferred on 25.06.2012. It appears that defendant No.2 died on 23.07.2012 that is to say immediately after filing of the appeal. Plaintiff filed application exhibit-8 on 06.03.2013 for amending the appeal memo thereby deleting respondent No.2-defendant No.2 Parvati and adding respondent No.2(A) namely, unknown and unnamed heirs and legal representatives of respondent No.2, residing at rooms No.1 and 2, ground floor, Gurukrupa Building No.3, Khetwadi, 4th Lane, Mumbai 400 004. Perusal of this application shows that on 25.01.2013, plaintiff had addressed a letter to the defendant No.1 Mohan Suryavanshi requesting him to furnish the death certificate of defendant No.2, names of all heirs and legal representatives, their ages, present addresses and relation with defendant No.2. The said letter was duly served on defendant No.1 Mohan Suryavanshi by R.P.A.D. as also by hand delivery. Defendant No.1

however did not furnish the details as sought by letter dated 25.01.2013. Perusal of the application further shows that plaintiff contended that defendant No.1 being the son of defendant No.2 is already on record. On 06.03.2013, the Registry of the appellate Court issued summons. In pursuance thereof, Bailiff tried to serve unknown and unnamed heir of respondent No.2 / defendant No.2 Mrs Parvati Raghunath Suryavanshi. On 22.03.2013, Bailiff submitted report to the effect that he visited the suit premises along with notice as also copy of the application for effecting service on respondent No.2(A) i.e. unknown and unnamed heirs and legal representatives of respondent No.2 Mrs. Parvati Raghunath Suryavanshi on 22.03.2013 at about 5.45 p.m. But unknown and unnamed legal representatives of respondent No.2 were not found. On his inquiry with defendant No.1-Mohan, he was informed that there is no unknown and unnamed heirs and legal representatives of respondent No.2 except respondent No.1-defendant No.1. Mr. Raje submitted that the said summons was not served on defendant No.3. The said submission is devoid of any substance. The summons was sought to be served on unknown and unnamed heirs and legal representatives of respondent No.2. Perusal of the report shows that on inquiry, Bailiff was informed by defendant No.1 that there was no unknown and unnamed heirs of respondent No.2 excepting respondent No.1. Plaintiff thereafter filed application at exhibit-10 on 17.10.2014 for not pressing the application at exhibit-8 filed for amending the appeal memo on the ground that defendant No.2 died during the pendency of the appeal and defendant No.1 being her son and defendant No.3 being her daughter in law are already on record. As noted earlier, defendant No.3, despite service did not appear in the appeal.

10. Mr. Raje relied upon the decision of the Apex Court in the case of **Ram Sakal Singh** (*supra*), and in particular paragraph 12 thereof.

Perusal of paragraph 12 in fact shows that the Apex Court observed that the salutary principle to bring on record the legal representative/representatives is to have the estate of the deceased in the litigation represented in the absence of which the Court would not be able to pronounce upon the rights of the deceased vis-a-vis parties to the Suit. It is, therefore, one of the duties of the Counsel to ensure proper representation by a legal representative of the estate of the deceased. In the present case, it is evident that plaintiff has taken due care and caution for bringing legal representatives of defendant No.2 on record. That apart, defendant No.1 and defendant No.3 are the heirs and legal representatives of defendant No.2 who are already on record. Thus, the estate of defendant No.2 is sufficiently represented before the Court. In view thereof, it cannot be said that the appeal stood abated as legal representatives of defendant No.2 were not brought on record.

11. After perusing the impugned order, it is evident that the appellate Court has considered the ground of non-user from paragraphs 18 to 22. The appellate Court considered decision in ***Kanta Goel Vs. B. P. Pathak***, AIR 1977 SC 1599 and held that one of the co-owners can maintain the Suit for eviction. In paragraph 22, the appellate Court observed that when the entire evidence of the plaintiff is unchallenged, there was no necessity for the trial Court to put further condition on the plaintiff to establish the case. The appellate Court accordingly held that plaintiff has established the ground of non-user. As far as the ground of additions and alterations of permanent nature are concerned, the appellate Court has considered this in paragraph 23. After considering the evidence of the plaintiff, which remained unchallenged, the appellate Court held that defendants have carried out additions and alterations of the permanent nature without prior permission of the plaintiff and the Corporation. In paragraph 25, the appellate court considered the ground

of nuisance and annoyance and also considered two N.C. Complaints produced by plaintiff at exhibits 36(1) and 36(5). The said evidence remained unchallenged. Accordingly, the appellate Court held that ground of nuisance and annoyance is established by the plaintiff. In paragraphs 26 and 27, the appellate Court considered ground of reasonable and bonafide requirement. The question of comparative hardship was considered in paragraph 28. After considering the evidence on record, the appellate Court decreed the Suit on that ground also.

12. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

13. At this stage, Mr. Raje orally prays for stay of this order for a period of eight weeks from today. He states that petitioner is in possession of room No.4 and nobody else is in possession. Petitioner has neither created third party interest nor parted with possession and Petitioner will hereafter neither create third party interest nor part with possession. He assures that the petitioner and all adult family members residing in room No.4 will give usual undertakings in this Court within one weeks from today with advance copy to other side, incorporating therein:

- (i) that they are in possession of room No.4 and nobody else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interest nor part with possession;
- (iv) that they will pay arrears of rent within 1 week from today to

the respondent;

(v) that they will not apply for further extension of time;

(vi) that in case they are unable to obtain suitable orders from higher Court within 8 weeks from today, they will vacate and hand over vacant and peaceful possession of room No.4 to the respondent.

14. In view thereof, notwithstanding dismissal of Writ Petition, this order shall remain stayed for a period of eight weeks from today subject to the petitioner and all adult family members residing in room No.4 filing undertakings in the aforesaid terms within one week from today and serving copy in advance to other side. It is made clear that in case arrears upto and inclusive of 8 weeks from today are not paid as also the undertaking in the aforesaid terms is not filed within one week from today, the interim order shall stand vacated without further reference to the Court.

15. List the Petition for reporting compliance after two weeks.

(R. G. KETKAR, J.)

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