

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10899 OF 2015

Shri Ashok Vishnu Jori and Ors. Petitioners
Vs
Smt. Padma Pandurang Shinde
and Anr. .. Respondents

Mr. G.S.Godbole, Senior Advocate, i/b Mr. Girish R. Agrawal, for
Petitioners.

Mr. Sanjay Kshirsagar, Advocate for Respondents no. 1 and 2.

Mr. Vishwanath Patil, Advocate for Respondent no.3.

CORAM : R.G.KETKAR,J.
DATE : 21/04/2016

PC:

1. Heard Mr.G.S.Godbole, learned senior counsel for the petitioners, Mr.Sanjay Kshirsagar, learned counsel for respondents no.1 and 2 and Mr. Vishwanath Patil, learned counsel for respondent no. 3 at length.

2. Rule. Learned counsel for the respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 21.8.2015 passed by the learned 3rd Jt. Civil Judge, Jr.Dn., Pune below Exhibit 43 in Misc.Civil Application No.987 of 2014. By that order, the learned trial Judge rejected the application made by the petitioners under Order 39, Rule 4 of C.P.C for

variation of the order dated 4.12.2014 passed by the learned trial Judge below Exhibit-5. The learned trial Judge recorded that Advocate for the defendants made a fair proposal for amicable settlement and in view of Section 89 of C.P.C., it would be proper to refer the parties to the Judicial Mediator on the joint pursis filed by the parties.

4. The petitioners, hereinafter referred to as 'defendants', had instituted Regular Civil Suit No.125 of 2002 against respondents no.1 and 2 under section 16(1)(i) of the Maharashtra Rent Control Act, 1999. Suit was dismissed by the trial Court on 28.2.2005. Civil Appeal preferred by the defendants was dismissed by the learned District Judge on 6.6.2011. It is the case of the defendants that the building where the property in dispute is situate, is in a dilapidated condition. There were in all 29 tenants. Out of 29 tenants, 21 tenants had agreed for sale of area of the tenanted premises.

5. Respondents no.1 and 2, hereinafter referred to as 'plaintiffs, instituted suit under Section 6 of the Specific Relief Act, 1963 (for short, 'Act') against the defendants, inter-alia, praying for decree against the defendants to hand over vacant and actual possession of the premises as it existed earlier after constructing the same and for perpetual injunction restraining the defendants from carrying out any construction as also doing any acts which will bring to an end tenancy rights as also from

creating third party interest.

6. During the pendency of the suit, the plaintiffs took out application Exhibit-5. By order dated 4.12.2014, the learned trial Judge partly allowed the application, The operative part of the order reads thus:

1. An application for temporary injunction is partly allowed.
2. Defendant Shri Ashok Jori, Ramesh Jori, Ganapat Jori and any person claiming through him that is Hussain Pathan or a Power of Attorney holder or any agent shall not proceed with the construction of the suit plot till decision of the suit about suit premises situated at Sadashiv Peth City Survey no.1512 admeasuring 235 meters. Particularly a 1 room about 110 square feet.
3. Further the defendant shall not create any third party interest in the suit plot till decision of this suit."

7. On 9.1.2013, the defendants filed pursis expressing their readiness and willingness to settle the subject matter amicably and peacefully. The defendants agreed to give the tenanted premises of area admeasuring 110 sq.ft in the newly constructed building. It was further set out that the construction is going on as per the sanctioned plan which is not challenged in the suit. On 13.1.2015, plaintiff filed their say which is to the following effect .

"Without prejudice to plaintiffs' right, no objection to compromise the matter. Defendant has not explained under what provision this pursis is given"

8. On 16.1.2015, on behalf of the defendants, pursis was filed setting out therein that under section 16(6)(d) sub-clause (1) and

(2) of the Maharashtra Rent Control Act, 1999, the defendants are ready to give to the plaintiffs peaceful possession on tenancy basis. The newly added respondent no.3-Municipal Corporation of City of Pune, (P.M.C) has sanctioned plan. The defendants are ready to give possession of flat no. 204, admeasuring 110 sq.ft carpet, on the second floor in the new building.

9. On the same day, on behalf of the plaintiffs, application Exh.40 was filed for appointing Court Commissioner. In paragraphs 3 and 4, it was alleged that despite injunction order, the defendants have started construction activity on the suit property in gross violation of the order of the Court. The stage of construction was also set out. The defendants filed their reply at Exh.42. In pursuance of the order passed by the learned trial Judge, Court Commissioner was appointed who submitted report on 2.1.2015. The learned Commissioner submitted report noting the progress of construction work.

10. On 10.6.2015, the defendants filed application Exh.43 under Order 39, Rule 4 of C.P.C for variation of the order dated 4.12.2014 below Exhibit-5, thereby, restricting the said order to the extent of suit premise, viz. one room admeasuring 110 sq.ft of flat no.204 on the second floor in the new building.

11. The plaintiffs filed reply dated 27.7.2015 resisting the application. It was, inter alia, contended that no case is made out under Order 39, Rule 4 for variation of the order dated

4.12.2014. It was further contended that though several opportunities were given to file Written Statement and Say to application Exh.5, the defendants did not bother to file Say and Written Statement on record.

12. By the impugned order, the learned trial Judge rejected the application and referred the parties to the Judicial Mediator on joint pursis filed by the parties. The defendants have challenged that order by way of present Writ Petition.

13. On this count the defendants, once again, reiterated their proposal for settling the dispute. Statement made on behalf of the defendants that the defendants will complete internal work of flat no.105 situate on first floor, including supply of water connection and also the defendants will ensure drainage facility is available to flat no.105, was recorded. In view thereof, the Corporation was impleaded as party respondent so as to facilitate issuing part Occupation Certificate at least qua flat no.105. Notice was issued to the newly added respondent and parties were put to notice that subject to time constraint and convenience of the Court, Petition will be disposed of finally at the stage of admission. In order to enable the defendants to complete internal work, clause (2) of the operative part of the order dated 4.12.2014 was relaxed to that extent only and the defendants were directed not to carry out any other work.

14. Additional affidavit dated 23.3.2016 was taken on record.

Certificate dated 20.3.2016 issued by Siddhant Architects Private Ltd along with sketch plan of flat no.105 situate on first floor, was taken on record. Statement on behalf of the defendants that the carpet area of flat no.105 on the first floor is 110.84 sq.ft with toilet provision in it, was recorded. Further statement that on or before 2.4.2016 the defendants will make application to the Corporation for obtaining part Occupation Certificate in respect of flat no.105, was also recorded.

15. In the order dated 30.3.2016, assurance on behalf of the newly added respondent that the Corporation will depute the concerned Engineer for verifying whether flat no.105 has carpet area of 110.84 sq.ft with toilet provision in it and that it will also file affidavit placing on record the measurements carried out by the concerned Engineer, was recorded.

16. The defendants have filed affidavit of Mr. Hussain Ahmed Pathan dated 5.4.2016 placing on record part Occupation Certificate dated 12.4.2016 in respect of flat no.105 on the first floor. Total carpet area of flat no.105 is 111.34 sq.ft. consisting of living room, toilet and Otta.

17. On behalf of the plaintiffs, affidavit of Deepak Yashwant Shinde dated 19.4.2016 is tendered. In his affidavit, it is inter-alia contended that the defendants accepted order passed below Exhibit-5 and thereafter filed application Exh.43 under Order 39, Rule 4 of C.P.C. on the ground that the order passed below Exh.5

is vague and the injunction ought to have been granted only to the extent of a room of 110 sq.ft. It is further contended that as suit is under Section 6 of the Act which is of a summary nature, same is required to be disposed of expeditiously. The impugned order does not require any interference under extra ordinary jurisdiction of this Court. He is made to file litigation filed by the defendants under section 16(1)(i) which was dismissed by the trial Court. Appeal preferred by the defendants was also dismissed. Grievance is made that the defendants dispossessed the plaintiffs without taking legal course. Reference is also made to other tenants who have instituted suit against the defendants and passing of injunction order in those suits. In paragraph 5 of the affidavit, it is asserted that the plaintiffs are occupying the premises of 110 sq.ft. excluding toilet. In terms of Section 16(6) (d)(i) of the Maharashtra Rent Control Act, 1999, the plaintiffs are entitled to get equivalent carpet area of 110 sq.ft excluding toilet. The plaintiffs, therefore, opposed grant of any relief in this petition.

18. In support of this petition, Mr. Godbole submitted that the defendants are ready and willing to hand over possession of flat no.105 situate on the first floor to the plaintiffs.

19. On the other hand, Mr. Kshirsagar relied upon the following decisions to contend that no case is made out for invocation of powers under Article 227 of the Constitution of India.

- (1) Sanjay Kumar Pandey Vs. Gulbahar Sheikh, (2004) 4 SCC 664 and in particular paragraph 4 thereof wherein the Apex Court has laid down parameters for exercising revisional jurisdiction under Section 115 of C.P.C.
- (2) Smt. Khatijabi Aboobaker Vs Karma Constructions , 1996(4) Bom CR 318 and in particular paragraphs 15 and 16 thereof.
- (3) Mohd.Mehtab Khan Vs Khushnuma Ibrahim, (2013) 9 SCC 221 and in particular paragraphs 10, 12 and 15.;
- (4) Krishna Ram Mahale Vs. Mrs Shobha Venkat Rao, AIR (1989) 4 SCC 131; and
- (5) Anwar Faramosh Khan Vs. Mahendrakumar Jugalkishore Gupta, AIR 2004 Bom 232.

He submitted that basically no case is made out by the defendants for variation of the order dated 4.12.2014 passed below Exh.5. He further submitted that the plaintiffs ought to hand over possession of 110 sq.ft excluding the toilet. In short, as the defendants are handing over possession of 110.34 sq.ft carpet area which is inclusive of toilet, there is non-compliance of Section 16(6)(d)(i) of the Maharashtra Rent Control Act, 1999. The plaintiffs are, therefore, not agreeable for accepting possession of 110.34 sq.ft carpet area which is inclusive of toilet. Mr Patil, upon taking instructions from Mr. Vikram D.Lahane, Building Inspector Department, P.M.C, states that the Corporation

has issued part Occupation Certificate and flat no.105 measures 110.34 sq.ft.

20. 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, the plaintiffs have instituted suit under section 6 of the Act, inter alia, alleging that the defendants have dispossessed them without their consent, otherwise than in due course of law. The plaintiffs have contended that as the defendants failed in obtaining decree under section 16(1)(i) of the Maharashtra Rent Control Act, 1999, it is only thereafter they have dispossessed the plaintiffs without following due process of law.

21. Perusal of paragraph 8 of the Plaint, prima facie shows that the plaintiffs asserted that the defendants intended to evict the plaintiffs and, therefore, did not carry out any repairs to the building. The building has become dangerous. Mr. Godbole submitted that the building was very old and perusal of the paragraph 8 also prima facie shows that the building was in a dangerous condition. Whether it was so made by the defendants or not, is a matter of evidence which cannot be gone into at this stage. It is also evident from the record that the defendants had filed pursis on 9.1.2015 expressing their readiness and willingness to compromise the dispute by giving area measuring 110 sq.ft in the newly constructed building. The

plaintiffs also without prejudice to the rights, gave no objection for compromise in the matter.

22. During the pendency of the suit, the plaintiffs took out application Exh.5 which was allowed on 4.12.2014. Perusal of clauses (2) and (3) of the operative part of the order extracted herein above, prima facie, shows that there was ambiguity as to whether the injunction was prohibiting the defendants to carry out construction only in respect of one room admeasuring 110 sq.ft or in respect of entire property. Clause (3) of the operative part also prohibited the defendants from creating any third party interest in the suit plot till the decision of the suit. In fact, the plaintiffs filed application for appointment of the Court Commissioner on the ground that the despite injunction order, the defendants have started construction activity in gross violation of the order of injunction. In the application for appointment of Court Commissioner at Exh.40, the plaintiffs made grievance in paragraph 3 to that effect. In paragraphs 4 and 5 of that application, the stage of the construction was also set out.

23. By the impugned order, the learned trial Judge rejected the application on the ground that there was no ambiguity in the order dated 4.12.2014. The learned trial Judge also recorded that there are no change of circumstances to vary the order passed on 4.12.2014. The learned trial Judge was also of the view that

prima facie there is nothing on record to show that the defendants have followed any lawful procedure for taking possession. The defendants evicted the tenants from the suit premises illegally. The learned trial Judge accordingly rejected the application.

24. Order 39, Rule 4 reads thus:

“4. Order for injunction may be discharged, varied or set aside.- Any Order for an injunction may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an Order for injunction has been passed after giving to a party an opportunity of being heard, the Order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the court is satisfied that the Order has caused undue hardship to that party.”

Perusal of the above extracted Second proviso of Order 39 Rule 4 shows that a party can apply for variation of the order which has been necessitated by change in circumstance. In the first place, perusal of clauses (2) and (3) of the order dated 4.12.2014 shows that there was ambiguity in that order. During the course of hearing, Mr. Kshirsagar fairly stated that the injunction was

only in respect of one room admeasuring 110 sq.ft and not in respect of suit plot. It is however material to note that the plaintiffs have filed application for appointment of Court Commissioner making grievance about the defendants carrying out construction in violation of the order dated 4.12.2014. In view thereof, I do not find that the learned trial Judge was justified in observing that there was no ambiguity in the earlier order. Apart from that, the learned trial Judge committed error in observing that there was no change of circumstance giving rise to filing of the application under Order 39 Rule 4. The learned trial Judge did not consider various pursis filed by both the parties for settling the entire controversy between the parties. In fact, by the impugned order, the learned trial Judge referred the parties to the Judicial Mediator on the basis of joint pursis filed by both the parties after recording that the defendants made a fair proposal for amicable settlement.

25. In pursuance of the order dated 30.3.2016 passed in this petition, the Corporation has issued part Occupation Certificate meaning thereby flat no.105 admeasuring 110.84 sq.ft is fit for occupation. In my opinion, ends of justice will be served by appointing Court Receiver, High Court Bombay in respect of flat no.105 and appointing the plaintiffs as agents of the Court receiver on usual terms without security on payment of rent of Rs.30/- per month and without any royalty. In view thereof. The

order dated 4.12.2014 restraining the defendants from carrying out further construction is dissolved.

26. Mr. Kshirsagar relied upon the decision of the Apex Court in the case of Sanjay Kumar Pandey (supra) and in particular paragraph 4. In paragraph 4, the Apex Court noted sub-section (3) of Section 6 of the Act lays down that no appeal shall lie from any order or decree passed in any suit instituted under Section 6. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to file a regular suit establishing his title to the suit property. The Apex Court has also observed that the remedy of filing a revision is available but that is only by way of an exception. The High Court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well settled parameters of the exercise of revisional jurisdiction under Section 115 of C.P.C. As noted earlier, in the present case, suit is still pending. Apart from that, parties have filed pursis for settling the entire dispute. During the course of hearing, Mr. Kshirsagar also made it clear that the injunction was only restraining the defendants from constructing one room admeasuring 110 sq.ft. In other words, there was no injunction restraining the defendants from proceeding with the construction, save and except one room ademasuring 110 sq.ft. Now, that room admeasuring 110 sq.ft is constructed by the

defendants and also part Occupation Certificate is issued by the Corporation, I do not find that this judgment will advance the case of the plaintiffs. In effect and substance, at this stage suit of the plaintiffs stands decreed.

27. Mr. Kshirsagar relied upon paragraphs 15 and 16 of Khatijabi Aboobaker case (supra). In that case, the decision of this Court in Meghji Jetha Shah Vs. Kalyanji Nanji Shah, AIR 1987 Bom 273 was referred. In that case, the learned Single Judge of this Court held that there is no prohibition either in the Specific Relief Act or in C.P.C. for the civil Court to act under Order 40, Rule 1 of C.P.C. Mr. Kshirsagar also relied upon the decision of the Apex Court in the case of Mohd. Mehtab Khan (supra) and in particular paragraphs 12 and 15. The Apex Court has dealt with scope of Section 6 of the Act which is undoubtedly of a summary nature. In that case, the decision of the Apex Court in the case of Wander Ltd Vs Antox India (P) Ltd, 1990 (Supp) SCC 727 was considered. Mr. Kshirsagar submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India. I do not find any merit in this submission for more than one reason. In the first place, Mr. Kshirsagar submitted that injunction was only in respect of 110 sq.ft. In other words, the defendants are at liberty to proceed with the construction on the suit plot. At the same time, the injunction was only qua one room admeasuring 110 sq.ft. The main grievance of the plaintiffs

is that they should be given 110 sq.ft excluding the toilet. As this is the only grievance of the plaintiffs, I do not find any impediment in appointing them as agents of the Court Receiver and putting them in possession of flat no.105 during the pendency of the suit which is in their interest. I really fail to understand the opposition of the plaintiffs in that regard. Hence the order.

(1) Receiver, High Court Bombay is appointed as Court Receiver in respect of Flat no.105 admeasuring 110.84 sq.ft on the first floor with all powers under Order 40, Rule 1 of C.P.C.

(2) The plaintiffs are appointed as agents of Court Receiver on usual terms without security on payment of rent of Rs.30/- per month and without any royalty. The plaintiffs will pay the electricity charges.

(3) By way of abundant caution, it is clarified that the injunction order dated 4.12.2014 below Exh.5 in R.C.S. No.987 of 2014 stands dissolved.

(4) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)