

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11394 OF 2015

Sarala Gopal Khatavkar ... Petitioner
Vs.
Bharati Vivekanand Hiremath ... Respondent

Mr. Prathamesh Bhargude for Petitioner.
Mr. Prathamesh Kamat i/b. Ms Sapna Rachure for Respondent.

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 16, 2016

P.C. :

Heard Mr. Bhargude, learned Counsel for the petitioner and Mr. Kamat, 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', has challenged the judgment and order dated 30.10.2015 passed by the learned District Judge-13, Pune in Miscellaneous Civil Appeal No.340 of 2014. By that order, the learned District Judge allowed the appeal preferred by the respondent, hereinafter referred to as 'plaintiff', and quashed and set aside the judgment and order dated 08.08.2014 passed by the learned Additional Judge, Small Causes Court, Pune below exhibits-5 and 24A in Civil Suit No.309 of 2013 and allowed those applications. The learned District Judge issued injunction restraining the defendant from creating third party interest in the suit premises and further issued mandatory injunction directing the defendant to restore the possession of the suit premises to the plaintiff within a period of one month from the date of the order.

3. Plaintiff has instituted the Suit against the defendant on or about

29.11.2013 inter alia praying for recovery of possession of the suit premises and for perpetual injunction restraining the defendant from creating third party interest therein. In paragraph 4, plaintiff asserted that on 06.09.2013, plaintiff was dispossessed from the suit premises by the defendant forcibly and unlawfully. Plaintiff has instituted criminal case before the Judicial Magistrate First Class, Pune. On the same day, plaintiff filed application exhibit-5 for injunction restraining the defendant from creating third party interest. Defendant filed reply dated 15.01.2014 opposing that application. On 05.02.2014, plaintiff filed application at exhibit-24A for mandatory injunction directing the defendant to restore possession of the suit premises. Defendant filed reply at exhibit-26 opposing that application. By the judgment and order dated 08.08.2014, the learned trial Judge rejected both the applications. Aggrieved by that decision, plaintiff preferred Miscellaneous Civil Appeal, which is allowed by the learned District Judge. It is against this decision, defendant has instituted the present Petition.

4. In support of this Petition, Mr. Bhargude submitted that plaintiff came with the case that she was dispossessed on 06.09.2013. The Suit is instituted on 29.11.2013. Though on the same day application exhibit-5 was made, the only prayer made in that application, was for temporary injunction restraining the defendant from creating third party interest. In other words, plaintiff did not immediately apply for mandatory injunction for restoration of possession of the suit premises. That prayer was made only in the application dated 05.02.2014 at exhibit-24A.

5. Mr. Bhargude further submitted that on the plaintiff's own showing, she is not in possession from 06.09.2013. Plaintiff has claimed restoration of possession as a final relief. She cannot be granted

interim relief which is in the nature of final relief at the interlocutory stage. He further submitted that defendant is in possession of the suit premises right from 06.09.2013 and is carrying on business in the suit premises. Plaintiff has several premises as is evident from extract of property card and photographs. The said aspect is not considered by the learned District Judge. In any case, he submitted that under Rent Control Act, provision is made for the landlord to recover possession. However, there corresponding provision is not made enabling the tenant to recover possession of the suit premises. Lastly, he submitted that Suit is not instituted under Section 6 of the Specific Relief Act, 1963. The learned District Judge was not justified in directing restoration of possession to the plaintiff and at the highest, could have issued injunction restraining the defendant from creating third party interest. For all these reasons, he submitted that Petition requires consideration.

6. On the other hand, Mr. Kamat supported the impugned order. He has invited my attention to paragraph 13 of the District Court's judgment. He submitted that defendant did not establish that plaintiff has voluntarily surrendered possession of the suit premises in her favour. The only conclusion is that the defendant has unlawfully and forcibly dispossessed the plaintiff from the suit premises. The learned trial Judge failed to consider this aspect. He submitted that defendant came with the case that tenancy agreement was executed in favour of the plaintiff on 21.04.2003. The period under the tenancy agreement expired on 31.12.2009. Assuming that the period expired, defendant was not justified in dispossessing the plaintiff from the suit premises without following due process of law. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. 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 inter alia contending that she was dispossessed from the suit premises unlawfully and forcibly on 06.09.2013. She has, therefore, instituted Suit on 29.11.2013 for recovery of possession from the defendant as also for injunction restraining the defendant from creating third party interest. On the same day, she also filed application exhibit-5. Pending the hearing of that application, on 05.02.2014, she filed application exhibit-24A for restoration of possession of the suit premises.

8. It is the case of the defendant that plaintiff has voluntarily surrendered the suit premises to her. Prima facie, defendant has not produced any material on record to substantiate the said plea. It, therefore, has to be prima facie held that defendant has unlawfully and forcibly dispossessed the plaintiff from the suit premises. Defendant did not follow due process of law for recovery of possession. Perusal of trial Court's order shows that the learned trial Judge did not advert to this aspect at all. As against this, the learned District Judge has observed in paragraph 13 that plaintiff was carrying on business in the suit premises and that she has entered into partnership with one Amol Shilvant. Prima facie, the contents of the partnership deed do not indicate that plaintiff has created interest of Amol Shilvant in the suit premises. The learned District Judge also did not accept the plea set up by the defendant that plaintiff has voluntarily surrendered possession of the suit premises in her favour. It was observed in paragraph 14 that the learned trial Judge was not justified in accepting the case of the defendant that plaintiff has surrendered possession voluntarily. For the reasons recorded by the learned District Judge in paragraphs 13 to 17, I do not find that the learned District Judge has committed any error in

allowing the appeal. The learned District Judge also considered the conduct of the parties in paragraph 21 and observed that there was nothing on record to show that plaintiff acquiesced the act of the defendant.

9. Mr. Bhargude submitted that though Suit was instituted on 29.11.2013, the application for restoration of possession was made on 05.02.2014 and that grant of relief claimed in application exhibit-24A will amount to granting of final relief at interlocutory stage. I do not find any merit in this submission as basically, defendant has failed to establish that she has taken possession lawfully from the plaintiff. Without following due process of law, defendant has taken possession from the plaintiff forcibly. In the case of ***Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727***, the Apex Court has dealt with the principles regulating grant or refusal of injunction and observed in paragraph 14 thus,

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion. ...”

10. Applying the tests in the above decision, I am of the opinion that the learned District Judge rightly interfered with the discretion exercised by the trial Court. The learned trial Judge had exercised the discretion

arbitrarily and ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

11. At this stage, Mr. Bhargude orally applies for continuation of the interim order dated 26.11.2015 for the period of 6 weeks from today. He assures that defendant will not apply for further extension of interim order.

12. As the interim order is operating from 26.11.2015, I find that the request made by Mr. Bhargude is reasonable. Hence, notwithstanding dismissal of the Petition, interim order dated 26.11.2015 shall remain in force for the period of 6 weeks from today with express understanding that defendant will not apply for further extension of interim order. Order accordingly.

(R. G. KETKAR, J.)

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