

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2234 OF 2014

Usman Abbas Sayyed ... Petitioner
Vs.
Hasham Abbas Sayed and others ... Respondents

Ms Eventa A. Gonsalves for Petitioner.
Mr. J. V. Parmar for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 10, 2016

ORDER :

Heard Ms Gonsalves, learned Counsel for the petitioner and Mr. Parmar, learned Counsel for the respondent No.1 at length.

2. By order dated 04.07.2014, notice was issued to the respondents, returnable on 01.08.2014. Office remark dated 08.08.2014 shows that as per the affidavit of service filed by the petitioner on 06.08.2014, respondents No.1 to 3 are duly served. During the pendency of the Petition, respondent No.2 expired. Petitioner took out Civil Application No.1803 of 2016 for bringing legal representatives of respondent No.2 on record. By order dated 15.07.2016, notice was issued to the legal representatives respondent No.2, returnable on 05.08.2016 and parties were put to the notice that subject to the time constraint and convenience of the Court, Petition will be disposed of finally on that date. By order dated 05.08.2016., C.A. was allowed after recording that legal representatives of respondent No.2 are served and to that effect, affidavit of service dated 26.07.2016 was filed. In view of the order dated 15.07.2016, I have heard the Petition for final hearing.

3. Despite service, none appears on behalf of the legal

representatives of respondents No.2 and 3. Rule. Mr. Parmar waives service for respondent No.1.

4. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 04.10.2013 passed by the Appellate Bench of the Small Causes Court at Mumbai below exhibit-7 in Appeal No.55 of 2011. By that order, the appellate Court allowed the application filed by the respondent No.1, hereinafter referred to as defendant No.1, and stayed the execution of judgment and decree dated 30.09.2011 passed by the learned trial Judge in R.A.D. Suit No.634 of 1998 till the disposal of the appeal.

5. In support of this Petition, Ms Gonsalves submitted that petitioner has instituted R.A.D.Suit No.634 of 1998 for declaration of his tenancy rights in respect of rooms No.35, 36 and 37 on the second floor of property known as 'Karvarna Terrace', Plot No.19, Dr. B. A. Road, Opposite Gloria Church, Byculla, Bombay 400 007 (for short 'suit premises') as also for declaration that the surrender of room No.35 by defendant No.1 in favour of defendants No.2 and 3 is illegal and unlawful and for restoration of the suit premises to them. Defendants No.2 and 3 are the landlords of the suit premises. Plaintiffs came with the case that their father was the original tenant on a monthly rent of Rs.306/-. Their father died on or about 21.07.1969 leaving behind their mother Hameeda Begum Sayyed who also died on 25.02.1987. Defendant No.1 had illegally surrendered room No.35 to defendants No.2 and 3. By judgment and decree dated 30.09.2011, the learned trial Judge decreed the Suit. The learned trial Judge declared that plaintiffs, who are the legal representatives of original plaintiff - Usman Abbas Sayyed are the tenants in respect of the suit premises. The learned trial Judge further declared that the surrender of room No.35 by defendant

No.1 in favour of defendants No.2 and 3 is illegal and unlawful. Defendants No.2 and 3 were ordered to hand over possession of room No.35 to the plaintiffs till December 2011.

6. Aggrieved by this decision, defendant No.1 preferred appeal. Defendants No.2 and 3 however, did not prefer appeal. During the pendency of the appeal, defendant No.1 filed application exhibit-7 for stay of the trial court's decree. By the impugned order, the appellate Court stayed the eviction decree. It is against this order, legal representatives of original plaintiff have instituted the present Petition.

7. In support of this Petition, Ms Gonsalves submitted that admittedly, defendant No.1 had surrendered possession of room No.35 to defendants No.2 and 3. Defendants No.2 and 3 though are directed to handover possession of room No.35 and also declaration sought by the plaintiffs is granted by the trial Court, they did not prefer appeal. In other words, defendants No.2 and 3 - landlords have accepted the trial Court's judgment. Defendant No.1 having surrendered possession of room No.35 could not have prayed for stay in respect of handing over possession of room No.35 to the plaintiffs. Defendant No.1 is in possession of rooms No.36 and 37 and to that extent, appellate Court should have granted stay and not in respect of direction to defendants No.2 and 3 to handover possession of room No.35 to the plaintiffs.

8. On the other hand, Mr. Parmar supported the impugned order and submitted that the decree cannot be partly executed. He, therefore, submitted that no case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by the learned

Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that defendant No.1 had surrendered room No.35 to defendants No.2 and 3. Defendant No.1 is in possession of rooms No.36 and 37. The learned trial Judge decreed the Suit in the following terms:

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1. Suit of the plaintiffs is decreed with costs.
 2. Plaintiffs are hereby declared the tenant in respect of the suit premises being Room Nos.35, 36 and 37 on the 2nd floor of the Property known as Kavarna Terrace, Plot No.19, Dr. B. A. Road, Opp. Gloria Church, Byculla, Bombay-400 007.
 3. It is hereby further declared that the surrender of Room No.35 of the suit premises being Room Nos.35, 36 and 37 on the 2nd floor of the Property known as Kavarna Terrace, Plot No.19, Dr. B. A. Road, Opp. Gloria Church, Byculla, Bombay-400 007 by the defendant No.1 to the defendant nos.2 and 3, is illegal and unlawful.
 4. The defendant nos.2 and 3 are hereby ordered to hand over the possession of the Room No.35 of the suit premises being Room Nos.35, 36 and 37 on the 2nd floor of the Property known as Kavarna Terrace, Plot No.19, Dr. B. A. Road, Opp. Gloria Church, Byculla, Bombay-400 007 to the plaintiffs till December, 2011.”

10. Perusal of the above extracted portion shows that the learned trial Judge declared that the surrender of room No.35 by defendant No.1 in favour of defendants No.2 and 3 is illegal and unlawful. The learned trial Judge also granted declaration of tenancy rights to the plaintiffs in respect of the suit premises. Though defendants No.2 and 3 were ordered to handover possession of room No.35 to the plaintiffs, they did not prefer appeal. In other words, they accepted the correctness of the trial Court's decree. In my opinion, once the defendant No.1 had surrendered room No.35 to defendants No.2 and 3, the appellate Court was not justified in granting blanket stay to the decree passed by the trial Court. In my opinion, the appellate Court should not have stayed direction No.4 issued by the trial Court ordering defendants No.2 and 3 to handover possession of room No.35 to the plaintiffs. At the same

time, as and by way of interim arrangement, it is necessary to appoint Court receiver in respect of room No.35 and plaintiffs, as agent of the Court Receiver without payment of any security and royalty but subject to payment of agreed rent to defendants No.2 and 3 and also payment of statutory dues. Plaintiffs assure that they will lodge papers of these proceedings in the office of the Court Receiver within one week from today. The Court Receiver shall not charge any fees in terms of Rule 591 of the Bombay High Court Original Side Rules. Hence, the following order:

- a. Impugned order dated 04.10.2013 below exhibit-7 passed by the appellate Court is modified;
- b. Application exhibit-7 filed by the defendant No.1 is partly allowed;
- c. The judgment and decree dated 30.09.2011 passed by the trial Court in R.A.D.Suit No.634 of 1998 is stayed to the extent of clauses 2 and 3 of the operative part of the order. By way of abundant caution, it is clarified that this stay shall not operate qua clause No.4 of the operative part of the trial Court's decree;
- d. Receiver, High Court, Bombay is appointed as Court Receiver in respect of Room No.35 on the 2nd floor of the Property known as Kavarna Terrace, Plot No.19, Dr. B. A. Road, Opp. Gloria Church, Byculla, Bombay-400 007 with all the powers under Order 40 of C.P.C.;
- e. Defendants No.2 and 3 shall handover possession of room No.35 on the 2nd floor of the Property known as Kavarna Terrace, Plot No.19, Dr. B. A. Road, Opp. Gloria Church, Byculla, Bombay-400 007 to the Court Receiver within 2 weeks from production of authenticated copy of this order;

f. The Court Receiver shall handover possession of room No.35 on the 2nd floor of the Property known as Kavarna Terrace, Plot No.19, Dr. B. A. Road, Opp. Gloria Church, Byculla, Bombay-400 007 to the plaintiffs as agent of the Court Receiver without payment of any royalty and security and subject to plaintiffs paying rent to the defendants No.2 and 3 and other statutory dues in respect of room No.35;

g. Plaintiffs agree to lodge papers of these proceedings in the office of the Court Receiver within one week from today;

h. The Court Receiver shall not charge any fees in terms of Rule 591 of the Bombay High Court Original Side Rules;

i. Court Receiver to act upon the authenticated copy of this order.

11. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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