

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8438 OF 2016

Krishnakant Manilal Dalal

.. Petitioner

-Versus-

Pradyumna J. Upadhyaya (deceased)
through 1(a) Madhukar Pradyumna
Upadhyaya and Ors.

..Respondents

Mr. D.D.Singh for petitioner

Mr. Vrushal Gupta for respondents.

CORAM : R.G.KETKAR, J.

DATE : 21st September 2016.

P.C.

1] Heard Mr. Singh learned Counsel for the petitioner and Mr. Vrushal Gupta for respondents.

2] By this petition under Article 227 of the Constitution of India, the petitioner (hereinafter referred to as defendant) has challenged the judgement and order dated 17th October 2015 passed by the learned Judge, Small Causes Court at Mumbai below Exh.19 in R.A.E. Suit No.227/314/2011. By that order, the learned trial Judge allowed the application made by the respondents (hereinafter referred to as plaintiffs) and appointed Mr.H.S.Samant, Architect to inspect the suit premises

more particularly described in para 1 of the plaint.

3] The plaintiffs were directed to give notice of seven days prior to inspection to all concerned parties and bear charges towards Architects fees and Photographer fees. The Architect was directed to file report on record along with sketch and other details within one month from the date of the order.

4] In support of this petition, Mr. Singh submitted that earlier the plaintiffs had filed an application Exh.8 on 15th April 2011, inter alia, praying for injunction restraining defendant from alienating, parting with possession or encumbering the suit premises or any part thereof to any third party and/or from carrying out any additions or alterations in the suit premises and appointment of commissioner for submitting a report to be placed on record on the condition of the suit premises as also prayed for appointment of photographer to take photographs at the cost of plaintiffs. By an order dated 12th September 2011, the learned Trial Judge rejected the application. He submitted that in para 14 the learned trial court dealt with the aspect of appointment of commissioner and observed that “nowhere the plaintiff has stated that he has issued notice to the defendants for taking inspection of the suit premises, therefore, with due respect, it is stated that the ratio laid down in the authorities are not

applicable in the case". The Authorities were referred in paras 7 and 12 of the order.

5] Mr. Singh, further submitted that the plaintiffs did not challenge the said order. The plaintiffs, thereafter, filed an application Exh.19 under section 28 of the Act for identical relief which was earlier rejected. The present application is, therefore, barred by principles of res judicata or in any case constructive res judicata. Learned trial Judge, was, therefore, not justified in allowing the application.

6] Mr. Singh further submitted that a perusal of the application Exh.19 does not indicate that the plaintiffs have set out any reasons for taking inspection of the suit premises. He submitted that plaintiffs ought to have explained the reasons or must have made their intentions clear for inspecting the suit premises. He, therefore, submitted that the impugned order deserves to be set aside.

7] On the other hand Mr. Gupta supported the impugned order. He submitted that the earlier application was not rejected on merits but was rejected solely on the ground that the plaintiffs had not given notice to the defendants for inspection. On 15th March 2015, plaintiffs had issued notice to the defendant for inspection of the suit premises on 22nd March

2015. In other words, by accepting the order dated 12th September 2015, Exh.8, the plaintiffs have issued notice for taking inspection. In view thereof, it cannot be said that the present application is barred by res judicata or by principles of constructive res judicata. He further submits that section 28 has recognised rights of the landlord for inspection of the suit premises. Section 28 does not require landlord to set out his intentions or assign reasons before taking inspection. He therefore submits that no case is made out by the petitioner and the petition be dismissed.

8] I have considered rival contentions. I have also perused the material placed before me. Section 28 of the Act reads thus:-

“28. The landlord shall be entitled to inspect the premises let or given on licence at a reasonable time after giving prior notice to the tenant, licensee or occupier.”

9] A perusal of section 28 shows that it has recognised the right of the landlord to inspect the suit premises. Earlier similar provision was not there in the old Act. In view thereof, the court has to give due weightage to the intention of Legislature for incorporating section 28 in the New Act.

10] Mr. Singh submitted that the application Exh.19 is hit by principles

of res judicata or constructive res judicata. I have gone through the impugned order. The learned Trial Judge has rejected the application solely on the ground that the plaintiff did not give notice to the defendants for taking inspection of the suit premises. It is evident from the record that the plaintiffs had sent a notice dated 15th March 2015 to the defendant requesting for inspection of the suit premises on 22nd March 2015. Thus, in compliance with the order dated 12th September 2011 the plaintiffs had issued notice. In view thereof, it cannot be said that the order dated 12th September 2011 will operate as res judicata or constructive res judicata. Hence, I find no merit in the petition. The petition fails and the same is dismissed.

(R.G.KETKAR, J)