

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

WRIT PETITION NO. 441 OF 2017

Shri Pavan Arun Bhokre

..Petitioner.

Vs

Shri Kedar Sanjeev Khadke and
Ors.

.. Respondents

Mr. Shailendra S. Kanetkar, Advocate for Petitioner.
Mr. Subodh S.Shah, Advocate for Respondent no.6.

**CORAM : R.G.KETKAR,J.
DATE : 16/01/2017**

PC:

1. Heard Mr.Shailendra Kanetkar, learned counsel for the petitioner and Mr. Subodh Shah, learned counsel for respondent no. 6 at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff', has challenged the Judgment and order dated 18.12.2015 passed by the learned 3rd Jt. Civil Judge, Sr. Dn., Pune below Exhibit-5 in Spl.Civil Suit No.1403 of 2015 as also the Judgment and order dated 15.12.2016 passed by the learned District Judge-18, Pune in Misc. Civil Appeal No.36 of 2016. By these orders, the Courts below dismissed the application filed by the plaintiff for injunction restraining the defendants from disturbing the lawful and peaceful possession of the plaintiff over the suit property without following due process of law.

3. In support of this petition, Mr. Kanetkar strenuously contended that respondent no.1, hereinafter referred to as 'defendant no.1' had executed registered leave and licence agreement dated 18.11.2008 in favour of the plaintiff. The plaintiff was put in possession of the suit property. Respondent no.6, hereinafter referred to as 'defendant no.6', instituted Summary Special Civil Suit No.171 of 2008 (re-numbered as Spl. Civil Suit No. 2617 of 2010 against defendant no.1-Mr. Kedar Sanjeev Khadke, defendant no.2-M/s Melinkeri Gapchup Construction Pvt Ltd, defendant no.3 -Ashok Gapchup (Director), defendant no.4- Prakash Melinkeri (Director) under Section 6 of the Specific Reliefs Act, 1963 (for short, 'Act'). The suit was decreed on 3.12.2013. Aggrieved by that decision, defendant no.1 preferred Civil Revision Application No.110 of 2014 which was dismissed by this court on 15.1.2015. Aggrieved by that decision, defendant no.1 preferred S.L.P. before the Apex Court which was summarily dismissed. He submitted that in those proceedings, the deed of correction/rectification dated 30.10.2007 executed by and between defendant no.6 and defendant no.2- M/s Melinkeri Gapchup Construction Pvt Ltd was not produced. The recital in the said deed shows that defendant no.2- M/s Melinkeri Gapchup Construction Pvt Ltd (Developers) had developed the property and had received entire consideration mentioned in the development agreement dated

31.12.2005 and had delivered possession of the show room to the owner (defendant no.6 herein) vide possession letter dated 20.7.2007. He submitted that in fact this developer was in possession of the suit property on 20.3.2006 and the said rectification deed as also fact of defendant no.1's possession over the suit property as of 20.3.2006 was not brought to the notice of any of the courts in suit instituted by defendant no.6 under section 6 of the Act. He submitted that the decree obtained by defendant no.6 in a suit under section 6 of the Act is not binding on the plaintiff and it is obtained by fraud and collusion between the defendants. The plaintiff has, therefore, filed suit for such declaration as also for perpetual injunction restraining the defendants from disturbing his lawful possession.

4. Mr.Kanetkar submitted that the Courts below were not justified in dismissing the application for injunction as the defendants have to follow due process of law. Defendant no.1-licensor cannot evict the plaintiff without approaching the competent authority under the Rent Control Act. Even if the licence period was from 1.11.2008 to 30.9.2009, still the plaintiff being in settled possession of the suit premises cannot be evicted or dispossessed without following due process of law. He, therefore, submitted that the impugned orders deserve to be interfere with.

5. On the other hand, Mr.Shah supported the impugned

orders. He submitted that basically the plaintiff, on its own showing, was inducted as a licensee in the suit property as per the leave and licence agreement dated 18.11.2008. Clause 11 thereof recited that licensee (plaintiff herein) admitted that the agreement shall not and does not create nor is the same intended to create demise and/or tenancy or any other right of any nature upon the licensee in respect of the residential premises. The agreement is nothing but mere permission given to the licensee of a licence for a limited period and with a view to tiding over their difficulties. In short, he submitted that the leave and licence agreement does not create any interest in favour of the plaintiff so as to institute suit for declaration that the decree obtained by defendant no.6 in a suit filed by him under section 6 of the Act is nullity and for injunction restraining the defendants including defendant no.6 from disturbing possession of the plaintiff without following due process of law. In fact, defendant no.6 by instituting suit under section 6 of the Act has followed due process of law. The plaintiff herein is claiming through defendant no.1. While dismissing the application for injunction, the Courts below have held that the plaintiff is claiming through defendant no.1. If Defendant no.1 was not in possession at the relevant time, the plaintiff cannot claim to be in possession of the suit property. The plaintiff did not pay costs of Rs. 5000/- as awarded by the trial Court. He, therefore, submitted that the

petition deserves to be dismissed.

6. 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 and is a matter of record that defendant no.6 has instituted suit under Section 6 of the Act against defendant no.1 and others. Suit was decreed by the trial Court and the said decree was confirmed right upto Apex Court. Plaintiff has instituted suit on or about 28.10.2015, inter alia, for declaration that the decree obtained by defendant no.6 is not binding on him and the same is nullity as is obtained by fraud and collusion between defendants no.1 to 6 and for perpetual injunction restraining the defendants from disturbing lawful and peaceful possession of the plaintiff over the suit property without following due process of law.

7. While dismissing the application, the learned trial Judge has observed in paragraph 22 that defendant no.1 has failed to prove his possession over the suit property. On the contrary, defendant no.6-(plaintiff) in a suit under section 6 of the Act, proved his possession and forcible dispossession. In paragraph 25, the learned trial Judge has observed that defendant no.1 failed to prove his possession over the suit property. Plaintiff herein is claiming possession of the suit property on the basis of possession of defendant no.1. The plaintiff herein failed to bring on record the documents to show that he has paid electricity and

other charges and thus has prima facie failed to prove his possession over the suit property. In paragraph 16, the learned trial Judge has considered the documents produced by the plaintiff herein and observed that the leave and licence agreement provided that electricity charges and other charges are to be paid by the licensee (plaintiff herein). However, no documentary evidence was produced by the plaintiff to prove that he has paid those charges. On the contrary, defendant no.6 has produced on record the property tax and electricity bills at Exhibit 19 which shows that for the year 2013-2014, defendant no.6 paid property tax of Rs. 82,586/- on 15.5.2013. Defendant no.6 paid property tax for the year 2015 by cheque/DD no.00252 dated 21.4.2016 to the tune of Rs. 91,109/- . The property tax details dated 2.5.2015 shows the name of defendant no.6 in respect of the suit property. Defendant no.6 also relied upon electricity bills for July 2015, August, 2015, September, 2015 and October 2015 issued by MSEB and paid by him.

8. As far as the District court is concerned, in paragraphs 18 and 19, the learned District Judge also observed that the plaintiff herein failed to prove his possession. There is absolutely no prima facie documentary evidence which would show that the plaintiff had exercised possessory right and presently he is in possession of the suit premises. On the contrary, the documents on record prima facie indicate that defendant no. 6 is in

possession. The learned District Judge has also referred to payment of the property tax and electricity bills by defendant no.6 .

9. Apart from the reasons given by the Courts below, the plaintiff claims to be in possession of the suit premises on the basis of leave and licence agreement. Section 52 of the Indian Easement Act 1882 defines the expression 'license' as under.

“52. "License" defined. -Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.”

Clause 11 of the Leave and Licence Agreement executed between the plaintiff and defendant no.1 reads thus:

“11. It is agreed and the licensee does admit that this agreement shall not and does not create nor is the same intended to create demise and/or tenancy or any other right of any nature, upon the licensee in respect of the said residential premises but this agreement is nothing but a mere permission given to the licensee on the licence for a limited period and with a view to tide over their difficulty.”

10. In view of Section 52 of the Act read with clause 11 of the Leave and Licence agreement, prima facie the plaintiff cannot claim any right, title and interest in the suit property. Explanation (b) to Section 24 of the Maharashtra Rent Control Act, 1999 lays down that an agreement of licence in writing shall be conclusive evidence of the fact stated therein. In view thereof, as also for

the reasons recorded by the Courts below, I do not find that any case is made out by the plaintiff for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

11. Mr. Kanetkar assures that within two weeks from today the costs awarded by the trial Court shall be paid to defendant no.6. In view thereof, the costs awarded by the trial Court shall be paid by the plaintiff herein to defendant no.6 within two weeks from today. Mr. Kanetkar orally prays for stay of this order for four weeks. Mr. Shah opposes the prayer. As the Courts below have concurrently found that the plaintiff is not in possession and that defendant no.6 is in possession as also in view of the facts and circumstances of the case, oral application of Mr. Kanetkar is rejected. Order accordingly.

(R.G.KETKAR, J.)