

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6635 OF 2015

Shri. Salim Mohammed Khan
And Ors.

...Petitioners

Versus

Usman Mohammed Khan
And Ors.

...Respondents

....

Mr.Pradeep J. Thorat, Advocate for the Petitioners.

Mr. P.K. Hushing, V.K. Bodhave i/b. A.M. Joshi, Advocate for
Respondent No.1.

Mr. Sandeep R. Waghmare, Advocate for Respondent No.5.

....

CORAM : R. G. KETKAR, J.

DATE : 25th JANUARY, 2017

P.C.

1. Heard Mr.Pradeep Thorat, learned Counsel for the petitioners, Mr. P.K. Hushing, learned counsel for respondent No.1 and Mr.Sandeep Waghmare, learned Counsel for respondent No.5, at length.

2. Rule. As respondent No.1 being the original plaintiff is the contesting respondent, notice on respondents No.2 to 4 and 6 is dispensed with. Learned Counsel for the respective respondents waive. At the request and by consent of the parties

as also in view of the order dated 14.7.2015, Rule is made returnable forthwith and the 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 1.4.2015 passed by the learned 8th Jt. Civil Judge, Junior Division, Pune below Exhibit-72 in Regular Civil Suit No.483/2013. By that order, the learned trial Judge rejected the application filed by defendants No.6 to 8 under Section 9-A of C.P.C. for framing and deciding preliminary issue of limitation.

4. At the threshold Mr. Hushing raised preliminary objection on the ground of maintainability of the application filed by the petitioners, hereinafter referred to as defendants No.6 to 8 under Section 9-A of C.P.C. for framing and deciding preliminary issue of limitation. He submitted that application Exhibit-5 filed by respondent No.1, hereinafter referred to as the 'plaintiff', was allowed by the learned trial Judge on 6.3.2014. It is only after disposal of the application for interim relief, defendants No.6 to 8 filed application Exhibit-72 for framing and deciding the preliminary issue under Section 9-A on the ground

that the suit is barred by law of limitation. He submitted that as no objection to jurisdiction was raised pending hearing of the application for temporary injunction, the application made by defendants No.6 to 8 itself was wholly misconceived and not maintainable. Since this Petition challenges the order passed on that application, this Petition deserves to be dismissed on that ground alone.

5. Mr. Hushing further relied upon the decision of this Court in ***Prabhudas Narayan Gedam and others v. Municipal Council, Bhadrawati, 2003(1) Mh.L.J. 275*** to contend that no case for invocation of powers under Article 227 of the Constitution of India is made out.

6. On the other hand, Mr. Thorat submitted that the suit instituted by the plaintiff, namely, R.C.S. No.483/2013 itself is wholly misconceived and deserves to be dismissed on the ground of maintainability. He relied upon the decision of Apex Court in ***T. Arvindandam v T.V. Satyapal, 1977(4) SCC 467*** to contend that if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the suit has no survival

value, the Court must exercise its powers to shoot down the bogus litigation at the earliest stage. He submitted that the present Suit is gross abuse of process of Court and if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing itself. He has taken me through the proceedings instituted by the plaintiff herein one after the other in support of this contention.

7. In order to appreciate the preliminary objection raised by Mr. Hushing, it is necessary to refer the earlier proceedings instituted by the plaintiff and thereafter deal with the objection of Mr.Hushing.

8. The plaintiff had instituted Regular Civil Suit No.1568/2005 on 15.11.2005 in the Court of Civil Judge, Senior Division, Pune for perpetual injunction against defendant No.1 Managing Trustee, Tayyabiya Yatimkhana Trust (for short, 'trust'), defendant No.2 Salim Mohammad Khan, defendant No.3 Khalid Mohammad Khan and defendant No.4 Madan Ranaka (defendants No.2 to 4, petitioners herein). The plaintiff came with the case that he is one of the sons of Mr. M.U. Pathan who was the original tenant of three rooms and independent bath

room and toilet more particularly described in paragraph-1 of the plaint (for short, 'suit property'). The plaintiff had left India for business purpose in the year 1972 and was carrying on business in China and other countries. Being son of original tenant M.U. Pathan, he was entitled to succeed as a tenant along with defendants No.2 and 3 being other sons of M.U. Pathan. During the period 2003-2005, the plaintiff did not return to India during holidays and he had been in China constantly till 12.9.2005. When he returned to Pune at his native place on 22.9.2005 he was shocked to know that defendants No.2 and 3 had entered into an agreement with defendant No.4 and they all together had a settlement with defendant No.1 regarding disposal of the suit property to defendant No.4. The plaintiff alleged that defendant No.4 had given huge amount to defendants No.2 and 3 as a part of the settlement. The plaintiff was kept in dark. Defendant No.2 had purchased 3 BHK flat at Clover Village, Salunke Vihar Road, Pune. Defendant No.3 had purchased flat at Bhawani Peth, Pune. Both defendants No.2 and 3 have surrendered their tenancy rights to defendant No.1 without consent of the plaintiff.

9. During pendency of the suit, the plaintiff took out application Exhibit-5. By order dated 13.2.2007, the learned trial Judge partly allowed the application and issued temporary injunction against defendant No.1 thereby restraining it from creating any third party interest in respect of the suit property in favour of defendant No.4 or any other person. It was also made clear that if defendant No.1 enters into any transaction with the third person during the pendency of the suit, the same shall be subject to adjudication of the rights of the plaintiff in the suit.

10. By order dated 23.5.2008 the suit was dismissed and order dated 13.2.2007 below Exhibit-5 was vacated. Aggrieved by that decision the plaintiff preferred Civil Appeal before the District Court, Pune. By order dated 4.8.2011, the learned District Judge dismissed the appeal. Aggrieved by this decision, the plaintiff instituted Second Appeal No.593/2011 in this Court. By order dated 12.2.2013, this Court dismissed the Second Appeal. Thus, this is how the proceedings of R.C.S. No.1568/2005 (for short, '**first suit**') came to an end.

11. It seems that during pendency of the first suit, the

plaintiff herein along with three others instituted Regular Civil Suit No.68/2006 (which was re-numbered as R.C.S. No.405/2010) (for short, '**second suit**') in the Court of Small Causes at Pune for declaration and permanent injunction. The plaintiff, who was plaintiff No.4 in the second suit, claimed declaration that he is a tenant in respect of the suit property of defendant No.1 Trust. The plaintiff also claimed injunction restraining defendants No.1 to 4 from transferring the rent receipt in the name of defendants No.2, 3 and 4 therein. During pendency of the second suit, the plaintiff filed application Exhibit-22 seeking permission to withdraw the suit with liberty to file fresh suit on the ground that during pendency of the second suit he had already instituted R.C.S. No.483/2013 (for short, '**third suit**'). By order dated 2.12.2013, the learned trial Judge allowed the plaintiffs to withdraw the suit as the plaintiff herein had already instituted the third suit.

12. In the third suit, the plaintiff has *inter alia* prayed for declaration that the surrender of the suit premises by defendants No.6 and 7 in their capacity as joint tenant of the suit premises to defendant No.1 and alleged acceptance of such

surrender by defendant No.1 is illegal and not binding upon the present plaintiff and that the plaintiff is entitled to occupy the suit premises as a tenant and to the exclusion of defendants No.6 and 7 since they claimed that they have surrendered their rights in favour of defendant No.1 and to the exclusion of defendant No.8 who claims that he has no interest in the suit property. The plaintiff also prayed for permanent injunction restraining defendant No.1 either by themselves or through their agents from creating third party interest either by way of lease, sell or by way of any other transaction as also restraining defendants No.6 to 8 from interfering with the plaintiff's possession of the suit and/or from causing any hindrance to his occupation of the suit premises in any manner whatsoever. The plaintiff also sought mandatory injunction directing defendants No.1 to 8 to evict themselves from the suit premises and handover the possession of the suit premises to the plaintiff recognizing his right as a joint tenant of the suit premises on the same terms and conditions as his father occupied the same.

13. Perusal of the prayers in the first suit shows that the plaintiff had instituted suit for injunction simplicitor. The suit was dismissed by the trial Court on 23.5.2008. Perusal of the

decision shows that during pendency of the suit defendants No.2 and 3 gave up their tenancy right or surrendered the same vide Exhibit-43 on record. The plaintiff did not amend the suit so as to challenge the surrender. The suit was dismissed. Appeal preferred by the plaintiff was also dismissed and Second Appeal was also dismissed by this Court on 12.2.2013. In paragraph-3 of the order dated 12.2.2013, this Court observed thus :

“3. In my view, if according to the appellant, surrender of the tenancy had taken place by respondent nos.2 and 3 then if the appellant intended to protect his tenancy right, he ought to have filed a suit for declaration that the surrender of the tenancy is contrary to his wishes and is contrary to law, and the respondent no.1 should not act upon it. The frame of the suit itself was defective.”

14. Perusal of the above extracted portion shows that this Court recorded that the frame of the suit itself was defective. If according to the plaintiff surrender of tenancy had taken place by respondents No.2 and 3 (defendants No.2 & 3) then if the plaintiff intended to protect his tenancy right, he ought to have filed a suit for declaration that the surrender of tenancy was contrary to his wishes and contrary to law and that defendant

No.1 should not act upon it. It is also material to note that pending the first suit, the plaintiff had already instituted second suit and it is only after dismissal of second suit by this Court on 12.2.2013, he filed purshis Exhibit-22 for withdrawal of the suit with liberty to file fresh suit. In fact, as noted earlier pending first suit defendants No.2 and 3 filed application Exhibit-43 placing surrender of tenancy on record. The plaintiff did not amend the suit. Even in the second suit, the plaintiff did not challenge surrender of tenancy rights by defendants No.2 and 3 and what was prayed for was that the plaintiff may be declared as a tenant. In my opinion, the plaintiff ought to have challenged the surrender of tenancy of defendants No.2 and 3. Perusal of the judgment of the trial Court in first suit shows that the plaintiff specifically averred that he came to know about surrender of tenancy rights by defendants No.2 & 3 after he visited Pune on 22.9.2005. In my opinion, the plaintiff should have filed suit within three years from the year 2005. For the first time in 2013 the plaintiff has instituted the suit challenging surrender of tenancy.

15. This matter was heard at length on 21.12.2016. Reference was made to the decision of Apex Court in **T.**

Arivandandam (supra) and it was made clear that the question whether the plaintiff can maintain suit challenging surrender of tenancy apart from issue of limitation would be decided. Accordingly the parties were heard at length on this ground. As the maintainability of the suit itself is under question, I do not find any merit in the submissions of Mr. Hushing that the application under Section 9-A was misconceived as it was filed after the application Exhibit-5 was decided. The moot question is whether the suit instituted by the plaintiff itself is maintainable as also whether it is barred by limitation.

16. Mr. Hushing submitted that defendants No.2 and 3 did not legally and validly surrender the tenancy rights. He relied upon Section 111 of the Transfer of Property Act, 1882 (for short, 'Act') and in particular clause (e) thereof. He submitted that the lease of immovable property determines by express surrender; that is to say, in case the lessee yields up his interest under the lease to the less or, by mutual agreement between them. In the present case, the defendants have not produced agreement on record to establish that there was express surrender. He further submitted that surrender of possession is one thing and surrender of tenancy rights is another thing. It is

only the landlord who can accept the surrender of tenancy. In the first suit, defendants No.2 & 3 filed application Exhibit-43 supported by an affidavit to the effect that they have surrendered their tenancy rights. Said surrender not having been accepted by the landlord is illegal. Defendant No.1 landlord has not yet issued rent receipts either in the name of defendants No.2 & 3 or defendant No.4. This indicates that the landlord has not accepted surrender of tenancy.

17. He further submitted that the plaintiff is in legal possession of the suit premises being joint tenant along with defendants No.2 and 3. He has taken me through the averments made in the present suit and in particular paragraph-18. Mr. Hushing further submitted that this is not a fit case for invocation of powers under Article 227 of the Constitution of India. In support of this proposition he relied upon decision of this Court in ***Prabhudas Gedam (supra)*** as also ***Narendra Pandurang Chatim v Shrikant Shambu, 2014 6 Mh.L.J. 763*** and in particular paragraph-11 thereof. In paragraph-11, the learned Single Judge of this Court referred to the decisions of ***Surya Dev Rai v Ram Chander Rai and others, (2003) 6 SCC***

675 and ***Shalini Shyam Shetty v Rajendra Shankar Patty, 2011(2) Bom.C.R. 242 (SC)***. In these decisions, it is held that the jurisdiction under Article 227 of the Constitution of India has not to be exercised just on the drop of a hat and on a mere asking by the petitioners. It also cannot be exercised in all cases to correct every error. It can be exercised only when the order is so perverse and arbitrary that its continuation will result in miscarriage of justice. But if the error is capable of being corrected in an appeal or revisional jurisdiction, this Court may refrain from embarking upon the process of correcting the same.

18. Apart from the fact that no such case is made out in the third suit, on merits, I find that the submissions made by Mr. Hushing are devoid of substance. While dismissing the first suit, in paragraph-2 the learned trial Judge specifically referred to the case made out by the plaintiff. The plaintiff came with the case that when he reached Pune at his native place on 22.9.2005 he was shocked to know that **defendants No.2 and 3 had entered into an agreement with defendant No.4 and they all together had a settlement with defendant No.1 regarding disposal of the suit property to defendant No.4.**

Defendant No.2 had purchased 3 BHK flat at Clover Village, Salunke Vihar Road, Pune and defendant No.3 had purchased a flat at Bhawani Peth, Pune. **Both the defendants No.2 and 3 have surrendered their tenancy rights to defendant No.1 in writing without consent of the plaintiff.** Thus, on the plaintiff's own showing there was agreement between defendants No.2 to 4 and defendant No.1. The case is, therefore, clearly covered by Clause 111(e) of the Act. In any case assuming it is not a case of express surrender, it is an implied surrender as per clause (f) of Section 111. (emphasis supplied)

19. As far as contention of Mr. Hushing that the plaintiff is in legal possession of the suit premises being joint tenant along with defendants No.2 and 3 is concerned, during pendency of the first suit, he took out application Exhibit-5 for injunction. In paragraph-8, the learned trial Judge observed that defendants No.2 and 3 had admittedly surrendered their tenancy rights and have vacated the suit premises. The plaintiff was also not in continuous physical possession of the suit property. In paragraph-9 it was noted that defendant No.1 is in possession of the suit property. As noted earlier, the suit was dismissed and

the interim order granted by the learned trial Judge during pendency of the suit was vacated. The appeal against that decision was dismissed and the Second Appeal was also dismissed by this Court. Thus, the plaintiff cannot claim to be either in factual or legal possession of the suit premises.

20. As noted earlier, the present suit is instituted challenging the surrender of tenancy. In my opinion, the plaintiff should have challenged surrender of tenancy in the first suit itself. Assuming that the plaintiff was not aware of surrender of tenancy rights by defendants No.2 and 3 in favour of defendant No.4 nonetheless during pendency of the suit defendants No.2 and 3 filed application Exhibit-43 supported by an affidavit placing on record surrender of tenancy rights in favour of defendant No.1. At least at that stage, the plaintiff should have amended the plaint so as to challenge surrender of tenancy rights by defendants No.2 and 3. That apart, instead of challenging surrender of tenancy rights during pendency of the suit, the plaintiff instituted second suit for declaration of his tenancy rights for challenging surrender. The first suit was dismissed on merits. The appeal preferred by the plaintiff was also dismissed and the Second Appeal was also dismissed.

After dismissal of the Second Appeal, the plaintiff filed application Exhibit-22 for withdrawal of the second suit with liberty to file fresh suit and in pursuance thereof present suit is filed. In my opinion, the present suit is misconceived and is clearly an abuse of process of law and process of the Court. The suit is clearly barred by limitation. Article 58 lays down period of three years limitation when the right to sue accrues. In my opinion, the plaintiff ought to have instituted suit within three years from 2005. As the plaintiff has, for the first time, challenged surrender of tenancy in the year 2013, it is clearly barred by limitation. That apart the suit is also hit by the principles of constructive resjudicata.

21. In the case of **Surya Dev Rai** (supra), in paragraph-22, Apex Court has dealt with supervisory jurisdiction under Article 227 of the Constitution of India. Apex Court has observed that “It is well settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved **or may even be exercised suo motu.** The paramount consideration behind

vesting such wide power of superintendence in the High Court is paying the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.” (emphasis supplied)

22. Applying the principles laid down by the Apex Court in ***Surya Dev Rai*** (supra) as also in ***T. Arivandandam*** (supra), I am satisfied that in the facts of the present case the suit instituted by the plaintiff in the year 2013 i.e. third suit is gross abuse of process of law and, therefore, it requires to be dismissed at the threshold. Hence following order :

- i] Petition succeeds. Regular Civil Suit No.483/2013 filed by the plaintiff stands dismissed.
- ii] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)