

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION [ST] NO.2894 OF 2017

WITH

CIVIL APPLICATION NO.285 OF 2017

Jaral David Fernandes	]	Petitioner
Vs.		
Mohammed WajidMomd Wahid Ansari	]	Respondent

.....
Mr. Prashant Pandey a/w Mr. Aigan Memon for the Petitioner.
Mr. Ahmed Nizam Shaikh, for the Respondent
.....

CORAM : R.G. KETKAR, J.

RESERVED ON: 26TH OCTOBER, 2018.
PRONOUNCED ON: 19TH NOVEMBER, 2018.

P.C.

Heard Mr. Pandey, learned Counsel for the petitioner/applicant and Mr. Shaikh, learned Counsel for the respondent in both the matters at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 9th April, 2015 passed by the learned trial Judge, Court Room No.35 of the Court of Small Causes at Mumbai, Bandra Branch below Exhibit 17 in L.D. Suit No.177 of 2014 as also the judgment and order dated 22nd December, 2016 passed by the Appellate Bench of the Court of Small Causes, Mumbai in Misc. Appeal No.60 of 2015. By these orders, the Courts below allowed the application made by the respondent, hereinafter referred to as 'plaintiff' and directed the petitioner, hereinafter referred to as 'defendant' to restore possession of Room No.7

admeasuring 8'x20' square feet situate at Ibrahim Chawl, Tape Village, Dadabhai Cross Road, near Bhawans College situate in land of CTS No.15 of Village Andheri, Andheri (West), Mumbai – 400 058 (for short 'suit premises') within a period of 2 months. The defendant is further restrained from creating third party interest or parting with possession of the suit premises till disposal of the suit.

3. The plaintiff has instituted suit against the defendant, inter alia, praying for declaration and injunction. It is the case of the plaintiff that he is carrying on business of Hair Cutting Saloon in the name and style “Jordhan Hair Cutting Saloon” since 2009 from the suit premises on leave and licence basis. He contended that the defendant had executed conducting agreement on 30th April, 2012. He has deposited Rs. 5,00,000/- with defendant. The conducting agreement is valid up to 31st March, 2019. The defendant with the help of others started harassing and torturing him. He, therefore, instituted the suit in the Small Causes Court.

4. During pendency of the suit, he took out application Exhibit 10 for temporary injunction, inter alia, praying for injunction restraining the defendant from disturbing his use, occupation, possession and enjoyment of the suit premises in any manner whatsoever nature without following due process of law. Notice was served on the defendant. The defendant appeared on 8th May, 2014 and sought time for engaging Advocate and for filing reply. Upon query made by the Court, the defendant made statement that he is not going to dispossess the plaintiff. After considering the apprehension of the plaintiff of dispossession, by order dated 8th May, 2014, the learned trial Judge issued injunction restraining the defendant from dispossessing the plaintiff from the suit premises till filing of the reply to the notice.

5. The plaintiff contended that on 22nd October, 2014, he left Mumbai to his native place to see his father-in-law who was very serious. When he reached at native place, his father-in-law expired. After staying there for a day, he came back to Mumbai. He was shocked and surprised to find that the suit premises was locked by putting some other lock by breaking open lock put by him. He, therefore, lodged complaint with D.N. Nagar Police Station alleging theft of articles lying in the shop as well as household articles, ration card, Bank account passbook, Harmonium and cash of Rs.10,000/-. But the Officials attached to the Police Station, however, instructed him to lodge the written complaint. Ultimately, N.C. Complaint No.3600 of 2014 under sections 323 and 504 Indian Penal Code 1860 was recorded as he was assaulted by kicks and fist blows. The plaintiff, therefore, made complaint to Senior Inspector of Police, D.N. Nagar Police Station, D.N. Nagar, Andheri (West) and copy thereof was forwarded to;

- [1] Deputy Commissioner of Police Bandra (West), Mumbai.
- [2] Asst. Police Commissioner, D.N. Nagar, Andheri, Mumbai.
- [3] Commissioner of Police, Crawford Market, Mumbai.
- [4] Home Minister of Manatralaya, Mumbai.

6. The plaintiff thereafter took out application Exhibit 17 on 31st October, 2014 for restoration of possession of the suit premises. By order dated 9th April, 2015, the learned trial Judge rejected application Exhibit 10. On the same day i.e on 9th April, 2015, the learned trial Judge allowed application Exhibit 17 and issued mandatory injunction as indicated earlier. Aggrieved by that decision, the defendant preferred Misc. Appeal No. 60 of 2015 which was dismissed by the Appellate Court on 22nd December, 2016. It is against these orders, the defendant has instituted present Petition.

7. In support of this Petition, Mr. Pandey strenuously contended that the suit premises belongs to sister of the defendant. Shop Act licence clearly shows that Margaret D. Fernandes, sister of the defendant is employer of Shop “Jordhan Hair Cutting Saloon”. Plaintiff is employee of the said saloon. He submitted that Margaret Fernandes is not impleaded in the suit. He submitted that the plaintiff is not in possession of the suit premise legally or factually. He submitted that the impugned orders are passed by the Courts below without giving any opportunity to sister of the defendant. The Courts below were not justified in passing the impugned orders in the absence of owner of the suit premises. The Courts below failed to appreciate that the plaintiff cannot claim possession from the defendant who was merely caretaker of the suit premises. He submitted that the plaintiff has prepared, forged and fabricated documents. There is no relationship of licensor and licensee between the parties. Relief granted by the Courts below amounts to passing of decree against the defendant at interlocutory stage. He submitted that the plaintiff has not approached the Court with clean hands and has suppressed material facts. The Courts below were, therefore, not justified in passing the impugned orders. He submitted that the Courts below failed to appreciate that the plaintiff did not come with a *prima facie* case let alone strong *prima facie* case. The balance of convenience also does not lie in favour of the plaintiff. The plaintiff has not demonstrated that irreparable loss and hardship would be caused to him if the injunction is refused. He submitted that once the learned trial Judge rejected application Exhibit 10 as the plaintiff was not found in possession, the Courts below were not justified in passing the impugned orders.

8. Mr. Pandey has invited my attention to compilation of documents and in particular, purported receipts signed by the parties, alleged leave and licence agreements as also alleged conducting agreement. He submitted that basically these documents do not bear signature of the defendant. Even the

plaintiff has forged and fabricated signature of the defendant. For all these reasons, he submitted that the impugned orders deserve to be set aside.

9. On the other hand, Mr. Shaikh supported the impugned orders. He submitted that as the plaintiff was unlawfully dispossessed from the suit premises, the learned trial Judge rejected application Exhibit 10 on 9th April, 2015. In paragraph 8 of that order, the learned trial Judge observed that as the plaintiff is not found in possession, balance of convenience does not lie in favour of the plaintiff and no inconvenience would be caused to the plaintiff in the event of refusal of temporary injunction.

10. In so far as application Exhibit 17 is concerned, he submitted that the learned trial Judge considered the documents produced by the plaintiff viz; ration card which *prima facie* indicates that the plaintiff was residing in the suit premises. The plaintiff also produced two agreements of leave and licence which support his contention that the suit premises was given to him by the defendant on leave and licence basis. The plaintiff was residing as also carrying on business of Hair Cutting Saloon there. The learned trial Judge also considered electricity bills towards payment of electricity charges. The learned trial Judge also referred to order dated 8th May, 2014 passed by the learned trial Judge below Exhibit 10. After considering the material on record, the learned trial Judge allowed the application Exhibit 17 on 9th April, 2015.

11. In so far as the Appellate Court's order is concerned, he submitted that the Appellate Court also considered leave and licence agreement dated 21st May, 2011 and the conducting agreement dated 30th April, 2012. The Appellate Court also noted order dated 8th May, 2014 passed by the learned trial Judge below Exhibit 10. After considering the material on record, the Appellate Court dismissed the appeal. He, therefore, submitted that no case is

made out for interfering with the impugned order.

12. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. Mr. Pandey submitted that ration card was subsequently suspended by the rationing authority. In so far as custody of the electricity bills with the plaintiff is concerned, he submitted that as the plaintiff was employee in the Hair Cutting Saloon, it is not surprising that he will have custody of the electricity bills. I do not find any merit in the submissions of Mr. Pandey. As mentioned earlier, by order dated 8th May, 2014, the learned trial Judge while issuing injunction recorded statement of the defendant that he will not dispossess the plaintiff. The learned trial Judge issued injunction restraining the defendant from dispossessing the plaintiff till filing reply to the motion. The plaintiff has relied on leave and licence agreements dated 9th June, 2010 and 21st May, 2011. The plaintiff has also relied on conducting agreement dated 30th April, 2012. After considering the material on record, both the Courts accepted that the plaintiff was carrying on business of Saloon from the suit premises as also he was residing there.

13. Mr. Pandey submitted that these documents are forged and fabricated documents and do not bear signature of the defendant. At the interlocutory stage, the Court cannot decide this plea and this plea can be decided only in a full-fledged trial. Thus, the Courts below after considering the material on record, allowed the application filed by the plaintiff. For the reasons recorded by the learned trial Judge from paragraphs 12 to 16, I do not find that the learned trial Judge committed any error in allowing application Exhibit 17. Mr. Pandey submitted that on the same day, the learned trial Judge rejected application Exhibit 10 on the ground that the plaintiff was not found in possession. A perusal of paragraph 8 of that order shows that the learned

trial Judge found that the plaintiff is not in possession of the suit premises. It is the case of the plaintiff that he was dispossessed on 30th October, 2014. I, therefore, do not find any merit in the submission of Mr. Pandey that as application Exhibit 10 was rejected, the Courts below were not justified in passing the impugned orders.

14. The Appellate Court has considered this aspect from paragraphs 22 to 25 and 27. For the reasons recorded therein, I do not find that the Appellate Court committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. C.A. No.285 of 2017 filed by the defendant for setting aside the order dated 22nd December, 2016 passed by the Appellate Bench of the Court of Small Causes in Misc. Appeal No. 60 of 2015 does not survive and the same is disposed of.

15. At this stage, Ms. Shirke orally applies for stay of this order for a period of 4 weeks from today. She submits that petitioner is in possession and he will neither create third party interest nor part with possession of the suit premises.

16. In view thereof, subject to petitioner neither creating third party interest nor parting with possession of the suit premises, this order shall remain stayed for a period of 4 weeks from today with express understanding that no further extension of interim relief shall be sought. Order accordingly.

[R.G. KETKAR, J.]