

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 930 OF 2014

Shrenik Himatlal Mehta

...Applicant

Versus

M/s. K. B. Hosiery Works and Others

...Respondents

....

Mr. Karan Bhide a/w. Neerav Merchant i/b. Thakordas & Madgavkar, for the Applicant.

Mr. Chetan Kapadia a/w. Abhishek Bhadang a/w. Kausar Banatwala i/b. Tushar A. Goradia, Advocate for Respondent No.2.

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CORAM : R. G. KETKAR, J.

DATE : 26th JUNE, 2018

P.C.

1. Heard Mr. Karan Bhide, learned counsel for the applicant and Mr. Chetan Kapadia, learned counsel for respondent No.2, at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as the 'plaintiff', has challenged the judgment and decree dated 29.11.2013 passed by the Appellate Bench of the Small Causes Court at Mumbai in Appeal No.501/2006. By that order, the Appellate Court dismissed the appeal preferred by the plaintiff. The Appellate Court upheld the judgment and decree dated 29.4.2006 passed by the learned

Judge, Court Room No.16 of the Small Causes Court at Bombay in R.A.E. & R. Suit No.713/1325 of 1997.

3. The plaintiff had instituted the suit for recovery of possession of land admeasuring 1271 square yards or thereabouts together with Shed (structure) erected thereon at Plot No.15, Forhett Street Cross Lane, Mumbai (for short, 'suit property') under Section 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The Courts below dismissed the suit principally on the ground that the plaintiff is not a owner of the suit property. The Appellate Court also held that the need pleaded by the plaintiff is neither reasonable nor bonafide.

4. In support of this application, Mr. Bhide strenuously contended that the Courts below committed serious error in holding that the plaintiff has not established his ownership rights in respect of the suit premises. He has invited my attention to :

- [i] Indenture of Lease dated 13.4.1948 between Sarafally Fazalally Raja (Lessor) on one hand and Chandulal Bahadarchand and Manilal Prabhulal, the Partners of Good Luck Auto Carrage and/or K.B. Hosiery Works on the other;
- [ii] Indenture of Mortgage dated 25.8.1955 between Sharafally

Fazalally Raja (Mortgagor) on one hand and Harjivandas Devchand Shah and Sanyukta wife of Harjivandas Shah (mortgagee);

- [iii] Conveyance dated 10.3.1960 executed by Harjivandas Devchand Shah, Sanyukta wife of Harjivandas Shah (Vendors) and the plaintiff (Purchaser). Himatlal Gopalji Mehta and Kishore Himatlal Mehta were the confirming parties. In particular he invited my attention to the recitals of the Conveyance Deed which are to the following effect :

“AND WHEREAS the due date for the repayment of the said sum of Rs.30,000/- due under the hereinbefore recited Indenture of Mortgage expired on the 15th day of December, 1955.

AND WHEREAS by the hereinbefore recited – Indenture of Mortgage it was declared that it shall be lawful for the Vendors at any time or times – without any further consent on the part of the – Mortgagor to sell the said land hereditaments and premises or any part thereof either together or in parcels or lots and either by public auction or by private contract subject to any conditions as to title or otherwise as the Vendors may think fit with power to the Vendors to execute all necessary – documents or other assurances and give effectual receipt for the purchase moneys and to do all acts, deeds, matters and things necessary or expedient for completing the sale.”

5. Relying upon the aforesaid recitals, he submitted that the Indenture of Mortgage expired on 15.12.1955. At that time, an amount

of Rs.30,000/- was due and payable. The Indenture of Mortgage also expressly conferred power to sell the suit property either by Public Auction or by private contract. He submitted that DW-1 admitted that by virtue of the Conveyance Deed at Exhibit-E, the plaintiff became landlord. He, therefore, submitted that the Courts below were not justified in dismissing the suit on the ground that the plaintiff had failed to establish his ownership rights.

6. Mr. Bhide further submitted that the plaintiff had earlier instituted Suit in the year 1962 against the present defendants and Chandulal Bahadarchand for redevelopment of the suit property after obtaining certificate of the Tribunal under Section 13(3)(B) of the Act. The Suit was decreed on 23.8.1966 and the appeal preferred against that decision was dismissed in 1968. He submitted that thus the issue whether the plaintiff is owner of the suit property or not was concluded in that proceeding. Even otherwise, the Courts below were therefore not justified in dismissing the Suit. He submitted that the Courts below observed that though the plaintiff was given opportunity to produce Indenture of Mortgage dated 25.8.1955, still he did not avail that opportunity. The plaintiff did not produce the Indenture of Mortgage. He submitted that in fact the Conveyance Deed also referred to the factum of execution of Indenture of Mortgage deed on 25.8.1955. In

particular, he relied upon following recital :

“ WHEREAS by an Indenture of Mortgage bearing date the 25th day of August 1955 and made between Sharafally Fazalali Raja therein and hereinafter called the Mortgagor of the One Part and the vendors therein called the Mortgagees of the Other Part registered with the Sub-Registrar of Assurances at Bombay under No.5507/55 of Book No.I on the 14th day of September 1957 in consideration of the sum of Rs.30,000/- (Rupees Thirty Thousand) lent and advanced by the Vendors to the Mortgagor the Mortgagor did thereby grant convey and assure unto the Vendors all that piece or parcel of land or ground together with the messuages tenements or buildings or structures standing thereon or any part thereof situate at – Forjett Street Bombay more particularly described in the Schedule thereunder written and also in the – Schedule hereunder written and intended to be hereby granted and conveyed with their appurtenances unto and to the use of the Mortgagees subject nevertheless to the proviso therein contained for redemption of the land hereditaments and premises on payment by the Mortgagor unto the Vendor's of the said sum of Rs.30,000/- (Rupees thirty thousand) with interest thereon at the rate of 9 per cent per annum on 15th day of December 1955 the due date;”

7. Merely because the Mortgage Deed was not produced by the plaintiff that itself will not be fatal for dismissal of the suit as the factum of execution of mortgage deed was expressly recited in the Conveyance Deed dated 10.3.1960. He submitted that because of the fact that the plaintiff was not in India, the decree passed in earlier suit of 1962 could

not be executed. He submitted that as the plaintiff is the owner of the suit property, the Courts below were not justified in dismissing the suit on that ground. He, therefore, submitted that the application requires consideration.

8. On the other hand, Mr. Kapadia supported the impugned orders. He submitted that in the present case, the plaintiff has not produced the Deed of Mortgage despite availing ample opportunities in the trial Court as also before the Appellate Court. He invited my attention to paragraph-14 of the trial Court's judgment where the learned trial Judge recorded that the plaintiff has failed to produce Deed of Mortgage. In paragraph-28 even the Appellate Court recorded that the plaintiff did not produce the Mortgage Deed to show that a power to sell without intervention of the Court is expressly conferred on the mortgagees. He submitted that for the first time the Mortgage Deed dated 25.8.1955 is produced in this Court without making out case for production of additional evidence under Order XLI Rule 27 of C.P.C. He invited my attention to the recital in the Conveyance Deed dated 10.3.1977 which records that the Indenture of Mortgage dated 25.8.1955 was registered with the Sub-Registrar of Assurances at Bombay under No.5507/55 of Book No.I on 14.9.1957. This aspect was also specifically agitated before the Appellate Court as reflected in

paragraph-30 of the order of the Appellate Court. Mr. Kapadia submitted that in the present case the plaintiff has not complied the conditions stipulated in Section 69 of the Transfer of Property Act, 1882 (for short, 'T.P. Act'). The Courts below, therefore, rightly came to the conclusion that as the plaintiff is not owner of the suit property, he cannot seek eviction by invocation of ground under Section 13(1)(g) of the Act. On merits also he submitted that from paragraphs-36 onwards, the Appellate Court has held that the plaintiff has not come to the Court with clean hands and has in fact suppressed material facts. The plaintiff has not established that the need pleaded by him is both reasonable as also bonafide.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff claims to have acquired ownership on the basis of Conveyance Deed dated 10.3.1960. It is not in dispute that on 13.4.1948 Sarafally Fazalally Raja has leased out the suit property to Chandulal Bahadarchand and Manilal Prabhulal. It is also not in dispute that the plaintiff did not produce Indenture of Mortgage dated 25.8.1955 executed by Sharafally Fazalally Raja in favour of Harjivandas Devchand Shah and Sanyukta wife of Harjivandas Shah either in the trial Court or before the Appellate Court.

The plaintiff has produced copy of that Indenture of Mortgage for the first time in this Court without making out a case under Order XLI Rule 27 of C.P.C..

10. In the case of **Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148**, while considering application under Order XLI Rule 27 of C.P.C., the Apex Court in paragraphs-36 and 39 observed thus :

“36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 Code of Civil Procedure enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy and Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham and Ors., AIR 1965 SC 1008; Soonda Ram and Anr. v. Rameshwaralal and Anr. AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy and Ors. AIR 1979 SC 553).

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence

under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam and Ors. AIR 1969 SC 101).”

11. In paragraph 36, the Apex Court observed that the general principle is that the appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. Order XLI Rule 27 of C.P.C. enables the appellate Court to take additional evidence in exceptional circumstances. The appellate Court may permit additional evidence only and only if the conditions laid down in the Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the Court and is to be used sparingly. In paragraph 39, it was observed that when a party had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot be allowed to produce it in appeal. The inadvertence of the party of realizing the importance of document does not constitute a substantial cause. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

12. In view thereof, the plaintiff cannot be permitted to produce the document for the first time in this Court without making out a case for production of additional evidence. Be that as it may, Mr. Bhide relied upon the recitals of Conveyance Deed dated 10.3.1960 which recited execution of Indenture of Mortgage on 25.8.1955 as also that as on 15.12.1955 the Indenture of Mortgage expired. At that time, an amount of Rs.30,000/- was due and payable. Even perusal of above extracted recitals in the Conveyance Deed do not satisfy the conditions laid down in Section 69 of T.P. Act. Section 69 reads thus :

69. Power of sale when valid.-- (1) A mortgage, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely:-

- (a) where the mortgage is an English mortgage, and neither mortgagor nor the mortgage is a Hindu, Muhammad an or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;
- (b) where a power of sale without the intervention of the court is expressly conferred on the mortgage by the mortgage-deed and the mortgage is Government;
- (c) where a power of sale without the intervention of the court is expressly conferred on the mortgage by the mortgage-deed and the mortgaged property or any part thereof 8 [was, on the date of the execution of the mortgage-deed], situate within the towns of Calcutta,

Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

- (2) No such power shall be exercised unless and until-
 - (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or
 - (b) some interest under the mortgage amounting at least to five hundred rupees is in areas and unpaid for three months after becoming due.
- (3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.
- (4) The money which is received by the mortgage, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.”

13. In order to establish that the express power is conferred on the mortgagee by the Mortgage Deed, it was imperative on the part of the plaintiff to produce the Mortgage Deed in the Courts below. Even if for the time being it is assumed in favour of the plaintiffs on the basis of the recitals of the Conveyance Deed, extracted hereinabove, such power is conferred, none the less a perusal of the Conveyance Deed, does not indicate compliance of Sub-section (2) of Section 69 of T.P. Act. There is no recital to that effect. Apart from that the plaintiff did not adduce any evidence or the material showing compliance of sub-section (2) of Section 69 of T.P. Act. The Courts below have concurrently held that the plaintiff has failed to establish his ownership rights in respect of the suit property. In paragraph-14, the learned trial Judge has referred to the provisions of the Act and also ultimately held that the plaintiff has failed to prove that he is owner of the suit property. The Appellate Court has discussed this aspect from paragraphs-22 onwards and has referred to the decisions of this Court and Apex Court. In paragraph-26, the Appellate Court held that the plaintiff has to satisfy the twin conditions laid down in Section 69, namely, (1) there must be express power conferred on the mortgagee in the Mortgage Deed itself to sell

mortgaged property without intervention of the Court and (2) if, mortgagee wants to sell the mortgaged property to recover mortgaged debt, he has to serve a notice in writing demanding principal money to the mortgagor and on his failure to comply, then and then only the mortgagee can sell the property. In paragraph-28, the Apex Court categorically recorded a finding that as the plaintiff failed to produce the Mortgage Deed to show that a power of sale without intervention of the Court is expressly conferred on the mortgagees as also having failed to show compliance of sub-section (2) of Section 69 of T.P. Act, the sale deed dated 10.3.1960 is hit by Sections 60 and 69 of T.P. Act. The plaintiff has not produced any material on record showing compliance of sub-section (2) of Section 69 of T.P. Act, namely, notice in writing was served on the mortgagor requiring payment of principal money and that default was committed in payment of principal money or of part thereof for three months after service.

14. Even on merits, the Appellate Court has held that the plaintiff did not come to the Court with clean hands and has in fact suppressed that he has several other premises which will meet his requirement. For the reasons recorded in paragraphs-36 to 44, I do not find that the Appellate Court committed any error in negating the ground under Section 13(1)(g) of the Act.

15. Thus, both the Courts after appreciating the evidence on record have concurrently held that the plaintiff has failed to establish his ownership over the suit property. The plaintiff was not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The plaintiff was also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Civil Revision Application fails and the same is dismissed with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)