

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.5849 OF 2016**

Mahaveer Jugraj Kothari] Petitioner

Vs.

Kewalchand Chothmal Kothari & Ors.] Respondents

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Mr. Yogendra Pendse, for petitioner.

Mr. Mahendra M. Agavekar, for respondent No.3.

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CORAM : R.G. KETKAR, J.

DATE : 12TH JUNE, 2018.

P.C:

Heard Mr. Pendse, learned Counsel for the petitioner and Mr. Agavekar, learned Counsel for respondent No.3 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as “defendant No.3” has challenged the judgment and order dated 23rd April, 2014 passed by the learned Judge, Court Room No.13 of the Court of Small Causes at Mumbai below Exhibit 58 in R.A.D. Suit No.1303 of 2011 as also judgment and order dated 15th January, 2016 passed by the Appellate Bench of the Court of Small Causes Mumbai in Misc. Appeal No. 254 of 2014. By these orders, the Courts below dismissed application/notice Exhibit 58 taken out by defendant No.3 for vacating injunction granted by order dated 20th October, 2011 below Exhibit 10 restraining defendant No.1 from dispossessing the plaintiff from the suit premises without following due process of law till disposal of the suit.

3. In support of this Petition, Mr. Pendse strenuously contended that defendant No.3 is in possession of the suit premises. He has taken me through paragraphs 17, 19 and 36 of the written statement dated 16th September, 2013. He submitted that defendant No.2/landlord had inducted defendant No.3 in the suit premises from 1st June, 2011. Defendant No.3 has paid rent to defendant No.2 from 1st June, 2011 to 31st March, 2012 and defendant No.2 had also issued rent receipts to defendant No.3.

4. In paragraph 19, defendant No.3 contended that the plaintiff broke open the lock on 8th November, 2011 of the suit premises and took forcible possession. The plaintiff also had thrown articles, documents and account books of defendant No.3. Wife of defendant No.3 lodged Police complaint with L.T. Marg Police Station on 10th November, 2011 and in pursuance thereof, investigation was carried out and F.I.R No.13 of 2013 was registered on 15th January, 2013 against the plaintiff. The plaintiff was arrested by the Police and was in Police custody for four days and later on the plaintiff was released on bail. In paragraph 36, it is contended that the plaintiff admitted exclusive possession of defendant No.3. As plaintiff is not in possession much less exclusive possession of the suit premises, question of disturbing alleged possession of the plaintiff does not arise. Mr. Agavekar supported Mr. Pendse.

5. I have considered the submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier by order dated 20th October, 2011, the learned trial Judge issued injunction restraining defendant No.1 from dispossessing the plaintiff from the suit premises without following due process of law till disposal of the suit. Defendant No.3 filed application for vacating that order. The Courts below have rejected that notice principally on the ground that defendant No.3 has not

established his possession in respect of the suit premises. In particular, the Appellate Court in paragraph 13 has observed that report lodged by defendant No.3 against the plaintiff shows that one Vijaykumar Alguram Gupta has been inducted as tenant in the suit premises. Even otherwise, in paragraph 19 of the written statement, defendant No.3 himself has asserted that he was dispossessed by the plaintiff on 8th November, 2011. In other words, defendant No.3 is not in possession of the suit premises.

6. In view thereof, I do not find that the Courts below committed any error in dismissing application/notice Exhibit 58 taken out by defendant No.3. Hence, no case is made out for interfering with the impugned orders in exercise of powers under Article 227 of the Constitution of India. The Petition fails and the same is dismissed reserving liberty to defendant No.3 to adopt due process of law for obtaining possession. All contentions of the parties in that regard are expressly kept open. If such proceedings are adopted, the concerned Court will decide it on the basis of the evidence on record, in accordance with law un-influenced by the observations made in the impugned orders and in this order.

[R.G. KETKAR, J.]