

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

WRIT PETITION NO. 4284 OF 2015

Mr. Francis Pereira

Age : 72 Years, Occupation – Retired

Resident at – Joe Apartments, Room No.7

3rd Floor, Charai, Thane (W).

... Petitioner

V E R S U S

Shri Surendra Jugal Tuli

Age : 38 Years, Occupation – Business

Resident at – A2 504, Gemini Co-op.

Housing Society Ltd., Pokhran Road No.2,

Near Hyde Park, Thane (W)

... Respondent

Mr. Aumkar Joshi for Petitioner.

Mr. M. J. Bhatt for Respondent.

CORAM : NITIN W. SAMBRE, J.

RESERVED ON : JUNE 26, 2018.

PRONOUNCED ON : JULY 5, 2018.

ORDER

. Order dated September 17, 2014 passed by the District Judge-7, Thane in Misc. Civil Appeal No. 15 of 2014, thereby restraining the present Petitioner from causing any obstruction to the possession of

the Respondent – Plaintiff over the suit property till the disposal of the suit is subject matter of challenge in the present Writ Petition.

2. It is the case of the present Petitioner – original Defendant that Respondent – Plaintiff filed Regular Civil Suit No. 99 of 2012 seeking declaration that Petitioner – Defendant has no right, title or interest in the suit property and restrained him by way of an injunction from disturbing the possession of the Respondent – Plaintiff.

3. The suit property consists of Gala No. 9050879/3 situated at Digvijay Industrial Estate, Upvan, Pokhran Road No.1, Thane. According to Respondent – Plaintiff, in 1982-83 they have developed the suit property which at earlier point of time was standing in the name of his father who expired in the year 1992. According to Respondent – Plaintiff, the Petitioner – Defendant got the said property on Leave and License basis in the year 1994, which was further renewed for a period of five years from the year 1999. It is the case of the Respondent – Plaintiff that possession of the suit property was handed over in January – 2012. According to him, on 11th January 2012 he noticed that some unknown persons are carrying out construction in the suit property and upon

enquiry it came to know that it is the Defendant, who is indulging in the act of illegal construction.

4. According to Respondent – Plaintiff, on 12th January 2012 the construction was demolished by the Municipal Corporation, Thane and after drawing panchanama handed over the possession to the present Respondent – Plaintiff being land owner and as such the Plaintiff is in possession of the suit property since 13th January 2012. According to Respondent - Plaintiff, on 18th January 2012 the Defendant tried to dispossess him which has prompted him to file the suit in question. Application [Exhibit – 5] for grant of temporary injunction was moved by the Respondent – Plaintiff.

5. The Petitioner – Defendant filed his written statement and claimed that the suit property is incorrectly described in the plaint. According to him, Shri Jugal Kishor Tuli was earlier owner, who had given the land on lease for a period of ten years. According to him, the total holdings of 500 sq. ft. along with constructed portion was agreed to be sold to the present Petitioner – Defendant vide Agreement dated 8th September 1987 for a consideration of Rs. 75,000/- part of which he was

already paid to Jugal Kishor Tuli. As such he remained in lawful possession of the suit property. According to him, there is electric connection in the name of the Petitioner – Defendant. So also he has paid the taxes. He would then urge that one Subhash Khubchand Goplani offered to acquire the business of Petitioner and entered into a registered sale-deed dated 23rd November 2011. When Subhash Goplani tried to carry out additional construction, the Respondent objected to the same and as such Subhash Goplani withdrew himself from the sale-deed.

6. It is for the Petitioner to file sufficient documents to demonstrate his possession over the suit property. He would draw support of Agreement dated 8th September 1987 entered into between the Petitioner – Defendant and Jugal Kishor Tuli, when Jugal Kishor Tuli has agreed to sell the properties in his favour. He would also draw support from the stamp receipt executed by the Respondent in his favour acknowledging payment of amount. In addition, he has produced on record the details about the electricity charges paid by him vide various receipts, property taxes paid by him. He submits that he is in settled possession of the suit property and he had never surrendered his

possession. According to him, the Plaintiff's application for grant of injunction was properly rejected by the learned trial court, however, in view of incorrect appreciation of pleadings and evidence, the Appeal came to be allowed.

7. *Per contra*, the learned Counsel for Respondent – original Plaintiff would urge that there was a Leave and License Agreement in favour of the present Petitioner and the father and husband of the Respondent. According to him, the period of license was already over and as such the possession was surrendered to the Respondent by the Petitioner. According to him, the notices issued by the Corporation about demolition of illegal structure speak voluminous about their settled possession and as such he sought dismissal of the present Writ Petition.

8. Considered rival submissions.

9. It is not in dispute that the documents which are produced on record by the present Petitioner speaks of an Agreement dated 8th September 1987 between Jugal Kishor Tuli – the father of the Respondent on one hand and present Petitioner on another, which speaks of

'Agreement to Sale' of the suit property in favour of the present Petitioner. Not only this, there appears to be a stamp receipt signed by the present Respondent acknowledging the amount which is to be adjusted in the consideration of the premises.

10. The Agreement dated 8th September 1987 and the alleged Leave and License Agreement of 1994 in clear terms speaks of the possession being handed over to the present Petitioner and he remained in possession of the same. The Respondent herein has come out with a plea in the plaint that the possession was surrendered to the Respondent – Plaintiff in January – 2012. Neither any possession receipt nor any document demonstrating handing over of possession is brought on record for consideration of this Court, but for a bare statement by the Respondent – Plaintiff.

11. Apart from the aforesaid pleadings of handing over of possession alleged by the Plaintiff in para 3 of the plaint there appears to be one more story developed by the Respondent – Plaintiff that they have received the possession from the Municipal Corporation, Thane on 12th January 2012 when the illegal structure was demolished. Even if it is

presumed that the illegal structure was demolished, still there was no authority with the Corporation to hand over the possession to the Respondent – Plaintiff when fact remains that both these documents i.e. Agreement to Sale and Leave and License Agreement in clear terms speaks of the possession of the Petitioner – Defendant.

12. The other documents viz – the receipt of payment of electricity charges from 21st August 1990 and also the payment of the Corporation taxes in clear terms establishes that Petitioner was in possession of the suit property upto 2012.

13. The contention of the Respondent that the property was agreed to be sold by the Respondent through Power of Attorney in favour of one Subhash Gopani even if presumed against the Petitioner, it is difficult to accept the possession of the Respondent – Plaintiff over the suit property.

14. Though the learned Counsel for Petitioner by inviting attention of this Court to the pleadings made in the Petition has tried to canvass that the Petitioner has admitted the possession of the Respondent,

however, there is hardly any material on record to accept the same. The trial court while rejecting Application for grant of temporary injunction [Exhibit - 5] has observed that the present Respondent – Plaintiff has not produced any documents to demonstrate their possession over the suit property. He has considered the documents Exh. 46/1 to 46/5 i.e. electricity bill, telephone bill and property tax receipts in favour of the Petitioner for refusing injunction.

15. The learned lower appellate court in its reasoning has though accepted the theory of Leave and License Agreement, however, believed the statement that the possession was surrendered in January – 2012 to the Respondent in absence of any oral or documentary evidence. The learned lower appellate court has committed serious error in recording finding that the documents viz – electricity bill, telephone bill etc. of 2011 onwards are not produced by Petitioner – Defendant, when the Evidence Act contemplate such burden to be discharged by Plaintiff – Respondent.

16. As observed herein above, the Petitioner in clear terms has established his possession over the suit property by virtue of Agreement to Sale and Leave and License Agreement. There is no documentary evidence

on record to infer surrender of possession by the present Petitioner to the Respondent. Rather the record depicts that the Respondents have acknowledged time and again payment of the part consideration. There is no acknowledgment of possession nor any other document so as to infer the possession was handed over by the Petitioner - Defendant to the Respondent - Plaintiff. All these material depicts that the Petitioner is in possession of the suit property since the date of agreement dated 8th September 1987 pursuant to clause – (1) of the said Agreement and also by virtue of Leave and License Agreement.

17. In view thereof, the order impugned passed by the learned District Judge – 7 Thane in Misc. Civil Appeal No. 15 of 2014 granting injunction against the Petitioner is not sustainable and as such is hereby quashed and set aside.

18. The prayer for injunction moved by the Respondent – Plaintiff as such stands rejected.

19. The writ petition stands allowed in terms of prayer clause (a).

(NITIN W. SAMBRE, J.)