

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8814 OF 2017

Hari Vishwambhar Nayar (deceased) through
legal heirs Lila Hari @ Haridasan Nayar and others ... Petitioners
Vs.
Pankaj Laxmikant Desai and others ... Respondents

WITH
WRIT PETITION NO.8815 OF 2017

Chandrakala Gujani @ Balaso Chavan and others ... Petitioners
Vs.
Pankaj Laxmikant Desai and others ... Respondents

Mr. Prafulla B. Shah i/b. Mr. Kayval P. Shah for Petitioner in both the
Petitions.

Mr. S. P. Thorat for Respondents No.3 to 5 in Writ Petition No.8814 of
2017.

Mr. P. S. Dani, Senior Advocate i/b. Mr. D. P. Rananaware for Respondent
No.3 in Writ Petition No.8815 of 2017.

CORAM : R. G. KETKAR, J.
DATE : JULY 4, 2018

P.C. :

Heard Mr. Shah, learned Counsel for the petitioner in both the
Petitions and Mr. Thorat, learned Counsel for respondents No.3 to 5 in
W.P.No.8814 of 2017 and Mr. Dani, learned Senior Counsel for
respondent No.3 in W.P.No.8815 of 2017 at length.

2. Writ Petition No.8814 of 2017 is instituted by the heirs and legal
representatives of Hari Vishwambhar Nayar, since deceased, hereinafter
referred to as 'plaintiffs', challenging the judgment and decree dated
09.03.2016 passed by the learned Civil Judge, Junior Division, Phaltan
in Regular Civil Suit No.185 of 1999 as also the judgment and decree
dated 19.04.2017 passed by the learned Ad-hoc District Judge, Satara in
Regular Civil Appeal No.108 of 2016. By these orders, the Courts

below partly decreed the Suit instituted by the plaintiffs and restrained defendant No.3 - Bhojraj Vitthalrao Naik-Nimbalkar and defendant No.4 - Sanmitra Promoters Private Limited, Phaltan from causing any sort of interference and / or obstruction in the plaintiffs' possession of tenanted room admeasuring 12' x 25' feet otherwise than in due course of law. The learned District Judge dismissed the cross-objections preferred by defendants No.3 and 4 against clause 2 of the operative part of the trial Court's order.

3. Writ Petition No.8815 of 2017 is instituted by the plaintiffs challenging the judgment and decree dated 09.03.2016 passed by the learned Civil Judge, Junior Division, Phaltan in R.C.S.No.232 of 1998 as also the judgment and decree dated 19.04.2017 passed by the learned Ad-hoc District Judge-2, Satara in Regular Civil Appeal No.107 of 2016. By these orders, the Courts below partly decreed the Suit instituted by the plaintiffs and issued injunction restraining defendant No.3 - Ishwarlal Gopichand Agarwal, defendant No.4 – Sanmitra Promoters Private Limited, Phaltan, defendant No.5 - Bhojraj Vitthalrao Naik-Nimbalkar from causing any sort of interference and / or obstruction in the plaintiffs' possession of tenanted room namely store room admeasuring 12 x 11 ft. and office 7½ x 11 ft. as spell out in the Commissioner's report exhibit-38, otherwise than in due course of law. The cross-objections referred by defendants No.4 and 5 were dismissed by the learned District Judge.

4. As the common questions of law and facts arose in these Petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy raised in these Petitions, facts from Writ Petition No.8815 of 2017 are taken into consideration.

5. In support of these Petitions, Mr. Shah invited my attention to

prayer clauses (a) and (d) of R.C.S.No.232 of 1998 instituted by the plaintiffs. By prayer clause (a), plaintiffs sought perpetual injunction restraining defendants No.1 and 2 (Pankaj Lakshmikant Desai and Smt. Kanchan Lakshmikant Desai) from creating third party interest in respect of the property described in paragraph 1-B of the plaint. By prayer clause (b), plaintiffs prayed for injunction restraining defendants No.3, 4 and 5 namely, Ishwarlal G. Agarwal, Sanmita Promoters Pvt. Ltd., Phaltan and Bhojraj Vitthalrao Naik-Nimbalkar from disturbing possession of the plaintiffs as also erecting wire compound in respect of property described in paragraph 1-B of the plaint. He invited my attention to the orders passed by this Court on 07.10.2014 in C.R.A.No.216 of 2013 and other companion Civil Revision Applications. By consent of the parties, this Court set aside the following judgments and decrees:

- (1) Judgment and decree dated 18.01.2007 in Regular Civil Suit No.232 of 1998 and judgment and decree dated 01.06.2012 in Regular Civil Appeal No.76 of 2007 and Regular Civil Appeal No.87 of 2007;
- (2) Judgment and decree dated 18.01.2007 in Regular Civil Suit No.185 of 1999 and judgment and decree dated 01.06.2012 in Regular Civil Appeal No.78 of 2007;
- (3) Judgment and decree dated 04.12.2006 in Regular Civil Suit No.265 of 2000 and judgment and decree dated 04.10.2012 in Regular Civil Appeal No.5 of 2007.

and directed the trial Court to frame the following issue as an additional issue:

“Whether the defendants (plaintiffs herein) prove that they are tenants in respect of open plot of land, as claimed by them in their respective written statements in the said Rent Act Suits, and in the Plaints in the Civil Suits for injunction.”

6. He submitted that by order dated 09.03.2016, the learned trial Judge partly decreed the Suit. The learned trial Judge held that plaintiffs prove that they are the tenants only in respect store room admeasuring 12 ft. x 11 ft. and office premises admeasuring 7 ½ ft x 11 ft. Plaintiffs failed to establish that they are the tenants in respect of open piece of land between Desai Petrol Pump and Agrawal's Hotel as approach road in the suit property described in paragraph 1-B. He submitted that basically, the Courts below failed to appreciate that plaintiffs are in exclusive possession of the open space in capacity as a tenant. The learned District Judge also wrongly came to the conclusion that plaintiffs are tenants in respect of store room admeasuring 12 ft. x 11 ft. and office premises admeasuring 7 ½ ft x 11 ft. In any case, he submitted that plaintiffs are in exclusive and settled possession of the property described in paragraph 1-B of the plaint. The Courts below were, therefore, not justified in issuing injunction restraining the defendants No.3 and 4 in Writ Petition No.8814 of 2017 and defendants No.3 to 5 in Writ Petition No.8815 of 2017 from causing any sort of interference and / or obstruction in the plaintiffs' possession of tenanted room namely store room admeasuring 12 x 11 ft. and office 7½ x 11 ft. as spell out in the Commissioner's report exhibit-38, otherwise than in due course of law. In short, he submitted that as the plaintiffs are in settled and exclusive possession of the open space described in paragraph 1-B of the plaint, the Courts below should have issued injunction restraining the defendants from causing interference and / or obstruction in respect of the open space described in paragraph 1-B of the plaint as well otherwise than in due course of law.

7. In support of his submissions, he relied upon the following decisions:

a. ***Ram Ratan Vs. State of Uttar Pradesh, (1977) 1 SCC 188***, and in

particular paragraphs 4 and 5;

b. ***Krishna Ram Mahale Vs. Shobha Venkat Rao, (1989) 4 SCC 131***, and in particular paragraphs 8 and 9. Mr. Shah has taken me through the trial Court's judgment as also Appellate Court's judgment in support of his submissions that the findings recorded by the Courts below are perverse and therefore, Petitions require consideration.

8. On the other hand, Mr. Thorat and Mr. Dani supported the impugned orders. They submitted that after appreciating the evidence on record, the Courts below have concurrently held that plaintiffs have established their tenancy only in respect of the constructed portion namely store room admeasuring 12 ft. x 11 ft. and office premises admeasuring 7 ½ ft x 11 ft. and not in respect of open piece of land. They submitted that after appreciating the evidence on record, the Courts below have concurrently held that plaintiffs have established their tenancy rights only in respect of the constructed portion namely store room admeasuring 12 ft. x 11 ft. and office premises admeasuring 7 ½ ft x 11 ft. and have failed to establish their tenancy rights in respect of open space as also that they are in exclusive possession of the open space. They submitted that no case is made out for interfering with the impugned orders.

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, after setting aside the orders passed by the Courts below, earlier, additional issue was framed namely, whether the plaintiffs prove that they are the tenants in respect of open plot of land as claimed by them. The Courts below, after appreciating the evidence on record, have concurrently found that plaintiffs have not established their tenancy rights in respect of open piece of land and have established

tenancy rights only in respect of store room and office premises. In particular, the learned trial Judge has considered averments made in paragraph 4 of the plaint. In paragraph 4, plaintiffs asserted that defendants no.1 and 2 and other tenants are also using the open space shown in blue colour in the map as ingress and egress. The learned trial Judge has considered the plaintiff's claim of tenancy in respect of open space from paragraphs 15 to 17. The learned trial Judge considered the claim of plaintiffs' exclusive and settled possession in paragraphs 18 to 26. P.W.5-Mahadev Shirsagar deposed that plaintiffs - Chavan had taken one room on rental basis for running a garage. The learned trial Judge considered the fact that there is no tenancy agreement in writing between the parties. The rent receipts at exhibits 162 to 166 do not give any description as to the area under the tenancy.

10. In paragraph 19, the learned trial Judge referred to the admission of P.W.1-Pramod and observed that plaintiffs are not in exclusive possession of open space. The open space is used by the plaintiffs and other tenants in common. In paragraph 25, the learned trial Judge considered the decision of the Apex Court in ***Rame Gowda Vs. M. Vardappa Naidu***, AIR 2004 SC 4609 and observed that the plaintiffs' user is clearly permissive and does not amount to possession much less a settled possession.

11. In so far as the judgment of the District Court is concerned, in paragraph 19, the learned District Judge referred to evidence of P.W.1 and observed that at the time of deposition, P.W.1 was 34 years and plaintiffs are claiming to be the tenants since the year 1952-53. P.W.1 does not have any personal knowledge about the rent agreement. In paragraph 20, the learned District Judge noted that the rent receipts mention only room number and not the open space. In paragraph 21, the

learned District Judge observed that P.W.1 admitted that the open space which is shown in a blue ink in a map annexed to the plaint ahead of room No.10 is not exclusively in their possession. They do not have documentary evidence to show that the open space shown in the blue ink was given to them on rent by the erstwhile landlord. On the contrary, P.W.1 admitted that the said open space was being used along with them by the erstwhile landlord also for ingress and egress to and from the suit property.

12. In paragraph 22, the learned District Judge observed that the evidence of P.W.1 clearly corroborates the theory of defendants No.1 to 5 that open space was being used by the landlords as well as the tenants as also the customers coming for repairing their vehicles for ingress and egress from and to the suit property. In paragraph 23, the learned District Judge referred to the evidence of P.W.2 Dattatray Jagtap and observed that he did not have any personal knowledge about the rent agreement regarding letting of premises, which took place in between the erstwhile landlord and predecessor of plaintiffs. In paragraph 24, the learned District Judge referred to evidence of P.W.3 - Shrikant Jadhav and observed that in cross-examination, he admitted that he had no personal knowledge about the events in respect of the suit property those have taken place prior to the year 1974. In paragraph 25, the learned District Judge referred to the evidence of P.W.5- Mahadev Shirsagar where he deposed that he was in service with the erstwhile landlord Dharsibhai Desai as a truck driver. In the year 1952-53, for the purpose of starting motor garage, plaintiffs' predecessor took one room on rental basis. His evidence clearly shows that neither plaintiffs nor their predecessor were the tenants in open space as contemplated by them.

13. In paragraph 26, the learned District Judge referred to evidence of P.W.6 Hanmantrao Ranaware who admitted that he does not have

personal knowledge regarding rent agreement, rent receipts as also the terms and conditions between erstwhile landlords and predecessor of the plaintiffs. He further admitted that both the tenants, namely, plaintiffs in the present case and plaintiffs in Writ Petitions No.8814 of 2017 were using the open space. In paragraph 28, the learned District Judge observed that both the tenants cannot claim tenancy rights on one and the same property. In paragraph 35, the learned District Judge referred to Court Commissioner's report at exhibit-38 and observed that from the mouth of the plaintiff No.2 i.e. P.W.1 Pramod himself, defendants have succeeded in bringing on record that the open space was not exclusively in their possession but it was being used by the landlords as well as all the tenants for their respective businesses and as per their convenience. In paragraph 40, the learned District Judge concluded that plaintiffs failed to establish that they are in possession of entire suit property described in paragraph 1-B of the plaint admeasuring 400 to 500 sq.mtrs. On the contrary, from the report of the Court Commissioner at exhibit-38, it can be safely inferred that they are in possession of store room admeasuring 12 ft. x 11 ft. and office premises admeasuring 7 ½ ft x 11 ft.

14. That apart, there is one more reason for declining to exercise powers under Article 227 of the Constitution of India in favour of the plaintiffs. I have already referred to prayers made by the plaintiffs in the Suit. By prayer clause (a), plaintiffs sought perpetual injunction restraining defendants No.1 and 2 (Pankaj Lakshmikant Desai and Smt. Kanchan Lakshmikant Desai) from creating third party interest in respect of the property described in paragraph 1-B of the plaint. By prayer clause (b), plaintiffs prayed for injunction restraining defendants No.3, 4 and 5 namely, Ishwarlal G. Agarwal, Sanmita Promoters Pvt. Ltd., Phaltan and Bhojraj Vitthalrao Naik-Nimbalkar from disturbing possession of the plaintiffs as also erecting wire compound in respect of

property described in paragraph 1-B of the plaint. Thus, plaintiffs have not sought declaration of their tenancy rights in respect of open plot of land forming part of premises described in paragraph 1-B of the plaint. As the plaintiffs have not claimed declaration of their tenancy rights, even otherwise, they are not entitled to declaration that they are tenants in respect of open plot of land.

15. Mr. Shah relied upon the decision of **Ram Ratan** (*supra*). In that case, the Apex Court held that a true owner has every right to dispossess or throw out a trespasser, while the trespasser is in the act or process of trespassing and has not accomplished his possession, but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law. In the case of **Krishna Ram Mahale** (*supra*), the Apex Court observed in paragraph 8 that it is well settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law. In my opinion, the said decisions are not applicable in the facts of the present case. After considering the evidence on record, the Courts below have concurrently held that plaintiffs are not tenants in respect of the entire property admeasuring 400 to 500 sq.mtrs. described in paragraph 1-B of the plaint but they are in possession of store room admeasuring 12 ft. x 11 ft. and office premises admeasuring 7 ½ ft x 11 ft. Plaintiffs were 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. Plaintiffs were also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, Petitions

fail and the same are dismissed.

16. At this stage, Mr. Shah orally applies for continuation of the ad-interim order dated 08.08.2017 passed by this Court. He further submits that injunction may be continued restraining defendants from obstructing or interfering with plaintiffs' possession in respect of property described in paragraph 1-B of the plaint admeasuring 400 to 500 sq.mtrs.

17. In view thereof, notwithstanding dismissal of the Petitions, the ad-interim order dated 08.08.2017 passed by this Court shall remain in force for a period of 8 weeks from today with clear understanding that no application for further extension shall be made and entertained by this Court. In so far as prayer for continuation of the injunction restraining defendants from obstructing possession of the plaintiffs over open space in suit premises described in paragraph 1-B of the plaint is concerned, the same is rejected. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab