

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO.119 OF 2018

IN

WRIT PETITION NO.8815 OF 2017

Chandrakala Gunaji @ Balaso Chavan and others ... Petitioners
Vs.
Pankaj Lakshmikant Desai and others ... Respondents

AND

REVIEW PETITION NO.120 OF 2018

IN

WRIT PETITION NO.8814 OF 2017

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

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

CORAM : R. G. KETKAR, J.

DATE : AUGUST 7, 2018

P.C. :

Heard Mr. Shah, learned Counsel for the petitioners at length.

2. By Review Petition No.119 of 2018 filed under Section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), petitioners have challenged the order dated 04.07.2018 passed by this Court in Writ Petition No.8815 of 2017. By that order, Writ Petition instituted by plaintiffs challenging the judgment and decree dated 09.03.2016 passed by the learned Civil Judge, Junior Division, Phaltan in Regular Civil Suit 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 was

dismissed. 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 spelt out in the Commissioner's report exhibit-38, otherwise than in due course of law. The cross-objections preferred by the defendants No.4 and 5 were dismissed by the learned District Judge.

3. In support of this Petition, Mr. Shah submitted that while disposing of Writ Petition No.8815 of 2017, the Court did not consider the submissions advanced on behalf of the petitioners to the effect that respondent No.3 herein, Ishwarlal Gopichand Agarwal had instituted Suit No.342 of 1999 against the plaintiffs for recovery of possession. The said Suit was dismissed in default. Respondent No.3 thereafter instituted Suit No.32 of 2016 for the self-same relief, which was withdrawn. In other words, respondent No.3 accepted that plaintiffs are in possession of the open space.

4. Mr. Shah further submitted that the Courts below have concurrently held that plaintiffs are not in exclusive possession of the open space but are in possession of the open space along with others. If this finding is recorded by the Courts below then this Court was not justified in granting only limited injunction restraining the defendants from disturbing and / or dispossessing the plaintiffs in respect of tenanted room viz. Store room and office without following the due course of law. As the plaintiffs are found in possession of the open space along with others, this Court should have issued injunction restraining

defendants from disturbing and / or dispossession plaintiffs from open space without following due process of law. Lastly, he submitted that the Courts below also did not consider the question of access to the plaintiffs for approaching the premises which are found to be in possession of the plaintiffs. As these submissions were not considered by this Court, this is a fit case for reviewing the order dated 04.07.2018.

5. I have considered the submissions advanced by Mr. Shah. I have also perused the material on record. While dismissing the Petitions, it was noted that in the earlier round of litigation, additional issue was ordered to be framed, “whether the plaintiffs prove that they are tenants in respect of open plot of land as claimed by the plaintiffs.” The Courts below, after appreciating the evidence on record, have concurrently found that the plaintiffs have not established their tenancy rights in respect of open space of land and have established tenancy rights in respect of store room and office premises. After considering the oral evidence of the parties, it was also noted that rent receipts at exhibits 162 to 166 do not give any description as to the area under the tenancy. In paragraph 16, the evidence of P.W.1 Pramod was noted. The said evidence was considered by the learned trial Judge in paragraph 19 and it was observed that the 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 observed that the plaintiffs' user is clearly permissive and does not amount to possession much less a settled possession.

6. In so far as the judgment of the District Court is concerned, the learned District has considered evidence of -

- (i) P.W.1 - Pramod in paragraphs 21 and 22;
- (ii) P.W.2 - Dattatraya Jagtap in paragraph 23;
- (iii) P.W.3 - Shrikant Jadhav in paragraph 24;

- (iv) P.W.5 - Mahadev Shirsagar in paragraph 25 and
- (v) P.W.6 - Hanmantrao Ranaware in paragraph 26.

7. In paragraph 28, the learned District Judge observed that both the tenants, namely petitioners in Writ Petition No.8814 and 8815 of 2017, 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.

8. This Court also declined to exercise powers under Article 227 of the Constitution of India as the plaintiffs did not seek declaration of their tenancy rights in respect of open plot of land forming part of the premises described in paragraph 1-B of the plaint. As the plaintiffs did not claim declaration of their tenancy rights, even otherwise, they are not entitled to declaration that they are tenants in respect of open plot of land.

9. In view thereof, I do not find any merit in the submission of Mr. Shah that in so far as the open space is concerned, injunction ought to have been issued restraining the defendants from dispossessing the plaintiffs from open space without following due process of law.

Regular Civil Suit No.342 of 1999 instituted by the respondent No.3 was dismissed in default in 2007. The subsequent Suit filed in the year 2016 i.e. Suit No.32 of 2016 was withdrawn. As against this, in the Suit instituted by the plaintiffs, after a full-fledged trial and after considering the evidence on record, the Courts below have partly decreed the Suit, as indicated hereinabove. I, therefore, do not find any merit in the submission of Mr. Shah that as this Court did not consider Suits filed by the respondent No.3, this is a fit case for review of the order.

10. In so far as the submission that as the plaintiffs are found in joint possession along with the other tenants in accompanying Writ Petition No.8814 of 2017, this Court was not justified in issuing injunction restraining the defendants from disturbing joint possession of the plaintiffs as also dispossessing them without following the due course of law, is concerned, as noted earlier, the Courts below have held that the user of the plaintiffs is permissive and it does not amount to possession much less a settled possession. I, therefore, do not find any merit in this submission as well. In so far as the access of the suit premises is concerned, the Courts below have partly decreed the Suit as indicated hereinabove. In paragraph 11, admission of P.W.1 that open space was being used along with them by the erstwhile landlord also for ingress and egress to and from the suit property. In view thereof, no case is made out for reviewing the order dated 04.07.2018.

11. In the case of ***Kamlesh Verma Vs. Mayawati***, AIR 2013 SC 3301, the Apex Court has considered the scope of review and has observed thus,

“The jurisdiction and scope of review is not that of an appeal and it can be entertained only if there is an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal

in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 of C.P.C. ”

12. Applying the tests laid down by the Apex Court to the facts of the present case, no case is made out. Hence, Review Petition No.119 of 2018 fails and the same is dismissed.

Review Petition No.120 of 2018

For the reasons recorded while dismissing Review Petition No.119 of 2018, Review Petition No.120 of 2018 also stands dismissed. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab