

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11669 OF 2016

WITH

WRIT PETITION (ST.) NO.27651 OF 2016

Mehboob Ali Niyaz Ali Shaikh ... Petitioner

Vs.

Abdul Rashid Mohammed Yusuf and others ... Respondents

Mr. Yuvraj D. Patil for Petitioner in both the Petitions.

Mr. Imtiaz Ahmed Raibakker for Respondent No.1 in both the Petitions.

CORAM : R. G. KETKAR, J.

DATE : JULY 25, 2018

P.C. :

Heard Mr.Patil, learned Counsel for petitioner and Mr.Raibakker, learned Counsel for the respondent No.1 in both the Petitions at length.

2. Writ Petition (St.) No.27651 of 2016 takes exception to the judgment and order dated 29.08.2016 passed by the Appellate Bench of the Small Causes Court at Bombay in Miscellaneous Appeal No.106 of 2016. By that order, the Appellate Court allowed the Appeal preferred by the respondent No.1 and set aside order dated 07.01.2016 passed by the learned trial Judge below exhibit-56 in R.A.D.&E. Suit No.163/251 of 2012. The Appellate Court dismissed the application exhibit-56 filed by the defendant No.3 (petitioner herein) seeking injunction restraining plaintiff and defendant No.1 from disturbing the possession of defendants No.2 to 4 in respect of the suit premises.

3. Writ Petition No.11669 of 2016 takes exception to the judgment and order dated 29.08.2016 passed by the Appellate Bench of the Small Causes Court in Miscellaneous Appeal No.92 of 2016. By that order, the Appellate Court allowed the Appeal preferred by the respondent No.1,

hereinafter referred to as 'plaintiff', and set aside order dated 07.01.2016 passed by the learned trial Judge below exhibit-22 in R.A.D.&E. Suit No.164/252 of 2012. The Appellate Court dismissed the application exhibit-22 filed by the defendant No.3 seeking injunction restraining plaintiff and defendant No.1 from disturbing the possession of defendants No.2 to 4 in respect of the suit premises.

4. Rule. Mr. Raibakker waives service on behalf of the first respondent. As the respondent No.1 is the only contesting respondent herein, the notice of rule on rest of the respondents is dispensed with. Having regard to the narrow controversy raised in this Petition and at the request and by consent of the parties, Rule is made returnable forthwith and Petitions are taken up for final hearing. For appreciating the controversy between the parties, facts from Writ Petition No.11669 of 2016 are taken into consideration.

5. Respondent No.1, hereinafter referred to as 'plaintiff', has instituted Suit for declaration that he is a tenant of defendant No.1-Khalique Ahmed Ansari in respect of shop No.9, 'A' Wing on the ground floor, Dubash Building situate at Hains Road, Bapurao Jagtap Marg, Byculla, Mumbai - 400 011 (for short 'suit premises'); for decree of eviction against the defendant No.2-Anwar Ali Niyaz Ali Shaikh, defendant No.3-Mehboob Ali Niyaz Ali Shaikh and defendant No.4-Zaid Ali Niyaz Ali Shaikh; for directing defendants No.2 to 4 to jointly and severally to handover quiet, vacant and peaceful possession of the suit premises among other reliefs.

6. During the pendency of the Suit, defendant No.3 took out application exhibit-22 for injunction - (i) restraining plaintiff and defendant No.1 from disturbing the possession of defendants No.2 to 4 in respect of the suit premises; (ii) from dispossessing the defendants

No.2 to 4 from the suit premises; (iii) restraining them from creating third party interest in the suit premises or (iv) parting with possession of the suit premises.

7. By order dated 07.01.2016, the learned trial Judge partly allowed the application and issued injunction restraining the plaintiffs from dispossessing defendants No.2 to 4 from the suit premises and /or from disturbing the possession of the defendants No.2 to 4 over the suit premises. Aggrieved by that decision, plaintiffs preferred Miscellaneous Appeal. By the impugned order, the Appellate Court allowed the Appeal. It is against this order, defendant No.3 has instituted the present Petition. Before proceeding with the matter on merits, it is relevant to note that defendants No.2 and 4 have not filed any Petition challenging the impugned order. In other words, defendants No.2 and 4 have accepted the order passed by the Appellate Court.

8. Mr. Raibakker invited my attention to the copy of the plaint filed by present defendant No.4 (Zaid Ali Niyaz Ali Shaikh), who is the plaintiff before the City Civil Court, Bombay against Anwar Ali Niyaz Ali Shaikh, who is the defendant No.2 and Mr. Mehboob Ali Niyaz Ali Shaikh, who is the defendant No.3 in the present Suit. By order dated 03.10.2015, the learned Judge of the City Civil Court, Greater Mumbai dismissed the Suit. The learned trial Judge held that plaintiff before the City Civil Court, who is defendant No.4 in the present case, is not in possession of the suit premises. He submitted that plaintiff therein (defendant No.4 herein) has not challenged the said decree and has thus attained the finality. In short, he submitted that defendant No.4 is not in possession. Mr. Raibakker also submitted that defendant No.2 did not participate in the trial and the trial proceeded ex-parte against him. He further submitted that it is only defendant No.3 who is in possession. He submits that plaintiff is present in the Court. He has tendered photocopy

of his Aadhar Card, which is taken on record and marked 'X' for identification. Upon taking instructions from him, he states that defendant No.3 is in possession of the suit premises. Impugned order passed by the Appellate Court may be modified thereby issuing injunction restraining plaintiff from dispossessing defendant No.3 from the suit premises and / or from disturbing the possession of the defendant No.3 over the suit premises.

9. On the other hand, Mr. Patil submitted that having regard to the prayer (b) in the Suit filed by the plaintiff as also the findings recorded by the learned trial Judge that defendants No.2 to 4 are in possession of the suit premises, the impugned order may be set aside thereby restoring the order of the trial Court.

10. 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 learned trial Judge has issued injunction restraining the plaintiff from dispossessing and / or disturbing possession of defendants No.2 to 4 over the suit premises. Aggrieved by that decision, plaintiff preferred appeal, which was allowed by the impugned order. Defendants No.2 and 4 have not challenged that order and thus have accepted the correctness of that order. Apart from that, defendant No.4 herein had filed substantive Suit being Suit No.2456 of 2010 in the City Civil Court, Bombay. By order dated 03.10.2015, the learned trial Judge dismissed the Suit. The learned trial Judge held that plaintiff therein is not in possession of the suit premises. Defendant No.4 has not challenged that order and thus order attained finality. In view thereof, I find that the learned trial Judge was not justified in issuing injunction against the plaintiff qua defendants No.2 and 4.

11. Mr. Raibakker has made statement that plaintiff will not

dispossess and / or disturb possession of the defendant No.3 over the suit premises. Statement made by Mr. Raibakker, on instructions, is accepted.

12. In view thereof, Petition is disposed of in the following terms:
 - a. The impugned order passed by the Appellate Court on 29.08.2016 in Appeals is modified;
 - b. Applications exhibits-22 and 56 filed by the defendant No.3 in both the Suits are partly allowed;
 - c. Plaintiff is restrained from dispossessing defendant No.3 and / or disturbing possession of the defendant No.3 over the suit premises.
 - d. Rule is partly made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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