

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.14158 of 2017

Rajeshkumar Raichand Jain] Petitioner

Vs.

State of Maharashtra and others] Respondents

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Mr. Sanjay Gidh, for Petitioner.

Mr. Saurabh Butala a/w Mr. Amogh P. Khadye, for Respondent No.2.

Mr. Anand Mishra i/b A.M. Sarogi, for Respondent No.5.

Mr. A.A. Alaspurkar, A.G.P for State.

O.S.D., D.N. Kher, Court Receiver present in the Court.

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CORAM : R.G. KETKAR, J.

DATE : 27TH FEBRUARY, 2018.

P.C.

Heard Mr. Gidh, learned Counsel for the petitioner, Mr. Butala, learned Counsel for Respondent No.2, Mr. Anand Mishra, learned Counsel for Respondent No.5 and Mr. Alaspurkar, learned A.G.P for Respondent No.1-State.

2. On the oral application made by Mr. Gidh, leave is granted to delete Respondents No.3 and 4. Amendment to be carried out forthwith.

3. By this Petition under Article 226 and 227 of the Constitution of India, the petitioner (hereinafter referred to as "plaintiff") has challenged the judgment and order dated 30th October, 2017 passed in Misc. Appeal No.145 of 2017 as also the judgment and order dated 30th October, 2017 passed below Exhibit 7 in Misc. Appeal No.145 of 2017 by

the Appellate Bench of Small Causes Court, Mumbai. By order dated 30th October, 2017 passed in Misc. Appeal No.145 of 2017, the Appellate Bench allowed the appeal preferred by the second respondent (hereinafter referred to as “defendant”) and quashed and set aside the judgment and order dated 21st September, 2017 passed by the learned trial Judge below Exhibit 10 in L.D. Suit No. 73 of 2017. The Appellate Bench dismissed the application-Exhibit 10. By order dated 30th October, 2017 below Exhibit 7, the Appellate Bench dismissed that application.

4. Rule. Learned Counsel for the respondents waive service. Having regard to the narrow controversy involved in this Petition, Rule is made returnable forthwith and this Petition is taken up for final hearing.

5. The plaintiff has instituted L.D. suit No.73 of 2017 in the Small Causes Court at Bandra, inter alia, contending that he is in possession of Flat No.104, Garden View, Shastri Nagar, Lokhandwala, Andheri (West), Mumbai 400 053 (for short 'suit premises') in pursuance of the leave and licence agreement entered into by and between the plaintiff and the defendant. It is the case of the plaintiff that negotiations were going on for renewal of leave and licence agreement executed on 12th September, 2016 for a period of 11 months. The period in that agreement was to expire on 31st July, 2017. It is the case of the plaintiff that defendant confirmed about renewal of the agreement and demanded a sum of Rs. 6500/- towards the legal charges which was deposited in her HDFC Account on 27th July, 2018. The plaintiff also relies upon Short Message Service (for short 'sms') exchanged between the parties. The plaintiff also claims to have transferred a sum of Rs. 30,350/- in the account of the defendant in furtherance of the oral agreement to renew the leave and licence agreement for a further period. The plaintiff alleged

that in his absence and without his knowledge and consent when the plaintiff was at his native place between May, 2017 and June, 2017, the defendant had carried out repairs. While carrying out repairs, no proper care was taken of his articles such as electronic items, T.V. Fridge, Air Conditioner, Washing Machine, Laptop, Computer and other household articles lying in the suit premises. The plaintiff, inter alia, prayed for direction to the defendant to make good the losses suffered on account of renovation work carried out by the defendant without his knowledge and without his consent. The plaintiff also claimed refund of the amount of the deposit in the event the defendant terminates or does not renew the agreement. The plaintiff also sought direction against the defendant to maintain status-quo till repayment of deposit money to the plaintiff without any licence fee and sought injunction restraining the defendant creating any third party rights by executing an agreement with new tenant.

6. Pending the suit, the plaintiff filed application at Exhibit 10 on or about 1st September, 2017, inter alia, prayed for following reliefs;

- (a) The Defendant may please be directed by this Hon'ble Court to maintain the status quo as a Licensee and give back him the possession and not to disturb the same till the Defendant returns all his belongings and articles which has been either sold out or taken away by his son without the Plaintiff consent.
- (b) The Defendant may please be directed by this Hon'ble Court not to create any third party rights till the final decision of the suit.
- (c) Give him one month's time to search new flat at old rate of Licence fee i.e Rs. 53,350/-.

(d) Any other reliefs as deem fit and proper in the facts and circumstances of the case may also be passed in favour of the plaintiff and against the defendants in the interest of justice by this Hon'ble Court.

Affidavit in support of that application was filed on 22nd August, 2017.

7. The defendant filed reply dated 8th September, 2017 opposing application Exhibit 10. In paragraph 5, the defendant specifically contended that during the first week of August, 2017, the plaintiff handed over possession of the suit premise and visited her residence at Mahim and handed over the keys of the suit premises but again made a request that though he is vacating the suit premises, he wants to retain the articles and belongings for few days until the arrangement is made. Though the plaintiff handed over keys of the suit premises, he requested to renew the licence whereupon she informed him that due to his wilful default in making payment of compensation amount, she will not renew the licence. She further claims to have informed the plaintiff that she will not extend the licence period on the ground that in the month of May, 2017, when the plaintiff was out of Mumbai and the suit premises was locked, she received a call from the Treasurer of Society Garden-View Mr. Rajesh Agarwal that there is heavy water leakage from her flat and due to the same the Society Electric meter room was flooded with water and the electricity of the Society was disconnected by Reliance Energy. She with her husband visited the suit premises called a plumber and stopped the leakage and carried out cleaning job of the suit premises.

8. By order dated 21st September, 2017, the learned Trial Judge allowed the application Exhibit 10 and directed the defendant to hand

over possession of the suit premises to the plaintiff till he is dispossessed by following due process of law. The defendant was further directed to maintain status-quo as to the possession of the suit premises of the plaintiff and not to disturb the same till return of all the dues of the plaintiff and his articles and belongings. The defendant was restrained from creating third party rights in the suit premises till the plaintiff is dispossessed by following due process of law.

9. Aggrieved by this decision of the trial Court, the defendant instituted Misc. Appeal No.145 of 2017. Pending the appeal, the defendant filed application Exhibit 7 for stay of operation of the trial Court's order dated 21st September, 2017. By order dated 30th October, 2017, the Appellate Bench allowed Misc. Appeal No. 145 of 2017 and quashed and set aside the trial Court's order dated 21st September, 2017. By order dated 30th October, 2017, the Appellate Court disposed of application Exhibit 7 as the main appeal itself was allowed. Aggrieved by these orders dated 30th October, 2017, the plaintiff has instituted the present Writ Petition.

10. The matter was heard before this Court on 25th January, 2018. After considering seriousness of the issues involved in the matter and having regard to the fact that entire rule of law had been thrown to the winds by the defendant-landlady by taking law in hands, this Court thought it appropriate to hold a deeper inquiry. The Court also noted that the plaintiff has challenged the order dated 30th October, 2017 (wrongly recorded as "13th October, 2017) below Exhibit 7 and did not challenge the order passed in Misc. Appeal No. 145 of 2017. Leave to amend so as to challenge that order as also implead new licensee was granted. After perusal of the order dated 30th October, 2017 passed in Misc. Appeal No.145 of 2017, this Court observed that the Appellate Bench had dealt

with the appeal and passed order in Misc. Appeal No.145 of 2017 in a casual manner. This Court also appointed Court Receiver, High Court Bombay as a receiver of the suit premises. The Court Receiver High Court Bombay was directed to take formal possession of the suit premises after giving 24 hours notice. This was to be subject to the further orders which would be passed by this Court. This Court also noted that learned Counsel for the defendant agreed to take instructions as to the arrangement which his client would propose to undertake by informing the new licensee seriousness of the issue and to ask him to find out any alternate accommodation. It was also made clear that failing any attempt on the part of the respondent-landlady to undertake this exercise on or before the adjourned date, there would be no alternative but to direct the Court Receiver to take physical possession of the suit premises.

11. In pursuance thereof, the Court Receiver submitted report dated 29th January, 2018 setting out therein that in terms of amended Rule 592, the Court Receiver is entitled to recover deposit of Rs. 15,000/- from the parties at whose instance the appointment is made. The Court Receiver, therefore, sought further directions as regards the steps to be taken by him in pursuance of the order dated 25th January, 2018. Mr. Gidh states that the plaintiff has deposited Rs. 15,000/- towards initial cost, charges and expenses of the Court Receiver and Rs. 3,000/- towards costs and incidental to the report.

12. The matter was heard on 30th January, 2018. Order dated 30th January, 2018 records appearance of Mr. Sarogi on behalf of newly added respondent No.5. The matter was adjourned to 6th February, 2018 by directing the parties to maintain status-quo in respect of the suit premises in regard to all the movable items.

13. Mr. Gidh submitted that the Appellate Court allowed Misc. Appeal preferred by the defendant on the footing that the plaintiff is in possession of the suit premises. The plaintiff has not alleged that he was dispossessed on a particular date. There is no prayer for handing over possession of the suit premises to the plaintiff. The Appellate Court, therefore, observed that there is no question of re-handing possession of the suit premises to the plaintiff. The Appellate Court was also of the view that leave and licence agreement was executed on 12th September, 2016 and it expired on 31st July, 2017. Relationship of plaintiff and defendant came to an end. Possession of the plaintiff after 31st July, 2017 is of a trespasser. He submitted that the Appellate Court committed serious error in observing that “in the counter reply, the plaintiff contended that he was dispossessed. The counter reply is not a pleading. Pleading is plaint and written statement. Counter reply, sur rejoinder, other replies is nothing but additional statements. They are not pleadings. Counter reply is given by the plaintiff to the written statement made by the defendant. Those are afterthought. Those are not having force of pleadings”. He submitted that the Appellate Court failed to consider reply filed by the defendant on 8th September, 2017 and in particular paragraph 5 thereof where defendant came with a case that in the first week of August, 2017, the plaintiff handed over possession of the suit premises. He submitted that the plaintiff never handed over possession to the defendant. In fact, discussions were going on for renewal of licence. He, therefore, submitted that impugned order deserves to be set aside.

14. Mr. Butala appearing on behalf of the defendant strenuously opposed the Petition and supported the impugned orders. He submitted that a perusal of the plaint shows that the plaint proceeds on the footing that the plaintiff is in possession of the suit premises. Even after alleged

dispossession, the plaintiff did not amend the plaint so as to claim possession of the suit premises from the defendant. He submitted that the license expired on 31st July, 2017. Despite licence period was over, the plaintiff is not removing his articles from the suit premises. In fact, after handing over keys of the suit premises to the defendant, he was allowed to keep his articles for few days with understanding that he will remove those articles. He submitted that after the plaintiff handing over possession in the first week of August, 2017, the defendant has executed registered leave and licence agreement in favour of respondent No.5 on 12th September, 2017 for a period of 12 months commencing from 1st September, 2017 and ending on 30th August, 2018 (both days inclusive). He submitted that in pursuance of order dated 25th January, 2018, he persuaded respondent No.5 to hand over possession of the suit premises to the defendant. Respondent No.5 is not ready and willing to hand over possession of the suit premises to the defendant. He submitted that no case is made out for interfering with the impugned order.

15. Mr. Mishra appearing on behalf of respondent No.5 submitted that respondent No.5 is residing in the suit premises along with family members. Respondent No.5 is a Film Producer and Writer. He is required to extensively travel. Respondent No.5 is going out of Mumbai in March. He submitted that respondent No.5 is ready and willing to hand over possession of the suit premises on 30th August, 2018. He invited my attention to prayers made in the present Petition to contend that the plaintiff has not sought possession of the suit premises. In any case, he is ready and willing to hand over possession at the end of April, 2018, so that in the meantime, he could make alternative arrangement.

16. I have considered the rival submissions of learned Counsel for

the parties. I have perused the material on record. A perusal of the order dated 25th January, 2018 shows that this Court considered the manner in which the defendant had dispossessed the plaintiff from the suit premises without following due process of law. This Court also noted that there was nothing on record to indicate that the plaintiff handed over possession of the suit premises to the defendant. The defendant took possession when the entire belongings including valuable belongings were inside the suit premises. This Court referred to Police panchnama dated 5th October, 2017 which shows that the plaintiff's articles were recovered from the scrap dealers. This Court noted that apart from this gross illegality from the defendant, she hurriedly entered into leave and licence agreement dated 12th September, 2018 with 5th respondent herein. This Court also noted that entire rule of law was thrown to the winds by the defendant taking law in hands.

17. After perusing the order dated 30th October, 2017 passed in Misc. Appeal No. 145 of 2017, this Court also observed that the Appellate Court dealt the appeal in a casual manner. I fully agree with this finding. A perusal of the order of the Appellate Court dated 30th October, 2017 in Misc. Appeal No. 145 of 2017 shows that the Appellate Court did not even bother to consider the reply filed by the defendant. As noted earlier, a perusal of paragraph 5 of the reply filed by the defendant on 8th September, 2017 shows that the defendant came with a case that in the first week of August, 2017, the plaintiff handed over possession of the suit premises to the defendant. Prima facie, the Appellate Court did not consider the correspondence including sms exchanged between the parties and the fact that the plaintiff had deposited amount of Rs.6,500/- as also Rs. 30,350/- in H.D.F.C Account. The Appellate Court with respect decided the appeal by considering only the case of the defendant and without

considering the material on record. In my opinion, the impugned order passed in Misc. Appeal No. 145 of 2017 suffers from serious infirmities. The Appellate Court failed to appreciate that the plaintiff was dispossessed without following due process of law. There is no material on record to indicate that the plaintiff voluntarily handed over possession to the defendant.

18. Mr. Mishra submits that in pursuance of registered leave and licence agreement dated 12th September, 2017, respondent No.5 is in possession. He may be permitted to retain the suit premises till 30th August, 2018. I do not find any merit in the submission of Mr. Mishra. In the first place, respondent No.5 is claiming through defendant. Secondly, defendant has executed leave and licence agreement in favour of respondent No.5. In view of Section 52 of the Indian Easements Act, 1882 as also having regard to the settled legal position, respondent No.5 cannot claim any right, title and interest in the suit premises. In view thereof, respondent No.5 cannot claim to continue in the said premises till the licence period expires on 30th August, 2018.

19. In view thereof, the impugned order cannot be sustained and as such is liable to be set aside. Once the order passed in the appeal is set aside, the order dated 30th October, 2017 passed below Exhibit 7 also being consequential requires to be set aside. Hence, the Petition is disposed of in following terms:

- [1] Impugned orders dated 30th October, 2017 passed in Misc. Appeal No.145 of 2017 and below Exhibit 7 in Misc. Appeal No.145 of 2017 are quashed and set aside.
- [2] Order dated 21st September, 2017 passed by the learned trial Judge below Exhibit 10 is restored.

- [3] The defendant shall hand over possession of the suit premises to the plaintiff within fifteen days from today, failing which, the Court Receiver shall take physical possession by dispossessing whomsoever in possession by taking Police protection, if necessary. In that event, the Police Officials attached to Amboli Police Station, Andheri (West) will extend full co-operation for implementation of this order.
- [4] Liberty is reserved to the defendant to adopt due process of law for eviction of the plaintiff. The same shall be decided on its own merits un-influenced by the observations made in the impugned order.
- [5] Liberty is also reserved to respondent No.5 to proceed against the defendant.
- [6] After plaintiff is put in possession, he will go on paying licence fee to the defendant.
- [7] In view of disposal of the Petition, Court Receiver's Report No. 27 of 2018 stands disposed of.
- [8] Rule is made absolute in aforesaid terms.
- [9] No order as to costs.

20. At this stage, Mr. Mishra submits that instead of giving 15 days time to hand over possession, 30 days time may be given. Mr. Gidh opposed this prayer made by respondent No.5. In view thereof, prayer made by respondent No.5 is rejected.

[R.G. KETKAR, J.]