

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.14223 OF 2017

Shobhana Pradheep Bajwa alias	]	
Mehta and another.	]	Petitioners
Vs.		
Yogesh Tribhunandas Mehta and others.	]	Respondent

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Ms. Hetal Patel i/b Mr. O.P. Pandya, for the petitioners.

Mr. J.A. Udaipuri a/w Ms. Lyra Fernandes i/b Udaipuri & Co., for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 28TH FEBRUARY, 2018.

P.C.

Heard Ms. Patel, learned Counsel for the Petitioners and Mr. Udaipuri, learned Counsel for Respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 10th November, 2017 passed by the Appellate Bench of the Small Causes Court, Mumbai in Misc. Appeal No.351 of 2017. By that order, the Appellate Court allowed the Appeal preferred by respondent No.1 and quashed and set aside the judgment and order dated 12th October, 2017 passed by the learned trial Judge below Exhibit 10 in R.A.D. Suit No.1407 of 2017 and dismissed the application

Exhibit 10.

3. The petitioners (hereinafter referred to as “plaintiffs”) have instituted a suit, inter alia, contending that they are in exclusive possession of Room No.1, ground floor, Shiv Sadan, Gandhi Marg, Ghatkopar (West), Mumbai – 400 085 (hereinafter referred to as “suit premises”.) The suit premises is a tenanted premises. Mother of plaintiff No.1 and defendants No.1 to 4 was the tenant of the suit premises. She died on 3rd September, 2001. Plaintiff No.1 along with her husband and her son, plaintiffs No.2 and 3 were residing at the time of death of her mother in the suit premises. Except plaintiff No.1's father, no legal heirs namely defendants No.1 to 4 resided along with her parents at the time of their death. Father of plaintiff No.1 and defendants No.1 to 4 died on 11th September, 2014.

4. The Plaintiffs relied upon several documents to substantiate their claim that they are residing in the suit premises. The Plaintiffs, therefore, instituted a suit for declaration that plaintiff No.1 is a monthly tenant in respect of the suit room and sought injunction restraining the defendants from dispossessing or interfering or disturbing their peaceful possession of the suit premises or taking forceful possession, save and except by due process of law; for direction to defendants No.5 and 6 (landlords) to issue rent bill in favour of plaintiff No.1 in respect of the suit premises.

5. During pendency of the suit, the plaintiffs took out application Exhibit 10 for temporary injunction restraining the defendants from disturbing and/or interfering with their peaceful possession.

6. Respondent No.1/defendant No.2 filed written statement, inter alia, contending that plaintiffs No.1 to 3 always resided at the matrimonial

home of Plaintiff No.1 at Vile Parle (East). Prior to their residence at Vile Parle, they were residing at other places. From time to time, they have shifted residence. Plaintiff No.1 was residing at G/4, Mahendra Park, Narayan Nagar, LBS Marg, Ghatkopar (West), Mumbai 400 086 in 1998. In 2008, she shifted her residence to Room No. 202, Everest, Vile Parle (East), Mumbai 400 057 and since then she is residing there. Permanent residence of the plaintiffs is Vile Parle (East). It was further contended that the plaintiffs have not produced any document substantiating their claim that they are in use, occupation and possession of the suit premises.

7. By order dated 12th October, 2017, the learned trial Judge allowed the application. Aggrieved by that decision, defendant No.2 preferred Misc. Appeal No.351 of 2017 which was allowed by the impugned order. Aggrieved by this order, plaintiffs have instituted the present Petition.

8. In support of this Petition, Ms. Patel strenuously contended that the Appellate Court committed serious error in interfering with discretionary order passed by the learned trial Judge. She has taken me through the documents on record produced by the plaintiffs as also, defendant No.2 to establish that the documents produced by the plaintiffs are in respect of the suit premises which conclusively establish that they are in possession of the suit premises. Defendant No.2 had instituted a suit in the Small Causes Court for declaration of tenancy rights in respect of Room No.1 and 2, Shiv Sadan, Gandhi Nagar, L.B.S. Marg, Ghatkopar (W), Mumbai-400 086. The suit was partly decreed on 30th April, 2010. The suit of declaration of tenancy rights, injunction and other reliefs in respect of the suit premises was dismissed. Aggrieved by that decision, defendant No.2 and his wife preferred Appeal No. 306 of 2010. The said Appeal was withdrawn on 19th March, 2016. She has invited my attention paragraph 6 of the reply filed by defendant No.2 where

defendant No.2 contended that after withdrawal of the appeal on 19th March, 2017, he caused entry in the suit premises on 20th March, 2016. Suit premises was vacant in any case. She has also invited my attention to the documents produced by defendant No.2 and submitted that the Appellate Court committed serious error in allowing the Appeal preferred by defendant No.2 on the ground that documents produced by defendant No.2 are the most recent documents establishing his possession over the suit premises. She submitted that before the learned trial Judge no documents were produced by defendant No.2. After hearing both the sides and perusing the documents as also considering the reply filed by defendant No.2, the learned trial Judge allowed the application. She, therefore, submitted that impugned order deserves to be set aside.

9. On the other hand, Mr. Udaypuri supported the impugned order. He invited my attention to cause title of the plaint which describes two addresses of the plaintiffs namely; Room No.202, Everest, Vile Parle (East), Mumbai – 400 057 and the suit premises. He submitted that the learned trial Judge decided the application Exhibit 10 by considering the case of the plaintiffs only. Learned trial Judge did not even refer to the reply filed by defendant No.2. He has taken me through the trial Court's order to submit that the learned trial Judge decided the application one sided.

10. I have considered the rival submissions of learned Counsel for the parties. I have also perused the material on record. A perusal of the cause title of the plaint shows that the plaintiffs have given two addresses, one of Vile Parle (East) and the other of the suit premises. Defendant No.2 contends that address of Vile Parle (East) is matrimonial home of plaintiff No.1. A perusal of the trial Court's order shows that in the opening sentence the learned trial Judge observed thus;

“Heard both the sides. Perused the documents of both parties”.

In paragraph 3, the learned trial Judge referred to case of the defendants that though the plaintiffs are not in possession of the suit premises, under the garb of relief of injunction they will acquire possession of the suit premises and thereby, rights of the defendants will be defeated. Save and except this, a perusal of rest of the paragraphs of the impugned order shows that the trial Judge considered the case of the plaintiffs only. In other words, the learned trial Judge did not even refer to much less discussed the reply filed by defendant No.2.

11. As against this, a perusal of the impugned order shows that the Appellate Court considered the documents produced by the plaintiffs as well by defendant No.2. After considering the documents on record, in paragraph 27, the Appellate Court specifically recorded a finding that defendant No.2 is having the most recent documents in his possession establishing his possession over the suit premises. As the order of the learned trial Judge is one sided viz; considers the care of the plaintiffs and not of the defendants, the Appellate Court was justified in interfering with that order.

12. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material.

The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

Applying the tests laid down by the Apex Court to the facts of the present case, in my opinion, the Appellate Court was justified in interfering with the impugned order as the learned trial Judge did not correctly apply the principles regulating the grant of injunction. Hence, no case is made out for interfering with the impugned order. Petition fails and as such dismissed. No order as to costs.

13. It is made clear that the observations made in this order are only for the purpose of deciding interim application made by the petitioners herein. The learned trial Judge will decide the suit on the basis of evidence on record and in accordance with law un-influenced by the observations made in the impugned order and this order. Liberty to apply for expeditious hearing of the suit.

[R.G. KETKAR, J.]