

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2893 OF 2015

Rajendra Kumar Upadhyay ... Petitioner

Versus

Mrs. Usha Jhaveri ... Respondent

Mr. Shardul Singh i/b. Ms. Vanita Kakar, Advocate for the Petitioner.

Ms. Sonal i/b. Prasad Kumar Das, Advocate for the Respondent.

CORAM : R. G. KETKAR, J.
RESERVED ON : 12th JULY, 2019
PRONOUNCED ON: 26th JULY, 2019

ORDER :

1. Heard Mr. Singh, learned Counsel for the petitioner and Ms Sonal, learned Counsel for the respondent at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the order dated 8.5.2014 passed by the learned Judge, Court Room No.16 of the Court of Small Causes at Mumbai below Exhibit-27 in R.A.E. & R. Suit No.683/1034 of 2009 as also the order dated 8.1.2015 passed by the Appellate Bench of the Small Causes Court in (iii) Revision Application No.376/2014. By order dated 8.5.2014, the learned trial Judge has allowed the application filed by the respondent, hereinafter referred to as the 'defendant' and stayed

the eviction suit till the City Civil Court, Mumbai disposes of Suit No.49/2005. By order dated 8.1.2015, the Appellate Court dismissed Revision Application on the ground of maintainability in view of Section 34(4) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. At the outset, Mr. Singh submitted that he is not questioning the correctness of the order of the Appellate Court dated 8.1.2015 which held that the revision application is not maintainable in view of the Full Bench decision of this Court in ***Bharatiben Shah Vs. Gracy Thomas, 2013 (2) Mh.L.J. 25.***

4. Rule. Mr. Prasad Kumar Das waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing. The relevant and material facts giving rise to filing of the present petition, briefly stated are as under.

5. The plaintiff claims to be owner of flat No.23 admeasuring 3470 sq. ft. built up area approximately on the 6th floor of building known as Bharatiya Bhavan Co-operative Housing Society Ltd. situate at Netaji Subhash Road, Mumbai - 400 020 (for short, 'suit premises'). One Moholal Maganlal Trust (for short, 'Trust') were the members of the Bhartiya Bhavan Co-operative Housing Society Ltd. (for short, 'society') and held ten shares under Share Certificate dated 15.8.2002. The Trust as such member were the owners of the suit premises. The trust offered to sell the suit premises to the plaintiff. The plaintiff was informed that the respondent, hereinafter referred to as the 'defendant', was the tenant of the suit premises. The plaintiff was also informed that the defendant had offered to purchase the suit premises on ownership

basis for an amount of Rs.42 Lakhs and was asked to confirm within 45 days from 22.1.2003. The plaintiff was informed that the defendant did not respond to the said offer. As the plaintiff was insisted in purchasing the suit premises, Memorandum of Understanding (for short, 'MOU') dated 10.9.2004 was entered into between the Trust and the plaintiff. As per the terms of MOU, the plaintiff agreed to purchase the shares issued by the society. On signing the MOU, the plaintiff paid Rs.4,20,000/- to the Trust and further agreed to pay Rs.37,80,000/- to the Trust on transfer of flat shares by the society in his favour.

6. The plaintiff further contended that the Trust in turn informed the society about signing of MOU and filed requisite forms for transfer of shares in favour of the plaintiff. As the society did not respond, the Trust filed appeal under Section 22(2) of the Maharashtra Co-operative Societies Act, 1960 before the Deputy Registrar, Co-operative Societies, 'A' Ward, Mumbai on 31.12.004. On 3.2.2005, the appeal was allowed and the society was directed to make the plaintiff as a member of the society and transfer the shares in his favour. On 6.7.2005, the Trust executed Deed of Confirmation of Sale and Transfer and sold the shares in the society along with ownership rights of the suit premises in favour of the plaintiff. The Deed recorded that the plaintiff had paid Rs.32,00,000/- (Rs.4,20,000/- paid on signing of MOU dated 10.9.2004 and subsequently Rs.27,80,000/-).

7. In the Deed of Confirmation of Sale and Transfer, it was agreed between the parties that the plaintiff will be allowed to retain Rs.10,00,000/- towards legal charges etc. The plaintiff also paid stamp duty of Rs.1,93,800/- as adjudicated by the office of the Collector of Stamps on the Deed of

Confirmation of Sale and Transfer dated 6.7.2005. The plaintiff also submitted application dated 6.7.2005 to the Collector of Mumbai seeking no objection certificate. By communication dated 19.6.2006, the Collector of Mumbai called upon the plaintiff to pay the transfer fee. The plaintiff instituted Writ Petition No.3133/2006 in this Court as the Collector of Mumbai refused to give NOC challenging Government Resolution dated 9.7.1999 read with G.R. dated 23.11.2001 and letter dated 19.6.2006 issued by the Collector of Mumbai. The petition is admitted on 24.7.2007 and is pending for final hearing.

8. Pending that Writ Petition, the Trust executed a Deed confirming the sale dated 17.4.2008. The Deed confirming the sale and transfer was annexed to the Deed of Confirmation dated 17.4.2008. The Deed of Confirmation was duly registered with the Sub-Registrar's office in view of the notification issued by the State of Maharashtra of effective without payment of transfer fee of the Collector and without NOC of Collector. In view of the order dated 3.2.2005 passed by the Deputy Registrar, 'A' Ward, the society transferred shares in the name of the plaintiff.

9. The defendant filed Revision Application No.128 of 2005 before the Divisional Joint Registrar challenging the order dated 3.2.2005. By order dated 14.11.2006, the Divisional Joint Registrar set aside the order and remitted the matter to the Deputy Registrar for registration on its own merits. After the remand, the Deputy Registrar passed an order on 21.5.2009 allowing the appeal filed by the Trust and directed the society to admit the plaintiff as member of the society. The defendant filed Revision Application No.175 of 2009. By order dated 11.11.2009, the Divisional Joint Registrar dismissed the

Revision Application. The defendant instituted Suit No.49 of 2005 on the Original Side of this Court against the Trust and the society for specific performance of oral agreement between the Trust and the defendant. The plaintiff was not made party in that suit. By order dated 26.3.2008, the plaintiff was joined as a party defendant in the said suit. In view of the pecuniary jurisdiction, the suit is now transferred to the City Civil Court, Mumbai and is renumbered as Suit No.570 of 2005.

10. The defendant challenged the order dated 21.5.2009 and 11.11.2010 passed by the Deputy Registrar and Divisional Joint Registrar respectively by instituting Writ petition No.659 of 2011 in this Court. By order dated 4.7.2011 Writ Petition was dismissed.

11. The plaintiff instituted present suit being R.A.E. Suit No.683/1034 of 2009. against the defendant for possession of the suit premises. The defendant filed Notice of Motion No.304 of 2012 in the Suit pending in the City Civil Court, Mumbai for stay of the eviction suit till disposal of the suit. The Motion is kept pending.

12. The defendant filed written statement dated 25.8.2009 in the eviction Suit. On 27.9.2007, the issues were framed. On 1.4.2014, the plaintiff filed affidavit of evidence. On the same day i.e. 1.4.2014 the defendant filed application Exhibit-27 for stay of the eviction suit till disposal of the suit No.5703 of 2005 pending in the City Civil Court. The plaintiff filed reply dated 7.4.2014. The defendant filed affidavit in rejoinder dated 15.4.2015. After hearing both sides, by order dated 8.5.2014, the learned trial Judge allowed the application and stayed the eviction suit till disposal of the Suit

No.5703 of 2005 pending in the City Civil Court. Aggrieved by this order, the plaintiff preferred Revision Application which was dismissed on 8.1.2015. Aggrieved by these orders, the plaintiff has instituted present petition.

13. As noted earlier the plaintiff has given up the challenge to the order of the Appellate Court dated 8.1.2015. The controversy now is as regards validity of the trial Court's order dated 8.5.2014.

14. In support of this Petition, Mr. Singh submitted that the learned trial Judge committed serious error in staying the eviction suit. He submitted that in paragraph 10, the learned trial Judge observed that the relief of specific performance cannot be granted by the Small Causes Court. Similarly, the decree of eviction cannot be passed in the Suit pending before the City Civil court. However, considering the fact that Suit for specific performance was instituted by the defendant in the earlier point of time and the eviction suit is subsequent in point of time, he was of the view that the tests required to be complied with to attract Section 10 of C.P.C. have been fully complied with.

15. Mr. Singh submitted that the basic purpose and the underlying object of Section 10 of C.P.C. is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. In support of this submission, he relied upon the following decisions:

- a. ***Aspi Jal Vs. Khushroo Rustom Dadyburjor*, (2013) 4 SCC 333**, and in particular paragraphs 9 to 11 thereof;
- b. **Order dated 06.04.2010** passed by this Court (Coram: A. S. Oka, J., as the learned Chief Justice of Karnataka High Court) in **Writ Petition No.7319 of 2008**.

16. Mr. Singh has invited my attention to paragraphs 5(w) and 7 of the plaint in Suit No.5703/2005 pending in the City Civil Court to contend that there is no concluded contract between the trust and the defendant. In fact in paragraph-5(w), the defendant herein asserted that the last meeting between the Trust and the defendant was held on 16.12.2004 whereas the schedule for payment was to be discussed but instead the Trust represented by Jinendra M. Shah advised the defendant's son that an agreement was entered into with a third party (plaintiff herein) in connection with the suit premises.

17. He invited my attention to the alleged discussion that took place among the persons, who were present in the meeting dated 29.11.2004. The defendant has alleged that Jitendra Moholal Shah (defendant No.3 therein) stated that the Trust was agreeable to receive payment in 12 months and the plaintiff agreed and requested defendant No.3 to prepare MoU. In paragraph 7, defendant therein contended that she is ready and willing to purchase the suit premises for a consideration of Rs.42 lakhs as orally agreed between the parties and payable within 12 months as agreed and at no point of time, she has refused to perform her part of obligation. He submitted that the contentions raised in paragraph 5(w) and the contentions as regards alleged discussion on 29.11.2004 and paragraph 7 are contradictory and inconsistent. In paragraph 5(w), the defendant contended that the last meeting was held on 16.12.2004 where at the schedule for payment was discussed. In other words, the contention of the defendant that Trust was agreeable to receive payment in 12 months is falsified.

18. On the other hand, Ms Sonal supported the impugned order. She submitted that flat No.22 and the suit premises i.e. flat No.23, both, are situate on the 6th floor. Flat No.22 and the suit premises were used to be as one unit.

There is a common electricity meter for both the flats. The 6th floor was made as per the requirement of the family of the defendant. For the convenience of the society, flat No.22 and suit premises were shown as two units. She has taken me through the assertions made in the plaint filed by the defendant for specific performance of contract. She submitted that the building was constructed in or about year 1940. In the course of time, the building required urgent and emergent structural repairs and therefore, the society obtained several reports from 1977 onwards. In respect of flat No.22 and suit premises, the extract of the report dated 03.12.1997 made by Rehab Consultants Pvt. Ltd. appointed by the Society is reproduced. The report dated December 1999 made by Mahimtura Consultants Pvt. Ltd. appointed by Society is extracted. The report of M/s. Parelkar & Dallas dated 20.04.2004 is enclosed at exhibit-F. She submitted that it was obligation of the Trust to contribute to the society for execution of the said repairs. This involved heavy expenses and large amounts, and therefore, the Trust requested the defendant to reimburse to the Trust all costs incurred in connection of repairs in view of agreement to convert tenancy of the defendant and late R. G. Jhaveri into ownership of flats. The defendant and also family of late R. G. Jhaveri contributed large amounts to the Trust / Society, particulars whereof were set out. In fact, in pursuance of consent terms dated 20.08.2002 filed in in R.A.E.& R.Suit No.1083/3801 of 1978, the designated heirs of late R. G. Jhaveri became the owners of flat No.22, which was divided into flat No.22-A and 22-B.

19. Mr. Sonal submitted that it was agreed between the Trust and defendant and R.G.Jhaveri that the tenancy rights will be converted into ownership basis in two stages, namely, first stage - by converting the ownership interest in flat No.22 and second stage - subsequently after a gap of two years, flat No.23 i.e.

suit premises was to be converted into ownership to enable the defendant to raise funds since the price agreed was Rs.42,00,000/- in her favour. She submitted that there was oral agreement between Trust and defendant for converting tenancy rights of suit premises into ownership rights in favour of the defendant. The price of Rs.42,00,000/- was agreed to be payable subject to Schedule of Payment being agreed between the parties. The original oral agreement was partly implemented by converting tenancy rights into ownership rights in respect of flat No.22. She invited my attention to the various meetings held between 25.06.2004 and 16.12.2004.

20. Ms Sonal submitted that defendant has never paid rent to the plaintiff. The defendant is disputing ownership of the plaintiff. The defendant does not accept that plaintiff is landlord or owner of the suit premises. In fact, the present Suit is instituted as a counter-blast to the Suit instituted by the defendant for specific performance of oral agreement.

21. Ms Sonal submitted that issue of ownership is raised in the Eviction Suit pending in the Small Causes Court. The defendant has instituted Eviction Suit for specific performance of contract, which is pending in the City Civil Court. Thus, the issue of ownership is involved in both the Suits. She relied upon the decision in ***Trikamdas Jethabai Vs. Jivraj Kalianji***, AIR 1942 **Bombay 314** where it is held that the words of Section 10 of C.P.C. are mandatory and require that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted Suit. It is immaterial that the relief claimed in the earlier Suit is of a different character from the relief claimed in the subsequent Suit. The real question is whether the matter in issue in the subsequent Suit is

directly and substantially in issue in the earlier Suit. The test whether a previously instituted Suit and a subsequently instituted Suit are 'parallel' is that if the first was determined, the matters raised in the second Suit would be res judicata by reason of the decision of the prior Suit.

22. Ms Sonal also relied upon decision in ***Joseph Kantharaj Vs. Attharunnisa Begum*, (2010) 2 SCC 619** to contend that when the respondent has instituted Suit for specific performance against the vendors of the present petitioner (plaintiff), the eviction Suit is required to be stayed. She further invited my attention to amendments made in Section 10 of C.P.C. where the words “for the same relief” have been omitted. She further relied upon paragraph 11 of ***Aspi Jal*** (*supra*) where it is reiterated that it is immaterial whether similar reliefs are claimed in both the Suits. She, therefore, submitted that no case is made out for interfering with the impugned orders.

23. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph 10 of the impugned order, the learned trial Judge noted that the relief of specific performance cannot be granted by the City Civil Court. Similarly, the eviction of the defendant cannot be granted in the Suit before the City Civil Court. The learned trial Judge thereafter proceeded to observe that the Suit instituted by the defendant for specific performance is earlier in point of time and the suit for eviction is subsequent in point of time. He was, therefore, of the view that the tests require to be complied with to attract Section 10 have been fully complied with.

24. Ms Sonal relief upon the decision in ***Joseph Kantharaj*** (*supra*). In that

case, respondent had instituted eviction petition in the year 1998 under the provisions of Karnataka Rent Control Act, 1961 contending that under a registered sale deed dated 25.09.1997, she had purchased the suit premises from previous owner Anthony Swamy. First appellant opposed the Petition. He contended that he is not tenant of the suit premises under the respondent. He contended that Anthony Swamy had entered into an agreement of sale dated 11.06.1997 in his favour agreeing to sell suit property for a consideration of Rs.1,05,000/- and that, under the said agreement Anthony Swamy confirmed having received Rs.75,000/- as advance and permitted first appellant to continue in possession free of rent in part performance of the agreement of sale. Thus, from that date, he has been in possession not as a tenant but as a purchaser in part performance of the agreement of sale. The trial Court allowed the Petition.

25. The order of the trial Court was challenged by filing Revision before the High Court. By order dated 18.10.2001, the High Court affirmed the trial Court's finding about relationship of landlord and tenant between the parties but held that ground of eviction was not established. Aggrieved by this decision, the first appellant instituted S.L.P. before the Apex Court, which was dismissed on 29.04.2002. It was clarified that the finding arrived at by the High Court about the relationship of the landlord and tenant is confined to the said proceedings for eviction and that the suit for specific performance filed by the appellant shall be decided on merits on the basis of the pleadings therein and the evidence adduced.

26. The respondent thereafter instituted second Petition under the provisions of the Karnataka Rent Act, 1999. The first appellant reiterated his

contention that there was no relationship of landlord and tenant between the parties. The learned trial Judge deferred the hearing of eviction proceedings till the disposal of Suit instituted by the appellant for specific performance of contract. That order was assailed in the High Court. The High Court allowed the Petition and it is against this order, the S.L.P. was preferred. In paragraph 10 of the decision, the Apex Court observed thus,

“10. We may however clarify that a mere assertion by a tenant that he is in possession in part performance of an agreement of sale, or the mere filing of a suit for a specific performance, by itself will not lead to deferment of the eviction proceedings under section 43 of the New Act. But where the respondent in an eviction proceeding under the Rent Act denies the relationship of landlord and tenant contending that he is not in possession as a tenant and produces and relies upon an agreement of sale in his favour which confirms delivery of possession in part-performance, and a specific performance suit is pending and there is no lease deed, or payment of rent from the date of such agreement of sale, or no acknowledgment of attornment of tenancy, section 43 of the new Act may apply. But a word of caution. Courts dealing with summary proceedings against tenants under Rent Acts for eviction, should be wary of defendants coming forward with defences of agreement of sale, lest that becomes a stock defence in such petitions. Unless the court is satisfied *prima facie* that the agreement is genuine and defence is bonafide, it should not defer the proceedings for eviction under the Rent Acts.”

27. A perusal of the above extracted paragraph shows that the Apex Court observed that Courts dealing with summary proceedings against tenants under the Rent Act for eviction should be wary of the defendants coming forward with defences of agreement of sale, lest that becomes a stock defence in such petitions. Unless, the Court is satisfied *prima facie* that the agreement is genuine and defence is bonafide, it should not defer the proceedings for eviction under the Rent Acts.

28. A perusal of the impugned order shows that the trial Court has not prima facie satisfied itself about the genuineness of the agreement and the defence of the respondent. The learned Counsel for the parties have advanced various contentions referred hereinabove in this Court. It will not be proper on the part of this Court to decide this aspect for the first time. As the learned trial Judge has not considered this aspect, the impugned order dated 08.05.2014 deserves to be set aside thereby restoring the application exhibit-27 filed by the respondent to the file of the trial Court to decide it afresh. The learned trial Judge will deal with the contentions recorded in this order in the light of decision in **Joseph Kantharaj** (*supra*) in addition to any other contentions that may be advanced while disposing of the application. Rule is made absolute accordingly with no order as to costs.

(R. G. KETKAR, J.)

Minal Parab