

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12252 OF 2017

Vivek Dattatray Shinde and others ... Petitioners
Vs.
Draupadi Shankarrao Astagaonkar and others ... Respondents

Mr. Mohit Punjabi i/b. Mr. Sanjay Gawde for Petitioners.
Mr. Sanskar Marathe for Respondents.

CORAM : R. G. KETKAR, J.
DATE : MARCH 4, 2019

P.C. :

Heard Mr. Punjabi, learned Counsel for the petitioners and Mr. Marathe, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the order dated 08.03.2017 passed by the learned Principal District Judge, Pune below exhibit-5 in Civil Appeal No.545 of 2016. By that order, the learned District Judge rejected the application filed by the defendants for the stay of the decree dated 18.03.2016 passed by the learned trial Judge in Civil Suit No.404 of 2009. Rule. Mr. Marathe waives service for the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. Respondents, hereinafter referred to as 'plaintiffs', instituted Suit for recovery of possession of block of two room admeasuring 300 sq.ft. plus courtyard admeasuring 150 sq.ft. in C.T.S.No.106/2 situate at Shivaji Nagar, Pune (for short 'suit premises') and for perpetual injunction restraining defendants from creating third party interest in the suit premises. Plaintiffs came with the case that they had gone for pilgrimage out of Pune during the period from 24.05.2009 till

02.06.2009. After return from pilgrimage on 02.06.2009, plaintiffs saw that their all domestic articles in the suit premises were scattered in the courtyard by removing the lock of the suit premises. On inquiry, plaintiffs came to know that defendants No.1 and 4 had removed the domestic articles of plaintiffs in the suit premises and unlawfully dispossessed them and had taken forceful possession of the suit premises. Defendants have kept five students on cot basis in the suit premises by obtaining huge amount as deposit from them. Plaintiffs tried to settle the matter with the help of prestigious persons in their society. As they did not succeed in the attempt for settling the controversy, they instituted the present Suit for possession and perpetual injunction.

4. Defendants filed written statement and resisted the claim of the plaintiffs. One of the contentions advanced by the plaintiffs was that the Suit is instituted under Section 6 of the Specific Relief Act, 1963 and the Small Causes Court has no jurisdiction to entertain and try the Suit. Defendants also contended that the Suit is bad for non-joinder of the necessary party. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence. By order dated 18.03.2016, the learned trial Judge decreed the Suit.

5. Aggrieved by that decision, defendants preferred Civil Appeal before the District Court. Pending the Appeal, they took out application exhibit-5 inter alia praying for stay of the execution of the impugned order. By the impugned order, the learned District Judge has rejected the application.

6. In support of this Petition, Mr. Punjabi submitted that the learned District Judge rejected the stay application on the ground that the suit premises have been let out by the defendants to some students. As the

third party rights have already been created by the defendants, they are not entitled to claim discretionary relief. No substantial loss will be caused to the defendants if execution of the impugned decree is not stayed. He submitted that the learned District Judge failed to appreciate that by refusing to grant stay to the impugned decree, the Appeal preferred by the defendants becomes infructuous. The reasons given in paragraph 6 are totally perverse.

7. On the other hand, Mr. Marathe supported the impugned order. He submitted that even during the trial, it has come on record that defendants have inducted students on cot sharing basis. As the defendants are not in possession of the suit premises, they are not entitled to equitable and discretionary reliefs.

8. 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 4 of the plaint, plaintiffs have specifically asserted that defendants have inducted 5 students on cot sharing basis in the suit premises. Defendants filed written statement and contended that Suit is bad for non-joinder of necessary parties. In paragraph 8 of the written statement, the defendants denied the contention advanced by the plaintiffs about induction of students on cot sharing basis in the suit premises. The learned District Judge rejected the stay application for the reasons recorded in paragraph 6 of the impugned order, which is to the following effect:

“6] in the case at hand, it appears that the suit premises has been let out by the appellants to some students, which is also stated in the instant application by the appellants. Third party rights have already been created by the appellants and, therefore, the appellants are not entitled to claim the discretionary relief of stay to the execution as stay cannot be claimed as of right merely because an appeal is preferred against the impugned judgment and decree. There would not

be any substantial loss to the appellants, if the execution of the impugned decree is not stayed. Principles of natural justice and the balance of comparative hardship, indeed, tilts in favour of the respondents. It would not be just and proper to deprive the respondents to reap the fruits of decree in their favour. At the most, appeal can be expedited. For the aforesaid reasons, the application is devoid of merit and, therefore, needs to be rejected.”

9. In my opinion, the learned District Judge failed to appreciate that by refusing stay to the execution of the decree, the appeal filed by the defendants would be rendered infructuous. Appeal under Section 96 read with Order XLI is a substantive right of the party to challenge the decree passed by the trial Court. In view thereof, the impugned order cannot be allowed to stand and is liable to be set aside. Hence, the Petition is disposed of in the following terms:

- a. Order dated 08.03.2017 passed by the learned District Judge below exhibit-5 in Civil Appeal No.545 of 2016 is set aside;
- b. Application exhibit-5 stands allowed;
- c. Liberty is reserved to the plaintiffs to file application for disposal of the appeal in a time bound manner. If such application is made, the learned District Judge will pass appropriate order on the stay application;
- d. All contentions of the parties on merits are expressly kept open;
- e. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)