

Arvind Narayan Vaishampayan Vs. Yashwant Govind Bhuskute and another	...	Applicant Respondents
--	-----	-----------------------

Mr. S. V. Palsuledesai for Applicant.
Mr. V. A. Gangal a/w. Mr. Anup N. Deshmukh for Respondents.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 16, 2019

Heard Mr. Palsuledesai, learned Counsel for the applicant and Mr. Gangal, learned Counsel for the respondents at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant', has challenged the judgment and decree dated 02.02.2011 passed by the learned Joint Civil Judge, Junior Division, Kalyan in R.C.S.No.305 of 1999 as also the judgment and decree dated 30.10.2013 passed by the learned Ad-hoc District Judge-1, Kalyan in Regular Civil Appeal No.28 of 2011. By these orders, the Courts below decreed the Suit instituted by the plaintiffs and directed the defendant to handover possession of old flat No.2 in Radhashram building and new flat No.9 in Malhar Ashish Co-operative Society (for short 'suit premises') to the plaintiffs within two months from the date of the order.

3. C.R.A. was adjourned from time to time for exploring the possibility of settlement. By order dated 29.11.2018, hearing of the C.R.A. was deferred till 07.12.2018 so as to enable the parties to try and explore possibility of settlement. On 13.12.2018, matter was adjourned to 07.01.2019 so as to enable the parties to exchange proposal for

possible settlement. On 07.01.2019, the matter was heard when it was adjourned till today i.e. 16.01.2019 so as to enable the parties to settle the matter. The learned Counsel for the parties assured that if by that time, settlement is not arrived at, they will proceed with the matter on merits. The learned Counsel for the parties submit that settlement is not possible. Accordingly, I have heard the parties.

4. The plaintiffs instituted Suit for recovery of possession of the suit premises *inter alia* contending that defendant was a tenant in respect of old flat No.2 admeasuring 198 sq.ft. in Radhashram building. As the building was old, plaintiffs proposed to demolish the old building and intended to construct new building. The plaintiffs entered into agreement with the then existing tenants who agreed to take flats in new building on ownership basis. The tenants who could not afford to purchase new flats entered into tenancy agreement with the plaintiffs. The defendant agreed to purchase flat on ownership basis in the newly constructed building. Accordingly, parties entered into registered agreement for sale on 18.03.1986 (exhibit-32) as per the Maharashtra Ownership of Flats (Regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963 (for short 'MOFA'). The total consideration agreed between the parties was Rs.1,02,830/-. Defendant paid Rs.24,000/- at the time of execution of the agreement of sale.

5. Sometime in the third week of June, 1987, defendant expressed his inability to pay full consideration amount. In view thereof, on 29.06.1987, parties entered into a fresh supplementary agreement at exhibit-34. Defendant agreed to take the new flat as a monthly tenant on the terms and conditions mentioned in the agreement dated 29.06.1987. It was further stipulated therein that in case the defendant could pay the full agreed price as stipulated in the agreement, he would be entitled to take the same flat on ownership basis. Plaintiffs further contended that

on 30.06.1987, defendant was inducted as a tenant in the newly constructed building, namely, 'Malhar Ashish'. The old flat No.2 was renumbered as flat No.9. Monthly rent agreed between the parties was Rs.200/- in addition to permitted increases, taxes and other charges like maintenance, electricity, etc. Defendant instituted R.C.S.No.557 of 1987 against the plaintiffs for injunction restraining them from disturbing his peaceful possession over the suit flat. In that Suit, defendant denied the title of the plaintiffs as landlords and claiming ownership, set up title in himself. The plaintiffs, therefore, sought eviction of the defendant on the ground of denial of title.

6. The plaintiffs further contended that defendant has acquired suitable alternate residence namely, flat No.A-402 in Hari Om Arcade Building, Manpada Road, Dombivali (E) and is residing in that flat along with his wife. The said premises is self-contained and more spacious than the suit premises. Thus, the plaintiffs have claimed possession on the ground of denial of title as contemplated by Section 116 of the Indian Evidence Act, 1872 (for short 'Evidence Act') as also under Section 13(1)(l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Bombay Rent Act'). The plaintiffs amended the plaint and claimed decree of eviction on the ground of arrears of rent as contemplated by Section 12 of the Bombay Rent Act. The Courts below, however, declined to pass decree on that ground.

7. The defendant filed written statement at exhibit-11 and traversed all the contentions raised in the plaint. He denied that there is relationship of landlord and tenant between the parties. He claimed to be in possession of the suit premises as an owner. As the plaintiffs agreed to sell the suit premises by a registered agreement dated 18.03.1986, there was no question of paying rent to the plaintiffs. The defendant relied upon the decree passed by the trial Court and the District Court in his

Suit restraining the plaintiffs from interfering with possession of the defendant over the suit flat. The defendant contended that the building where the suit premises is situate is illegal. The plaintiffs have constructed the building without obtaining the sanction from the Planning Authority. The defendant demanded documents from the plaintiffs such as sanctioned plan, commencement certificate, completion certificate and title clearance certificate. The plaintiffs however, failed to provide these documents. The defendant, therefore, could not obtain loan and make payment of remaining consideration to the plaintiffs. The defendant admitted acquisition of flat No.A-402 in Hari Om Arcade Building. He however, contended that acquisition of the said flat has nothing to do with the suit premises as the same is purchased by him on ownership basis. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. By order dated 02.02.2011, the learned trial Judge decreed the Suit. The learned trial Judge held that plaintiffs proved that there exists landlord and tenant relationship between the parties; that the plaintiffs proved that the defendant has acquired suitable alternate residence i.e. flat No.A-402 in Hari Om Arcade Building.; that the plaintiffs proved that the defendant has committed breach of conditions of tenancy. The learned trial Judge declined to pass decree on the ground of arrears of rent.

8. Aggrieved by this decision, defendant preferred appeal in the District Court. By order dated 30.10.2013, the learned Ad-hoc District Judge-1, Kalyan dismissed the appeal. The learned District Judge held that plaintiffs are entitled to decree of eviction on the ground of denial of title by the defendant. The learned District Judge further held that the defendant has acquired suitable alternate residence. It is against these orders, defendant has instituted the present C.R.A.

9. In support of this Application, Mr. Palsuledesai strenuously

contended that the Courts below committed serious error in decreeing the Suit instituted by the plaintiff on the ground of denial of title as also on the ground that defendant has acquired suitable alternate residence. He submitted that basically, there is no relationship of landlord and tenant between the parties. The decree passed by the Courts below is, therefore, without jurisdiction, and as such, is a nullity. The parties had executed agreement of sale dated 18.03.1986 and declaration dated 14.10.1994 at exhibit-90. The total consideration agreed between the parties was Rs.1,02,830/-. Out of this consideration, admittedly, defendant had paid a sum of Rs.24,000/- to the plaintiffs at the time of execution of the agreement of sale. Thus, the defendant was inducted in the suit premises as a prospective purchaser and not as a tenant. The agreement of sale is duly registered and was executed as per the provisions of MOFA.

10. Mr. Palsuledesai further submitted that defendant had instituted R.C.S.No.557 of 1987 for injunction restraining the plaintiffs from disturbing possession of the defendant. By order dated 12.08.1993, the learned trial Judge decreed the Suit. Aggrieved by that decision, plaintiffs preferred Civil Appeal No.180 of 1996, which was dismissed by the learned District Judge on 23.10.1997. The plaintiffs thereafter did not prefer Second Appeal in this Court. As the injunction decree is still in force and is not set aside, the plaintiffs cannot recover possession of the suit premises from the defendant.

11. Mr. Palsuledesai further submitted that the building where suit premises is situate is illegal. The plaintiffs, therefore, did not furnish documents such as sanctioned plan, commencement certificate, completion certificate and title clearance certificate. The defendant could not avail loan facility from the financial institutions. He further submitted that the Courts below committed error in decreeing the Suit on

the ground of denial of title as also acquisition of suitable alternate residence. He, therefore, submitted that Application requires consideration.

12. On the other hand, Mr. Gangal supported the impugned orders. He submitted that earlier, agreement of sale was executed by the plaintiff in favour of the defendant on 18.03.1986. Plaintiff had agreed to sell flat No.2, which was renumbered as flat No.9 for a total consideration of Rs.1,02,830/-. Out of that consideration, defendant had paid Rs.24,000/-. The balance consideration was to be paid on or before 15.07.1987. Defendant did not pay the balance consideration. These facts are not disputed. As defendant expressed inability to pay the balance consideration, parties executed subsequent agreement exhibit-33 on 29.06.1987. Fresh possession receipt at exhibit-34 was executed and defendant was put in possession as a tenant of the plaintiff. The amount of Rs.24,000/- was converted into loan amount which was to be adjusted against the rent.

13. Mr. Gangal submitted that after appreciating the evidence on record, the Courts below have concurrently held that defendant has acquired suitable alternate residence and accordingly decreed the Suit under Section 13(1)(i) of the Bombay Rent Act. He, therefore, submitted that no case is made out for interfering with the impugned orders.

14. I have considered the rival submissions advanced by the learned Counsel appearing of the parties. I have also perused the material on record. The parties entered into registered agreement of sale on 18.03.1986 at exhibit-32. The defendant agreed to purchase the suit premises for a consideration of Rs.1,02,830/-. Admittedly, defendant paid Rs.24,000/- and thereafter, did not pay the balance consideration. The parties thereafter executed supplementary rent agreement on

29.06.1987 at exhibit-33. A fresh possession receipt at exhibit-34 was executed.

15. Mr. Palsuledesai submitted that as the building where suit premises is situate is illegal, plaintiffs did not furnish the documents sought by the defendant for availing loan. The learned District Judge has considered this aspect in paragraph 25. In paragraph 25, the learned District Judge noted that defendant's wife owns flat No.5 in the same building where suit premises is situate. She was an employee of Mahanagar Telephone Nigam Limited. She had obtained loan for purchase of the said flat. It was noted that loan could not have been obtained without furnishing the requisite documents. As the defendant's wife had obtained the loan, it goes to show that plaintiffs had furnished requisite documents to her for obtaining the loan. It is, therefore, difficult to believe the defendant's contention that building is illegal and is constructed without any sanctioned plans.

16. It is also not in dispute that till date, defendant did not pay the balance consideration. It is also evident from record that defendant expressed his inability to pay balance consideration. In view thereof, on 29.06.1987, parties entered into a fresh supplementary agreement at exhibit-34. The defendant agreed to take a new flat as a monthly tenant on terms and conditions mentioned in the agreement dated 29.06.1987. Mr. Palsuledesai submitted that the said agreement was not intended to be acted upon and in fact, it was obtained forcibly from the defendant. This aspect was considered by the learned District Judge in paragraph 14. It was observed that the agreement bears signature not only of the defendant but also his wife as a witness. The defendant admitted that the same was affixed in his presence. He further admitted that he never raised grievance about plaintiffs being landlord obtained his signature on

the rent agreement exhibit-33 forcibly. Though defendant alleged that agreement exhibit-33 is a sham document and was never intended to be acted upon, he did not file any Suit for specific performance of agreement of for cancellation of the subsequent agreement dated 29.06.1987. The defendant instituted Suit for injunction simplicitor.

17. Mr. Palsuledesai submitted that there is no relationship of landlord and tenant between the parties and the Court had no jurisdiction to entertain and try the Suit. He submitted that defendant has taken possession of the suit premise in part performance of agreement of sale dated 18.03.1986, and therefore, there is no relationship of landlord and tenant between the parties but there is relationship of vendor and purchaser. The decree passed by the Courts below is a nullity. It is not possible to accept this submission. After execution of the fresh supplementary agreement on 29.06.1987 at exhibit-33 and possession receipt at exhibit-34, defendant was put in possession as a tenant of the suit premises. The Courts below, therefore, held that there is no relationship of vendor and purchaser between the parties and the relationship between the parties is that of landlord and tenant. The defendant denied the title of the plaintiffs and claimed title in himself. The learned District Judge considered this aspect from paragraphs 28 to 30 and held that plaintiffs are entitled to decree of eviction on the ground of denial of title.

18. In so far as the acquisition of alternate suitable residence is concerned, the said ground is considered by the learned District Judge in paragraphs 31 and 32. The learned District Judge noted that not only defendant acquired flat No.402, A-Wing in Hari Om Arcade building in the name of his wife but also the wife has purchased flat in a building where the suit premises is situate. Thus, plaintiffs have successfully

established that defendant has acquired not one but two premises in Dombivali area. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit on the ground of denial of title as also acquisition of suitable alternate residence by the defendant.

19. Mr. Palsuledesai submitted that in any case, in view of the decree passed by the Courts in a Suit instituted by the defendant restraining the plaintiffs from obstructing his possession, the Courts below were not justified in decreeing the Suit. I do not find any merit in this submission. As mentioned earlier, the learned trial Judge decreed the Suit filed by the defendant on 12.08.1993. The learned District Judge dismissed the Appeal on 23.10.1997. In paragraph 10 of that decision, the learned District Judge observed that plaintiff's (defendant herein) possession is a lawful possession. Defendant (plaintiff No.1 herein) is not permitted to take forcible possession. He must obtain such possession as he is entitled through the Court. The law requires that the owner could dispossess the trespasser by taking recourse to remedies under law. Thus, the plaintiffs are entitled to recover possession of the suit premises by following due process of law. The plaintiffs have followed due process of law by instituting the Suit.

20. In the light of the aforesaid discussion, no case is made out for invocation of powers under Section 115 of C.P.C. Defendant was not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendant was also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, Application fails and the same is dismissed.

(R. G. KETKAR, J.)