

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.514 OF 2018
IN
CIVIL REVISION APPLICATION NO.268 OF 2018

Purnima Hotel and another.	..Applicants
<u>IN THE MATTER BETWEEN</u>	
Purnima Hotel and another	..Applicants
<i>Versus</i>	
Kakani Kutumb Kalayan Nidhi	
and others.	..Respondents

....

Mr. Jayendra D. Khairnar, Advocate for the Applicants.
Mr. Vaibhav Ugle, Advocate for Respondent No.4.
Mr. V.R. Kasle, Advocate for Respondent No.5.

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CORAM : R. G. KETKAR, J.

DATE : 04th FEBRUARY, 2019

P.C.

1. Not on board. At the request of Mr.Kasle taken up in the production board.
2. Heard Mr. Jayendra D. Khairnar, learned counsel for the applicants, Mr. Vaibhav Ugle, learned counsel for respondent No.4 and Mr.V.R. Kasle, learned counsel for respondent No.5, at length.
3. By this application, defendants No.1 & 2 have sought clarification of the order dated 16.7.2018 passed by this Court in C.R.A. No.268/2018, C.R.A.(St.) No.18459/2018 and W.P. No.1946/2018.
4. Defendants No.1 & 2 have prayed that it may be clarified that

respondent No.5 is entitled to receive possession only in respect of the suit property which is/was in actual physical possession of defendants No.1 & 2 i.e. Galas No.1 to 4 along with open space parking, except the area which is in possession of respondent No.4/defendant No.4 Deepak Kanhaiyyalal Kaurani. Regular Civil Suit No.91/2005 was instituted by Kakani Kutumb Kalayan Nidhi Trust, (for short, 'Trust') through its Trustee Dr. Shriniwas Zumberlal Kakani against defendants No.1 & 2 and respondent No.4 herein who was impleaded as defendant No.4.

5. In paragraph-7, the learned trial Judge observed that defendants No.1 to 3 were duly served. However, they did not file written statement within the stipulated time and therefore 'No WS' order was passed against them. Despite service of suit summons, defendants No.4 to 6 remained absent and the suit was ordered exparte against them. It is the case of the plaintiff that defendants No.1 to 3 are the tenants in the suit premises and defendant No.4 is unlawful sub-tenant. Defendants No.2 & 3 have unlawfully sub-let the pan stall which is on the Western side of Gala No.1 below stair-case admeasuring 8 ft. x 6 ft. and 3 ft. x 3.6 ft. where defendant No.4 carries on the business of Pan Stall.

6. By order dated 31.1.2008, the learned trial Judge decreed the suit and directed defendants No.1 to 3 to hand over vacant and peaceful

possession of the suit premises to the Trust within two months. Aggrieved by this decision, defendants No.1 & 2 preferred Civil Appeal No.19/2008. Defendant No.6 Badrinarayan Ramlal Kakani, since deceased, through his L.Rs preferred Civil Appeal No.17/2008. By order dated 18.4.2018, the learned District Judge dismissed both the appeals.

7. It is against these orders, Civil Revision Applications and Writ Petition were filed. By order dated 16.7.2018, C.R.A. No.268/2018 was disposed of by setting aside the orders passed by the Courts below thereby restoring the suit before the trial Court for deciding it *denovo*. Defendants No.1 & 2 were directed to hand over possession of the suit premises to defendant No.5 Shreyas Shriniwas Kakani. Liberty was reserved to respondent No.2(b) Jagdish Badrinarayan Kakani to take out application before the trial Court or to adopting appropriate proceedings for recovery of possession of the suit premises from respondent No.5. In view of disposal of C.R.A. No.268/2018, in the aforesaid terms, C.R.A.(St.) No.18459/2018 and W.P. No.1946/2018 were also disposed of as they did not survive.

8. Mr. Khairnar submitted that except Pan stall, defendants No.1 & 2 are ready and willing to hand over possession to respondent No.5 Shreyas Shriniwas Kakani. Mr. Khairnar states that defendants No.1 & 2 will deposit the keys of the suit premises within one week from today,

under intimation in writing to the learned Counsel for respondent No.5 herein. In pursuance thereof, defendants No.1 and 2 have handed over possession to respondent No.5. Mr. Kasle confirms this fact.

9. On the other hand, Mr. Kasle submitted that defendant No.4 is unlawful sub-tenant inducted by defendants No.1 & 2. The suit was proceeded ex parte against defendant No.4. Defendant No.4 being unlawful sub-tenant is bound by the decree passed by the trial Court. Defendant No.4 also did not prefer any appeal challenging the eviction decree passed by the trial Court. He submitted that defendants No.1 & 2 have averred in the application that defendant No.4 was initially their employee and later on started running his business on his own. Without prejudice to the rights and contentions of respondent No.5 in the pending application, he is permitted to take away the keys of suit premises to be deposited by defendants No.1 & 2 in the trial Court.

10. The matter was heard on 16.8.2018 and notice for final disposal was issued to respondent No.4 Deepak Kanhaiyyalal Kaurani returnable on 19.9.2018. The notice was to further indicate as to why he should not be directed to hand over possession of Pan Stall, more particularly described in paragraph-1(b) of the plaint, to respondent No.5 Shreyas Shriniwas Kakani.

11. In pursuance thereof, Mr. Vaibhav Ugle learned Counsel for respondent No.4 has filed affidavit of respondent No.4 dated 24.1.2019.

In paragraphs-6 to 8 of said affidavit it is stated thus:

- “6. I say that I am use, occupation and possession of the 5 X 3.5 and in the said premises. I am running pan stall since 1988 till today. I further say that for the said premises I am making regularly payment of rent of Rs.100/- in Cash per day since 1988 to applicants. I say that applicant has told me that you are sub tenant of him therefore you need not receipt of the rent and applicant further states that he will pay rent to landlord on behalf of me and take receipt from landlord. Therefore applicant has not issued rent receipt but applicants regularly receiving daily rent from me till I received notice in CRA No.268/2018. I say that between myself and applicants have oral sub-tenancy agreement from last thirty years of the Suit Property.
7. I further say that the said suit was proceeded exparte against me and I am bound by the decree passed by the Ld. Trial Court. It is admitted that I did not prefer any appeal challenging the eviction decree passed by the Ld. Trial Court.
8. I say that I am sub-tenant of the applicant/original defendant No.1 and 2. I am ready to hand over possession of Pan Stall, more particularly described in para 1(b) of the plaint to the respondent.”

12. In view of the assurances made in paragraphs-6 to 8, extracted hereinabove, respondent No.4 shall hand over possession of the Pan Stall, as more particularly described in paragraph-1(b) of the plaint to respondent No.5 within two weeks from today. Mr.Ugle states that respondent No.4 may also be permitted to file written statement as by order dated 16.7.2018 after setting aside the decrees, R.C.S. No.91/2005 is restored to the file of the trial Court.

13. In view thereof, Civil Application is disposed of by passing following order :

- i. Respondent No.4 shall hand over possession of the Pan Stall, as more particularly described in paragraph-1(b) of the plaint to respondent No.5 within two weeks from today. Upon handing over possession, respondent No.4 will file written statement within four weeks from handing over possession, in the trial Court and serve copy on the other side during this period.
 - ii. The parties will be at liberty to adduce fresh evidence in the trial Court.
 - iii. Upon receipt of possession from respondent No.4, respondent No.5 will neither create third party interest nor part with the possession of that premises and shall abide by the suit subject to rights of the parties to challenge the decision.
 - iv. Civil Application is disposed of in aforesaid terms with no order as to costs.
 - v. List the application for reporting compliance after three weeks.
- Order accordingly.

(R. G. KETKAR, J.)