

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 991 OF 2014

Kum. Aaffaque Mustaque Momin

...Applicant

Versus

Smt. Pharinaz Samir Shabazkar
and others

...Respondents

....

Mr. Sanjay S. Patil, Advocate for the Applicant.

Mr. Girish G. Togani, Advocate for Respondent No.1.

Mr. Rajesh Singh, Advocate for Respondents No.6 to 8.

Mr. A.B. Malvankar a/w. Mrs. M.D. Choudhary, Section Officer, Court Receiver's office, are present.

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CORAM : R. G. KETKAR, J.

DATE : 30th JANUARY, 2019

P.C.

1. Heard Mr.Sanjay Patil, learned counsel for the applicant, Mr.Girish Togani, learned counsel for respondent No.1, Mr. Rajesh Singh, learned Counsel for respondents No.6, 7 and 8, at length.

2. Office remark shows that C.R.A. is dismissed against respondent No.3 as per the order dated 26.4.2017 passed by Registrar (Judicial-II).

3. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as the 'defendant' has challenged the judgment and decree dated 20.2.2007 passed by the learned Civil Judge, Junior Division, Bhiwandi,

District - Thane in R.C.S. No.1099/2001 as also the judgment and decree dated 11.7.2014 passed by the learned Principal District Judge, Thane in Civil Appeal No.65/2007. By these orders, the Courts below decreed the suit instituted by respondent No.1, hereinafter referred to as the 'plaintiff' and directed the defendant to hand over possession of the premises situate in Municipal House No.246/1, more particularly described in paragraph-1 of the plaint. The learned trial Judge held that the plaintiff proved that the defendant has made additions and alterations of permanent nature in the suit premises without written permission of the plaintiff; the plaintiff proved that she requires the suit premises reasonably and bonafide for running her own business and that greater hardship will be caused to the plaintiff in case the eviction decree is refused.

4. Aggrieved by that decision, the defendant preferred appeal. By order dated 11.7.2014, the learned District Judge dismissed the appeal. The learned District Judge decreed the suit under Section 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short, 'Act').

5. In support of this application, Mr. Patil strenuously contended that the courts below committed serious error in passing the decree of eviction under Section 16(1)(g) of the Act. He submitted that some portion of the suit premises was demolished by a person claiming to be a

developer. He further submitted that pending C.R.A., the defendant was dispossessed by the transferee. He invited my attention to the additional affidavit filed by the defendant. In paragraph-4, it is stated that the Municipal House No.246 is situate on land bearing City Survey No.353. Said land belong to respondent No.4 – Niyamat Zahid Patel. Sometime in the month of June/July, 2013, respondent No.2 Rameez Mansoor Baharuddin and respondent No.3 Safdar Mohommad Jafar Momin approached the defendant and asked him to hand over vacant and peaceful possession of the suit premises. They showed photo-copy of the sale deed dated 8.5.2013 and informed the defendant that they have purchased the land on which Municipal House No.246 is situate. They claimed to have purchased the land from respondent No.4 Niyamat Zahid Patel. They claimed possession from the defendant on the ground that they intend to construct multi-storied R.C.C. building i.e. Shopping Centre on the land. They also assured him that after the construction, they would give one shop-gala to the defendant at the site of the suit premises. The defendant did not accept their proposal on the ground that the plaintiff has initiated eviction proceedings. Unless and until the eviction proceedings are withdrawn against him, he will not handover possession of the suit premises. It is further stated that after detailed discussion, respondents No.2 and 3 agreed to sell the shop gala

admeasuring 127 sq. ft. at the basement of the proposed mall at the construction cost which was to be constructed in future. They demanded Rs.7 Lakhs as the construction cost. The defendant paid Rs.5 Lakhs and on 7.5.2014 a registered agreement of sale was executed by respondents No.2 and 3 in favour of the defendant. He invited my attention to clause (3) of that agreement which specifically recorded that the possession of the suit premises will be handed over by the defendant only after arrival of the settlement between the plaintiff and respondents No.2 and 3, the owners of the land. He submitted that as the defendant was illegally dispossessed, he has instituted R.C.S. No.404/2015 for restoration of possession.

6. Mr. Patil invited my attention to the affidavit of evidence filed on 13.12.2005 by the plaintiff under Order XVIII Rule 4 of C.P.C. However, the plaintiff did not enter into the witness box and confirmed that the contents of the affidavit are as per her say and that the affidavit is under her signature. He submitted that said statement is to be made on oath and is to be recorded by following the procedure prescribed under Order XVIII Rule 5 of C.P.C.. In support of this proposition, he relied upon the decision of Apex Court in **Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd., (2004) 1 SCC 702**. He submitted that as the plaintiff did not enter the witness box and confirmed that the

contents of the affidavit are as per her say and that the affidavit is under her signature, said affidavit cannot be ordered to form part of the evidence. The Courts below were, therefore, not justified in passing the decree on the basis of the affidavit in examination in chief filed by the plaintiff. He has also taken me through the findings recorded by the Courts below to submit that the findings recorded by the Courts below are perverse and, therefore, application requires consideration.

7. On the other hand, Mr. Togani appearing for the plaintiff and and Mr.Singh appearing for respondents No.6 to 8 have supported the impugned orders. Mr. Singh submitted that the reliance placed by the defendant on the decision of **Ameer Trading Corporation Ltd.** (supra) does not advance the case of the defendant. He submitted that Order XVIII Rules 4, 5 and 13 of C.P.C. are required to be construed harmoniously. He submitted that no prejudice is caused to the defendant and in any case even no prejudice is shown even before this Court. In fact, the defendant proceeded to cross-examine the plaintiff's witness.

8. Mr. Singh further submitted that in the order dated 9.9.2015 the statement made on behalf of the defendant that some portion of the suit premises was demolished by some person claiming to be a developer, was recorded. This Court appointed Court Receiver to visit the suit premises and take symbolic possession and to submit a report with regard

to ascertain which party is in possession of the suit premises.

9. In the order dated 4.3.2016, the statement made on behalf of the defendant that he had been forcibly dispossessed. In view thereof, by order dated 21.4.2016 this Court directed the Court Receiver to take forcible possession of the suit premises from whosoever may be found in possession, if necessary, with assistance of the police authority. He submitted that in pursuance of this order, the Court Receiver dispossessed respondents No.6, 7 and 8 from Gala No.2 situate in the Municipal House No.246/2. He, therefore, submitted that the possession of Gala No.2 may be restored to respondents No.6 to 8.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the plaintiff has instituted suit invoking the ground under Sections 15 and 16(1)(g) of the Act. The Courts below have concurrently decreed the suit under Section 16(1)(g) of the Act. Insofar as the judgment of the District Court is concerned, said ground is discussed in paragraphs-12 and 13. The learned District Judge observed that the plaintiff asserted that she requires the suit premises to start the cloth business and, therefore, she needs the premises reasonably and bonafide. She also deposed that the defendant is having adjoining gala on tenancy basis and if the eviction decree is passed, the defendant

will not suffer hardship.

11. On behalf of the defendant it was sought to be contended that the plaintiff is working as temporary teacher and is earning Rs.2,000/- per month. It was also brought on record that her husband is working in K.M.E.S. School for last two years and her son appeared for 10th standard examination. In the cross-examination, the plaintiff deposed that she wanted the suit premises for her son and husband. The learned District Judge observed that the defendant could not show any oblique motive in filing the suit on the ground of bonafide requirement. After considering the evidence on record, the learned District Judge concluded that the requirement pleaded by the plaintiff is both, reasonable as well as bonafide. The requirement cannot be said to be malafide if the plaintiff wants to start the business for her son. The learned District Judge also noted that the defendant is having adjoining gala on tenancy basis from the plaintiff's sister and, therefore, no hardship will be caused to the defendant in case the eviction decree is passed. The learned District Judge also found that the defendant did not make any efforts for acquiring any other premises after service of termination notice and filing of the suit.

12. Mr. Patil relied upon the decision of **Ameer Trading Corporation Ltd.** (supra) to contend that as the defendant did not enter

into the witness box, her affidavit of examination-in-chief cannot be ordered to form part of the evidence. I do not find any merit in this submission. In paragraph-33, the Apex Court observed that presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examination him. The defendant would not be prejudiced in any manner whatsoever the examination-in-chief is taken on an affidavit and in the event, he desires to cross-examine the said witness he would be permitted to do so in the open court.

13. In the present case, no objection was taken by the defendant for admitting affidavit of examination-in-chief in evidence on the ground that the plaintiff did not enter into the witness box and did not confirm the contents of said affidavit. On the other hand, the defendant cross-examined the plaintiff. Mr. Patil has also not shown that any prejudice is caused to the defendant because of the plaintiff not entering into the witness box and confirming the contents of the examination-in-chief.

14. Thus, after appreciating the evidence on record the Courts below have concurrently decreed the suit. The defendant is 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. The defendant is also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Civil Revision Application fails and the same is dismissed with no order as to costs.

15. As mentioned earlier, by order dated 9.9.2015 the Court Receiver was appointed to visit the suit premises and submit report. In the order dated 4.3.2016, this Court recorded that defendant was forcibly dispossessed. In view thereof, by order dated 21.4.2016 this Court directed the Court Receiver to forcibly take possession of the suit premises from whosoever found in possession and if necessary with the assistance of police authority. In pursuance thereof, respondents No.6 to 8 were dispossessed from Gala No.2 situate in Municipal House No.246/2.

16. A perusal of Court Receiver's Report No.692/2015 dated 19.10.2015 shows that Samir Shabazkar (husband of the plaintiff), Mr.Mustaque Siraj Momin (father of the defendant) and the plaintiff -

Pharinaz Samir Shabazkar pointed out the suit premises to the representative of the Court Receiver. The representative of the Court Receiver found that Mr. Mirza Nasir Yusuf Ali informed that he is in possession of the premises and he had purchased the said premises from Rameez Mansoor Bahudeen one year back. He refused to open the shop premises and also refused to hand over symbolic possession to the Court Receiver.

17. A perusal of the Court Receiver's report No.204/2016 dated 28.4.2016 shows that the plaintiff was present at the site along with her husband. Father of the defendant was also present. Mirza Nasir Yusuf along with respondent No.7 and respondent No.2 arrived at the shop and started abusing handing over of the possession. With the police assistance, possession of the shop premises is taken by the Court Receiver and presently it is in possession of the Court Receiver.

18. Respondents No.6 to 8 have, therefore, took out application for intervention and accordingly they were added as respondents. The grievance of Mr. Singh is that though respondents No.6 to 8 are not party in the proceedings and they are occupying the premises in Municipal House No.246/2, (1) Smt. Pharinaz Samir Shabazkar (plaintiff), (2) Mr. Samir Shabazkar (husband of the plaintiff) and (3) Mr. Mustaque Siraj Momin (father of the defendant) have reported to the representative of

the Court Receiver that this is the subject matter of the controversy between the parties. He submitted that the suit premises is situate in Municipal House No.246/1 and respondents No.6 to 8 were in possession of the shop premises situate in Municipal House No.246/2. Thus, respondents No.6 to 8 were dispossessed at the instance of (1) Smt. Pharinaz Samir Shabazkar (plaintiff), (2) Mr. Samir Shabazkar (husband of the plaintiff) and (3) Mr. Mustaque Siraj Momin (father of the defendant).

19. It is not in dispute that the suit premises is situate in Municipal House No.246/1. Respondents No.6 to 8 were in possession of the premises in Municipal House No.246/2. *Prima facie* neither the defendant nor the plaintiff were in a position to substantiate their claim that the shop premises in possession of respondents No.6 to 8 situate in Municipal House No.246/2 is the subject matter of the present C.R.A.. Thus, by misleading the representative of the Court Receiver they were instrumental in dispossessing respondents No.6 to 8 from the shop premises situate in Municipal House No.246/2. *Prima facie* (1) Smt. Pharinaz Samir Shabazkar (plaintiff), (2) Mr. Samir Shabazkar (husband of the plaintiff) and (3) Mr. Mustaque Siraj Momin (father of the defendant) have committed contempt by misleading the representative of the Court Receiver in dispossessing respondents No.6 to 8.

20. In view thereof, issue notice to (1) Smt. Pharinaz Samir Shabazkar (plaintiff), (2) Mr. Samir Shabazkar (husband of the plaintiff) and (3) Mr. Mustaque Siraj Momin (father of the defendant) under Rule 9(1) of Chapter XXXIV of the Bombay High Court Appellate Side Rules, 1960 as to why action under the Contempt of Courts Act, 1971 be not initiated against them, returnable on **27.2.2019**. To be listed in the Supplementary Board. For the time being, their presence is dispensed with. In the meantime, the Court Receiver shall put respondents No.6 to 8 in possession of the shop premises situate in Municipal House No.246/2 within one week from today. This shall be subject to the proceedings pending between the parties and the concerned Court shall decide the proceedings uninfluenced by the observations made in this order.

21. All concerned parties to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

Deshmane (PS)