

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3989 OF 2019

Prafulchandra Padamsey Hirji

...Petitioner

Versus

Mr. Hirendra Dhanpati Kuruwa
And others

...Respondents

....

Mr. Rajesh A. Revankar, Advocate for the Petitioner.

Mr. Vikas Murudkar, Advocate for Respondents No.1 to 3.

....

CORAM : R. G. KETKAR, J.

DATE : 05th APRIL, 2019

P.C.

1. Not on board. At the request of Mr.Revankar taken up for admission.
2. Heard Mr. Rajesh A. Revankar, learned counsel for the petitioner and Mr.Vikas Murudkar, learned counsel for respondents No.1 to 3, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff' has challenged the order dated 3.11.2018 passed by the learned Judge, Court Room No.6 of the Court of Small Causes at Mumbai below Exhibit-36 in L.D. Suit No.43/57 of 2010. By that order, the learned trial Judge rejected the application made by the petitioner for clubbing L.D. Suit No.43/57 of 2010 and L.E. Suit No.35/40 of 2014.

4. The petitioner had instituted L.D. Suit No.43/57 of 2010 in or about March, 2010 *inter alia* praying following reliefs (prayer clauses (a) to (e)):

- “(a) That this Hon'ble Court be pleased to declare that the Defendants above named are gratuitous licensees in respect of the suit premises i.e. (a) one room on the ground floor along with a bath room, (b) one room on the first floor along with attached bath room and a balcony and (c) one room on the first floor of the out house of the said building known as “Vatcha Villa” situate at 5, Vatcha Gandhi Marg, New Gamdevi, Bombay-400 007, more particularly described in the sketch being Exhibit “A1” with is a sketch plan of the said ground floor wherein the suit premises are earmarked in red color strips, Exhibit “A2” is a sketch plan of the said first floor wherein the suit premises are earmarked in blue color strips and Exhibit “A3” is a sketch plan of the said of out house of the said building wherein the suit premises are earmarked in green color strips;
- (b) That this Hon'ble Court be pleased to declare that the Defendants above named are gratuitous licensees in respect of the suit premises i.e. (a) one room on the ground floor along with a bath room, (b) one room on the first floor along with attached bath room and a balcony and (c) one room on the first floor of the out house of the said building known as “Vatcha Villa” situate at 5, Vatcha Gandhi Marg, New Gamdevi, Bombay – 400 007, more particularly described in the sketch being Exhibit “A1” which is a sketch plan of the said ground floor wherein the suit premises are earmarked in red color strips, Exhibit “A2” is a sketch plan of the said first floor wherein the suit premises are earmarked in blue color strips and Exhibit “A3” is a sketch plan of the said of out house of the said building wherein the suit premises are earmarked in green color strips;
- (c) That this Hon'ble Court be pleased to restrain the

Defendants, their servants and agents by an order of permanent injunction from selling, disposing off, encumbering, altering, making any additions, alienating creating third party right of what so ever nature or otherwise dealings with in any manner the said suit premises i.e. (a) one room on the ground floor along with a bath room, (b) one room on the first floor along with attached bath room and a balcony and (c) one room on the first floor of the out house of the said building known as "Vatcha Villa" situate at 5, Vatcha Gandhi Marg, New Gamdevi, Bombay – 400 007, more particularly described in the sketch being Exhibit "A1" which is a sketch plan of the said ground floor wherein the suit premises are earmarked in red color strips, Exhibit "A2" is a sketch plan of the said first floor wherein the suit premises are earmarked in blue color strips and Exhibit "A3" is a sketch plan of the said of out house of the said building wherein the suit premises are earmarked in green color strips;

- (d) That Defendant Nos. 1 to 3 be ordered and decreed to pay to the Plaintiff mesne profits from the date of termination of the gratuitous license i.e. is from 15.04.1988 till vacant possession of the suit premises is received by the Plaintiff from the Defendants at the rate of Rs.200/- per sq. ft. per month in respect of the suit premises or at such rate as this Hon'ble Court may deem fit after inquiry under Order 20, Rule 12 of the Code of Civil Procedure, 1908;
- (e) For appointment of Court Commissioner under order 26 rule 9 of the Code of Civil Procedure to visit the suit premise and submit the report regarding the user and condition of the suit premises with powers to take photographs and measurements in respect of the suit premises viz. (a) one room on the ground floor along with a bath room, (b) one room on the first floor along with attached bath room and a balcony and (c) one room on the first floor of the out house of the said building known as "Vatcha Villa" situate at 5, Vatcha Gandhi Marg, New Gamdevi, Bombay – 400 007, more particularly described in the sketch being Exhibit "A1" which is a

sketch plan of the said ground floor wherein the suit premises are earmarked in red color strips, Exhibit "A2" is a sketch plan of the said first floor wherein the suit premises are earmarked in blue color strips and Exhibit "A3" is a sketch plan of the said of out house of the said building wherein the suit premises are earmarked in green color strips;"

5. It appears that the plaintiff filed application under Order II Rule 2 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') in that suit and obtained leave. After obtaining leave, he has filed L.E. Suit No.35/40 of 2014 on 5.2.2014, *inter alia* praying following reliefs (prayer clauses (a) to (e) :

- "a) That this Hon'ble Court be pleased to declare that the Defendants above named are gratuitous licensees and the license has been duly terminated by Notice dated 7.1.2014 in respect of the suit premises i.e. (i) one room on the ground floor along with a bath room, (ii) one room on the first floor with attach balcony and one attached bath rooms and (iii) one bath room and toilet (now merged and converted into a room) located on the first floor of the outhouse, more particularly described in Exhibit "A" annexed hereto located in Vatcha Villa building situated at 5, Vatcha Gandhi Marg, New Gamdevi, Bombay – 400 007, admeasuring approximately about 566 sq. ft.
- b. That this Hon'ble Court be pleased to direct the Defendants to hand over vacant and peaceful possession of the suit premises i.e. (i) one room on the ground floor along with a bath room, (ii) one room on the first floor with attach balcony and one attached bath rooms and (iii) one bath room and toilet (now merged and converted into a room) located on the first floor of the outhouse, more particularly described in Exhibit "A" annexed hereto located in Vatcha Villa building situated at 5, Vatcha

Gandhi Marg, New Gamdevi, Bombay – 400 007, admeasuring approximately 566 sq. ft.

- c. That this Hon'ble Court be pleased to restrain the Defendants, their servants and agents by an order of permanent injunction from selling, disposing off, encumbering, altering, making any additions, alienating, creating third party right of what so ever nature or otherwise dealings with in any manner the said suit property i.e. (i) one room on the ground floor along with a bath room, (ii) one room on the first floor with attached balcony and one attached bath rooms and (iii) one bath room and toilet (now merged and converted into a room) located on the first floor of the outhouse, more particularly described in Exhibit "A" annexed hereto located in Vatcha Villa building situated at 5, Vatcha Gandhi Marg, New Gamdevi, Bombay – 400 007, admeasuring approximately about 566 sq. ft.;
- d. That Defendants be ordered and decreed to pay to the Plaintiff mesne profits from the date of termination of the gratuitous license i.e. is from 7.1.2014 till vacant possession of the suit premises is received by the Plaintiff from the Defendants at such rate as this Hon'ble Court may deem fit after inquiry under Order 20, Rule 12 of the Code of Civil Procedure, 1908;
- e. For appointment of Court Commissioner under order 26 rule 9 of the Code of Civil Procedure to visit the suit premise and submit the report regarding the user and condition of the suit premises with powers to take photographs and measurements in respect of the suit premises i.e. (i) one room on the ground floor along with a bath room, (ii) one room on the first floor with attach balcony and one attached bath rooms and (iii) one bath room and toilet (now merged and converted into a room) located on the first floor of the outhouse, more particularly described in Exhibit "A" annexed hereto located in Vatcha Villa building situated at 5, Vatcha Gandhi Marg, New Gamdevi, Bombay – 400 007, admeasuring approximately about 566 sq. ft."

6. A comparison of the prayers made in the 2010 suit with the prayers made in the 2014 suit shows that save and except prayer clause (b), all the prayer clauses are already made in the 2010 suit. That apart, as mentioned earlier the petitioner has obtained leave under Order II Rule 2 of C.P.C.. In view thereof, Mr. Revankar seeks permission to withdraw L.D. Suit No.43/57 of 2010 and submits that it may be clarified that withdrawal of the suit will not come in the way of the petitioner in prosecuting the L.E. Suit No.35/40 of 2014.

7. In view thereof, on the motion made by Mr. Revankar, L.D. Suit No.43/57 of 2010 is allowed to be withdrawn. The petitioner shall file formal application before the trial Court for withdrawal of L.D. Suit No.43/57 of 2010. The learned trial Judge will permit the petitioner to withdraw that suit as also will pass appropriate orders as regards refund of Court fees. The learned trial Judge will decide L.E. Suit No.35/40 of 2014 on its own merits and in accordance with law and will not dismiss the suit on the ground that the petitioner has withdrawn the earlier suit. All contentions of the parties on merits in L.E. Suit No. 35/40 of 2014, except maintainability of the second suit on the ground of withdrawal of the earlier suit, are expressly kept open. Petition is disposed of in aforesaid terms with no order as to costs. All concerned parties, including the trial Court, to act upon an authenticated copy of this order. Order accordingly.

(R. G. KETKAR, J.)