

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 14020 OF 2018

Mr. Somnath D. Anchan

And others

...Petitioners

Versus

Mr. Tejbahadur Ramlochan Singh

And another

...Respondents

WITH
Civil Application No.30 of 2019
In
Writ Petition NO. 14020 OF 2018

....

Mr. R.R. Varma i/b. Jawahar Prajapati, Advocate for the Petitioners.

Mr. Mandar Soman, Advocate for Respondent No.1.

Ms. Geeta Sonawane, AAGP, for Respondent No.2-State.

....

CORAM : R. G. KETKAR, J.

DATE : 19th MARCH, 2019

P.C.

1. Heard Mr. R.R. Varma, learned counsel for the petitioners, Mr. Mandar Soman, learned counsel for respondent No.1 and Ms. Geeta Sonawane, learned A.G.P. for respondent No.2-State, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the order dated 17.10.2017 passed by the Competent Authority (Rent Act), Konkan Division, Mumbai (for short, 'Competent Authority') in Application No.99/2012 as also the order dated 26.9.2018 passed by the Additional Commissioner, Konkan Division, Mumbai (for short, 'Commissioner') in

Revision Application No.1106/2017. By order dated 17.10.2017, the Competent Authority allowed the application made by first respondent under Section 24 of the Maharashtra Rent Control Act, 1999 (for short, 'Act') and directed the petitioners to hand over vacant and peaceful possession of flat No.301, B-5, A-Wing, Shivam Co-operative Housing Society Ltd., Kanyapada, Goregaon (East), Mumbai 400 063 (for short, 'suit premises') to first respondent. The petitioners are directed to pay to the first respondent double the rate of monthly license fee i.e. Rs.2,500/- X 2 = Rs.5,000/- from the date of termination of leave and license agreement i.e. from 25.11.2008 till the date of handing over vacant possession of the suit premises to the first respondent. By order dated 26.9.2018, the Commissioner dismissed the Revision Application. It is against these orders, the petitioners have instituted present petition.

3. Respondent No.1 filed application under Section 24 of the Act *inter alia* contending that he is the owner of the suit premises. He had purchased the suit premises by a registered sale deed dated 18.4.2002 from Gita Prem Narayan Singh. After registration of the sale-deed, he was put in possession of the suit premises. He is the absolute owner of the suit premises. Respondent No.1 also referred and relied upon the sale deed dated 18.4.2002.

4. Respondent No.1 contended that the leave and licence agreement was executed between the parties on 22.4.2002. The leave

and licence agreement was orally extended from time to time. By notice dated 10.11.2008, respondent No.1 called upon the petitioners to surrender the suit premises. It is the case of respondent No.1 that Somnath Babu Kunder, brother-in-law of petitioner No.1 was inducted by the petitioners without his permission. Not only that he had also instituted a suit being Suit No.1480/2009 before the City Civil Court, Dindoshi on the basis of forged and fabricated documents claiming that the first respondent had agreed to sell the suit premises to the petitioners for a total consideration of Rs.3,50,000/-. Respondent No.1 increased the price of the suit premises from Rs.3,50,000/- to Rs.5,00,000/-. Somnath Babu Kunder paid Rs.2 Lakhs in cash and Rs.2 Lakhs by Pay Order to the first respondent. Respondent No.1, however, failed to execute the agreement of sale. Somnath Babu Kunder, therefore, instituted suit as also lodged complaint with Dindoshi police station. Somnath Babu Kunder further alleged that he had paid Rs.2,71,000/- to Allahabad Bank and cleared the outstanding loan which was taken by the first respondent by mortgaging the suit premises. He had also paid sum of Rs.4,70,000/- to the first respondent and also was paying the maintenance charges of the society. Prayer was, therefore, made to grant leave to defend.

5. After hearing both sides, by order dated 31.5.2014, the Competent Authority granted leave to defend. The Competent Authority

granted leave to defend on the ground that the first respondent failed to produce any document which proves his ownership. Leave and licence agreement is executed in the year 2002 and the petitioners are residing in the suit premises till the year 2009 on the basis of oral agreement. Respondent No.1 has to produce the document to prove his claim of ownership. The Competent Authority, therefore, came to the conclusion that triable issues of law and facts are involved in the matter. It is, therefore, just and proper to grant leave to defend. Recording of evidence is necessary to determine the controversy between the parties.

6. It appears that in pursuance of the order granting leave to defend, the petitioners filed written statement. On 2.1.2017, respondent No.1 filed evidence and the matter was adjourned for exhibiting the documents to 6.2.2017. Ultimately on 7.6.2017, the Competent Authority exhibited the documents and adjourned the matter for cross-examination of the first respondent to 12.7.2017. On 12.7.2017, Advocate for the petitioners was absent. The Competent Authority thereafter closed the cross-examination of the first respondent and adjourned the matter for recording evidence of the petitioners to 31.7.2017. On 31.7.2017, the petitioners' Advocate was absent. Evidence was not tendered by the petitioners. The matter was, therefore, kept for filing written arguments on 23.8.2017. On 23.8.2017, respondent No.1 filed written arguments. The petitioners

were absent and the matter was kept for orders. On 17.10.2017, the Competent Authority allowed the application as indicated earlier.

7. In paragraph-10, the Competent Authority dealt with the aspect of failure on the part of the petitioners to avail the opportunities afforded to them. In paragraph-11, the Competent Authority referred to the registered sale deed dated 18.4.2002 produced by the first respondent. After considering the evidence on record, the Competent Authority allowed the application and directed the petitioners to hand over possession of the suit premises to the first respondent.

8. Aggrieved by that decision, the petitioners and Somnath Babu Kunder filed Revision Application which was rejected by the Commissioner by order dated 26.9.2018.

9. Respondent No.1 filed Execution Application No.85/2018. By order dated 28.11.2018, the Competent Authority directed the Execution Officer to issue notice of 24 hours. On 1.12.2018, possession of the suit premises was taken by the Execution Officer and was handed over to the first respondent. To that effect, panchnama was drawn on 1.12.2018. On 1.12.2018, Indemnity bond was also given by the first respondent taking responsibility of handing over articles of the petitioners lying in the suit premises. The petitioners have, therefore, filed Civil Application No.30/2019 for restoration of possession of the suit premises.

10. In support of this petition, Mr. Varma strenuously contended that after considering the material on record, the Competent Authority granted leave to defend. In pursuance thereof, the petitioners filed written statement. However, no opportunity was given to the petitioners to cross-examine respondent No.1 as also adduce their evidence. He has taken me through the Rozanama of the Competent Authority. He further submitted that even while taking possession of the suit premises, no notice was served on the petitioners though the Competent Authority had directed the Execution Officer to issue notice of 24 hours' to the petitioners before execution. The notice was pasted on 13.11.2018.

11. Mr. Varma further submitted that leave and licence agreement was executed on 22.4.2002 for the period commencing from 26.4.2002 and expiring on 25.3.2003. However, the proceedings under Section 24 of the Act is filed in the year 2012 which is hopelessly barred by law of limitation. He submitted that basically respondent No.1 had agreed to sell the suit premises to the petitioners. The petitioners have instituted suit for specific performance of contract. The suit was unfortunately dismissed in default. Notice of Motion is taken out for restoration of said suit, which is pending. As respondent No.1 had agreed to sell the suit premises to the petitioners, the authorities below were not justified in allowing the application under Section 24 of the

Act. He, therefore, submitted that the petition requires consideration and possession of the suit premises may be restored to the petitioners.

12. On the other hand, Mr. Soman supported the impugned orders. He submitted that while granting leave to defend, the Competent Authority observed that respondent No.1 failed to produce any document to prove his ownership over the suit premises. He submitted that the ownership of the first respondent was never in issue. On the contrary, the petitioners came with the case that they had paid substantial consideration to the first respondent for purchasing the suit premises. Not only that they also claimed to have filed suit for specific performance of the contract against the first respondent. The Competent Authority was, therefore, not justified in granting leave to defend on the ground that triable issues of law and facts are involved in the matter.

13. Insofar as the contention of Mr. Varma that no opportunity was given to the petitioners is concerned, Mr. Soman has invited my attention to paragraph-10 of the order of the Competent Authority and submitted that though opportunity was given to the petitioners to adduce evidence, they did not avail that opportunity. He submitted that respondent No.1 has produced registered sale deed dated 18.4.2002 which shows his ownership. Having regard to explanation (b) to Section 24 of the Act, an agreement of licence in writing is conclusive evidence of the fact stated therein. The Authorities below were, therefore,

justified in allowing application under Section 24 of the 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 for the parties. I have also perused the material on record. As mentioned earlier, by order dated 31.5.2014, the Competent Authority granted leave to defend. It is no doubt true that respondent No.1 has not challenged said order. The Competent Authority granted leave to defend for the reasons recorded in paragraph-4 of the order, which reads thus :

“4. Heard both the parties and perused the record, from the facts and submission made by the rival parties. It is necessary to see that the Applicants claiming as owner of the Application premises which is disputed by the Respondents. The Leave and License Agreement entered between Applicant and Respondent No.1 and respondent No.2 is wife of Respondent and Respondent No.3 is residing in the Application premises. The Respondent No.3 paid the sale amount to the Applicant by way of cash and pay order. The Respondent also placed on record the Receipt dated 1.12.2003 for sum of Rs.25000/- paid by the Respondent No.3 to the Applicant and the said receipt issued by the Applicant. The Respondent also placed on record the Receipt dated 23.07.2008 which shows that Applicant received a sum of Rs.2,00,000/- in cash and Rs.2,00,000/- in pay order. The Respondent also filed copy of Civil suit filed by the Respondent and copy of the order dated 04.11.2009 passed by the Dindoshi for withdrawing the Civil suit with a liberty to file specific performance suit against the Applicant. The Respondent also placed on record the order passed by the Chief Metropolitan Magistrate

which shows that the Respondent paid an amount of Rs.2,71,000/- to Allahabad Bank and cleared the outstanding of Applicant. The bank statement is also annexed by the Respondent No.3. The Applicant placed on record Leave and License Agreement. The Applicant failed to produce any documents which proves his ownership in the Application premises. The Leave and License Agreement produced by the Applicant in the year of 2002 and Respondents are residing in the Application premises till the year of 2009 on the basis of oral Agreement. Applicant need to produce the documents which prove his contention that he is the original owner of the application premises. It is necessary to take on record some documents which prove that Respondents are Licensee of the Application premises and there is no sale agreement between Applicant and Respondent No.3. On careful consideration of all these facts, I have come to the conclusion that there are triable issues of law and facts involved in the matter. It will be just and proper to grant Leave to defend. The recording of Evidence is necessary to determine the controversy between the parties. Hence, I pass the following order.”

15. A perusal of paragraph-4, extracted hereinabove, shows that the Competent Authority observed that respondent No.1 failed to produce any document which proves his ownership in the suit premises. The Leave and License Agreement was executed in the year of 2002. The petitioners are residing in the suit premises till 2009 on the basis of oral agreement. After considering the material on record, the Competent Authority came to the conclusion that there are triable issues of law and facts involved in the matter. In my opinion, the order granting leave to defend suffers from total non-application of mind and

is perverse to say the least. It is not in dispute and is rather a matter of record that the leave and licence agreement is already on record of the Competent Authority. Explanation (b) to Section 24 reads thus :

“24. Landlord entitled to recover possession of premises given on licence on expiry.---

(1) xxxx

(2) xxxx

(3) xxxx

Explanation.--For the purposes of this section, –

(a) xxxx

(b) an agreement of licence in writing shall be conclusive evidence of the fact stated therein.”

16. That apart the petitioners claimed to have paid the consideration to the first respondent for purchasing the suit premises. Not only that they further claimed to have filed suit for specific performance of contract against the first respondent. Thus, the issue of ownership of the first respondent was never in question and was never doubted by the petitioners. It was, therefore, not open for the Competent Authority to deal with the issue of ownership which was never raised by the parties before it.

17. In the case of **Surya Dev Rai v. Ram Chander Rai and others, (2003) 6 SCC 675**, the Apex Court has exhaustively dealt with the scope of Article 227 of the Constitution of India.

18. In paragraph-22, the Apex Court observed that “It is well-settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being

invoked at the instance of any person aggrieved **or may even be exercised *suo motu***. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.”

(emphasis supplied)

19. In paragraph-24, the Apex Court observed that “The power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate Courts and Tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the Court or Tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.”

20. In paragraph-25, the Apex Court observed that “In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also

make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised *suo motu* as well.”

21. In paragraph-26, the Apex Court observed that there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded. It was also held that where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.

22. In paragraph-38, the Apex Court summed up the conclusions. Clauses 4, 5, 7 and 9 read thus :

“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

XXXXX

XXXXX

- (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.
- (5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.
- (6) xxxx
- (7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High

Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) xxxx

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.”

23. Applying the tests laid down by the Apex Court in the case of **Surya Dev Rai** (supra) to the facts of the present case and for the reasons indicated above, I am more than satisfied that the Competent Authority was not justified in granting leave to defend. The Competent Authority has failed to exercise a jurisdiction which it does have and such failure occasioned a failure of justice. The manner in which the

Competent Authority granted leave to defend has shocked the judicial conscience of this Court that dictates to act lest a gross failure of justice or grave injustice should occasion. In order to ensure that grave miscarriage of justice is not further carried, I deem it appropriate to exercise *suo motu* power for setting aside the order dated 31.5.2014 granting leave to defend. The order dated 31.5.2014 passed by the Competent Authority granting leave to defend is accordingly set aside.

24. Coming to the merits of the case, I have already dealt with the proceedings before the Competent Authority. In paragraph-10, the Competent Authority observed that respondent No.1 filed his affidavit of evidence on 2.1.2017. The documents of respondent No.1 were exhibited on 7.6.2017. The matter was thereafter posted for cross-examination of the first respondent and adjourned to 12.7.2017. The opportunity was not availed by the petitioners and their Advocate and the cross-examination of the first respondent was closed. The matter was thereafter posted for evidence of the petitioners. Despite opportunities granted for that purpose, the petitioners did not adduce any evidence. The matter was adjourned to 23.8.2017 for written arguments. Respondent No.1 filed written argument but none was present for the petitioner and the matter was closed for orders.

25. Thus, despite giving opportunities to the petitioners, they did not cross-examine respondent No.1's witness. They also did not

adduce evidence in support of their case. It, therefore, cannot be said that they were not given opportunity by the Competent Authority. What is significant to note that the last date was on 23.8.2017 and ultimately order was passed on 17.10.2017. No attempts were made by the petitioners for recalling the no-cross order as also for seeking permission to adduce their evidence. I, therefore, do not find any merit in the submission of Mr. Varma that no opportunity was given to the petitioners to cross-examine respondent No.1 and further adduce their evidence.

26. The Competent Authority noted that respondent No.1 has purchased the suit premises by way of a registered sale deed dated 18.4.2002. Mr. Varma submitted that the application under Section 24 of the Act is barred by limitation. The Competent Authority also noted that respondent No.1 issued termination notice dated 10.11.2008 and thereafter filed present proceedings in the year 2012. I, therefore, do not find any merit in this submission.

27. Aggrieved by the order of the Competent Authority, the petitioners filed Revision Application before the Commissioner which was rejected on 26.9.2018. Thus, the authorities below have concurrently allowed the application filed by the respondent under Section 24 of the Act. I do not find that the authorities below committed any error in passing the impugned orders. In view thereof, no case is

made out for invocation of powers under Article 227 of the Constitution of India. Hence, petition fails and the same is dismissed.

28. The petitioners have taken out Civil Application No.30/2019 for restoration of the possession. As main petition is dismissed, no case is made out for granting any relief. Mr. Varma submitted that the possession of the suit premises was taken without issuing any notice to the petitioners and that notice dated 13.11.2018 was pasted. Section 45 of the Act reads thus :

“45. Effect of refusal or failure to comply with order of eviction .-- If any person refuses or fails to comply with the order of eviction made under section 43 within thirty days of the date on which it has become final, the Competent Authority or any other officer duly authorised by the Competent Authority in his behalf, may evict that person from, and take possession of, the premises and deliver the same to the landlord and for that purpose, use such force as may be necessary. ”

29. In the present case, Revision Application was dismissed on 26.9.2018. The possession of the suit premises is taken on 1.12.2018 and the petition is instituted on 5.12.2018. In fact, the petitioners ought to have approached this Court immediately after dismissal of Revision Application on 26.9.2018. In view thereof, I do not find any merit in the submission of Mr. Varma. Hence, Civil Application is rejected.

30. At this stage, Mr. Varma orally applies for stay of the order of eviction passed by the Authorities below. On instructions he, however,

states that the petitioners are not ready and willing to comply clause (iii) of the order dated 17.10.2017 passed by the Competent Authority by depositing the amount.

31. Section 24(2) of the Act reads thus :

“24. Landlord entitled to recover possession of premises given on licence on expiry .---

(1) xxxx

(2) Any licensee who does not deliver possession of the premises to the landlord on expiry of the period of licence and continues to be in possession of the licensed premises till he is dispossessed by the Competent Authority shall be liable to pay damages at double the rate of the licence fee or charge of the premises fixed under the agreement of licence. ”

32. As the petitioners are not ready and willing to comply mandate of the statute, it is not possible to accede to the request made by Mr. Varma. Hence oral application for stay is rejected. The petitioners are at liberty to remove their belongings lying in the suit premises within two weeks from today. Order accordingly.

(R. G. KETKAR, J.)