

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6324 OF 1999
WITH
CIVIL APPLICATION NO.624 OF 2017
AND
CIVIL APPLICATION NO.313 OF 2019
IN
WRIT PETITION NO.6324 OF 1999

Janardan Narsingh Mahajan ... Petitioner
Vs.
Messers Makhija Vohra Builders ... Respondent

Mr. Vijay Gharat a/w. Ms Rupali Dhivar for Petitioner.
Ms Rupali Dhivar for Applicant in C.A.W.No.313 of 2019
Mr. Bhavin Gada a/w. Ms Nasafiya i/b. Harakhchand Co. for Res. No.1.

CORAM : UJJAL BHUYAN, J.
Reserved on : NOVEMBER 28, 2019
Pronounced on : JANUARY 09, 2020

JUDGMENT :

Heard Mr. Vijay Gharat, learned counsel for the petitioner and Mr. Bhavin Gada, learned counsel for respondent No.1. None has appeared for the remaining respondents.

2. By filing this petition under Article 227 of the Constitution of India, petitioner seeks quashing of judgment and order dated 22.07.1999, passed by the City Civil Court, Bombay in Short Cause Suit No.3733/1992 whereby the said suit preferred by respondent No.1 as the plaintiff for restoration of possession of the suit flat was decreed in favour of respondent No.1.

3. It may be mentioned that Short Cause Suit No.3733/1992 was instituted by respondent No.1 as the plaintiff wherein Janardhan Narsing Mahajan was arrayed as the defendant. Janardhan Narsing Mahajan is

the petitioner in the present writ petition. On his death, he has been substituted by his legal heirs.

4. Case of respondent No.1 (plaintiff hereinafter) is that petitioner (defendant hereinafter) was the lessee of a plot of land bearing City Survey No.8619/22 of Village-Danda, Taluka-Andheri and situated at Anant Vihar Cooperative Housing Society, 19th Road, Khar West, Mumbai.

4.1. An agreement was executed on 05.07.1979 between the defendant on the one hand and Mr. Pratap Vallabhdas Palicha and Mr. Kan Jhumatlal Choithramani on the other hand. As per this agreement, defendant granted Mr. Palicha and Mr. Choithramani right of development of the said plot of land as per terms and conditions mentioned in the agreement.

4.2. Pursuant to the said agreement, Mr. Palicha and Mr. Choithramani constructed a building on the said plot of land consisting of ground plus three upper floors. Each floor was one flat. Occupation certificate of the said building was obtained on 23.11.1983.

4.3. Mr. Palicha and Mr. Choithramani let out the flats on the first floor, second floor and third floor to Mrs. Rama H. Abhichandani (first floor and third floor) and Mrs. Meena Lalchand Nagpal and Mrs. Lina Bhajandas Nagpal (second floor). As per the agreement dated 05.07.1979, Mr. Palicha and Mr. Choithramani were required to handover the ground floor flat to the defendant upon the defendant paying back Rs.45,000.00 which was deposited with him by the said two persons while executing the agreement dated 05.07.1979. The said two persons had issued pleaders notice dated 21.12.1983 calling upon the defendant to take over possession of the ground floor flat (referred to hereinafter as the suit flat) after returning back the amount of Rs.45,000.00.

4.4. However, the defendant, did not respond to the said letter.

4.5. After about six months of issuance of the said letter, one Mr. Ramniklal Damji Gada contacted Mr. Choithramani and produced before him an agreement dated 29.10.1983 executed between the defendant on the one hand and the said Mr. Gada on the other hand. Mr. Gada also produced a power of attorney dated 31st October, 1983 executed in his favour by the defendant.

4.6. As per the said agreement, defendant alleged that though four years period had elapsed since execution of the agreement dated 05.07.1979, Mr. Palicha and Mr. Choithramani did not inform the defendant about development of the property, besides committing various breaches of the agreement. Defendant was desirous of terminating the agreement dated 05.07.1979 as well as the power of attorney granted to Mr. Palicha and Mr. Choithramani. It is stated that Mr. Gada agreed to bear all expenses on behalf of the defendant that would be incurred in termination of the agreement. In this connection, Mr. Gada agreed to pay a sum of Rs.4,00,000.00 to the defendant, out of which the defendant received Rs.60,000.00. That apart, defendant granted tenancy rights to Mr. Gada in respect of the suit flat at the rate of Rs.250.00 per month and authorized Mr. Gada to take over possession of the suit flat.

4.7. Mr. Palicha and Mr. Choithramani on being approached by Mr. Gada, stated that they would hand over possession of the suit flat to the defendant only upon the defendant returning back the sum of Rs.45,000.00. However, the defendant told them that they should deal with Mr. Gada directly to which the plaintiff was not agreeable.

4.8. It is stated that for about two and half years thereafter, no development took place. However, Mr. Gada kept on pressurizing Mr. Palicha and Mr. Choithramani to handover the suit flat. It is stated that in order to avoid legal complications, Mr. Palicha and Mr. Choithramani

agreed to the suggestion of Mr. Gada. On 29.01.1986, Mr. Gada paid them Rs.45,000.00 whereafter possession of the suit flat was handed over to Mr. Gada.

4.9. According to the plaintiff, Mr. Palicha by a tenancy agreement dated 01.02.1986, granted tenancy rights in respect of the suit flat to the plaintiff on payment of one month's rent by the plaintiff which was received on 01.02.1986 itself. Plaintiff therefore, claims to be a tenant in respect of the suit flat and to be in possession since then. It is also the case of the plaintiff that Mr. Gada executed a registered deed of transfer of charge dated 15.02.1986 transferring all his rights, benefits and advantages acquired by him under the agreement dated 29.10.1983 in favour of Mr. Palicha and Mr. Har Mohinder Singh Vohra, partners of the plaintiff. This was informed by Mr. Gada to the defendant vide letter dated 02.04.1986, copy of which was handed over to Mr. Palicha.

4.10. Plaintiff stated that the suit flat was not acquired for residential purpose but to accommodate tenants of properties which were being taken over by the plaintiff for development, plaintiff being builder and developer. Accordingly, plaintiff allowed one Mr. Nevatia to stay in the suit flat by way of temporary alternate accommodation. The said Mr. Nevatia was in possession of the suit flat from March, 1986 till January/February, 1988.

4.11. Thereafter, the suit flat was used for marriage ceremony of the daughter of a distant relative of the brother of Mr. Makhija, a partner of the plaintiff.

4.12. It is stated that a letter dated 14.11.1988 was issued to the defendant by Anant Vihar Cooperative Housing Society Ltd. complaining that the suit flat was being used by outsiders without the permission of the Society. Plaintiff replied to the said letter on 28.11.1988 whereafter the suit flat was kept under lock and key and was used only sparingly by the plaintiff.

4.13. Plaintiff alleged that on 13.01.1989 at about 7.30/7.45 pm, Mr. Palicha received a telephone call from one Mr. Abhichandani, tenant of the first floor of the suit building informing him that about 7/8 persons had come to the suit flat and were attempting to enter the said flat by breaking open the lock. On hearing the same, Mr. Palicha rushed to the residence of Mr. Vohra, a partner of the plaintiff whereafter both of them went to the suit flat. They found the lock of the collapsible door already broken by the defendant who was accompanied by those 7/8 persons. Despite their objection, the defendant and the other persons forcefully entered into the suit flat. Though Mr. Palicha and Mr. Vohra had informed Bandra Police Station about the incident, police came to the site after about two hours, by which time, the defendant had already broken open the main door and entered into the suit flat.

4.14. Defendant instituted Suit No.509/1989 in the City Civil Court, Bombay against Mr. Palicha, Mr. Choithramani and Mr. Gada and obtained an *ex-parte* injunction order on 21.01.1989 restraining them from dispossessing the defendant from the suit flat.

5. Thereafter the related suit was filed under Section 6 of the Specific Relief Act, 1963 seeking a decree for restoration of possession of the suit flat along with compensation for wrongful dispossession and *mesne* profit.

6. Though the alleged dispossession took place on 13.01.1989, the suit was filed only on 11.07.1989. There were office objections regarding the plaint. However, plaintiff did not remove the office objections till 10.06.1992. Though the office objections were removed subsequently following which the suit was registered, plaintiff did not seek any *ad interim* relief immediately. It is stated that the defendant was served on 18.07.1996 though disputed by the defendant. However, the suit came to be decreed *ex parte* on 11.02.1999 and in execution of the said *ex parte* decree, it is stated that plaintiff got back possession of the suit flat.

7. The *ex parte* decree dated 11.02.1999 was challenged by the defendant before this Court in WP No.1940/1999 which was disposed of vide order dated 08.04.1999 by setting aside the *ex parte* decree, permitting the defendant to file written statement and directing that the suit be disposed of expeditiously. Plaintiff was directed not to induct any third party into possession of the suit flat and also not to create any third party rights or to dispose of the suit flat.

8. Defendant thereafter filed written statement raising preliminary objections as to maintainability of the suit as well as on merit. Defendant specifically denied that possession of the suit property was handed over to the plaintiff after the tenants of the first, second and third floors came to occupy those floors. While he admitted about execution of the agreement and power of attorney granted to Mr. Gada, he however stated that he was deceived by Mr. Palicha and Mr. Choithramani. Knowing about such attempt to deceive him and to dispossess him, defendant had filed Suit No.509/1989. Plaintiff had knowledge of the suit whereafter fraud was committed upon him by the said two persons in collusion with Mr. Gada by executing tenancy agreement, deed of charge and power of attorney in favour of the plaintiff. Defendant categorically stated that he was in exclusive use, occupation and in possession of the suit flat on 13.01.1989, further denying that he had dispossessed the plaintiff forcibly as alleged.

9. Upon pleadings, issues were framed by the Court below; the main issue being as to whether plaintiff could prove that it was in possession of the suit flat on 13.01.1989 and that it was forcibly dispossessed on that day by the defendant.

10. By the impugned judgment and order dated 22.07.1999 (dictated on 20, 21 and 22 July, 1999), learned Court below decreed the suit holding that since plaintiff was already in possession of the suit flat in pursuance of *ex parte* decree dated 11.02.1999, further direction for

handing over possession to the plaintiff was not required. However, plaintiff was directed not to part with possession of the suit flat or to induct any third party or create third party rights in respect of the suit flat till 30.09.1999.

11. Detailed submissions have been made by learned counsel for the parties.

12. While learned counsel for the defendant (petitioner herein) assailed the impugned judgment by contending that the defendant was a victim of fraud committed by the partners of the plaintiff which factum was acknowledged by the Court below, notwithstanding the same, the suit was decreed in favour of those who played fraud which is against all cannons of law, justice and equity. That apart, there was no conclusive evidence regarding possession of the suit property by the plaintiff as on 13.01.1989 and alleged dispossession of the plaintiff on that day at the hands of the defendant. In the absence thereof, impugned judgment cannot be sustained.

13. On the other hand, learned counsel for the plaintiff (respondent No.1 herein) strongly supported the impugned judgment. He has referred to various portions of the judgment to contend that learned Court below had arrived at a finding of fact as to possession of the plaintiff over the suit flat as on 13.01.1989 and its dispossession at the hands of the defendant on that day. In the absence of any perversity, such finding of fact is not liable to be disturbed by the writ court exercising jurisdiction under Article 227 of the Constitution of India.

14. Submissions made by learned counsel for the parties have been duly considered. Also perused the materials on record.

15. Since the related suit was filed under Section 6 of the Specific Relief Act, it would be apposite to advert to the same at the outset. Section 6 is quoted hereunder:-

“6. Suit by person dispossessed of immovable property –

(1) if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person through whom he has been in possession or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought –

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.”

16. From a perusal of the provisions contained in sub-section (1) of Section 6 as extracted above, it is seen that if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person through whom he has been in possession or any person claiming through him may recover the possession by filing a suit notwithstanding any other title that may be set up in such suit. Four expressions are of importance in this sub-section, namely, “any person”, “dispossessed without his consent”, “immovable property” and “otherwise than in due course of law”. The sum and substance is that if a person is dispossessed of immovable property without his consent otherwise than in due course of law, he may file a suit to recover possession of such immovable property notwithstanding any other title to that property that may be set up in defence. While it is essential for a person instituting the suit to establish that he was in possession over the immovable property and he was illegally dispossessed from the same, the crucial expression is “any person”. Any person may mean, a natural person or a juristic person.

17. In so far the related suit is concerned, it was instituted by respondent No.1 as the plaintiff. Description of the plaintiff is as under: -

“Messers Makhija Vohra, Builders

A partnership firm constituted under the provisions of Indian Partnership Act, 1932,

duly registered with the Registrar of Firms having its registered address at Plot No.471, 16th Road, Khar West, Bombay-400052.”

18. Thus from the above, it is seen that the partnership firm was the plaintiff and it was not represented by any of its partners. I have also carefully perused the plaint which has been annexed to the writ petition. The plaint does not disclose particulars of the partners of the partnership firm or that the plaintiff was represented by the partners. On the contrary, in paragraph 2 of the plaint, it was specifically averred that the suit was filed by the plaintiff in respect of the suit flat.

19. Question for consideration is as to whether a partnership firm constituted under the Indian Partnership Act, 1932 is a “person” within the meaning of Section 6(1) of the Specific Relief Act, 1963?

19.1. The expression “any person” is not defined under the Specific Relief Act, 1963 though under Section 3(42) of the General Clauses Act, 1897, “person” has been defined to include any company or association or body of individuals whether incorporated or not. However, as per Section 4 of the Indian Partnership Act, 1932, partnership has been defined as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually partners and collectively a firm.

19.2. Supreme Court was confronted with the question as to whether definition of ‘person’ occurring in Section 3(42) of the General Clauses

Act, 1897 should be imported into Section 4 of the Indian Partnership Act, 1932 in the case of *Dulichand Laxminarayan Vs. Commissioner of Income Tax*, AIR 1956 SC 354. After elaborately examining the legal position in English Law as well as in Indian Law, it was held that the general concept of partnership, firmly established in both systems of law, is that a firm is not an entity or person in law but is merely an association of individuals and a firm name is only the collective name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership. It was, therefore, held that to import the definition of the word 'person' occurring in Section 3(42) of the General Clauses Act, 1897 into Section 4 of the Indian Partnership Act, 1932 would be totally repugnant to the subject of partnership law. Therefore, it has been consistently held in this country that a firm as such is not entitled to enter into partnership with another firm or individuals; Indian Law has not given legal personality to a firm apart from the partners.

20. In *Malabar Fisheries Company Vs. IT Commissioner*, reported in AIR 1980 SC 176, Supreme Court has held that a partnership firm under the Indian Partnership Act, 1932 is not a distinct legal entity apart from the partners constituting it and equally in law the firm as such has no separate rights of its own in the partnership assets. Partnership assets or properties belong to all the partners constituting the firm.

21. The view that partnership firm is not a legal entity like a company, rather it is a group of individual partners, has been reiterated by the Supreme Court in *Comptroller & Auditor General Vs. Kamlesh Vadilal Mehta*, (2003) 2 SCC 349.

22. Again in *N. Khadervali Saheb Vs. N. Gudu Saheb*, reported in (2003) 3 SCC 229, Supreme Court has held that a partnership firm is not an independent legal entity, the partners are the real owners of the assets of the partnership firm. Actually, the firm name is only a compendious

name given to the partnership for the sake of convenience. The assets of the partnership belong to and are owned by the partners of the firm.

23. At this stage, it would be useful to refer to Order XXX of the Civil Procedure Code, 1908. Rule 1 thereof deals with suing of or by partners in the name of firm. It says that any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm of which such persons were partners at the time of accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were at the time of accruing of the cause of action, partners of such firm, to be furnished and verified in such manner as the court may direct. The provisions contained in Rule 1 of Order XXX is procedural. In the event a partnership firm intends to file a suit, the same has to be filed by any two or more persons who were partners of the said partnership firm at the time of accruing of the cause of action. This procedural provision only buttresses the point that a partnership firm itself has no legal personality other than the partners constituting it and therefore, any two or more persons claiming to be partners of the partnership firm at the time of accruing of the cause of action can sue in the name of the partnership firm.

24. It is therefore, a settled legal proposition that a partnership firm is not a legal entity. In other words, it is not a juristic person; obviously, it is not a natural person. Under the law of partnership, a partnership firm has no legal existence apart from its partners and the partnership firm is only a collective name or description of the individuals who comprise the partnership firm. It is also settled that a partnership firm cannot enter into partnership with another partnership firm or other individuals. If a partnership firm cannot enter into a partnership, natural corollary would be that a partnership firm cannot institute a suit in its own name *de hors* being represented by two or more of the partners in terms of Rule 1 of Order XXX, Civil Procedure Code, 1908.

25. In the instant case, the suit is instituted by the partnership firm on its own. There is no authorization by the partners authorizing anyone of them to institute the suit on behalf of the partnership firm. That being the position, the very institution of the suit by the partnership as the plaintiff rendered the suit defective. Learned Court below ought to have returned back such a defective plaint. On this ground alone, the impugned judgment and order is liable to be set aside.

26. At this stage, it may also be relevant to examine the conduct of the plaintiff. As already noted the alleged date of dispossession of the plaintiff from the suit flat was 13.01.1989. Under sub-section (2) (a) of Section 6 of the Specific Relief Act, 1963, no suit under the said section shall be brought after expiry of six months from the date of dispossession. From the record, it is seen that the suit was filed on 11.07.1989 i.e., just within a day or two of expiry of the aforesaid period of six months. That apart, after filing, plaintiff did not remove the office objections in the plaint till 10.06.1992 i.e., for a period of almost three years. Though disputed by the defendant, according to the plaintiff, summons were served upon the defendant only on 18.07.1996. Explanation furnished by the plaintiff for such nonchalant approach was that it was not urgently in need of the suit flat as it was acquired not for their residential purpose but to accommodate occupants of properties taken over by the plaintiff for development purpose. Plaintiff further stated that negotiation was going on with the defendant to settle the dispute. It was for this reason that the plaintiff did not file the suit immediately after the alleged dispossession. However, the fact of negotiation with the defendant and settlement not materializing was not stated by the plaintiff either in the plaint or in the evidence. But more significantly there was no explanation at all by the plaintiff as to why it sat over the suit for about three years after filing by not removing the office objections and thereafter not praying for any ad-interim relief. Overall, the plaintiff did not pursue the suit for more than seven years,

which is quite inexplicable for a person who alleges illegal and forcible dispossession of immovable property. Learned Court below overlooked this aspect of the matter by observing that learned Advocate for the plaintiff “gave some explanation” for not filing the suit immediately after 13.01.1989. Such conduct of the plaintiff cast a serious doubt about its *bonafides*.

27. But more importantly, learned Court below noted that after lodging of the plaint in the office of the Court below, plaintiff carried out certain corrections in the plaint in order to bring the suit within the pecuniary jurisdiction of the Court. While initially plaintiff claimed Rs.3,000.00 per month as *mesne* profit, the same was changed to Rs.2,000.00 after filing. Learned Court below noted that there was no order or noting of the Registrar permitting the plaintiff to carry out the corrections. However, learned Court below overlooked the same by stating that such “technicality” should be ignored in view of the legal provision that plaintiff can restrict its claim so as to bring the suit within the pecuniary jurisdiction of the Court. Certainly, a plaintiff can project its case as it deems fit and proper in accordance with law. There can be no dispute to such a proposition. But the point is can a plaintiff correct or alter or amend the plaint after filing the same in the Court Registry or for that matter whether a defendant can change the written statement after filing? Once a plaint or a written statement or an application is filed by a litigant in the Court Registry, such plaint or written statement or application becomes the property of the Court. If that be so then without the permission of the Registry in the event the suit is yet to be registered or of the Court after registration, no such correction or alteration or amendment can be carried out by a litigant; otherwise, it may impinge upon the sanctity of court proceeding. Therefore, learned Court below was not at all justified in overlooking such conduct of the plaintiff by terming it as a mere “technicality”. Making changes in pleadings or court documents by a litigant without permission of the court is not a

mere technicality. It is a gross misconduct which should be viewed seriously.

28. Proceeding further, it is seen that after going through the evidence and other materials on record, learned Court below recorded a finding in paragraph 23 of the impugned judgment that he had no hesitation to record that Mr. Palicha, Mr. Choithramani and Mr. Gada had deceived the defendant by joining hands with each other. He further recorded that the defendant being a Government servant, had come under the clutches of these three persons probably because of financial and/or physical difficulty and that the said three persons fully exploited the said circumstances of the defendant and deceived him. However, after noting the above, learned Court below expressed helplessness by saying that while the Court had got full sympathy for the defendant but it could not help him for the reason that plaintiff had sufficiently proved that Mr. Gada had inducted it into the suit flat through the tenancy agreement. Relevant portion of paragraph 23 of the impugned judgment is extracted hereunder: -

“23. I, after going through the entire evidence adduced by both the parties and particularly various agreements and power of attornies, executed by the defendant in favour of Mr. Pratap and Kan and/or with Mr. Gada and Mr. Kan and Mr. Gada, do not hesitate to record that the said Mr. Pratap and Kan and Gada deceived the defendant by joining hands with each other. The defendant a responsible Class-I Officer in Government Service, came in the clutches of these three persons, most probably because of financial and/or physical difficulties. The said three persons fully exploited the said circumstances of the defendant and deceived him. This court has got full sympathy for the defendant, but cannot help him for the reason that the plaintiffs have sufficiently proved that the said Mr. Gada inducted them into the suit flat by creating the tenancy under the tenancy agreement Ext.A.....”

29. This finding of deception has neither been challenged by the plaintiff nor by the said three persons. As a result, the above finding has attained finality.

30. It is a settled proposition that a litigant must approach the court with clean hands and a clean mind. A litigant who practices deception cannot seek any relief from the Court. Learned Court below came to the conclusion that the three persons including the two, namely, Mr. Palicha and Mr. Choithramani, who are partners of the plaintiff, had deceived the defendant by joining hands with each other. If this is the conclusion arrived at by the Court below, then the plaintiff would be disentitled to any relief from the Court. Court proceeding or Court process cannot be misused by a deceptor to perpetuate deception. On this ground itself, relief sought for by the plaintiff should have been declined.

31. On merit also, findings of the learned Court below on the face of the evidence on record *vis-a-vis* possession of the plaintiff over the suit flat as on 13.01.1989 and its alleged dispossession at the hands of the defendant on the same day are highly questionable. There is hardly any cogent evidence regarding possession of the plaintiff over the suit property as on 13.01.1989; besides the evidence being materially contradictory or absent as regards alleged dispossession. But in view of the discussions made in the forgoing paragraphs, I am of the view that further deliberation on merit may not be necessary.

32. Consequently and having regard to the above, impugned judgment and order dated 22.07.1999, passed by the Bombay City Civil Court in Short Cause Suit No.3733/1992 cannot be sustained and is hereby set aside.

33. Rule is made absolute accordingly with cost of Rs.5,000.00.

34. Connected civil applications are also disposed of accordingly.

(UJJAL BHUYAN, J.)