

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8642 OF 2022

Manda Rohidas Koli

..Petitioner

V/s.

Dinanath Dharmaji Worlikar (Decd)(Deleted)
& Ors.

..Respondents

Mr. Atul Damle, Sr. Counsel i/b. Ms. Swati Turbhekar for the
Petitioner.

Ms. Kalpana Kanhere for the respondents 2(1), 2(2), 2(3), 2(4)

CORAM : NITIN W. SAMBRE, J.

DATED : 10th AUGUST, 2022

P.C.:

1. The respondents/plaintiffs initiated L.E. Suit No. 54 of 2011 alleging that the present petitioner is gratuitous tenant. The said suit came to be decreed vide judgment and order dated 07/09/2017.
2. The appeal preferred by the present petitioner being appeal no. 28 of 2019 also came to be dismissed on 17/02/2021. As such this petition.
3. The contentions of Mr. Damle, learned senior counsel appearing for the petitioner are petitioner is the owner of the suit property and as such the petitioner is in continuous possession of the said property. According to him, the suit property was

inherited by the petitioner from her ancestral and specific plea to that effect was raised in the written statement. He would further urge that the plea of adverse possession was also raised as the petitioner continued in uninterrupted possession of the suit property. He would further urge that the witness of the plaintiff is his daughter-in-law and as such she cannot be said to have personal knowledge of the fact which are pleaded in the plaint which relegate back to the status of ownership of ancestral of the plaintiffs to the suit.

4. Mr. Damle would invite my attention to the specific pleadings in the plaint that the grandfather of the respondents/plaintiffs has given the suit property to the grandfather of the petitioner/defendant as the gratuitous licensee. As such, according to him the evidence of the witness of the plaintiff who happens to be the daughter-in-law ought not to have been accepted so as to infer the gratuitous tenancy. In addition his contentions are before the Trial Court the petitioner/defendant had every intention to enter into the witness box to establish his plea of ownership and ownership acquired by way of adverse possession.

5. According to him, may be under incorrect provisions of the law (order IX rule 13 of the CPC) a prayer was made for permission

to led evidence, the Court below committed an error in rejecting the same so also the Appellate Court has failed to consider the same. As such, according to him the impugned judgments are in violation the principle of natural justice and as such are not sustainable.

6. Learned Counsel for the respondents/plaintiffs would support the judgment impugned.

7. She would urge that the concurrent findings recorded by the Court below are based on the rival pleadings, the evidence i.e. the eviction notice, the tax receipts etc. and that being so the present petition is liable to be dismissed, which is preferred against the concurrent findings.

8. I have appreciated the aforesaid submissions.

9. It appears that the suit in question claims to be initiated by the respondents/plaintiffs being L.E. Suit No. 54 of 2011 on 05/03/2011. It is specific case of the respondents/plaintiffs perhaps who have expired during the long pendency of the suit proceedings that their grandfather inducted the grandfather of the present petitioner/defendant as gratuitous tenant. It is further claimed that the eviction notice was served on the petitioner/defendant which was duly proved from the testimony of

the plaintiff's witness. The notice of termination of such tenancy dated 19/10/2020 Exhibit-25 is relied by the both the Courts below alongwith the oral testimony of the respondents/plaintiffs' witness.

10. If we appreciate the very evidence of the respondents/plaintiffs, what can be noticed is - the respondents have specifically pleaded about the 3rd generation gratuitous tenancy, the requirement of the premises for bonafide purpose, and the fact that the respondents/plaintiffs were paying rent from the document viz. tax receipts, which are produced on record before the Trial Court at Exhibit 19, 34 & 35.

11. As such, it appears that the witness of the present respondents/plaintiffs who happened to be the family member has specifically proved the case of the plaintiffs as is pleaded in the plaint.

12. As against the above, the petitioner/defendant has come out with the case that - (a) that petitioner is the owner of the suit property & (b) have acquired ownership by virtue of the adverse possession.

13. It appears that the petitioner since beginning were interested in prolonging the suit proceedings. My attention invited to the fact that the suit was initially proceeded without written

statement for not filing the written statement by the petitioner within a statutory time. However, an opportunity was given to the petitioner to file written submission on record by setting aside said order at later stage.

14. Apart from above, it can be noticed from the records that the petitioner intentionally continued the cross examination of the respondents/plaintiffs' witness for a period of almost four years.

15. If we appreciate the defense of the petitioner of claiming ownership over the suit property - (a) at the instance of petitioner no specific issues were framed to that effect and (b) the petitioner/defendant has not entered into the witness box to prove the claim that they are either owner of the suit property by virtue of vesting of title into them or in alternate have acquired the ownership over the suit property by virtue of adverse possession.

16. Rather after the lengthy cross examination of the respondents/plaintiffs' witness, the petitioner/defendant has chosen not to led any evidence.

17. After the suit was decreed on 17/09/2017 the petitioner appears to have moved an application under order IX rule 13 vide Marji Application No. 332 of 2017 seeking to set aside the decree. The said application was rejected by the reasoned order on

06/01/2018 by the Judge, Small Causes Court with an observation that the petitioner has intentionally taken out the said application under the incorrect provisions. The Trial Judge then considered the fact that the application was taken out with an intention to delay the issuance of warrant of possession.

18. The fact that the petitioner has not led any evidence for the default of his lawyer is at all not established. It appears that the petitioner/defendant lawyer was very much available during the suit proceedings as he has continued the cross examination of the respondents/plaintiffs' witness for a period of 4 years. As such it cannot be claimed that there was a denial of opportunity of hearing to the petitioner by not granting sufficient opportunity to him to led evidence.

19. The contentions that the oral evidence of the respondents/plaintiffs' witness ought to have been accepted is also liable to be rejected for the reason that the said witness happens to be a family member of the respondents/plaintiffs, which fact is not in dispute.

20. The respondents/plaintiffs have specifically come out with the case of gratuitous tenancy which is denied by the petitioner/defendant with the specific defense that they have

become the owner of the property. The fact remain that the petitioner/defendant have failed to prove such fact as the burden shifts on the petitioner/defendant to that effect.

21. Rather from the appreciation of the pleadings of the respondents/plaintiffs and the evidence on record including that of the documentary evidence, in my opinion both the Courts below were justified in recording the findings of existence of gratuitous tenancy and for the termination of such tenancy.

22. In the aforesaid background, in my opinion no case for interference is made.

23. The petition, as such, fails and stands dismissed.

24. Ad-interim protection is ordered to be continued for a period of four weeks from today.

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by ANANT
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Date: 2022.08.20
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(NITIN W. SAMBRE, J.)