

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10407 OF 2022

Mrs. Sheela Sushilkumar Madhumal ...Petitioner
vs.
Firoz Badruddin Ajani and Ors. ...Respondents

Mr. Nitesh S. Nevshe - Advocate for the Petitioner
Mr. P. P. Pujari - AGP for the State-Respondent No. 3

CORAM : S. M. MODAK, J.

DATE : 30th AUGUST, 2022

P. C. :-

1. Heard learned Advocate for the Petitioner/Defendant in eviction Suit. There is already eviction decree against the present Petitioner passed by the Court of Small Causes, Pune.
2. In fact the said decree was stayed by the First Appellate Court on 20/06/2020 by putting certain conditions. For some reason or other, the Petitioner has not complied with those conditions and the First Appellate Court was pleased to vacate that conditional stay as per Order dated 19/03/2022. It is mentioned in para no. 4 of the application dated 19/04/2022 filed before the executing Court for issuance of possession warrant (page nos. 122 and 123).
3. The Respondents decree holder has filed Darkhast and filed an

application for issuance of possession warrant and the matter is now fixed on 02/09/2022 (page no. 122)

4. By way of this Writ Petition, the Petitioner Judgment debtor has challenged the execution proceedings No. 41 of 2022. Sum and substance of the contention advanced on behalf of the Petitioner is as follows:-

a) As the Respondent is not owner he is not competent to file a suit for eviction (my attention is invited to the answers given by the plaintiff in para no. 2 at page no. 124).

b) The execution is also not maintainable in view of filing of specific performance suit. (page no. 132) It is pending before the Senior Division Court at Pune. The suit is of the year 2013.

c) My attention is invited to a copy of the leave and license agreement filed at page no. 33 and specifically clause no. 13. It says about the referring the dispute to the arbitration mutually agreed upon.

d) The contention is that the Respondents ought to have exhausted that clause prior to filing of suit for eviction.

e) The leave and license agreement was not registered one.

5. Learned Advocate for the Petitioner relied upon filing two judgments:

(i) S. P. Chengalvaraya Naidu (dead) by LRs Vs. Jagannath (Dead) by LRs and Others¹

1 AIR 1994 Supreme Court 853

(ii) Kiran Singh and Others Vs. Chaman Paswan and Others²

6. If decree is passed without jurisdiction it is treated as Nulity that is non-erst in the eyes of law. Furthermore if fraud is played by litigant on Court by withholding vital documents the guilty party is liable to thrown out at any stage. It has been observed that such ground can also be considered at Appellate stage also.

7. On the basis of above contentions, when documents placed on record are perused we may find that the Court of Small Causes has decreed the suit on 15/02/2018. The present Petitioner has contested the said suit by filing written statement. The trial Court has framed issues. Those find place on page no. 53. It seems that the issue of the jurisdiction was raised. It was answered in the affirmative.

8. It seems that in that suit also the present Petitioner has informed the Court about filing of Special Civil Suit for specific performance. It finds place on page no. 16.

9. The trial Court decreed the suit after conducting full fledged trial. The trial Court directed the present Petitioner to handover the possession of suit premises that is shop no. 26 and 26A. There is a direction to pay Rs. 5,40,000 with some other conditions.

10. The present Petitioner has filed First Appeal being RCA No. 250 of 2018 against the eviction decree. The First Appellate Court as per Order

2 AIR 1954 Supreme Court 340 (1)

dated 22/06/2020 has stayed the execution of the decree by putting certain conditions. Two months time was granted to deposit of Rs. 5,40,000/- so also three months time was granted to pay occupation charges. It seems that the Petitioner could not comply with those conditions and accordingly the First Appellate Court has vacated the Order vide Order dated 19/03/2022.

11. Admittedly, uptill now neither the Order dated 15/02/2018 nor the Order dated 19/03/2022 were challenged by the Petitioner. She could have challenged those orders up till now. So this Court feels that the grounds taken as referred above cannot be taken in the Writ Petition.

12. The Petitioner is at liberty to raise those ground in substantive appeal filed by her before the First Appellate Court. Merely because the interim stay is vacated, still the Petitioner can pursue that appeal on the basis of the merits. It is not made clear whether the First appeal is pending or not. But if it is pending then the grounds raised before this Court can certainly be raised therein. This liberty is not unconditional. The petitioner has to satisfy the first appellate court that those grounds were in fact taken before the trial court or else not taken but now can be taken on the basis of certain provisions of law.

13. So I do not think that there is any merit in this Writ Petition. I do not think any case is made out for issuance of the notice to the

Respondents.

14. Hence this Writ Petition is dismissed.

15. When asked, learned Advocate for the Petitioner submitted that the Petitioner will deposit the amount of Rs. 5,40,000/- as ordered by the first appellate Court on 22 June 2020, if certain time is granted. It is submitted that due to covid, the Petitioner has lost her financial means. This Court is inclined to grant her one month time from date of uploading of this order to deposit the amount as ordered by the First Appellate Court in RCA No. 250 of 2018 on 22/06/2020. The Petitioner is at liberty to intimate the executing Court about granting of time by this Court by filing an affidavit. The executing Court to act upon the said affidavit even though copy of this judgment will not be available till that time. It is due to the fact that this order is passed today in open Court and from tomorrow onwards this Court is having holidays till 4/9/2022 on account of Lord Ganapati festival.

16. For one month executing Court not to proceed with that execution.

[S. M. MODAK J.]