

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7685 OF 2023

Ramesh Bhikoba Mandhare & Ors.

...Petitioners

Versus

Durgaben Shantilal Mallesha

...Respondent

Adv. Mohan N. Dhamal a/w Adv. Vishal M. Dhamal for the
Petitioners.

Adv. Swapnil Bangar i/b Adv. Ashok V. Jain for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : DECEMBER 1, 2023

P. C. :

1. The challenge in the Petition is to the order dated 9th March, 2023, allowing the Plaintiffs Application and directing the Defendant Nos. 1 to 3 to step into the witness box and lead evidence before the Plaintiff's evidence.

2. The suit has been filed by the Plaintiff seeking recovery of the possession of the suit premises from the Defendants and for inquiry into the mesne profits under Order 20 Rule 12 of CPC. Surprisingly, the Trial Court has cast the burden upon the Defendants to prove the capacity in

which they are occupying the suit premises. Despite the suit being filed by the Plaintiff seeking recovery of the possession, no burden is cast upon the Plaintiff. The provisions of Section 101 of the Evidence Act places burden of proof on the person who asserts a fact to prove and establish the same.

3. In the present case, the Plaintiff is seeking recovery of the possession on the ground that since 2011 the suit premises have not been used by the Defendant Nos. 2 or 3 and on the ground of non user as well as on the ground of subletting. The burden is therefore upon the Plaintiff to first establish the ground on which the recovery of possession is sought. The Trial Court without considering the statutory provisions have framed only three issues as under.

1. In what capacity the Defendants are occupying the suit premises?

5. Whether the plaintiff is entitled for the reliefs claimed?

6. What order and decree?

4. Although by reason of the issues which are framed by the Trial Court, the impugned order can be justified, the issues are not correctly framed and are not in consonance with the principles of law.

5. In light of the above, the impugned order is required to be quashed and set aside. The Petitioner is at liberty to file an Application before the

Trial Court seeking recasting of the issues. The Application be filed within a period of two weeks. The response, if any, be filed within a period of two weeks thereafter.

6. The Trial Court is requested to decide the Application expeditiously and in any event within a period of four weeks from the date of completion of pleadings. The Trial Court is requested to first decide the Application as regards recasting of issues and thereafter proceed with the hearing of the suit.

7. Writ Petition is disposed of in the above terms.

8. It is clarified that the Trial Court to decide the Application on its own merits uninfluenced by the observations made in the impugned order as well as in the present order.

(SHARMILA U. DESHMUKH, J.)