

AGK

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

WRIT PETITION NO.14745 OF 2023

Digitally
signed by
ATUL
GANESH
KULKARNI
Date:
2023.12.01
10:34:56
+0530

Sanjay Sakharam Jadhav

... Petitioner

V/s.

Shanti Shopping Centre Premises,
A Cooperative Society Ltd.

... Respondent

Mr. Shriram Kulkarni with Mr. Monish S. Vig and Mr.
Dhiraj Shrivastav for the petitioner.

Mr. Sanjeev A. Sawant with Mr. Heramla S. Kadam and
Ms. Samiksha Mane for the respondent.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 29, 2023

PC.:

1. The petitioner/original plaintiff is challenging orders passed by the Courts below rejecting application for temporary injunction restraining defendant/housing society from disturbing occupation and possession of the petitioner over the suit property.

2. Petitioner's case in short is that the defendant/cooperative housing society is the owner of a demarcated area shown as parking lot in the sanctioned plan. The parking lot is meant for parking of two-wheeler and four-wheeler vehicles. The defendant/society on 31 May 2018 executed an agreement termed as "Parking Lot Use Agreement" in favour of the plaintiff. The period of the agreement was for three years. Petitioner was put in occupation and possession of the parking lot as a licensee for a

period of three years from 1 April 2018 till 31 March 2021. The agreement contained a clause that the agreement can be extended for further period. Petitioner incurred expenses towards maintenance of the parking lot and there is no breach of agreement committed by him. Petitioner received a communication from the society on 27 October 2021 permitting him to continue rights conferred under the agreement till the new agreement is entered into between the parties. However, thereafter the defendant has threatened to discontinue plaintiff's services and to dispossess him from the suit premises. Petitioner, therefore, filed Regular Civil Suit NO.134 of 2023 seeking relief of injunction not to disturb his possession over the suit property without following due process of law.

3. The respondent/housing society contested the suit by contending that the plaintiff was allowed to use suit premises for the purpose of carrying on business of parking as per agreement which expired on 31 March 2021. According to the defendant, after expiry of agreement, the plaintiff is illegally and unauthorizedly parking vehicles of general public on the space of the society without having any legal right. The defendant/society is in exclusive physical possession of the suit property since 1 April 2021.

4. The Trial Court rejected temporary injunction application holding that the plaintiff is in possession of the suit premises as licensee of defendant/society on the basis of Parking Lot Use Agreement. The Appellate Court confirmed the order. The plaintiff has, therefore, filed present writ petition.

5. Learned advocate for the petitioner submitted that the petitioner having been put in possession of the suit premises, even if his status has become that of trespasser, he is entitled to the relief of injunction unless he is dispossessed by following due process of law. He invited my attention to various clauses of the agreement dated 1 April 2018 to urge that the plaintiff was put in exclusive possession of the premises in question. He emphasized on clause 16 of the agreement to contend that the said clause recognizes delivery of exclusive possession in favour of the plaintiff and, therefore, the Courts below ought to have protected possession of the plaintiff. He submitted that the reasons assigned by the Courts below are contrary to the legal principles settled by this Court and the Apex Court. In support of his submission, he relied on the judgment of this Court in **Balwant Chatrabhuj Thakkar v. Commissioner, Municipal Corporation of Greater Mumbai & Ors.** reported in 2017 (2) Mh.L.J. 601 and Apex Court judgment in **Maria Margarida Sequeira Fernandes & Ors. v. Erasmo Jadh De Sequeira (dead) through LRs.** Reported in (2012) 5 SCC 370.

6. I have carefully scrutinised orders passed by the Courts below, agreement entered into between the parties entitled as Parking Lot Use Agreement, communication dated 27 October 2020. On perusal of the agreement and the pleadings of the parties, it appears that the purpose of entering into the agreement with the plaintiff by the housing society was to allow the plaintiff to carry on business by using the suit premises as parking lot. Clauses 1, 3 and 16 of the agreement read as under:

“1. Grant of Use – The party of the First Part hereby grants a non-exclusive right, privilege and permission, subject to the terms and provisions of this Agreement, to possess and occupy the Parking Lot for the sole purpose as defined and set forth below.

3. Limitations to Agreement – The party of the second Part's use of the Parking Lot shall not be exclusive. The party of the First Part shall also have the right to use the Parking Lot for its own purposes, which shall take priority over The party of the second Part's right of use. The party of the second Part, nor any of their tenants, rental patrons etc., may sell, rent, lease of charge for the use of the Parking Lot. The party of the second Part shall use the Parking Lot solely for its own business related services.

16. If the party of the second part fails to vacate and handover the peaceful possession of the said premises on expiry by efflux of time, or termination/earlier determination of the agreement, then the party of the second part shall be deemed to be rank trespasser in illegal possession/occupation of the said premises. The party of the first part shall be entitled by himself or through his agents/servants, to physically upon the said premises and physically remove or be a cause to be removed at the risks and the costs of the party of the second part, all goods articles and things belonging to the party of the second part and take exclusive physical possession of the said premises and occupy the same and evict the party of the second part as if the party of the second part was a rank trespasser. The party of the first part is also entitled to appoint agent/s to remove the entire goods articles belonging to the party of the second part in the said premises at the risks and the cost of the party of the second part. The party of the second part shall have no right at any such time to object, intervene by any such action/s taken by the party of the first part or his agent/s, servant/s.”

7. On meaningful reading of the agreement and the nature of right conferred on the plaintiff, it appears that the plaintiff was permitted to regulate and use suit premises for the purpose of allowing public to park their two-wheeler and four-wheeler vehicles in the suit premises. Clauses 1 and 3 of the agreement specifically states that the society has conferred non-exclusive right, privilege and permission, subject to the terms of the agreement to possess and occupy the parking lot for the purpose as defined and set out in the agreement. Clause 3 further clarifies nature of petitioner's right to use parking lot to be non-exclusive. The nature of right conferred on the Plaintiff under the agreement prima facie appears to be restricted to use of the suit premises to allow public to park their vehicles. The nature of right conferred on the plaintiff cannot be equated with the conferment of delivery of possession. Therefore, prima facie it cannot be concluded that the plaintiff was in exclusive possession of the suit premises to the exclusion of the society.

8. The Apex Court in **Rame Gowda v. M. Varadappa Naidu** reported in (2001) 1 SCC 769 had an occasion to consider right of a person in settled possession to claim injunction against true owner. In the said context, the Apex Court observed as under:

“9. The phrase “settled possession” does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the

attributes of “settled possession” (SCC p. 527, para 12):

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of *animus possidendi*. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession.”

9. In so far as the contention raised by the petitioner that in clause 16 of the agreement the defendant society has accepted the fact that the plaintiff is in exclusive possession is concerned, it is settled cannon of interpretation that in case of conflict of two clauses of an agreement, earlier clause will prevail over the later clause. (See: Radha Sunder Dutta vs Mohd. Jahadur Rahim **AIR 1959 SC 24**)

10. Clauses 1 and 3 of the said agreement are unambiguous which indicate that non-exclusive right and privilege is conferred on the plaintiff to use the suit premises as parking lot. Such

conferment of right cannot be equated with the expression “settled possession” to enable the plaintiff to claim injunction against true owner. The privilege/ right to use (non-exclusive right) conferred on the plaintiff by way of agreement comes to an end on expiry of the agreement. It is not in dispute that on the date of filing of the suit, there was no subsisting right in favour of the plaintiff to continue with use of the suit premises as parking lot. Therefore, the plaintiff failed to make out a prima facie case to claim injunction against true owners. In my opinion, therefore, the approach adopted by the Courts below refusing injunction cannot be faulted.

11. In so far as the judgment in **Balwant Thakkar** (supra) is concerned, the person was inducted in actual possession of the shops and, therefore, this Court protected the person in possession till he is evicted by following due process of law.

12. In the judgment in **Maria Fernandes** (supra) it is held as under:

“**97.** Principles of law which emerge in this case are crystallised as under:

(1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

(2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

(3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

(4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour.

(5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”

As held earlier, in the facts of the case, the plaintiff is conferred with non-exclusive right, privilege and permission to use the suit premises for parking lot which cannot be equated with delivery of exclusive possession. In **Maria Fernandes** (supra) it is held that the protection of the court can only be granted to the person who has valid, subsisting licence agreement in his favour. On the date of filing of the suit, there was no subsisting right in favour of the plaintiff to continue with use of the suit premises as parking lot.

13. On overall consideration of the judgments passed by the Courts below and based on material on record, in my opinion, there is no error apparent on the face of record as there is no error of jurisdiction calling for interference at the hands of the petitioner.

14. The writ petition is dismissed. No costs.

(AMIT BORKAR, J.)