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(2009) 03 BOM CK 0131

Bombay High Court

Case No: Appeal (Lodg.) No. 110 of 2009 in Suit No. 2429 of 1997

Smt. Pushpa T. Kadambande		APPELLANT
	Vs	
Naina Deepak Kamani and Others		RESPONDENT

Date of Decision: March 26, 2009

Acts Referred:

- Constitution of India, 1950 - Article 227

Citation: (2009) 111 BOMLR 1822 : (2009) 4 MhLj 469

Hon'ble Judges: Swatanter Kumar, C.J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: D.S. Chandnani, instructed by, Lexim Associates, for the Appellant; Sheetal Kumar, instructed by , M.M. Patel and Co. for Respondent No. 1, P.R. Kadam, for Respondents 3 and 4 and K.L. Vyas, Court Receiver, for the Respondent

Judgement

D.Y. Chandrachud, J.

Admit. By consent of the learned Counsel made returnable forthwith. Counsel appearing for the Respondents waive service. With the consent of the learned Counsel and at their request, the appeal is taken up for hearing and final disposal.

2. An order passed by a Learned Single Judge on a report submitted by the Court Receiver has been called into question in these proceedings. The subject matter of the dispute is a residential flat - Flat 31 - situated on the ground floor of a building called Ram Nivas situated at Pochkhanwala Road, Worli, Mumbai. The suit out of which the proceedings arise has been instituted by the First Respondent in order to seek a declaration that a person by the name of Lakhan Channa Kanojia - the Seventh Defendant to the suit and the Eighth Respondent to these proceedings is a trespasser; for an order directing him to hand over possession of the flat to the Second Respondent and for certain other reliefs. The Appellant was not impleaded as a party to the suit. The building in which the flat is situated is owned by a

company by the name of Janson Engineering and Trading Private Limited; the Second Respondent to the Appeal. The flat was occupied by a tenant by the name of Kadambande. Kadambande died. The Appellant was the wife of the original tenant. According to the Appellant, Kanojia was a personal servant of her deceased husband and stayed in the flat along with them. She asserts that the couple treated Kanojia like a son.

3. An application was moved in the suit for the appointment of a Receiver. By an order dated 7th February, 2000 a Learned Single Judge of this Court directed that the Court Receiver shall stand appointed as Receiver of the flat and that after taking physical possession of the flat, he shall appoint an agent. Before the Learned Single Judge the Appellant filed an affidavit to the following effect:

Since last two years I have left the said premises in the hands of the said Kanojia completely and have gone to stay at 10, South Harsidhi, Opp. Urdu School, Indore. I however come to Bombay very often and whenever I come to Bombay I reside with the said Kanojia the Defendant No. 7 in the said premises.

She has further stated in Paragraph 5(h) that " I say that the said Kanojia the Defendant No. 7 is like my son and he is the tenant and/or the subtenant in respect of the said premises. The Defendant No. 6 knowing that I am residing at Indore wanted to oust the said Kanojia the Defendant No. 7 and his family members from the said premises and has therefore obtained papers and documents as stated hereinabove from me by misguiding me and playing fraud upon me.

4. The Learned Single Judge observed that the averments contained in the affidavit left no manner of doubt that the original tenant had left Mumbai as well as the suit premises. The Learned Single Judge, however, clarified that the appointment of the Receiver "will not come in the way of .... the proceedings that the original tenant might have already launched or may launch in future in relation to her status as a tenant of the suit premises".

5. The order of the Learned Single Judge was carried in appeal by the Appellant to the present proceedings. The Division Bench dismissed the appeal, however, with the clarification that if the Appellant had an independent right in relation to the premises, the observations of the Learned Single Judge would not come in the way of the Appellant since she was not a party to the proceedings in the suit. A SLP was filed before the Supreme Court by the Appellant. While dismissing the petition, the Supreme Court has observed as follows:

The petitioner claims tenancy right in the flat in question. Certain directions were issued by learned Single Judge directing the Court Receiver to take formal possession of the flat but it was clarified that the present occupants be not physically evicted for a period of four weeks from the date of the order. Against the order of the learned Single Judge the matter was taken in appeal by the petitioner. That appeal was dismissed by the impugned order. It was, however, clarified that

whatever observations that were made by learned Single Judge would be of no consequence so far as the applicant is concerned because she was not a party to the same. After the passing of the impugned order the petitioner has filed a substantive suit claiming tenancy right in respect of the flat. Status quo order initially granted was vacated. .... the learned senior counsel is apprehensive that the direction given by learned Single Judge may come in his way in getting the relief from the Court where the suit is pending or from the appeal Court where appeal against order vacating the status quo is pending. We have no doubt that in view of the clarification as noted in the impugned order, there is no question of any observation or direction made by learned Single Judge in proceeding to which she was not a party being taken against the petitioner. The proceeding initiated by petitioner would be decided on its own merits in accordance with law.

6. The Appellant had instituted a declaratory suit in the Court of Small Causes, seeking relief in recognition of her right as a tenant. Initially by an order dated 20th November, 2000 the Learned Trial Judge in the Court of Small Causes dismissed an application for interim relief. In an appeal preferred by the Appellant before the Appellate Bench, the interim order of the Trial Judge was set aside and an interim injunction was issued restraining inter alia the Second Respondent and the Court Receiver from disturbing the possession of the Appellant till the disposal of the suit. The Appellate Bench of the Small Causes Court categorically rejected the contention of the Second Respondent that the Appellant had surrendered possession of the premises on 31st December, 1993. The Appellate Bench observed that prima facie the Appellant had established possession of the suit premises which would warrant an order of protection till the suit was decided. The Second Respondent assailed the order of the Appellate Bench in a petition under Article 227 which was dismissed by a Learned Single Judge on 1st September, 2004.

7. On 27th September, 2006 the Court Receiver fixed royalty in the amount of Rs. 60,000/per month. The Court Receiver, it may be noted, had taken formal possession of the premises in pursuance of the order dated 7th February, 2000. Kanojia was appointed agent of the Receiver. A Notice of Motion was taken out for setting aside the determination of royalty. The Motion was dismissed on 23rd July, 2008. The order of dismissal was confirmed in appeal on 29th August, 2008.

8. Kanojia took out a Notice of Motion seeking the dismissal of the suit on the ground that the Appellant who was a necessary party to the proceedings had not been impleaded as a party. The Motion was dismissed by a Learned Single Judge of this Court on 28th March, 2007. The Appellant thereupon took out a Notice of Motion seeking the dismissal of the suit inter alia on the ground that though she was a necessary party, being in occupation of the residential flat as a tenant together with Kanojia, she has not been impleaded as a party. The Notice of Motion was dismissed by a Learned Single Judge of this Court on 26th October, 2007. The Learned Single Judge observed that the conduct of the Appellant was to be

deprecated since it was obvious that she was acting in concert with Kanojia (the original Seventh Defendant). The Learned Judge observed thus:

...the applicant and defendant 7 are represented by the same advocate. The applicant treats defendant 7 as her son. The applicant and defendant 7 claim to be tenants of the said flat. Clearly, therefore, because defendant 7 could not get the relief, the applicant has preferred this notice of motion. In fact, this is admitted in the affidavit in support of the motion. The court of coordinate jurisdiction has rejected the case that the plaintiff has played any fraud and held that the suit cannot be dismissed on that ground. While dismissing the appeal filed by the applicant challenging the said order, the Division Bench has confirmed this finding. It is, therefore, not possible for this Court to adjudicate upon that issue again and give any finding. It was improper for the applicant to raise the same contention. I deprecate this conduct of the applicant. Ideally, the applicant should be saddled with heavy costs. However, I refrain from doing so hoping that the applicant would desist from repeating such conduct in future.

The order of the Learned Single Judge dated 26th October, 2007 was confirmed by the Division Bench on 18th June, 2008. The Division Bench observed as follows:

As rightly submitted on behalf of the respondent No. 1/ original plaintiff, it appears that this is a proxy litigation sought to be initiated by the Defendant No. 7 in the name of the appellant and that too without seeking joinder of the appellant as the party to the pending suit between the plaintiff and the Defendant No. 7. The grievance which was sought to be made by the Defendant No. 7 having already been adjudicated during the pendency of the said suit in Notice of Motion No. 696 of 2007, it is not permissible to re adjudicate the same by taking out another notice of motion in the same suit and more particularly in view of the fact that the order passed in the said notice of motion had already attained finality in the appeal against such order.

The Division Bench held that the appeal that was filed by the Appellant was an abuse of process.

9. The impugned order of the Learned Single Judge was based on a report submitted by the Court Receiver. The Receiver sought the leave of the Court for removing the obstruction raised to his taking over possession of the premises from Kanojia who had been in arrears of the payment of royalty. The Learned Single Judge noted that the consequence of the execution of an agency agreement stipulating the payment of periodic royalty was that in the case of default the agent of the Receiver could be removed. The Learned Judge adverted to an order passed on 5th July, 2007 on an earlier report of the Receiver wherein it was observed that the Receiver was duty bound to execute the orders of the Court. The Court Receiver made attempts to take possession of the premises from Kanojia. The report of the Receiver records that on 5th December, 2007 when his representative visited the

premises he was manhandled by the son of the original Seventh Defendant. As a result, the order of the Court dated 5th July, 2007 could not be executed. The Learned Single Judge referred to the diverse orders that have been passed by the Learned Single Judge of this Court and by Division Benches and concluded by making the report of the Receiver absolute, directing that vacant possession of the premises would be handed over to the Receiver by all parties who would remain present at the site on 16th February, 2001. The Learned Single Judge clarified that the expression ''parties'' would include the Appellant and there was a direction to the effect that if either the Appellant or the Seventh Defendant resisted or obstructed the Receiver in taking possession, they shall be removed from the premises, if necessary with the aid of police assistance. Stay was refused by the Learned Single Judge on 12th February, 2009. The order has been implemented.

10. On behalf of the Appellant it has been submitted that the Appellant has filed a declaratory suit in the Small Causes Court in which the Appellate Bench granted interim relief protecting the possession of the Appellant on 28th August, 2002. That order, it was submitted was confirmed by a Learned Single Judge of this Court on 1st September, 2004. Hence, it was urged that since a competent forum having jurisdiction to entertain and try the suit instituted by the Appellant had protected her possession, it was improper for the Receiver to seek directions for the removal of the Appellant. It was urged that the judgment of the Learned Single Judge insofar as it directs that the Appellant be removed from the premises suffers from a manifest error since the effect thereof would be to override the order passed by the Small Causes Court.

11. On the other hand, it has been urged on behalf of the First Respondent that as of date the Appellant has not obtained any declaration in respect of her alleged status as a tenant in the premises. On the contrary it has been urged that the Appellant had filed an affidavit in the proceedings before the Learned Single Judge which culminated in the order dated 7th February, 2000 specifically stating that she had left the premises and had gone to Indore. Hence, it was urged, the Appellant is only acting at the behest of the Seventh Defendant and that is a circumstance which has been commented upon in several judgments delivered by the Learned Single Judges and by the Division Bench of this Court.

12. The record before the Court shows that the conduct of the Appellant and of the Seventh Defendant has been adversely commented upon in several judgments which continue to hold the field. While appointing the Court Receiver on 7th February, 2000 the Learned Single Judge observed that two positions which were admitted between the parties were that (i) Kadambande was the original tenant and (ii) presently Kanojia was in physical possession of the flat. The Appellant in fact filed an affidavit stating that she had left the premises in the hands of Kanojia and had gone to reside at Indore. She, however, claimed that she comes to Mumbai often when she resides with Kanojia whom she claimed was "like my son". The Learned

Judge observed that the statements on affidavit made by the Appellant left no manner of doubt that she had left Mumbai and the suit premises. At this stage, it may be noted that the Seventh Defendant instituted a Notice of Motion for the dismissal of the suit on the ground that the Appellant had not been impleaded as a party. A Learned Single Judge by his order dated 28th March, 2007 held that there was no reason to entertain the Motion at the instance of the Seventh Defendant. Thereupon the Appellant instituted a Notice of Motion for the dismissal of the suit. A Learned Single Judge of this Court dismissed the Notice of Motion on 26th October, 2007. There is a finding in the order of the Learned Judge that both the Appellant and the Seventh Defendant were being represented by the same advocate. The conduct of the Appellant was deprecated by the Learned Judge. The Division Bench by its order dated 18th June, 2008 held that it was the Seventh Defendant who appeared to be pursuing a "proxy litigation" in the name of the Appellant without seeking joinder of the Appellant as a party to the suit. In the circumstances, it is evident that in several judgments of the Court inter partes the view which has been taken is that the Appellant and the Seventh Defendant are acting in concert; the Appellant had left the premises and had gone to Indore and that the litigation in the name of the Appellant was as a matter of fact litigation which was being pursued to protect the interest of the Seventh Defendant.

13. Be that as it may, there is undoubtedly an order passed by the Appellate Bench of the Small Causes Court on 28th August, 2002 which continues to hold the field. By the order of the Small Causes Court Respondent No. 2 and the Receiver have been restrained from disturbing the possession of the suit premises and of the Appellant till the disposal of the suit. That order was confirmed by a Learned Single Judge of this Court on 1st September, 2004 while dismissing the writ petition instituted by the Second Respondent. At every stage of the proceedings, which arise out of the suit in this Court, it has been clarified that the interlocutory directions shall not stand in the way of the Appellant in pursuing her own remedy for establishing her claim to the tenancy. This was clarified in the order of the Learned Single Judge dated 7th February, 2000 while appointing the Receiver as well as in the order of the Division Bench in appeal dated 21st June, 2000. The order passed by the Supreme Court on 29th July, 2000 in the SLP filed by the Appellant onces again clarifies that the appointment of a Receiver in pursuance of the order of the Learned Single Judge would not come in the way of the Appellant in pursuing the appeal before the Small Causes Court at the interlocutory stage. As already noted earlier it was there after that the Appellate Bench of the Small Causes Court had passed an interlocutory injunction protecting the possession of the Appellant. The fact that the Appellant had instituted a declaratory suit in the Small Causes Court in which an interim order enures to her benefit was also noticed in the order of the Division Bench dated 8th June, 2008. The Court Receiver has been impleaded to the declaratory suit instituted by the Appellant before the Small Causes Court.

14. The order which has been passed by the Small Causes Court in the declaratory suit instituted by the Appellant could not have been overridden by the Receiver resorting to the simple expedient of placing a report before the Learned Single Judge. Undoubtedly, insofar as the Seventh Respondent is concerned, he was appointed as an agent of the Court Receiver. Upon his failure to pay the royalty, the Receiver was duty bound to seek appropriate relief before the Learned Single Judge hearing the Receiver''s Reports for the removal of the Seventh Defendant who had been appointed as his agent. But the removal of the Seventh Defendant cannot operate to prejudicially affect such rights as the Appellant may claim to tenancy in respect of the suit premises. At this stage, the claim of the Appellant cannot be regarded as illusory having regard to the circumstance that the Appellate Bench of the Small Causes Court has at the interlocutory stage found prima facie substance in the claim of the Appellant. The order of the Appellate Bench as already noted has been confirmed by a Learned Single Judge of this Court. The suit instituted before the Small Causes Court seeks a declaration of tenancy for the Appellant. The Small Causes Court is the competent forum under the Rent Act vested with exclusive jurisdiction to entertain and try the suit. In Anthony C. Leo Vs. Nandlal Bal Krishnan and others, . the Supreme Court held thus:

Where a Rent Act is applicable, the inter se rights and obligations of the landlord and tenant are regulated and controlled by such Rent Act. In areas where any special law governing, the incidences of tenancy is not applicable, the law relating, to lessor and lessee as envisaged by the general law of the land, namely, Transfer of Property Act, will regulate and determine inter se right and obligations which a third party may have in respect of a property in which a receiver has been appointed, the receiver, like a party to the suit, will have same limitation. The receiver will be bound by the incidences of tenancy flowing from the statute regulating and determining inter se rights of landlord and tenant. Therefore, there is no manner of doubt that no order for eviction of the tenant can be passed by the Court at the instance of its officer, the receiver, without taking recourse to appropriate proceedings for eviction of the tenant under the appropriate statute regulating and governing the inter se rights of landlord and tenant. It may also be emphasized here that even apart from an eviction proceeding, any incidence of tenancy which is regulated and controlled by a special statute cannot be altered, varied or interfered with except in accordance with the provisions of such statute. The Court in such cases has no jurisdiction to pass orders and direction affecting the right of the tenant protected, controlled or regulated by the Rent Act on the score of expediency in passing some order or direction for the maintenance and preservation of the property in custodia legis.

15. Consequently, in our view, while the direction issued by the Learned Single Judge for the removal of the Seventh Defendant who was the agent of the Receiver in default was valid, the further clarification that parties including the Appellant would have to handover vacant possession on 16th February, 2009 was misconceived. No such direction could have been issued qua the Appellant who was protected by an

order of the Appellate Bench of the Small Causes Court. The Court Receiver could not have sought any directions against the Appellant without the permission of the Small Causes Court. The Small Causes Court is the appropriate forum for adjudicating upon the suit instituted by the Appellant for declaration of the status claimed by her as a tenant. In these circumstances, the Appeal will have to be allowed in part and the direction issued by the Learned Single Judge in the order dated 11th February, 2009 to the effect that the Appellant should handover vacant possession to the Court Receiver will have to be set aside. There shall be an order in these terms. In the meantime, the Court Receiver, as noted above has taken possession of the suit premises. We direct that the Court Receiver shall place a report within a period of two weeks from today before the Small Causes Court seeking appropriate directions from that Court in regard to the premises. Upon such a report being made, the Small Causes Court shall consider the report and pass appropriate directions thereon after hearing the parties. The Appeal shall stand disposed of in the aforesaid terms. There shall be no order as to costs.