
(1998) 02 BOM CK 0033

In the Bombay High Court

Case No : Civil Revision Application No. 1002 of 1997

Madhav Narayan Mujumdar and others

APPELLANT

Vs

Southern Knitting Works Pvt. Ltd. and another

RESPONDENT

Date of Decision : 04-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 11, 115

Citation : (1998) 3 ALLMR 194 : (1998) 4 BomCR 153

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : V.R. Manohar, S.A. and Anil V. Anturkar, for the Appellant; A.S. Bobade, S.A., Nitin P. Deshpande and M.G. Heblikar, for the Respondent

Judgement

D.K. Deshmukh, J.—By this civil revision application, the petitioners challenge the order dated 16-9-1997 passed by the Appellate Court in Misc. Civil Appeal No. 240/ 97. That appeal was also filed by the petitioners challenging the order dated 19-6-1997 passed by the Judge, Small Causes Court, Pune below Exh. 5 in Civil Suit No. 379/97. The Civil Suit No. 379/97 was filed by the respondent No. 1. In that suit the respondent No. 1 - original plaintiff had claimed a declaration that the plaintiff is a tenant of the suit property. A permanent injunction was also sought, restraining the defendant Nos. 1 to 5, namely, the present petitioners from dispossessing the plaintiff from the suit property. The suit property was described as Survey No. 707/final plot No. 411, admeasuring about 12 acres. A temporary injunction in the same terms namely restraining the present petitioners from disturbing the possession of the suit property of the plaintiff was also sought. It appears that the trial Court granted an ex-parte order on 29-5-1997, directing the parties to maintain status quo. Thereafter, by order dated 19th June, 1997 after hearing both the sides, the trial Court granted a temporary injunction as prayed for by the plaintiff. That injunction has been confirmed by the Appellate Court. Therefore, in this revision application the petitioners are challenging two orders passed by the subordinate Court.

2. Facts giving rise to present proceedings, relevant for the purpose of the decision of this revision application are that the property, admittedly was owned by the predecessor in title of the petitioners Nos. 1 to 4 namely. Mujumdar. A lease of this property was granted by them in favour of a Company, namely M/s. S.V. Supnekar Kulkarni & Sons Limited. The lease-hold rights were assigned by that Company in favour of the respondent No. 1 Company, namely, M/s. Southern Knitting Work Ltd. In 1958 the landlord Mujumdar filed civil suit being Civil Suit No. 838/1958 for a decree of eviction against the original lessee and the transferee namely, the respondent No. 1. The suit was dismissed by the trial Court and the order of the trial Court was confirmed by the Appellate Court. Civil Revision Application No. 1864/1963 was filed before this Court and during the pendency of that revision the parties arrived at a compromise and consent terms were filed in the civil revision application. As per the consent terms that were filed before this Court, the respondent No. 1 agreed to hand over possession of the suit land to one Vinayak Supnekar, who is respondent No. 2 in the present petition/revision. It was also agreed that the respondent No. 1 will hand over possession of the entire land to the respondent No. 2 within six months. Vinayak Supnekar was to pay an amount of Rs. 50,000/- to the respondent No. 1 as the cost of the construction standing on the land. As per those consent terms the respondent No. 2 was to pay an amount of Rs. two lakhs to the landlords and thereafter, the landlords were to execute sale deed of the property in favour of the respondent No. 2. It was also provided that in case the respondent No. 1 fails to hand over possession within the stipulated period, the landlord shall be entitled to recover possession by executing the decree. The civil, revision application was disposed of in terms of the consent terms filed by the parties. It appears that thereafter, an agreement was arrived at between the landlords and the respondent No. 2 Supnekar. As a result of which Supnekar was to become owner of 8 acres of land and the landlords were to get back 4 acres of land. That agreement was also placed before the Court and by order dated 26-8-1976 that agreement was accepted by the Second Joint Civil Judge. Jr. Dvn. Poona. It appears that the entries were also taken in the relevant revenue record, pursuant to that agreement. It appears that the respondent No. 1 filed Civil Suit No. 748/79 before the Civil Judge. Sr. Dvn. Poona, praying for an order, setting aside the consent terms dated 6-12-1966 filed in the Civil Application No. 1864/1963 before this Court as also the decree passed pursuant to those consent terms as also the satisfaction order dated 25-8-1976, as having been obtained by fraud. A permanent injunction was also claimed restraining the defendants namely, the present petitioners from acting upon the consent terms and the satisfaction order. That civil suit was decided by the 3rd Joint Civil Judge, Jr. Dvn. Pune by the judgment dated 18-12-1993 and the suit was dismissed. The respondent No. 1 feeling aggrieved by that judgment filed Civil Appeal No. 766/94 before the District Judge, Pune, which is pending in the District Court. It appears that on 12-4-1996 an application was filed in that civil appeal by the respondent No. 1, seeking a direction from the Appellate Court, namely, the District Judge, against the petitioners and the respondent No. 2, directing them

not to disturb the possession of the respondent No. 1 over the suit premises i.e. Survey No. 707 final plot No. 411, C.T.S. No. 21. It appears that, that application which is at Exh. 59 on the record of the Civil Appeal No. 766/94 has been decided by the Addl. District Judge, Pune by his order dated 2-5-1996 and the learned Second Addl. District Judge, Pune rejected that application. The present suit was filed on 29th May, 1997 wherein as stated above, an application for temporary injunction was filed and the injunction was granted by the trial Court and confirmed by the Appellate Court.

3. Shri Manohar the learned Counsel appearing for the petitioners submitted that the orders impugned in the revision, are absolutely illegal. He submitted that the very basis of the suit, as can be seen from the plaint, was that the petitioner is in possession of the suit land. In the submission of the learned Counsel this basis is totally non-existent and contrary to the stand taken by the petitioners in the previous litigation. He further submitted that filing of the present suit without disclosing in the plaint and in the application for temporary injunction the various litigations between the parties in relation to the same subject-matter and the same controversy and the orders passed by the Court in those proceedings amounts to indulgence in vexatious litigation and therefore, the courts below have transgressed limits of their jurisdiction in entertaining such applications and granting such applications. He submitted that in paragraph 8 of the plaint, the plaintiff had again made claim that the consent terms are bad in law and that the consent terms were never acted upon while the same controversy was raised in Civil Suit No. 748/1979. He pointed out that it is not disclosed in the plaint that the same controversy was raised in a Civil Suit No. 748/79. In paragraph 10 of the plaint, the plaintiff respondent No. 1 has claimed that the respondent No. 1 is in physical possession of the suit premises since 1952. It is claimed that the plaintiff as tenant is in peaceful and vacant possession thereof. The learned Counsel pointed out that thus though the basis of this suit is that the respondent No. 1 is in possession of the property, whereas in earlier Civil Suit No. 748/1979 the same Respondent No. 1 in possession of the property, whereas the earlier Civil Suit No. 748/1979, the same Respondent No. 1 in paragraph 10 of the plaint has stated that under threat and because of blackmail practiced by the defendant Nos. 1 and 2, Dr. R.J. Kulkarni, the Managing Director of the respondent No. 1 Company relinquished his office, surrendered shares of Rs. one thousand of the respondent No. 1 Company in favour of the respondent Nos. 1 and 2 and Survey No. 707. The learned Counsel submitted that thus in the suit it was the stand that the possession of the land was surrendered. He further relied on the deposition of Shri Kuikarni, who was examined in Civil Suit No. 748/79 on behalf of the respondent No. 1 Company and urged that even according to that witness possession of the suit property was not with the company. The learned Counsel, therefore, submitted that the very "basis" on which the suit has been filed did not exist. The learned Counsel further submitted that the Civil Court has decided the civil suit and has recorded a categorical finding that the respondent No. 1 Company is not in possession of the suit property and in the face of that

categorical finding the courts below, ignoring that finding, could not have granted the injunction.

4. The learned Counsel further submitted, relying on the judgment of the Supreme Court in the case of *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another*, , that the question about the validity of the consent terms arrived at between the parties was raised in Civil Suit No. 748/1979. The question whether the consent term are already acted upon or not was also raised and decided in Civil Suit No. 748/79 and therefore, the present suit was barred by principles of constructive res judicata.

5. Shri Bobade, the learned Counsel appearing for the respondent No. 1, original plaintiff, urged that there is no document on the record which would show that at any point of time the respondent No. 1 Company handed over possession of the suit premises to anybody. The learned Counsel further submitted that the finding that has been recorded by the Civil Judge, Jr. Dvn., Pune in judgment in Civil Suit No. 748/79 was on the basis of the findings recorded by this Court in company petition. The learned Counsel submitted that the observations were made by this Court in the company petition in the face of the submissions made before this Court that as there is no registered deed of assignment, the respondent No. 1 the Company never became lessee of the suit premises. He submitted that the lease was infact assigned to the respondent No. 1 Company and that the respondent No. 1 Company was in actual possession of the property are admitted facts between the parties as can be seen from the consent terms. In the submission of the learned Counsel, therefore, the findings recorded in Civil Suit No. 748/79 are therefore, of no relevance for deciding the present question. The learned Counsel further submitted by referring to the statements made in the deposition of Shri Kulkarni, that the witness never stated that possession of the property was handed over to the landlords. He further submitted that there is no question of the judgment in Civil Suit No. 748/79 operating as res judicata because the present suit has been filed in the Court of Small Causes which has jurisdiction to decide questions arising between the landlord and the tenants under the Bombay Rent Act and because of the provisions of section 28 of the Bombay Rent Act, the Small Causes Court has exclusive jurisdiction to deal with these questions. The learned Counsel further relying on the judgment of the Supreme Court in the case of *D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others*, , submitted that as there is no jurisdictional error committed by the courts below, this Court cannot interfere with the orders impugned in the petition in its jurisdiction u/s 115 of the Code of Civil Procedure. The learned Counsel also relied on the observations of the Supreme Court in the case of *Ratilal Balabhai Nazar Vs. Ranchhodbhai Shankarbhai Patel and Another*, . The learned Counsel submitted that whether the respondent No. 1 is legally in possession of the property or not, whether it is entitled to be continued in the possession of the property or not are the questions that are to be decided at the trial of the suit and therefore, this Court could not interfere with the interim orders passed by the two courts below in its

jurisdiction u/s 115 of the Code of Civil Procedure.

6. Now if in the light of the rival submissions the record of the case is perused, it becomes clear that in the present civil suit the respondent No. 1 was claiming that the consent terms are bad in law and that the consent terms were never acted upon and therefore, the respondent No. 1 continues to be in possession of the suit property and as he was in possession of the suit property as a sub-lessee and as the sub-lessee by a subsequent amendment in the Bombay Rent Act created before 1st February, 1973, have been legalised, he is in possession of the suit property lawfully as a lessee and therefore, he claimed a declaration that he is tenant of the suit property and an injunction that his possession as a tenant of the suit property should not be disturbed by the petitioners. Now for granting these reliefs to the petitioners the issue that would be required to be decided by the Court would be whether the consent terms firstly were legal and valid and secondly whether they were acted upon or not.

7. Now perusal of the prayer clause of Reg. Civil Suit No. 748/79 shows that the first relief that was claimed in that civil suit was for setting aside the consent terms and the second relief that was claimed was an order of injunction restraining the defendants in that suit, namely the landlords and Supnekar, the respondent No. 2 from acting upon the consent terms. Perusal of the issue that were framed in that civil suit shows that the Issue Nos. 6, 7, 8 and 9 related to the validity of the consent terms. Issue No. 10 related to the adoption of those consent terms by the company in its General Body Meeting and issue No. 3(A) was whether the compromise, namely consent terms were acted upon or not or whether they have lapsed. Perusal of that judgment shows that the Court of 3rd Jt. Civil Judge, Jr. Dn. Pune has recorded finding on these issues. In paragraph 24, the Court has observed :--

"In the present case, the compromise decree has already been acted upon and land has been transferred in defendants" possession. Hence, plaintiffs ought to have been asked for recovery of the land. As plaintiffs have failed to ask for such a relief of recovery of possession, the suit is not maintainable. The plaintiffs have tried to contend that the plaintiff company is still in possession, but it is not the case. The compromise decree as also C.R. Application No, 98/76, goes to suggest that defendant No. 1 is in possession of 8 acres land and defendant Nos. 4 to 9 are in possession of 4 acres of land. 7/12 extracts are also in favour of defendants. The witness for plaintiff, has clearly admitted in his cross that there are crops grown in the suit property. The crops are taken by defendants. Company is not taking the crops. Company is not cultivating and there is no complaint made in writing to anybody objecting for defendants" taking the crops. Further witness has admitted in his cross that there are some tenants in the suit premises and all of them except one are giving rents to defendants."

The Court has further observed :--

"On these admissions and facts on record, go to show that defendants are in

possession of the suit property. Hence, in view of the proviso to section 34, plaintiff ought to have filed the suit for recovery of the property. Failure to do so, definitely, disentitles them for such a declaration."

The Court in paragraph 25 has observed :--

"The effect of declaration if got by plaintiffs, will be that the compromise decree will be set aside. But, as plaintiffs have already lost the possession original owners defendant Nos. 4 to 9 have already come in possession, as also the defendant No. 1 is in possession of the rest of the land, as per agreement between defendant Nos. 4 to 9 and defendant No. 1. Plaintiff will get nothing but a mere order of the Court, on piece of paper."

Thus it is clear that on both the issues that arise for consideration in the present suit, there is a clear finding recorded by the Civil Judge. Jr. Dvn. in Reg. Civil Suit No, 748/79. The Supreme Court in its judgment in the case of The Workmen of Cochin Port Trust, referred to above, in paragraph 8 has observed thus :--

"It is well known that the doctrine of res judicata is codified in section 11 of the CPC but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of section 11 of the CPC and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties. The principle of res judicata also comes into play when by a judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res Judicata on that issue is directly applicable.

When any matter which might and ought to have been made a ground of defence or attract in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and therefore, is taken as decided."

8. It is thus clear that the question whether this suit would be barred by principles of res judicata arises and that question was also raised. However, it appears from the judgment of the Appellate Court that the Appellate Court refused to consider that question at this stage, making following observations:--

"Second question is about the res judicata which is a mixed question of facts and law. Therefore, I think it is not proper to go into that question at this stage".

In my opinion before granting temporary injunction it is necessary for the Court to consider whether the plaintiff has made out a prima facie case in his favour or not. The question, therefore, whether the same issues which arise for

consideration in the present suit, were raised in the suit previously instituted between the same parties, was necessary to be considered for deciding the question whether the plaintiff has prima facie case in its favour or not. In my opinion in any case it was necessary for the Court to consider the observations made in the judgment of the trial Court in Civil Suit No. 748/79 before arriving at the conclusion whether a plaintiff has made out a prima facie case or not. However, the perusal of the judgment of both the courts below shows that both the courts below have not appreciated the conclusion reached and the findings recorded by the Civil Judge, Jr. Dvn. in the above referred suit after full trial. It is further to be seen here that the relief of injunction is clearly in the discretion of the Court. Any person who approaches the Court for such a discretionary relief is under a duty to place before the Court full facts. It is an admitted position before me that though the respondent No. 1 had approached for identical relief, the Appellate Court in Civil Appeal No. 766/94 by an order dated 4th May, 1996 has declined to grant that relief. The fact that the Appellate Court was approached for the same relief, which was declined by the Appellate Court was suppressed. It is further clear that the perusal of the order of the Second Additional Judge, Pune dated 4-5-1996 shows that while deciding the application filed by the respondent No. 1 for temporary injunction in the same terms as it claimed in the present proceedings the learned Second Additional District Judge has recorded a categorical finding that the respondent No. 1 has failed to prove that it is in possession of the entire field Survey No. 707 admeasuring 12 acres and six gunthas, In my opinion it was necessary for the respondent No. 1 to disclose to the Court this fact. Non disclosure of such an important aspect of the matter which was relevant for consideration by the courts below in my opinion does not entitle the respondent No. 1 to the discretionary relief of injunction from the Court.

9. It is further to be seen here that the learned Counsel for the respondent could not explain as to how, when they filed earlier suit namely, Civil Suit No. 748/79 on the basis that the respondent has surrendered the possession of the land, they could file this suit claiming to be in possession of the land. It is to be seen that though, specifically raised this aspect has also not been considered by the courts below.

10. Shri Manohar, submitted that the Appellate Court in paragraph 15 of the judgment has observed that the plaintiff has produced evidence in appeal to show that the plaintiff is recovering rent from the tenants. He submitted that no such evidence has been produced. Shri Bobade on the other hand submitted that it is true that the rent receipt were not filed before the Court but they were shown to the Court. He also offered to show those receipts to this Court. From the above it is clear that the rent receipts are not filed on record. In my opinion the Appellate Court committed a grave error in relying on the documents which are not filed on record. Unless documents are produced on record and an opportunity is given to the other side to inspect the documents and to controvert them, no reliance could have been placed on those documents by the Appellate

Court. Merely because the documents were shown to the Court, the Court could not have relied on them and in no case could have found fault with the petitioner for not filing counter affidavit.

11. In so far as the question of the jurisdiction of this Court to interfere with the two orders passed by the subordinate courts are concerned the Supreme Court in paragraph 8 of its judgment in the case of M/s. D.L.F. Housing and Construction Company Pvt. Ltd. referred to above, has observed :

"the words "illegally" and "with material irregularity" as used in clause (c) do not cover either errors of fact or of law: they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law after the prescribed formalities have been complied with".

12. It is therefore, clear that this Court can interfere with the decision of the subordinate Court in exercise of its revisional jurisdiction if this Court comes to the conclusion that in reaching that decision the subordinate courts have committed material error in following the procedure. In the present case, I find that for entertaining the application filed by the respondent No. 1 for injunction, the consideration of the previous litigation between the parties in relation to the same subject-matter and the orders passed therein and as also the question whether the suit would be barred of the principles of constructive res judicata or not were necessary to be gone into by the courts below. The Court by refusing to go into such question in my opinion has committed material error in exercise of its jurisdiction and therefore this Court would be entitled to interfere with the orders of the subordinate Court in exercise of its jurisdiction u/s 115 of the Code of Civil Procedure.

13. In the result therefore the present revision application succeeds and is allowed. Rule is made absolute in terms of prayer clause (a) with no order as to costs.

14. At this stage the learned Counsel appearing for the respondent No. 1 requests that the status quo as it is obtained as on today should be directed to be maintained by the parties till the respondent No. 1 gets a steno copy of this order and for the period of two weeks thereafter. The request is opposed by the learned Counsel appearing for the petitioners. He submits that though the injunction order was passed by the trial Court, it remained stayed by the Appellate Court during the pendency of the appeal and after that order was confirmed by the Appellate Court by an order dated 15-10-1997 passed in the present revision application that order was stayed by this Court and that order has remained stayed throughout the pendency of these proceedings. The learned Counsel further submits that the order directing the parties to maintain status quo is likely to be misconstrued. Because in the submission of the learned Counsel though according to the petitioners they have taken possession of the

property long back, the respondent No. 1 continues to content that the respondent No. 1 is in possession. The learned Counsel for the petitioners submits that though the activity was going on 4 acres of land during the pendency of the revision the construction activity was stopped.

15. Considering these rival submissions made, in my opinion the interest of justice would be sub-served by directing the petitioners not to re-commence their construction activity on the suit land for a period of four weeks from today, C.C. expedited.

16. Application allowed.