

(2016) 02 BOM CK 0191

In the Bombay High Court

Case No : Civil Revision Application No. 58 of 2015

Mahesh Zangoji Ghotekar

APPELLANT

Vs

Prayas Sakhare and Others

RESPONDENT

Date of Decision : 18-02-2016

Acts Referred:

Specific Relief Act, 1963 — Section 6, Section 6(1), Section 9

Citation : (2016) 166 AIC 384 : (2016) 3 AIRBomR 714 : (2016) 3 BCR 824 :
(2016) 4 MhLJ 134

Hon'ble Judges : R.K. Deshpande, J.

Bench : Single Bench

Advocate : S.A. Kalbande, Advocate, for the Appellant; S.G. Karmarkar,
Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Deshpande, J.—1. Admit.

Heard finally by consent of the learned counsels appearing for the parties.

2. The dispute arising out of a suit under Section 6 of the Specific Reliefs Act, pertains to Plot No. 8, Khasra Nos. 62, 69, 71 and 87 of Mouza Ajani in the layout Uruvila Cooperative Housing Society, Wardha Road, Nagpur, which was owned by one Smt. Jasabai, the mother of the present applicant, the original plaintiff. The respondent no. 2 Smt. Manjushri Prayas Sakhare is the daughter of Nivrutti, real brother of the plaintiff, and the respondent No. 1 is her husband. In Special Civil Suit No. 104 of 2012 filed by the applicant-plaintiff, the respondents were joined as defendant nos. 1 and 2, as it was alleged that they have forcibly taken possession of the suit premises on 01.09.2011 and the suit was filed on 02.02.2012, which was during the period of limitation of six months, about which there is no dispute.

3. The applicant-plaintiff alleged that he was in actual possession of the suit block from the year 2006 to 2008 along with his brother Nivrutti and Smt.

Umabai, the wife of Nivrutti. The respondent No. 2 Smt. Manjushri, daughter of Nivrutti, was married in the year 2000 with the respondent no. 1 and she started residing separately at her matrimonial house at Sugat Nagar, Nagpur. Nivrutti died on 27.02.2007 and Smt. Umabai, his widow, shifted to her sister's house at Jaywant Nagar Nagpur. After the death of Nivrutti and shifting of Smt. Umabai, the plaintiff was in exclusive possession of the property. The plaintiff also shifted thereafter in the year 2008 from the suit house to Beltarodi, a different locality, where he started residing. The suit block was given by him to one Dr.Dubey, who was in need of it, on the maintenance charges of Rs. 3,500/- per month. Dr.Dubey resided in the suit block from 10.07.2008 to 31.08.2011 and paid the maintenance charges of Rs. 3,500/- per month to the plaintiff. On 01.09.2011, the respondents-original defendants entered the suit house forcibly and started occupying it. These facts are not in dispute.

4. The suit was resisted by the respondents-defendants by filing written statement. It was the stand taken that the suit house is the joint family property in which the defendant no. 2 being the daughter of Nivrutti, the real brother of plaintiff, had share and there was no partition of this property. This stand taken can be prima facie accepted as undisputed. It was the further stand taken that the respondent no. 2 being the co-owner of the property cannot be evicted in a suit under Section 6 of the Specific Reliefs Act and the applicant/plaintiff is required to file a suit for partition and separate possession. According to the defendants, they were in constructive possession of the suit block and that the suit under Section 6 of the Specific Reliefs Act was not maintainable.

5. The plaintiff himself entered the witness box and examined Smt. Umabai, the mother of the respondent no. 2; Dr.Dubey who occupied the suit block from 10.07.2008 to 31.08.2011 and one another witness Shri Rameshchandra Arjundas Godbole, to whom it is alleged that the tenant/occupant Dr. Dubey had handed over the keys of the suit block after vacating it on 31.08.2011. Both the respondents have entered the witness box and they were cross examined.

6. The trial Court took the view that the property is the joint family property, the possession of all co-parcener or co-owner can be said to be the joint possession. The possession of one of the co-owner can be said to be the possession of all the co-owners. As per the specific admission of the plaintiff in his cross examination, the suit property is certainly a joint family property of the plaintiff and the defendant no. 2 and the possession of both can be said to be the joint possession over the suit property and in such circumstances, the question of dispossession of one co-owner by another co-owner does not at all arise. It is further held in paragraph 17 that all the legal heirs of Smt. Jasabai can be said to be in possession of the suit property and the defendant no. 2 being the daughter of the legal heir, namely Shri Nivruttinath, her possession can be said to be through her father Shri Nivruttinath, as a co-owner and in such circumstances, it cannot be said to be dispossession by one co-owner to another co-owner. It further holds that no doubt possession of the plaintiff over the suit property is in the

nature of joint possession as co-owner but not exclusive possession.

7. Keeping in view the pleadings, the evidence brought on record and the findings recorded by the trial Court, the following points are required to be determined by this Court.

(I) Whether the lower appellate Court was right in dismissing the suit under Section 6 of the Specific Relief Act holding that the property is the joint family property and the possession of one of the co-owners can be treated as possession of all the co-owners?

(II) Whether the plaintiff has established his claim for restoration of possession as contemplated by Section 6 of the Specific Reliefs Act.

8. Shri Kalbande, the learned counsel appearing for the applicant has relied upon the decision of this Court in case of Abdul Aziz Sk. Imam Musalman and others vrs. Sk. Amir Sk. Burham Musalman and another, reported in , AIR 1941 Nagpur 130, delivered by Shri Justice Vivian Bose, as he then was. The last paragraph of the said decision being relevant, the same is reproduced below;

"Reliance is however placed by the learned counsel for the applicant on certain statements in the written statements where the defendants admit that the property is the joint property of the plaintiff and the defendants and on a statement of defendant 5 where she admits that they have a joint title. That however has nothing to do with the question of possession under S.9. It may well be that a joint owner of property is still at the date of suit under S. 9 entitled to the property and would be given possession in a suit properly instated for the purpose. But, nevertheless, it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself. The title of the others may not be extinguished when this is done, but if that ouster took place more than six months before the institution of the suit under S.9, then for the purposes of S.9 that ouster would hold good even though the title of the plaintiff may not be extinguished. Consequently, the admission of the defendants which go to the question of title do not oust the jurisdiction of the Court, and as neither side contended that they were in joint possession within six months before the suit was filed, the lower Court was right in placing the plaintiff in exclusive and not in joint possession. The application is dismissed with costs".

This court has held that the fact that the parties have joint title over the suit property has nothing to do with the question of possession under Section 9 (now Section 6) of the Specific Reliefs Act. It further holds that it may well be that a joint owner of the property is still at the date of suit under Section 9 entitled to property and would be given possession in a suit properly instituted for that purpose. But, nevertheless, it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself. The Court further takes note of the fact that the neither side has contended that they were in joint possession within six months before the suit was filed.

9. In the another decision of the Punjab and Haryana High Court in the case of Shrimati Amar Kaur vrs. Hardev Singh and others, reported in , AIR 1992 P.& H 205, it is held in paragraph 10 that, "the mere fact that the defendants (respondents) claimed to be co-sharers will not make any difference because a co-sharer is entitled to remain in exclusive possession of separate and joint land under the arrangement consented to by other co-sharers and in that contingency it is not open to any such co-sharer to disturb the arrangement without the consent of the others except by filing a suit for partition.

10. In the another decision of the Kerala High Court in case of Abdul Rahiman vrs. Nalakath Muhammed Haji, reported in , AIR 1997 KERALA 23, it has been held in paragraph 3 that, "Section 6 provides a summary, cheap and useful remedy to a person dispossessed of immovable property otherwise than in due course of law. The object of the section is to discourage people from taking the law into their own hands, however, good their title may be. It provides a summary remedy to a person who has without his consent been dispossessed of immovable property otherwise than in due course of law, for recovery of possession without establishing title". It is further held that, "plaintiff must prove his previous possession and dispossession by the defendants otherwise than in due course of law within six months from the suit and the Court need not go into the nature of parties" possession".

11. In another decision of the Apex Court in case of Sadashiv Shyama Sawant through L.Rs and others vrs. Anita Anant Sawant, reported in , 2010 (2) Mh.L.J 805. It is held in paragraph 19 as under.

19. A landlord by letting out the property to a tenant does not lose possession as he continues to retain the legal possession although actual possession, user and control of that property is with the tenant. By retaining legal possession or in any case constructive possession, the landlord also retains all his legal remedies. As a matter of law, the dispossession of tenant by a third party is dispossession of the landlord. The word "dispossessed" in Section 6(1) must be read in this context and not in light of the actual possession alone. If a tenant is thrown out forcibly from the tenanted premises by a trespasser, the landlord has implied right of entry in order to recover possession (for himself and his tenant). Similarly, the expression "any person claiming through him" would bring within its fold the landlord as he continues in legal possession over the tenanted property through his tenant. As a matter of fact, on plain reading of Section 6(1), it is clear that besides the person who has been dispossessed, any person claiming through him can also file a suit seeking recovery of possession. Obviously, a landlord who holds the possession through his tenant is competent to maintain suit under Section 6 and recover possession from a trespasser who has forcibly dispossessed his tenant. A landlord when he lets out his property to the tenant is not deprived of his possession in the property in law. What is altered is mode in which the landlord held his possession in the property inasmuch as the tenant comes into physical possession while the landlord retains possession through his

tenant. The view of Calcutta High Court that where the tenant was forcibly ejected from the land by the third party, it may reasonably be held that landlord has also been dispossessed is the correct view. We find ourselves in agreement with the view of Bombay, Patna, Pepsu and Rajasthan High Courts and hold, as it must be, that there is nothing in Section 6 of the Act to bar a landlord from suing a trespasser in possession even when, at the date of dispossession, the property is in actual occupation of a tenant entitled to possession. The views expressed by Madras High Court in *Veeraswami Mudali* (supra) and *(Kanneganti) Ramamanemma* (supra) and by Nagpur Judicial Commissioner in the case of *Ramchandra* (supra) do not lay down the correct law.

It is held that a landlord by letting out the property to a tenant does not lose possession as he continues to retain the legal possession although actual possession, user and control of that property is with the tenant. By retaining legal possession or in any case constructive possession, the landlord also retains all his legal remedies. As a matter of law, the dispossession of tenant by a third party is dispossession of the landlord. It further holds that a landlord when lets out his property to the tenant is not deprived of his possession in the property in law. What is altered is mode in which the landlord held his possession in the property inasmuch as the tenant comes into physical possession while the landlord retains possession through his tenant.

12. Keeping in view the law laid down in the aforesaid decision, the undisputed factual position in the present case will have to be looked into. The suit block was owned by Smt. Jasabai, the mother of the plaintiff and from the year 2006 it was in actual and physical possession of the plaintiff, his brother Nivrutti and Smt. Umabai, the wife of Nivrutti. The defendant no. 2 was married in the year 2000 and she started residing separately along with her husband at different place and was not in actual physical possession of the suit property. Nivrutti died on 27.02.2007 and thereafter Smt. Umabai, his widow, shifted to her sister's house. The plaintiff continued to remain in actual physical possession of the suit property till 2008 when he inducted Dr. Dubey as tenant in the suit block on monthly maintenance of Rs. 3,500/- and shifted himself to another place at Beltarodi. Dr.Dubey occupied the suit block from 10.07.2008 to 31.08.2011 and paid the month maintenance of Rs. 3,500/- to the plaintiff.

13. It is not the case of the respondents/ defendants pleaded in the written statement that they were in joint possession of the suit block as co-sharers at any time after the year 2000 i.e. when the respondent no. 2 married with the respondent no. 1. There is no such evidence led by the defendant that they were in joint possession along with the plaintiff in respect of the suit block. On the contrary, it is admitted in the oral evidence that Dr.Dubey was in actual possession of the suit block from 10.07.2008 to 31.08.2011 and was paying monthly maintenance charges of Rs. 3,500/- to the plaintiff. Merely because the property is the joint family property, it does not follow that for the purposes of Section 6 of the Specific Reliefs Act, the possession of one of the co-owner can

be treated as the possession of all the co-owners.

14. In terms of the decision of this Court in the case of Abdul Aziz Sk. Imam (cited supra) in the absence of any case of joint possession of the suit block, the finding of the trial Court that the suit property is the joint family property and possession of all co-owners or co-parceners can be treated to be the joint possession, cannot be accepted for the purpose of Section 6 of the Specific Reliefs Act. In terms of decision of the Apex Court in case of Sadashiv Shayma Sawant (cited supra), the plaintiff continues to be the landlord or licensor in respect of the suit property and Dr. Dubey, the occupant from 10.07.2008 to 31.08.2011, holding the possession for and on behalf of the plaintiff. The plaintiff continued to retain legal or constructive possession over the suit block and the defendants could not have entered the suit block on 01.09.2011. In view of this, even if all the findings recorded by the Trial Court in favour of the defendants are accepted, still the plaintiff cannot be denied the relief of possession. The trial Court has committed an error in dismissing the suit for possession and it has to be held that the plaintiff is entitled to restore the possession over the suit property. Both the questions are answered accordingly.

15. In the result, the judgment and order dated 13.03.2015 passed by the trial Court in Special Civil Suit No. 104 of 2012 is hereby quashed and set aside. The Special Civil Suit No. 104 of 2012 is decreed and the respondents-defendants are directed to hand over the vacant possession of the suit house to the plaintiff and to pay the plaintiff damages/mesne profit or occupational charges at the rate of Rs. 500/- per day from the date of dispossession till the decision by the trial Court on 13.03.2015. No order as to costs.

16. At this stage, the learned counsel for the respondents prays for stay of the decision of this Court for a period of eight weeks.

In view of this, the possession of the respondents shall not be disturbed for a period of six weeks from today, after expiry of which the plaintiff/applicant shall be entitled to get the decree executed in accordance with law.