ssp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELATE JURISDICTION
WRIT PETITION NO.1550 OF 1997

1 Bhagirathi G. Khedkar
(since deceased through L.Rs)
1a Mahadev Ganu Khedkar
1b Vithal Ganu Khedkar
1c pandurang Ganu Khedkar
1d Sunanda Gopal Kamble

2 Vatsala Ganu Khedkar
3 Sushila Ganu Khedkar ...Petitioners

vs.

Anuradha Vijay Prabhu ...Respondent

Mr.Suresh Gole for the petitioners
Mr.Pratap Patil i/b Mr.B.R.Patil for the respondent

CORAM :A.S.OKA,J.
DATE : NOVEMBER 30,2010

ORAL JUDGMENT :

1 Heard the learned counsel for the petitioners. The respondent in this writ petition under Article 227 of Constitution of India is the original second plaintiff. The petitioners are 2nd, 3rd and 4th obstructionists.

2 In execution of a decree for possession passed in favour of the respondent, the obstructionists viz; the present petitioners and one Genu, husband of the first petitioner obstructed the execution of the decree. Therefore, obstructionist notice was taken out by the respondent under Rule 97 of Order XXI of the Code of Civil Procedure,1908 (hereinafter referred to as the said Code) for removal of obstruction. The first

obstructionist Genu filed a reply for himself and on behalf of other obstructionists. As stated above, the present first petitioner is the wife of the first obstructionist. The 2nd and 3rd petitioners are daughters of the first petitioner. In the reply it was contended that the first plaintiff was a tenant in respect of the godown premises and surroundings of open space. The first obstructionist contended that he was in the employment of the first plaintiff in his Charcoal shop for about 45 to 50 years. A specific contention was raised that about 42 to 45 years back the first plaintiff had let out as a sub tenant a portion of the open space to the first obstructionist on which he had put up construction of a room. The case of the obstructionist in the reply is that the first plaintiff has charged rent of Rs.5/- p.m which amount on some occasion was deducted from the salary payable to the first obstructionist. It is the specific case that on some occasions, the first plaintiff used to pass rent receipt. It is contended that the first obstructionist was paying rent to the respondent (second plaintiff) at the instance of the first plaintiff. Further case made out in the reply is that as the first plaintiff was desirous of constructing a temple of Saibaba, on his request he demolished the said room and put up a new room on another plot which was given to him by the second plaintiff in lieu of earlier plot. It is his case that he was inducted as sub-tenant in the year 1957 and therefore, as the sub tenancy was in existence in the year 1959, he became a lawful sub-tenant.

3 The obstructionist notice was heard by the learned Trial Judge who recorded a finding that the obstructionist was a lawful sub-tenant of the plaintiffs in respect of the suit premises. The trial Court held

that the respondent has failed to prove that the obstruction was caused by the obstructionist without any just cause or the obstruction was caused on instigation of the Judgment Debtor. The learned trial Judge did not consider the evidence of the present first petitioner. Therefore, the Notice was discharged.

4 An appeal was preferred by the respondent. In the appeal, the Appeal Bench of Court of Small Causes has interfered by holding that the obstructionists failed to prove that the first obstructionist was a lawful sub-tenant of the first plaintiff. The Appellate court recorded a finding on the first point that the obstructionists have no independent right and interest in respect of the premises. Therefore, Appeal Bench proceeded to make obstructionist notice absolute.

5 Inviting attention of the Court to the finding recorded by the Trial Court on the first issue, the learned counsel for the petitioner submitted that unless it was established by the Decree Holder that the obstruction to the decree was occasioned without any just cause by the Judgment Debtor or by some other person or at the instigation of the Judgment Debtor or on his behalf, or by transferee of the Judgment Debtor pendente lite, the order of removal of obstruction cannot be passed. He relied upon the rules 97 and 98 along with rule 101 of Order XXI of the said Code in support of his submission. He submitted that the finding on this aspect was recorded by the trial Court against the respondent-plaintiff and the said finding has not been upset by the Appeal Bench. He submitted that unless said finding was disturbed, the obstructionist notice could not have been made absolute. He submitted that even the finding recorded by the Appeal Bench on the issue of sub tenancy

is perverse. He submitted that the evidence of the first obstructionist was not taken into consideration by the trial Court by observing that the first obstructionist was not in a position to depose. He submitted that the first petitioner stepped into witness box and stated that the first obstructionist was inducted as a tenant by the first plaintiff. He submitted that no evidence was adduced by the plaintiffs to deny the statement on oath. He submitted that in view of the nature of the finding of the trial Court that the first obstructionist was not capable of giving evidence, the Appeal Bench could not have interfered with the said finding as the said finding was based on the observations made by the trial Court during the course of recording of evidence. He submitted that the Appeal Bench committed an error by relying upon the deposition of the first obstructionist. He submitted that unless it was established that the view taken by the trial court was perverse, there was no reason for the Appeal Bench to take a different view. He submitted that the petitioners cannot be thrown out on the basis of the collusive decree obtained by the original plaintiffs.

6 I have given careful consideration to the submissions. The first obstructionist for himself and on behalf of the present petitioners filed a reply to the obstructionist notice. In paragraphs 3 and 4 of the reply, the first obstructionist has stated thus :

> 3 I say that originally the plaintiff no.1 herein was a tenant in respect of the godown premises and the surrounding open space. The said Shri Kashinath Dalvi was carrying on business of charcoal from the said godown premises. I say that I was in the employment

of the said Shri Dalvi in his charcoal shop about 45-50 years back. I say that about 40-45 years back the said Shri Dalvi let out as a sub-tenant a portion of the said open space, on which I put up a construction consisting of a room of about 10 x 12 area. The rent charged by the said Shri Dalvi was nominal viz. Rs.5/- per month, which he some times used to deduct from my salary and some times I used to pay him myself. I say that for such tenders of rent, the said Shri Kashinath Dalvi, some times used to pass receipts and some times not. I say that subsequently I was paying rent to the plaintiff no.2 at the instance and request of the plaintiff no.1. I say that I had in my possession such receipt passed by the plaintiff no.1, but the same are not with me now in the circumstances stated hereinafter.

4 I say that somewhere in 1955-1956 the said Kashinath Dalvi the plaintiff no.1 herein decided to close down his business of charcoal and accordingly he did close down the same. I say that thereafter somewhere in 1957 the plaintiff no.1 wanted to put up a temple of Shri Sai Baba and for that purpose he wanted me to shift to another part of the open space and he requested me to do so. I say that accordingly, I demolished and dismantled the said old construction and put up a room admeasuring 10 x 12 at the said new plot which was given to me in lieu of surrendering the said old portion. I say that the said new plot, on which I constructed the said new room admeasuring as above, was also given to me as a

> sub-tenant, on the same terms and conditions. I say that this happened in 1957. I submit that by virtue of the Amendment of the Rent Act, 1959, I have become the lawful sub-tenant in respect of the said space. I say that I am fully protected under the Bombay Rent Act and accordingly claim protection of the Rent Act.

7 Even assuming that the evidence of the first obstructionist is discarded on the ground that he was not in a position to depose, it will be necessary to note the evidence of the second petitioner (second obstructionist). Though in the reply to the obstructionist notice a specific case was made out that it was the first obstructionist who constructed a room admeasuring 10 x 12 , no such case was made out by the second obstructionist in her evidence. On the contrary, the evidence of the second obstructionist is completely silent about the construction of the room/suit premises by her husband. Though the case made out in the reply was that the first obstructionist used to pay rent even to the present respondent, no such case was made out by the second obstructionist in her evidence and according to her, she used to pay rent to the other plaintiff. Though second obstructionist claimed to be paying rent to the first plaintiff, not a single rent receipt was produced by her.

8 Perusal of the Judgment of the Appellate Court shows that the evidence of the first petitioner has been considered. In paragraphs 16 and 17 of the Judgment, the Appeal Bench has discussed the aforesaid factual aspects. The learned Judges noted that though a case is made out by the first obstructionist that at the instance of the first plaintiff rent was being paid to the second

plaintiff, the first plaintiff has not deposed about the payment of the rent to the second plaintiff. Thus, the evidence of the first petitioner (second obstructionist) is inconsistent with the stand taken in the affidavit in reply filed by the first obstructionist for himself and on behalf of other obstructionist. Considering all this, the Appellate Court disbelieved the case of the obstructionists that the first obstructionist was inducted as a sub-tenant by the first plaintiff. It is not as if that the entire case of the petitioners has been disbelieved by the Appeal Bench only on the basis of the deposition of the first obstructionist. The evidence of the first petitioner was found completely inconsistent with the stand taken in the reply. Thus, a finding of fact has been recorded by the Appellate Court that the petitioners failed to establish that the first obstructionist was inducted as a lawful sub-tenant of the first plaintiff prior to the year 1959. In writ jurisdiction it is not possible to upset the finding on the issue of sub tenancy recorded by the Appeal Bench in as much as the said finding is based on the appreciation of evidence.

9 The case of the decree holder was that the obstructionists obstructed the execution at the instance of and at the instigation of the defendants. After the petitioners obstructionists failed to substantiate their specific case that the first obstructionist was inducted as a lawful sub-tenant, the case made out by the respondent-plaintiff that the obstruction has been caused at the instance and at the instigation of the defendants has been accepted. The case of the respondents was that the obstruction was caused at the instance of and at the instigation of the defendants. The case set up by the petitioners was that the first obstructionist was a

lawful sub tenant. After having failed to establish the case of sub tenancy, the case made out by the respondent has been accepted and therefore, a specific finding has been recorded in paragraph 30 of the impugned Judgment that the obstructionists obstructed the execution proceedings at the instance of and at the instigation of the defendants. Hence, there is a specific finding recorded which has a result of upsetting the finding of the executing court on the first point.

10 In view of what is discussed above, this is not a case in which in writ jurisdiction interference can be made with the orders passed by the Courts below. There is no merit in the writ petition. Writ petition is rejected. Rule is discharged with no order as to costs.

JUDGE