

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Civil) No(s).8904/2009

(From the judgment and order dated 10/02/2009 in FA No.25792/2008 of The HIGH COURT OF BOMBAY)

VIVEK SHANTARAM DHURI

Petitioner(s)

VERSUS

RAKESH RAJENDRAKUMAR AGARWAL & ANR.

Respondent(s)

(With appln(s) for permission to file rejoinder affidavit and direction and permission to file additional documents and prayer for interim relief and office report)

Date: 07/03/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE G.S. SINGHVI

HON'BLE MRS. JUSTICE RANJANA PRAKASH DESAI

For Petitioner(s) Mr. Jaideep Gupta, Sr. Adv.  
Mr. Shivaji M. Jadhav, Adv.  
Mr. Brij Kishor Sah, Adv.  
Mr. Rahul Jain, Adv.  
Mr. Anish R. Shah, Adv.

For Respondent(s) Mr. V.A. Mohta, Sr. Adv.  
Mr. Satyajit A. Desai, Adv.  
Mr. Somnath Padhan, Adv.  
Mr. Srikant Munghate, Adv.  
Mr. Nilakanta Nayak, Adv.  
Ms. Anagha S. Desai, Adv.  
  
Mr. Pankaj Gupta, Adv

UPON hearing counsel the Court made the following  
O R D E R

This petition is directed against judgment dated 10.2.2009 of the learned Single Judge of the Bombay High Court whereby he dismissed the appeal filed by the petitioner and upheld the judgment and decree passed by Civil Judge (Senior Division), Vasai (hereinafter referred to as "the trial Court") in Special Civil Suit No.59/2007.

In the suit filed by him, the plaintiff (respondent No.1 herein) prayed for issue of a direction to the defendants (the petitioner and respondent No.2 herein) to handover vacant possession of Shop Nos.4 to 7 of Trimurti Building situated at village Diwanman, Taluk Vasai and pay compensation for the period from 4.1.1999 to 9.3.1999 at the rate of Rs.35,200/- per day and from 10.3.1999 till the date of delivery of possession at the rate of Rs.400/- per day. This prayer of respondent No.1 was founded on the following assertions:

1. that he had purchased the suit property from respondent No.2 vide registered agreement for sale dated 19.5.1998,
2. that he had paid the total consideration of Rs.4 lacs by cheque and,
3. that respondent No.2 did not hand over possession of the

shops because the same had been unauthorizedly occupied by the petitioner.

In the written statement filed by him, respondent No.2 admitted the claim of respondent No.1. He averred that the suit property was sold to respondent No.1 for a sum of Rs.4 lacs. He further averred that possession of the suit property was not given to respondent No.1 because the shops were with the petitioner. According to respondent No.2, he had given the shops to the petitioner for temporary use without any consideration and the latter had agreed to vacate the same within short period, but he did not fulfill his promise. Respondent No.2 further averred that the petitioner purchased some portion of the same building and he was having showroom of Hero Honda under the name of Dhuri Motors.

In a separate written statement filed by him, the petitioner pleaded that the shops sold by respondent No.2 belongs to the partnership of S/Shri Dilip Jugaldas Shah, Anton Gonsolves and Pandit Kaka Purohit and respondent No.2 did not have the right to sell the same to respondent No.1. Another plea taken by the petitioner was that he had purchased the suit property and paid more than 90% of the total consideration.

On the pleadings of the parties, the trial Court framed the following issues:

1. Whether Plaintiff proves that he had purchased the shop Nos.4 to 7 situated at Building namely "Trimurti Centre" in village Diwanman, Navghar, Tq. Vasai on 19/05/1998 by registered agreement for sale?
2. Whether Defendant No.1 proves that Defendant No.1 had permitted Defendant No.2 to use the said suit shop on licence without consideration on temporary basis?
3. Whether Defendant No.2 proves that the shop Nos. 4 to 7 in Trimurti Building had been purchased by him in 1992 and obtained possession thereof?
4. Whether Plaintiff is entitled to seek vacant and peaceful possession of suit shop Nos. 4 to 7 from Defendant No.2?
5. What order?

After considering the pleadings of the parties and evidence produced by them, the trial Court decreed the suit and directed the petitioner to hand over the vacant and peaceful possession of the suit property to respondent No.1.

The appeal filed by the petitioner was dismissed by the learned Single Judge of the High Court, who agreed with the trial Court that the petitioner had not adduced any evidence to prove that he had purchased the suit property and had paid 90% of the price to the vendor. The learned Single Judge further observed that respondent No.1 had purchased the property by registered agreement of sale and, therefore, he would stand in the shoes of the vendor, i.e., respondent No.2 and would be clothed with all the rights vested in the latter. He rejected the petitioner's arguments that respondent No.2 could not have sold the suit property belonging to the partnership firm by observing that he himself had purchased shop Nos.1, 2 and 3 from respondent No.2 and thereby admitted his title to the property.

Shri Jaideep Gupta, learned senior counsel appearing for the petitioner argued that the impugned judgment is liable to be set aside because while dismissing the appeal, the learned Single Judge did not advert to the findings recorded by the trial Court on various issues and did not discuss the evidence produced by the parties. He then argued that the trial Court committed serious error by declaring that the agreement for sale entered into between respondent Nos.1 and 2 had the effect of conveying the title in favour of respondent No.1. Learned senior counsel submitted that the judgment of the Division Bench of the Bombay High Court in State of Maharashtra and others v. Mahavir Lalchand Rathod and another 1993 MhLJ 1492 is clearly distinguishable because the agreement executed in that case contained stipulations from which it could be inferred that the parties had intended to convey the title. Shri Gupta invited our attention to clause 22 of the agreement for sale executed by respondent No.2 in favour of

respondent No.1 and argued that the suit for possession filed by respondent No.1 was not maintainable because the agreement for sale did not confer title upon him.

Shri V.A. Mohta, learned senior counsel appearing for respondent No.1 supported the judgment under challenge and argued that the petitioner has no locus to challenge the decree passed by the trial Court because he had illegally retained possession of the shops which were given to him by respondent No.2 for temporary use. Shri Mohta then referred to the provisions of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short, 'the Act') and argued that the trial Court and the High Court rightly treated the agreement for sale dated 1.9.2005 as conveyance deed and the decree passed by the trial Court did not suffer from any legal infirmity warranting interference by the High Court. Shri Mohta submitted that the impugned judgment cannot be termed as erroneous on the ground that the learned Single Judge did not elaborately consider the pleadings and evidence of the parties because he has discussed all the issues and recorded his reasoned agreement with the trial Court.

We have considered the respective arguments. In our opinion, the petitioner's challenge to the decree passed by the trial Court and the impugned judgment is wholly meritless and the special leave petition is liable to be dismissed.

In the written statement filed by him, the petitioner had pleaded that his possession was lawful because he had purchased the suit property, i.e., the shops from respondent No.2 and paid 90% of the sale consideration. However, no evidence was produced by him to prove the factum of purchase or payment of 90% of the price. Neither the agreement allegedly executed between the petitioner and respondent No.2 or the partnership firm was tendered in evidence nor any document was produced to show that he had paid 90% of the consideration. In contrast, respondent No.2 had pleaded that the petitioner had purchased three other shops in the same building and he had given temporary possession of the suit property to the petitioner with the understanding that the latter would vacate the shop within a short period and will make separate arrangement. For the sake of reference, paragraph 3 of the written statement filed by respondent No.2 is extracted below:

"The galas stated in the plaint of suit are sold by registered sale deed and sale price of the same were accepted by way of cheques said cheques were encashed from Syndicate Bank, Vasai. But at the time of said registration possession of said galas were not given to the plaintiff by the defendant because said galas were given by this defendant to the defendant no. 2 Vivek Shantaram Dhuri, who was acquainted with this defendant, for temporary use without any consideration. At the time when this defendant sold galas to the plaintiff by registered sale deed, the defendant no. 2 told this defendant that he would vacate said galas within short period and that he will make separate arrangement. Hence this defendant told the plaintiff that he will handover possession within a month time after registration. Defendant no.2 purchased galas from this defendant of same building and he has shown room of Hero Honda in that premises under name of Dhuri Motors. Since the galas in suit shops were vacant and as this defendant knew defendant no. 2 he gave said galas to defendant no. 2 for use without any consideration. But the defendant no. 2 later on avoided and neglected to vacate said galas. No transaction of any nature took place in between defendant no. 2 and the present defendant in respect of these galas. The defendant no. 2 have no right, interest to use the said galas."

The trial Court analysed the evidence and held that the petitioner has miserably failed to prove that he had purchased the suit property from respondent No.2 and paid 90% of the price. The learned Single Judge independently considered the pleadings and evidence of the parties and expressed his agreement with the trial Court.

In the context of the concurrent findings recorded by the trial Court and the High Court, we asked Shri Gupta to show whether any documentary evidence was produced by his client to prove the factum of purchase of the suit property. In reply, the learned senior counsel fairly stated that his client did not produce any evidence to substantiate his assertion about purchase of the suit property from respondent No.2 and payment of 90% of the sale consideration. Therefore, we do not have the slightest hesitation to hold that the petitioner has no right whatsoever to retain possession of the suit property, which was given to him by respondent No.2 for temporary use. We further hold that the petitioner is guilty of reprehensible conduct of retaining possession of the suit property with the mala fide intention of grabbing the same.

The argument of Shri Jaideep Gupta that the agreement for sale executed by respondent No.2 in favour of respondent No.1 did not have the effect of conveying title in favour of the latter and that in the absence of title, respondent No.1 was not entitled to file suit for possession sounds attractive in the first blush but, on a careful examination of various clauses of the agreement and the provisions of Sections 4 and 4A of the Act, we are convinced that the trial Court did not commit any error by relying upon the ratio of the judgment in State of Maharashtra and others v. Mahavir Lalchand Rathod (supra) holding that respondent No.2 had the locus to file the suit. It is not in dispute that respondent No.1 had entered into an agreement for sale of the suit property and paid rupees 4 lacs to respondent No.2. He had also paid the stamp duty and registration charges amounting to Rs.64,180/-. Therefore, all the rights, title and interest in the suit property stood transferred in favour of respondent No.1 and he was entitled to sue the petitioner and respondent No.2.

The learned counsel's criticism of the judgment of the learned Single Judge is also untenable. The parameters for exercise of jurisdiction by the appellate Court have been succinctly laid down in Sarju Pershad vs. Raja Jwaleshwari Pratap Narain Singh and others AIR 1951 SC 120, paragraph 7 of which reads thus:

"7. The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact [Vide Lord Atkin's observations in W.C. Macdonald v. Fred Latimer A.I.R. 1929 P.C. 15. The gist of the numerous decisions on this subject was clearly summed up by Viscount Simon in Watt v. Thomas [1947] A.C. 484 at 486, and his observations were adopted and reproduced in extenso

by the Judicial Committee in a very recent appeal from the Madras High Court (Saraveeraswami v. Talluri). The observations are as follows :-

"But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

On the basis of above discussion, the special leave petition is dismissed. The petitioner is directed to handover vacant possession of the shops to respondent No.1 within four weeks from today and submit a report to this effect in the Registry of the Bombay High Court. The Registry shall list the matter before an appropriate Bench after obtaining direction from the Chief Justice. If the concerned Bench finds that the petitioner has not complied with the direction contained in this order, then the High Court shall initiate proceedings against him under the Contempt of Courts Act, 1971 and pass appropriate order.

(KUSUM SYAL)  
SR.P.A

(PHOOLAN WATI ARORA)  
COURT MASTER