

BALKRISHNA DATTATRAYA GALANDE

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v.

BALKRISHNA RAMBHAROSE GUPTA AND ANOTHER

(Civil Appeal No. 1509 of 2019)

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February 06, 2019

**[R. BANUMATHI AND R. SUBHASH REDDY, JJ.]**

*Specific Relief Act, 1963:*

s. 38 – Suit under – Seeking permanent injunction against the defendant – Claiming to be in actual possession of the suit property being the tenant thereof – Defendant-Landlord’s case was that there was no relationship of tenant-landlord between the parties since the year 1991 when the tenant had vacated the premises pursuant to a settlement entered in a suit – Trial court dismissed the suit on the ground that the plaintiff failed to prove his possession – First appellate court decreed the suit holding that the plaintiff established his possession – High Court upheld the order of appellate court – On appeal, held: A suit under s. 38 for the relief of permanent injunction cannot be granted unless the plaintiff proves that he was in actual possession of the suit property – Trial court on appreciation of oral and documentary evidence rightly held that the plaintiff failed to prove actual possession over suit property – Appellate Court and High Court were not correct in setting aside judgment of trial court by drawing inference of possession of the plaintiff – Suit is dismissed.

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**Allowing the appeal, the Court**

**HELD:** 1. The first respondent-plaintiff has filed the suit under Section 38 of the Specific Relief Act seeking permanent injunction on the ground that he is in actual possession of the suit property. Grant of permanent injunction results in restraining the defendant’s legitimate right to use the property as his own property. Under Section 38 of the Specific Relief Act, an injunction restraining the defendant from disturbing

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- A **possession may not be granted in favour of the plaintiff unless he proves that he was in actual possession of the suit property on the date of filing of the suit. [Para 11][798-F, G]**
2. **Case of the appellant-defendant was that a settlement was arrived at between the parties in an earlier suit filed in 1988 and pursuant to the settlement, the plaintiff had vacated the premises in 1991. This has not been rebutted by the plaintiff by adducing substantive evidence. The plaintiff has to prove his actual possession on the date of filing of suit. The First Appellate Court concluded that the appellant-defendant had failed to prove that the plaintiff has vacated the premises in 1991 after withdrawal of earlier suit. The possession of the plaintiff cannot be based upon the inferences; drawn from circumstances. The plaintiff has to prove actual possession for grant of permanent injunction. [Para 11][798-H; 799-A-B]**
- D **3. The trial court pointed out that on the date of inspection by Commissioner, the premises was not fit for conducting the hotel business. The trial court rightly rejected the contention of the plaintiff that he has carried out repairs after the inspection by the Commissioner observing that the first respondent-plaintiff has failed to produce documents such as the order of the court permitting him to carry repairs, receipts of material purchase and labour charges paid etc. From the photographs filed by the plaintiff, the trial court rightly concluded that the condition of the said premises was not at all fit for any purpose. [Para 10][798-E]**
- F **4. According to the plaintiff, he was conducting business of hotel and Pan shop in the suit premises and also carrying on fabrication work. For running the business of hotel and Pan shop, two licences are required. In his evidence, the plaintiff admitted that he was not holding any licence. The plaintiff had admitted that three-phase electricity connection is required for carrying out the business of fabrication which he was allegedly carrying on in the suit premises. But in his cross-examination, he admitted that he does not have such three-phase electricity connection at the suit premises. In the**
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absence of licence and the requisite electricity connection, the trial court rightly rejected the plea of the plaintiff that he has been carrying on business of hotel, Pan shop and fabrication work at the suit premises. [Para 12][799-C-F]

5. Defendant's plea that after 1991, the plaintiff was not in possession of the suit property is corroborated by the evidence of 'S'. Based upon the evidence of the defendant and of 'S', the trial court has arrived at conclusion that in all probability, the first respondent-plaintiff must have vacated the suit premises in the year 1991. This conclusion of the trial court is fortified by yet another circumstance viz., non-payment of rent by the respondent-plaintiff from the year 1991. The defendant had also not initiated any proceedings claiming rent or arrears of rent. After filing of the suit in 2004, the plaintiff has sent a cheque dated 14.05.2005 for Rs.10,395/- towards payment of rent for 189 months thereby admitting that he has not paid the rent for more than fifteen years. The plaintiff has suppressed the material fact that he has not paid the rent from 1991. The trial court observed that the plaintiff has not come to the court with clean hands and that he cannot sustain his claim for the equitable relief of permanent injunction. [Paras 13 and 14][799-G-H; 800-B-D]

6. The party seeking injunction based on the averment that he is in possession of the property and seeking assistance of the Court while praying for permanent injunction restraining other party who is alleged to be disturbing the possession of the plaintiff, must show his lawful possession of the property. Having not paid rent for more than fifteen years, it cannot be said that possession of the plaintiff can be said to lawful possession entitling him to grant of permanent injunction. [Para 15][800-E-F]

7. In the earlier suit, the tenanted premises was described as only one room. In its order in the interlocutory application in the present case, the trial court had pointed out that the total area of the premises described in all the schedule

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- A is 356 sq. ft. When the defendant decided to develop his property through second respondent-builder and in that regard, a public notice was given, the plaintiff issued notice dated 13.04.2000 through his advocate claiming that he was a tenant of the portion of the land measuring 1000 sq. ft. since last twenty two years. The objection of the plaintiff was, however, rejected by the Corporation and layout of the proposed building on the said land was sanctioned by the Corporation. This conduct of the plaintiff also disentitles him from claiming the equitable relief of permanent injunction and these aspects were not properly appreciated by the First Appellate Court.
- B [Para 16][800-G-H; 801-A-B]

- C 8. Upon appreciation of the oral and documentary evidence, the trial court rightly held that the plaintiff failed to prove his actual and physical possession over the suit property on the date of the suit. When the finding of the trial court was based on oral and documentary evidence, the First Appellate Court and the High Court were not right in setting aside the judgment of the trial court by drawing inference of possession from Purshis Ex.-41. The First Appellate Court and the High Court fell in error by presuming that the plaintiff was in possession by merely relying upon the prior suit filed by the appellant-defendant for possession and Purshis Ex.-41. The impugned order of the High Court affirming the findings of the First Appellate Court is not sustainable and is liable to be set aside. [Para 18][801-D-F]
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F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1509 of 2019.

From the Judgment and Order dated 23.06.2016 of the High Court of Judicature at Mumbai in Writ Petition No. 6873 of 2016.

G S. M. Jadhav, Ms. Qurratulain, Nicholas Choudhary, Ms. Amandeep Kaur, M/S. S.M. Jadhav And Company, Advs. for the Appellant.

Dr. Abhishek Atrey, Brijesh Panchal, Vikash Gupta, Sandeep Chaudhary, Advs. for the Respondents.

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The Judgment of the Court was delivered by A

**R. BANUMATHI, J.** 1. Leave granted.

2. This appeal arises out of the judgment dated 23.06.2016 passed by the High Court of Judicature at Mumbai dismissing the Writ Petition No.6873 of 2016 thereby affirming the judgment of the First Appellate Court decreeing the first respondent's suit for permanent injunction. B

3. The first Respondent-plaintiff claiming to be a tenant filed a suit in the year 2004 for permanent injunction restraining the appellant-landlord from disturbing his peaceful possession in the suit premises. Case of the first respondent-plaintiff was that he was running eating house, a pan shop and was also doing fabrication work in the suit premises which has been constructed in tin sheet, wooden logs and rafters. According to the first respondent-plaintiff, he was inducted in the suit premises as a tenant in the year 1977 on monthly rent of Rs.55/- . Appellant-defendant has earlier instituted a suit against the first respondent-plaintiff in RCS No.1004/1988 and the said suit was dismissed as withdrawn. The first respondent-plaintiff averred that he repeatedly called upon the appellant-defendant to carry out the necessary repairs in the suit premises; however, the appellant-defendant refused to carry out the repairs. The first respondent-plaintiff further alleged that after obtaining permission from the Corporation for effecting the necessary repairs, when he was about to start the repair works, on 19.08.2004, the appellant-defendant came along with his men and obstructed the first respondent-plaintiff from carrying out the repairs. Hence, the first respondent-plaintiff was constrained to file the suit for permanent injunction. C

4. The appellant-defendant filed a written statement contending that the first respondent-plaintiff was in occupation of only one room until the year 1991. According to the appellant-defendant, earlier he instituted a suit in RCS No.1004/1988 against the first respondent-plaintiff and during the pendency of that suit, parties arrived at a settlement and in pursuance of that settlement, the first respondent-plaintiff had handed over the possession of the suit premises to the appellant-defendant. Accordingly, the appellant-defendant filed Purshis Ex.-41 on 23.04.1991 seeking permission to withdraw the suit and the said suit was disposed of on 26.04.1991. According to the appellant, the relationship between the parties as landlord-tenant F

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- A ceased to exist. The appellant further averred that he had executed a Development Agreement with the second respondent and when he was about to start the development of the suit premises, the first respondent-plaintiff had filed the suit for permanent injunction and therefore, prayed for dismissal of the suit.
- B 5. Based upon the pleadings and evidence, relevant issues were framed before the trial court. Upon consideration of oral and documentary evidence, the trial court dismissed the suit holding that the first respondent-plaintiff has not produced any licence or electricity connection to show that he was running the hotel, pan shop and doing fabrication work showing that he has been carrying on the business
- C from the suit premises. The trial court held that the plea of the first respondent-plaintiff that he has been in occupation of the suit premises is not acceptable. Referring to the settlement arrived at, in RCS No.1004/1988, the trial court pointed out that after disposal of RCS No.1004/1988, the first respondent-plaintiff had not paid the rent and
- D that the first respondent-plaintiff failed to establish that he was the tenant in the suit premises and on those findings, the trial court dismissed the suit.
- E 6. In appeal the First Appellate Court allowed the appeal filed by the first respondent-plaintiff by holding that there is nothing on record to show that after withdrawal of the earlier suit i.e. RCS No.1004/1988, the first respondent-plaintiff has vacated the suit premises in the year 1991. After referring to the evidence of the first respondent-plaintiff (PW-1) and other evidence, the First Appellate Court held that the first respondent-plaintiff had established his possession over the suit property and that the trial court erred in
- F drawing presumption of possession based on withdrawal Purshis Ex.- 41 filed in RCS No.1004/1988. Challenging the judgment of the First Appellate Court, the appellant-defendant filed the Writ Petition No.6873 of 2016 before the High Court under Article 227 of the Constitution of India which came to be dismissed by the impugned judgment.
- G 7. We have heard the learned counsel appearing for both the parties and perused the impugned judgment and materials on record. When the first respondent-plaintiff has neither proved his actual possession nor shown to have paid the rent from the year 1991, in the suit filed by the first respondent-plaintiff under Section 38 of the
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Specific Relief Act, whether the High Court and the First Appellate Court were right in granting permanent injunction in favour of the first respondent-plaintiff, is the point falling for consideration in this appeal.

8. Both the First Appellate Court and the High Court mainly relied upon Purshis Ex.-41 dated 23.08.1991 based on which the court permitted the appellant-defendant to withdraw his earlier suit RCS No.1004/1988 on the ground that there were technical defects in the said suit. Placing reliance upon Purshis Ex.-41, both the High Court and the First Appellate Court have held that there was no settlement between the parties and there is no other evidence to show that the first respondent-plaintiff has voluntarily surrendered the possession of the suit premises and that the appellant-defendant has taken possession by following due process of law. Contention of the appellant-defendant that after the settlement in the earlier suit RCS No.1004/1988, the first respondent-plaintiff vacated the premises, was not accepted by the courts below on the ground that Purshis Ex.-41 does not indicate that the first respondent-plaintiff vacated and handed over possession of the suit premises to the appellant-defendant. The conclusion of the First Appellate Court as affirmed by the High Court presuming possession of the first respondent-plaintiff based on the Purshis Ex.-41 is not a correct approach.

9. In a suit filed under Section 38 of the Specific Relief Act, permanent injunction can be granted only to a person who is in actual possession of the property. The burden of proof lies upon the first respondent-plaintiff to prove that he was in actual and physical possession of the property on the date of suit. The First Appellate Court drew inference of the possession of the first respondent-plaintiff from Purshis Ex.-41 and from the circumstances that he has obtained permission from the Corporation for carrying out the repairs. The Commissioner's report dated 02.11.1988 which was referred to in extenso in the order passed in interlocutory application (Ex.-5) dated 17.10.2005 rejecting the first respondent's prayer for temporary injunction shows the poor condition of the suit premises prior to filing of the suit RCS No.430/2004. The Commissioner's report indicates that even after replacing the roof by new tin sheet, the premises was not fit to carry on business. In the order passed in the interlocutory

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- A application (Ex.-5) dated 17.10.2005, the trial court referred to the report of the Commission which reads as under:-

- “.....The flooring was completely damaged. Big Shahabadi tiles were kept without using cement or morter for joining/ pointing. It was just of shift flooring, wooden stall was also closed at the time of commission work. According to plaintiff the premises was taken for conducting business i.e. eating house. Considering the condition of the premises on the date of commission work, it was impossible to carry such business in it. It is not case of the plaintiff that he carried repairs after commission work....”
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- C As observed by the trial court, the first respondent-plaintiff has not brought on record any document to show that the court has passed any order permitting him to carry repairs after the date of inspection by the Commissioner and having regard to the condition of the building, it was impossible for the first respondent-plaintiff to
- D carry business in the suit premises.

10. As rightly pointed out by the trial court on the date of inspection by Commissioner, the premises was not fit for conducting the hotel business. The trial court rightly rejected the contention of the first respondent-plaintiff that he has carried out repairs after the inspection by the Commissioner observing that the first respondent-plaintiff has failed to produce documents such as the order of the court permitting him to carry repairs, receipts of material purchase and labour charges paid etc. From the photographs filed by the first respondent-plaintiff, the trial court rightly concluded that the condition of the said premises was not at all fit for any purpose.
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- F 11. The first respondent-plaintiff has filed the suit under Section 38 of the Specific Relief Act seeking permanent injunction on the ground that he is in actual possession of the suit property. Grant of permanent injunction results in restraining the defendant's legitimate right to use the property as his own property. Under Section 38 of the Specific Relief Act, an injunction restraining the defendant from disturbing possession may not be granted in favour of the plaintiff unless he proves that he was in actual possession of the suit property on the date of filing of the suit. The earlier suit RCS No.1004/1988 was filed in the year 1988 and it proceeded till 1991. In the present case, the first respondent-plaintiff has to prove his actual possession
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on the date of filing of suit. The First Appellate Court concluded that the appellant-defendant had failed to prove that the plaintiff has vacated the premises in 1991 after withdrawal of earlier suit RCS No.1004/1988. Contention of the appellant is that a settlement was arrived at between the parties and pursuant to that settlement, the plaintiff has vacated the premises in 1991. This has not been rebutted by the first respondent-plaintiff by adducing substantive evidence. The possession of the plaintiff cannot be based upon the inferences; drawn from circumstances. The plaintiff has to prove actual possession for grant of permanent injunction.

12. According to the first respondent-plaintiff, he was conducting business of hotel and Pan shop in the suit premises and also carrying on fabrication work. As pointed out by the trial court, the first respondent-plaintiff admitted that for running the business of hotel and Pan shop, two licences are required. In his evidence, the first respondent-plaintiff admitted that he was not holding any licence issued by the Pune Municipal Corporation for carrying on business. The trial court also pointed out that the first respondent has admitted that three-phase electricity connection is required for carrying out the business of fabrication which he was allegedly carrying on in the suit premises. But in his cross-examination, the first respondent admitted that he does not have such three-phase electricity connection at the suit premises. In the absence of requisite electricity connection, the contention of the first respondent that he has been carrying on the business of fabrication at the suit premises does not appear to be probable. In the absence of licence and the requisite electricity connection, the trial court rightly rejected the plea of the first respondent that he has been carrying on business of hotel, Pan shop and fabrication work at the suit premises.

13. Contention of the appellant-defendant that after 1991, the first respondent-plaintiff was not in possession of the suit property is corroborated by the evidence of Sandeep Wagh. In his evidence, Sandeep Wagh stated that he knows the first respondent-plaintiff and appellant-defendant and that the first respondent-plaintiff had met with an accident and thereafter he was not carrying on any business at the suit premises. Based upon the evidence of appellant-defendant and Sandeep Wagh, the trial court has arrived at conclusion that in all probability, the first respondent-plaintiff must have vacated the suit premises in the year 1991. In our considered view, the First

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- A Appellate Court ought not to have interfered with the findings of fact recorded by the trial court on the basis of Purshis Ex.-41.
  - 14. The conclusion of the trial court that the first respondent-plaintiff vacated the suit property since the year 1991 is fortified by yet another circumstance viz., non-payment of rent by the respondent-plaintiff. Admittedly, ever since withdrawal of earlier suit RCS No.1004/1988, the first respondent-plaintiff has not paid any rent from the year 1991. Be it noted, that the appellant-defendant had also not initiated any proceedings claiming rent or arrears of rent from the first respondent-plaintiff. After filing of the suit in 2004, the first respondent-plaintiff has sent a cheque dated 14.05.2005 for Rs.10,395/- towards payment of rent for 189 months thereby admitting that he has not paid the rent for more than fifteen years. The trial court also observed that the first respondent-plaintiff has suppressed the material fact that he has not paid the rent from 1991. The trial court observed that the first respondent-plaintiff has not come to the court with clean hands and that he cannot sustain his claim for the equitable relief of permanent injunction.
  - 15. The First Appellate Court did not keep in view that the first respondent-plaintiff has not shown that he has paid any rent after 1991 and that without paying rent, he cannot have any legitimate right to be in possession of the suit premises. The party seeking injunction based on the averment that he is in possession of the property and seeking assistance of the Court while praying for permanent injunction restraining other party who is alleged to be disturbing the possession of the plaintiff, must show his lawful possession of the property. Having not paid rent for more than fifteen years, it cannot be said that possession of the first respondent-plaintiff can be said to lawful possession entitling him to grant of permanent injunction.
  - 16. The appellant-defendant decided to develop his property through second respondent-builder and in that regard, a public notice was given calling for objections from persons, whether any person having any interest in the property. At that time, the first respondent-plaintiff issued notice dated 13.04.2000 through his advocate claiming that he is a tenant of the portion of the land measuring 1000 sq. ft. since last twenty two years. In the earlier suit RCS No.1004/1988, the tenanted premises was described as only one room. In its order in the interlocutory application (Ex.-5) dated 17.10.2005, the trial
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court has pointed out that the total area of the premises described in all the schedule is 356 sq. ft. It is not known how the first respondent-plaintiff issued legal notice claiming tenancy right over thousand square feet. As pointed out by the trial court, objection of the first respondent-plaintiff was rejected by the Corporation and accordingly, layout of the proposed building on the said land was sanctioned by the Corporation (Ex.-42/4). This conduct of the first respondent-plaintiff also disentitles him from claiming the equitable relief of permanent injunction and these aspects were not properly appreciated by the First Appellate Court.

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17. As discussed earlier, in a suit filed under Section 38 of the Specific Relief Act, possession on the date of suit is a must for grant of permanent injunction. When the first respondent-plaintiff has failed to prove that he was in actual possession of the property on the date of the suit, he is not entitled for the decree for permanent injunction.

18. Upon appreciation of the oral and documentary evidence, the trial court rightly held that the first respondent-plaintiff failed to prove his actual and physical possession over the suit property on the date of the suit. When the finding of the trial court was based on oral and documentary evidence, the First Appellate Court and the High Court were not right in setting aside the judgment of the trial court by drawing inference of possession from Purshis Ex.-41. In our considered view, the First Appellate Court and the High Court fell in error by presuming that the first respondent-plaintiff was in possession by merely relying upon the prior suit filed by the appellant-defendant for possession and Purshis Ex.-41. The impugned order of the High Court affirming the findings of the First Appellate Court is not sustainable and is liable to be set aside.

19. In the result, the impugned judgment dated 23.06.2016 passed by the High Court in Writ Petition No.6873/2016 is set aside and this appeal is allowed. The suit RCS No.430/2004 filed by the first respondent is dismissed. No costs.

Kalpana K. Tripathy

Appeal allowed.