

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.64 OF 2007

Abdul Razak Faujdarkhan (deceased)	)
through LRs.	)
1. Mrs.Mehrunissa w/o. Abdul Razzaque	)
Khan, age about 65 years.	)
2. Iqbal s/o. Abdul Razzaue Khan	)
Aged about 36 years, No.1 & 2 are legal	)
heirs of original deceased Applicant	)
Abdul Razak Faujdakhan	)
 Having their address at 11/11, Afateh	)
Manzil, 3 rd Sankli Street, Byculla,	)
Kalachowki, Mumbai-400 008.	)
And carrying on business at M/s.Khan	)
Bread Shop No.16, Ready Money Bldg.	)
No.2, 14-16, Clare Road, Byculla	)
Mumbai-400 008.	)...Applicants (Org.Plaintiffs)

V/s.

1 Smt.Sharada R.Adyanthaya	)
aged about 68 years, Occupation Business	)
C/o. Bharat Hindu Hotel, Ready Money	)
Building No.2, 14-16, Clare Road, Byculla	)
Bombay-400 008.	)
 2 Hozaiifa Shoeb Contractor	)
of Mumbai, Indian Inhabitant, aged about	)
35 years, Occ. Business, having his address	)
at Shop No.16/17, Ready Money Building	)
No.2, Clare Road, Byculla, Mumbai-400 008	) ...Respondents (Org.Defendants)

Mr.M.L.Palan a/w Ms.J.P.Thakkar for the applicants.
Ms.Kavita A.Shah for respondent no.2.

CORAM: K.R.SHRIRAM, J.

DATED : 9th March 2015.

JUDGMENT :

1 The applicants are legal heirs of the original applicant (the original plaintiff) who had filed a RAD Suit No.2515 of 1989 seeking a declaration that he is the lawful original sub-tenant or deemed tenant in respect of the suit premises. The suit premises is very small admeasuring 8 feet in length, 2feet deep and 6 feet in height (suit premises) and is situated outside one Bharat Hindu Hotel situated at Shop No.16 in Readymoney Building No.2 which was later called Al-Hafiz Building No.2, 26, Clare Road, Byculla, Mumbai-400 008 (said premises). It is the case of the applicant that he was carrying on business in the name and style 'Khan Bread Shop' and he was the sole proprietor. The suit premises was an alcove in the road side of the said premises. One may even call it a stall.

2 The respondent no.1 was the proprietor of Bharat Hindu Hotel and legal heir of the original tenant of the said premises. Originally one Ramanna Shetty was the tenant of the said premises. After Ramanna Shetty's demise, his wife Meenakshi Heggadathi became the tenant and later on the respondent no.1 who was their daughter became the tenant in respect of the said premises where business of Bharat Hindu Hotel was being carried on.

For the sake of convenience the parties are hereinafter referred to by the original description in the trial court, i.e., applicant is the plaintiff and respondent no.1 is the defendant. Respondent no.2 is referred to as Respondent no.2. The defendant and respondent no.2 are collectively referred to as respondents.

3 It is the specific case of the plaintiff that in or about 1958 he took the suit premises, which is basically an alcove in the said premises from Ramanna Shetty at a monthly rent of Rs.90/- and that Ramanna Shetty was however, not issuing any rent receipts in his favour. The plaintiff thereafter has said that after Ramanna Shetty's demise, when his wife Meenakshi became the tenant, the plaintiff was paying monthly rent of Rs.150/- but the said Meenakshi was also not issuing any receipts in favour of the plaintiff. Thereafter from 1981 or there about, the plaintiff started paying Rs.300/- per month which was increased to Rs.350/- in 1983. Even at that stage nobody issued any rent receipts to the plaintiff. From 1983 or thereabout the plaintiff started depositing the rent in the bank account of defendant upto end of March-1989. The plaintiff was in possession of slip books from April 1988 till end of April-1989. The plaintiff however, had in his possession Shop and Establishment Certificate since the year 1973 onwards and he also got telephone installed in the suit premises in his name and had various municipal licenses to show that he was in exclusive occupation and possession of the suit premises. The plaintiff has also stated that he has lost, mis-placed documents from 1958 to 1980 and the same are not traceable.

4 On or about 30.6.1989, the defendant and her son Subanna Shetty approached the plaintiff and asked the plaintiff to vacate the suit premises. The plaintiff declined and went to the police and lodged a complaint. On 1.7.1989 the plaintiff filed the present suit. According to the plaintiff he is a protected lawful sub-tenant of the defendant under Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947, (Bombay Rent Act) in respect of the suit premises.

5 The defendant resisted the suit by filing a written statement through her son and Constituted Attorney one Ramrathan Adyanthaya. The defendant has denied the claim of the plaintiff of lawful sub-tenancy or deemed tenancy in respect of the suit premises. The defendant has also denied that the plaintiff was in exclusive possession of the suit premises since 1958. The stand of the defendant was that the plaintiff was in occupation of the suit premises by virtue of a conducting agreement and the latest conducting agreement was dated 1.9.1983 for a period of 11 months and extended upto 30.6.1989. It is also the case of the defendant that after the last conducting agreement came to an end by efflux of time, on 29.6.1989, the plaintiff peacefully handed over possession of the suit premises to the defendant and in confirmation thereof, the plaintiff also swore an affidavit before a Notary Public confirming handing over the possession. The defendant after taking over physical possession of the suit premises on 30.6.1989, refunded the

security deposit amount and paid for the price of stock in trade and started renovation work of the hotel business. It is the case of the defendant that the plaintiff after handing over possession on 29.6.1989 rushed to the court on 1.7.1989 and obtained an injunction suppressing all material facts and prayed for dismissal of the suit.

6 The trial court framed issues on 11.6.1988 and subsequently added one more issue. The following issues were framed by the trial court.

<u>ISSUES</u>	<u>FINDINGS</u>
1. Whether plaintiff proves that he used to pay rent to previous landlord and thereafter Defendant in respect of the suit premises ?	Yes.
2 Whether the plaintiff proves that he is in possession of suit premises ?	Yes.
3 Whether plaintiff is entitled to declaration on terms and prayer (a)	Yes.
4 Whether plaintiff is entitled to order of injunction in terms of prayer (a)	Yes.
5 What order and Decree	As per final order

ADDITIONAL ISSUE

- 1 Does the plaintiff prove that suit premises is the premises within the meaning of Section 5(8) of Bombay

Rent Act ?

Yes.

7 The issues which are material for the present, are issue nos.2 & 3.

8 In order to substantiate the suit claim, the plaintiff examined himself as PW-1 and also led documentary evidence. In rebuttal, the defendant examined her son and Constituted Attorney Ramrathan Adyanthaya as DW-1 and also adduced documentary evidence through him.

The trial court decreed the suit in favour of the plaintiff.

9 Against the said judgment and order of the trial court, the defendant filed an appeal before the appellate bench of the Small Causes Court.

10 The respondent no.2 was subsequently added pursuant to an order dated 12.1.2012 passed by this court as respondent no.2 had purchased the suit premises and the restaurant premises. During the pendency of this Civil Revision Application, the petitioner also expired and the present applicants are the legal heirs of the original applicant.

The appeal court set aside the judgment of the trial court. The judgment and order of the appeal court dated 5.6.2007 is impugned in this Civil Revision Application.

11 The submission of the respondents' counsel has been that the onus was on the plaintiff to establish that he was in possession from 1958 onwards and admittedly the petitioner has not produced any document to show that he was in possession from 1958 to 1973 as a sub-tenant. The counsel submitted that even if we assume for the sake of argument that the plaintiff was in possession, the same was only on a conducting basis as could be seen from the agreements entered into on 1.9.1981 and 1.9.1983 which came to end in 1989 and the affidavits dated 29.6.1989 viz. Exhibit-5, Exhibit-6 & Exhibit-7 in the trial court. The counsel also submitted, in the alternative, assuming for the sake of argument and without admitting that the plaintiff was in occupation from 1958 to 1973 as a sub-tenant, that arrangement or relationship or equation got changed on 1.9.1981 when the plaintiff entered into the conducting agreement (Exhibit-5) and in any event the petitioner surrendered possession on 29.6.1989. Therefore, by any stretch of imagination, the plaintiff cannot ask to be declared as a sub-tenant. The counsel also pointed out various contradictions in the plaint and in the evidence of the plaintiff and further submitted that the fact that the plaintiff suppressed the two agreements Exhibit-5 & Exhibit-6 and the affidavit Exhibit-7 in the plaint and while obtaining the ex-parte injunction, necessitates this court to take a very strong view adverse to the plaintiff.

12 The counsel also submitted that even for the plaintiff to be declared as a sub-tenant and seek protection under Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act,

1947, the plaintiff has to satisfy the conditions mentioned therein. The condition was that the plaintiff was a licensee as defined under Section 5(4)(A) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and the petitioner failed to produce any documentary evidence and prove that the plaintiff was a protected licensee/tenant as on 1.2.1973.

13 Having considered the pleadings and evidence filed, this court is of the view that the trial court erred by drawing an adverse inference in favour of the plaintiff relying on the testimony of DW-1 that he was unable to depose whether the plaintiff was given the suit premises by his grand-father in the year 1958 or not as he was only 2 years old at that time and that he had personal knowledge only from the year 1978. The trial court completely ignored the fact that the plaintiff has in the plaint, stated that he did not have any document to prove that he was in possession from 1958 onwards or atleast that he was in possession from 1.2.1973 as per the amended Rent Act. The trial court also completely ignored the fact that the plaintiff had entered into the conducting agreement in 1983, extended in 1984 until 30.6.1989 and the affidavit dated 29.6.1989 confirming handing over possession. The trial court also got carried away by the fact that the plaintiff stated in his evidence that he did not know English and he has studied only in Urdu Medium School until standard-8. Though the plaintiff had produced certain documents like municipal license issued in 1978, the fact is there was nothing to prove that the plaintiff was in occupation from 1958 to 1.2.1973.

14 The trial court also ignored the fact that the plaintiff had not disclosed about the conducting agreement and the affidavit of surrender in the plaint and was also guilty of suppressing facts.

15 The trial court erroneously came to a conclusion that the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 are applicable to the suit premises as the suit premises are premises as defined under Section 5(8) of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 and negated the contention of defendant that the suit premises was merely a stall. The trial court also observed that the defendant had not properly proved the agreements at Exhibit-5 & 6 (the two conducting agreements) and therefore, as far as the claim as a sub-tenant and deemed tenant in respect of the suit premises is concerned, the trial court observed that the plaintiff has given oral evidence that he is occupying the suit premises since 1958 and was paying monthly rent to the predecessor in title of the defendant. The trial court has proceeded on the basis that the defendants' evidence adduced through her Constituted Attorney does not substantiate the case of the defendant because the witness admitted that he did not know whether the plaintiff was inducted in the suit premises in 1958 or not. The court also erroneously held that no satisfactory evidence was adduced by the defendant that the plaintiff had surrendered the suit premises on or about 30.6.1989 as contained in the written statement. In view of these errors the trial court decreed the suit and declared that the plaintiff was a lawful sub-tenant and that he has

proved that he was in exclusive possession of the suit premises since 1958 till filing of the suit.

16 The trial court has not taken into consideration the following contradictions in the evidence of the plaintiff.

(a) In the examination in chief on 6.8.2001 the plaintiff has stated as under :-

“I am producing the license issued by B.M.C. on 21.3.1987 along with xerox copy. The said license in my name and is in respect of the suit premises”.

But in examination in chief on 18.2.2002 the plaintiff has stated as under :-

“I do not have any certificate for shop and establishment for the period from 1979 to 1987. The said certificate may be in possession of the Defendant. In my absence the said certificate is taken by the defendant and since then it has not been returned to me”.

And in the cross-examination on 2.8.2002 the plaintiff has stated as under :-

“The previous license of my business has been taken away by the defendant from me from the suit premises, before filing the suit. I do not remember in whose name the said license was. I do not remember whether it was not in my name”.

(b) As regards the conducting agreement Exhibits-5 & 6 let us see what the plaintiff has stated. In the examination in chief on 6.8.2001

the plaintiff states as under :-

“The first agreement in respect of the suit premises was entered into in the year 1958. I do not have the said agreement. The said agreement may be with the deft”.

“Last agreement was executed in the year 1983. Thereafter there is no agreement in writing”.

In the examination in chief, on 16.1.2002 the plaintiff states as under :-

“Last agreement between myself and defendant was executed in the year 1983. Copies of the agreements were not handed over to me from 1958 to 1983. Agreement of 1983 was for 11 months. I do not know English. I have studied upto 8th Standard in Urdu Medium. The contents of last agreement of 1983 were not read over and explained to me either by the Defendant or her sons. Agreement of 1983 was expired on 1.8.1984. No new agreement was executed after 1984”.

17 Therefore, the plaintiff has admitted that he had no documents whatsoever to prove that he has been in possession from 1958. Further the plaintiff had no evidence to show that he was paying rent to Ramanna Shetty or to his wife later.

18 The plaintiff had also suppressed the agreements of 1981 and 1983 and the affidavit of 1989. When the plaintiff was confronted with the agreements, the plaintiff tried to wriggle out of the agreements and the affidavits by stating in the cross-examination that he did not know English and he studied only upto 8th standard in

the Urdu medium and the contents of the agreements were not read out to him. At the same time, if one looks at the signature in the documents, it does not look like that of a person who did not know to read or write English. Even in the plaint or in the evidence recorded there is no endorsement to state that the plaintiff did not know English and that it was read out or interpreted in Urdu or Hindi. In the cross-examination the plaintiff admits that at the time of filing the suit, he knew that he had signed agreements Exhibit-5 & Exhibit-6 but still he chose to suppress the same. The plaintiff also in cross-examination, admits that he has signed Exhibit-5 and Exhibit-6 and the signature on page-6 at Exhibit-5 was a short signature. The plaintiff has also in the cross-examination confessed that in the affidavit in support of his injunction application (Exhibit-2) does not bear his signature is not correct. In the cross-examination he also confessed that his statement in affidavit Exhibit-2, paragraph-10, that he did not execute the alleged agreement and affidavit is not correct.

19 Therefore, it is very clear that here is a person who has lied on oath. Here is a person who has suppressed documents and obtained orders from the court. Here is a person who on affidavit states that he does not know English whereas the documents speak otherwise.

The trial court has completely overlooked these facts.

20 Moreover, DW-1 has deposed that the plaintiff came to occupy the suit premises as a conductor of the business of the

defendant under the conducting agreements Exhibit-5 & Exhibit-6 and that the plaintiff handed over possession by executing a separate affidavit dated 29.6.1989 which is at Exhibit-7 before the trial Court. Therefore, the onus was on the plaintiff to establish that he was in possession since 1958 onwards continuously till 1.2.1973 if he wanted protection under Section 15(4). In my opinion, the plaintiff has failed in that regard. Mere statements in the plaint are not enough. Moreover, the mere admitted position of the plaintiff's possession itself would not be sufficient to give possession to the plaintiff under the provisions of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 unless the other ingredients are also met. The trial court has also erred in observing that Exhibits-7, 5 & 6 are not proved. This is because in the cross-examination the plaintiff himself has admitted both the documents. The plaintiff has also gone ahead and admitted that after executing the agreement dated 1.9.1983, he started paying Rs.350/- per month. This admission of the documents by the plaintiff himself is the best piece of evidence and the observation of the trial court that the said documents are not duly proved is not correct.

21 Mr.Palan counsel for the petitioner relied upon the judgment of this court in the matter of Om Prakash Berlia & Ors. Vs. Unit Trust of India & Ors.¹ in support of his submission that the trial court was right in discarding Exhibit-5 and Exhibit-6 as not sufficiently proved. In my view, the said judgment has no relevance to the present case in view of what I have stated above.

¹ AIR 1983 Bom. 1

The plaintiff neither showed any agreement nor called upon the respondent to produce any such agreement.

22 In the examination-in-chief, the plaintiff has stated that the last agreement between him and respondent was executed in the year 1983 and the agreement of 1983 was for 11 months. If it was tenancy as claimed by the plaintiff, it would not be for 11 months like in the case of leave and license.

23 The plaintiff has also not explained in the plaint how he came into possession of the suit premises. He ought to have explained all these because in the cross-examination on 19.7.2002 the plaintiff has also stated that he was in employment of BEST and retired from BEST in the year 1988.

24 Further section 15A of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 provides as under :-

“15A. Certain licensees in occupation on 1st February 1973 to become tenants.

(1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purpose of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid]”

Therefore, to get the protection of section 15-A, the plaintiff has to prove that he was in occupation of the premises or any part thereof on 1.2.1973, the premises or any part thereof is not less than a room and he was in occupation as a licensee.

25 Licensee under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 is defined under Section 5 (4A) as under :-

“Licensee”, in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge: and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960 ; but does not include a paying guest, a member of a family residing together, a person in the service or employment of the licensor, or a person conducting a running business belonging to the licensor, [or a person having any accomodation for rendering or carrying on medical or para-medical services or activities in or near a nursing home, hospital or sanitorium,] or a person having any accomodation in a hotel, lodging house, hostel, guest house, club, nursing home, hospital, sanitorium, *dharmashala*, home for widows, orphans or like premises, marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges licence fee or charge for such premises

of the employee or spouse not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or institution ; and the expressions “licence”, “licensor” and “premises given on licence” shall be construed accordingly;]”

Therefore, to be a licensee in respect of any premises or any part thereof the person must be in occupation of the premises or such part as the case may be under a subsisting agreement for license, which license must be given for a license fee or charge. The definition of licensee excludes a person conducting a running business belonging to the licensor. In this case there is no evidence given by the plaintiff that he was in occupation on 1.2.1973 or that he was paying a license fee or charge on 1.2.1973. Therefore, the appellate court was correct in not giving the plaintiff the protection under Section 15-A.

26 In the circumstances, the plaintiff has not proved that he has been in continuous possession of the suit premises since 1958 onwards. Even if it is considered that the plaintiff was in continuous possession of the suit premises since 1958 onwards, the possession will have to be considered only as a conductor. The documents that are agreements at Exhibit-5 and Exhibit-6 demolished the case of the plaintiff as admitted to be made out by oral testimony that he was

either a sub-tenant or protected licensee in respect of the suit premises. When the plaintiff has entered into agreements being Exhibit-5 & Exhibit-6, as conductor of business belonging to defendant even after amendment to Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 which gives protection to the occupants for a consideration prior to 1973, it has to be held that the plaintiff had possession only as a conductor and the plaintiff will be deemed to have waived the said protection by entering into the agreements in the year 1981 and 1983. I gain support on this finding from the judgment of this court in the matter of Alban Joseph Gonsalves Vs. Rallis India Ltd.²

27 Section 115 of the Code of Civil Procedure 1908, is a procedure prescribed and provided by the Code for exercise of the power of superintendence by the High Court over the courts subordinate to it. The purpose behind Section 115 is undoubtedly to keep check over jurisdictional errors by the subordinate courts. It is not necessarily for the purpose of granting any relief as such to any party to the suit. Apart from being discretionary power, the Statute prescribes specific restrictions over its exercise. The High Court while exercising the revisional jurisdiction can interfere with the order passed on appeal by the appellate authority only on three grounds i.e.,

(i) Where the original or appellate authority exercised a jurisdiction not vested in it by law ;

² 2004 Vol. 106(2) Bom.L.R.645

- (ii) Where the original or appellate authority failed to exercise a jurisdiction so vested, or
- (iii) Where in following the procedure or passing the order, the original or appellate authority acted illegally or with material irregularity.

28 The jurisdiction exercised under Section 115 is supervisory in nature. It is exercised when the subordinate court has assumed the jurisdiction which it did not have or has failed to exercise the jurisdiction though available in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby. The Court may also step in if there is an error which is manifest and apparent on the face of the proceedings or the appellate authority acted illegally or with material irregularity and grave injustice or gross failure of justice has occasioned thereby. The appellate court has not acted illegally or with material irregularity or exercised jurisdiction not vested or failed to exercise jurisdiction so vested. Therefore, there is no need for this court to interfere.

29 In the circumstances, Civil Revision Application is dismissed with costs in the sum of Rs.10,000/- to be paid by the petitioner to the Maharashtra Legal Aid Services Authority.

(K.R.SHRIRAM, J.)