

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 715 OF 2014

M/s Palecha Metal Corporation

..Applicants

Vs.

Grah Rachana Realtors Pvt. Ltd.

..Respondent

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Mr. A.V. Anturkar, Sr. Advocate a/w Rajan Yadav, Advocate i/b Shah Kayval for Applicant.

Mr. V.A. Thorat, Sr. Advocate a/w Bhavin Bhatia, Advocate for Respondent.

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CORAM : N.M. JAMDAR, J.

DATED : 5 MAY 2015

ORAL ORDER:

By this revision application, the applicant challenges the judgment and order dated 11 April 2014 passed by the Appeal Bench of the Small Causes Court, Mumbai dismissing the appeal filed by the applicant and confirming the judgment and decree dated 6 October 2007 passed by the Small Causes Court Judge, Mumbai. By the impugned judgment and order, the applicant has been directed to be evicted from the premises in question.

2. The suit premises are first floor and entire second floor with an open terrace situated in the property known as “Veeni-Nisha Chambers”(Desai House), situated at 327, Jagannath Shankar Sheth

Road, Thakurdwar, Mumbai. The tenancy in respect of premises was created in favour of the applicants by an agreement dated 22 April 1988 and the applicants were in possession of the premises thereafter. The respondent purchased the property by Deed of Conveyance dated 24 April 1999 and by letter dated 29 April 1999, the predecessor-in-title informed the applicants about the transfer of property by letter of attornment.

3. The respondent filed a R.A.T. & R. Suit No. 636/1089/2001 in the Small Causes Court, Mumbai. The suit was filed on two grounds. Firstly, that the applicants were in arrears of rent since October 1999. Notice of demand was issued on 2 August 1999 which was duly served. The applicants failed to pay the arrears of rent and were liable to be evicted. Secondly, it was contended that the applicants constructed two rooms on the front side of the terrace and one room on the rear side of terrace, which amounts to permanent construction in the premises and accordingly the applicants were liable to be evicted under Section 16 (1)(b) of the Maharashtra Rent Control Act, 1999. The applicant filed their written statement and contended that the notice of demand was not served, that the applicants were always ready and willing to pay the rent however, the respondent avoided to accept the same. It was also contended that they have not changed the user of the premises and have not constructed any room and the premises are in the same condition as it were let out to them. On behalf of the respondent-plaintiff, the Sub-Engineer of the Mumbai Municipal

Corporation was examined. The applicants did not step in witness box nor produced any documentary evidence. The learned Small Causes Court Judge by judgment and decree dated 6 October 2007 decreed the suit on the ground of default and permanent construction. Appeal No. 656/2007 filed by the applicant was dismissed by the Appeal Bench of Small Causes Court, Mumbai by judgment and order dated 11 April 2014 and the decree passed by the Small Causes Court was confirmed. Hence this Revision Application.

4. Mr. Anturkar, the learned Senior Counsel for the applicant firstly contended that the applicant is not liable to be evicted on the ground of default. He contended that the suit was instituted on 16 July 2001, after the Act of 1999 was brought into force on 14 March 2000. He submitted that the notice was given by the respondent on 2 August 1999. According to the learned Counsel, that once the Bombay Rent Act was repealed and the Act of 1999 was brought into force, the cause of action which accrued under Bombay Rent Act is deemed to have lapsed and only those suits which were pending as on the date when the Act of 1999 was brought into force are saved by the repeal provision contained under Section 58 of Act of 1999. This contention cannot be accepted. Section 58 (2)(a) deals only with the applications, suits and such other legal proceedings which were pending and are continued. There is no reference to the cause of action and neither there can be. The cause of action which accrued to the respondent

to seek eviction of the applicant on the ground of default as rightly contended by Mr. Thorat, the learned Senior Counsel for the respondent, will continue till it barred by period of limitation. There is no material change brought about by both the Acts as far as the ground of default is concerned. The right of the landlord to seek recovery of possession of the tenanted premises on the ground of default in payment of arrears of rent is common under both the Acts. In fact the Act of 1999 contain provisions which are more beneficial to the tenant. Therefore even if the cause of action which accrued under the provisions of Bombay Rent Act is continued, no prejudice at all is caused to the tenant. In fact the new Act gives one more opportunity to deposit the rent within period of 90 days from receipt of summons, which provision is more beneficial.

5. The next contention raised by Mr. Anturkar was that the notice was not validly served on the applicant which is a partnership firm. According to the learned Counsel for the applicant, it was served on one Roopchand who is the husband of one of the partners. He submitted that in view of Section 19 of the Partnership Act, such notice is not valid. The perusal of both the impugned decisions shows that this fact of the non service of notice is urged the first time in the revision application. The stand of the applicant was not that the said Roopchand was not authorized to receive the notice on behalf of the firm being husband of one of the partners. The stand throughout argument was that no notice was served on Roopchand or on any partner. Implicit in the stand that the notice

had been served on Roopchand, it would be a valid notice, because no stand was taken that irrespective of service of notice on Roopchand, there would be no valid notice. The proof of service of notice is in the realm of facts. Both the Courts have concurrently found that the notice was served under the certificate of post and the address was correct. In view of this position, the argument regarding non service of notice cannot be accepted.

6. The third ground taken by Mr. Anturkar is that for the period of default specified in the plaint i.e. October 1998 to June 2000, there is no notice by the respondent. Mr. Thorat pointed out that the suit is filed on the ground that the applicants have not paid the arrears of rent and till the date of filing of this suit, the applicants were in arrears. After the institution of the suit, the Act of 1999 gave an opportunity to the applicants to pay entire arrears within 90 days from the receipt of summons. In spite of service of summons of a plaint alleging that the applicants have not paid the rent or not cleared the arrears within period of 90 days, Applicant would be considered as defaulter if they do not pay the arrears. It has not been urged that the applicant has availed this opportunity to clear the arrears, therefore this contention also cannot be accepted.

7. The second ground of eviction against the applicants is that the applicant has carried out permanent construction of two rooms on the terrace. It is the contention of Mr. Anturkar that the

respondent had sought to produce a map through the engineer of the Municipal Corporation which map has been held as not proved by the Appeal Bench of the Small Causes Court, yet the Appeal Bench has passed the decree against the applicant. Apart from the map, it is to be noted that the applicants were put in possession on the basis of written document executed on 22 December 1987. The agreement describes the premises. There is no mention of rooms on the terrace. Once the phrase 'terrace' is specifically mentioned in the agreement it would naturally mean open to sky.

8. Thus once the description of the premises on the date the applicant came in possession, was specified in a written documents, burden was on the applicant to explain the existence of the additional rooms. There could be two defenses. Firstly, that the applicant has not constructed these two rooms and they were always part of the premises and they have not been mentioned in the agreement. Second, the rooms have been constructed after the agreement but not by the tenant. Both the stands would be mutually destructive. Upon a query to Mr. Anturkar, he submitted that he has instructions to take both the stands. It is not possible to accept two divergent stands to the issue.

9. Even assuming it is possible, even both these stands examined independently, will not save the applicant from decree of eviction on this ground. Once the tenancy has been created by

specific document which describes premises and does not specify existence of any rooms on the terrace, it was upon the applicant to show that irrespective of this description there were rooms in existence when the document was executed. The applicants have neither stepped in witness box nor produced any document. As regards second explanation that the rooms were constructed not by the applicants but by one Roopchand, it has to be noted that Roopchand is the husband of one of the partners. It is also not believable that applicants would permit Roopchand to construct the rooms on the terrace, which is not permitted under the Development Control Regulation without raising any objection at all. Even assuming the rooms have been constructed by the Roopchand, it can only be with consent of the applicants for their enjoyment. The respondents have produced on record the complaints to the Municipal Corporation in the year 2001 wherein it is stated that the construction is being carried out and not that the construction is completed.

10. As regard the contention of Mr. Anturkar regarding the map in question, it has to be noted that the engineer from the Municipal Corporation was examined and he has stated that the map bears official seal and that it was executed for the purpose of carrying out repairs and this map did not show existence of the rooms. Thus all the ingredients of allowing this map to be read in evidence were fulfilled. In spite of the same, the Appeal Bench has

stated that it cannot be read in evidence. Even otherwise, in view of the written documents between the parties, as stated above, the respondents have proved their case. Taking overall view of the matter, the finding of fact recorded by both the Courts that the notice was served on the applicant and it has failed to clear the arrears, cannot be disturbed. The finding of the Applicant was carried out permanent construction of rooms on the terrace also cannot be disturbed. There is no perversity in appreciation of evidence or error of jurisdiction so as to warrant interference in revisional jurisdiction. The Revision Application is accordingly rejected.

11. The learned Counsel for the applicants seeks continuation of the ad-interim order. The ad-interim order to continue for period of 12 weeks from today on the condition that the applicants will not create any third party rights in the property. The learned Counsel for the Applicant undertakes that in case the applicants file any further proceedings, they will give advance notice of three working days to the respondents.

(N.M. JAMDAR, J.)