

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

CIVIL REVISION APPLICATION NO.401 OF 2015

Navinchandra Chhabildas

.. Applicant

Versus

Kamlesh Singh Harnamsingh Chowhan

.. Respondent

Mr. Zuben Kamdin a/w Ms. Jenifer, Mr. Jayesh Rathod, Ms. Sanskruti Kadam i/by Mr. D. H. Shah, for the Applicant.

Mr. A. A. Kumbhakoni, Senior Advocate a/w Mr. Vivek Kantawala i/by Vivek Kantawala & Co., for the Respondent.

CORAM : R.M. SAVANT, J.

DATE : 2nd DECEMBER, 2015

PC.

1. The Revisionary Jurisdiction of this Court is invoked against the order dated 13.04.2015 passed by the Appellate Bench of the Small Causes Court, Mumbai, by which order the Appeal filed by the Respondent herein came to be allowed and resultantly, the judgment and order dated 05.11.2004 passed by the Learned Judge of the Small Causes Court, Mumbai, dismissing RAE Suit No.727/1312 of 1999 came to be set aside and in turn, the suit came to be decreed and the Applicant was directed to hand over possession of the suit premises within 3 months from the date of the order. The suit premises are numbered as B-52 having two portions, the front portion which comprises of 8 ft. X 9 ft. and the second portion

admeasuring 8 ft. X 8 ft. which is a proper room in the building owned by the family of the Respondent/original Plaintiff. It appears that along with the said premises i.e. B-52, there are other two rooms i.e. B-51 and A-29 which were tenanted in the name of the father of the Applicant. The suit in question being RAE Suit No.727/1312 of 1999 has been filed for eviction of the Applicant from the said suit premises on the ground of non-user for the preceding six months, acquisition of alternate accommodation and bonafide requirement. In the context of the challenge raised in the above Civil Revision Application, it is required to be noted that in the Written Statement an averment has been made in paragraph 8 that the other members of the family being Vijay and Suresh with their wives and children are residing in the suit premises.

2. The parties went to trial and in so far as the Defendant i.e. Applicant herein is concerned, only the evidence of his brother Vijay was adduced as the Power of Attorney of the Applicant. In so far as the evidence of said Vijay is concerned, it is required to be noted that in his cross-examination he has stated that Mahendra who is his brother is residing at Nepeansea Road and that he at present is residing at 501, Panchshil, Churchgate, Mumbai. It has further come in his cross-examination that as on the date when he deposed, he with his family sometimes resides in the suit premises. It has further come in his cross-

examination that the Churchgate premises at Panchshil is taken by him one year back. He has further stated that it is not true that the Defendant and his family is not residing in the suit premises thereafter he has clarified that sometimes they are coming in the suit premises. The Trial Court on the basis of the evidence on record dismissed the suit on the ground of limitation and also negated the two grounds i.e. non-user and acquisition of alternate accommodation by holding that the suit premises were taken on tenancy basis by the father of the Defendant in the name of the Defendant for the benefit of the family. The Trial Court negated the ground of acquisition of alternate accommodation. In so far as bonafide requirement is concerned, the Respondent/Plaintiff did not press the said ground.

3. The aggrieved Plaintiff carried the matter by way of Appeal being Appeal No.652 of 2006. The Appellate Bench of the Small Causes Court, Mumbai, on a re-appreciation of the material on record came to a conclusion that the suit was required to be decreed on the ground of non-user as well as acquisition of suitable alternate accommodation and rejected the contention raised on the point of limitation and held that the suit as filed was within limitation. The Appellate Bench of the Small Causes Court, Mumbai has adverted to the fact that the tenant Navinchandra is not residing in the suit premises as also has adverted to

the acquisition of the premises by the tenant Navinchandra, his brothers Mahendra and Vijay, whose evidence has been adduced in the suit on behalf of the Defendant. The Lower Appellate Court as indicated above has accordingly by the impugned judgment and order dated 13.04.2015 set aside the decree of dismissal passed by the Trial Court and in turn has decreed the suit.

4. It is sought to be contended by Mr. Zuben Kamdin Learned Counsel appearing on behalf of the Applicant that the ground of non-user would not be available if the family members of the tenant are residing in the premises in question. The Learned Counsel would contend that in so far as the acquisition of alternate accommodation is concerned, there is no material placed on record that Suresh who is also occupying the suit premises has acquired alternate accommodation. In my view, it is not possible to accept the said contentions urged on behalf of the Applicant in the light of the findings which have been recorded by the Appellate Bench of the Small Causes Court, having regard to the acquisition of the premises by the tenant Navinchandra, his brothers Mahendra and Vijay. In so far as Suresh is concerned, no evidence is led that he is still occupying the suit premises.

5. It was lastly sought to be contended that the very locus of the

Plaintiff to file the suit is in question, having regard to the fact that the property is already partitioned and the suit premises have not come to the share of the Plaintiff in the partition. The said aspect has also been dealt with by the Lower Appellate Bench of the Small Causes Court who has held that the proceedings relating to partition are pending in the Apex Court and as yet the property belonging to the family has not been partitioned by metes and bounds. It would therefore have to be held that the Petitioner who is a co-owner is entitled to file the suit for eviction. In the light of the findings which have been recorded by the Appellate Bench of the Small Causes Court, the exercise of the Revisionary Jurisdiction of this Court is not warranted. The Civil Revision Application is accordingly dismissed.

6. At this stage, the Learned Counsel appearing for the Applicant prays for stay of the eviction decree for some period so as to enable the Applicant to approach the Apex Court. In the facts and circumstances of the case, the decree is stayed for a period of eight weeks on the usual undertaking to be filed in this Court within two weeks from date.

[R.M. SAVANT, J]