

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

CIVIL REVISION APPLICATION NO. 910 OF 2014

E.P.K. Balkrishnan & Anr.

..Applicants

Vs.

Ms. Quency Gomes now known as
Mrs. Quency Ralph Miranda

..Respondent

....

Mr. E.K. Sasidharan, Advocate for Applicants.
Ms. Eventa Gonsalves, Advocate for Respondent.

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***CORAM : N.M. JAMDAR, J.
DATED : 07 APRIL 2015***

ORAL ORDER.:

By this application, the applicants challenge the judgment and decree dated 23 June 2010 passed by the Small Causes Court, Mumbai and the judgment and order dated 16 August 2014 passed by the learned Appeal Bench of the Small Causes Court, directing eviction of the applicants.

2. The suit premises are a tenement in the property known as “Monica Gomes House” situated at Tank Pakhadi, Sahar Village, Mumbai. The Applicant No.1 was a tenant of the suit premises with monthly rent of Rs.80/-. A notice was issued by the respondent-landlady terminating the tenency of the Applicant No.1. Thereafter

respondent filed a suit RAE Suit No. 2602/1988 in the Small Causes Court, Mumbai. The respondent alleged that the Applicant No.1 has migrated to Madras for about last five years though he had represented to the respondent as he is temporarily shifted to Madras for business, and has sublet the premises to the Applicant No.2. The respondent accordingly sought possession of the suit premises from the applicants on the ground that the Applicant No.1 has committed breach of terms of tenancy and the provisions of the Bombay Rent Act. A written statement was filed by the Applicant No.2 on 17 January 1991. Thereafter written statement was filed on behalf of Applicant No.1 through Applicant No.2 as a constituted attorney, on 22 September 2005. In these written statements, the applicants denied the facts that the Applicant No.1 has shifted to Madras permanently and they stated that the Applicant Nos.1 and 2 are relatives. It was denied that there was sub-tenancy created in respect of premises.

3. The parties led their evidence, both oral as well as documentary. The learned Small Causes Court Judge framed issues as regard sub-letting and acquisition of suitable alternate premises. The learned Judge held that the Applicant No.1 created sub-tenancy in favour of the Applicant No.2 and all ingredients of sub-tenancy stood proved. Accordingly, the learned Small Causes Court Judge by the judgment and decree dated 23 June 2010 decreed the suit and directed the applicant to handover the possession. As regard the other issues, the learned Small Causes Court Judge held against

the respondent. Thereafter, the applicants filed an Appeal No. 146/2010 before the Appeal Bench of Small Causes Court, Mumbai. In this appeal, the respondent also filed Cross Objection No. 10/2011. The Appeal Bench confirmed the findings of the Small Causes Court that the Applicant No.1 has sub-let the premises in favour of the Applicant No.2. Accordingly, the Appeal Bench dismissed the appeal filed by the applicants by order dated 16 August 2014 and also dismissed the Cross Objection filed by the respondent.

4. The question that arises for consideration is that whether the Applicant No.1 has sub-let the premises in favour of the Applicant No.2. The fact that the Applicant No.2 is in possession of the suit premises is not disputed.

5. First contention of the learned Counsel for applicants is that the Applicant No.2 is a family member and therefore there is no sub-tenancy. The learned Counsel for the respondent has rightly pointed out that, if this was the position, in the written statement filed by the applicant would have disclosed the nature of relationship at the first instance itself. It is not enough to mention that they are close relatives. It is only in the evidence that it is sought to be deposed that the Applicant No.2 is the husband of the niece of Applicant No.1. The applicants have produced certain documentary evidence to show the relationship. The learned Small Causes Court Judge considered the documents produced. The copy

of the birth certificate of the wife of the Applicant No.2 was not taken into consideration as it was not proved. The other documents which were produced by the applicants were also looked into but were not found sufficient to establish the relationship. Further more even assuming that the Applicant No.2 is the husband of niece of Applicant No.1, it could not be said that he is a close family member.

6. The second aspect is whether the Applicant No.1 had shifted from the premises permanently and relinquished control in favour of the Applicant No.2. If that is established and Applicant No.2 continues to be in possession, it would prove sub-tenancy. Both the Courts have considered that when the notice was issued prior to the institution of suit to both the applicants at the address of the suit premises, the Applicant No.1 did not claim the notice. This is because the Applicant No.1 was not present in the suit premises. Till 2005, the Applicant No.1 did not file the written statement and it was filed by the Applicant No.2 as a constituted attorney. At one stage, the suit was directed to be proceeded against the Applicant No.1 ex-parte.

7. Furthermore, the Applicant No.2 has secured an independent ration card of the suit premises and the entry in respect of the Applicant No.1 stands canceled. There is absolutely no explanation for this change in the ration card and why it was necessary. The learned Counsel for the applicant relied upon the

decision of the Apex Court in *M/s S.F. Engineer Vs. Metal Box India Ltd. & Anr.* passed in Civil Appeal No. 4189/2014. He contended that the Applicant No.1 has continued to pay rent. However it would not make any difference as decree is not on the ground of default. It is laid down by the Apex Court in the judgment of *M/s S.F. Engineer (supra)* that it is difficult for landlord to directly prove the factum of sub-letting, and it is to be inferred from the facts on record. If the above mentioned facts and circumstances are taken cumulatively, do indicate that the Applicant No.1 had discontinued residing in the suit premises to the extent that the Applicant No.2 has got his own independent ration card in respect of the suit premises.

8. The learned Counsel for the Applicants submitted that the Applicant No.1 intermittently visits the suit premises which fact has also been accepted by the respondent and therefore it cannot be said that he has relinquished his rights over premises. The finding of fact of both the Courts below is that the Applicant No.1 has shifted from the premises permanently. This finding as stated above is based on appreciation of evidence and it is not perverse finding. If a tenant has shifted from the premises permanently, the only fact that he visits the sub-tenant as visitor intermittently does not mean that sub-tenancy has not occurred. The question is of his intention to permanently reside elsewhere. This is amply proved by the evidence on record as far as the present case is concerned.

9. The finding of fact rendered by both the Courts below that the Applicant No.1 has surrendered the control of the premises in favour of the Applicant No.2 and this finding being a possible view based on evidence led, it cannot be disturbed in the limited revisional jurisdiction. The Revision Application therefore cannot be entertained and it is rejected.

10. The learned Counsel for the applicants seeks continuation of the interim order dated 11 September 2014. Considering the facts and circumstances of the case, I am inclined to grant six weeks time to the applicants, however since some time will be required for obtaining the copy of this order, it is directed that the ad-interim order dated 11 September 2014 be continued for a period of eight weeks on the same terms and conditions stated in the said order.

(N.M. JAMDAR, J.)