

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 24 OF 2014

Lalitkumar S. Jain .. Applicant
vs.
Chandrakant K. Mhatre & anr. .. Respondents

Mr. N.V. Walavalkar, Sr. Advocate i/b Mr. Santosh M. Suryawanshi
for the Applicant.
Mr. D. S. Patil for the Respondent No.1.

CORAM : M. S. SONAK, J.
DATE : 08 SEPTEMBER 2015.

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] This Civil Revision Application impugns the judgment and decree dated 22 November 2013 made by the Division Bench of the Small Causes Court, Bandra, Mumbai (Appeal Court) dismissing the applicant's(tenant) Appeal No. 109 of 2008 against the judgment and decree dated 30 January 2008 made in R.A.E. & R. Suit No.151/366 of 1993 ordering the eviction of the applicant from the suit premises on the ground of default in payment of rent and unlawful subletting.

3] Having heard the learned counsel for the parties and perused the record, in the peculiar facts and circumstances of the present case, the impugned judgment and decree dated 22 November 2013 made by the Appeal Court is required to be set aside, primarily on the following two grounds:

(a) The applicant's application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (CPC) was not at all considered by the Appeal Court before making the impugned judgment and decree dated 22 November 2013;

(b) The applicant's contention with regard to absence of statutory notice under Section 12(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Rent Act) was misconstrued and consequently not considered in its proper perspective.

4] There is no dispute that the applicant had taken out an application under Order 41 Rule 27 of CPC to produce on record additional evidence at the appeal stage, on the aspect of unlawful sub-letting. The record indicates that such application was not even considered by the Appeal Court at the stage of making of impugned

judgment and decree dated 22 November 2013. This is therefore, a case of failure to exercise jurisdiction. The Apex Court in the case of *North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by L.Rs.*¹ has held that it is improper for the High Court to dismiss an appeal even without considering the application under Order 41 Rule 27 of the CPC. On this short ground, the impugned judgment and decree dated 22 November 2013 is required to be set aside and the matter remanded to the Appeal Court for fresh consideration of the applicant's Appeal No. 109 of 2008, alongwith application (Exhibit-31) under Order 41 Rule 27 of the CPC made by the applicant. Needless to add that the application under Order 41 Rule 27 of the CPC is required to be considered at the stage of final hearing of the appeal as held by the Apex Court in case of *Union of India Vs. Ibrahim Uddin & another*².

5] On the aspect of default in payment of rent, Mr. Walavalkar, learned senior advocate for the applicant made reference to notice dated 27 October 1991 issued by the landlord to the applicant. In this notice, there is demand made for arrears of rent for the period between 1 October 1989 and 30 September 1991. It is the case of Mr. Walvalakar that the material on record clearly bears out such

1 AIR 2008 Supreme Court 2139

2 (2012) 8 Supreme Court Cases 148

arrears were in fact, cleared by the applicant. Mr. Walvakar points out that this aspect is even admitted by the landlord in paragraph 4 of the plaint. However, the suit for eviction was instituted on the basis that the applicant, allegedly, once again fell in arrears for the period from 1 November 1992 to 31 January 1993. Mr. Walavalkar submits that insofar as the alleged arrears for the said period of about three months are concerned, there was no notice under Section 12(2) of the Rent Act issued by the landlord. Such notice, according to Mr. Walavalkar is mandatory and therefore, in absence of such notice, there was no question of making any decree of eviction on the ground of default in payment of rents.

6] It is not necessary for this Court, at this stage, to decide upon the validity or otherwise of the aforesaid contentions of Mr. Walavalkar. However, perusal of the impugned judgment and decree dated 22 November 2013 does indicate that the aforesaid contentions of Mr. Walavalkar were possibly misconstrued and consequently, there has been no consideration of the same. Since the matter is being remanded to the Appeal Court, it is only appropriate that the Appeal Court considers such contentions in its proper perspective.

7] As noted earlier, the Trial Court by judgment and decree dated 30 January 2008 had ordered eviction of the applicant. During pendency of the Appeal, there shall be a restrain upon the execution of this eviction decree. This shall, however, be subject to the applicant depositing before the Appeal Court compensation at the rate of Rs.3000/- per month with effect from 1 December 2013 till 31 August 2015 and compensation at the rate of of Rs.5000/- per month from 1 September 2015 till the dismissal of the appeal before the Appeal Court. This direction is made consistent with the principles laid down by the Hon'ble Apex Court in cases of *Atma Ram Properties (Private) Limited Vs. Federal Motors Private Limited*³ and *State of Maharashtra & anr. Vs. M/s. Super Max International Pvt. Ltd. & Ors.*⁴ In this case, the suit premises admeasure about 220 sq. ft. and are situated at Borivali (E) and used for commercial purposes.

8] The arrears of compensation to be deposited within a period of two months from today. In case, there was any default in the matter of deposit of compensation in terms of earlier order made by the Appeal Court, liberty is granted to make good the default within a period of two months from today.

3 2005(1) SCC 705

4 2009(5)ALL MR 1001

9] As there was some controversy whether the applicant continues to be in the suit premises, the applicant was directed to file an affidavit to explain his position in this regard. The applicant has now filed an affidavit in which he has stated that he continues to be in possession of the suit premises where from he personally carries out the business of M/s. Laxmi Crockery. In the said affidavit, the applicant has stated that he has not created any third party interest in respect of suit premises. The respondent-landlord has filed affidavit-in-rejoinder to dispute this position.

10] Although the contentions of parties on this aspect are kept open, the applicant is hereby restrained from parting with possession of the suit property or creating any third party interest therein. The applicant is also directed to file an affidavit-cum-undertaking to this effect before the Appeal Court within a period of four weeks from today.

11] It is made clear that this Court has not examined the merits of the matter and accordingly, all contentions of all parties are kept open for decision by the Appeal Court. The Appeal Court is directed to dispose of the appeal as expeditiously as possible and in any case

within a period of six months from the date of production of authenticated copy of this order.

12] The parties to appear before the Appeal Court on 21 September 2015 at 11.00 a.m. and produce authenticated copy of this order.

13] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

14] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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CERTIFICATE

**“I certify that this Order uploaded is a true
and correct copy of original signed Order.”**