

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.97 OF 2016
WITH
CIVIL APPLICATION NO. 356 OF 2016 IN CRA/97/2016**

Shri A.S.Siddiqui

..Applicant

Vs

Shankar Ramnihor Yadav

.. Respondent

Mr. Vishal Kanade, a/w Ms. N.S.Moily, Advocates for Applicant.
Mr. Abhay L. Patki, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 29/09/2016

PC:

1. Heard Mr. Vishal Kanade, learned counsel for the applicant and Mr. Abhay Patki, learned counsel for the respondent at length. Rule. Mr.Patki waives service on behalf of the respondent. At the request of the learned counsel for the parties, Rule is made returnable forthwith and the Application is taken up for final hearing.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as 'defendant', has challenged

(1) Judgment and decree dated 4.5.2011 passed by the learned Judge presiding over Court Room No.35 of the Court of Small Causes at Mumbai (Bandra Branch) in R.A.E. & R. Suit No. 194/497 of 1997;

(2) Judgment and order dated 8.1.2016 passed by the Appellate Bench of the Small Causes Court below Exhibit-15 in A-1 Appeal No.41 of 2012 by which the Appellate Court dismissed the application taken out by the defendant under Order 41, Rule 27 of C.P.C;

(3) Judgment and decree dated 8.1.2016 passed by the Appellate Bench of the Small Causes Court in A-1 Appeal No.41 of 2012 dismissing the appeal preferred by the defendant.

By these decrees, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as 'plaintiff', on the ground of arrears of rent (Section 12) and additions and alterations of permanent nature without the written consent of the plaintiff (S.13(1)(b)) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The Courts below directed the defendant to deliver vacant possession of Room no.4 of Kamla Sadan Chawl No.1, situate at Chimatpada, Marol Naka, Andheri Kurla Road, Bombay 400 059 (for short, 'suit premises') to the plaintiff as also the Courts below directed the defendant to pay arrears of rent.

3. Plaintiff had instituted suit against the defendant under sections 12, 13(1)(a) read with section 108 (o) of the Transfer of Property Act, 1882 and Section 13 (1)(b) of the Act. The plaintiff

contended that the defendant was monthly tenant of the suit premises at Rs.45/-. The defendant is in arrears of rent from 1.12.1991 to 31.1.1996 amounting to Rs.2250/- and permitted increases at the rate of Rs. 14.70 p.m. from 1.4.1994. The defendant has failed and neglected to pay arrears of rent and permitted increases inspite of oral demand. The plaintiff issued demand notice dated 23.2.1996. It was replied by the defendant on 8.3.1996. As the defendant did not comply with requisition contained in the demand notice, the suit is instituted on 26.4.1996.

4. The plaintiff further contended that the defendant has erected permanent structure by constructing two rooms over the suit premises in contravention of Section 108(o) of the T.P.Act and thus has caused waste and acted contrary to Section 108(o) of the T.P.Act. The plaintiff claimed possession under Section 13(1) (b) and 13(1)(a) r/w section 108(o) of the T.P.Act.

5. The defendant resisted the suit and denied relationship of landlord and tenant as also denied the ground invoked by the plaintiff. The defendant further contended that the suit property is situate in an area declared as a slum area under the provisions of the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 (for short, '1971 Act') by issuing Notification dated 15.11.1977 under Section 4(1) which was

published in the Government Gazette dated 16.1.1978 and, therefore, the suit is not maintainable.

6. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led evidence. After considering the evidence on record, the learned trial Judge decreed the suit under sections 12 and 13(1)(b) as also 13(1)(a) read with section 108 (o) of the T.P. Act. The learned trial Judge held that there exists relationship of landlord and tenant between the parties; defendant is a willful defaulter; defendant has made permanent additions and alterations in the suit premises without the plaintiff's written permission. The learned trial Judge, however, declined to pass decree on the ground under section 108(o) the T.P. Act.

7. Aggrieved by this decision, the defendant preferred Appeal. During the pendency of the Appeal, the defendant took out Application Exh.15 under Order XLI, Rule 27 of C.P.C. for production of (1) sale deed dated 7.4.1987 executed Kamladevi Tiwari in favour of her nephew-Premshankar Ramnath Tripathi and (2) papers and proceedings of suit between the plaintiff herein and the said Tripathi for cancellation of sale deed dated 7.4.1987 and the Consent Decree passed in that suit. By order dated 8.1.2016, the Appellate Court dismissed the application. The Appellate Court dismissed the Appeal on the same day and

upheld the decree of eviction passed by the trial Court on grounds under section 12 and 13(1)(b) of the Act. The Appellate Court also held that as the declaration was set aside by the Slum Tribunal on 24.2.1998 in Appeal No. 38 of 1994, it cannot be said that the suit is hit by Section 22 of 1971 Act. It is against these decisions, the defendant has instituted the present application.

8. In support of this Application, Mr. Kanade submitted that the Appellate court committed serious error in dismissing the application under Order 41, Rule 27 of C.P.C. He has taken me through application Exh.15 made by the defendant and in particulars paragraphs 2 and 3 thereof. In paragraph 2 the defendant referred to conveyance deed dated 7.4.1987 executed by Kamladevi Tiwari in favour of Prameshnakr Ramnath Tripathi. In paragraph 3, the defendant referred to Suit No. 1650 of 1994 instituted by Kamladevi Tiwari on the Original Side of this Court against the defendant challenging the deed of conveyance dated 10.12.1991. The Appellate Court, without considering relevancy of these documents, rejected the application on 8.1.2016. He has taken me through the order rejecting application made by the defendant under Order 41, rule 27. He submitted that by refusing permission to the defendant to produce on record these documents, it has caused serious prejudice and valuable rights of the defendant are affected. He, therefore, submitted that the

order dated 8.1.2016 below Exh.15 may be set aside with direction to the Appellate Court to decide the application afresh.

9. As far as merits of the case are concerned, he submitted that the plaintiff claims to have purchased the suit property from Kamladevi Tiwari on 10.12.991 and further claims that the said instrument is a registered instrument. He submitted that though the sale deed was executed on 10.12.1919 and was lodged for registration, it is not registered. In other words, he submitted that no title is acquired by the plaintiff on the strength of the sale deed dated 10.12.1991. Apart from that, he submitted that the demand notice was issued on 23.2.1996 and the suit was instituted on 25.4.1996. As Kamladevi Tiwari has already executed sale deed in favour of Premshankar Tripathi dated 7.4.1987, even otherwise the plaintiff cannot acquire title on the basis of the sale deed dated 10.12.1991. Basically on the basis of one property, there cannot be two sale deeds.

10. Mr Kanade submitted that the time of issuing demand notice dated 23.2.1996 as also at the time of instituting suit on 26.4.1996, the plaintiff had no right, title and interest in the suit property and consequently he has no locus to institute the suit. Premshankar Tripathi had instituted suit in August 1996 against the present plaintiff for cancellation of sale deed dated 10.12.1991 executed in favour of the plaintiff by Kamladevi

Tiwari as also restraining the plaintiff from recovering rent. In that suit, compromise terms were entered into on 6.10.1997 and consent decree was passed in terms of consent terms. In short, he submitted that only on 6.10.1997, the plaintiff can claim to be owner of the suit premises. He submitted that the Courts below were, therefore, not justified in passing the decree on the grounds of arrears of rent under section 12 of the Act. At the most, arrears, if any, have to be treated as debt and cannot be ground for eviction.

11. As far as the ground under section 13(1)(b) of the Act is concerned, he submitted that the Courts below have not properly appreciated the evidence on record. He further submitted that as the suit premises was covered by Notification under Section 4 of the Act published on 24.1.1978, the suit instituted on 26.4.1996 was not maintainable as the plaintiff did not obtain permission under Section 22 of 1971 Act. He, therefore, submitted that the impugned orders deserve to be set aside. He submitted that application requires consideration.

12. On the other hand, Mr. Patki supported the impugned orders. He submitted that the defendant was fully aware of execution of sale deed by Kamladevi Tiwari in favour of Prwemshankar Tripathi on 7.4.1987. The defendant was also equally aware of the sale deed dated 10.12.1991 executed by

Kamladevi Tiwari in favour of the plaintiff. The sale deed dated 10.12.1991 was lodged for registration with Registrar of Assurance, Bandra on the same day. Mr Patki states that the said instrument is a registered instrument. Statement of Mr Patki is recorded.

13. Mr. Patki further submitted that on 7.7.1993 Smt Kamladevi Tiward had issued notice to the defendant informing him that she had sold and assigned the premises in favour of the plaintiff by executing sale deed dated 10.12.1991. Kamaladevi Tiwari instructed the defendant to forthwith attorn and become tenant of the plaintiff and henceforth pay rent to the plaintiff. He, therefore, submitted that as Kamladevi Tiwari had authorized the plaintiff to recover rent, he falls within the expression 'landlord' defined under section 5(3) of the Act. After appreciating the evidence on record, the Courts below have concurrently decreed the suit by holding that the defendant is a willful defaulter. He, therefore, submitted that no fault can be found with passing of decree under section 12.

14. As far as the ground under section 13(1)(b) of the Act is concerned, he has taken me through the impugned orders and in particular paragraph 22 of the Appellate Court order. In paragraph 22, the Appellate Court recorded that during the course of cross examination, the defendant has admitted that

when he obtained the suit premises it was a ground floor structure but now there is floor room over the suit premises. He, therefore, submitted that the Courts below were fully justified in passing the decree under section 13(1)(b) of the At.

15. As far as the contention based on Section 22 of 1971 Act is concerned, he submitted that the declaration dated 15.11.1977 was set aside by the Tribunal on 24.2.1998. thus, during the pendency of the suit, the declaration was set aside and, therefore, the plaintiff's suit will not hit by Section 22 of the Act of 1971. He invited my attention to paragraphs 29 and 30 of the Appellate Court order. In para 30, the Appellate Court referred to the decision of this Court in Lallji Lachhamndas Vs. Amruddin Amanulla, 1998 (4) Bom C R 335. Mr. Patki relied upon the decision of this Court in Abdul Basu Vs. Smt. Teresa Rozario, 1986 (I) All India Rent Control Journal 154 and in particular paragraph 6 thereof. For all these reasons, he submitted that no case is made out for invocation of powers under section 115 of C.P.C.

16. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As far as the ground under section 22 of the Act of 1971 is concerned, it has come on record that the area where the suit premises is situate was declared slum area as per Notification dated 15.11.1977. It has also come on record that

Appeal No.38 of 1994 was filed before the Maharashtra Slum Area Tribunal. On 24.2.1998, the declaration dated 15.11.1977 was set aside.

17. In the case of Abdul Basu (supra), suit was instituted in December, 1977 and the suit was decreed exparte on 12.4.1979 and Teresa executed the decree and obtained possession 10.5.1979. On 22.5.1979, Abdul Basu filed application for setting aside exparte decree on two grounds viz., (1) that a fraud was practiced upon him by the landlady as she asked him not to appear in the suit as she wanted to withdraw the suit (2) that the premises were declared as a slum area under Section 4 of 1971 Act. In that case, on 9.9.1977 Notification was issued declaring the premises as a slum area. It was set aside on 7.12.1979 Exparte decree on the ground that the suit instituted by the landlady was bad. Against that order, Teresa filed Revision before the Appellate Court of Small Causes Court which was allowed on 15.3.1980. Revisional Court took into account the fact that the Notification declaring area slum on 9.9.1977 was set aside on 7.12.1979. The revision was allowed. In paragraph 6, the learned Single Judge held that the effect of the order setting aside the Notification dated 9.9.1977 was that there was no declaration under Section 4 at any time and the suit was not governed by Section 22 of the Act 1977. It was further held that

the suit would have been bad if the notification dated 9.9.1977 was still subsisting. Once that notification is set aside, the very effect of it is washed away.

18. In the case of Hari S. Yadav Vs Hiralal Prabhu Yadav, 2002 (6) Bombay C.R. 177, the learned Single Judge held that before the decree became final, the Notification issued under section 4 was set aside and, therefore, suit is not hit by Section 22 of the Act. In view of the decisions of this Court, as pending the suit declaration itself was set aside, one has to proceed on the premise that the said declaration never existed in the eyes of law. The submission based on Section 22 of the Act of 1971 is, therefore, devoid of substance and courts below rightly held that the suit was maintainable.

19. Mr. Kanade submitted that by rejecting the application under Order 41, Rule 27 of C.P.C, valuable rights of the defendant are affected. The Appellate Court while rejecting the application, did not record any finding as to whether the documents sought to be produced by the defendant are relevant or not. I do not find any merit in this Submission. Perusal of the record shows that the defendant was aware of the sale deed dated 7.4.1987 executed by Kamladevi Tiwari in favour of Premshankar Tripathi. The defendant was also aware of the sale deed dated 10.12.1991 executed by Kamladevi Tiwari in favour of

the present plaintiff. It is no doubt true that the plaintiff did not disclose filing of the suit to Premshankar Tripathi against him for cancellation of sale deed dated 10.12.1991 as also passing of compromise decree in that suit. However, nothing turns on this document. It is not disputed that Premshankar Tripathi had instituted the suit against the present plaintiff for cancellation of the sale deed dated 10.12.1991 as also restraining the plaintiff from collecting rent. The suit was compromised in terms of consent terms dated 6.10.1997 and consent decree was passed. Thus, from 6.10.1997 the plaintiff has perfected his title. The submission made by Mr. Kanade that the plaintiff could not have issued demand notice dated 23.2.1996 as also could not have instituted the suit on 26.4.1996 loses significance once the compromise decree was passed in favour of the plaintiff wherein Premshankar Tripathi relinquished his right, title and interest in the suit property and also accepted that the plaintiff as owner thereof. Even if these documents were allowed to be produced, it will not further case of the defendant, rather title of the plaintiff stands established. Understood thus, I do not find that any prejudice is caused to the defendant or valuable rights of the defendant are affected. Perusal of the application does not show that the defendant made out any case under Order 41, Rule 27 of C.P.C. I, therefore do not find that the Appellate Court committed

any error in dismissing the application.

20. As far as the ground of eviction under Section 12 of the Act is concerned, as noted earlier, the plaintiff had perfected title only on 6.10.1997 after passing of compromise decree. Thus, when the plaintiff had issued demand notice on 23.2.1996 and had instituted suit on 26.4.1996, in the absence of title in his favour, could not have claimed possession on the ground of arrears of rent. Section 5(3) of the Act defines the expression 'landlord' as under :

“5. In this Act unless there is anything repugnant to the subject or context -

(3) "Landlord" means any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of, any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not being a tenant who from time to time derives title under a landlord, and further includes in respect of his sub-tenant, a tenant who has sub-let any premises; and also includes, in respect of a licensee deemed to be a tenant by section 15A, the licensor who has given premises on licence and in respect of the State Government or as the case may be, the Government allottee referred to in sub-clause (b) of clause (1A), deemed to be a tenant by section 15B, the person who was entitled to receive the rent if the premises were let to a tenant immediately before the coming into force of the Bombay Rent, Hotel and Lodging House Rates Control, Bombay Land Requisition and Bombay Government Premises (Eviction) (Amendment) Act, 1996.”

Perusal of the plaint shows that the plaintiff did not come with

the case that he was receiving rent or is entitled to receive rent in respect of the suit premises from defendant, whether on his own account or on behalf of or for the benefit of any other person. As the plaintiff perfected his title only on 6.10.1997 at the highest arrears of rent could be treated as debt and cannot be a ground for eviction under section 12 of the Act. Understood thus, the Courts below were not justified in passing the decree on that ground.

21. That brings me to the ground under section 13(1)(b) of the Act. After appreciating the evidence on record, the Courts below have decreed the suit. In particular, the trial Court has considered this ground from paragraph 28 to 34. As far as the Appellate Court is concerned, this aspect is considered from paragraphs 21 to 24. In paragraph 21, the Appellate Court noted that the defendant removed manglore tiles of the roof and the rafters below the same. He has extended the height of the walls upto 20 feet unlawfully and unauthorisedly on iron girders of about 9" with iron girders frame over the top of the walls. The defendant has constructed two floor rooms over the suit premises with windows and doors fixed thereon. For the reasons recorded in paragraphs 21 and 22 by the Appellate Court, I do not find that the Courts below committed any error in decreeing the suit under section 13(1)(b) of the Act.

22. The defendant was not in a position to demonstrate that the findings recorded by the Courts below in respect of ground under Section 13 (1)(b) are perverse being based on no evidence or that they are contrary to the evidence on record. Defendant was not in a position to show that on the basis of material on record, no reasonable person would have come to the conclusions arrived at by the Courts below. In the light of the aforesaid discussion, I do not find that the applicant has made out any case for invocation of powers under section 115 of C.P.C in relation to ground under section 13(1)(b) of the Act. In the result, Application partly succeeds. Decree passed by the Courts below under section 12 is set aside and that under section 13(1) (b) is upheld. Rule is made absolute partly in the above terms with no order as to costs.

23. At this stage, Mr. Kanade orally applies for stay of this order for a period of 8 weeks from today. He states that the applicant is in possession of the suit premises and nobody else is in possession. The applicant has neither created third party interest nor parted with possession and the applicant will hereafter neither create third party interest nor part with possession. Mr. Kanade assures that within two weeks from today, the applicant and all adult family members residing in the suit premises will file usual undertaking in this Court, after

giving advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interests nor part with possession;
- (iv) that they will pay arrears of rent within 2 weeks from today;
- (v) that they will not apply for further extension of time;
- (vi) that in case they are unable to obtain suitable orders from higher Court within 8 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondent-plaintiff.

24. In view thereof, notwithstanding passing of eviction decree under section 13 (1)(b) of the Act, eviction decree is stayed for a period of 8 weeks from today subject to the applicant and all adult family members residing in the suit premises filing undertakings in the aforesaid terms within two weeks from today and serving copy in advance to other side. It is made clear that if the undertakings in the aforesaid terms are not filed and arrears are not paid within two weeks from today, the interim order shall stand vacated without further reference to Court.

25. Respondent-plaintiff is permitted to withdraw the amount deposited by the defendant in the trial Court unconditionally. In view of disposal of Civil Revision Application, Civil Application No. 356 of 2016 does not survive and the same is disposed of accordingly.

26. List the Application for reporting compliance after three weeks.

27. All parties including trial Court to act upon the authenticated copy of this order.

(R.G.KETKAR, J.)