IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5748 OF 2016

Smt. Madhuben Ishwarlal Nakkar
And Anr. ...Petitioners
Versus
Rushab Developers ...Respondent
....
Mr.R.A. Thorat, Senior Advocate a/w. Jitendra M. Patil, Advocate for the Petitioners.
Mr. Bhavik Manek i/b. V.N. Ajitkumar, Advocate for the respondent.
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CORAM : R. G. KETKAR, J.

DATE : 19th OCTOBER, 2016

P.C.

1. Heard Mr. R.A. Thorat, learned Senior Counsel for the petitioners and Mr. Bhavik Manek, learned Counsel for the respondent, at length.

2. Rule. Mr.Manek waives service. At the request and by consent of parties as also having regard to the fact that short controversy is raised in this Petition, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 10.2.2016 passed by the Appellate Bench of Small Causes Court at Bombay below

Exhibit-13 in A(1) Appeal No.51/2011. By that order, the Appellate Court allowed the application Exhibit-13 made by the respondent under Order XLI Rule 27 of C.P.C. and allowed the respondent to furnish undertaking along with annexure thereto as prayed for. Appellate Court also issued certain directions about depositing the amount and investment of amounts in Nationalized Bank.

4. In support of this Petition, Mr. Thorat submitted that the respondent instituted suit under Sections 15, 16(1)(a), 16(1)(b), 16(1)(i) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). He submitted that the learned trial Judge decreed the suit on 6.5.2011 only under Section 15 of the Act. In other words, the learned trial Judge did not pass decree on the grounds made out under Sections 16(1)(a), 16(1)(b), 16(1)(i) and 16(1)(n) of the Act. Aggrieved by that decision, the petitioners instituted appeal. Pending Appeal, the respondent took out application Exhibit-13 under Order XLI Rule 27 of C.P.C. for production of undertaking as required under Section 16(6) of the Act. He invited my attention to the findings recorded by the learned trial Judge on the ground under Section 16(1)(i) and submitted that after considering the evidence of the parties, the learned trial Judge held that the respondents have no financial capacity to carry out the construction. PW-1 admitted that the plaintiffs firm has no income and consequently no income tax was paid. After

considering the evidence of PW-1, the learned trial Judge held in paragraph-21 that no documentary evidence was produced on record to show that sufficient funds are ready and project can be completed within the stipulated period. In paragraph-22, the learned trial Judge also considered preparation of plans and evidence of PWs-2 & 3. After considering the evidence on record, the learned trial Judge recorded a finding that none of the conditions in respect of availability of sufficient funds, preparation of plans and estimates of the new buildings were complied by the respondent.

5. Mr. Thorat invited my attention to application at Exhibit-13 filed by the respondent and in particular paragraphs-12 to 15 and submitted that the respondent has made out ground only under Order XLI Rule 27(1)(b) and not under Order XLI Rule 27(1)(aa). He submitted that Appellate Court has not recorded any finding as to whether it requires production of additional evidence to enable it to decide the appeal. He, therefore, submitted that the impugned order is unsustainable and is liable to be set aside.

6. On the other hand, Mr. Manek supported the impugned order. He submitted that the appeal is continuation of the suit. One of the grounds on which the respondents have sought eviction is under Section 16(1)(i).

As required under Section 16(6), the respondents are ready and willing to furnish undertaking. Along with the undertaking, the respondents also proposes to produce individual income tax returns of the Partners, namely, (i) Ranshi L. Shah, (ii) Kalyanji R. Shah, (iii) Mukesh R. Shah, (iv) Jitendra R. Shah, (v) Ramesh N. Shah, (vi) Kantilal N. Shah, (vii) Kishore N. Shah and (viii) Mahesh N. Shah. Each of the Partners have necessary funds for the purpose of erection of new building. The respondents, therefore, prayed for production of income tax assessment returns of last three Financial Years, namely, Assessment Year 2012-13, 2013-14 and 2014-15. In paragraph-8 of the application, reference is also made to the Government bonds in the name of the Partners of the plaintiff firm. Mr. Manek submitted that the Appellate Court was justified in allowing the application as appeal being continuation of the suit the undertaking in terms of Section 16(1)(6) can be filed even at the Appellate stage. He, therefore, submitted that no case is made out for interfering with the impugned order.

7. I have considered rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph-7 of the Petition, the petitioners have given details of the arguments advanced before the Appellate Court. Perusal of application Exhibit-13 and in particular paragraphs-12 to 15 shows that the respondent came with the case falling under Order

XLI Rule 27(1)(b). Perusal of the application does not indicate that the respondent came with the case falling under Order XLI Rule 27(1)(aa) of C.P.C. If the case is falling only under Order XLI Rule 27(1)(b), Appellate Court is required to decide said application along with appeal and also record finding whether it requires documents sought to be produced by the party in order to enable it to decide the appeal. Perusal of the impugned order does not show that Appellate Court has recorded any finding to that effect. Order XLI Rule 27(1)(b) reads thus :

> "27. Production of additional evidence in Appellate Court.-- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if--
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> (a) xx xx xx xx
>
> (aa) xx xx xx xx
>
> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

8. Perusal of the above extracted provision shows that under this clause the requirement of the Appellate Court is *sine qua non* for allowing production of the documents or

examination of any witness to enable it to pronounce judgment or for any substantial cause. As the Appellate Court has not recorded a finding in terms of Order XLI Rule 27(1)(b) of C.P.C., impugned order cannot be sustained and as such is liable to be set aside thereby restoring the application to the file of Appellate Court for deciding it afresh. Hence, following order :

[i] Impugned order dated 10.2.2016 passed by the learned Appellate Bench of Small Causes Court at Bombay below Exhibit-13 in A(1) Appeal No.51/2011 is quashed and set aside and application Exhibit-13 is restored to the file of Appellate Court.

[ii] While deciding the main appeal, Appellate Court will consider afresh application Exhibit-13 and record finding in terms of Order XLI Rule 27(1)(b) of C.P.C.

[iii] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)