

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2775 OF 2014

Adi Lim Billimoria ... Petitioner
Vs.
Zarine Shapur Rao and others ... Respondents

Mr. P. S. Dani, Senior Advocate a/w. Mr. Vipul Bilve i/b. Mulla & Mulla & CBC for Petitioner.
Mr. P. K. Dhakephalkar, Senior Advocate i/b. Mr. Pritesh Vyas for Respondents No.1 and 3.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 04, 2016

ORDER :

Heard Mr. Dani, learned Senior Counsel for the petitioner and Mr. Dhakephalkar, learned Senior Counsel for respondents No.1 and 3 at length. Mr. Dani orally applies for deleting respondents No.2(a) to 2(d) on the ground that respondents No.1 and 3 are the only contesting respondent in the present Petition. On the motion made by Mr. Dani, leave to delete respondents No.2(a) to 2(d) is granted. Amendment shall be carried out forthwith. Rule. Mr. Vyas waives service for respondents No.1 and 3. He assures that within three weeks from today, he will file appearance on behalf of the respondent No.3. In view of the controversy as also at the request and by consent of the learned Counsel appearing for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff No.2' has challenged the judgment and order dated 14.02.2014 passed by the Appellate Bench of the Small Causes Court in Revision Application No.275 of 2013. By that order, the appellate Court allowed the Revision Application

preferred by respondent No.1, hereinafter referred to as 'defendant No.1(b)' and set aside the trial Court's order dated 10.10.2013 passed below exhibit-26 in L.E.&C. Suit No.78/95 of 2012. The Appellate Court directed the trial Court to frame issues on the pleas put forth and as contended in the application at exhibit-26 regarding bequeath made under Will dated 08.07.1995 and other issues. The learned trial Judge is also directed to avoid use of the word 'purported' while referring the said Will in the issues to be framed.

3. Plaintiff No.2 along with respondent No.4, hereinafter referred to as plaintiff No.1, has instituted Suit against respondent No.1, defendant No.1(b), Dr. Rusi Variava - defendant No.1(a) and defendant No.2 - Firoze Shapur Rao for recovery of possession of flat No.61, Las Palmas, Little Gibbs Road, Malbar Hill, Mumbai 400 006 and garage No.6 (for short 'suit premises') as also for perpetual injunction restraining the defendants from unlawfully subletting or giving licence and / or assigning and / or creating third party interest and / or alienating and / or parting with the possession of the suit premises and for appointment of Court Receiver, High Court, Bombay as Receiver of the suit premises.

4. In paragraph 1 of the plaint, plaintiffs came with the case that one Ardeshir Khorshedji Wadia was occupying the suit premises under the Indenture of Registered Lease dated 24.03.1964 executed between himself and his wife and H. D. Mahtani, taken over by Tenerife Co-operative Housing Society Limited. Said Ardeshir had executed Will and Testament dated 08.07.1995. He expired on 02.04.1996. Plaintiffs are appointed as executors of the said Will and Testament of the said Ardeshir. They had already instituted Testamentary Petition in this Court, which is pending. Said Ardeshir's wife Aloo had predeceased him. Deceased Ardeshir had no issue. Plaintiffs asserted that according

to the Indian Succession Act, 1925 (for short 'Act') as applicable to Parsis, the heir of the deceased Ardeshir is Noshir Ardeshir Soonawalla, who is the only surviving first cousin of the deceased from paternal side. In paragraph 7, reference is made to clause 6 of the Will of Ardeshir. It is contended that under clause 18 of the Will, the deceased had bequeathed the net proceeds after disposal of the suit premises to Bomanji Dinshaw Petit Parsi General Hospital, Bombay for poor Parsi patients, after providing for legacies all his assets to Bomanji Dinshaw Petit Parsi General Hospital.

5. Defendants No.1(a) and 1(b) have resisted the Suit by filing separate written statements inter alia contending that Small Causes Court has no jurisdiction to entertain and try the Suit. Defendant No.1(a) along with his sister defendant No.1(b) became tenants in respect of the suit premises as per Section 5(11)(c)(i) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Bombay Rent Act'). It is further contended that bequest of tenancy as per clause 18 of the Will dated 08.07.1995 is void being against the Law.

6. On the basis of the pleadings of the parties, by order dated 24.01.2013, the learned trial Judge framed following issues:

- “1) Whether plaintiffs prove that original defendant No.1 was the gratuitous licensee in respect of the suit premises?
- 2) Whether plaintiffs prove that the licence is duly terminated?
- 3) Whether this Court has jurisdiction to try and entertain the suit?
- 4) Whether suit is maintainable?
- 5) Whether suit is barred by the provisions of the Limitation Act?
- 6) Whether plaintiffs are entitled for decree of eviction of the suit premises as sought for?
- 7) What order as to mesne profits?
- 8) What order & decree?”

7. Defendant No.1(b) took out application exhibit-26 on 03.06.2013 for framing issues as per schedule annexed to that application.

Defendant No.1(b) prayed for framing of following additional issues:

“[1] Whether bequest of suit premises under the purported WILL dated 8/7/1995 was illegal, null and void or void ab-initio?

[2] Do plaintiffs prove that they have locus-standi to file the present suit in the capacity as executors of the purported Will and Testament dated 8/7/1995?

[3] Do defendants prove that late Khorshed Variava became tenant in respect of suit premises u/s.5(11)(c)(i) of Bombay Rent Act 1947?

[4] Do defendants No.1(a) and 1(b) prove that they became entitled to tenancy rights in respect of the suit premises being the heirs and legal representatives of deceased Mrs. Khorshed Variava?”

8. By order dated 10.10.2013, the learned trial Judge partly allowed the application and framed following issue as additional issue:

“7b) Do defendants No.1(a) and 1(b) prove that they are the statutory tenants in respect of the suit premises?”

9. Aggrieved by this decision, defendant No.1(b) preferred Revision Application. By the impugned order, the appellate Court allowed the Revision Application, as indicated earlier. It is against this order plaintiff No.2 has instituted the present Petition.

10. In support of this Petition, Mr. Dani submitted that in view of the Full Bench decision of this Court in the case of **Bhartiben Vs. Gracy Thomas, 2013 (2) Mh.L.J. 25**, the appellate Court committed serious error in holding that Revision is maintainable. He submitted that in the case of **Bhartiben (supra)**, Full Bench of this Court has held that Revision under Section 34 of the Maharashtra Rent control Act, 1999 corresponding to Section 29 of Bombay Rent Act is not maintainable against the procedural orders. Framing of issues is a procedural order, and therefore, Revision itself was not maintainable.

11. He further submitted that plaintiffs have not averred in the Suit that under the Will dated 08.07.1995, Ardeshir had bequeathed tenancy rights of suit premises. The Suit is instituted by the plaintiffs in the capacity as executors of the Will. He, therefore, submitted that the appellate Court was not justified in framing additional issue namely, “whether bequest of suit premises under the purported Will dated 08.07.1995 was illegal, null and void or void ab-initio?”

12. As far as framing of additional issue No.2 namely, “do plaintiffs prove that they have locus standi to file the present suit in the capacity as Executors of the purported Will and Testament dated 08.07.1995?” is concerned, he submitted that it is taken care of by issue No.2 of application exhibit-26 taken out on 03.06.2013. As far as additional issues No.3 and 4 are concerned, the learned trial Judge has clubbed these issues together and framed additional issue No.7(b). Plaintiffs have not challenged the order passed by the trial Court. He, therefore, submitted that the appellate Court was not justified in framing additional issues 1 to 4. Instead the appellate Court should have confirmed the order of the trial Court framing additional issue No.7(b).

13. On the other hand, Mr. Dhakephalkar supported the impugned order. He submitted that the appellate Court has considered the objection as regards maintainability of the Revision Application and has observed that if the issues suggested by the defendant No.1(b) are not framed, certainly, the parties may not be in a position to appreciate the real controversy on which they have to go to the trial. The appellate Court further observed that refusal to frame issue can certainly be stated to be affecting the substantial rights so as to invoke the revisional jurisdiction. He, therefore, submitted that the appellate Court rightly held that the Revision is maintainable.

14. On merits, he has taken me through the written statement filed by defendant No.1(b) and supported the impugned order. He submitted that defendant No.1(b) has specifically contended that tenancy rights cannot be bequeathed or sold in view of the prohibition contained in the Bombay Rent Act. Even if the genuineness / legality and validity of the Will is upheld by the Apex Court, bequeath of tenancy in clause 18 is void being against Law. He submitted that the learned trial Judge should have framed issue on the basis of the pleadings and more particularly, on the basis of the stand taken by defendant No.1(b) in the written statement. He, therefore, submitted that appellate Court rightly directed framing of additional issue No.1. As far as additional issue No.2 is concerned, defendant No.1(b) will be satisfied, if it is clarified that issue No.4 framed on 24.01.2013 includes the issue of locus standi of the plaintiffs to maintain the Suit. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

15. I have considered the rival submissions advanced by the learned Senior Counsel appearing for the parties. I have also perused the material on record. Mr. Dani submitted that as the order passed by the learned trial Judge framing additional issue is purely a procedural order, it does not affect substantive rights of the parties. Revision Application institute by defendant No.1(b) is, therefore, not maintainable as held by the Full Bench of this Court in the case of **Bhartiben** (*supra*). The said contention was also advanced before the appellate Court. While repelling that contention, in paragraph 7, the Appellate Court has considered the decision of **Bhartiben** (*supra*) as also **Shradha Associate, Pune Vs. St. Patrick's Town CHSL, 2003 (2) Mh.L.J. 219, A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sanham, AIR 2012 SC 2010** and **Depe**

Global Shipping Agencies Pvt. Ltd. Vs. Mpil Corporation Limited, 2012 (2) Mh.L.J. 318. The Appellate Court observed that if the issue is not framed, certainly the parties may not be in a position to appreciate the real controversy on which the parties have to go to the trial. In the case of A. Shanmugam (supra), the Apex Court has observed that the proper framing of the issues enables to clearly focus on the controversy and to appreciate the documents and evidence properly. In view thereof, I do not find that the appellate Court committed any error in holding that Revision is maintainable.

16. Even assuming that Revision is not maintainable, I have heard the learned Senior Counsel on merits of the controversy instead of directing the respondents to challenge the order of the trial Court by way of Writ Petition in this Court. As noted earlier, defendant No.1(b) has specifically pleaded in paragraph 15 of the written statement about the bequest of tenancy in clause 18 of the Will dated 08.07.1995. In view thereof, the learned trial Judge should have framed issue on the basis of the defence taken by the defendant No.1(b). In view thereof, I do not find that the appellate Court committed any error in framing additional issue No.1, extracted hereinabove.

17. As far as the additional issue No.2 is concerned, the learned trial Judge has observed in paragraph 6 that the issue whether the plaintiffs have locus standi to file the Suit or not is covered in issue No.4, viz. whether the Suit is maintainable or not, framed on 24.01.2013. Subject to this clarification, it is not necessary to frame additional issue No.2.

18. As far as additional issues No.3 and 4 are concerned, in paragraph 7, the learned trial Judge has observed that having considered the pleadings in the written statement of the defendants, instead of framing

two additional issues on this claim, only one issue is sufficient as suggested at serial No.4 in the schedule annexed to the application. Accordingly, the learned trial Judge has framed additional issue No.7(b), extracted hereinabove. I do not find that the learned trial Judge has committed any error in that regard. In my opinion, the appellate Court should have framed only additional issue No.1, extracted hereinabove.

19. Mr. Dani states that plaintiffs have not claimed that the tenancy rights are bequeathed by Ardeshir under Will dated 08.07.1995. Statement made by Mr. Dani, on instructions, is recorded. While recording findings against the additional issue No.1, the learned trial Judge will bear this statement in mind.

20. In the light of this, Petition succeeds. Rule is partly made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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