

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

CIVIL REVISION APPLICATION NO.335 OF 2016

M/s. Globe Transport Company ..Applicants

Vs

M/s. Sunrise Lifestyle and
Homes Pvt. Ltd. and Ors. .. Respondents

WITH

WRIT PETITION NO.11237 OF 2015

M/s. Globe Transport Company ..Petitioners

Vs

M/s. Sunrise Lifestyle and
Homes Pvt Ltd and Ors. .. Respondents

Mr. S.U.Kamdar, Senior Advocate with Mr. S.S.Purohit a/w Ms. J.S.Kachalia, Mr. Karan Dua, Mr. Chirag Shah i/b. Wadia Ghandy & Co, Advocates for Applicants/petitioners.

Mr. P.K.Dhakephalkar, Senior Advocate i/b Jagdish G. Reddy, Advocate for respondent no.1 in both petitions.

CORAM : **R.G.KETKAR,J.**
RESERVED ON : **19/09/2016**
PRONOUNCED ON: **07/10/2016.**

ORDER:

1. Heard Mr. S.U. Kamdar, learned senior counsel for the Applicants and Mr. P. K. Dhakephalkar, learned senior counsel for respondent no.1 at length.

2. Civil Revision Application No.335 of 2016 is instituted under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') by applicants, hereinafter referred to as 'defendant no.1', challenging the Judgment and decree dated 12.3.2008 passed by the learned Judge, presiding over Court Room No.8 of the Court of Small Causes at Bombay in R.A.E.&R.Suit No. 224/479 of 1995 as also the Judgment and decree dated 8.7.2014 passed by the Appellate Bench of the Small Causes Court at Bombay in A-1 Appeal No.576 of 2008. By these orders, the Courts below decreed the suit instituted by respondent no.1, hereinafter referred to as 'plaintiffs', under section 13(1)(b) and section 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (for short, 'Act') and directed defendant no.1 and respondents no.2 and 3, hereinafter referred to as 'defendants no.2 and 3', to hand over vacant possession of Shop No.11-12, F-Block, Shalimar Estate, formerly known as 'Sitaram Building', Palton Road, Crawford Market, Mumbai-400001 (for short, 'suit premises') in favour of the plaintiffs within a period of three months.

3. Writ Petition No. 11237 of 2015 is instituted by defendant no.1 challenging (a) the Judgment and order dated 21.4.2003 passed by the learned Judge presiding over Court Room No.8 of the Court of Small Causes at Mumbai in Interim Notice No. 3894

of 2002; (b) the Judgment and order dated 2.8.2006 passed by the Appellate Bench of the Court of Small Causes at Bombay in Appeal No.121 of 2004; (c) the Judgment and decree dated 8.7.2014 passed by the Appellate Bench of the Small Causes Court in A-1 Appeal No.576 of 2008 in so far as rejecting the application dated 3.10.2013 filed by defendant no.1 pending the appeal so as to amend written statement by incorporating paragraph 3(a) contained in the Schedule annexed to the application. By orders dated 21.4.2003 and 2.8.2006, the Courts below dismissed the Interim Notice taken out by defendant no.1 pending the suit for amending the written statement. While deciding substantive Appeal on 8.7.2014, the Appellate Court also dismissed application dated 3.10.2013 filed by defendant no.1 for amending the written statement.

4. Plaintiffs have instituted suit against the defendants for recovery of possession of the suit premises on the grounds available under section 13(1)(b) (carrying out additions and alterations of permanent nature without plaintiffs' written consent), section 13(1)(c) (defendants are source of nuisance and annoyance to neighbouring occupants), section 13(1)(g) (plaintiffs require the suit premises reasonably and bonafide), inter alia, contending that defendant no.1 are monthly tenant at the rate of Rs.1115/-. Defendant no.1 have illegally constructed

cabins in the suit premises and unlawfully sub-let the same to defendants no.2 and 3, thereby, defendant no.1 are profiteering out of suit premises as contemplated by Section 13(1)(e) of the Act. The plaintiffs require the suit premises reasonably and bonafide for their use and occupation and if the suit is decreed, no hardship will be caused to the defendants. The plaintiffs issued notice dated 3.5.1993 calling upon the defendants to hand over vacant possession of the suit premises. Defendant no.1 gave reply dated 1.6.1993.

5. Defendant no.1 filed Written Statement dated 29.11.1997 resisting the suit. Defendant no.1 contended that the suit is based on false and fabricated documents. The plaintiffs have not come to the court with clean hands and suit is outcome of fraud played upon by the plaintiffs in connivance with the defendants no.2 and 3 on defendant no.1. Defendant no.1 are in occupation of the suit premises as per registered Deed of Assignment dated 20.7.1973 executed by one Sorab K. Irani and others. Since then, defendant no.1 are in occupation of the suit premises. The ground floor is made up of personal toilet and some portion is earmarked as godown. Other portions are divided by way of cabins for employees and for office. Mezzanine floor was used by defendant no.1 as office. Defendant no.1

alleged that defendants no.2 and 3 trespassed upon the suit premises on 16.2.1994 in collusion with the plaintiffs. On 19.2.1994, defendant no.1 have lodged complaint with A.C.P, Greater Mumbai. In addition, defendant no.1 had instituted S.C.Suit No.1677 of 1994 in the Bombay City Civil Court at Bombay against defendant no.1-B.Z. Zameer Ahmed Khan, defendant no.2- Abdul Razak Rafi Parvez, both carrying on business in the name and style of M/s National Travels from portion of the suit premises, defendant no.3- M/s Sunrise Housing Development and Finance Pvt. Ltd. (plaintiffs herein), inter-alia, praying for restoration of possession of premises admeasuring 70-80 sq.feet, out of the suit premises from which defendants no.1 and 2 therein wrongfully and illegally dispossessed defendant no.1 herein (plaintiffs therein) by use of force on 16.2.1994. Defendant no.1 further alleged that defendants no.2 and 3 have shifted their belonging in the suit premises. Defendant no.1 contended that in the suit instituted in the Bombay City Civil Court, they had taken out notice of Motion. Learned Judge of the City Civil Court granted injunction and also appointed Court Receiver. The plaintiffs herein preferred Appeal from Order No. 429 of 1995 which was dismissed. In short, defendant no.1 denied allegation of carrying out permanent additions and alterations without written consent of the plaintiffs

as contemplated by section 13(1)(b) of the Act. Defendant no.1 also denied that they are source of nuisance and annoyance to the plaintiffs and the neighbouring occupiers as contemplated by Section 13(1)(c) of the Act and that they have unlawfully sub-let a part of the suit premises to defendants no.2 and 3 as contemplated by Section 13(1)(e) of the Act. On the basis of the pleadings, the learned trial Judge framed necessary issues. As noted earlier, the Courts below decreed the suit only under section 13(1)(b) and 13(1)(e) of the Act. It is against these decisions, defendant no.1 have instituted presented Civil Revision Application.

6. In support of the Civil Revision Application, Mr. Kamdar strenuously contended that the Courts below committed serious error in decreeing the suit. He submitted that defendant no.1 entered into partnership with K.A. Mohamad Sultan Rawthor on 1.4.1993. Defendant no.1 in partnership with K.A. Mohamad Sultan Rawthor started selling tickets to National Tourist under the name and style of 'Globe Tours and Travels'. Defendant no.1 also entered into partnership with one Jagnath Shetty on 1.4.93 for selling tickets to M/s Jabbar Travels under the name and style as Globe Travels. He submitted that open space in front of the suit premises was trespassed upon by Zameer Ahmed Khan and Abdul Razak Rafi Parvez and they started carrying on business

by describing property as room/shop no.F-37 of Sitaram building. They were carrying on business under the name and style as M/s National Travels. On 15.2.1994, said Zameer Ahmed Khan and Abdul Razak forcibly entered the suit premises in connivance with the plaintiffs and carried out construction of staircase.

7. Mr. Kamdar invited my attention to Written Statement dated 29.11.1997 filed by defendant no.1 and in particular paragraph 4 thereof. He submitted that draftsman committed serious error in paragraph 4. The statements made in paragraphs 1 to 4 of the written statement are not correct. The said statements were inadvertently made by the draftsman who had drafted S.C.Suit No.1677 of 1994. The assertions made in that suit were substantially incorporated in paragraphs 1 to 4 of the written statement. He submitted that pending the present suit, defendant no.1 filed Interim Notice for amending the written statement. The said notice was, however, dismissed by the Courts below. After eviction decree was passed against the defendants, defendant no.1 filed substantive Appeal. Pending the Appeal, defendant no.1 took out application dated 3.10.2013 for amending the written statement. Even that was rejected while dismissing the Appeal preferred by defendant no.1. He submitted that the Courts below committed serious error in rejecting the Interim Notice as also Appellate Court committed serious error in

dismissing the application dated 3.10.2013. Against these decisions, defendant no.1 have instituted Writ Petition No.11235 of 2015. Because of the mistake committed by the draftsman in drafting the written statement in eviction suit, defendant no.1 should not suffer. No prejudice will be caused to the plaintiffs in case the Interim Notice taken out during the pendency of the suit is allowed and/or application dated 3.10.2013 taken out pending the Appeal is allowed.

8. Mr. Kamdar submitted that the Courts below have decreed the suit under section 13(1)(b) and 13(1)(e) of the Act. As far as ground of unlawful sub-letting is concerned, he submitted that the Courts below passed decree on this ground on the basis of an alleged admission of subletting in the written statement filed by defendant no.1. Nowhere in the written statement there is such admission or word about sub-letting by defendant no.1. That apart, the assertions made in the written statement are factually erroneous in as much as case of National Travels was pleaded, instead of giving reply to the allegation of National Tourist. This, however, does not amount to admission that there is subletting to National Tourist. The factual erroneous pleadings crept in due to error on the part of Advocate who was himself confused between National Tourist and National Travels. He submitted that basically the plaintiffs did not discharge the burden for

establishing the ground of unlawful subletting. The Courts below also committed serious error in discarding the voluminous documentary evidence produced by defendant no.1.

9. Mr. Kamdar submitted that the purported admissions were obvious inadvertent error in the written statement. Defendant no.1 relied upon the proceedings initiated against Mr. Zameer Khan and Mr. Abdul Parvez. Defendant no.1 have not filed any suit against defendants no.2 and 3. The alleged admission in the written statement cannot be used against the defendants. The Appellate Court discarded the evidence of defendant no.1 merely on the ground that in its reply dated 1.6.1993 defendant no.1 did not disclose the status of defendants 2 and 3. Defendants no.2 and 3 were the trade name of partnership firm of defendant no.1. Control of the suit premises is always with defendant no.1.

10. Mr. Kamdar submitted that defendant no.1 being travel agents and being involved in business of tours and travels, were entitled to carry on business including the agency business for the purpose of their main business. In furtherance of its business of transport and travels activities, partner of defendant no.1 entered into partnership deed dated 1.4.1993 with Mr. K.A. Mohd. Sultan Rawthor wherein the parties agree to carry on business with tours and travels under the partnership firm of M/s Globe Tours and Travels. Parties also agreed that partnership firm would

also sell tickets and service on behalf of defendant no.3- National Tourists. Thus, M/s Globe Tours and Travels are agents of defendant no.3. However, possession and control of the suit premises remained with partners of defendant no.1. Mr. Kamdar submitted that defendant no.1 also entered into an arrangement with Mr. Jaganath Shetty vide partnership deed dated 1.4.1993 whereunder partnership firm of M/s Globe Tours and Travels who would sell tickets and services to M/s Jabbar Travels-defendant no.2. Defendant no.2 confirms the said arrangement.

11. Mr. Kamdar submitted that on 15.2.1994 while defendant no.1 commenced erection of doors on the side portion of the suit premises, in late night of 15.2.1994 and early morning of 16.2.1994 at the instance of plaintiffs, one Mr Zameer Khan and Mr Abdul Pervez, owners of M/s National Travels who also occupied shop no. F-37 at the instance of the plaintiffs along with 20 persons forcibly entered upon the suit premises and shifted the goods of defendant no.1 lying therein to the rest of the suit premises. Mr. Zameer Khan and Mr Abdul Parvez were working at the instance of plaintiffs is evident from the fact that they were initially operating right outside the suit premises from a cabin with the leave of the plaintiffs and later-on forcibly entered into the suit premises to somehow create ground for the plaintiffs to proceed against defendant no.1. Defendant no.1 had

lodged a complaint dated 16.2.1994 in view of unauthorised acts of Mr. Zameer and Mr. Abdul. Defendant no.1 also filed suit in the City Civil Court and took out Notice of Motion for recovery of possession and appointment of court receiver and also for injunction. By order dated 30.1.1995 the learned trial Judge passed an order of injunction and appointed court receiver thereby directing court receiver to take possession from the portion of the suit premises from Mr Zameer and Mr Abdul. Aggrieved by this decision, Mr Zameer and Mr Abdul preferred Appeal from Order No.429 of 1994. They also took out Civil Application No.1734 of 1995 for stay of the trial Court's order. By order dated 14.7.1995, this Court refused to interfere with the trial Court's order. Aggrieved by this order, Mr Zameer and Abdul approached the Apex Court by filing S.L.P. which was dismissed with direction to this court to dispose of Appeal expeditiously. By order dated 27.8.1997 this Court dismissed the Appeal and upheld the trial Court's order. Mr. Kamdar submitted that the plaintiff engineered induction of Mr. Zameer and Mr Abdul with a view to making out a ground of unlawful subletting against defendant no.1

12. As far as the ground of carrying out additions and alterations of permanent nature is concerned, he submitted that on 13.8.1987 Shabbir Abbasbhai Soni had made affidavit setting

out therein that M/s Globe Transport Company are tenants in respect of the suit premises and their tenanted premises along with open space and two WCs for their exclusive use as shown in the plan annexed thereto and whole area in their occupation is bounded by brick masonry wall of 9 feet height as shown in the sketch attached thereto and marked by red coloured boundary line. The said sketch was duly signed by Shabbir Soni. M/s Globe Transport Corporation are authorized and permitted to use whole space (enclosed and open) as aforesaid for their business purpose. He submitted that perusal of the plan shows that M/s.Globe Transport Corporation has office on the first floor and there is staircase leading to the first floor.

13. Mr. Kamdar submitted that the Courts below passed decree on the ground under section 13(1)(b) of the Act in the absence of any evidence on record. The Courts below mainly relied upon the Court Receiver's report which was disputed by the plaintiffs themselves. He has taken me through affidavit of examination in chief of Shabbir and in particular paragraphs 7 and 9. In paragraph 9, it is stated that Commissioner submitted report dated 21.2.1994 and the plaintiffs objected to it by filing objections. The Commissioner did not put correct facts on record. He prayed that the report and objections be read in evidence as part of the record. The Courts below, however, wrongly

proceeded on the footing that defendant no.1 did not object to the Court Receiver's report. In particular, he has invited my attention to paragraph 23 of the trial Court's judgment and paragraph 25 of the Appellate Court's judgment. For all these reasons, he submitted that the application requires consideration.

14. As far as Writ Petition No 11237 of 2015 is concerned, he submitted that the impugned orders may be set aside thereby permitting defendant no.1 to amend the written statement and an opportunity may be given to lead evidence. He, therefore submitted that the impugned orders may be set aside and matter may be remanded to the trial Court for disposing of the suit in accordance with law.

15. On the other hand, Mr. Dhakephalkar supported the impugned orders. He submitted that writ petition challenges order dated 21.4.2003 passed by the trial Court and order dated 2.8.2006 passed by the appellate court dismissing the interim Notice taken out by defendant no.1 for amending the written statement. Present petition is instituted on 20.4.2015. The petition suffers from gross delay and latches in challenging these orders. In fact, after Interim Notice was dismissed, parties proceeded to lead evidence and thereafter the learned trial Judge decreed the suit. Instead of challenging those orders in this

Court, defendant no.1 participated in the trial. After the suit was decreed, during the pendency of the appeal, defendant no.1 filed application dated 3.10.2013 for amending the written statement which was rightly rejected by the appellate Court. He submitted that the petition is filed as an after thought somehow with a view to praying for remand. He submitted that the conduct of defendant no.1 disentitles any relief under Article 227. He further submitted that the Courts below rightly rejected the Interim Notice and the application dated 3.10.2013 as it amounts to withdrawal of admissions given by defendant no.1 in the written statement.

16. As far as Civil Revision Application is concerned, he submitted that after appreciating the evidence on record, the Courts below have decreed the suit. He has taken me through the impugned orders and submitted that no case is made out for invocation of powers under section 115 of C.P.C.

17. 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 of unlawful subletting under section 13(1)(e) of the Act is concerned, the Courts below after appreciating the evidence on record have concurrently decreed the suit. In particular, the Appellate Court has considered this aspect from paragraphs 28 to 41. In

paragraph 30, the Appellate Court referred to Exhibit-C Collectively issued by defendant no.3-National Tourist on 22.9.1994 wherein the address of the suit premises is shown. Even the receipt dated 11.9.1994 issued by defendant no.2 indicates address of the suit premises. Exhibit-D Collectively is a notice issued by the plaintiff's Advocate to defendants no.1 to 3 which was replied on 1.6.1993. Notice issued by Advocate for the plaintiffs writ of summons and intimation of court commissioner's visit were served upon defendants no.2 and 3 on the suit premises. In paragraph 31, the appellate court referred to cross examination of DW 1 wherein he admitted that defendants no.2 and 3 are doing business in the part of the suit premises. He however volunteered and stated that he himself is doing business in the name of defendants no.2 and 3. The Appellate Court observed that this was an after thought. It was held that the plaintiffs proved that defendants no.2 and 3 retained full control over the part of the suit premises and for the first time in evidence altogether different story was put forth to the effect that defendants no. 2 and 3 are partners in business of M/s Globe Transport Corporation and Globe Tours and Travels. The Appellate Court also commented upon evidence of D.W. 2 K.Mohd Sultan Rawthor in paragraphs 31 and 32. In paragraph 33, the Appellate Court dealt with evidence of DW 3 Jaganath Shetty.

After considering the evidence on record, in paragraph 41, the Appellate Court observed that the plaintiffs have proved subletting in favour of defendants no.2 and 3 by defendant no.1 and held that the plaintiffs have established the ground of unlawful subletting.

18. As far as the ground of additions and alterations of permanent nature is concerned, the Courts below have concurrently decreed the suit on this ground.

19. Mr. Kamdar heavily relied upon affidavit dated 13.8.1987 made by Shabbir Abbabhai Soni. He further submitted that the Court Commissioner's report dated 21.2.1994 was objected by the plaintiffs. The Courts below, however, wrongly proceeded on the footing that defendant no.1 did not object to the Court Commissioner's report. He submitted that the findings recorded in paragraph 23 by the trial Court and in paragraph 25 by the Appellate Court are factually incorrect and contrary to the evidence on record. I do not find any merit in these submissions. It is not in dispute that the Court Commissioner submitted report dated 21.2.1994. Defendant no. 1 filed Written Statement dated 29.11.1997. Perusal of paragraph 4 of the Written Statement shows that defendant no.1 have specifically referred to report dated 21.2.1994 in the following words:

“These defendants say that when the Court Commissioner was appointed, he visited the site and made report on 21.2.1994. It was clear that some construction work was being carried out from the suit premises by defendant nos 2 and 3.”

In paragraph 4, the learned Judge has observed that the visit of the Court Commissioner to the suit premises and the report dated 21.2.1994 was not denied by defendant no.1. In paragraph 23, the learned trial Judge referred to the report of the Court Commissioner and observed that the Court Commissioner's report and his rough sketch plan had gone unchallenged by both the parties. It was further observed that the parts of mezzanine floor and cabin walls were made of cement concrete. Certainly, construction of cement concrete is of permanent nature and it cannot be removed without causing damage to the suit premises. Construction of mezzanine floor and cabin walls in the suit premises is of permanent nature and is made without permission of the plaintiffs. In paragraph 17, the learned trial Judge also held that the construction of cabin walls and parts of mezzanine floor in cement concrete certainly amounts to construction of permanent nature. No doubt, cabins are wooden but they are fixed in cement concrete walls. These cabins cannot be removed without damaging the suit premises.

20. As far as the appellate court is concerned, in paragraph 25

the Commissioner's report is referred. It was observed that the Commissioner found entire parts of the mezzanine floor and the cabin walls are made up of cement and concrete. It can be very well said that the wall of the cabin and parts of mezzanine floor are made up of cement and concrete work which is undisputedly of permanent nature. The report of the Court Commissioner also remains unchallenged. The findings recorded by the Courts below are borne out from the Commissioner's report.

21. Mr. Kamdar submitted that in paragraph 9 of examination in-chief of the plaintiff's witness Shabbir Soni, he objected to the report. Perusal of paragraph 9 also shows that witness prayed that the report and objections be read in evidence as part of the record. As noted earlier, defendant no.1 did not deny the Commissioner's visit and report dated 21.2.1994. Even no material is produced on record showing objections raised by defendant no.1. Thus, the Courts below rightly held that the Commissioner's report was not challenged by defendant no.1.

22. After considering the material on record, the Courts below have concurrently decreed the suit under sections 13(1)(b) and 13(1)(e) of the Act. Defendant No.1 was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to the evidence on record. Defendant no.1 was also not in a

position to show that on the basis of material on record, no reasonable or prudent person would have come to the conclusions other than those arrived at by the Courts below. In the light of the aforesaid discussion, I do not find that the applicants have made out any case for invocation of powers under section 115 of C.P.C. In the result, Application fails and the same is dismissed.

23. As far as Writ Petition No. 11237 of 2015 is concerned, as noted earlier, during the pendency of the suit, defendant no.1 filed application for amending the written statement. That was rejected by the learned trial Judge on 21.4.2003. Aggrieved by that order, defendant no.1 preferred Appeal which was dismissed on 2.8.2006. Defendant no.1 did not challenge these orders in earlier point of time. In fact, the parties proceeded to lead evidence and thereafter the learned trial Judge decreed the suit. In other words, defendant no.1 participated in the trial. Petition is instituted in the year 2015 challenging the orders dated 21.4.2003 and 2.8.2006 which suffers from gross delay and latches. Even otherwise, on merits I do not find any merit in the submission of Mr. Kamdar.

24. During the pendency of the Appeal, defendant no.1 filed application dated 3.10.2013 for amending the written statement. Mr. Dhakephalkar submitted that the Appellate Court rightly

rejected the application on the ground that defendant no.1 intend to withdraw admissions in the written statement. In paragraph 16 of the order dated 2.8.2006 passed by the Appellate Court, it was held that defendant no.1 have admitted the separate existence of defendants no.2 and 3. The withdrawal of admissions will cause serious prejudice and injustice to the plaintiffs. In paragraph 56, while dismissing the application dated 3.10.2013 made by defendant no.1 for amending the written statement pending the substantive appeal, the Appellate Court observed that in view of the clear admissions in the written statement by defendant no.1, if the proposed amendment is allowed, then it would definitely cause injustice to the plaintiffs. In view of this finding, I find substance in the submission of Mr. Dhakephalkar. Conduct of defendant no.1 disentitles any discretionary relief to them under Article 227 of the Constitution of India. In view thereof, Petition fails and the same is dismissed. In the circumstances, there shall be no order as to costs.

25. At this stage, Ms.Kachalia orally applies for stay of the eviction decree for a period of 12 weeks from today. She assures that the applicants and all partners of defendant No.1 using the suit premises will give usual undertakings with advance copy to the other side within two weeks from today incorporating therein :

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that they will pay the arrears of rent, if any, to the respondents within two weeks from today; and
- (v) that in case the applicants are unable to obtain suitable orders within twelve weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

26. In view thereof, notwithstanding dismissal of Civil Revision Application and subject to the applicant filing undertakings in aforesaid terms within two weeks from today, eviction decree shall not be executed for a period of 12 weeks from today. It is made clear that in case the applicants do not file undertakings in aforesaid terms and arrears of rent are not paid within two weeks from today, interim order shall stand vacated without further reference to the Court.

27. List the matter for reporting compliance after three weeks.

(R.G.KETKAR,J.)