

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

**CIVIL REVISION APPLICATION NO.256 OF 2016**

Y. Mohamed Abdulla

.... Applicant

versus

Mrs. Nasima Zulkernain Merchant & Ors.

... Respondents

Mr.V.A. Thorat, a/w Ms Prachi Tatke, Senior Advocate a/w  
Mr.Ashok Pandey for the applicant.  
Mr.Kunal Bhanage, for the respondents.

**CORAM : R.G. KETKAR, J.**

**DATE : 20<sup>th</sup> OCTOBER, 2016**

**P.C. :**

1. Heard Mr.V.A. Thorat, Senior Counsel for the applicant and Mr.Kunal Bhanage, learned Counsel for the respondents, at length.

2. By this Application u/s 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant No.1', has challenged the judgment and decree dated 21/02/2008 passed by the learned Judge, presiding over the Court No.8 of the Small Causes Court at Bombay in R.A.E. Suit No.891/1574 of 1999 as also judgment and decree dated 24/02/2016 passed by the Appellate Bench of the Small Causes

Court in Appeal No.279/2008. By these orders, the Courts below decreed the suit instituted by the first respondent, hereinafter referred to as the 'plaintiff', under section 13(1)(b) and 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

3. Plaintiff instituted the Suit inter alia contending that defendant No.1 had illegally and unauthorizedly constructed three Stalls being Stalls No.2, 3 and 4. Defendant No.1 has illegally and unlawfully inducted defendant No.2 in Stall No.2, defendant No.3 in Stall No.3 and defendants No.4(a) to 4(b) in Stall No.4. Plaintiff further alleged that the defendant No.1 has carried out structural additions and alterations in the suit premises without consent of the plaintiff and in breach of the terms of tenancy and in breach of the B.M.C. Rules and Regulations. The unauthorized work carried out by the defendant No.1 has caused waste and is causing damage to the main structure of the suit building. Plaintiff has enumerated additions and alterations in paragraphs No.18(a) to 18(k).

4. Plaintiff further alleged that the defendant No.1 is recovering Rs.900/- per month for Stall No.1 which is in

possession of defendant No.3, so also Rs.600/- for Stall No.2 which is in possession of defendant No.3 and Rs.900/- for Stall No.3 which is in possession of defendant No.4. Plaintiff, therefore, contended that defendant No.1 is profiteering.

5. Defendant No.1 resisted the Suit by filing written statement. Defendant No.1 contended that the Stalls were part of the suit premises annexed thereto. Defendant No.1 contended that plaintiff had purchased the said building on 30/08/1999, and immediately thereafter within 10 days, plaintiff had instituted suit against the defendants. Plaintiff has also instituted other Suits against all other tenants. Defendant No.1 denied the allegations of carrying out additions and alterations of permanent nature and also denied inducting defendants No.2 to 4 in the suit premises. Defendant No.1 contended that the Stalls were constructed and let out much prior to 1973. It has further contended that plaintiff did not give correct position of these Stalls, which he alleged to have been illegally constructed. Defendant No.1 denied that he unlawfully sub-let the same to defendants No.2 to 4. Defendant No.1 also filed additional written statement. Defendants No.2 to 4 though served have not filed their

written statement.

6. On basis of the pleadings of the parties, learned trial Judge framed the necessary issues. The parties led evidence. After considering the evidence on record, Courts below decreed the Suit u/s 13(1)(b) and 13(1)(e) of the Act. It is against these orders, defendant No.1 has instituted the present Civil Revision Application.

7. In support of this Application, Mr. Thorat contended that the Courts below decreed the Suit u/s 13(1)(b) and 13(1)(e) of the Act. The Stalls are not part of the suit premises. In fact, in paragraph No.8(i) of the plaint, plaintiff came with the case that the stalls are attached to the suit premises. He submitted that as these stalls are not part of the suit premises, it cannot be held that defendant No.1 either illegally constructed the Stalls in the suit premises or that he had unlawfully sublet premises to defendants No.2 to 4. It cannot be said that defendant No.1 had parted exclusive possession of these stalls in favour of defendants No.2 to 4. He submitted that in the year 1999-2000, MHADA had taken over repair work of the building. Mr.Thorat has invited my attention to the plaint, and in particular, paragraphs No.3, 5, 6,

8(i), 8(iii), 9(i) as also written statement. He submitted that Stalls were constructed and also were let out to defendants No.2 to 4 much prior to 1973.

8. Mr.Thorat submitted that during pendency of the Suit, Court Commissioner was appointed, who submitted a report in the year 1999. Court Commissioner was not examined. Courts below committed serious error in relying upon the report submitted by the Court Commissioner at Exhibit-N. Mr.Thorat also invited my attention to the plans at pages No.353 and 373. Plan at page No.373 was obtained under Right to Information Act, 2005. He submitted that after the Suit was decreed by the Trial Court, defendant No.1 approached Appellate Court under Order 41 Rule 27 of C.P.C. for production of additional evidence. By order dated 06/02/2016, the Appellate Court rejected the application. In paragraph No.5 of that order, the Appellate Court observed that documents can be produced during the course of the argument. In other words, while rejecting the application, the Appellate Court was of the view that the documents sought to be produced by the defendant No.1 can be considered during the course of arguments. He submitted that the documents sought to be produced clearly

establish the existence of the stalls right from 1959. He submitted that the Appellate Court committed error in not considering documents while deciding the appeal. The Courts below have decreed the suit merely on the basis of evidence of the plaintiff and the case made out by the plaintiff was not substantiated during the course of evidence. The Courts below wrongly placed burden on defendant No.1 to establish negative thing. He submitted that basically plaintiff has not established that defendant No.1 has constructed three stalls which are of permanent nature and that defendants No.2 to 4 were inducted after 1973. He submitted that application requires consideration.

9. On the other hand, Mr.Bhanage has invited my attention at paragraphs No.3, 5, 6 and 18 of the plaint, paragraph No.18(a) dealing with the grounds under section 13(1)(b) of the Act, as also paragraphs No.22(a) dealing with the grounds under section 13(1)(e) of the Act. He has taken me through report submitted by Court Commissioner in the year 1999. He submitted that in presence of parties, the Court Commissioner inspected the premises and submitted report noting therein measurements of stalls. Defendant No.1 did not file objection to Court

Commissioner's report. The Courts below have considered the measurements of the stalls after visit of the Court Commissioner and have recorded findings that area of the stalls is increased as compared the area mentioned in the Court Commissioner's report. He has also taken me through the cross examination of defendant's witness, wherein he admitted that he came in the suit premises in the year 1985 and since then there are three stalls. He further admitted that earlier there was only one stall. Defendant's witness also admitted that he is collecting Rs.900/- for stall No.3 and that license from Mumbai Municipal Corporation for carrying out business in stall No.3 is obtained. The license is not in his name, but it is in the name of Faiyyaz Pawaskar, since deceased. He admitted that Pan-bidi stall in stall No.2 is run by defendant No.3 Sayyad Ilyas and he is collecting Rs.600/- from him. He further admitted that he is not running the Pan Shop in stall No.2. Defendant No.3 has obtained license from M.M.C. for running Pan Shop and is also paying electricity bills. Stall No.1 is in possession of defendant No.2 - Shabbir Yakub. He is carrying on business of doing radio repairing. He has also obtained license from M.M.C. in his name. Defendant No.2 is paying rent of Rs.900/- per month to

the defendant No.1.

10. Mr.Bhanage submitted that after appreciating evidence on record Courts below have decreed the suit u/s 13(1)(b) and 13(1)(e) of the Act. The findings recorded by the Courts below are based on appreciation of evidence on record and therefore no case is made out invoking power under section 115 of the Act.

11. I have considered rival submission advanced by the learned Counsel for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit alleging that the defendant No.1 has unauthorizedly and illegally constructed three stalls. Defendant No.1, in turn, has inducted defendants No.2 to 4 in the stalls and is recovering amount from defendants No.2 to 4. Plaintiff has further alleged about carrying out unauthorized construction of bathroom and toilet block in the common passage at the entrance of the suit building. He has enumerated additions and alterations in paragraphs No.18(a) to 18(k).

12. So far as ground under section 13(1)(b) is concerned, the learned trial Judge has considered this aspect in paragraphs No.22 to 38. The ground of unlawfully subletting is considered by

the learned trial Judge from paragraphs No.12 to 21. As far as Appellate Court is concerned, ground under section 13(1)(b) is considered in paragraphs No.40 to 48 and the ground of unlawfully subletting is considered in paragraphs No.32 to 39. In paragraph No.34 the Appellate Court noted the measurements of the stalls reflected in Court Commissioner's report. The Appellate Court noted that as far as Stall No.4 is concerned, the Court Commissioner during the course of inspection carried out in October 1999 found that it admeasures 6 x 1 ft. It was thereafter raised to 6 ft x 6ft x 1.5 ft and the sitting platform also came to be raised by 6 ft. x 2 ft.

13. After considering the evidence on record also the admission of defendant No.1 that Stalls No.2 to 4 are part and parcel of the suit premises. The Appellate Court held that defendant No.1 has inducted defendants No.2 to 4 and that defendants No.2 to 4 are running their respective business. Defendant No.1 is recovering amounts of Rs.900/-, Rs.600/- and Rs.900/- respectively from them and is thereby profiteering.

14. In paragraphs No.41 and 42 Appellate Court dealt with ground u/s 13(1)(b) of the Act as also undertaking given by

defendant No.1 in consent terms of not raising area of stalls to defendants No.2 to 4 alongwith the sitting platform. The Appellate Court noted that area of Stall No.2 is 6 ft x 6 ft x 1.5 ft and area of sitting platform is 6 ft x 2 ft. Area of stall No.3 is about 6 ft x 6 ft x 1.5 ft and sitting platform thereof is of 6 ft x 2 ft. Area of Stall No.4 is about 7.3 ft x 11 ft x 2.5 ft and area of sitting platform is 2 ft. The Appellate Court therefore observed that from the factual data, area of the stalls came to be increased in breach of unequivocal undertaking given by the defendant No.1 in consent terms, Exh.G filed in the notice of injunction. In paragraph No.43 the Appellate Court considered section 342 of Mumbai Municipal Corporation Act, 1888 and construction of mezzanine floor in 100% area, construction of toilet, bathroom, installation of steel and syntax water tank, new opening of door and window from road side of the suit premises and changing of wooden door and window by installing M.S. Frame window amounts to permanent construction or tenantable repairs.

15. In paragraph No.44 the Appellate Court observed that no permission was sought by defendant No.2 in respect of changes near entrance in the suit premises. The Appellate Court held that

changes do not amount to tenantable repairs. In paragraph No.45, the Appellate Court observed that construction of toilet and bathroom in mezzanine floor by installing steel and and syntax water tank for storage of water amounts to alteration and additions of permanent nature. In Paragraph No.46 Appellate Court observed that old wooden window and door were replaced in M.S. Window and grills. The additions and alterations were carried out thereby damaging the suit building amounts to endangering life of suit building and suit premises. In paragraph No.48 the Appellate Court noted that the suit premises is very old of 95 years. The Appellate Court after considering the decisions, recorded a categorical finding that defendant No.1 carried out additions and alterations of permanent nature. The Appellate Court also found that construction of loft of 36 ft. amounts to material additions and alterations, so also construction of toilet and bathroom on the ground floor near entrance and that it was demolished by the plaintiff as it was going to cause serious damage to the building.

16. Mr.Thorat submitted that the stalls were constructed prior to 1973 and defendants No.2 to 4 were also occupying those

three stalls prior to 1973. He also invited my attention to the deed of assignment which records existence of these three stalls. I do not find merit in this submission. In the first place, defendant No.1 has not established construction of three stalls as also induction of defendants No.2 to 4 prior to 1973. That apart, defendants No.2 to 4 also did not participate in the trial. Secondly, the deed of assignment also does not record names of the occupants in the three stalls.

17. In view thereof, I do not find that the Courts below committed any error in decreeing the suit. It also cannot be said that the findings recorded by the Court below are perverse being based upon no evidence or that they are contrary to the evidence on record. Defendant No.1 was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusions other than those arrived at by the Courts below. Merely because on the basis of evidence on record another view is possible that itself is no ground for invocation of powers under section 115 of C.P.C. In the result, C.R.A. fails and the same is dismissed.

18. At this stage, Mr. Pandey orally applies for stay of eviction decree for a period of 12 weeks from today. He states that

the applicant is in possession and has neither created third party interest nor parted with the possession. He will hereafter neither create third party interest nor part with the possession. He further states that the applicant and all adult family members residing with him are ready and willing to give usual undertaking within four weeks from today. Learned Counsel for the respondents opposes said prayer.

19. Having regard to the fact that applicant desires to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying eviction decree for a period of twelve weeks from today subject to the applicant and all adult members residing with him giving usual undertaking to this Court within four 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 four 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 respondents.

20. In view thereof, notwithstanding dismissal of Civil Revision Application, the eviction decree shall remain stayed for a period of 12 weeks from today, subject to the applicant filing undertaking in the aforesaid terms within four weeks from today, with copy in advance to the other side. In case the applicant does not file undertaking in the above terms and/or arrears of rent are not paid within four weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after six weeks. Order accordingly.

**(R. G. KETKAR, J.)**