

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 477 OF 2013**

Mrs. Maria w/o Noronha and d/o Peter F. ..Applicants
Peris, since deceased, through Heirs:
1a. Shri Milton Moronha;
1b. Charolotte D'Souza.

Vs

1. Mr. Shyam Narayan (landlord) C/o K.A
Dubey (Rent Collector), (deleted); .. Respondents
1.Mr A. Razzaquebhai Haji Esmail and
Ors.

Mr. B.K.Raje, Advocate for Applicants.
Mr. Mukesh Rawal, Advocate for Respondent no.3.

CORAM : R.G.KETKAR,J.
DATE : 06/06/2016

PC:

1. Heard Mr. B.K.Raje, learned counsel for the applicants and Mr. Mukesh Rawal, learned counsel for respondent no.3 at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants have challenged the Judgment and decree dated 17.12.1998 passed by the learned Judge, presiding over Court Room No.13, of the Court of Small Causes at Bombay in R.A.Declaratory Suit No.637 of 1982 as also the Judgment and decree dated 1.2.2013 passed by Appellate Bench of Small Causes Court at Mumbai in Appeal No.92 of 2001. By these orders, the Courts below dismissed the suit instituted by applicant no.1-Ms. Maria w/o Noronha,

hereinafter referred to as 'original plaintiff', for declaration that Ms. Maria is a tenant of Room no.16, 1st floor, Syam Narayan Sada (Rabiabai Building), Plot No.23, Supari Baug Road, Parel, Bombay 400 012 (for short, 'suit premises'), and for perpetual injunction restraining the respondents, hereinafter referred to as 'defendants', from transferring, alienating, disposing of or parting with possession of the suit premises and/or transferring the rent bill from the name of the original tenant Peter F. Peris, since deceased, to the name of someone else.

3. In support of this application, Mr. Raje strenuously contended that the Courts below committed serious error in dismissing the suit. He invited my attention to :

(i) paragraph 8 of the cross examination of original plaintiff Maria wherein she deposed that “it is true that at the time of death of my father, defendant no.2 Mrs Indinha and defendant no.3 Ms Perpetral were residing **with me** in the suit premises.

(ii) paragraph 11 of evidence of examination-in-chief of DW 1 – Ms Perpetral Gilbert Gomes, wherein she deposed that “ the say of the plaintiff that at the time of death of my father Mr. Peter, the plaintiff-Ms .Maria was residing in the suit premises inborn.” (sic).

(iii) paragraph 24 of the appellate Court's order wherein the appellate court observed as under :

“Plaintiff in her examination in chief and also cross-examination has admitted that at the time of death of deceased tenant, original defendant no.2 and defendant no.3 were residing in the suit premises.”

4. Mr.Raje submitted that in paragraph 24 the Appellate Court held that in examination in chief as also during cross examination original plaintiff Maria admitted that at the time of death of Peter F. Peris, original defendant no.2 and defendant no.3 were residing in the suit premises. In other words, original plaintiff Maria was not residing in the suit premises at the time of death of Peter. He submitted that this finding is contrary to paragraph 8 of cross examination of the original plaintiff-Ms. Maria wherein she categorically stated that she was residing along with defendant no.2 and defendant no.3 in the suit premises at the time of death of Peter. He submitted that the Courts below overlooked the material part of evidence and, therefore, the findings recorded by the lower Courts are vitiated. In support of this proposition he relied upon the decision of the Apex court in the case of Damadilal Vs. Parashram, A.I.R 1976 Supreme Court 2229 and in particular Head Note-(C).

5. Mr. Raje further submitted that the appellate court observed in paragraph 19 that that the defendants issued notice dated 29.4.1998 at Exhibit 2 calling upon the original plaintiff to produce documents, namely, Ration Card, Electoral roll,

children's school record, original plaintiff's husband record. Though the notice was duly served on the original plaintiff through her Advocate, she did not produce any documents when called upon. The Appellate Court, therefore, had drawn adverse inference. He submitted that having regard to evidence of PW 1-Maria and DW 1-Peripetral, the plaintiff has positively established that she was residing in the suit premises at the time of death of original tenant Peter Peris. He, therefore, submitted that the matter requires consideration.

6. On the other hand, Mr. Rawal supported the impugned orders.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Mr. Raje heavily relied upon paragraph 8 of the cross examination of the original plaintiff Maria. I have already extracted relevant portion earlier. Perusal of paragraph 8 shows that the plaintiff deposed that at the time death of her father Peter Peris, defendants no.2-Mrs Idinha Maria and defendant no.3 Mrs Perpetral Gomes were residing with her in the suit premises. In support of this statement, however, the original plaintiff Maria has not produced a single document. During the course of hearing, Mr. Raje also conceded this fact. It is in that context, one has to consider evidence of DW 1 Ms Perpetral

Gomes. In paragraph 9 of her examination in chief, DW 1 specifically deposed that at the time of death of her father Peter, original plaintiff Ms.Maria was residing at 103, Bridge View Byculla. It is in that context one has to appreciate the notice dated 29.4.1998 issued by the defendants calling upon the plaintiff to produce Ration Card , electoral roll, children's school record. It is not in dispute that the said notice was duly served upon the original plaintiff through her Advocate. It is also not disputed that the plaintiff did not produce the said documents. The Courts below after considering the evidence on record have categorically recorded a positive finding that the plaintiff failed to establish that she was residing in the suit premises at the time of death of her father Peter. The Courts below considered the birth certificates of children of the original plaintiff at Exh.A collectively. The children were born between 1963 and 1966. In that birth certificate, address of the suit premises is mentioned. It is not in dispute that Peter died on 28.1.1975. The moot question is whether the original plaintiff Maria was residing in the suit premises at the time of death of Peter on 28.1.1975 and that she has substantiated the said fact by producing the documentary evidence. Section 5(11)(c)(i) reads thus:

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

(11). "tenant" means any person by whom or on whose account rent is payable for any premises and includes,----

(c) (i) in relation to any premises let for residence, when the tenant dies, whether the death has occurred before or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1978, **any member of the tenant's family residing with the tenant at the time of his death** or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court;"

(emphasis supplied)

As the suit premises are let for residence, any member of the tenant's family residing with the tenant at the time of his death or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court becomes tenant. In the present case, the plaintiff has failed to establish that at the time of tenant's death, she was residing with the tenant. As against this, defendants no. 2 and 3 have substantiated that they were residing with the original tenant at the time of his death.

8. Mr. Raje relied upon the decision in the case of Damadilal (supra). In the present case, I have already held that the original plaintiff Maria failed to establish that at the time of death of the original tenant she was residing in the suit premises. It, therefore, cannot be said that the courts below ignored any material and relevant evidence. Hence, reliance placed by the applicant on the said decision does not advance her case. After

considering the material on record, I do not find that the Courts below committed any error in arriving at that conclusions. Mr. Raje was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of evidence 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 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.

(R.G.KETKAR, J.)