

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 305 OF 2016

Mr. Nathaline Pereira (since Deceased)
Through LRs Mr.Tobias Pereira (deceased)
And Ors

...Applicants

Versus

Mr. Peter Thomas Sequeira
And Ors

...Respondents

....

Mr. A.N. Nasikwala, Advocate for the Applicants.
Mr. Shane Peter Sequeira, Respondent No.3 present in person for himself and on behalf of Respondents No.1 and 2.

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CORAM : R. G. KETKAR, J.

DATE : 25th July, 2016

P.C.

1. Heard Mr. A.N. Nasikwala, learned Counsel for the applicants and Mr.Shane Peter Sequeira, respondent No.3 appearing in person for himself and on behalf of respondents No.1 and 2, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants have challenged the judgment and decree dated 23.8.2010 passed by

the learned Judge, presiding over Court Room No.36 of the Court of Small Causes at Mumbai (Bandra Branch) in R.A.E. & R. Suit No.388/1088 of 1994 as also the judgment and decree dated 14.3.2016 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in A-1 Appeal No.254/2010. The learned trial Judge decreed the suit under Sections 13(1)(g) and 13(1)(l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Bombay Rent Act'). Aggrieved by that decision, the applicants preferred appeal. During pendency of the appeal, respondents No.1 to 3 did not press the ground of eviction under Section 13(1)(g) of the Bombay Rent Act. Appellate Court dismissed the appeal and decreed the suit only under Section 13(1)(l) of the Bombay Rent Act. It is against these decisions, the applicants have instituted the present Civil Revision Application.

3. In support of this application, Mr.Nasikwala strenuously contended that originally the suit was instituted in the year 1994 only against Mrs.Nathaline Pereira under Section 13(1)(g) of the Bombay Rent Act. Original defendant died on 2.8.1998 leaving behind present applicants as her heirs and

legal representatives, hereinafter collectively referred as 'defendants'. Accordingly they were brought on record in the trial Court. He submitted that pending the suit, respondents No.1 to 3, hereinafter referred to as the 'plaintiffs, took out Interim Notice No.1118/2006 for amending plaint so as to incorporate the ground of acquisition of suitable alternate residence under Section 13(1)(l) of the Bombay Rent Act. By order dated 14.8.2007, the learned trial Judge allowed the notice and directed the plaintiffs to amend the plaint and gave liberty to the defendants to file additional written statement or consequential amendment to the written statement.

4. Mr. Nasikwala submitted that the Bombay Rent Act was repealed by Maharashtra Rent Control Act, 1999 (for short, 'Maharashtra Rent Act'). Maharashtra Rent Act was brought into force w.e.f. 31.3.2000. In view of repeal of the Bombay Rent Act, the ground of acquisition of suitable alternate residence under Section 13(1)(l) of the Bombay Rent Act is not available. He relied upon Section 58 of the Maharashtra Rent Act as also Order 1 Rule 10(5) of C.P.C. In other words, he submitted that the ground of acquisition of suitable alternate residence was

available prior to coming into force Maharashtra Rent Act. During the lifetime of original defendant tenant, said ground was not pleaded. After the death of original defendant, the ground was sought to be added in the year 2007. Said ground is no longer available under the Maharashtra Rent Act. He, therefore, submitted that the Courts below were not justified in passing the decree under Section 13(1)(l) of the Bombay Rent Act as said ground was not available against the defendants who are L.Rs of original defendant, tenant.

5.. He further submitted that defendant No.6 Eugene Simon T. Pereira has not secured any alternate accommodation. He has taken me through (i) oral evidence of defendant No.6 Eugene T. Pereira to show that flat No.B-505 at Vakola stands in the name of his uncle and aunt. In other words, he has not acquired suitable alternate residence. He submitted that the Courts below were not justified in passing the decree under Section 13(1)(l) of the Bombay Rent Act.

6. Mr. Nasikwala further submitted that the defendants took out application Exhibit-40 under Order 41 Rule 27 of C.P.C. for production of additional evidence. By order dated

14.3.2016, the Appellate Court dismissed the application. He submitted that for the reasons stated in the application Exhibit-40, the Appellate Court should have allowed the application and permitted the defendants to lead additional evidence. He, therefore, submitted that the application requires consideration and also interim relief as prayed for deserves to be granted.

7. Mr. Nasikwala relied upon the decision of this Court in the case of ***Mrs. Saharabegam Sikandar Shaikh and others v. Abdul Ali Mawaji Tejani and others, 1991 Bombay Rent Cases 215*** to contend that in the case of eviction under Section 13(1)(l), it is to be found out whether the acquisition has been made by the defendant; whether it has been made by the defendant for the benefit of himself and the members of his family and lastly whether the same is suitable for the defendant and the members of his family. Merely because the evidence has been led to show that the alternate premises have been acquired by the defendant by advancing his moneys would not invariably lead to an inference that the same had been acquired for his own benefit. It may happen that the defendant acquires residence not for his own benefit but for the benefit of his son or

any other member of his family whom he seeks to habilitate in life. The crucial question which has to be gone into is whether the acquisition is for the benefit of the defendant himself and the members of his family who are to continue to reside with him as members of his family unit.

8. On the other hand, respondent No.3 supported the impugned orders. He relied upon the decision of Apex Court in the case of **Shri Harish Tandon v. The Addl. District Magistrate, Allahabad, U.P. and others, 1995(1) SCC 537**. He submitted that in paragraph-24, Apex Court referred to the decision of **H.C. Pandey v. G.C. Paul, 1989(3) SCC 77**, wherein Apex Court has held thus:

“It is now well settled that on the death of the original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefore. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants.”

9. In paragraph-25 of that report, Apex Court referred to the decision of **Smt. Gian Devi Anand v. Jeevan Kumar and others, 1985 (2) SCC 683** and observed thus :-

“The heirs of the deceased tenant in the absence of any provision in the Rent Act to the contrary will step into the position of the deceased tenant and all the rights and obligations of the deceased tenant including the protection afforded to the deceased tenant under the Act will devolve on the heirs of the deceased tenant. As the protection afforded by the Rent Act to a tenant after determination of the tenancy and to his heirs on the death of such tenant is a creation of the Act for the benefit of the tenants, it is open to the Legislature which provides for such protection to make appropriate provisions in the Act with regard to the nature and extent of the benefit and protection to be enjoyed and the manner in which the same is to be enjoyed. If the Legislature makes any provision in the Act limiting or restricting the benefit and the nature of the protection to be enjoyed in a specified manner by any particular class of heirs of the deceased tenant on any condition laid down being fulfilled, the benefit of the protection has necessarily to be enjoyed on the fulfilment of the condition in the manner and to the extent stipulated in the Act.”

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs had

instituted the suit in the year 1994 against Mrs. Nathaline Pereira. Originally the suit was instituted only under Section 13(1)(g) of the Act. Mrs. Nathaline Pereira died on 2.8.1998 leaving behind the applicants as her heirs and legal representatives. The plaintiffs took out Interim Notice No.1118/2006 for amending plaint thereby incorporating ground of acquisition of suitable alternate residence as contemplated by Section 13(1)(l) of the Bombay Rent Act. By order dated 14.8.2007, the notice was made absolute. Operative part of the order reads thus :

“ The notice is made absolute.
The plaintiffs are directed to amend the
plaint within 14 days from the date of this
order.
The plaintiffs are further directed to
serve the amended copy of plaint to the
defendants.
Liberty is given to the defendants to file
additional written statement or
consequential amendment to the written
statement.
Suit adjourned to 28.8.2007 at 2:30
p.m.”

11. It is settled position that once the application for amending the plaint is allowed, it relates back to the date of institution of the suit unless the trial Court expressly orders

that the amendment shall be from the date of making of the application under Order VI Rule 17 of C.P.C. and also keeps the issue of limitation open. In the present case, while allowing the application for amendment, the learned trial Judge did not clarify that the amendment shall operate from the date of application for amendment or from the date of order allowing amendment. In other words, the application relates back to the date of filing of the suit. Mr.Nasikwala relied upon Section 58 of the Maharashtra Rent Act to contend that after coming into force of Maharashtra Rent Act from 31.3.2000, the ground of acquisition of suitable alternate residence is not available. In any case that ground may have been available to the plaintiffs against the original defendant tenant Smt. Nathaline Pereira. Said ground is not available qua the defendants who are L.Rs of Mrs. Nathaline Pereira.

12. Section 58 of the Maharashtra Rent Act so far as is relevant for deciding the controversy reads thus :

“58. Repeal and saving.- (1) On the commencement of this Act, the following laws, that is to say,--

(a) the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947;

- (b) the Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946 including the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949; and
- (c) the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954; shall stand repealed.

(2) Notwithstanding such repeal--

- (a) all applications, suits and other proceedings under the said Acts pending, on the date of commencement of this Act before any Court, Controller, Competent Authority or other office or authority shall be continued and disposed of, in accordance with the provisions of the Acts so repealed, as if the said Acts had continued in force and this Act had not been passed;

.....”

13. The provisions of Section 58(2)(a) clearly shows that notwithstanding repeal of Bombay Rent Act, all applications, suits and other proceedings under the Bombay Rent Act pending on the date of commencement of the Maharashtra Rent Act i.e. on 31.3.2000 before any Court shall be continued and disposed of in accordance with the provisions of the Act (Bombay Rent Act) so repealed as if said Act (Bombay Rent Act) had continued in force and this Act (Maharashtra Rent Act) had not been passed. In view of the express language in Section

58(2)(a), the suit instituted in the year 1994 shall be continued and disposed of in accordance with the provisions of the Bombay Rent Act as if the Bombay Rent Act had continued in force and Maharashtra Rent Act had not been passed. In view thereof, it has to be held that once the application for amendment was allowed and that it relates back to the date of institution of the suit, the ground under Section 13(1)(l) of the Act is available to the plaintiffs.

14. Mr.Shane Peter Sequeira relied upon the decision of Apex Court in the case of **Harish Tandon (supra)**. In paragraph-26, Apex Court has observed thus:

“26. The framers of the Act have clearly expressed their intention in Sections 12, and 25 while protecting the tenant from eviction except on the grounds mentioned in Section that after the death of the original tenant his heirs will be deemed to be holding the premises as joint tenants, and for any breach committed by any of such joint tenants, all the heirs of the original tenant have to suffer. They cannot take a plea that unless the grounds for eviction mentioned in Sub-section (2) of Section are established individually against each one of them, they cannot be evicted from the premises in question.”

15. Perusal of above paragraph-26 clearly shows that on the death of the original tenant his heirs will be deemed to be holding the premises as joint-tenants. They cannot taken a plea that unless the grounds for eviction mentioned in sub-section (2) of Section 20 are established individually against each one of them, they cannot be evicted from the premises in question. Thus the contention raised by Mr. Nasikwala based on the decision of this Court in the case of **Mrs. Saharabegam Sikandar Shaikh (supra)** as also the contention that as defendant No.6 has not acquired any alternate suitable residence, the Courts were not justified in passing the eviction decree under Section 13(1)(l) of the Bombay Rent Act cannot be accepted.

16. After considering the evidence on record, the Courts below have concurrently held that the plaintiffs have established the acquisition of suitable alternate residence by the defendants. In particular, defendant No.1 Tobias Ronald Pereira, husband of original defendant tenant was residing at 5, Sukh Sagar, Near Vakola Municipal Market, Santacruz (E), Mumbai. He, however, died on 25.2.2006. John Ronald Pereira, son of

original defendant tenant, is residing at Shamiana Apartments, “A” Block, Fr. Peter Pereira Road, Kurla West, Mumbai. Another son Martin Richard Pereira is residing at Shamiana Apartments, “B” Block, Fr. Peter Pereira Road, Kurla West, Mumbai and said fact is also admitted in evidence. As far as defendant No.6 Eugene Simon T. Pereira, son of the original tenant is concerned, it is the case of the plaintiffs that he migrated to New Zealand. He further admitted that his wife is staying in Flat No.505, Friends C.H.S. Vakola, Santacruz (East), Mumbai along with her son. As far as defendants No.3, 4 and 7 are concerned, they had not participated in the trial and in fact suit proceeded against them exparte. They also did not prefer appeal and appeal preferred by defendants No.2, 5, 6 and 8 was dismissed against defendants No.3, 4 and 7. As far as defendant No.8 Mrs. Judy Clare Pinto, daughter of original defendant tenant is concerned, it is the case of the plaintiffs that she migrated to New Zealand.

17. Mr. Nasikwala further submitted that in view of Order I Rule 10(5) of C.P.C., the proceedings as against the defendants who were subsequently added shall be deemed to have begun

only on the service of the summons. I do not find any merit in this submission. Defendants are brought on record after the death of original defendant in their capacity as her legal representative and were not added as such. The question is whether the ground of eviction under Section 13(1)(l) of the Act will relate back to the date of filing of the suit. I have already held that the amendment relates back to the date of filing of the suit. I, therefore, do not find any merit in the submission advanced by Mr.Nasikwala relying Order I Rule 10(5) of C.P.C..

18. Lastly Mr. Nasikwala submitted that the defendants had filed application under Order XLI Rule 27 of C.P.C. The learned Appellate Court, however, dismissed that application. As noted earlier, the plaintiffs did not press the ground of eviction under Section 13(1)(g) of the Bombay Rent Act. Perusal of application under Order XLI Rule 27 of C.P.C. shows that the defendants wanted to bring on record acquisition of other premises by the plaintiffs. That evidence would have been relevant for considering ground of eviction under Section 13(1)(g) of the Bombay Rent Act. As the plaintiffs have pressed the ground only under Section 13(1)(l) of the Bombay Rent Act, in

my opinion, the Appellate Court was justified in rejecting the application. The defendants were 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 evidence on record. The defendants were not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

19. At this stage, Mr. Nasikwala orally applies for stay of this order for a period of eight weeks from today. Mr. Nasikwala states that defendants No.5 and 8 are present in Court. Upon taking instructions from them, he states that the applicants are in possession and they have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with the possession. He further states that the applicants and all adult family members residing with them are ready and willing to give usual

undertaking within two weeks from today. Respondents No.1 to 3 oppose said prayer.

20. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying operation of this order for a period of eight weeks from today subject to the applicants and all adult members residing with them in the suit premises giving usual undertaking to this Court 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 No.1 to 3 within two weeks from today; and
- (v) that in case the applicants are unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondents No.1 to 3.

21. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period

of eight weeks from today, subject to the applicants filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case the applicants do not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)