

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

CIVIL REVISION APPLICATION NO. 309 OF 2016

Mrs Vasudha Dyaneshwar
Jawalkar

..Applicant

Vs

Mrs. Nanuben Devshi Gada and
Ors.

.. Respondents

Mr. R.A.Thorat, Senior Advocate, i/b Mr. P.J.Thorat, Advocate for Applicant.

Mr. Y.S.Jahagirdar, Senior Advocate a/w Mr. Satyan N. Vaishnav and Ms Nupur J. Mukherjee, i/b M/s N.N.Vaishnawa & Co., Advocates for Respondents 1(a) to 1(f).

CORAM : R.G.KETKAR,J.

DATE : 03/08/2016

PC:

1. Heard Mr. R.A.Thorat, learned senior counsel for the applicant and Mr. Y.S.Jahagirdar, learned senior counsel for respondents 1(a) to 1 (f) at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as 'defendant no.2', has challenged the Judgment and decree dated 20.12.2012 passed by the learned Judge, presiding over Court Room No.20 of the Court of Small Causes Court at Mumbai in R.A.E. Suit No.3/4 of 2000 as also the Judgment and decree dated 14.3.2016 passed by the Appellate Bench of the

Small Causes Court in (2a) Appeal No.4 of 2013. By these orders, the Courts below decreed the suit instituted by Mrs Nanuben Devshi Gada, hereinafter referred to as 'original plaintiff', under section 13(1)(e) and 13(1)(g) of the Bombay Rents, Hotel and House Rates Control Act, 1947 (for short, 'Act').

3. Original plaintiff had instituted suit against defendant no.1- legal heirs of Sunderbai Namdev Waghmare and Venubai Namdev Waghmare, for recovery of possession shop no.2, ground floor, Devji Sadan, situate at plot no. 355, Bhandarkar Road, Matunga, Mumbai 400 019 (for short, 'suit premises'), inter-alia, on the ground that original tenant Sunderbai and Venubai expired without leaving any heir. Defendant no.2 is unauthorised occupant of the suit premises and was impleaded as per order dated 15.6.2005 passed in Interim Notice No.3792 of 2003. Original plaintiff contended that defendant no.2 claims to be partner of deceased tenant- Venubai as per partnership deed dated 9.4.1997. The said partnership deed is bogus and colourable and defendant no.2 did not acquire any tenancy rights. Plaintiff sought eviction of the defendants on the ground that defendant no.1 had vacated the suit premises and acquired suitable premises elsewhere. Defendant no.1 had sublet the suit premises without consent of the plaintiff and in contravention of the provisions of the Act. The defendants have committed

breaches of the terms and conditions of the tenancy and that the plaintiff requires the suit premises for personal use and bonafide requirement.

4. By order dated 5.3.2007, the learned trial Judge appointed Additional Registrar to represent the estate of the deceased tenants Sunderbai and Venubai. He filed written statement dated 7.10.2009 resisting the suit.

5. Defendant no.2 filed written statement in September, 2005, inter alia, denying that original tenants Sunderbai and Venubai expired without leaving any heir. Defendant no.2 came with the case that deceased tenant Venubai and defendant no.2 executed partnership deed dated 9.4.1997.

6. On the basis of pleadings of the parties, the learned trial Judge framed necessary issues. Parties led evidence. After considering the evidence on record, the Courts below decreed the suit, as stated earlier. It is against these orders, defendant no.2 has instituted the present application.

7. In support of this Application, Mr. Throat strenuously contended that Smt. Sunderbai Namdev Waghmare and Smt. Venubai Namdev Waghmare were joint tenants in the suit premises. Sunderbai died in the year 1990. Venubai died in the year 1999. The plaintiff had instituted suit against defendant no.1, legal heirs of Sunderbai and Venubai, on 1.11.1999.

Defendant no.2 was impleaded on 5.6.2005. By order dated 5.3.2007, the learned trial Judge appointed Addl. Registrar to represent the estate of defendant no.1. He submitted that basically suit itself is not maintainable as the suit was instituted against the legal heirs of Sunderbai and Venubai without naming the heirs. Suit against dead person is not maintainable. He further submitted that the Courts below have referred to the provisions of Order 22, Rule 4-A of C.P.C while considering the aspect of maintainability of the suit against defendant no.1. He submitted that If, in any suit, it appears to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may appoint Administrator-General, or an officer of the Court to represent the estate of the deceased person. In the present case, the said provision is not applicable as before institution of the suit Sunderbai and Venubai had expired. In short, Mr. Thorat submitted that recourse cannot be had to provisions of Order 22, Rule 4-A. He further submitted that the suit was instituted by Mrs Nanuben Devshi Gada on 1.11.1999 and she gave power of attorney to her husband in the year 2009. In other words, he had no authority to verify and sign plaint on behalf of the plaintiffs.

8. In order to substantiate his submission that the suit against unknown legal representatives of the defendant is not

maintainable, Mr. Thorat relied upon the following decisions:

1. Donald Gonsalves Vs. Penha de Franca Youth Club, 2002 (3) All MR 814;

2. Sheel Arora Vs. Sanjay Fetah Bahadur Shrivastava, 2004 (2) Bombay C.R. 518;

3. Srikant S. Volvoikar Vs. Narendra Pandu Chatim, 2010 (4) B.C.R. 336.

9. Mr. Thorat further submitted that the suit filed against defendant no.1, dead person, itself, is not maintainable and the decree passed by the Courts below is nullity and cannot be executed. In support of this proposition. He relied upon the decision of Dowry Prohibition Act Vs. Union of India, (1998) 5 SCC 567.

10. On merits, Mr. Thorat submitted that the Courts below were not justified in passing the decree under section 13(1)(g) of the Act. He has taken me through the averments made in paragraph 5(iii) of the plaint as also paragraph 7 of affidavit of evidence under Order 18, Rule 4 of Devshi D. Gada to contend that the plaintiff did not establish the bonafide requirement.

11. As far as the ground under section 13(1)(e) of the Act is concerned, he submitted that on the basis of the partnership deed executed between defendant no.2 and Venubai on 9.4.1997, defendant no.2 is carrying on business in the suit

premises. Defendant no.2 cannot be treated as unlawful sub-tenant. He submitted that Application requires consideration.

12. On the other hand, Mr. Jahagirdar supported the impugned orders. He submitted that in paragraph 2 of the plaint, the plaintiff specifically asserted that original tenant Sunderbai and Venubai expired without leaving no heir. Though defendant no.2 denied the said fact in the written statement, defendant no.2 did not bring any material on record showing the names and address of heir of Sunderbai and Venubai. In the evidence, the plaintiff's witness Devshi reiterated that after the death of Sunderbai in 1990, he made inquiries with neighbours and also with workers in the suit shop to try and find out if there were any heirs but no one was able to give any names or details or even to confirm that there are any heirs. After the death of Venubai in the year 1999, he made inquiries with neighbours and also with workers in the suit shop to try and find out if there were any heirs but nobody was able to give any names or even to confirm that there are any heirs. After the death of Sunderbai and Venubai, no one has approached the plaintiff or his wife making claim regarding tenancy of the suit premises or even offering to pay rent. It is in these circumstances it was not possible to give names of legal representatives of original tenants.

13. Mr. Jahagirdar further submitted that defendant no.2 is a

rank trespasser having no semblance of right, title and interest. He cannot make any grievance in that regard. He relied upon the decision of the Apex Court in the case of Balwant N. Viswamitra Vs. Yadav Sadashiv Mule, (2004) 8 SCC 706.

14. On merits, he submitted that the Courts below have concurrently decreed the suit under sections 13(1)(e) and 13(1)(g) of the Act. Though he may not be in a position to defend the eviction decree in respect of ground under section 13(1)(g) of the Act, he has taken me through the evidence of DW 1 Sayyed Haseen Ahmed Zaidi, Constituted Attorney of defendant no.2, and in particular his cross-examination. In cross examination, defendant no.2 claims that he is heir and legal Representative of Sunderbai and Venubai. Defendant no.2 is distant relative of Sunderbai and Venubai. Relying upon this portion of the cross examination, Mr Jahagirdar submitted that on one hand defendant no.2 has prayed for dismissal of the suit on the ground that the suit is instituted against dead person and that the suit is instituted against defendant no.1, legal heirs of Sunderbai and Venubai and, therefore, is not maintainable and on the other he claims to be distant relative of Sunderbai and Venubai and as such heir and legal representative. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C.

15. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, it is not in dispute and is a matter of record that Sunderbai and Venubai were joint tenants of the suit premises. Sunderbai died in the year 1990. Venubai died in the year 1999. PW 1-Devshi Gada has deposed in paragraphs 3 and 4 of further affidavit of evidence dated 7.11.2012 as under:

“3. I say that after Sunderbai died in 1990 I made inquiries with the neighbours and also with the workers in the suit shop to try and find out if there were any heirs but no one was able to give me any names at all, nor even to confirm that there are any heirs at all. Again after Venubai died in 1999 I made enquiries with the neighbours and also with the workers in the suit premises to try and find out if there were any heirs but no one was able to give me any names at all nor even to confirm that there are any heirs at all.

4. I say that, since the death of Sunderbai and Venubai no one has approached me or my wife to make any claim regarding tenancy the suit premises or claiming to the heirs or even offering to pay the rent. In the circumstances, it is not possible to give any names of heirs of the original tenants at all. I am advised that if defendant no.2 claim to knew the heirs but is deliberately withholding information and is not furnishing the particulars before this Hon'ble Court, then adverse inference should be drawn against defendant no.2 and she is the one who should be punished and the premises.”

Thus, the plaintiff has made inquiries for finding out the details of heirs and legal representatives of Sunderbai and Venubai. Even after making inquiries, no details were furnished to him. It,

therefore, cannot be said that no bonafide attempts were made by the plaintiff for instituting suit against legal representatives of Sunderbai and Venubai.

16. The Courts below have relied upon the provisions of Order 22, Rule 4-A of C.P.C.. Order 22 Rule 4A reads thus:

“4A. Procedure where there is no legal representative:- (1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court—

(a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person. ”

17. Mr. Thorat submitted that admittedly in the present case, original tenant Sunderbai and Venubai died in the year 1990 and 1999 respectively and the suit is instituted after their death. Order 22, Rule 4-A will not be applicable and Courts were therefore not justified in resorting to the said provision. It is not

possible to accept this submission. In the case of Balvant Vishvamitra (supra), the Apex Court has referred to decision of this Court in Spl. Civil Application No. 1360 of 1973 decided on 15/16th November, 1977. In that case, property was let out by the landlord to one Narayan. Narayan died and thereafter landlord terminated tenancy by issuing notice to “the heirs and legal representatives” of deceased Narayan. A suit was thereafter filed against heirs and legal representatives of deceased Narayan on the grounds of arrears of rent and unlawful sub-letting of the suit premises. The person in possession of the property (sub tenant) made an application to be joined as the party defendant which was granted. The suit was not contested by heirs and legal representatives of the deceased Narayan and it was contested by sub-tenant and the decree was passed by the trial Court and confirmed by the Appellate Court.

18. The sub-tenant approached the High Court. It was contended that the notice addressed to “ the heirs and legal representatives” of deceased Narayan could not be said to be in accordance with law and tenancy was thus not validly terminated. No suit could be filed and no decree could have been passed. Negating the said contention, the Court held that person who could make grievance were the heirs and legal representatives of the deceased Narayan and the petitioner had

no right to make such grievance. The Court further observed that since the petitioner was claiming through tenant, he was bound by the decree passed in the suit and the petition was, therefore, dismissed.

19. In the present case also, identical situation is obtaining. As noted earlier, the plaintiff made inquiries for finding out the heirs and legal representatives of the deceased Sunderbai and Venubai and as no information was furnished to him, he instituted suit against the heirs and legal representatives of Sunderbai and Venubai. That apart, during pendency of the suit, the trial Court by order dated 5.3.2007 appointed Addl. Registrar to represent the estate of defendant no.1 on the application made by defendant no.2, by order dated 5.6.2005 he was impleaded. Defendant no.2 claims to have entered into partnership with Venubai on 9.4.1997. In view thereof, I do not find that the suit is not maintainable for not naming the heirs and legal representatives of Sunderbai and Venubai. Reliance placed by Mr. Thorat on the decisions referred in paragraph 8 does not advance the case of defendant no.2.

20. Though it is not necessary to deal with contention of Mr Thorat based on Order 22, Rule 4-A in view of Balvant Vishvamisra case (supra), I have dealt this contention for sake of completion of the decision. Perusal of Order 22, Rule 4-A,

extracted herein above, shows that it applies to a situation where during the pendency of the suit any party to the suit dies leaving behind no legal representative. It is common ground between the learned counsel for the parties that there is no identical provision dealing with the situation where the party has died before the institution of the suit leaving behind no heirs. If there is no such provision, I see no good reason why the Court cannot have recourse to Section 151 of C.P.C. and also can invoke the principles underlying in Order 22, Rule 4-A. The Court in such a situation will be justified in appointing Administrator-General or an officer of the court or such other person as he thinks fit to represent the estate of the deceased person for the purpose of the suit. In the present case, the learned trial Judge has appointed Addl. Registrar of the Court to represent the estate of defendant no.1. Even on this ground also I do not find any merit in the submission of Mr Thorat that suit is liable to be dismissed on the ground of maintainability and the decree passed by the trial Court is nullity and decree is executable.

21. As far as ground of unlawful subletting is concerned, defendant no.2 came with the specific case that partnership deed was executed between him and Venubai on 9.4.1997. The Courts below have considered the evidence on record and in particular the Appellate court from paragraph 35 onwards has considered

the ground of unlawful subletting. The Appellate Court held that though defendant no.2 claims to have entered into partnership deed with Venubai on 9.4.1997 he did not produce the same. Thus, the entire foundation of defendant no.2's case was partnership deed dated 9.4.1997 and that itself was not produced. For the reasons recorded by the Courts below, I do not find that they committed any error in passing the decree under section 13(1)(e).

22. As far as the decree passed by the Courts below under section 13(1)(g) is concerned, Mr. Jahagirdar also did not seriously support the decree on that ground. In view thereof, the decree passed by the Courts below under section 13(1)(e) is confirmed. Defendant no.2 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 material on record. Defendant no.2 was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. Hence, no case is made out for invocation of powers under section 115 of C.P.C. Application fails and the same is dismissed.

23. At this stage, Mr. Thorat orally applies for continuation of ad-interim order dated 9.6.2016 for a period of 12 weeks from today. He states that defender no.2 is in possession of the suit

premises and nobody else is in possession. He has neither created third party interest nor parted with possession and he will hereafter neither create third party interest nor part with possession. He assures that within two weeks from today, defendant no.2 and all adult family members using the suit premises will file usual undertaking in this Court, after giving advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interests nor part with possession;
- (iv) that they will pay arrears of rent, if any, within 2 weeks from today;
- (v) that they will not apply for further extension of time;
- (vi) that in case they are unable to obtain suitable orders from higher Court within 12 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondents.

24. Hence, notwithstanding dismissal of the Application, subject to Defendant no.2 and all adult family members using the suit premises filing undertaking in the aforesaid terms within two

weeks from today and serving copy in advance to other side, ad-interim order dated 9.6.2016 shall remain in force for a period of 12 weeks from today. It is made clear that in case the undertaking in the aforesaid terms is not filed and arrears of rent are not paid within two weeks from today, the ad-interim stay shall stand vacated without further reference to the Court.

25. List the Application for reporting compliance after three weeks.

(R.G.KETKAR, J.)