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

CIVIL REVN. APPLICATION NO. 318 OF 2016

Smt. Puspaben Jaswantlal Vora and Anr. ... Applicants.

V/s.

Mr. Navinchandra Hariram Somaiya. ... Respondent.

Mr. Ram Apte, Senior Advocate a/w. Chandrakant Chavan and Manoj Mane for the Applicants.

Mr. P.S. Dani, Senior Advocate a/w. Mr. Bhandary S.G. i/b. Bhandary & Bhandary for the Respondent.

CORAM : N.M. Jamdar, J.

28 November, 2016.

Oral Order :-

The Applicants are tenants and the Respondent is a landlord of the suit premises. By this Revision the Applicants have challenge the concurrent findings recorded by the Small Causes Court, Mumbai and the Appellate Bench of Small Causes Court whereby the suit for eviction filed by the Respondent – landlord decreed and the appeal filed by the Applicants is dismissed.

2. The Respondent – landlord filed RAE Suit No. 690/1270 of 2004 against the Applicants for eviction from the suit premises. The suit premises are residential Room Nos. 9 & 10 situated on the Second floor of the building known as Somaiya Building, 107, Keshavji Naik Road, Mumbai – 400 009. The contention of the Respondent – landlord was that the suit premises were let out to the Applicant No.1 who acquired a suitable residential accommodation and her brother i.e. Applicant No.2 continued to occupy the premises and therefore, there was a case of sub-tenancy as well as there was a non-user by the original tenant. Both the Applicants filed their written statement and parties led their evidence. The learned Small Causes Court Judge came to the conclusion that the suit filed by the Respondent – Plaintiff was not barred by limitation, and the premises were not being used continuously for period of six months preceding to the date of filing the suit for the purpose it was let and accordingly decreed the suit by the judgment and order dated 31 January 2010. Appeal No. 139 of 2010 filed by the Applicant to the Appellate Bench was dismissed by the Appellate Bench of the Small Causes Court on 20 April 2016. Thereafter, the present Revision is filed.

3. Mr. Apte, the learned Senior Advocate for the Applicants firstly submitted that the Applicant No.2 is a protected tenant

having been in the premises on 1 February 1973 and it is the case of the Respondent – landlord himself that a sub-tenancy has been created in favour of the Applicant No.2. He submitted that the Applicant No.2 is occupying the premises since the year 1960. Mr. Dani, the learned Senior Advocate for the Respondent on the other hand submitted that the Applicant No.2 has never claimed any independent right in the premises and in fact has admitted in the cross-examination that he never claimed any right of protected licensee or lawful sub-tenancy in respect of the suit premises.

4. The term 'licensee' has been defined under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. To get protection of Section 15A of the Act, the person must be a licensee in the first place. The term 'licensee' has been interalia defined to include a person who is in occupation of the premises under a subsisting agreement of licence for a licence fees or a charge but does not include a member of the family and other categories so specified. Perusal of the definition makes it amply clear that a person must be in occupation under a subsisting agreement for licence, for a licence fees or charge and a mere family member cannot be termed as a licensee of the premises. It is not the case of the Applicants that there was any consideration for occupation of the Applicant No.2. The Applicant No.2, as per the case of the Applicants, occupied the premises as brother of Applicant No.1. It has come on record that it

is in the year 1976 that the Applicant No.1 left the suit premises, therefore, as on 1 February 1973 the occupation of Applicant No.2 cannot be stated as of a licensee contemplated under the provisions of Section 15A of the Bombay Rent Act. As far as the contentions of Mr. Apte that it is the Respondent – landlord who has come to the Court with a case of sub-tenancy us concerned, it will have to be seen that similarly the Applicant No.2 has also categorically asserted that he has never claimed the status of protected tenant or that he is occupying the premises on his own right or payment of any consideration. Therefore, if the rival versions are kept aside and the evidence as on record is considered, which has been considered by both the Courts, then the Applicant No.2 does not fall in the definition of 'licensee'. Even if it is assumed that it is the responsibility of the Court to assess the evidence, irrespective of the stand of the parties to find out whether Section 15A of the Act is attracted, the evidence on record does not show that the Applicant No.2 fulfills the ingredients of being a protected licensee.

5. The next contention raised by Mr. Apte is that once sub-letting by Applicant No.1 to Applicant No.2 was not held to be a ground for eviction, then there cannot be any non-user of the premises. It was contended that even though the Applicant No.1 may have shifted to different place, the Applicant No.2 continue to occupy the premises who was the family member and there cannot be a decree under Section 16(1)(n). This submission cannot be

accepted. Section 16(1)(n) reads as under :-

“ That the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit.”

The Act governs the relationship between the landlord and tenant and the reference to Section 16(1)(n) is to the tenants. Therefore, if the premises are not used by the tenant for the purpose for which they were let out for continuous period of six months immediately preceding the date of the suit, the landlord will be entitled to a decree for possession. Therefore, what is necessary is, the non-occupation by the tenant for period of six months prior to institution of suit and without reasonable cause. In the present case the tenant – Applicant No.1 has shifted to an alternate premises in the year 1976 with no intention to return. If the interpretation placed by Mr. Apte that even though the tenant may not use the premises and shifts elsewhere with no intention to return, if some of his family member continued to reside in the premises then there will be no non-user is accepted it will give rise to great abuse, where the tenants move to another premises permanently and keeping somebody in the tenanted premises only to have a hold, thereby nullifying the right of the landlord to seek eviction under Section 16(1)(n). As held by the learned Single Judge of Gujarat High Court in the case of *Mohini Bhiryomal Hingorani v/s. Bhanubhai Manilal Patel* reported in 1985

Bom. R.C. 27 interpreting the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 that it is an underlying condition of every landlord tenant relationship that the tenant needs the premises.

6. Therefore, the contentions advanced by Mr. Apte that because the Applicant No.2 continues to occupy premises irrespective of the Applicant No.1's absence for more than period of six months, there will be no decree under Section 16(1)(n) of the Act of 1999, cannot be accepted.

7. Mr. Apte then submitted that assuming that the Applicant No.1 shifted from the premises in the year 1976 and the suit which was instituted in the year 2004 is barred by period of limitation. This contention also cannot be accepted. As rightly contented by Mr. Dani, the provisions of Section 16(1)(n) provides for a starting period of cause of action, that if the premises are not used continuously for period of six months immediately preceding the date of suit without reasonable cause, a right is accrued to the landlord to seek eviction. The legislature by providing this period of six months has consciously omitted the reference the situation prior to six months before the institution of the suit. All that is required is that there should be a non-user without justifiable cause six months prior to the institution of suit. The non-user could be six months

and one day, or twenty years. The Respondent – landlord has proved that as far as the period of six months are concerned, there was a non-user by the tenant without justifiable cause.

8. Mr. Apte then submitted that notices were issued in the year 1984 by the father of the Respondent – landlord which has been suppressed and the suit ought to have been dismissed on that ground. If the notices, which are annexed to the Petition, are perused, they allege sub-tenancy, profiteering and acquisition of suitable alternate accommodation. In the present case a decree is passed not on the ground of profiteering, or acquisition of suitable accommodation or sub-letting, but on the ground of non-user by the original tenant. Therefore, factum of notices issued earlier on completely different grounds are not relevant. As far as the suppression of facts is concerned, the suppression of such a nature that it dis-entitles to a Plaintiff to any decree. In the present case a full fledged trial took place before the learned Small Causes Court Judge. A statutory appeal was fully heard and all the parties had full opportunity to put-forth their rival contentions. The Applicants had put-forth their defence of earlier notices being issued, which was also considered. Even otherwise, for the purpose of maintaining the present suit, what was relevant was non-occupation of six months prior to institution of suit and therefore, the earlier notices were not strictly relevant. Therefore, I am not inclined to non-suit the

Respondent – landlord only on this ground.

9. In the circumstances, no case is made out for interfering with the impugned judgment and orders. There is neither any error of jurisdiction nor any perversity in the appreciation of evidence. The Civil Revision Application is accordingly dismissed.

10. The learned Counsel for the Applicants seeks continuation of the ad-interim order which was granted in this Petition. After hearing both the sides, I am inclined to grant four weeks' time. However, since it will take some time to get copy of the order, the ad-interim relief is continued for period of six weeks from today on the same terms and conditions.

(N.M. Jamdar, J.)