

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.312 OF 2016

Mansukh Hiralal Joshi (decd) through his legal
heirs Manjulaben M. Joshi and others ... Applicants
Vs.
Chinadevi Durgaprasad Pandey (decd) through
Jagatkishor Durgaprasad Pandey (decd) through his
legal heirs Premadevi J. Pandey and others ... Respondents

Mr. N. P. Bhavsar for Applicants.
Mr. Omar K. Shaikh for Respondents No.1 and 4.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 30, 2016

P.C. :

Heard Mr. Bhavsar, learned Counsel for the applicants and
Mr. Shaikh, learned Counsel for respondents No.1 and 4 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 13.09.2011 passed by the learned Judge, presiding over Court Room No.38 of the Court of Small Causes at Bombay (Bandra Branch) in R.A.E.&R. Suit No.810 of 2001 as also the judgment and decree dated 21.04.2016 passed by the Appellate Bench of the Court of Small Causes at Bombay in Appeal No.80 of 2011. By these orders, the Courts below decreed the Suit instituted by the respondents, hereinafter referred to as 'plaintiffs', under sections 16(1)(g) and 16(1)(n) of the Maharashtra Control Act, 1999 (for short 'Act').

3. In support of this Application, Mr. Bhavsar strenuously contended

that plaintiffs instituted Suit against Mansukh Hiralal Joshi. He had died on 15.11.1994. The Suit is instituted on 26.11.2001 against the dead person. The Suit filed against the dead person, itself, is not maintainable and the decree passed by the Courts below is a nullity.

4. He further submitted that the Courts below were not justified in decreeing the Suit on the ground of non-user under Section 16(1)(n) of the Act. He submitted that defendants have produced evidence on record to substantiate user of the suit premises. In particular, he invited my attention to paragraph 23 of the trial Court's judgment. In paragraph 23, the learned trial Judge discussed the testimony of P.W.1 Jagatkishor. P.W.1 Jagatkishor deposed that since 2000, nobody resided in the suit premises. He however admitted that for 5 years preceding to October 2000, the suit premises were not kept locked. In other words, this clearly shows that the suit premises are in use of the defendants, and therefore, the Courts below were not justified in decreeing the Suit under Section 16(1)(n) of the Act.

5. As far as the bonafide requirement under Section 16(1)(g) of the Act is concerned, he submitted that the Suit was instituted by Chinadevi Durgaprasad Pandey (since deceased). In the Suit, she pleaded her personal requirement. The Courts below were, therefore, not justified in decreeing the Suit after her death on that ground. After her death, the need came to an end.

6. On the other hand, Mr. Shaikh supported the impugned orders. He invited my attention to paragraphs 20 and 21 of the trial Court's judgment and paragraphs 10 and 11 of the appellate Court's decision. He submitted that for the reasons stated therein, the Courts below rightly held that the Suit cannot be said to be not maintainable as it was originally filed against the dead person. He also invited my attention to paragraphs 13 and 14 of the appellate Court's judgment. He submitted that appellate Court considered the evidence on record and held that the demand notice and suit summons were served to the defendants at the address of the alternate premises i.e. at Borivali address. Power of Attorney executed by the defendant No.1(a) in favour of the D.W.1 Chirag Joshi at exhibit-73 also shows that the address of the defendants is mentioned of Borivali and not of the suit premises. D.W.1 Chirag Joshi also admitted in the cross-examination that defendants have their own flat at Gokul Dham, near Kora Kendra, Borivali (West). After considering these circumstances, the appellate Court observed that defendants did not adduce any material on record to show that they are residing in the suit premises. In paragraph 14, the appellate Court noted that the electricity bills produced by the defendants are of the period after institution of the Suit. The appellate Court also considered the suggestion given to P.W.1 that the suit premises were not locked continuously prior to 2000, which was admitted by him. The appellate Court observed that stray admission will not dilute the case of non-user alleged by the plaintiffs as no positive evidence is adduced by the defendants.

7. As far as the ground of bonafide requirement is concerned, he submitted that in paragraphs 17 and 20, the appellate Court has dealt with this aspect. For all these reasons, he submitted that no case is made out for interfering with the impugned orders.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As far as submission made by Mr. Bhavsar that the Suit instituted against the dead person was liable to be dismissed on the ground of maintainability is concerned, I do not find any merit in this submission. The learned trial Judge has considered this aspect in paragraph 21. It was observed that by order dated 04.02.2003, the learned trial Judge permitted plaintiffs to bring on record, defendants as legal representatives of the original defendant and the point of tenability of the Suit against the dead person was already decided. As far as the appellate Court is concerned, in paragraph 10, it referred to the decision of the Apex Court in the case of ***Karuppaswamy Vs. C. Ramamurthy, (1993) 4 SCC 41*** and overruled the objection raised by the defendants. For the reasons recorded therein, I do not find any merit in the submission of Mr. Bhavsar.

9. As noted earlier, the Courts below have decreed the Suit under Sections 16(1)(g) and 16(1)(n) of the Act. As far as the ground under Section 16(1)(n) of the Act is concerned, the same is considered by the trial Court in paragraphs 25 and 26 and appellate Court in paragraphs 13 to 15. The appellate Court has considered the circumstances in paragraph 13 and also the fact that the defendants did not adduce any material showing that they are residing in the suit premises. The findings recorded by the Courts below are based upon the appreciation of evidence on record.

10. As far as the ground of bonafide requirement and hardship is concerned, that aspect is considered by the trial Court in paragraphs 29 to 34 and by the appellate Court in paragraphs 16 to 23. In paragraph

17, the appellate Court observed that the requirement pleaded by the original plaintiff also includes the requirement of her family members. After her death, her son Jagatkishore was brought on record and after his death, present plaintiff and three daughters are brought on record. Plaintiffs are residing in the rented premises. It is in these circumstances, the appellate Court decreed the Suit. The findings recorded by the Courts below are based upon evidence on record. No other contention was raised.

11. Defendants were not in a position to demonstrate that the findings recorded by the Courts below are based on no evidence or that they are contrary to the evidence on record. Defendants were also not in a position to demonstrate that on the basis of evidence on record, no reasonable or prudent person would have reached the conclusions 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. Hence, Application fails and the same is dismissed.

12. At this stage, Mr. Bhavsar orally applies for orally applies for stay of this order for the period of 12 weeks from today. He states that the defendants are in possession of the suit premises and nobody else is in possession. Defendants have neither created third party interest nor parted with possession and the defendants will hereafter neither create third party interest nor part with possession. He assures that within 3 weeks from today, defendants and all adult family members residing in the suit premises, will give usual undertaking with advance copy to the other side, incorporating therein that,

- i) they are in possession and nobody else is in possession of the suit premises;

- ii) they have neither created third party interest nor parted with possession of the suit premises;
- iii) they will hereafter neither create third party interest nor part with possession of the suit premises;
- iv) they will pay up-to-date arrears of rent, if any, to the respondents within three weeks from today;
- v) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will vacate and handover vacant and peaceful possession of the suit premises to the respondents;

13. In view thereof, notwithstanding dismissal of C.R.A, subject to the defendants and all adult family members residing in the suit premises filing undertaking in the aforesaid terms within three weeks from today after giving advance copy to the other side, decree of eviction shall not be executed for a period of twelve weeks from today. It is made clear that in case they do not file undertaking and / or do not pay arrears of rent, if any, to the plaintiffs within three weeks from today, the interim order shall stand vacated without further reference to the Court.

14. List the Application for 'reporting compliance' after four weeks.

(R. G. KETKAR, J.)

Minal Parab