

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 393 OF 2016

Mr Peter Thomas Sequeira
And Ors

...Petitioners

Versus

Mr Nathaline Pereira (since Deceased)
Through LRs Tobias Pereira and Ors

...Respondents

....

Mr. Shane Peter Sequeira, petitioner No.3 present in person for himself and on behalf of petitioner Nos.1 and 2.

Mr. A.N. Nasikwala, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 25th July, 2016

P.C.

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

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants, hereinafter referred to as the 'plaintiffs', 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 insofar as declining to pass decree for mesne profit.

3. The plaintiffs have instituted the suit against the respondents, hereinafter referred to as the 'defendants', *inter alia* praying for possession of flat No.8 on the 2nd floor of Sequeira Villa, C.S.T. Road, Vidhanagari Marg, Kalina, Santacruz (East), Mumbai – 400 098 as also by prayer clause (e) the plaintiffs specifically sought the decree of mesne profit from the month of November, 1994 @ Rs.292.78ps per month or such other rate as the Court deems fit and proper. The learned trial Judge partly decreed the suit and ordered eviction of the defendants. The prayer for permanent injunction was rejected. Aggrieved by this decision, original defendants No.1,2,5, 6 and 8 preferred appeal which was dismissed on 14.3.2016. Mr.Sequeira submitted that while partly decreeing the suit, the learned trial Judge should have passed the decree in terms of

prayer clause (e) of the suit. Even if that decree is not passed, while supporting the trial Court's decree, the plaintiffs can urge before the Appellate Court to pass decree of mesne profit in terms of prayer clause (e). In support of this submission, he relied upon following decisions :

- [i] Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735;
- [ii] Gulamhusain Asgaraly Vahanvaty and others v. Allahabad Bank and others, in C.R.A. No.152/2007 dated 8.4.2011 passed by this Court [Coram: V.M. Kanade,J.]
- [iii] Alok Kumar Sharma v. Smt. T. Hemalatha in Second Appeal No.45/2011 dated 30.7.2012 passed by Andhra Pradesh High Court.

4. On the other hand Mr. Nasikwala submitted that while partly decreeing the suit the learned trial Judge declined to pass the decree of *mesne profit* in terms of prayer clause (e). The plaintiffs neither preferred cross-appeal nor cross-objection. The plaintiffs are, therefore, precluded from challenging the correctness of the orders passed by the Courts below in so far as mesne profits are concerned. In short, he submitted that Civil Revision Application itself is not maintainable.

5. I have considered rival submissions advanced by the parties. I have also perused the material on record. As noted earlier, the plaintiffs have sought possession of the suit premises. Prayer clause (e) reads thus :

“(e) The Defendants be ordered and decreed to pay mesne profits to the Plaintiffs from the month of November, 1994 at the rate of Rs.292.78 per month of such other rates as the Hon'ble Court deems fit and proper;”

6. The learned trial Judge decreed the suit on 23.8.2010.

Operative part of the order reads thus:-

“ Suit is decreed partly with proportionate costs.

Plaintiffs prayer for permanent injunction is hereby rejected.

The Defendants shall hand over the vacant and peaceful possession of suit premises viz. Flat No.8, situate on 2nd floor of Sequeira Villa, C.S.T. Road, Vidyanagri Marg, Kalina, Santacruz (East), Mumbai-400 098 to the Plaintiffs within three months from the date of this order.

Decree be drawn up accordingly.”

7. Perusal of the above order shows that the learned trial Judge did not pass any decree as far as mesne profits in terms of prayer clause (e) is concerned. Mr. Sequeira submitted that the trial Court's order is silent in that regard. The very fact that

the learned trial Judge did not pass the decree in terms of prayer clause (e) amounts to refusal to pass the decree for mesne profits. The plaintiffs should have preferred cross-objections or cross-appeal to the extent of refusal of decree in terms prayer clause (e). Having not done so, the plaintiffs are precluded from challenging refusal in passing the decree in terms of prayer clause (e).

8. Mr. Sequeira relied upon the decisions referred in paragraph-3 of this order. In the case of ***Bhagwati Prasad (supra)*** in paragraph-17, Apex Court noted that the High Court rejected the plaintiff's claim both for past rent and future mesne profits. The application for leave to appeal presented by the plaintiff expressly challenged the judgment and decree passed by the High Court both in regard to the past rent and future mesne profits. In fact the valuation of the appeal was placed on that basis. In short, in that case the plaintiff has specifically challenged the decree passed by the High Court in respect of the past rent and future mesne profits. It is in that context, in paragraph-18 Apex Court observed that once it is held that the plaintiff is entitled to eject the defendant, it follows that from the

date of the decree granting the relief of ejectment to the plaintiff, the defendant who remains in possession of the property despite the decree, must pay mesne profits or damages for use and occupation of the said property until it is delivered to the plaintiff. In view thereof, the reliance placed on the decision in the case of **Bhagwati Prasad (supra)** does not advance the case of the plaintiff.

9. In the case of **Gulamhusain Vahanavaty (supra)**, in paragraph-6 it was observed that the trial Court though decreed the suit filed by the plaintiff for possession, did not give any direction for holding inquiry regarding mesne profits. The plaintiffs being aggrieved by said judgment and order to the extent that no direction had been given for holding an enquiry regarding mesne profits, initially filed an application before the trial Court under Section 152 of C.P.C.. The trial Court dismissed that application. The plaintiffs thereafter filed appeal before the Appellate Bench. In other words in the appeal, the plaintiffs specifically challenged the refusal to pass judgment and decree of mesne profits. The Appellate Court dismissed the appeal on the ground that there were no pleadings in respect of

mesne profits. This Court held that the Appellate Court proceeded on the presumption that there were no pleadings in respect of seeking enquiry into the mesne profits. The trial Court did not give reasons why the order for inquiry into mesne profits was not granted. It is in that context, the learned Single Judge observed that for passing the order of mesne profits the trial Court has to pass order into the enquiry in the suit itself. In the present case, the trial Court has partly decreed the suit. In other words, the trial Court did not pass the decree for mesne profits or ordered enquiry to be held in that regard. In view thereof, in my opinion, said decision does not advance the case of the plaintiffs.

10. As far as the decision in ***Alok Kumar Sharma (supra)*** is concerned, in that case the learned trial Judge while passing the decree of eviction directed to hold enquiry into the mesne profits on a separate application. The Appellate Court passed the decree for mesne profits and directed the defendants to pay certain amounts. Thus in that case, there was a direction, albeit on separate application for holding enquiry. In the present case, there is no such direction. In view thereof, the reliance placed

by the plaintiffs on said decision does not advance the case of the plaintiffs.

11. Mr. Sequeira relied upon the decision of ***Banarsi and others v. Ram Phal (2003) 9 SCC 606*** and in particular paragraph-10 thereof. In paragraph-10, Apex Court considered three situations as follows :

- “(i) The impugned decree is *partly* in favour of the appellant and partly in favour of the respondent;
(ii) The decree is *entirely* in favour of the respondent though an issue has been decided against the respondent;
(iii) The decree is *entirely* in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a *finding* in the judgment which goes against the respondent.”

12. In the present case, Mr. Sequeira submitted that the decree is passed in favour of the plaintiffs and, therefore, he can support the findings in respect of mesne profits. It is not possible to accept this submission. The suit is partly decreed and decree of possession is passed. There is no decree in respect of mesne profits or direction for holding separate enquiry for mesne profits. In view thereof, the plaintiffs ought to have filed either cross-objection or cross-appeal challenging

that part of the decree whereby the relief in terms of prayer clause (e) was not granted. Hence, I find merit in the submission of Mr. Nasikwala that C.R.A. is not maintainable as the plaintiffs did not file cross-objection or cross-appeal in the appellate Court. Hence, Civil Revision Application fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)