

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 374 OF 2016

The Bombay Presidency Radio
Club Ltd.

...Applicant

Versus

Pallan Adi Katgara and another
...Respondents

....

Mr.R. B. Raghuwanshi i/b. Mr.Sandeep A. Bhagwat, Advocate
for the Applicant.

Mr. P.S. Dani, Senior Advocate i/b. Anand Gandhi, Advocate for
Respondents No.1 and 2.

....

CORAM : R. G. KETKAR, J.

DATE : 31st August, 2016

P.C.

1. Heard Mr.R.B. Raghuwanshi, learned Counsel for the applicants and Mr.P.S. Dani, learned Senior Counsel for 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, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 30.11.1999 passed by the learned Judge, presiding over Court Room No.27 of the Court of Small Causes at Bombay in R.A.E. Suit No.1235/1977 as also the judgment and decree dated 18.12.2012 passed by the Appellate Bench of Small Causes Court at Bombay in A-1 Appeal No.581/2005. By

these orders, the Courts below decreed the suit on the ground that the defendants have carried out permanent construction without prior written consent of the plaintiffs as contemplated under Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act') and their acts are contrary to Section 108(o) of the Transfer of Property Act, 1882 (for short, 'T.P. Act') read with Section 13(1)(a) of the Act. The relevant and material facts giving rise to filing of present Civil Revision Application, briefly stated, are as under :

3. On 25.3.1977, Maharashtra Investment and Land Corporation instituted the suit against the defendants *inter alia* contending that they are owners of the plot of land admeasuring 343 square meters or thereabout situate at Arthur Bunder Road, Colaba, Mumbai – 400 005 (for short, 'suit land'). Original plaintiffs purchased the suit land by deed of assignment dated 24.12.1974 from the Official Liquidator of the Colaba Land and Mill Co. Ltd. (for short, 'previous landlord') with the sanction of this Court. By indenture dated 25.11.1980, the original plaintiffs transferred the suit land to K.F. Enterprises. By dissolution whereof by deed dated 3.9.1981, the present plaintiffs became owners of the suit land. The suit was instituted by Maharashtra Investment and Land Corporation against the defendants. By order dated 18.1.1994, the present plaintiffs were brought on record in

the place and stead of Maharashtra Investment and Land Corporation, the original plaintiffs.

4. It is the case of the plaintiffs that by an agreement dated 21.8.1945 entered into between the previous landlord and the defendants, the suit land was let out to them as a monthly tenant on payment of Rs.75/- subject to various terms and conditions stipulated in the agreement. Clause 2(c) thereof provided that at no point the defendants will erect upon the suit land any 'pucca' or permanent structure whatsoever nor erect thereon any temporary structure except for the use of the tenant's club or its staff and except with the provisions consent in writing of the land-lord nor to erect any such temporary structure or add to alter or pull down the same save and except in accordance with the plans elevation and sections previously submitted in triplicate to and approved by the Architects of the landlord. Clause 2(d) thereof provided that the suit land shall not be used for any purpose other than parking of the cars or erection of the temporary structures.

5. After the original plaintiffs purchased the suit land, by his letter dated 25.1.1975, the previous landlord informed the defendants that he has under the direction of the High Court of Judicature at Bombay sold and assigned his entire right title and interest in the suit land to the plaintiffs subject to the covenants and conditions

contained in the agreement dated 21.8.1945. The defendants further informed that henceforth the rent should be paid to the original plaintiffs. The original plaintiffs by their Solicitor's letter dated 10.2.1975 requested the defendants to pay them monthly rent of the suit land on behalf of the original plaintiffs from February, 1975 onwards. In the said letter, they requested the defendants to extend all facilities for inspection of the suit land by the Architect of the original plaintiffs, who would visit the suit land on the next day during the working hours.

6. It is the case of the plaintiffs that on 14.2.1975 their Architect visited the suit land along with plan of the suit land. He observed certain structures were built on the suit land as more particularly set out in paragraph-5 of the plaint. By letter dated 24.2.1975, the plaintiffs terminated the tenancy of the defendants in accordance with the agreement and called upon them to vacate the suit land. By letter dated 17.7.1975, the defendants replied the notice. The plaintiffs contended that the defendants have put up 'pucca' or permanent structures on the suit land and committed breach of the agreement. The defendants are using the suit land for the purpose other than parking of the cars without written permission of the plaintiffs and thus have committed an act contrary to Section 108(o) of the T.P. Act read with Section 13(1)(a) of

the Act. The plaintiffs, therefore, claimed that they are entitled to claim possession under Section 13(1)(b) of the Act. The plaintiffs also claimed possession under Section 13(1)(i) of the Act.

7. The defendants filed points of defences dated 23.8.1977 denying the assertions made by the plaintiffs about visiting the suit land by their Architect on 14.2.1975. Defendants contended that they have obtained the permission from the previous landlord to build said structures. The defendants denied that they have put up 'pucca' or permanent structure on the suit land or they have committed breach of the agreement. The defendants also denied that they have put suit land to use for purposes other than for which it was leased under the agreement and thereby committed acts contrary to Section 108(o) of T.P. Act.

8. On 15.9.1998, the points of defences were amended by incorporating paragraphs 7-A to 7-C. In the amended points of defences, in the alternative and in the event the Court coming to the conclusion that the defendants have carried out works of constructions which are not permanent constructions and without the consent of previous landlords, the defendants contended that the original owners have waived and acquiesced to the acts of the defendants. Said works were carried out in the year 1963-64 or thereabout and the previous landlords did not

raise any objection and went on accepting rents from the defendants without any demur. The defendants further contended that the constructions were carried out in the year 1963-64 or thereabout and the suit instituted on 25.3.1977 is clearly barred by law of limitation. It was further contended that the works which are not of permanent nature, were carried out for better and more beneficial enjoyment of the demised premises. The demised premises could not have been used or enjoyed by the defendants in a better and more beneficial manner.

9. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. The plaintiffs led oral and documentary evidence by examining as many as six witnesses. As against this, the defendants did not examine any witness on their behalf. After considering the evidence on record, the learned trial Judge decreed the suit under Section 13(1)(b) and 13(1)(a) of the Act read with Section 108(o) of T.P. Act. Aggrieved by this decision, the defendants preferred appeal which is dismissed by the Appellate Court. It is against these decisions, the defendants have instituted the present Civil Revision Application.

10. In support of the application, Mr.Raghuwanshi submitted that the plaintiffs did not produce

- [i] Original agreement dated 21.8.1945;
- [ii] Deed of assignment dated 24.12.1974, by which the

original plaintiffs had purchased the suit land from the previous landlord with the sanction of this Court;

- [iii] Indenture deed dated 25.11.1980 between the original plaintiffs and K.F. Enterprises; and
- [iv] Deed of dissolution dated 3.9.1981.

11. Mr. Raghuwanshi submitted that the plaintiffs came with the case that their Architect had visited the suit land and submitted report dated 14.2.1975. However, said report is not proved by examining Architect. The plaintiffs produced the photographs. However, they did not produce the negatives. They did not examine the photographer as also developer who developed these photographs. The previous landlords were not examined and one Bhalchandra D. Purohit, partner of original plaintiffs was examined.

12. Mr. Raghuwanshi has taken me through cross-examination of the plaintiffs witnesses and in particular cross-examination of PW-1 Homi Adi Katgara. He submitted that at the time when he was examined on 13.6.1997, he was 33 years old. He has no personal knowledge about the agreement dated 21.8.1945. He admitted that he did not make any enquiry with the Corporation as to whether the structure has been assessed at any time. He did not make any enquiry with

the erstwhile owner. He did not make any enquiry with the previous landlords and, therefore, he did not know if the previous landlords permitted the defendants to put up structure. PW-1 admitted that he joined the plaintiff in the year 1981. He admitted that prior to 1981, he has no personal knowledge as regards affairs of the firm. He does not know whether the construction that has been erected by the defendants in 1963-64 was with the consent of the plaintiffs. He does not know whether the defendants have raised construction with the consent of the erstwhile landlords. He has not enquired with erstwhile landlords as regards raising of construction. He has not enquired with erstwhile landlords as to whether the consent was given or not. PW-1 further admitted that he did not know who had taken the photographs produced in the Court. He did not know the exact date of taking photographs.

13. Mr. Raghuwanshi submitted that the construction was put up in the year 1963-1964 and the suit is instituted in the year 1977, which is clearly barred by law of limitation. He submitted that without any evidence on record, the Courts below have decreed the suit. He further submitted that the Appellate Court was not justified in admitting in evidence the agreement dated 21.8.1965 which was marked as Article X-1 by the trial Court. For all these reasons, he submitted that the

application requires consideration.

14. On the other hand, Mr. Dani supported the impugned orders. He submitted that initially in the point of defences no contention was advanced as regards carrying out construction in the year 1963-64 and suit being barred by law of limitation. The points of defences were amended on 15.9.1998 by incorporating paragraph-7A to 7C. He submitted that for the first time, in these amended points of defences, the defendants came with the case that the construction works were carried out in the year 1963-64 or thereabout and the previous landlords did not raise any objection to the same and went on accepting the rent from the defendants without any demur. The defendants further pleaded that the previous landlord had waived their objections and acquiesced to the acts of the defendants. However, in order to establish the defence, the defendants did not examine any witness. He submitted that after appreciating the evidence on record, the Courts below decreed the suit. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C..

15. I have considered rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the decree of eviction is passed on two grounds, namely,

Section 13(1)(b) of the Act and Section 108(o) of T.P. Act read with Section 13(1)(a) of the Act. Clauses 2(c) and 2(d) of the agreement dated 21.8.1945 read thus :

“2(c) Not at any time to erect upon the land hereby let any “pucca” or permanent structure whatsoever, nor to erect thereon any temporary structure except for the use of the tenants club or its staff and except with the previous consent in writing of the landlord nor to erect any such temporary structure or add to alter or put down the same save and except in accordance with the plans elevation and sections previously submitted in triplicate to and approved by the architects of the landlord.

2(d) Not to use the land hereby let for any purpose other than the parking of cars or the erection of the temporary structures as aforesaid.”

16. Perusal of the above extracted clauses clearly shows that the defendants were prohibited from erecting upon the suit land any “pucca” or permanent structure whatsoever, nor to erect thereon any temporary structure except for the use of the tenants club or its staff and except with the previous consent in writing of the landlord. The defendants were also prohibited from using suit land for any purpose other than parking of cars or the erection of the temporary structures. The defendants have not brought on record any written permission of the landlords for carrying out permanent construction.

17. The trial Court referred to clauses 2(c) & (d) of

the agreement in paragraph-15 and also considered evidence adduced on behalf of the plaintiffs. The learned trial Judge held that these clauses specifically enjoins the defendants with the duty to obtain the permission in writing before proceeding with any construction. Not only that duty also cast upon the defendants to submit the plan of said constructions to the Architect and the plaintiffs for approval before proceeding with said construction. In paragraph-19, the learned trial Judge referred to the case made out by the defendants that the constructions have been made with previous permission of the previous landlords and that no action was taken against them. The learned trial Judge referred to the evidence on record and ultimately observed that the suit land was let out to the defendants specifically for the purpose of parking of cars by its members. Construction of ware tank and other structures which are of permanent nature in cement and concrete can be stated to be for the better and beneficial enjoyment of the premises provided premises were let out to the defendants and not open or piece of land. After considering the photographs and also referring to various decisions cited before it, the trial Court held that the defendants have contravened the terms of tenancy agreement. The defendants failed to establish that the plaintiffs have waived the contravention or has acquiesced to it. The

learned trial Judge accordingly decreed the suit under Section 108(o) of T.P.Act read with Section 13(1)(a) and 13(1)(b) of the Act.

18. The Appellate Court has considered this agreement in paragraph-11. The Appellate Court observed that in paragraph-2 of the written statement, the defendants contended that they will refer and rely upon the agreement dated 21.8.1945. The plaintiffs have produced copy of the agreement and in fact called upon the defendants to produce the original. In spite of service of notice to produce the original document, defendants did not produce it though during the course of evidence the defendant's Advocate sought time for production of the documents. The Appellate Court further observed that there was no dispute that such agreement has taken place in between previous landlord and the defendants and the defendants have come in possession of the suit land in pursuance thereof. The Appellate Court, therefore, observed that the defendants must be in possession of the original document or at least copy of said document. In view thereof, copy produced by the plaintiffs and marked as Article X-1 by the trial Court can be admitted in evidence as per Section 65(a) of the Indian Evidence Act, 1872. The Appellate Court observed that though the trial Court relied on the contents of the document, it did not exhibit and formally admit said

document in evidence and accordingly the Appellate Court admitted it in evidence.

19. The Appellate Court also considered the correspondence between the plaintiffs and the original plaintiffs at Exhibits-E and F. After considering the evidence on record, the Appellate Court noted that the suit land was given only for parking purposes. However, the defendants have carried construction and are using it for purposes other than parking of cars. The Appellate Court, therefore, upheld the order passed by the trial Court and passed eviction decree.

20. In the case of **S.R. Tewari v. Union of India and another, (2013) 6 SCC 602**, and in particular in paragraph-30, Apex Court has observed thus:

“30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weight of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

(Vide: Rajinder Kumar Kindra v. Delhi Administration, AIR 1984 SC 1805; Kuldeep Singh v. Commissioner of Police & Ors., AIR 1999 SC 677; Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary, AIR 2010 SC 589; and Babu v. State of Kerala, (2010) 9 SCC 189).”

21. Applying the tests laid-down by the above decision to the facts of the present case, it cannot be said that the findings have been arrived at by the Courts below by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. It also cannot be said that the findings are “against the weight of evidence” and that they outrageously defy logic as to suffer from the vice of irrationality.

22. 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.

(R. G. KETKAR, J.)