

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 491 OF 2015

M/s. Austvinayak Enterprises
and another

...Applicants

Versus

Smt. Jaywanti A. Salgaonkar
(since deceased) through
1[a] to 1[d]

...Respondents

....

Mr.Rajeev Narula i/b. Jhangiani Narula & Associates, for the
Applicants.

Mr.E.K. Sasidharan, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 30th August, 2016

P.C.

1. Heard Mr. Rajeev Narula, learned Counsel for the applicants and Mr.E.K. Sasidharan, learned Counsel for respondents No.1[a] to 1[d], at length.

2. Rule Mr. Sasidharan waives service. In view of order dated 28.6.2016 as also at the request and by consent of parties, Rule is made returnable forthwith and the application is taken up for final hearing.

3. 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 31.10.2012 passed by the learned Judge, presiding over Court room No.32 of the Court of Small Causes at Bombay (Bandra Branch) in R.A.E. Suit No.14/2007 as also the judgment and decree dated 17.2.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in (A-1)Appeal No.3/2013. By these orders, the Courts below dismissed the suit instituted by the plaintiffs against the respondents, hereinafter referred to as the 'defendants' for recovery of possession of room No.14 situate in Merwin Francis Misquitta Chawl, bearing CTS No.418 Part, 418/1 to 14 at Sahaji Raje Road, in compound of Prachi Society, Vile Parle (East), Mumbai – 400 057 (for short, 'suit premises'). The relevant and material facts giving rise to filing of this C.R.A., briefly stated, are as under.

4. It is the case of the plaintiffs that the defendant is the tenant of plaintiff No.2 in respect of the suit premises admeasuring 200 sq. ft. Plaintiff No.2 have purchased property bearing C.T.S. No.418 Part, 418/1 to 14 by conveyance deed dated 25.10.1995 from its owner Mr.Merwin Francis Misquitta. Since then plaintiff No.2 are the owners

of said property. Plaintiff No.2 had entered into development agreement dated 2.6.2005 as also given General Power of Attorney duly registered with the office of Sub-Registrar, Brandra, Mumbai on 2.6.2006 in favour of plaintiff No.1. Plaintiff No.1 is authorized to develop the said property. There are 14 occupants/tenants in different chawls/structures on the said property, out of which 12 tenants have vacated their respective premises by surrendering their possession to the plaintiffs in lieu of monetary consideration or alternate accommodation given by the plaintiffs to them. Defendant, however, has refused to vacate the suit premises instead of offering alternate accommodation admeasuring 240 sq. ft. carpet in the proposed building to be constructed on said property.

5. The plaintiffs also alleged that the defendants have carried out additions and alterations of permanent nature in the suit premises by extending the area by about 100 sq. ft. and, therefore, the Municipal Corporation of Greater Mumbai (for short, 'Corporation') had issued a notice under Section 351 of the Mumbai Municipal Corporation Act, 1888. The plaintiffs have decided to demolish all the structures on the said property and after demolition intend to re-erect and construct entirely new building with

sanctioned plan of the Corporation. The suit premises in occupation of the defendant are reasonably and bonafide required by the landlord/owner for the immediate purpose of demolishing the same and such demolition is to be made for the purpose of erecting new building upon said property.

6. It is further asserted that the commencement certificate of the new building will not be approved by the Building Proposal Department unless the suit premises are demolished. The plaintiffs have claimed possession under Section 16(1)(i) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). The plaintiffs have also expressed willingness to give undertakings in terms of Section 16(6) of the Act.

7. The defendant resisted the suit *inter alia* contending that plaintiff No.2 has no right in the suit premises. The defendant is in possession of area admeasuring 15' X 25' ft. and not 200 sq. ft. as alleged. The defendant also contended that the execution of the development agreement cannot be basis for filing suit. It was contended that the plaintiffs are not entitled to claim possession under Section 16(1)(i) of the Act. The defendant denied financial condition of the plaintiffs is sound and they can complete the proposed

building on suit property.

8. On the basis of the pleadings of the parties, learned trial Judge framed issues. Parties led evidence. After considering the evidence on record, learned trial Judge dismissed by the suit by holding that the plaintiffs have failed to comply the provisions of Section 16(6) of the Act. Aggrieved by this decision, the plaintiffs preferred appeal. During pendency of the appeal, the plaintiffs filed application Exhibit-11 and filed undertaking dated 5.2.2014 of Dhanpatraj V. Bhansali, partner of plaintiff No.1. The defendant filed affidavit of Smt. Jaywanti A. Salgaonkar dated 12.3.2014 *inter alia* raising objections to the undertaking filed by plaintiff No.1. One of the objections raised by the defendant is based on Section 16(6)(d) of the Act, namely, undertaking is not given by the landlord/owner of the suit premises but on behalf of plaintiff No.1, developer.

9. By the impugned order, Appellate Court dismissed the appeal only on the ground that neither the plaintiffs nor the defendants have established the exact area in possession of the defendant. On one hand the plaintiffs contended that the defendant is in possession of 200 sq. ft. carpet area and offered 240 sq. ft. carpet area in the newly

constructed building, on the other, defendants came with the case that they are in possession of area admeasuring about 375 sq. ft. It is against these orders, the plaintiffs have instituted this Revision Application.

10. In support of this application, Mr. Narula has taken me through the pleadings of the parties as also oral and documentary evidence. He submitted that in paragraph-1 of the plaint, the plaintiffs specifically asserted that the defendant is tenant of suit premises admeasuring 200 sq. ft. carpet area. The defendant on the other hand contended in paragraph-1 of the written statement that she is in possession of three sheds being room No.3 admeasuring 15' X 25', room No.2 admeasuring 15' X 25 ft. and room No.7 admeasuring 15' X 25'. Insofar as the present controversy is concerned, she contended that the defendants are in possession of 375 sq. ft. carpet area. Mr. Narula submitted that in paragraph-1 of the affidavit of evidence of Dhanpatraj V. Bhansali, he specifically stated that the defendant is tenant of suit premises admeasuring 240 sq. ft. He has taken me through the cross-examination of said witness and submitted that said statement remained unchallenged. He also invited my attention to affidavit of examination-in-chief of the defendant and in particular

paragraph-1 wherein she has reiterated the contentions raised in written statement. In the cross-examination, she stated that there are three separate rooms each admeasuring 15' X 25'. He submitted that as PW-1 specifically deposed that the defendant is in possession of 240 sq. ft., which remained unchallenged, Appellate Court was therefore not justified in dismissing appeal on the ground that exact area of the suit premises is not brought on record.

11. Mr.Narula invited my attention to the orders of this Court dated 13.6.2016 and 28.6.2016 in the Revision Application. In these orders, the statement on behalf of the plaintiffs without prejudice to their rights and contentions that the plaintiffs are ready and willing to offer 350 sq. ft. carpet area to the defendant, was recorded. He further states that plaintiff No.2 landlord/owner will give fresh undertaking in terms of Section 16(6) of the Act incorporating therein :

- [i] That the plaintiffs are ready and willing to offer 375 sq. ft. carpet area to the defendant;
- [ii] The plaintiffs will furnish copies of Intimation of Disapproval [IOD] and sanctioned plans to the

defendant and after one month of furnishing of these copies will call upon the defendant to hand over possession of the suit premises.

12. On the other hand, Mr.Sasidharan supported the impugned orders. He has invited my attention to the findings recorded by learned trial Judge in paragraphs-33 to 36. In paragraph-36, the learned trial Judge recorded a finding that the plan filed on behalf of the plaintiffs is not proved by examining concerned witness. Said plan is also not sanctioned by the Corporation. The plan produced by the plaintiffs was marked as Article 'X'. Said plan does not show that how many storied building is to be constructed by the plaintiffs. The plaintiffs did not give undertaking in terms of Section 16(6) of the Act. The learned trial Judge, therefore, held that the plaintiffs have not fulfilled the conditions stipulated in sub-clauses (b) and (c) of sub-section 6 of Section 16 of the Act.

13. As far as the Appellate Court is concerned, Mr.Sasidharan submitted that the Appellate Court dismissed the appeal on the ground that the exact area of the suit premises is not brought on record. He submitted that although PW-1 was not cross-examined as regards actual area in possession of the defendants nonetheless in

the examination-in-chief as also in the cross-examination the witness on behalf of the defendants deposed that the defendants are in possession of 15' X 25' ft. i.e. 375 sq. ft.. He submitted that basically the landlord/owner has not given undertaking in terms of Section 16(6)(d) of the Act. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

14. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, there is dispute between the parties as regards the exact area in possession of the defendants. On one hand, the plaintiffs claimed that the defendants are in possession of 200 sq. ft. carpet area and offered 240 sq. ft. carpet area, on the other hand, the defendants claimed that the suit premises admeasures 375 sq. ft. In the orders dated dated 13.6.2016 and 28.6.2016, statement made on behalf of the plaintiffs that without prejudice to the rights and contentions they are ready and willing to offer 375 sq. ft. carpet area to the defendant, was recorded. Mr. Narula has also made statement during the course of hearing, which is recorded hereinabove. During the course of hearing, Mr. Narula stated that the plaintiff No.2 will file fresh undertaking in

the appellate Court offering 375 sq. ft. carpet area to the defendant. In view thereof, insofar as the controversy in respect of area no longer survives.

15. In view of the contention advanced by Mr.Sasidharan that in terms of Section 16(6)(d) of the Act, it is for the landlord to give undertaking. It is necessary for plaintiff No.2 being the landlord to give undertaking in terms of Section 16(6)(d) of the Act. Mr. Narula assures that within two weeks from the date of appearance, plaintiff No.2 landlord/owner will file fresh undertaking enclosing therewith plan prepared through registered Architect, with advance copy to other side, in terms of Section 16(6) of the Act incorporating therein, amongst others, :

[i] That the plaintiffs are ready and willing to offer 375 sq. ft. carpet area to the defendant;

[ii] The plaintiffs will furnish copies of Intimation of Disapproval [IOD] and sanctioned plans to the defendant and after one month of furnishing of these copies will call upon the defendant to hand over possession of the suit premises.

16. In view thereof, application is disposed of in

following terms:

- [i] The impugned judgment and decree dated 17.2.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in (A-1)Appeal No.3/2013 is quashed and set aside and appeal is restored to the file of Appellate Court. Parties agree that they will appear before the Appellate Court on 6.9.2016 and for that purpose no fresh notice be issued to them.
- [ii] Plaintiff No.2 landlord/owner shall file undertaking in the aforesaid terms enclosing therewith plan prepared through registered Architect within two weeks from 6.9.2016 and shall serve copy in advance on the other side.
- [iii] The learned Appellate Court is requested to dispose of the appeal within three weeks from the date of appearance of the parties.
- [iv] All contentions of the parties, on merits, are expressly kept open.
- [v] Office is directed to remit R & P forthwith.
- [vi] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)