

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.313 OF 2016

Haquiqualla Khan Azimbullab Khan ... Applicant

Vs.

Yacoobhai Rasulbhai and another ... Respondents

Mr. R. A. Thorat, Senior Advocate a/w. Ms Nazia S. A. Shaikh for Applicant.

CORAM : R. G. KETKAR, J.

DATE : 25TH OCTOBER 2016

P.C. :

Heard Mr. Thorat, learned Senior Counsel for the applicant at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908, applicant, hereinafter referred to as 'defendant No.2' has challenged the judgment and decree dated 05.11.2009 passed by the learned Judge, presiding over Court Room No.12 of the Court of Small Causes at Mumbai in R.A.E. Suit No.1000/1823 of 2004 as also the judgment and decree dated 03.05.2016 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.33 of 2010. By these orders, the Courts below decreed the Suit instituted by the respondent No.1, hereinafter referred to as 'plaintiff', under Section 16(1)(e) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. Plaintiff instituted Suit for recovery of possession of shop No.15 situate on the ground floor of building known as Taher Building, 236-242, Maulana Azad Road, Mumbai 400 008 (for short 'suit premises') inter alia contending that Shaikh R. Ajabali Shaikh

Wahid was a monthly tenant in respect of the suit premises. Defendant No.1 Hazarathali Shaikh Rajabali is the only heir and legal representative of the original tenant. Plaintiff alleged that defendant No.1 has unlawfully sublet and / or parted with possession and / or assigned his interest in the suit premises without consent and knowledge of the plaintiff and in breach of provisions of the Act in favour of the applicant. Plaintiff further contended that defendant No.2 is in exclusive use, occupation, possession and enjoyment of the suit premises and carrying on business of ready-made garments under the name and style of M/s. H. H. Garments.

4. Defendant No.2 resisted the Suit by filing written statement inter alia contending that he was put in possession of the suit premises by the original tenant in the year 1992 with the written consent and knowledge of the plaintiff. The writing by which the consent was given by the plaintiff is misplaced. During the lifetime of the original tenant, he was paying rent to the plaintiff and after his death, defendants are paying the rent to the plaintiff vide pay orders.

5. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led evidence. After considering the evidence on record, Courts below decreed the Suit only under Section 16(1)(e) of the Act. It is against these orders, defendant No.2 has instituted the present application.

6. In support of this Application, Mr. Thorat submitted that the rent receipt dated 04.03.2004 at exhibit-46 clearly shows that plaintiff had accepted Rs.37,000/- from defendant No.2 in cash for transfer charges of the suit premises. Courts below disbelieved that

document. In paragraph 27, the learned trial Judge referred to Section 73 of the Indian Evidence Act, 1872 (for short 'Evidence Act'). The learned trial Judge compared the disputed signature appearing on exhibit-46 with the admitted signature and held that there is no similarity between the disputed signature and admitted signature. He submitted that Section 73 of the Evidence Act empowers the Court to direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. He submitted that in the present case, the learned trial Judge did not call upon the plaintiff to sign document in the presence of the Court for the purpose of comparing disputed signature on exhibit-46.

7. As far as the appellate Court is concerned, the appellate Court did not deal with this aspect and merely confirmed the said finding in paragraph 19. Perusal of exhibit-46 and the admitted signature of the plaintiff clearly establishes similarity between the signatures. In other words, he submitted that plaintiff accepted Rs.37,000/- from defendant No.2 for transferring tenancy in his favour. Courts below were not justified in passing the decree under Section 16(1)(e) of the Act. He, therefore, submitted that application requires consideration.

8. I have considered the submissions advanced by Mr. Thorat. I have also perused the material on record as also receipt at exhibit-46 dated 04.03.2004. As noted earlier, plaintiff came with the case that defendant No.1 has unlawfully sublet the suit premises to the defendant No.2. Defendant No.2 denied these assertions. In paragraph 6, defendant came with the case that original tenant had put him in possession of the suit premises in the year 1992 with the written consent

and knowledge of the plaintiff. He further came with the case that the writing by which the consent was given by the plaintiff is lost. The learned trial Judge has considered ground of unlawful subletting from paragraphs 16 to 31. In paragraph 16, the learned trial Judge noted that Shaikh R. Ajabali Shaikh Wahid was the original tenant and the said fact was not in dispute. No material is brought on record by the defendant No.2 that with the consent of landlord, he was inducted in the suit premises. In paragraph 21, the learned trial Judge considered evidence of P.W.1 and D.W.1. D.W.1 deposed that he was put in possession of the suit premises by original tenant in the year 1992 with the consent of the plaintiff dated 04.03.2004. According to the D.W.1, consent letter dated 04.03.2004 (exhibit-46) is signed by Mr. Noomanbhai Tambawalla, who is a constituted attorney of the plaintiff. D.W.1 further deposed that he had paid Rs.37,000/- in cash being the charges for transferring he rent receipt in respect of the suit premises. He further deposed that he had withdrawn Rs.37,000/- from the Bank on 04.03.2004 to enable him to pay the amount to the plaintiff. Defendant No.2 also examined D.W.2 Faisal Naik to prove that he had withdrawn the amount of Rs.37,000/- on 04.03.2004. D.W.2 was working as a Branch Manager of Development credit Bank, Byculla Branch. The learned trial Judge noted that the bank statement is not marked as exhibit since the said statement was not prepared as per the provisions of Bankers Book Evidence Act. In paragraph 24, the learned trial Judge noted that there are recognized modes of proving the handwriting and signature.

9. The learned trial Judge noted that defendant No.2 did not examine handwriting expert or any other witness who is well acquainted with handwriting and signature of P.W.1 Noomanbhai Tambawala. Even in the written statement, defendant did not come with the case that on 04.03.2004, plaintiff accepted Rs.37,000/- towards transfer charges of

tenancy rights. The learned trial Judge, therefore, observed in paragraph 26 that the evidence of D.W.1 is beyond the pleadings and is not trustworthy as regards execution of document at exhibit-46. In paragraph 27, the learned trial Judge referred to Section 73 of the Evidence Act. He also compared the disputed signature with the admitted and came to the conclusion that there is no similarity between the disputed signature and admitted signature.

10. I have also perused exhibit-46 and I do not find that the learned trial Judge committed any error in recording that finding. This finding is confirmed by the appellate Court. In view thereof, I do not find that the Courts below committed any error in disbelieving exhibit-46.

11. Mr. Thorat further submitted that plaintiff's witness admitted that defendant No.2 was inducted as a tenant. The learned trial Judge has considered this aspect in paragraph 29 and it was observed that the admission should be put to the maker so as to afford chance of explanation and it should be read as a whole. P.W.1 was not asked about the said admission and consequently, was not given opportunity to explain under what circumstances, he made such statement. The appellate Court has considered this aspect in paragraphs 21 and 22. In paragraph 22, the appellate Court noted that during the course of cross-examination of P.W.1, the admission that defendant No.2 became tenant of the suit property was not confronted to him. P.W.1 was not given opportunity to explain under what circumstances, he made such statement. I do not find that the Courts below committed any error in that regard more so when the alleged admission was not put to P.W.1 during the course of his cross-examination. Defendant No.2 was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based upon no evidence or that they are contrary to

the evidence on record. Defendant No.2 was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusion other than arrived at by the Courts below. Merely because on the basis of record, other 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. Thorat orally applies for stay of this order for a period of twelve weeks from today. He states that the defendant No.2 is in possession of the suit premises and nobody else is in possession. Defendant No.2 has neither created third party interest nor parted with possession and that he will hereafter neither create third party interest nor part with possession. He assures that the defendant No.2 and all adult family members using/residing in the suit premises will give usual undertakings in this Court on or before 18.11.2016 with advance copy to other side, incorporating therein that,

- (i) they are in possession of the suit premises and nobody else is in possession;
- (ii) they have neither created any third party interest nor parted with possession;
- (iii) they will hereafter neither create third party interest nor part with possession;
- (iv) they will pay arrears of rent on or before 18.11 to the respondents;
- (v) they will not apply for further extension of time;
- (vi) in case they are unable to obtain suitable orders from higher Court within 12 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondents.

13. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of twelve weeks from today subject to the applicant and all adult family members using/residing in the suit premises filing undertakings in the aforesaid terms on or before 18.11.2016 and serving copy in advance to other side. It is made clear that in case arrears upto and inclusive of 12 weeks from today are not paid as also the undertaking in the aforesaid terms is not filed on or before 18.11.2016, the interim order shall stand vacated without further reference to the Court.

14. List the Application for reporting compliance on 25.11.2016.

(R. G. KETKAR, J.)

Minal Parab