

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.322 OF 2016

1. Chandrakant Sripat Kadam ..Applicants
(deceased):
1(a) Chetan Sripat Kadam and
Ors

Vs

1. Mohanlal U Bhattee and Anr. .. Respondents

Mr. R.A.Thorat, Senior Advocate a/w Ms. Pratibha Shelake,
Advocate for Applicants.

Mr. R.S.Apte, Senior Advocate a/w Mr. Sagar Ambedkar, Advocate
for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 06/10/2016

PC:

1. Heard Mr. R.A.Thorat, learned senior counsel for the applicants and Mr. R.S.Apte, learned senior counsel for the respondents at length. Rule. Mr. Ambedkar waives service on behalf of respondent no.1. Notice of rule on respondent no.2 is dispensed with as respondent no.2 did not challenge the trial Court's decree. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), applicants no.1(a) to 1(d),

hereinafter referred to as 'defendants', have challenged the Judgment and decree dated 16th to 18th February, 2008 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.345/956 of 1991 as also the Judgment and decree dated 6th May, 2016 passed by the Appellate Bench of the Small Causes Court in Appeal (A1) No. 203 of 2007. By these orders, the Courts below decreed the suit instituted by respondent no.1, hereinafter referred to as 'plaintiff', under sections 12, 13 (1)(e) and 13(1)(g) of the Bombay Rents Hotel, Lodging and House Rates Control Act, 1947 (for short, 'Act').

3. Respondent no.1 along with Smt. Atmadevi Bhattoo, since deceased, instituted suit against Chandrakant S. Kadam, since deceased through his heirs and legal representative (defendants herein) and respondent no.2, hereinafter referred to as 'defendant no.2', for recovery of possession of shop no. 5 in building known as 'Asha Kunj', situate at Chhittabhai Patel Road, kandivali (East), Mumbai 400 101 (for short, 'suit premises'), inter alia, on the ground that Chandrakant Kadam, since deceased, was a monthly tenant. Monthly rent was Rs. 172.30 inclusive of permitted increases. Deceased Chandrakant had started a laundry business and was running the said business from the suit premises. After the death of Chandrakant, the defendants

changed user and started running printing press. Defendants have unlawfully sublet the suit premises to defendant no.2. Defendant no.2 is carrying on business of Hair Cutting Saloon in the name and style of 'Dreamland Hair Dressers'. Defendants were charging amount of Rs.3500/- per month from defendant no.2 as against monthly rent of Rs.172.30 and thereby profiteering from it.

4. The plaintiff contended that defendants are in arrears of rent from 1.9.1988 to 31.7.1991 totally amounting to Rs.6080.50. On 25.4.1990, the plaintiff issued demand notice calling upon deceased Chandrakant to pay arrears of rent from 1.9.1988 to 31.3.1990 amounting to Rs. 3873.70. The said notice was returned with postal remark 'unclaimed'. The plaintiff thereafter issued notice dated 12.6.1990. Despite service of that notice, defendants did not tender the amount. Defendants gave reply denying the allegations made in the notice. The plaintiffs further contended that they require the suit premises reasonably and bonafide for the benefit of the plaintiff-Mohanlal's sons and daughter. Mohanlal has two sons and daughter. Daughter of plaintiff no.1 intends to set up a coaching class of typing and shorthand in one of the shops. Number of students joining the said class is increasing day-by- day and the present premises is too small to accommodate all students. Thus, the plaintiff

claimed possession of the suit premises from the defendants on the ground of arrears of rent (S.12), unlawful subletting (S.13(1)(e)) and reasonable and bonafide requirement (S.13(1)(g)). In addition, the plaintiff has claimed possession also under section 13(1)(b) and 13(1)(a) read with section 108(o) of T.P.Act. Suit is, however, decreed under sections 12,13(1)(e) and 13(1)(g) of the Act.

5. Defendants resisted the suit by filing written statement and denied the contentions raised in the plaint. It appears that defendant no.2 did not file written statement. Defendant no.2 filed application seeking permission to file written statement which was rejected by the trial Court. It is not disputed that aggrieved by that decision, defendant no.2 instituted proceeding in this court which was also dismissed. In other words, the suit proceeded in the absence of written statement of defendant no.2.

6. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. The parties led evidence. After considering the evidence on record, the learned trial Judge decreed the suit. Aggrieved by this decision, defendants preferred appeal. During the pendency of the appeal, defendants filed application under Order 41 Rule 27 of C.P.C., on 26.8.2013 for bringing on record acquisition of following premises by the

plaintiff after passing of eviction decree on 16.2.2008.

1. Commercial premises admeasuring 500 sq.ft. adjacent to the premises where the plaintiff is carrying on business of typing institute which was vacated by earlier occupant about 2 to 3 years back and the same was let out by the plaintiff to one Mr. Sunil Mhatre who is carrying on business of Kiran shop;
2. One more shop admeasuring 150 sq.ft which is on southern side of shop occupied by Mhatre where earlier occupant was carrying on business of under the name and style of .. laundry, fell vacant about 4 years back and is in possession of the plaintiff;
3. On the northern side of the suit premises, premises admeasuring 120 sq.ft was let out to one person about 3 to 4 years back where the business of Chinese Food is carried on. Along with the application, defendants 1(a) to 1(d) also enclosed registered leave and licence agreement executed by the plaintiff in favour of Sunil Mhatre. The premises were given on leave and licence basis for the period from 1.3.2008 to 28.2.2013. By order dated 6.5.2016, the Appellate Court allowed the application Exh.16. By judgment and decree dated 6.5.2016, the Appellate Court dismissed the appeal preferred by defendants 1(a) to 1(d). It is against these orders defendants 1(a) to 1(d) have instituted the present application.

7. In support of this application, Mr. Thorat has taken me through :

1. Paragraph 2, wherein the plaintiff set out ground under section 13(1)(e) of the Act;

2. Examination-in-chief of PW 1-Mohanlal Bhate and in particular paragraph 3 thereof;

3. Paragraphs 5 to 8, where the plaintiff has pleaded ground under section 12 and paragraph 9 where the plaintiff set out ground under section 13(1)(g) of the Act.

8. Mr. Thorat submitted that in examination in chief PW 1 stated that in or around in April 1990, user of the suit premises was changed by Chandrakant Kadam, since deceased, to that of Hair Cutting Saloon and defendant no.2 was found in occupation of the suit premises and was conducting business of Hair Cutting Saloon therein. He submitted that the plaintiff admitted that defendants started business of Hair Cutting Saloon. In other words, defendant no.2 did not start business of Hair Cutting Saloon. He, therefore, submitted that the courts below were not justified in passing eviction decree under section 13(1)(e) of the Act.

9. As far as the ground under section 13(1)(g) of the Act is concerned, the Appellate Court, though allowed application Exhibit -16 under Order 41, Rule 27, did not deal with acquisition

of three premises. The Appellate Court, therefore, committed serious error in not considering the submissions advanced on behalf of defendants 1(a) to 1(d) that in view of acquisition of three premises after passing of eviction decree, the need of the plaintiff does not survive.

10. As far as the ground of arrears of rent is concerned, he submitted that in the application under Order 47, Rule 27 defendants specifically contended that the defendants have sent arrears of rent from September, 1988 to August, 1990 by cheque drawn on Abhudaya Bank which was not cleared by the plaintiff. In other words, the Courts below ere not justified in passing eviction decree under section 12 of the Act.

11. On the other hand, Mr.Apte supported the impugned orders. He submitted that in the written statement, defendants did not come with the case that defendant no.2 was their employee. Statement in examination in chief of PW 1 on which heavy reliance is placed only shows that PW 1 deposed that Chandrakant Kadam, since deceased, has changed the user of the suit premises to Hair Cutting Saloon. This also shows presence of defendant no.2 in the suit premises. He, therefore, submitted that this so-called statement of PW 1 in examination in chief is not fatal and the Courts below were justified in passing eviction decree under section 13 (1)(e) of the Act.

12. As far as decree under section 12 of the Act is concerned, Mr. Apte submitted that the Courts below, after appreciating the evidence on record, have concurrently held that defendants have not paid interest as also costs. Defendants did not deposit rent in the Court from August, 2006. He, therefore, submitted that the Courts below were fully justified in passing the decree under section 12 of the Act.

13. As far as the ground under section 13(1)(g) of the Act is concerned, he submitted that Mr. Mhatre was inducted in the premises admeasuring 80 sq.ft even prior to institution of the suit to the knowledge of defendants. In other words, though Mr Mhatre was occupying the portion of 80 sq.ft., leave and licence agreement was executed only in 2008. It, however, does not mean that the bonafide requirement of the plaintiff does not survive. 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 the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff came with the case that defendants were earlier using the suit premises for laundry business. The said business was changed after the death of original tenant Chandrakant to printing press. The plaintiff further contended that defendant no.2 carries on

business of hair cutting saloon in the name and style of 'Dreamland Hair Cutting Saloon'. Perusal of the written statement shows that in paragraph defendants denied the allegation about unlawful subletting. They, however, did not contend that defendant no.2 was employee of defendants. Mr. Thorat relied upon paragraph 3 of the examination in chief of PW 1 which is to the following effect :

“I say that in and around April, 1990 the user of the suit premises was changed by original defendant no.1 to that of Hair cutting Saloon and Defendant no.2 was found in occupation of the suit premises and conducting the business of Hair cutting Saloon therein.”

Perusal of the above extracted portion shows that PW 1 stated that in or about April 1990 user of the suit premises was changed by Chandrakant to Hair Cutting Saloon. This is consistent with paragraph 2 of the plaint. PW 1 further stated that defendant no.2 was found in occupation of the suit premises and was conducting business of Hair Cutting Saloon. In other words, presence of defendant no.2 was reiterated by PW 1 in examination in chief.

15. As noted earlier, defendant no.2 did not file written statement earlier. He took out application for permission to file written statement which was rejected by the trial Court.

Aggrieved by that decision, defendant no.2 instituted proceeding in this court which was dismissed. It further appears that defendant no.2 was permitted to lead evidence and he deposed that he was employee of defendants. In my opinion, once defendant no.2 did not file written statement, he cannot be permitted to lead evidence. At the most, he could have cross examined the plaintiff's witness. In short, defendants and defendant no.2 failed to establish that defendant no.2 was employee of defendants. It has also not come on record that defendants were conversant with carrying on business of hair cutting saloon. In view thereof, I do not find that the courts below committed any error in passing decree under section 13(1) (e) of the Act.

16. As far as the ground of default under section 12 of the Act is concerned, it is not disputed that defendants have not paid interest. As per section 12(3) defendants are required to pay regularly standard rent and permitted increases. DW 2 Kamlesh in his cross examination admitted that he did not deposit rent in the court from August, 2006. The Courts below, therefore, held that the plaintiff has established ground of default. The said finding is based on appreciation of evidence on record. In view thereof, I do not find that the courts below committed any error in passing the decree under section 12 of the Act.

17. That brings me to the ground under section 13(1)(g) of the Act. As noted earlier, during the pendency of Appeal, application under Order 41, Rule 27 of C.P.C., was filed by defendants which was allowed. The Appellate Court has considered this aspect in paragraph 32 of the impugned order. Perusal of the paragraph 32 shows that the Appellate Court only considered leave and licence agreement executed by defendants in favour of Mhatre. The Appellate Court, however, did not consider the fact that the plaintiff did not establish the contention raised in the reply that the premises in possession of Mhatre was already given to him prior to filing of the suit and the said state of affairs continued during the pendency of the suit. The plaintiff did not produce any material to substantiate that plea. As against this, defendants produced registered leave and licence agreement which shows that defendants gave premises admeasuring 125 sq.ft to Mhartre on leave and licence basis for the period from 1.3.2008 to 28.2.2013. The plaintiff did not bring any material to establish that the premises were in occupation of Mhatre even prior to the institution of the suit in 1991. That apart, the Appellate Court did not consider the case of defendants about acquisition of two more premises. In view thereof, in my opinion, the Appellate Court was not justified in decreeing the suit under section 13(1)(g) of the Act. In the light of the aforesaid discussion, the decree

passed by the Courts below under section 12 and 13(1)(e) of the Act is upheld and the plaintiff has not established ground of eviction under section 13(1)(g).

18. Rule is partly made absolute in the aforesaid terms with no order as to costs.

19. At this stage, Mr. Thorat orally applies for stay of this order for a period of 12 weeks from today. He states that the applicants are in possession of the suit premises and nobody else is in possession. The applicants have neither created third party interest nor parted with possession and the applicants will hereafter neither create third party interest nor part with possession. Mr. Thorat assures that within two weeks from today, the applicants and all adult family members using the suit premises will file usual undertakings in this Court, after giving advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interests nor part with possession;
- (iv) that they will pay arrears of rent within 2 weeks from today;

(v) that they will not apply for further extension of time;
(vi) that 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 respondent-plaintiff.

20. In view thereof, notwithstanding passing of eviction decree, the eviction decree is stayed for a period of 12 weeks from today subject to the applicants and all adult family members using the suit premises filing undertakings in the aforesaid terms within two weeks from today and serving copy in advance to other side. It is made clear that if the undertakings in the aforesaid terms are not filed and arrears are not paid within two weeks from today, the interim order shall stand vacated without further reference to Court.

21. List the Application for reporting compliance after three weeks.

(R.G.KETKAR, J.)