

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5224 OF 1997

Ashok Babulal Desarda
and others.

...Petitioners

Versus

Balkrishna R. Divte (since deceased)
through L.Rs. Surekha B. Divte
and another.

...Respondents

With
Civil Application No.6797 of 1997
In
Writ Petition NO. 5224 OF 1997

With
Civil Application No.8038 of 1997
In
Writ Petition NO. 5224 OF 1997

With
Civil Application No.2079 of 2015
In
Writ Petition NO. 5224 OF 1997

....
Mr.P.B. Shah, Advocate a/w. K.P. Shah, Advocate for the
Petitioners.

Mr. A.B. Tajane, Advocate for the Respondents.

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CORAM : R. G. KETKAR, J.

DATE : 29th August, 2016

P.C.

1. Heard Mr.P.B. Shah, learned Counsel for the petitioners and Mr.Ashok Tajane, learned Counsel for the respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and decree dated 7.2.1994 passed by the learned VIth Additional Judge, Small Causes Court, Pune in Civil Suit No.1126/1990 as also judgment and decree dated 8.9.1997 passed by the learned 11th Additional District Judge, Pune in Civil Appeal No.337/1994. Learned trial Judge decreed the suit under Sections 13(1)(g), 13(1)(a) of Bombay Rents, Hotel and Lodging Rates Control Act, 1947 (for short, 'Act') read with Section 108(o) of the Transfer of Property Act, 1882 (for short, 'T.P. Act'). As against this, the Appellate Court decreed the suit under Section 13(1)(a) of the Act read with Section 108(o) of T.P. Act, under Section 13(1)(g) as also on the ground that defendant No.1 had unlawfully sub-let the suit premises to defendants No.2 and 3 as contemplated by Section 13(1)(e) of the Act.

3. During pendency of this Petition, the petitioners have taken out Civil Application No.6797/1997 bringing on record acquisition of following premises by the respondent herein:

- [i] Shop admeasuring 150 sq. ft. on the ground floor on 36, Ganesh Peth, Pune;

[ii] Two rooms admeasuring 200 sq. ft. on the ground floor at 1203, Shimpi Ali, Camp, Pune;

[iii] Premises admeasuring more than 300 sq. ft. in possession of Yash Raj Electrical (Sancheti Electric Shop) the erstwhile tenant.

4. The petitioners have also taken out Civil Application No.8038/1997 bringing on record :

[i] The order passed by Apex Court upholding the judgment dated 23.7.1997 passed by this Court in Writ Petition No.493/1985; and

[ii] Income tax returns, to substantiate that the suit premises are in use and occupation of the petitioners.

5. The petitioners have filed Civil Application No.2079/2015 for bringing on record acquisition of following premises by the respondents:

[i] Shop admeasuring 120 sq. ft. in possession of erstwhile tenant Jagdish Bhikulal Unecha on 29.3.2014 in execution of decree passed in Civil Suit No.519/2002;

[ii] Shop admeasuring 120 sq. ft. in possession of erstwhile tenant Khimraj Chamanji Chaudhari and others in execution of the decree passed in Civil Suit No.92/2003.

[iii] Acquisition of one room on the first floor from one Urdu school.

6. Mr.Shah submitted that entire ground floor is in possession of the respondents herein except one room in

possession of tenant Bhosale which is used for residential purpose. The suit premises admeasures 240 sq. ft. Having regard to the fact that the respondent plaintiff has obtained possession of two shops admeasuring 120 sq. ft. each from Unecha and Chaudhari and shop admeasuring more than 300 sq. ft. in possession of erstwhile tenant Sancheti Electric Shop, the need of plaintiffs no longer survives. He submitted that the respondents/plaintiffs have not disputed acquisition of these premises and, therefore, Civil Applications filed under Order XLI Rule 27 of Code of Civil Procedure, 1908 may be allowed.

7. On the other hand, Mr. Tajane has disputed that on account of acquisition of these premises the need of the plaintiffs stands satisfied.

8. As far as the ground of unlawful sub-letting under Section 13(1)(e) of the Act is concerned, Mr. Shah submitted that the learned trial Judge did not pass decree on this ground. The learned District Judge, however, passed decree even on this ground without recording any finding as to whether the defendant No.1/original tenant has parted with the suit premises by divesting his interest in the suit premises in favour of defendants No.2 and 3. The learned District Judge did not record any finding as to whether defendant No.1 has lost control over the suit premises. He, therefore, submitted that the findings recorded by the learned District Judge are liable to be set aside. As far as

the ground under Section 108(o) of T.P. Act is concerned, the Courts below did not apply the criteria laid-down by this Court in catena of judgments of this Court as also by the Apex Court. In other words, he submitted that the decree passed by the Courts below deserve to be set aside.

9. On the other hand, Mr. Tajane supported the impugned orders. He submitted that the learned District Judge decreed the suit under Section 13(1)(e) and 13(1)(g) of the Act as also under Section 13(1)(a) read with Section 108(o) of the T.P. Act, after considering the evidence on record. He, therefore, submitted that no case is made out for interfering with the impugned orders.

10. During the course of hearing of this Petition, I made suggestion to Mr. Tajane to consider whether the order passed by the learned District Judge should be set aside so as to restore the appeal thereby permitting the parties to lead evidence either before the trial Court or before the Appellate Court by following procedure under Order XLI Rule 28 of C.P.C.. He states that, the respondent is present in Court. He has tendered photocopy of PAN card of the respondent, which is taken on record and marked 'X' for identification. Upon taking instructions from him, Mr. Tajane states that by consent, the order passed by the learned District Judge may be set aside and the appeal may be restored. Parties may be permitted to lead additional evidence after restoration of appeal and all contentions of

the parties may be kept open. He further submitted that the District Court may be directed to decide appeal in a time bound manner.

11. In view thereof, by consent of the parties, petition is disposed of in following terms:

- [i] Impugned judgment and decree dated 8.9.1997 passed by the learned 11th Additional District Judge, Pune in Civil Appeal No.337/1994 is set aside and the appeal is restored to the file of learned District Judge. Interim order passed in appeal shall stand revived;
- [ii] Civil Applications No.6797/1997, 8038/1997 and 2079/2015 are allowed;
- [iii] Parties agree that they will appear before the learned District Judge on 6.9.2016 and for that purpose no fresh notice be issued to them.
- [iv] The learned District Judge will follow procedure under Order XLI Rule 28 of C.P.C. and either take evidence or direct the trial Court from whose decree the appeal is preferred to take such evidence and send it to the District Court. The learned Counsel for the parties assure that they will extend full cooperation for recording of additional evidence and complete recording of evidence within three months from the date of appearance;
- [v] The learned District Judge is requested to decide the

appeal as expeditiously as possible and preferably within six months from today.

- [vi] Liberty to apply for fixation of reasonable compensation is granted to the respondents.
- [vii] All contentions of the parties on merits are expressly kept open.
- [viii] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)