

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.441 OF 2015

Hooblal Jaimangal Singh (decd) through Jitendra Hooblal Singh and others	...	Applicants
Vs.		
Shyamphal G. Sharma (decd) through Kamladevi Shyamphal Sharma and others	...	Respondents

Mr. Vincent E. Pereira for Applicants.
Mr. Rajesh Parab for Respondents No.1(b) to 1(g).

CORAM : R. G. KETKAR, J.
DATE : JULY 11, 2016

P.C. :

Heard Mr. Pereira, learned Counsel for applicants and Mr. Parab, learned Counsel for respondents No.1(b) to 1(g) at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908, applicants, hereinafter referred to as 'defendants' have challenged the judgment and decree dated 07.12.2002 passed by the learned Judge, presiding over Court Room No.23 in the Court of Small Causes at Bombay in R.A.E. Suit No.2178 of 1988 as also the judgment and decree dated 02.05.2015 passed by the Appellate Bench of the Court of Small Causes at Mumbai in (A1) Appeal No.286 of 2003. By these orders, the Courts below decreed the Suit instituted by respondent No.1, hereinafter referred to as 'plaintiff' under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

3. In support of this Application, Mr. Pereira strenuously contended that the suit room namely, old room No.4 and new room No.8 is situate in an area, which is declared as a slum area by the competent authority

under the provisions of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (for short 'Slum Act'). He has taken me through paragraph 9 of the written statement and paragraph 12 of the additional written statement filed on behalf of the defendants as also cross-examination of P.W.1 Ramnarayan Shamlal Sharma to contend that suit room is situate in the slum area. In view of Section 22 of the Slum Act, in the absence of written permission of the Competent Authority, Suit itself is not maintainable and as such, was liable to be dismissed.

4. As far as the ground of arrears of rent is concerned, Mr. Pereira submitted that plaintiff's father was working as a rent collector of Ms Mercilina D'souza. In other words, plaintiff is not the landlord of the suit room. He has taken me through the admissions of P.W.1 Ramnarayan Sharma. He further submitted that the scrutiny order was passed on 05.04.1994 and subsequently, by order dated 07.07.1997, extension was granted for depositing the amount. In other words, he submitted that by depositing the amount as per orders dated 05.04.1994 and 07.07.1997, it cannot be said that defendants are willful defaulters as contemplated by Section 12 of the Act.

5. As far as the ground of bonafide requirement is concerned, Mr. Pereira submitted that the learned trial Judge did not accept that ground. Plaintiff did not file cross-objections or cross-appeal. No contention was advanced before the appellate Court. Despite that, the appellate Court decreed the Suit also on the ground under Section 13(1)(g) of the Act. For all these reasons, he submitted that application requires consideration.

6. On the other hand, Mr. Parab supported the impugned orders. He

submitted that defendants did not establish that the suit room is situate in the area, which is declared as a 'slum area'. As far as the ground of default is concerned, he submitted that defendants did not admit that plaintiff is the owner of the suit room and further they did not pay the rent to him from 01.06.1984 onwards. He further submitted that as far as the contention based on Section 22 of the Slum Act is concerned, defendants admitted in cross-examination that except Government Gazette, they do not have any document to show that the suit room is in the slum area. He also invited my attention to paragraph 8 of the trial Court judgment to substantiate that the learned trial Judge was justified in passing the decree on the ground of arrears of rent as contemplated by Section 12 of the Act. As far as not filing cross-objections / cross-appeal challenging the finding recorded in respect of ground under Section 13(1)(g) of the Act is concerned, he relied upon Order 41, Rule 33 of C.P.C.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph 9 of the written statement, defendants contended that they recently came to know that the area in which suit room is situate is declared as a slum area under the Slum Act and on verification of this fact, defendants reserved their right to file additional written statement giving all details about the slum and maintainability of the Suit under the provisions of the Slum Act. Defendants filed additional written statement on 04.03.2002. In paragraph 12, defendants contended that plaintiff ought to have made statement about declaration of slum area. It is further contended that property is in slum area and the Government authorities had instructed that they would recover rent / compensation from the occupants and no slum lords could recover rent or possession, as claimed by the plaintiff. Perusal of the assertions made

in the written statement does not indicate that defendants categorically pleaded that the suit room falls in particular C.T.S. number which is declared as a slum area by Gazette Notification. The assertions made in paragraph 9 of the written statement and paragraph 12 of the additional written statement are bereft of any particulars. That apart, in paragraph 24 of the cross-examination of the defendant, he admitted that except the Government Gazette, he does not have any other document to show that the suit room is in area which is declared as slum area.

8. Perusal of the evidence on record as also findings recorded by the Courts below does not indicate that defendants have established that the suit room is in an area which is declared as a slum area. Apart from that, defendants did not examine any officer to substantiate that the suit room is in an area, which is declared as a slum area. The Courts below, after appreciating the evidence on record, have concurrently held that the suit room does not fall in the slum area. In view thereof, I do not find any merit in the submission of Mr. Pereira based on Section 22 of the Slum Act.

9. As far as the ground of arrears of rent under Section 12 is concerned, in paragraph 22 of the examination-in-chief, defendant specifically deposed that plaintiff is not the owner of the suit premises. He did not pay rent to him from 01.06.1984. Mr. Pereira submitted that in fact plaintiff's father was working as rent collector with Ms Mercilina D'souza . With the assistance of the learned Counsel appearing for the parties, I have perused the oral evidence of the parties. Perusal of the cross-examination of P.W.1 does not indicate that P.W.1 admitted that his father was working as a rent collector with Ms Mercilina D'souza. As against this, he specifically denied that the owner of the suit room is either Ms Mercilina D'souza or Lina D'souza. He deposed that the open

plot belonged to one Sebastian D'souza. The suit chawl was constructed in the year 1978. Ms Mercilina D'souza or Lina D'souza have no right over the suit room being old room No.4 or new room No.8. The Courts below have considered this aspect and have concurrently held that plaintiff has established the ground of arrears of rent under Section 12. The Courts below and in particular appellate Court has observed in paragraph 29 that the defendants did not pay rent to the plaintiff from 01.06.1984 on the ground that plaintiff is not the owner of the suit premises. In paragraph 8, the learned trial Judge had considered the rent receipts produced by the defendants at exhibits-9 and 10. The learned trial Judge observed that defendants produced rent receipts only for the years 1970, 1983 and of December 1987 and did not produce the other rent receipts on the ground that they have been destroyed in the flood that took place in the year 1972. The learned trial Judge noted that defendants produced rent receipts of the year 1983 and December 1987, and therefore, the explanation that the rent receipts were destroyed in the flood of 1972 is not acceptable and that the rent receipts at exhibits-9 and 10 appeared to be false one. In view thereof, I do not find that the Courts below committed any error in passing the decree under Section 12 of the Act. As far as the ground of bonafide requirement is concerned, it is no doubt true that trial Court did not pass decree on that ground and the appellate Court decreed the Suit also on that ground. Mr. Pereira submitted that no arguments were advanced as regards the said ground and the plaintiff did not file either cross-appeal or cross-objections. It is not possible to accept this contention. In the case of ***Banarsi Vs. Ramphal*, 2003 (9) SCC 606**, the Apex Court has observed in paragraphs 9 to 11 thus,

“9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and

(B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in *Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar and Anr.*, [1971] 1 SCR 146 that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross objection though certain finding may be against him. Appeal and cross-objection both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was well-settled position of law under the unamended CPC.

10. CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
- (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.”

10. The Apex Court has held that in the type of case (i), it is necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The present case does not fall in the type of case (i). The Suit for eviction is decreed by the trial Court. In view thereof, I do not find any merit in the submission of Mr. Pereira that in the absence of cross-appeal or cross-objections, the Appellate Court was not justified in passing decree under Section 13(1)(g) of the Act. For the reasons recorded in paragraphs 33 and 34 of the order, in my opinion, no fault can be found with the

Appellate Court decreeing Suit under Section 16(1)(g) of the Act. 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 the evidence on record. Defendants were also not in a position to demonstrate that on the basis of evidence on record, no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. Merely because on the basis of evidence on record, another view is possible that itself is no ground for invocation of powers under Section 115 of C.P.C. No case is made out by the defendants for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed.

11. At this stage, Mr. Pereira orally applies for stay of this order for the period of eight weeks from today. He states that defendants are in possession and nobody else is in possession. The defendants have neither created third party right nor parted with possession. They will hereafter neither create third party right nor part with possession. He assures that within two weeks from today, defendants and all the adult family members residing in the suit room will file usual undertaking incorporating therein that,

- i) they are in possession and nobody else is in possession of the suit room;
- ii) they have neither created third party interest nor parted with possession of the suit room;
- iii) they will hereafter neither create third party interest nor part with possession of the suit room;
- iv) they will pay up-to-date arrears of rent to the plaintiff within two weeks from today;
- v) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will vacate and

handover vacant and peaceful possession of the suit room to the plaintiff;

12. Subject to the defendants and all the adult family members residing in the suit room filing undertaking in the aforesaid terms within two weeks from today after giving advance copy to the other side, this order shall remain stayed for a period of eight weeks from today.

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

(R. G. KETKAR, J.)

Minal Parab