

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

CIVIL REVISION APPLICATION NO. 376 OF 2016

Sandip Ranjit Atit

..Applicant

Vs

Pravin Moreshwar Desai, since
deceased, through her LRs:
1A) Mrs Lata Sudhir Desai and
Ors.

.. Respondents

Mr.Shailesh Dalal, Advocate for Applicant.
Ms Sharmila Deshmukh, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 30/08/2016

PC:

1. Heard Mr.Shailesh Dalal, learned counsel for the applicant and Ms.Sharmila Deshmukh, learned counsel for the respondents at length.
2. By this Application under Section 115 of the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), the applicant, hereinafter referred to as 'defendant', has challenged the Judgment and order dated 3.11.2015 passed by the learned Judge presiding over Court Room No.7 of the Court of Small Causes at Mumbai below Exhibit 52 in R.A.D. Suit No.1816 of 2008 as also the Judgment and order dated 18.6.2016 passed by the Appellate Bench of the Small Causes Court, Mumbai in Revision Application No.42 of 2016. By these orders, the Courts below rejected the

application made by defendant no.2 under Order VII, Rule 11(a) of C.P.C. for rejection of the plaint on the ground that there is no cause of action for instituting the suit. Defendant no.2 further contended that the plaintiffs, after institution of the suit, have abandoned their claim and, therefore, the suit is also liable to be dismissed under Order 23, Rule 1 of C.P.C.

3. In support of this Application, Mr. Dalal strenuously contended that in paragraph 1 of the plaint, the plaintiffs averred that original plaintiff- Pravin Moreswar Desai was a Consulting Civil & Structural Engineer and Project Consultant. He was practicing his profession from 1970 onwards from Cabin no.14, 1st floor, Prakash Chamber, 77, Nagindas Master Road (Meadows Street), Fort, Mumbai-400 003 (for short, 'suit premises'). He submitted that there is no averment in the plaint as to in what capacity the original plaintiff-Pravin Desai was in possession of the suit premises.

4. In paragraph 2, it is averred that the plaintiff shared office of his paternal cousin Shri M.V. Vijaykar, Advocate in the suit premises from 1970 till the demise of M.V.Vijaykar in 1998. In paragraph 4, it is asserted that one Shastri, Solicitor, since deceased, was tenant of the entire first floor and Shri M.V.Vijaykar was Assistant and right hand man of Shri Shastri. Mr. Dalal submitted that perusal of the averments made in the plaint

shows that original plaintiff as also Mr. Vijaykar were gratuitous licensees. As the plaintiffs did not disclose in what capacity Pravin Desai, original plaintiff, was in possession of the suit premises, plaint is liable to be rejected for want of cause of action.

5. He further submitted that during the pendency of the suit, the plaintiffs filed application for amending the plaint and claimed to be sub-tenant in the suit premises. Whereas in the suit originally instituted, the plaintiffs sought declaration of their tenancy right, by the amendment application they claim declaration that they are sub-tenants. In other words, the plaintiffs have abandoned their claim of declaration of tenancy in the suit. In view of Order 23, Rule 1 of CP.C., the suit is liable to be dismissed on the ground of abandonment of the claim. He submitted that the learned trial Judge did not discuss this aspect in the impugned order. He submitted that the application for amendment is verified by the plaintiffs and they have to stand by the statements made on oath. For all these reasons, he submitted that plaint is liable to be rejected.

6. On the other hand, Ms. Deshmukh supported the impugned orders. She submitted that in fact earlier the defendant had filed application Exh.50 for deciding issue of jurisdiction as a preliminary issue. That application was rejected. The learned trial

Judge has observed in paragraph 4 that suit is part-heard. After considering the averments made in the plaint, the Courts below have rejected the application. She, therefore, submitted that no case is made out for invocation of powers under section 115 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. As noted earlier, defendant no.2 has filed application Exh.52 on 9.9.2015, inter-alia, contending that the plaint is liable to be rejected under Order 7, Rule 11 of C.P.C. as no cause of action is disclosed in the plaint. The defendant, however, has not given any details as to on what basis he claims that the suit is liable to be rejected as no cause of action is disclosed in the plaint. As far as abandonment of the claim is concerned, in paragraph 2 the defendant contended that after institution of the suit, the plaintiffs have abandoned their claim and, therefore, the suit is liable to be dismissed as per the provisions of Order 23, Rule 1 of C.P.C. Perusal of the application shows that it is bereft of any particulars.

8. As far as the order passed by the learned trial Judge is concerned, in paragraph 4 the learned trial Judge observed that the cause of action constitutes bundle of facts. It is a mixed question of law and fact. In my opinion, whether the plaintiffs

are gratuitous licensees as claimed by the defendants or are tenants as claimed by the plaintiffs, is a matter of evidence and cannot be decided at the stage of considering the application under Order VII, Rule 11 of C.P.C. The learned trial Judge rightly held that it's a mixed question of law and fact. Appellate Court has upheld the trial Court's order.

9. As far as the ground of abandoning the claim is concerned, it is not in dispute and is a matter of record that the application made by the plaintiffs for amending the claim was rejected. Thus, as of date, the unamended plaint has to be considered while deciding the suit. Perusal of paragraph 12 of the plaint shows that the plaintiffs are claiming declaration that they are lawful, deemed and/or statutory tenants. In view thereof and also for the reasons recorded by the Courts below, I do not find that any case is made out for invocation of powers under section 115 of C.P.C. Hence, Application fails and the same is dismissed.

10. Needless to observe that the learned trial Judge will decide the suit on the basis of evidence on record and on its own merits and in accordance with law uninfluenced by the observations made in the impugned orders as also this order.

(R.G.KETKAR, J.)