

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.382 OF 2014

IN

CIVIL REVISION APPLICATION NO.784 OF 2014

Dr. (Mrs.) Usha Madhukar Samel and others ... Applicants

Vs.

Nishikant Chandrakant Karnik and others ... Respondents

Mr. G. S. Godbole, Senior Advocate i/b. Ms Manjiri S. Parasnis for Applicants.

Mr. Pradip R. Kadam for Respondents No.2, 3, 5(C) and 6.

CORAM : R. G. KETKAR, J.

Reserved on : JUNE 13, 2016

Pronounced on : JUNE 23, 2016

ORDER :

Heard Mr. Godbole, learned Senior Counsel for applicants and Mr. Kadam, learned Counsel for respondents No.2, 3, 5(C) and 6 at length.

2. By this Application under Order 41, Rule 27 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants have prayed for production of - (i) email dated 26.09.2012 sent by Ashok Pradhan to Swapnil Jaiwant, son of applicant No.2; (ii) death certificate of Neela H. Pradhan; (iii) letter dated 04.07.2014 of BEST enclosing therewith electricity consumption of Pradhan's flat (another tenant) residing in flat No.8, Park View; (iv) email dated 10.10.2012 sent by Dilip Bhide to Swapnil Jaiwant, son of applicant No.2 along with letter dated 03.01.2001 as also letter dated 04.07.2014 of BEST and the electricity bill as also chart of electricity consumption in respect of another tenant Sharma.

3. In paragraph 3 of the application, applicants averred that after passing of the impugned order, when they were discussing among

themselves and other family members about the filing of a Revision Application in this Court, Swapnil Jaiwant, son of applicant No.2 informed the applicants that in the year 2010 and 2012, he had received emails from two erstwhile tenants of the plaintiffs namely, Pradhan and Bhide family informing that Pradhan family and surrendered the possession of flat No.8 in Park View Annex building. Email from Dilip Bhide indicated that flat let out to Mr. Bhide is not in use. On 30.12.2010, Neela Pradhan staying in flat No.8 died and brothers of Neela namely, Ashok and Abhay are permanently settled in U.S.a. Thus, Pradhan's have surrendered the flats to the landlords as is evident from the email dated 26.09.2012. Copies of the inspection extracts, the Assessment and Collection Department of Corporation shows that flat No.7 on the first floor was shown to be in possession of the plaintiffs, which were let out to Mr. Sharma after filing of the Suit. It is further contended that all these documents could not be produced by the applicants despite of due diligence and these documents are produced with a view to enabling this Court to arrive at a just decision.

4. Mr. Godbole has taken me through the documents and also invited my attention to explanation given in paragraphs 3 to 5 for non production of the documents, during the pendency of the appeal and submitted that applicants-defendants have made out a case for production of additional evidence.

5. On the other hand, Mr. Kadam submitted that plaintiffs have filed reply opposing the application. In paragraph 4, it is specifically asserted that the email annexed to the application is a got-up document. At no point of time, Pradhans have surrendered the tenanted premises to the landlord as alleged or otherwise. The said premises is still in occupation of the tenants. It is further contended that if the email is perused carefully, it will be clear that it appears to have been sent by Ashok Pradhan to his cousin Kishor Pradhan. It is surprising that one brother is sending email on 25.12.2012 in respect of the death of their sister on 31.12.2010. Though the said email

dates back to 2012, the same is produced in the appellate Court and is produced as an afterthought.

6. In paragraph 5, It is asserted that the tenancy of the flat stands in the name of Mr. Ashok Pradhan. No documents showing surrender of tenancy is produced. The electricity bills of July 2014 in the name of Mr. Ashok Pradhan shows that he is in possession of the suit premises. It was further denied that plaintiffs are in possession of the premises tenanted to Mr. Pradhan or Mr. Bhide. As far as premises let out to Mr. Sharma is concerned, it is stated that since inception, the bills stood in the name of the landlord and the tenant did not get it changed to his name. This was also brought to the notice of the appellate Court. Mr. Kadam, therefore, submitted that no case is made out for production of additional evidence.

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, the appeal was decided on 08.04.2014. Emails dated 26.09.2012 and 10.10.2012 were sent by Kishor Pradhan to Swapnil Jaiwant, son of applicant No.2 and by Dilip Bhide to Swapnil Jaiwant, son of applicant No.2 respectively. Perusal of explanation given in paragraphs 3 to 5 cannot be said to be sufficient to permit the defendants to produce these documents, more so, in view of the reply filed by the plaintiffs. No rejoinder is filed by the defendants controverting the facts stated in the reply.

8. In the case of ***Union of India. Vs. Ibrahim Uddin, (2012) 8 SCC 148***, the Apex Court has exhaustively dealt with provisions of Order 41, Rule 27 of C.P.C. in paragraphs 36 to 49. In paragraph 36, the Apex Court observed that the general principle is that the appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. Order 41, Rule 27 of C.P.C. enables the appellate Court to take additional evidence in exceptional circumstances. The appellate Court may

permit additional evidence only and only if the conditions laid down in the Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. In paragraph 39, it was observed that when a party had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot be allowed to produce it in appeal. The inadvertence of the party of realizing the importance of document does not constitute a substantial cause. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

9. Applying the tests laid down in this decision, I do not find that defendants have made out any case satisfying the conditions stipulated in Order 41, Rule 27 of C.P.C. The documents are produced only as an afterthought with a view to making out a ground that the requirement of plaintiffs does not subsist. Even assuming for the time being in favour of the applicants / defendants that case is made out for production of additional evidence, nonetheless, the appellate Court has decreed the Suit not only under Section 13(1)(g) but also under Section 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. I have already held that the appellate Court was fully justified in decreeing the Suit on both the grounds. Hence, Civil Application fails and the same is dismissed with no order as to costs.

(R. G. KETKAR, J.)

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