

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

[Civil Revision Application No.452 of 2016]
[Converted from Writ Petition NO. 7252 OF 2014]

Shamimbai Abdul Hamid
(since Deceased)
Abbas Hamid Shah & Anr.

...Petitioners

Versus

Austin Nazareth Alias Namy
Alex D'silva

...Respondent

....

Mr.Pushpaj S. Singh, Advocate for the Petitioners.

Mr. J.M. D'Silva, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 28th July, 2016

P.C.

1. Heard Mr.P.S. Singh, learned Counsel for the petitioners and Mr.J.M. D'Silva, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and decree dated 1.3.2011 passed by the learned Judge presiding over Court Room No.35 of the Small Causes Court at Mumbai (Bandra Branch) in R.A.E. & R. Suit No.312/615 of 1997 as also the judgment and decree dated 5.5.2014 passed by the Appellate Bench of the Small Causes Court in A-1 Appeal No.5/2011.

3. The respondent has instituted the suit against the petitioners, hereinafter referred to as 'defendants No.1 and 2', *inter alia* claiming possession of room No.2 situate at Cicilbai Kaitan D'Silva Chawl No.2, Marol village, Marol Maroshi Road, Andheri (East), P.O. J.B. Nagar, Near Marol Masjid, Mumbai – 400 059 (for short, 'suit premises') *inter alia* on the grounds under Sections 12, 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The learned trial Judge decreed the suit under Section 13(1)(b) of the Act and turned down the plaintiff's case of eviction on the grounds under Sections 12, 13(1)(e) and 13(1)(g) of the Act. Aggrieved by this decision, defendants No.1 and 2 preferred appeal. The plaintiff preferred cross-objections. The Appellate Court decreed the suit under Section 13(1)(b) and 13(1)(g) of the Act. It is against these decisions, defendants No.1 and 2 have instituted the present petition. In view thereof, leave to convert this Writ Petition into Civil Revision Application is granted. Amendment shall be carried out within one week from today.

4. In support of this application, Mr. Singh submitted that by order dated 8.1.2016, this Court directed the plaintiff to file affidavit as it was pointed out to the Court that premises

occupied by one tenant by name Joseph Gabriel became available to the plaintiff. In pursuance thereof, the plaintiff filed affidavit of Austin Nazareth alias Namy Alex D'Silva. In that affidavit, it is stated that the suit filed against said Joseph Gabriel was decreed on 4.11.2004. Aggrieved by that decision, said Joseph Gabriel preferred appeal No.30/2005. That appeal was dismissed on 4.4.2005. Aggrieved by these decisions, heirs of Joseph Gabriel have instituted Civil Revision Application No.661/2008. C.R.A. is admitted and is pending for final disposal. The eviction decree is stayed.

5. Mr. Singh submitted that defendants No.1 and 2 have filed affidavit of Smt. Maimunisha Anwar Shaikh placing on record that the plaintiff had instituted R.A.E. Suit No.310/611/1997 against another tenant Niklas Kabral. The suit was decreed on 4.2.2008 and the plaintiff had obtained possession through bailiff on 20.8.2008. Mr. Singh also invited my attention to the order dated 3.2.2009 below Exhibit-1 in Execution Application No.52/2008 recording that the bailiff report below Exhibit-6 dated 18.8.2008 shows that the possession of the premise of Niklas Kabral were handed over to the plaintiff and the execution is fully satisfied. Mr. Singh,

therefore, submitted that as the possession of the premises in occupation of Niklas Kabral are obtained by the plaintiff in the year 2008, the requirement pleaded by the plaintiff no longer subsists. He also invited my attention to the affidavit in rejoinder filed by the plaintiff and in particular paragraphs-3(c), (d) and (e) to contend that the possession of the suit premises of Niklas Kabral is with the plaintiff. He, therefore, submitted that the Appellate Court was not justified in passing the decree under Section 13(1)(g) of the Act. In view of the plaintiff obtaining possession of the premises of Niklas Kabral, the need pleaded by the plaintiff is fully satisfied.

6. Mr. Singh further submitted that as far as the eviction on the ground under Section 13(1)(b) of the Act is concerned, the Courts below committed serious error in passing the decree. He has taken me through the deposition of defendant No.2 as also the findings recorded by the Courts below and submitted that the application requires consideration.

7. On the other hand Mr. D'Silva supported the impugned orders. He submitted that as far as the decree obtained the plaintiff against Joseph Gabriel is concerned, said cannot be executed in view of pendency of C.R.A. No.661/2008 in this

Court. As far as the premises of Niklas Kabral is concerned, Mr. D'Silva has taken me through paragraphs-3(c) and 3(d) of the affidavit in rejoinder filed in February, 2016 by the plaintiff. Mr. D'Silva submitted that after obtaining the possession from heirs of Niklas Kabral, they broke open the lock and forcefully taken possession of the premises after execution of the decree on 21.8.2008. The plaintiff, therefore, lodged complaint on 22.8.2008 with the police. In pursuance thereof, the police recorded panchnama and had put new lock and keys were handed over to the plaintiff. Senior police officer attached to the police station orally instructed the plaintiff not to remove the articles lying in the premises or use the premises without orders from the Court where criminal proceedings are initiated against the Kabral family for offences committed by them after execution of decree. Since then the plaintiff has not opened the premises and it is full of cobwebs and nuisance by rats and bandicoots. In short, he submitted that the said premises are not available for occupation.

8. As far as the ground of eviction under Section 13(1)(b) of the Act is concerned, he has invited my attention to the deposition of defendant No.2 and in particular cross-

examination and also findings recorded by the Courts below. He submitted that after appreciating the evidence on record, the Courts below have concurrently decreed the suit under Section 13(1)(b) of the Act and, therefore, no case is made out for invocation of powers under Section 115 of C.P.C.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Courts below have decreed the suit under Section 13(1)(b) of the Act. The learned trial Judge declined to pass decree under Section 13(1)(g) of the Act. Appellate Court decreed the suit also under Section 13(1)(g) of the Act. In paragraph-8E and 8F, the plaintiff had pleaded his requirement. The plaintiff came with the case that his son Joslin D'Silva is aged about 22 years. The house where the plaintiff and his family are residing is not sufficient. It is difficult for the plaintiff's family and that of his son's family to reside together. After the marriage, son Joslin can stay separately near the house. The plaintiff is employed in Railways and from the meager income, it is difficult to meet the family expenses as also to educate and marry his daughter. There are lot of expenses for Christian marriages and the retirement dues of the plaintiff

will be spent on the marriage of his daughter. It is difficult for him to buy a new house for his son. The plaintiff, therefore, requires the suit premises for bonafide requirement for himself and for his son.

10. As far as the ground of bonafide requirement is concerned, Appellate Court has considered this aspect from paragraphs-21 to 28. In paragraph-23, Appellate Court noted that the plaintiff's son is 24 years old and is required to be married. It was further noted that the plaintiff is occupying the premises admeasuring 500 sq. ft. and the suit premises admeasures 500 sq. ft. Appellate Court also noted that the sisters of the plaintiff are married and are residing with their in-laws and are not staying in the suit premises. Appellate Court has considered the eviction decree passed against Joseph Gabriel. As noted earlier, though eviction decree was passed by the trial Court, said tenant had instituted C.R.A. No.661/2008 and the same is pending for final disposal in this Court. In other words, the said premises are not available to the plaintiff as on date. It has however come on record that the plaintiff has also obtained possession of premises of tenant Niklas Kabral. Even assuming for the time being that the said premises will satisfy

the need of the plaintiff, nonetheless the Courts below have decreed the suit under Section 13(1)(b) of the Act. It is in that regard necessary to consider the evidence of defendant No.2. In the cross-examination of defendant No.2, she has stated thus:-

“Since my birth the suit premises was made up of mud and mangalore tiles roof. I do not remember when the mangalori tiles roofs was replaced by cement sheet roof. Witness is referred to para no.11 of the written statement of defendant no.1. Defendant no.1 made a statement there that brick massinary walls were from the very beginning of the suit premises. It is not true to say that myself and defendant no.1 are making false statement in respect of walls of the suit premises. We have not obtained permission from landlord prior to replacing of mangalori tiles by cement sheet. I am not aware whether permission from BMC was obtained prior to replacing of roof. It is not true to say that we have carried out illegal work of replacing of roof of the suit premises and they are not tenantable repairs. It is not true to say that we have demolished the mud walls and constructed brick massinary walls. It is not true to say that I am deposing false that we re-plastered the mud walls. It is true that window on the eastern wall is removed and wall is constructed. It is true that we have enclosed the verandah. It is true that bathroom is constructed in the same an that enclosed portion is used as hall. I am not aware for the work of enclosing the varanda, constructing bathroom making hall, and removing the window we have not obtained permission of landlord or BMC.”

11. These admissions were considered by the Courts

below. In particular, Appellate Court has considered ground under Section 13(1)(b) from paragraphs-14 to 20. In paragraphs-16 and 17, Appellate Court has considered the admissions given by defendant No.2. Appellate Court also considered in paragraph-15 as to whether construction carried out by the defendants is permanent structure. Appellate Court applied the principle for finding out whether the construction made by the defendants is of permanent nature by taking into account the mode and degree of annexation as also the intention of the party putting up the structure and whether addition thereto amounts to substantial and change in the nature and form of accommodation.

12. In my opinion, Appellate Court has rightly applied the principles which govern for determining the nature of construction whether is permanent or not. After considering the evidence on record, the Courts below have concurrently held that the defendants have carried out the construction of permanent nature. The defendants have converted the suit premises into a permanent structure made out of brick masonry walls etc. without prior permission of the plaintiff. The defendants have removed the door from East side abutting on

the verandah, and shifted the same to the South side of the suit premises. After removing said door from the East side i.e. Verandah, said Verandah is enclosed and made into a room, with a hall and bathroom therein. The side walls of the suit premises are removed and the surrounding open space has been enclosed and converted into four rooms i.e. hall, bedroom, dining room and a kitchen. The existing bathroom in the corner of the old premises is now shifted near the newly constructed kitchen. A new bathroom is constructed in the enclosed verandah in the hall, after shifting the door from the East side. The external and internal mud walls of the suit premises are removed except for one wall and in its place brick masonry structure has been erected. The original Manglore tiles have been removed and in its place cement asbestos sheets are put. In my opinion, the defendants have virtually changed the nature of the suit premises and, therefore, the Courts below were justified in passing the decree under Section 13(1)(b) of the Act. In view thereof, no case is made out for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed with no order as to costs.

13. At this stage, Mr. Singh orally applies for stay of this

order for a period of eight weeks from today. Mr. Singh states that the applicants are in possession and they have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with the possession. He further states that the applicants and all adult family members residing with them are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

14. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying operation of this order for a period of eight weeks from today subject to the applicants and all adult members residing with them giving usual undertaking to this Court within two weeks from today incorporating therein:

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

- (v) that in case the applicants are unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

15. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of eight weeks from today, subject to the applicants filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case within one week from today the Writ Petition is not converted into Civil Revision Application and further if the applicants do not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)