

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.665 OF 2015

Vijay Mohan Pathare and another

.. Applicants

Versus

Ramkrishna Jaywant Lolekar (Deceased)

and others

.. Respondents

Dr. Pallavi Divekar i/by M/s. Divekar & Co., for the Applicants.

CORAM : R.M. SAVANT, J.

DATE : 5th FEBRUARY 2016

PC.

1. The revisionary jurisdiction of this Court is invoked against the judgment and order dated 07.05.2015 passed by the Appellate Bench of the Small Causes Court, Mumbai, by which order, the Appeal filed by the Applicants being Appeal No.481 of 2005 came to be dismissed and resultantly, the judgment and order dated 26.04.2005 passed by the Trial Court in RAE Suit No.626/1991 of 1987 came to be confirmed.

2. The Applicants herein are the original Plaintiffs and the Respondent Nos.1 and 2 herein are the original Defendants. It appears that the original Defendant No.2 Hirabai Lolekar has expired and in her

place her heirs have been brought on record. The Respondent Nos.1 and 2 herein i.e. the Defendant Nos.1 and 2 are brother and sister. It seems that the tenancy in respect of the premises in question came to be created sometime in the early 1940's i.e. 1941-1942 and the said tenancy was created in the name of the Defendant No.1 i.e. Respondent No.1 herein. The suit in question came to be filed by the Plaintiffs/landlords principally on two grounds i.e. arrears of rent and subletting. It was the case of the Plaintiffs that the Defendant No.1 was in arrears of rent from 01.05.1977 to 20.04.1987 which arrears were at the rate of Rs.99/- per month. However, significantly the Plaintiffs in the suit had not prayed for a decree for recovery of arrears of rent. In so far as the ground of subletting is concerned, it was the case of the Plaintiffs that the Defendant No.1 has not been residing in the suit premises and that the Defendant No.1 has sublet the suit premises to the Defendant No.2 which was illegal. The Trial Court adjudicated upon the said suit and has by its judgment and order dated 26.04.2005 dismissed the suit. In so far as the ground of arrears of rent is concerned, the Trial Court held that since there was no service of notice on the Defendants and therefore, the suit on the ground of non-payment of rent was without any cause of action. The Trial Court thereafter proceeded to consider the case of the Plaintiffs. The Trial Court having regard to the evidence of the Defendant No.2, wherein she stated that the Defendant

No.2 was always ready and willing to pay the rent, but the Plaintiffs who were not accepting the same. The Defendant No.2 has given the particulars of the money orders, the letter addressed to the landlord Exh.5 as also the fact that the Defendant No.2 was constrained to open an account in the Bank for depositing the rent. The Trial Court also adverted to the fact that the payment of rent by money order was not denied in the cross-examination of the Plaintiffs. The Trial Court was of the view that from the record it is clear that no notice was served upon the Defendant Nos.1 and 2. The Trial Court lastly adverted to the fact that though the Plaintiffs claimed that the Defendant Nos.1 and 2 were in arrears of rent, pertinently in the suit had not sought recovery of arrears of rent which speaks in a manner volumes for the said case of the Plaintiffs based on the said ground.

3. In so far as ground of subletting is concerned, the Trial Court has recorded that the facts on record clearly indicate that the tenancy was basically taken for the family consisting of the Defendant No.1, his mother, two brothers and three sisters which included the Defendant No.2. This according to the Trial Court clearly indicate that both the Defendant No.1 and 2 have got a right to reside in the premises. The Trial Court observed that right from the beginning the Defendant No.2 is claiming to be a tenant of the premises in question in respect of which the Defendant No.2

had also addressed a letter dated 17.11.1987 to the Plaintiffs. The Trial Court lastly observed that the fact that the Defendants were in possession of the suit premises since the year 1942-1943 has not been denied by the Plaintiffs and therefore, the Trial Court observed that the evidence on record does not substantiate the ground of subletting as urged by the Plaintiffs. The Trial Court accordingly by its judgment and order dated 26.04.2005 has dismissed the suit.

4. The Plaintiffs carried the matter in Appeal by filing Appeal No.481 of 2005. The Lower Appellate Court on a re-appreciation of the material on record reiterated the findings of the Trial Court in respect of the ground of arrears of rent as also in respect of the ground of subletting. In so far as the ground of subletting is concerned, the Lower Appellate Court has observed that the Plaintiffs have not satisfied the two crucial conditions namely that exclusive possession is required to be handed over and that the consideration is being paid or has passed between the two parties. The Appellate Bench of the Small Causes Court has by the impugned judgment and order dated 07.05.2015 dismissed the Appeal.

5. The Learned Counsel appearing on behalf of the Applicants Dr. Pallavi Divekar would contend that the Courts below have been swayed by the fact that the Defendant Nos.1 and 2 were closely related

being brother and sister without considering the fact that though the tenancy was in the name of the Defendant No.1, the Defendant No.2 was residing and therefore there was subletting of the premises in question. In support of her contention that relation between the parties is not the consideration which ought to weigh with the Courts. The Learned Counsel sought to place reliance on the following judgments of the Apex Court reported in (2005) 1 SCC 31 in the matter between Joginder Singh Sodhi Vs. Amar Kaur, AIR 1988 SC 396 in the matter between Bhairab Chandra Chandan Vs. Ranadhir Chandra Dutta, (1998) 3 SCC 1 in the matter between Bharat Sales Ltd. Vs. Life Insurance Corporation of India and the unreported judgment dated 3rd March 2010 of a Learned Single Judge of this Court in Civil Revision Application No.676 of 2009 between Shri. Harakchand Hirji Shah & Ors. Vs. Vasudev Vaghji Relan & Anr.

6. In so far as the judgments of the Apex Court are concerned, the said judgments have been rendered in the facts of the cases which were there before the Apex Court. The said judgments concern cases, wherein handing over possession to third parties/family members was writ large and there was no dispute about the same. The fact that the person put in possession was doing a different business from the one earlier done had also come on record. It is in the said context that the Apex Court held

that the fact that the family members were in occupation had no relevance in so far as the issue of subletting is concerned. In so far as the judgment of the Learned Single Judge of this Court in *Shri. Harakchand Shah's* case (*supra*) is concerned, in the said case also the possession was handed over to the Defendant No. 2 and 3 by the Defendant No.1 who was the tenant and who had left the country and was residing in London. It had come on record in the said case that the Defendant Nos.2 and 3 were exclusively using the premises and the Defendant No.1 only occasionally visiting them. It is in the facts of the said case that the judgment was rendered by the Learned Single Judge. However, the facts in the instant case are clearly distinguishable from the facts of the judgments cited (*supra*). In the instant case, it is not disputed that the tenancy was created in the year 1942-1943 and that the Defendant Nos.1 and 2 were brother and sister and were jointly residing in the premises with the other family members from the inception. It is also not in dispute that Defendant No.2 has been continuously residing in the premises and which has continued even after her marriage. The Courts below were right in coming to a conclusion that just because there was some estrangement in the relationship between the Defendant Nos.1 and 2, it cannot be said that the Defendant No.2 is in illegal occupation of the premises and that there is subletting.

7. Both the Courts below having recorded findings of fact on the

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aforesaid two issues, this Court therefore does not deem it appropriate to exercise its revisionary jurisdiction against the concurrent orders passed by the Courts below. The Civil Revision Application is accordingly dismissed.

[R.M. SAVANT, J]