

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 353 OF 2015

Suresh Narayan Gaikar ...Applicant

Versus

Sudam Dala Rajput ...Respondent

WITH

Civil Revision Application NO. 337 OF 2015

Suresh Narayan Gaikar ...Applicant

Versus

Dagdu Krishna Pawar ...Respondent

....

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

Mr. Piyush M. Shah a/w. Mr. Pankaj Shah, N.M. Dethia & Ms. Jigna Shah, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 26th July, 2016

P.C.

1. Heard Mr. J.M.D'silva, learned Counsel for the applicant and Mr.P.M. Shah, learned Counsel for the respondent in both the applications, at length.

2. Rule. Mr. Shah waives service. At the request and by consent of the parties, Rule is made returnable forthwith and Civil Revision Applications are taken up for final hearing.

3. By these applications under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants, hereinafter referred to as the 'plaintiff', has challenged the judgment and decree dated 24.3.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in Appeal No.181/2009 and Appeal No.179/2009. By these orders, the Appellate Court allowed the appeals preferred by the respondents, hereinafter referred to as the 'defendant' and quashed and set aside the judgment and decree dated 26.8.2009 passed by the learned Judge, presiding over Court Room No.33 in R.A.E. & R. Suit No.383/786 of 1999 and R.A.E. & R. Suit No.382/785 of 1999. The Appellate Court dismissed the suits instituted by the plaintiffs.

4. The short controversy in the present applications is whether the suit premises falls in an area which is declared as a slum area under the provisions of the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 (for short, 'Act'). The learned trial Judge had framed issue No.5, namely, whether the suits are maintainable in view of the contention raised by the defendant that the suit premises falls

in an area declared as a slum area. The learned trial Judge held that the suit premises does not fall in an area which is declared as a slum area Accordingly, the learned trial Judge decreed the suits on 26.8.2009.

5. During pendency of the appeals, the plaintiff filed application under Order 41 Rule 27 of C.P.C. for adducing evidence. By order dated 24.3.2014, the Appellate Court allowed the applications and admitted documents filed at Sr. No.2 and 3 i.e. certified copy of the judgment in Appeal No.181/1986 and letter dated 9.11.2010 issued by Deputy Collector, Malad. Appellate Court thereafter decided the appeals on the same day i.e. 24.3.2014 and as indicated earlier allowed the appeals.

6. Appellate Court held that the plaintiff had filed application under Section 22 of the Act seeking permission for recovery of rent only. In other words the application filed by the plaintiff was not for permission to institute the suit for eviction and for recovery of possession. Appellate Court held that as the application under Section 22 made by the plaintiff was only for permission to recover rent and not for recovery of possession, and as the suit property falls in an area which is declared as a

slum area, the suits are not maintainable. Appellate Court has considered this aspect from paragraphs-17 onwards.

7. Mr. D'Silva submitted that though the Appellate Court has referred to the decision of the Slum Tribunal dated 9.10.1997 in Appeal No.181/1986, the Appellate Court did not record any finding as to whether the suit premises falls either in portion marked as "A" or portion marked as "B". He submitted that M/s. Heavenkores Real Estate Pvt. Ltd. had filed Appeal No.181/1986 challenging the declaration of slum in respect of property bearing CTS No.581/A-18, 581/A-18-1 to 9 and 581/A-19, 581/A-19-1 to 23. The learned President of the Tribunal confirmed the declaration of slum dated 14.10.1996 as far as portion marked as "B" shown bounded in red colour on the plan submitted and tendered before the Tribunal. As far as the slum declaration in respect of portion marked "A" shown bounded in green colour on the plan of CTS No.581/A-18, 581/A-18-1 to 9, 581/A-19, 581/A-19-1 to 23 is concerned, it was quashed and set aside.

8. As against this, Mr. Shah supported the impugned order. He invited my attention to paragraph-14 and submitted

that the appellate Court has considered the decision of the Tribunal dated 9.10.1997 in Appeal No.181/1986 and thereafter held in paragraph-15 that the suit premises is declared as slum and said declaration is not at all set aside till date. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C..

9. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute and rather it is a matter of record that during pendency of the appeals, the plaintiff filed applications under Order 41 Rule 27 of C.P.C. for leading additional evidence. By order dated 24.3.2014 the Appellate Court allowed the applications partly and admitted in evidence the decision of the Tribunal dated 9.10.1997 in Appeal No.181/1986 as also letter dated 9.11.2010 issued by the Deputy Collector, Malad. Appellate Court thereafter considered the proceedings filed by the plaintiff under Section 22 of the Act and held that the plaintiff had applied for permission to recover rent and not for recovery of possession and eviction. Mr. Shah submitted that even Appellate Court after considering the

decision dated 9.10.1997 and letter dated 9.11.2010 of Deputy Collector, Malad held that the suit premises is in slum area.

Paragraph-14 of the order read thus :

“14. The plaintiff has come with the case that the suit premises is declared as slum. The gazette of the same is filed on record. The plaintiff has come with specific case in his plaint in paragraph No.11 as under:

“The plaintiff has already obtained the permission from the Competent Authority to file the above suit against the defendant.”

This very contention in the plaint itself clear that the suit premises is declared as slum. At this appellate state the respondent has taken out application Exh.20 for producing additional evidence. He has produced two documents one is judgment in Appeal No. 181 of 1986 and another is letter dated 09.11.2010. On the basis of these two documents respondent tried to say that suit premises is declared as slum and the slum declaration is set aside. We have gone through the judgment in Appeal No.181 of 1986. It is revealed that the appeal is preferred by one M/s. Heavenkores Real Estate Pvt. Ltd. against the slum declaration of the plot in question. It was CTS No.581/A-18 and 581/A-19. It is further mentioned in the judgment that in some portion of the above CTS numbers construction has raised, therefore, the property was divided into two parts one is already constructed with the buildings while other was pockets and these slum dwellers though have not been represented by any person, cannot be and should not be

discarded by the Tribunal as the slum legislation is not given powers of judicial review but to see that the slum dwellers are rehabilitated by up gradation of slum. There is no doubt that the slum dwellers do not have the basic amenities. It is also held that in the above plot i.e. first part already three buildings have been come up with open space if any on the demarcated portion which is to be marked as "A" on the plan and another part was marked as "B". The slum declaration in respect of portion marked 'A' i.e. portion of the land where already 3 buildings have been constructed is set aside and the slum declaration in respect of remaining portion i.e. portion 'B' is confirmed by this judgment."

10. Perusal of the paragraph, extracted hereinabove, does not indicate that Appellate Court recorded any finding as to whether the suit premises fall either in portion demarcated and marked "A" on the plan or portion marked as "B". Appellate Court mainly considered the letter dated 9.11.2010 and the application filed under Section 22 of the Act was for recovery of rent only. It is also material to note that after having allowed the application under Order 41 Rule 27 of C.P.C. on 24.3.2014 the Appellate Court did not give opportunity to the parties to lead evidence as per Order 41 Rule 28 of C.P.C. Order 41 Rule 28 of C.P.C. reads thus :

“
Order XLI
APPEALS FROM ORIGINAL DECREES

28. Mode of taking additional evidence.--
Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court. take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.”

11. In my opinion, Appellate Court did not follow the procedure laid down under Order 41 Rule 28 of C.P.C.. After allowing additional evidence to be produced, Appellate Court either should have taken evidence or directed the trial Court to take such evidence and to send it to Appellate Court. In my opinion, Appellate Court ought to have recorded a positive finding as to whether the suit premises falls in portion marked as “A” or “B” and thereafter recorded finding whether the suit falls in the slum area after permitting parties to lead evidence. On this ground alone, the impugned order cannot be sustained and as such is liable to be set aside thereby restoring the

appeals to Appellate Court for following the procedure under Order 41 Rule 28 of C.P.C. Appellate Court may either take evidence or direct the trial Court to record evidence and transmit the evidence to Appellate Court. Parties are allowed to lead evidence as to whether the suit premises falls in portion marked “A” or “B” on the plan and consequently whether Section 22 of the Act is applicable or not.

12. In view thereof, Civil Revision Applications are allowed in following terms :

- [i] Impugned judgment and decree dated 24.3.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in Appeal No.181/2009 and Appeal No.179/2009 are quashed and set aside and the Appeals are restored to the file of Appellate Court;
- [ii] Parties are at liberty to lead evidence as to whether the suit premises falls in portion marked as “A” or portion marked as “B” on the plan as per the decision of the Tribunal dated 9.10.1997 in Appeal No.181/1986;
- [iii] Appellate Court may either take evidence or direct the trial Court to take such evidence and send it to Appellate

Court;

- [iv] After receipt of evidence, Appellate Court will proceed to decide the appeals on merits. All contentions of the parties on merits, including whether permission under Section 22 of the Act was sought for recovery of rent only or for possession of the suit premises or both, are expressly kept open.
- [v] Rule is made absolute in both Civil Revision Applications with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)