

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 600 OF 2016
WITH
CIVIL APPLICATION NO. 687 OF 2016

Mr. Mahavir Bhaiju Sakaldas Dhobi
Since deceased by his heirs and Legal
Representatives :

1A. Smt. Rampyari Mahavir Dhobi & Ors. ...	Applicants
Vs.	(Orig. Defendants)
Mr. Tinu Mansen Bhansali & Ors. ...	Respondents

Mr. Vishal Kanade a/w Ms. Trupti Bharadi, Advocate for the applicants.
Mr. S.M.Vyas, for the Respondent Nos. 3 to 5.

CORAM: R.G.KETKAR, J.
DATE : 26th October, 2016.

P.C.

1. Heard Mr. Vishal Kanade, learned counsel for the applicants
and Mr. S.M.Vyas, learned counsel for respondent Nos. 3 to 5 at length.

2. By this Application under Section 115 of the Code of Civil
Procedure, 1908, the applicants, hereinafter referred to as “the defendants”
have challenged the judgment and decree dated 4.5.2010 passed by the
learned Judge presiding over in Court Room No.19 of the Court of Small
Causes at Mumbai in T.E. Suit No.110/134 of 2008 as also the judgment

and decree dated 3.9.2016 passed by the Appellate Bench of the Small Cause Court under Section 2(b)(i) Appeal No.346 of 2010. By these orders, the Courts below decreed the suit instituted by the plaintiffs for possession of an open plot of land bearing C.S. No.45 of Malabar and Cumballa Hill Division, situate at 81, Banganga Road, Mumbai 400 006 (for short, “the suit premises”) and directed the defendants to hand over vacant and peaceful possession of the suit premises to the plaintiffs and also ordered enquiry into mesne profits.

3. The plaintiffs instituted the suit, inter alia, contending that on 30.3.1950, lease was executed between Mr. Bachubhai Thakordas Merchant, Atmaram Sevaklal, Mansen Pushpasen Goragandhi, Rasiklal Bhagwandas Merchant and halchandra Jekisandas Sheth as the Trustees on behalf of Shree Chevli Bhanushali Mahajan Bobmay as the Lessors of one part and Mr. Bhaiju Sakaldas as the lessee of the other part granted lease of the suit property admeasuring 450 sq. yards for a period of 21 years commencing from 1.4.1950 on the monthly lease rent of Rs.150/- on the terms and conditions set out therein. Subsequently, by an agreement dated 18.2.1959 executed between Mr. Bachubhai Thakordas Merchant, Babulal Laxmidas Ganjawala & Dr. Ratnasen B. Verma, the then trustees of the

Shree Chevli Bhanushali Mahajan Bombay as the lessors of the one part and Mr. Bhaiju Sakaldas as the lessee of the other part, the lessors granted lease of vacant land admeasuring about 57 sq. yards and forming part of C.S. No.45 of Malabar and Cumballa Hill Division and situate at 81, Banganga Road, Mumbai 400 006 for a period of 3 years on monthly rent of Rs.35/- per month on the terms and conditions set out therein. The said premises were let out to the lessee Mr. Baiju Sakaldas for the purpose of washing business only i.e. Dhobighat and to raise Kutcha structures with consent of the trust. The plaintiffs further contended that the lease expired by efflux of time on 31.3.1971 and since then the defendants are in possession of the suit premises without paying any rent and/or compensation to the plaintiffs. The plaintiffs contended that the defendants have constructed and/or put up various unauthorized structures without the knowledge and consent of the plaintiffs and Municipal Corporation and let out the same to various persons. The defendants have also changed the user of the premises contrary to the lease to residential as well as commercial purposes. The plaintiffs contended that the Maharashtra Rent Control Act, 1999 (for short "M.R. Act") came in force with effect from 31.3.2000 withdrawing protection of the Rent Act to the defendants. The plaintiffs, therefore, terminated the tenancy by a letter dated 5.10.2007 and

called upon the defendants to hand over the vacant and peaceful possession of the suit premises. On 28.11.2007, the defendants gave reply falsely contending that they are regularly paying the rent. The plaintiffs contended that tenancy of the defendants stands terminated since 30.11.2007 and from 1.12.2007 onwards the defendants are in unlawful use, occupation and possession of the suit premises. The plaintiffs therefore instituted the suit on 19.3.2008 for recovering possession of the suit premises.

4. The defendants filed Written Statement resisting the suit, inter alia, contending that they are in authorised, uninterrupted possession of the suit premises. The suit is liable to be dismissed in view of Section 3 (wrongly mentioned as Section 2) and Articles 66 and 67 of the Limitation Act, 1963. The defendants denied construction of unauthorized structures and that they acted contrary to the terms of the Indenture of lease. The defendants also denied that there was change of user and that they are acting contrary to the terms of the agreement as alleged by the plaintiffs. The defendants further contended that the period of notice required is six months.

5. On the basis of the pleadings, the learned Judge framed the necessary issues. The parties led the evidence. After considering the evidence on record, the Courts below decreed the suit. It is against these orders, the defendants have filed the present application.

6. In support of this application, Mr. Kanade, submitted that the lease expired by efflux of time in the year 1971. The defendants did not pay the rent after expiry of this period and in fact, an attempt was made in the year 1991 by sending the rent which was returned unclaimed. He submitted that as the lease expired by efflux of time in the year 1971 and the suit is instituted in the year 2008, it is barred by limitation. He further submitted that as the lease expired by efflux of time, there was no necessity of issuing notice under Section 106 of the Transfer of Property Act, 1882 (for short T.P. Act). Mr. Kanade relied upon the following decisions :-

(i) **Smt. Shanti Devi vs. Amal Kumar Banerjee AIR 1981 SC 1550**, to contend that where a lease is for a definite term it expires by efflux of time by reason of Section 111(a). Service of a notice under Section 106 is not necessary for determination of lease.

(ii) **Maharashtra Rajya Veej Vitaran Company, Malkapur & Anr. vs. manoj Abarao Deshmukh & Anr. 2015 (3) Mh.L.J.459**, to

contend that the period of limitation under Article 67 of the Limitation Act requires filing of suit for possession within a period of 12 years when the tenancy is determined. As the tenancy came to be determined by efflux of time in the year 1971, it was necessary for the plaintiffs to have filed suit for possession within 12 years from 1971. As the suit instituted in the year 2008, it is barred by limitation.

7. Mr. Kanade submitted that though in the written statement, it was specifically contended that the suit is barred by limitation in view of Section 3 read with Articles 66 and 67, the learned Judge did not frame any issue. He has taken me through the judgments of the learned trial Judge as also of the Appellate Court. In particular in para 11, the Appellate Court recorded a finding that the suit premises is an open land. The plaintiffs are entitled to terminate tenancy of the defendants and therefore the question of limitation does not arise. He submitted that the Appellate Court did not deal with the issue of limitation. He, therefore, submitted that the application requires consideration.

8. On the other hand, Mr. Vyas supported the impugned orders. he submitted that M.R. Act was brought into force with effect from 31.3.2000. The definition of the expression “premises” in Sections 7(9)

does not include 'open land'. In other words, after coming into force of the M.R. Act on 31.3.2000, the protection of Rent Control Act is not available. The plaintiffs have terminated the tenancy by letter dated 5.10.2007 and the suit is instituted in the year 2008. He also invited my attention to the deposition of DW-1 Sukhraj Mangal Dhobi, wherein he deposed that the first lease came to an end by efflux of time in the year 1971. Thereafter there was no agreement of any nature in between the plaintiffs and the defendants. The subsequent lease of 1959 was for 3 years. It came to an end by efflux of time in the year 1962. Thereafter, there was no further agreement in between his grandfather and the plaintiff-trust. It is true that after expiry of lease, the grandfather was the monthly tenant in respect of the land. He denied that the defendants are in unlawful occupation of the suit premises.

9. Mr. Vyas relied upon the decision of the Apex Court in the case of **Burmah Shell Oil Distributing now known as Bharat Petroleum Corporation Ltd. vs. Khaja Midhat Noor & Ors. AIR 1988 SC 1470** to contend that in view of Section 107 of T.P. Act, a lease for a period exceeding one year could be executed by a registered instrument only by both the lessor and the lessee. In the absence of a registered instrument, the

lease shall be deemed to be “lease from month to month”. In view of the provisions of Section 107 and in the absence of a registered instrument, it must be read that the defendants are holding over. He submitted that in view of Section 111(a) read with Sec. 107 and Section 116 of T.P.Act, it must be held that the suit is within limitation. He therefore, submitted that no interference with the impugned orders is required.

10. I have considered the rival submissions advanced by the learned counsel for the parties. I have also perused the material on record. As noted earlier, the first lease deed was executed on 30.3.1950 for a period of 21 years commencing from 1.4.1950. By efflux of time, the first lease came to an end on 31.3.1971. The subsequent lease dated 10.2.1959 was for a period of 3 years which came to an end by efflux of time on 9.2.1963. Section 111 of the T.P. Act provides for determination of lease of immovable property. Clause (a) thereof lays down that a lease of immovable property determines by efflux of time limited thereby. Section 107 lays down that how leases are made. It lays down that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Section 116 of the T.P. Act reads thus :-

“116.Effect of holding over -

If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.”

11. As noted above, the first lease deed was determined by efflux of time on 31.3.1971. The second lease deed was determined by efflux of time on 9.2.12963. It is not in dispute that even after expiry of lease, the defendants continued in possession of the suit property. The questing is the nature of possession of the defendants in the suit property. Perusal of Section 116 shows that if a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, **or otherwise assents to his continuing in possession**, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106. As noted earlier, the lease is executed for the purpose of washing business and residential purpose of lessee. In other words, the lease is

neither for agricultural nor for manufacturing purpose as contemplated by Section 106 of the T.P. Act. In view of Section 116, after the efflux of time, the defendants continued in possessions of the suit premises. On account of the plaintiffs assenting to their continuing in possession, the lease is deemed to have been renewed from month to month. In view thereof, the plaintiffs were justified in issuing notice on 5.11.2007 determining the tenancy of the defendants. The defendants have not brought any material on record to show that the plaintiffs have not assented their continuing in possession. In fact, perusal of the written statement filed by the defendants clearly shows that they claimed to be in authorized and uninterrupted possession of the suit premises and they claimed that notice of six months period was required to be issued. In fact, during the course of cross-examination, the defendants' witness deposed that after expiry of the lease period, they are the monthly tenant in respect of the suit land and they are in lawful occupation of the suit land. In view thereof, it has to be held that the defendants were holding over the suit property as contemplated by Section 116 of the T.P. Act. If that be so, as also having regard to the fact that M.R. Act was brought into force with

effect from 31.3.2000, a notice was issued on 5.11.2007 and the suit is filed on 19.3.2008. It cannot be said that it is barred by limitation. In view thereof, I do not find that the Courts below have committed an error in decreeing the suit.

12. Mr. Kanade relied upon a decision in **Smt. Shanti Devi** (supra). In that case, the Apex Court held that the lease is for a definite term and it expired by efflux of time by reason of Section 111(a), service of a notice under Section 106 of the T.P. Act is not necessary for determination of the lease. It also held that Section 111(a) had to be read with Section 116 of the T.P. Act. In the absence of any allegation by the tenant that he was a tenant holding over within the meaning of Section 116 of the Act, the matter falls to be governed by Section 111 (a) of the T.P. Act. In the present case, perusal of the written statement and in particular para 1 as also cross-examination of the defendants' witness clearly show that the defendants' case that it is holding over the suit premises within the meaning of Section 116 of the Act. In view thereof, the said decision is not applicable to the facts of the present case.

13. As far as the decision in the case of **Maharashtra Rajya Veej Vitaran** (supra) is concerned, in that case, the lease was executed on 10.4.1938 for a period of 50 years which expired on 9.4.1988. On 23.12.1992, the plaintiffs therein had issued notice to the defendants terminating the lease and demanding possession. Second notice was issued on 27.2.2002 terminating the lease and suit was instituted on 11.7.2003. After considering the decision in **Shanti Devi's** case, it was held that after the lease was determined by efflux of time, it was not necessary to issue notice. It was observed that as per Article 67 of the Limitation Act, suit for possession was required to be filed within 12 years when the tenancy is determined. As the tenancy was determined by efflux of time on 9.4.1988, the suit ought to have been instituted within a period of 12 years. As the suit was instituted on 11.7.2003, it was barred by limitation. Perusal of the decision does not indicate that any argument based on Section 116 of the T.P. Act was advanced. In the present case, I have already indicated that the defendants themselves came with the case of continuation of monthly tenancy. I have also held that no material is

brought on record by the defendants to indicate that the plaintiffs have not assented to their continuing in possession of the suit premises. As noted earlier, after efflux of time, the defendants continued in possession of the suit premises as monthly tenant in view of Sec. 107 of the T.P.Act. The tenancy was terminated on 5.10.2007 and the suit was instituted on 19.3.2008. In view thereof, it cannot be said that the suit is barred by limitation.

14. As the suit property is admittedly an open plot of land, the defendants are not entitled to protection of M.R. Act. The Courts below have concurrently held that plaintiffs have validly terminated the tenancy. The Courts below were therefore right in decreeing the suit. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. The Application fails and the same is dismissed.

15. In view of the disposal of the C.R.A., C.A. No.687 of 2016 for stay does not survive and the same is disposed of.

16. At this stage, Mr. Kanade orally prays for stay of eviction

decree for a period of eight weeks from today. He assures that the defendants and all adult family members residing/using the suit premises will give undertaking incorporating therein :-

(a) that they are in actual possession of the suit premises and nobody else is in possession;

(b) that they have so far neither created third party interest nor parted with possession of the suit premises;

© that they will hereafter neither create third party interest nor part with possession of the suit premises;

(d) that they will pay the arrears of rent, if any, upto and inclusive of December, 2016 within two weeks from today.

(e) In case they are unable to obtain orders from the higher Court within 8 weeks from today, they will hand over vacant and peaceful possession of the suit property to the plaintiffs.

17. In view thereof, notwithstanding dismissal of Civil Revision Application, the eviction decree shall not be executed for a period of 8 weeks from today, subject to the applicants filing undertaking in the aforesaid terms on or before 18.11.2016 with advance copy to the other side. It is made clear that in case the undertaking is not filed within the stipulated period and the arrears of compensation are not paid, the interim order shall stand vacated without further reference to the Court. Mr. Vyas prays for withdrawal of the amount deposited by the defendants. Permission as prayed for is granted. Order accordingly.

(R.G.KETKAR, J.)