

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 769 OF 2013

Robert A. D'souza @ Robert Anthony
Rodrigues and another

...Applicants

Versus

Smt. Radhabai Tulsiram Pahade
(since Deceased) And another

...Respondents

....

Mr. P.S. Dani, Senior Advocate i/b. S.s. Kanetkar, Advocate for
the Applicants.

Mr. Mithilesh Pandey h/f. V. D'silva, Advocate for Respondent
No.1(a).

....

CORAM : R. G. KETKAR, J.

DATE : 16th June, 2016

P.C.

1. Heard Mr.P.S. Dani, learned Senior Counsel for the
applicants and Mr.Mithilesh Pandey, learned Counsel for
respondent No.1A, at length.

2. By this application under Section 115 of Code of Civil
Procedure, 1908 (for short, 'C.P.C.'), the applicants, hereinafter
referred to as the 'defendants No.2 and 3', have challenged the
judgment and decree dated 6.8.2013 passed by the Appellate
Bench of the Small Causes Court at Bandra, Mumbai in Appeal

No.257/2007. By that order, the Appellate Court allowed the appeal preferred by respondents No.1(a) to 1(d), hereinafter referred to as the plaintiffs and quashed and set aside the judgment and decree dated 13.7.2007 passed by the learned Judge, presiding over Court Room No.36 in R.A.E. & R. Suit No.1420/4391 of 1986 and decreed the suit. The Appellate Court directed the defendants to hand over possession of a room situate on Plot No.80 at Kherwadi, Bandra (East), Mumbai – 400 051 (for short, 'suit premises') as also to pay arrears of past three years rent amounting to Rs.1080/- within three months from the date of order. The order of enquiry for deciding future mesne profits from the date of the order till handing over of actual possession of suit premises to the plaintiffs was also passed.

3. The plaintiffs instituted the suit against (1) C.F. D'Mello (since deceased) through L.Rs. 1(a) to 1(d) and present applicants being defendants No.2 and 3, under the provisions of Sections 12 and 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The learned trial Judge dismissed the suit *inter alia* holding that the plaintiffs could not establish the existence of relationship of landlord and tenant

between them and the applicants/defendants No.2 and 3 in respect of the suit premises; the plaintiff failed to prove that the defendants are in arrears of the rent for more than six months and consequently became defaulters; the plaintiffs failed to prove that the demand notice under Section 12(2) of the Act has been duly served on the defendants. Aggrieved by this decision, the plaintiffs preferred appeal which is allowed by the impugned order. It is against this decision, defendants No.2 and 3 have instituted the present C.R.A..

4. In support of this application, Mr. Dani submitted that the learned trial Judge considered the admissions of PW-1 as also the documentary evidence adduced by the defendants in support of their case. In paragraph-12, the learned trial Judge observed that the admission has to be used as an evidence against the author unless it is proved to be erroneous or insignificant in case no other evidence has been adduced on record by the plaintiffs for explaining the vital submissions given by PW-1. PW-1 stated that Mr.Nathu Ganpat Tepan was the brother of the original plaintiff Smt.Radhaben Tulsiram Pande. The suit property was jointly owned by the original plaintiff and

Mr.Nathu Tepan. She has further admitted that there are five rooms in the chawl. Out of five rooms, two rooms are in possession of the plaintiffs and remaining three rooms are in possession of Mr. Nathu Tepan. PW-1 admitted that out of three rooms of Mr.Nathu Tepan, one room is occupied by his legal representatives. One room is occupied by his one tenant and the third room is occupied by defendant No.2 Robert D'souza. Said witness further categorically admitted that the plaintiffs have no right in respect of three rooms belonging to Mr.Nathu Tepan. The learned trial Judge thereafter proceeded to hold that in view of the admissions of PW-1 which are self-explanatory no other proof is required to explain and answer the fact in issue. The admissions corroborate the defence of the defendants, namely, they are claiming the right in the premises through Mr.Nathu Tepan.

5. As against this, the Appellate Court relied upon the affidavit dated 3.10.1988 filed by Kamla Nathu Tepan which was filed at interim stage. He submitted that the Appellate Court committed serious error in relying upon said affidavit which could not be treated as an evidence to substantiate the claim of

the plaintiffs. Defendants No.2 and 3 are claiming to be tenant of Nathu Tepan. Defendants No.2 and 3 also produced the rent receipts. The Appellate Court, however, disbelieved them on the ground that they are suspicious. He submitted that the Appellate Court committed serious error in reversing the well reasoned order passed by the trial Court. He, therefore, submitted that the application requires consideration.

6. On the other hand, Mr. Pandey supported the impugned order.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record.

8. As noted earlier, PW-1 came with the case that there are five rooms in the chawl. Out of five rooms, two rooms are in possession of the plaintiffs and remaining three rooms are in possession of Mr. Nathu Tepan. The plaintiffs further came with the case that out of two rooms, one is in her possession and the suit premises i.e. room no.1 was occupied by C.F. D'mello. It is her case that she took out injunction notice No.1481/1988

seeking injunction against C.F. D'mello from parting with possession and creating third party interest. She came with the case that defendants No.2 and 3 approached Radhabai on 24.8.1988 for transferring the rent receipt in their name which she refused. She thereafter moved Interim Notice No.6842 of 1988 contending that on 4.10.1988, defendants No.2 and 3 obtained possession of suit premises breaking open the lock of the suit premises.

9. It is at this stage relevant to note that at the time of hearing of said applications, affidavit was filed by Kamla Nathu Tepan on 3.10.1988. In the affidavit, she stated that her husband Nathu Tepan and Radhabai are the joint owners. Room No.1 standing on the suit property belongs to original plaintiff Radhabai and she has instituted the suit for possession of suit premises. On 24.8.1988 defendants No.2 and 3 approached Radhabai and in presence of Kamala Nathu Tepan insisted Radhabai for transferring the rent receipts in their name. Original plaintiff Radhabai, however, refused. She further stated that father of defendants No.2 and 3 is tenant of Kamla Nathu Tepan in respect of room No.3 standing on plot No.80 and that

C.F. D'mello was tenant in respect of the suit premises, namely, room No.1. She further stated that defendants No.2 and 3 do not possess nor she herself or her sons consented them to reside or occupy the suit premises.

10. Kamla Nathu Tepan thereafter filed another affidavit on 7.10.1988 contending that her thumb impression was obtained on affidavit dated 3.10.1988 by the daughter of the plaintiff without understanding contents therein. The Appellate Court has considered this aspect in paragraphs-25 and 26 and observed that in the subsequent affidavit dated 7.10.1988, Kamla Nathu Tepan did not specifically state that tenancy rights in respect of the suit premises, namely, room No.1 was surrendered by C.F. D'mello. It was also not stated by her that the tenancy rights of defendant No.2 was created around the year 1984 after surrender of tenancy right by C.F. D'mello.

11. The Appellate Court thereafter considered P.R card at Exhibit-A collectively, which substantiated the claim of Radhabai. Defendant No.2 has fairly admitted that out of five rooms standing on plot No.80, on right side of suit premises there is room of Radhabai. Room No.4 adjacent to room of

Radhabai being room No.4 was occupied by his father. Evidence of defendant No.2 shows that after filing of the suit he and his brother came to reside in the suit premises corroborates the plaintiffs contention that defendants No.2 and 3 were inducted in the suit premises after filing of the suit and around 4.10.1988. Said fact is corroborated from the affidavit of Kamla Nathu Tepan dated 3.10.1988. Defendant No.2 also deposed that he does not know who was previous tenant/occupant of the suit premises.

12. In paragraph-29, the Appellate Court observed that the defendants have not produced any document to establish their tenancy right in the suit premises alleged to have been created by Kamla Nathu Tepan six years prior to filing of their written statement dated 4.4.1990 i.e. around the year 1984. No evidence is produced by them to show that they paid any rent to Kamla Nathu Tepan from the year 1984 to 1986. Defendant No.2 admitted that the rent was not paid by him for the first five years.

13. In paragraph-30, the Appellate Court considered the rent receipts produced at Exhibits-2 to 14 and observed that

they are suspicious. There are eraser and overwriting in dates, months and year of rent receipts. The rent receipts not bear signature/thumb impression of Kamla Nathu Tepan. The Appellate Court ultimately held that the defendants failed to establish about creation of tenancy either by Nathu Tepan or his wife Kamla Nathu Tepan. The Appellate Court also considered the statement dated 14.12.1978 referred in P.R. Card at Exhibit-A collectively. That document shows that C.F. D'mello was the monthly tenant and said room was given to him by Radhabai.

14. In paragraph-33, the Appellate Court observed that it has been proved that the demand notice dated 11.4.1986 at Exhibit-B collectively was issued to C.F. D'mello under Section 12(2) of the Act and he was called upon by Radhabai to pay the arrears of rent pertaining to period since January, 1976 to March, 1986. The notice returned with endorsement 'not found' and the notice which was sent by UPC was not returned back and, therefore, under Section 27 of the General Clauses Act, there is presumption of due service of notice. At the time of demand notice and on the date of Suit, C.F. D'mello was alive. The Appellate Court thereafter held that despite service of

demand notice the tenant was not ready and willing to pay the rent of suit premises and hence no protection under the Act can be granted to them.

15. After considering the material on record, I do not find that the Appellate Court has committed any error. The trial Court did not consider the fact that Radhabai was the owner of two rooms out of five rooms. Out of two rooms, the suit premises, namely, room No.1 was occupied by C.F. D'mello as a tenant and other room was occupied by her. The learned trial Judge totally mis-directed in that regard and observed that in view of admission of PW-1, no other proof was required. As against this, the Appellate Court has correctly reappreciated the evidence on record. Defendants No.2 and 3 were not in a position to demonstrate that the findings recorded by the Appellate Court are perverse being based on no evidence or that they are contrary to evidence on record. Merely because another view is possible on the basis of evidence on record, that itself is no ground for invocation of powers under Section 115 of C.P.C.. Hence, Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall

be no order as to costs.

16. At this stage, Mr. Dani orally applies for stay of this order for a period of twelve weeks from today. He further states that the applicants and all adult family members residing with them are ready and willing to give usual undertaking within three weeks from today. The learned Counsel for the respondent opposes said prayer.

17. 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 twelve weeks from today subject to the applicants and all adult members residing with them giving usual undertaking to this Court within three 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; and (iv) that in case the applicants are unable to obtain suitable orders within twelve weeks from today from

the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

18. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of 12 weeks from today, subject to the applicants filing undertaking in the aforesaid terms within three weeks from today, with copy in advance to the other side. In case the applicants do not file undertaking in the above terms within three weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for compliance after four weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)