

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.1129 OF 2014

Jayashree Ravindra Shimpi ... Applicant
Vs.
Noorjaha Begum Bashir Ahmad and others ... Respondents

Mr. N. R. Bubna for Applicant.
Mr. Mahendra N. Sandhyanshiv for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JUNE 21, 2016

P.C. :

Heard Mr. Bubna, learned Counsel for applicant and Mr. Sandhyanshiv, learned Counsel for respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as defendant No.4, has challenged the judgment and decree dated 31.01.2003 passed by the learned Joint Civil Judge, Junior Division, Malegaon in R.C.S.No.464 of 1992 as also the judgment and decree dated 28.07.2014 passed by the Additional District Judge-1, Malegaon in Regular Civil Appeal No.33 of 2003. The learned trial Judge decreed the Suit filed by the respondent No.1, hereinafter referred to as plaintiff, under Sections 12, 13(1)(e), 13(1)(c) and 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). The learned trial Judge also held that greater hardship will be caused to the plaintiff by refusing to pass the decree. The learned District Judge passed the decree under Sections 12, 13(1)(e), 13(1)(c) and 13(1)(g) of the Act. It is against these orders, defendant No.4 has instituted the present Application under Section 115 of C.P.C.

3. In support of this application, Mr. Bubna raised following contentions:

(a) Plaintiff came with the case that open space and the structure admeasuring 9' x 10' in City Survey No.1184-B (old survey No.296) situate within municipal limits of Malegaon Municipal Corporation, Taluka Malegaon, District Nashik (for short 'suit premises') was let out to one Sarubai, daughter of Vedu Bhil by executing Leave and Licence Agreement dated 16.04.1960. Plaintiff contended that in view of amendment to the Act, Sarubai became tenant. Defendant No.1 was occupying the suit premises along with the said Sarubai and consequently, he became the tenant. Plaintiff alleged that defendant No.1 had carried out unauthorized construction by encroaching open area admeasuring 21' x 13'. He submitted that plaintiff did not seek possession of the encroached portion. Accordingly, valuation was also not made and no prayer was made for possession of the encroached portion. While decreeing the Suit, the learned trial Judge directed defendants No.1(A), 3 and 4 to handover possession of the suit premises along with the encroached portion and structure on it as shown in annexure 'A' attached to the plaint within two months from the date of the order jointly and severally. He submitted that clause (ii) of the operative part of the order cannot be sustained and as such, is liable to be set aside. The learned District Judge did not modify clause (ii) of the operative part of the order of the trial Court and dismissed the appeal.

(b) Plaintiff came with the case that premises were let out to Sarubai. Defendant No.1 became tenant. Defendant No.1, in turn, unlawfully sublet the suit premises to defendants No.2 and 3. Defendant No.4 (applicant herein) is residing along with defendants No.2 and 3 in the suit premises. He submitted that basically, the findings recorded by the

Courts below that Sarubai became tenant and that defendant No.4 thereafter was inducted in the suit premises is based upon conjectures and surmises. The said finding is not borne out from the evidence on record. Merely because, Sarubai continued in possession on the basis of Leave and Licence Agreement dated 16.04.1960, that will not confer on her status of protected licensee / deemed tenant.

(c) Defendant No.1 did not contest the Suit. Suit was abated qua defendant No.2. Defendant No.3 filed written statement and did not participate in the Suit. In other words, defendants No.1 to 3 did not contest the Suit. Defendant No.4 contested the Suit. The Courts below, however, held that defendant No.1 was a tenant. Defendant No.4 has no locus. Plaintiff did not enter into witness box and examined Constituted Attorney who had no personal knowledge. In other words, defendant No.4 was not given opportunity to contest the Suit and in fact, the Suit was decreed on the premise that defendant No.4 has no right, title and interest in the suit premises.

(d) If it is held that defendant No.4 is not a tenant of the suit premises, and consequently, is an encroacher, the rent Court will have no jurisdiction to entertain and try the Suit.

4. Mr. Bubna has taken me through the impugned orders and submitted that the Application requires consideration.

5. On the other hand, Mr. Sandhyanshiv supported the impugned orders. He invited my attention to the description of the suit property given in paragraph 1 as also paragraph 3 of the plaint and submitted that plaintiff has sought eviction of defendants from the open space as also construction admeasuring 9' x 10'. As far as clause (ii) of the operative

part of the trial Court's order is concerned, he submitted that plaintiff has sought possession of even encroached portion.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Mr. Bubna submitted that after the expiry of licence period, Sarubai could not be treated as a licensee / tenant of the suit premises. The findings recorded by the Courts below to that effect are based on surmises and conjectures and not on evidence on record. It is not possible to accept this submission for more than one reason. The learned trial Judge has considered this aspect in paragraph 16 of the judgment. P.W.1 produced Leave and Licence Agreement dated 16.04.1960 at exhibit-86 and tax assessment extract at exhibit-89. The learned trial Judge observed that though the period stipulated in the Leave and Licence Agreement expired and after the expiry of the Leave and Licence Agreement, there is no fresh Leave and Licence Agreement between Sarubai and Papamiya, however, Sarubai was allowed to continue to reside in the suit premises. This shows that plaintiff accepted Sarubai as a tenant of the suit premises. She was in the suit premises as on 01.02.1973 and therefore, in view of Section 15A of the Act, the licensee on 01.02.1973 deemed to have become tenant of the premises in their possession. The learned trial Judge, therefore, held that Sarubai has become tenant of the suit premises and died in the year 1984. The learned trial Judge also considered exhibit-23 i.e. extract of death register where address of defendant No.1 was shown that of the suit premises. Defendant No.1 died on 01.02.1994. In paragraph 18, the learned trial Judge also noted that defendant No.1 was residing with Sarubai in the suit premises and therefore, he became tenant on the same terms and conditions. Though defendants No.3 and 4 denied that defendant No.1 was the tenant of the suit premises, they did not adduce

any evidence. Thus, plaintiff has established that Sarubai became tenant in view of Section 15-A of the Act and from the extract of death register at exhibit-23, it is clear that defendant No.1 expired on 01.02.1994 in the suit premises, and therefore, defendant No.1 became tenant as he was residing with Sarubai. As against this, defendant No.4 did not adduce any evidence to indicate that after the expiry of Leave and Licence Agreement dated 16.04.1960, nobody other than Sarubai and for that matter, defendant No.1 was residing in the suit premises.

7. As far as the appellate Court is concerned, in paragraph 23, the learned District Judge held that defendants No.3 and 4 have not adduced any evidence to prove that defendant No.1 had any residential house / place in Malegaon. They did not dispute that defendant No.1 died in Malegaon. Death extract revealed that he expired on 01.02.1994 in the suit premises. Not only that, the suit notice / suit summons issued to him on the address “City Survey No.1184-B, Mosam Pool Zopad Patti, Sangameshwar, Malegaon” was duly served on him.

8. In paragraph 24, the learned District Judge dealt with the issue of default and ultimately held that defendant No.1 and after his death, his legal representative defendant No.1A are the willful defaulters in payment of rent. In paragraph 37, the learned District Judge dealt with the issue of jurisdiction and observed that the said issue was decided by the learned trial Judge on 27.01.1998, which order was upheld by the learned District Judge by passing order on 04.02.1999. The learned District Judge decreed the Suit under Sections 12, 13(1)(e), 13(1)(c) and 13(1)(g) of the Act. Thus, the Courts below have concurrently decreed the Suit instituted by the plaintiff.

9. In view thereof, I do not find any merit in the submission advanced by Mr. Bubna that the Courts below recorded findings on the

basis of conjectures and surmises. The findings recorded by the Courts below are based upon the evidence.

10. Mr. Bubna submitted that the Courts below were not justified in directing handing over possession of the encroached portion. As noted earlier, after perusing the description of the suit premises in paragraph 1 of the plaint, the Courts below, and in particular the trial Court could not have directed handing over possession of the encroached portion and structure on it as shown in annexure 'A' attached to the plaint. Mr. Sandhyanshiv states that Mr. Farooq Shaikh, son of respondent No.1-plaintiff is present in the Court. Upon taking instructions from him, he states that not only the suit premises but the construction on the encroached portion is demolished by the Municipal Corporation of Malegaon. Statement made by Mr. Sandhyanshiv, on instructions, is recorded.

11. After considering the submissions advanced by the learned Counsel for the parties, I do not find that the Courts below committed any error in decreeing the Suit. Defendant No.4 was not in a position to demonstrate that the findings recorded by the Courts below are based on no evidence or that they are contrary to the evidence on record. Defendant No.4 was also not in a position to demonstrate that on the basis of evidence on record, no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. Merely because on the basis of evidence on record, another view is possible that itself is no ground for invocation of powers under Section 115 of C.P.C. No case is made out by the defendant No.4 for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed.

(R. G. KETKAR, J.)