

IN THE HIGH Court OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.714 OF 2015

Shekhar Narayana Shetty ... Applicant
Vs.
Madhavlal Narayanlal Pittie and others ... Respondents

Mr. Girish S. Godbole, Senior Advocate i/b. Ms Kavita A. Shah for Applicant.
Mr. Zal Andhyarujina a/w. Mr. B. N. Shukla i/b. B. N. Shukla & Co. for
Respondent No.1.

CORAM : R. G. KETKAR, J.
Reserved on : AUGUST 10, 2016
Pronounced on: AUGUST 22, 2016

P.C. :

Heard Mr. Godbole, learned Senior Counsel for applicant and
Mr. Andhyarujina, 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 has challenged the
following orders:

a. judgment and decree dated 10.08.2006 passed by the
learned Judge, presiding over Court Room No.21 of the Court of Small
Causes at Mumbai in R.A.E. Suit No.1569 of 1998;

b. judgment and order dated 07.05.2014 passed by the
Appellate Bench of the Small Causes Court at Bombay below exhibit-43
in Appeal No.565 of 2006;

c. judgment and order dated 08.09.2015 passed by the
Appellate Bench of the Small Causes Court at Bombay below exhibit-75
in Appeal No.565 of 2006;

d. judgment and order dated 08.09.2015 passed by the
Appellate Bench of the Small Causes Court at Bombay below exhibit-76
in Appeal No.565 of 2006;

e. judgment and decree dated 16.09.2015 passed by the Appellate Bench of the Small Causes Court at Bombay in Appeal No.565 of 2006.

3. The learned trial Judge decreed the Suit under Sections 13(1)(k), 13(1)(b) and 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). The appellate Court dismissed the Appeal and passed decree only under Section 13(1)(e) of the Act. The facts and circumstances, giving rise to filing of this Application, briefly stated, are as under:

4. Respondent No.1 - Madhavlal Narayanlal Pittie, hereinafter referred to as 'plaintiff', has instituted Suit against defendant No.1 - Vijay Simon Pinto, since deceased, defendant No.1-A - Owen Pinto and Wilma Louis and defendant No.2 - Shekhar Narayan Shetty (applicant herein). Defendant No.1 Vijay Simon Pinto died leaving behind - (i) Margarete (widow), (ii) Maleolm (son) and (iii) Melroy (son). Applicant shall hereinafter be referred to as 'defendant No.2'. Respondents No.2 to 5 shall hereinafter be collectively referred to as 'defendant No.1'.

5. Plaintiff instituted Suit inter alia contending that by order dated 21.07.1967 passed by this Court in Suit No.224 of 1961 filed on the Original Side, he was appointed as Receiver in respect of property known as 'Shivlal Motilal Mansion / Compound' comprising of several buildings bearing Municipal House No.1 to 23 at Dr. Bhadkamkar Marg and 299-307 at Bellasis Road situate at the junction of Dr. Bhadkamkar Marg (formerly known as 'Lamington Road) and Bellasis Road, Mumbai Central, Mumbai - 400 008 with all powers under Order XL Rule 1 of C.P.C. among other properties. Plaintiff contended that Simon Pinto was the tenant in respect of room No.D of flat No.E-22 on 3rd floor of

building No.303, Shivilal Motilal Mansion, Bellasis Road, Mumbai - 400 008 (for short 'suit premises'). Defendant No.1 and 1-A have unlawfully inducted defendant No.2 in the suit premises. Defendant No.2 is the unlawful occupant and was joined as a party for obtaining complete relief. Plaintiff has, therefore, sought decree on the ground of unlawful subletting as contemplated by Section 13(1)(e) of the Act. Plaintiff further alleged that suit premises was let out for residential purpose. Defendant No.2 is using the suit premises to accommodate the staff of various hotels run by him. Plaintiff further contended that defendants have carried out several unauthorized and illegal additions and alterations of permanent nature in the suit premises without obtaining permission of plaintiff as also Municipal Corporation of Greater Mumbai (for short 'Corporation'). On these and among other grounds, plaintiff sought for possession of the suit premises as also prayed for interim reliefs. The Suit was declared by Gokul Birdichand Sharma, Constituted Attorney of plaintiff on 15.10.1998. It was redeclared on solemn affirmation by said Sharma on 22.10.2002.

6. Defendant No.2 filed written statement on or about 04.09.2013 inter alia contending that plaint is not declared, affirmed and signed by the alleged Constituted Attorney of plaintiff, who is not concerned and is not aware of facts of the Suit. Suit is also barred by limitation. Defendant No.2 contended that he is not aware that Simon Pinto was a tenant in respect of the suit premises. He contended that he was inducted in the suit premises with an implied and express consent, permission, accord and approval of the plaintiff. He denied that suit premises was unlawfully transferred and that he is an unlawful occupant and consequently plaintiff is entitled to decree under Section 13(1)(e) of the Act. As far as the other grounds are concerned, they were also denied.

7. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues on 22.06.2004. Parties led oral as well as documentary evidence. After considering the evidence on record, by judgment and decree dated 10.08.2006, the learned trial Judge decreed the Suit, as indicated earlier. Aggrieved by that decision, defendant No.2 preferred Appeal before the Appellate Bench of the Small Causes Court. During the pendency of the Appeal, plaintiff filed application at exhibit-43 seeking permission to verify / declare the Suit / plaint to cure the irregularities in the plaint. By order dated 07.05.2014, the appellate Bench allowed the application in terms of prayer clause (a). On the same day i.e. on 07.05.2014, appeal was decided by the Appellate Bench comprising of Shri S. B. Gabhane, Additional Chief Judge and Shri H. M. Bhosale, Judge. Shri Gabhane allowed the Appeal. Shri Bhosale dismissed the Appeal. The matter was thereafter referred to the third Judge Shri Yogesh Rane, Additional Chief Judge. By order dated 16.12.2014, the third Judge dismissed the Appeal.

8. It is against this decision, C.R.A. No.90 of 2015 was preferred in this Court. By order dated 05.05.2015, C.R.A. was disposed of by directing the learned Chief Judge of Small Causes Court to assign the appeal for denovo consideration. Plaintiff took out application exhibit-75 praying for permission to verify the plaint by condoning the delay in moving the application. By order dated 08.09.2015, the appellate Court allowed the application and permitted the plaintiff to sign and verify pleadings as sought for. On the same day i.e. on 08.09.2015, application filed by the plaintiff at exhibit-76 for production of documents was allowed. By judgment and decree dated 16.06.2015, the appellate Court dismissed the Appeal. It is against the orders dated 10.08.2006 passed by the trial Court, 08.09.2015 below exhibits 75 and 76 as also final judgment of the appellate Court dated 16.09.2015, defendant No.2 has

instituted the present Application under Section 115 of C.P.C.

9. In support of this Application, Mr. Godbole strenuously contended that plaint was not signed and verified by the plaintiff. Plaintiff was appointed as Court Receiver by this Court. He could not have delegated power by appointing Gokul B. Sharma as his Constituted Attorney. Plaintiff had given power of attorney in favour of Gokul Sharma on 21.04.1995. He had verified the plaint on 15.10.1998 and redeclared the plaint on 22.10.2002. He submitted that Gokul Sharma had no personal knowledge in respect of the transactions that took place prior to 21.04.1995 being the date on which plaintiff gave power of attorney to him. He further submitted that Articles 66 and 67 of the Limitation Act, 1963 prescribe period of 12 years when the forfeiture is incurred or the condition is broken or when the tenancy is determined, respectively. Plaintiff has not deliberately mentioned the exact date when the cause of action accrued. He also submitted that the appellate Court was not justified in allowing the applications exhibit-43, 75 and 76 thereby permitting the plaintiff himself to verify and sign the plaint as also produce documents. He submitted that this is not a case of mere irregularity as held by the appellate Court but it is a case of illegality which goes to the root of the matter as also the very maintainability of the Suit.

10. Mr. Godbole submitted that defendant No.2 specifically came with the case that he was inducted in the suit premises with the implied and express consent, permission, accord and approval of the plaintiff. During the course of evidence of defendant No.2, it has come on record that he was inducted in the year 1985 in the suit premises. As plaintiff had given Power of Attorney to Gokul Sharma on 21.04.1995, he had no knowledge and also was not competent to depose in that regard. He

further submitted that plaintiff did not enter into witness box to substantiate his case. The findings recorded by the Courts below are perverse as the Courts below relied upon the list of occupants / tenants prepared by the Executive Engineer, Mumbai Building Repairs & Reconstruction Board, Mumbai. In respect of the suit premises, occupier was shown as Walter Louis and not defendant No.2 herein. The list was allegedly prepared by Architect Mr. V. L. Mankar in respect of structure repair work undertaken in the year 1988.

11. Mr. Godbole relied upon the following decisions -

a. **1963 ALL WR (HC) 696** to contend that Receiver is not entitled to delegate to another any of the duties entrusted to him by the Court;

b. **(1910) 5 Low Bur Rul 213 (215) (FB)** to contend that a Receiver cannot assign to another for valuable consideration any of his rights as Receiver;

c. ***Ratnasami Pillai Vs. Sabapathy Pillai*, AIR 1925 Mad. 318** to contend that the Receiver is an officer of the Court and whatever power he exercises are delegated powers of the Court which the Court expressly gives him. He has no powers except what the Court grants him;

d. ***Harinagar Sugar Mills Limited Vs. M. W. Pradhan*, AIR 1966 SC 1707**, and in particular paragraph 15 to contend that a Receiver appointed by the Court has no estate or interest himself and the scope of his power is defined by the provisions of Order XL of C.P.C. and the specific orders made by the Court thereunder. He is frequently spoken to as the “hand of the Court”.

12. On merits, Mr. Godbole submitted that plaintiff has failed to establish the ground of unlawful subletting. As the findings recorded by

the Courts below are perverse while accepting plaintiff's case of unlawful subletting under Section 13(1)(e) of the Act, the impugned orders deserve to be interfered with under Section 115 of C.P.C.

13. On the other hand, Mr. Andhyarujina has supported impugned orders. He has invited my attention to the order dated 21.07.1967 passed by this Court in Suit No.224 of 1961 appointing plaintiff as a Court Receiver. Plaintiff has instituted the Suit for recovery of possession of the suit premises. That order permitted plaintiff to take all measures for management of the properties including appointment of staff, carrying out repairs and / or renovations, taking legal advice and legal steps, instituting proceedings for recovery of rent, compensation, possession etc. In any case, during the pendency of the appeal, plaintiff filed applications exhibits-43 and 75 seeking permission to verify and sign the plaint. Those applications were allowed by the appellate Court. He submitted that though earlier, Gokul Sharma, as a Constituted Attorney, has verified the plaint, at the highest, that can be considered as an irregularity. The said irregularity is removed by filing applications exhibits-43 and 75.

14. Mr. Andhyarujina further submitted that defendant No.2 has admitted his possession in the suit premises. Defendant No.2 specifically came with the case that with an implied and express consent, permission, accord and approval of the plaintiff, he was inducted in the suit premises in the year 1985. Once plaintiff has established occupation of defendant No.2 in the suit premises, burden is shifted on him to establish that he is lawfully inducted in the suit premises. The Courts below have considered this aspect and have concurrently found that defendant No.2 did not establish that he was lawfully inducted in the suit premises. On the other hand, he was the

unlawful subtenant in the suit premises. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

15. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute and rather is a matter of record that plaintiff was appointed as a Court Receiver in respect of the suit premises among other properties. The relevant part of the order dated 21.07.1967 appointing plaintiff as Court Receiver reads thus,

“AND THIS Court BY AND WITH SUCH CONSENT DOTH FURTHER ORDER that without prejudice to the generality of powers conferred hereinabove the properties described in the Schedule hereunder written AND THIS Court BY AND WITH SUCH CONSENT DOTH FURTHER ORDER that without prejudice to the generality of powers conferred hereinabove the 4th Defendant as Receiver be and he is hereby inter alia empowered to take all measures which he deems fit for the management of the said properties including the appointment of staff, carrying out repairs and / or renovations, taking legal advice and legal steps, instituting proceedings for recovery of rent, compensation, possession etc. and / or actions and other proceedings touching the said properties and incurring necessary miscellaneous expenses in respect of the said properties.”

16. Perusal of the above extracted portion shows that without prejudice to the generality of powers conferred on the plaintiff as Court Receiver, he was empowered to take all measures which he deems fit for the management of the properties including appointment of staff, carrying out repairs and / or renovations, taking legal advice and legal steps, instituting proceedings for recovery of rent, compensation, possession, etc. Order XL, Rule 1(1)(d) reads thus,

“1. Appointment of receivers.-(1) Where it appears to the Court to be just and convenient, the Court may by order-

(a) to (c) ...

(d) confer upon the Receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and

disposal of such rents and profits, **and the execution of documents as the owner himself has**, or such of those powers as the Court thinks fit.

(emphasis supplied)”

17. Perusal of order dated 21.07.1967 passed by this Court in Suit No.224 of 1961 as also paragraph 5 of the written statement filed by the defendant No.2 shows that defendant No.2 admitted that plaintiff is one of the co-owners of the suit property. In view of the order dated 21.07.1967 passed by this Court as also Order XL, Rule 1(1)(d) of C.P.C., extracted hereinabove, plaintiff being the co-owner is entitled to execute Power of Attorney. I, therefore, do not find merit in the submission made by Mr. Godbole that Court Receiver being agent of the Court, cannot delegate his powers. In view of the language employed in the order dated 21.07.1967 as also Order XL, Rule 1(1)(d), I do not find any merit in the contention of Mr. Godbole that plaintiff could not have delegated his power by giving Power of Attorney to Gokul Sharma and, therefore, Suit is not maintainable. The reliance placed by Mr. Godbole on the decisions referred in paragraph 10 does not advance case of the defendant No.2.

18. As far as the verification and redeclaration of plaint by Gokul Sharma as Constituted Attorney of plaint is concerned, equally, I do not find any merit in this submission. As noted earlier, during the pendency of the appeal, plaintiff took out application exhibit-43 seeking permission to sign and verify the plaint. That application was allowed on 07.05.2014. On the same day, appeal was decided as indicated earlier. The matter was referred to the third Judge, who decided the Appeal on 16.12.2014. C.R.A.No.90 of 2015 was disposed of by this Court on 05.05.2015 for deciding the appeal *denovo*. Plaintiff, therefore, took out application exhibit-75 once again praying for permission to sign and verify the plaint. That was allowed on

08.09.2015. Thus, assuming there was defect, if any, in signing and verification of the plaint, that was also cured by the plaintiff. I, therefore, do not find any merit that the orders dated 07.05.2014 below exhibit-43 and 08.09.2015 below exhibit-75 are liable to be set aside.

19. Mr. Godbole submitted that plaintiff did not enter into witness box. Gokul Sharma, Constituted Attorney of plaintiff, was examined as P.W.1. Power of Attorney was given by the plaintiff to Gokul Sharma on 21.04.1995. He had, therefore, no knowledge about what transpired prior to 1995. In this regard, it is material to note that plaintiff specifically alleged that defendant No.2 was unlawfully inducted in the suit premises. In paragraph 7, defendant No.2 contended that he was inducted into the suit premises with an implied and express consent, permission, accord and approval of the plaintiff. In paragraph 6 of the affidavit of examination-in-chief of the defendant No.2, he stated that on or about December, 1985, Mr. Shantilal Shah, Manager and Constituted Attorney of plaintiff, had personally let out the suit premises to him with the implied and express consent, permission, accord and approval of the plaintiff. He further stated that plaintiff was personally aware about possession of the suit premises by him since the year 1985. Thus, the burden is on defendant to establish the consent of the plaintiff. This aspect is considered by the Courts below. In particular, the appellate Court has considered this aspect from paragraphs 30 to 40. The appellate Court noted that once the possession of the third party is proved, the initial burden on the landlord would stand discharged. As defendant No.2 has admitted his possession, burden is on the defendant No.2 to prove the nature of his lawful possession. In paragraphs 34 and 35, the appellate Court has considered the evidence of plaintiff and defendant No.2's witnesses and disbelieved the case made by the defendant No.2 that he was inducted by Shantilal Shah in the year 1985.

Defendant No.2 also failed to establish the consent of the plaintiff for his induction. Even otherwise, in my opinion, plaintiff or Shantilal Shah could not have given express or implied consent for inducting defendant No.2. As noted earlier, by order dated 21.07.1967 in Suit No.224 of 1967, plaintiff was appointed as the Court Receiver. The relevant portion of that order reads thus,

“... AND THIS Court BY AND WITH SUCH CONSENT DOTH HEREBY DECLARE that the 4th Defendant (plaintiff herein) as such Receiver through his said Attorneys hereby undertake to this Hon'ble Court not to encumber or dispose of any of the said properties until all the liabilities incurred by the Court Receiver, High Court, Bombay as such Receiver are discharged and in the meantime agrees to indemnify and keep indemnified the Court Receiver, High Court, Bombay against all such liabilities which may have been incurred by the Court Receiver, High Court, Bombay as such Receiver and of the said properties of which he has been appointed the Receiver provided that such indemnity shall not extend to any liability to pay save and except out of the said properties described in the Schedule hereunder written ...”

20. Defendant No.2 has not brought on record any material to indicate that all the liabilities incurred by the Court Receiver, High Court, Bombay have been discharged. In view of the order passed by this Court, extracted hereinabove, plaintiff could not have inducted defendant No.2. I, therefore, do not find any merit in the submission of Mr. Godbole that defendant No.2 was inducted with the implied and express consent, permission, accord and approval of the plaintiff.

21. As far as the contention of Mr. Godbole that Suit is barred by limitation is concerned, I do not find any merit in this submission as well. The Suit is instituted in the year 1998. The Courts below have found that till the year 1991, the legal representatives of original tenant Simon Pinto were occupying the suit premises. Under Articles 66 and

67 of the Limitation Act, period of 12 years is prescribed. In any case, as the Suit is instituted in the year 1998 and the legal representatives of original tenant Simon Pinto were occupying the suit premises till the year 1991, it cannot be said that the Suit is barred by limitation.

22. After considering the material on record, I do not find that the Courts below committed any error in passing the decree under Section 13(1)(e) of the Act. Defendant No.2 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.2 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. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed.

23. At this stage, Ms Shah orally applies for stay of this order for a period of twelve weeks from today. She states that the applicant is in possession of the suit premises and nobody else is in possession. The applicant has neither created third party interest nor parted with possession and the applicant will hereafter neither create third party interest nor part with possession. She assures that the applicant and all adult family members using/residing in the suit premises will give usual undertakings in this Court within two weeks from today with advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest nor

parted with possession;

(iii) that they will hereafter neither create third party interest nor part with possession;

(iv) that they will pay arrears of rent within 2 weeks from today to the respondents-plaintiffs;

(v) that they will not apply for further extension of time;

(vi) that in case they are unable to obtain suitable orders from higher Court within 12 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondents.

24. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of twelve weeks from today subject to the applicant and all adult family members using/residing in the suit premises filing undertakings in the aforesaid terms within two weeks from today and serving copy in advance to other side. It is made clear that in case arrears upto and inclusive of 12 weeks from today are not paid as also the undertaking in the aforesaid terms is not filed within two weeks from today, the interim order shall stand vacated without further reference to the Court.

25. List the Application for reporting compliance after three weeks.

(R. G. KETKAR, J.)

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