

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.730 OF 2015

Mr. Khan Asad Asif

.. Applicant

Versus

Mr. Vijay Laxman Patil and others

.. Respondents

Mr. Vishal Kanade i/by Mr. P. J. Ramchandani, for the Applicant.

Mr. A. M. Ranpise i/by Bhairavi Ranpise, for the Respondents.

CORAM : R.M. SAVANT, J.

DATE : 12th FEBRUARY 2016

PC.

1. The revisionary jurisdiction of this Court is invoked against the order dated 11.09.2015 passed by the Appellate Bench of the Small Causes Court, Mumbai, by which the Appeal in question being Appeal No.443 of 2010 came to be allowed and resultantly, the judgment and order dated 28.01.2010 in RAD Suit No.707 of 2006 came to be modified to the extent mentioned in the operative part of the impugned order.

2. The Applicant herein is the original Defendant No.4 and the Respondent Nos.1 to 3 herein are the original Plaintiffs in the suit in question being RAD Suit No.707 of 2006. The parties would be referred to as per their nomenclature in the Trial Court. The Plaintiffs had filed the suit in question for declaration that they are tenants in respect of the suit

premises being Shop No.01, on the ground floor of the building No.246, situated at Maulana Azad Road, formerly known as Ripon Road, Mumbai-400 008. The Plaintiffs are the heirs of one Smt. Kamalabai Patil who was the tenant in respect of the suit premises. The Defendant Nos.1 and 2 were the licensees of the said Smt. Kamalabai Patil and it seems that the said Defendants had surrendered the tenancy to the Defendant No.3 who is the original landlord. It seems that the Defendant No.3 sold the property wherein the suit premises are situated to the Defendant No.6. It is the Defendant No.6 who has inducted the Defendant No.4 in the suit premises by virtue of a tenancy agreement executed between two. It is the case of the Plaintiffs that it is sometime in the year 2005 that they have realized that the Defendant Nos.1 and 2 had surrendered the premises and it is now the Defendant No.4 who is in occupation and possession. It is on the said basis that the Plaintiffs filed the suit in question for declaration and the relief sought. The stand taken by the Defendant No.4 was that the Small Causes Court did not have the jurisdiction as there was no privity of contract between the Defendant No.4 and the Plaintiffs and the privity of contract is between Defendant No.4 and Defendant No.6 landlord. The Trial Court framed issues amongst which was the issue of limitation, as also whether the Plaintiffs are the legal heirs and representatives of the said Smt. Kamalabai Patil. The Trial Court has also framed the issue as to

whether the Defendant Nos.1, 2 & 4 have become direct tenants in respect of the suit premises. In so far as the issue as to whether the Plaintiffs are the legal heirs and representatives of the deceased tenant are concerned, the Trial Court ruled in favour of the Plaintiffs. The Trial Court also issued the declaration that they are the tenants in respect of the suit premises. The Trial Court also held that the suit filed was within limitation. The Trial Court answered the issue in so far as whether the Defendant Nos.1, 2 & 4 have become direct tenants against the said Defendants. In so far as the issue of limitation is concerned, the Trial Court held that the cause of action for filing the suit arose in the year 2005 when the Plaintiffs acquired knowledge that the Defendant No.4 was inducted into the suit premises by the Defendant No.6 and therefore, the suit filed in the year 2006 was within limitation. The Trial Court however denied the relief of possession on the ground that it does not have the jurisdiction to pass an order of possession by dispossessing the Defendant No.4 as there was no privity of contract between the Plaintiffs and the Defendant No.4 and as such the Defendant No.4 was therefore a trespasser who would have to be proceeded with before the appropriate Court. The Trial Court therefore partly decreed the suit by issuing the declaration of tenancy in favour of the Plaintiffs, however it did not grant other reliefs sought by the Plaintiffs.

3. The Plaintiffs aggrieved by the part decreeing of the suit by the Trial Court by judgment and order dated 28.01.2010 filed Appeal No.443 of 2010 before the Appellate Bench of the Small Causes Court. The Appellate Bench of the Small Causes Court reversed the finding of the Trial Court in so far as the entitlement of the Plaintiffs for possession is concerned. The Appellate Bench of the Small Causes Court held that the Trial Court had erred in observing that it did not have jurisdiction to pass a decree of possession in view of the fact that it is the Small Causes Court either under Section 28 of the old Bombay Rent Act or under Section 33 of the Maharashtra Rent Control Act, which has the jurisdiction to try the issue between a landlord and tenant. The Appellate Bench of the Small Causes Court held that the issue of possession of the tenanted premises is incidental or ancillary to the issue of declaration which was sought by the Plaintiffs. In so far as the issue of limitation is concerned, the Trial Court refused to entertain the submissions made on behalf of the original Defendant No.4 challenging the finding of the Trial Court on the said issue in the absence of any cross objections filed by the Defendant No.4. The Appellate Bench of the Small Causes Court accordingly has modified the decree passed by the Trial Court and has in turn passed the decree of possession and directed the Defendant No.4 to hand over possession. The Appellate Bench of the Small Causes Court has also granted mesne profits

to the Plaintiffs.

4 . The Learned Counsel appearing on behalf of the Civil Revision Applicant Mr. Vishal Kanade would seek to reiterate the case of the Applicant before the Appellate Bench of the Small Cause Court in so far as the issue of limitation is concerned. The Learned Counsel would contend that even in the absence of Appeal or cross objection filed, the Applicant was entitled to assail the findings of the Trial Court on the said issue of limitation. The Learned Counsel seeks to place reliance on Order 41 Rule 22 and 33 to buttress the said contention. In so far as the decree for possession which has been passed by the Appellate Bench of the Small Causes Court, the Learned Counsel would contend that the decree of possession could not have been passed by the Appellate Bench of the Small Causes Court having regard to the fact that there was no privity of contract between the Defendant No.4 and the Plaintiffs. In my view, it is not possible to accept the said contentions of the Learned Counsel. In so far as the first contention is concerned, a reading of Order 41 Rule 22 makes it clear that only if cross objections are filed that a challenge to the finding recorded by the Trial Court could be entertained. In so far as Rule 33 of Order 41 is concerned, it sets out the powers and jurisdiction of the Appellate Court and the said provision cannot be called in aid to contend that a finding recorded by the Trial Court can be assailed in the Appellate

Court without there being any cross objection. In so far as the decree of possession is concerned, in my view having regard to the scope of Section 28 of the old Act as also Section 33 of the present Act and having regard to the judgment of a Learned Single Judge of this Court reported in **AIR. 2003 Bombay 85** in the matter of **Sutar Pukraj Somtiji Vs. Mrs. Yellubai Mallappa Wagle and another**, in which case the facts were almost identical as in the present case, the decree of possession passed by the Appellate Court cannot be faulted with. Hence, no case for exercise of the revisionary jurisdiction of this Court is made out. The Civil Revision Application is accordingly dismissed.

5. At this stage, the Learned Counsel appearing for the Applicant prays for continuation of the ad-interim order dated 11.12.2015 passed in the above Petition for sometime so as to enable the Applicant to take appropriate steps. In the facts and circumstances of the case, the said order is continued for a period of eight weeks from date on the usual undertaking being filed by the Applicant in this Court within two weeks from date. If the undertaking is not filed within the time stipulated by the instant order, the Respondent Nos.1 to 3 would then be free to execute the decree in accordance with law.

[R.M. SAVANT, J]