

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 81 OF 2016

Manohar Krishnarao Mullerpatan
(deleted) M/s. R. & G. Mullerpatan & Co. ...Applicant

Versus

Hiralal H. Shah and Ors ...Respondents

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Mr.P.S. Dani, Senior Advocate i/b. Jui Nerurkar, Advocate for the applicant.

Mr.R.S. Apte, Senior Advocate a/w. Dinesh S. Chanboowala, Advocate for respondent No.5.

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CORAM : R. G. KETKAR, J.

DATE : 07th OCTOBER, 2016

P.C.

1. Heard Mr. P.S. Dani, learned Senior Counsel for the applicant and Mr. R.S. Apte, learned Senior Counsel for respondent No.5, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant hereinafter referred to as the 'plaintiff', has challenged the judgment and decree dated 27.9.2007 passed by the learned Judge, presiding over Court Room No.7 of the Court of Small Causes at Bombay in L.E. & C. Suit No.76/88 of 1982 as also the judgment and decree dated 14.9.2015 passed by the Appellate Bench of Small Causes Court at Bombay in Appeal No.675 of 2007. By these

orders, the Courts below have dismissed the suit instituted by the plaintiff for recovery of possession of plot of land and premises being Plot No.109-C of the Sion Matunga (East) Estate of the Municipal Corporation of Greater Bombay, bearing Cadestral Survey No.409/6 (part) of Sion Division, situate at opposite Jawaharlal Nehru Park, Sion (East), Bombay – 400 022 (for short, 'suit property') as also for decree directing the defendants to pay to the plaintiff Rs.58,768.15 being the arrears of statutory rent or compensation and arrears of extra ground rent.

3. The plaintiff has instituted the suit against defendant No.1 Hiralal H. Shah, defendant No.2 M/s. Niranjani Building Corporation, defendant No.3 Laxman Chawla, defendant No.4 Kaushalya Laxman Chawla and defendant No.5 Nirmal Co-operative Industrial Estate Society Ltd. (for short, 'society'). The plaintiff contended that by agreement for building lease dated 12.2.1964 the Municipal Corporation of Greater Mumbai (for short, 'Corporation') agreed to give on lease to the plaintiff for the purpose of constructing building to be used for industrial purposes admeasuring about 1343.88 square yards for a period of 99 years on terms and conditions contained in said agreement and in proforma of Indenture of Lease annexed to the said agreement. By agreement for sub-lease dated 23.9.1971, the plaintiff agreed to give on lease suit

premises to defendants No.3 & 4 for a period of 90 years on terms and conditions in the said sub-lease and in proforma of Indenture of Lease. The plaintiff has put defendants No.3 & 4 in occupation of the land. In terms of said agreement, defendants No.3 & 4, by agreement dated 28.10.1971 agreed to sell to defendant No.1 all their right, right and interest and benefits under the agreement dated 23.9.1971 between them and the plaintiff on the terms and conditions contained in the agreement dated 28.10.1971.

4. The plaintiff further contended that by another supplementary agreement dated 15.4.1972 between the plaintiff and defendants No.3 & 4 certain terms and conditions in the agreement dated 23.9.1971 were added, altered or modified with a view to redeeming the agreement dated 23.9.1971 as modified by supplementary agreement dated 18.4.1972.

5. The plaintiff further contended that by agreement for sub-lease dated 4.5.1972 between the plaintiff therein described as sub-lessee, defendants No.3 & 4 therein described as a 'confirming party', and defendant No.1 therein described as 'sub-lessee', the plaintiff therein described as sub-lessee, confirmed *inter alia* that all the rights, title and interest and benefits of defendants No.3 & 4 in the agreement dated 23.9.1971 as modified by the supplementary agreement dated 18.4.1972 are transferred,

absolutely to defendant No.1 in terms of clause-2 of said agreement. The plaintiff also agreed to demise to defendant No.1 by way of sub-lease plot of land for a period of 90 years from 20.4.1972 subject to the terms and conditions contained in the said agreement and in the proforma of Indenture to sub-lease annexed therein and on payment of rent of Rs.561/- per month for the period from 20.4.1972 to 30.9.1972 and thereafter at the monthly rent of Rs.2,461/- for the period of 20 years from 1.10.1972.

6. The plaintiff further contended that by declaration made by defendant No.1 on 5.5.1972, the defendant No.1 declared that he had entered into agreement for sub-lease for and on behalf of defendant No.2. In terms of said agreement for sub-lease and proforma of Indenture annexed thereto, defendant No.1 and/or defendant No.2 constructed a building consisting of industrial units and sold the units on what is popularly known as 'Ownership Basis' subject to the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. The purchasers of said units in the building constructed by defendant No.1 and/or defendant No.2 formed themselves into a co-operative society, namely, defendant No.5. Defendant No.5 society is in possession of the building on the plot of land on which building is constructed through defendants No.1 & 2. The plaintiff further came with the case that as per the

agreement dated 12.2.1964 between them and the Corporation and the proforma of Indenture of Lease annexed thereto and proforma of Indenture sub-lease annexed to the said agreement dated 4.5.1972, defendant No.1 and/or defendant No.2 have to pay to the plaintiff as demanded by the Corporation extra ground rent for additional built up areas, at the rate of Rs.6,079/- per annum i.e. Rs.506.59/- per month from 1.1.1975 as demanded by the Corporation.

7. The plaintiff alleged that defendant No.1 and/or defendant No.2 have been habitual defaulters and irregular in payment of rent at the rate of Rs.561/- per month and also the extra ground rent payable under the terms of the agreement. Defendant No.1 and/or defendant No.2 were in arrears of rent in all amounting to Rs.41,685.75. The plaintiff thereafter referred to the correspondence and alleged that defendants No.1 & 2 are in arrears of rent as contemplated by Section 12(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). In addition, the plaintiff alleged that defendant No.1 had committed similar breaches in the past. The plaintiff, therefore, instituted suit for recovery of possession of the suit property as also claimed amount of Rs.58,768.15 being the arrears of rent or compensation and arrears of ground rent.

8. Defendants No.1 & 2 filed written statement resisting the claim. Defendants No.1 & 2 contended that as per the sub-lease executed on 23.9.1971, executed by the plaintiff in their favour, defendants No.3 & 4 in turn transferred their interest in favour of defendants No.1 & 2. Defendants No.3 & 4 had not filed written statement. Defendant No.5 filed written statement resisting the suit *inter alia* contending that the members of the society have purchased various units out of the units constructed by defendants No.1 & 2 and had formed co-operative society under the provisions of the Maharashtra Co-operative Societies Act, 1960. Defendant No.5 further contended that notice dated 1.4.1982 was not served on them. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. Parties led evidence. After considering the material on record, the learned trial Judge dismissed the suit. Aggrieved by that decision, the plaintiff instituted appeal which was dismissed by Appellate Court. It is against these decisions, the plaintiff has instituted present Civil Revision Application.

9. In support of this application, Mr. Dani strenuously contended that the Courts below committed serious error in dismissing the suit. The Courts below also committed error in holding that as defendant No.5 Society in pursuance of the order of trial Court has deposited amount of ground rent @ Rs.561/- per month and Rs.507/-

as extra ground rent for the period covering 1.12.1984 to 31.7.1999 within four weeks from the date of the order on 6.7.1999, the defendant No.5 Society is entitled to protection against eviction from the suit property. Mr. Dani invited my attention to clauses-5 and 21 of the agreement of sale dated 30.3.1974.

10. On the other hand, Mr. Apte supported the impugned orders. He has taken me through the impugned orders. In particular he submitted that Appellate Court has considered the agreements and lease deed as also the fact that the plaintiffs, defendants No.3 and 4 had executed sub-lease of suit plot in favour of defendants No.1 and 2 for constructing industrial units thereon. Defendants No.1 and 2 have constructed industrial units and after obtaining occupation certificate from the Corporation have sold it to the members of defendant No.5. The Courts below have held that the plaintiff has not produced any material to indicate that the suit notice dated 1.4.1981 was served on defendants No.3 & 4. Suit notice was also not issued to defendant No.5 and was issued only to defendants No.1, 2, 3 and 4. The Courts below held that the members of defendant No.5 are in possession of their respective units as per the agreement executed from time to time. The Courts below also considered clauses-4 & 5 of the lease deed dated 23.10.1985 as also Section 108(j) of T.P. Act and held that the liabilities of defendants No.3 & 4 is not crystallized and

suit notice was defective notice. Defendant No.5 has deposited the ground rent on 6.7.1999 as per the order passed by the trial Court. The plaintiff should have given notice to defendants No.1 to 5 after ascertaining their liability of paying ground rent and extra ground-rent of the respective period by indicating bifurcation therefor. The plaintiff has failed to discharge this duty. It cannot be said that the tenancy was properly terminated by the plaintiff by issuing suit notice dated 1.4.1981. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

11. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Courts below have dismissed the suit. In particular, Appellate Court has considered :

- (1) registered lease-deed dated 12.2.1964 executed by Corporation in favour of the plaintiff.
- (2) agreement of sub-lease dated 23.9.1971 whereunder the plaintiff agreed to give on lease suit premises to defendants No.3 & 4 for 90 years.
- (3) Lease agreement dated 18.4.1972.
- (4) Lease agreement dated 4.4.1972.
- (5) registered lease-deed dated 23.10.1985 between the Corporation and the plaintiff.
- (6) Suit notice dated 1.4.1981.

12. In paragraph-14, Appellate Court held that the suit notice was addressed by the plaintiff to defendants No.1, 2,

3 & 4. Defendants No.1 & 2 gave reply to the notice and denied their liability of payment of ground rent and extra ground rent. The plaintiff did not produce any material to indicate that the suit notice was duly served on defendants No.3 & 4. It is evident that by virtue of the agreement for sub-lease dated 23.9.1971, the plaintiff agreed to give them on lease for a period of 90 years. By agreement dated 28.10.1971, the defendants No.3 & 4 agreed to sell their right, title and interest and benefits under the agreement dated 23.9.1971 between them and the plaintiff. By agreement for sub-lease dated 4.5.1972 between the plaintiff, defendants No.3 & 4 and defendant No.1 plaintiff confirmed that all the rights, title and interest and benefits of defendants No.3 & 4 in the agreement dated 23.9.1971 as modified by sub-lease agreement dated 18.4.1972 are transferred absolutely to defendant No.1. The plaintiff also agreed to demise to defendant No.1 by way of sub-lease plot of land for a period of 90 years from 20.4.1972. By declaration made by defendant No.1 on 5.5.1972, defendant No.1 declared that he had entered into agreement for sub-lease for and on behalf of defendant No.2. Thus, defendants No.3 & 4 in turn transferred their interest in favour of defendants No.1 & 2. Construction and handing over of units to the members of defendant No.5 Society in the year 1975. Thus the liability for payment of ground rent and extra ground rent is on the members of defendant No.5.

Society. Appellate Court considered clauses-4, 5 of the lease deed dated 23.10.1985 as also Section 108(j) of T.P. Act and held that it was liability of the purchasers of the units from defendants No.1 & 2 in making payment of ground-rent and extra ground-rent. After considering the suit notice dated 1.4.1981, Appellate Court also held that the specific liability of defendants No.3 & 4 was not crystallized and the suit notice was a defective notice. In the suit notice, the plaintiff did not specifically point out liability of defendants No.3 & 4 of paying ground rent or extra ground-rent of the suit property. In fact the tenor of evidence of PW-1 and the suit notice dated 1.4.1981 clearly shows that there was no grievance of the plaintiff against defendants No.3 & 4 about arrears of ground rent.

13. Appellate Court held that the plaintiff has failed to prove breach of condition of tenancy of registered lease dated 12.2.1964, 23.9.1971, 18.4.1972 and 23.10.1985 respectively. Appellate Court also recorded that defendant No.5 has deposited the rent covering the period 1.12.1984 to 31.7.1999 within four weeks from the date of order passed by the trial Court. The Courts below held that the plaintiff failed to establish that he has validly terminated tenancy by issuing suit notice. Thus, the Courts below after considering evidence on record have concurrently dismissed the suit. The plaintiff was not in a position to demonstrate that the findings recorded by Courts below are perverse

being based on no evidence or that they are contrary to evidence on record. The plaintiff was not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)