

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2446 OF 2017

Minalini Lalit Modi.)
Age 51 Years, Occ.Business)
residing at Carmichael House,)
3rd floor, Carmichael Road,)
Mumbai-400026.)...Petitioner

Versus

1.M/s.Kishinchand Chellaram)
having its address at Gazdar House,)
Girgaon Road, Mumbai-400002.)

2.Shri.Shashi P.Jain)
Age 74 years, Occ.:Business)
having his address at)
C/o.Dhanamal Silk Mills Pvt.Ltd.)
Dadi Mansion, Behind Metro Cinema,)
Mumbai-400020.)...Respondents

*Mr.Vijay Thorat, Senior Counsel with Mrs.Ranjana Parikh with
Mr.Naresh Rathani, for the Petitioners.*

*Mr.S.M.Gorwadkar, Senior Counsel i/b. Mr.Pritesh Vyas, for Respondent
no.1.*

CORAM : G.S.Kulkarni, J.

Reserved on : 26th July,2017

Pronounced on : 19th September,2017

JUDGMENT:

1. Rule returnable forthwith. Respondents waive service. By consent of the parties heard finally.

2. The learned trial judge of the Small Causes Court at Mumbai by an order dated 25 August 2009 allowed an application (Eviction Notice) filed by the petitioner seeking a relief to implead her as a defendant in a Suit (RAE Suit No.743/2805 of 1982-Eviction Suit) instituted by respondent No.1-landlord (plaintiff). The appellate bench of the Small Causes Court by the impugned order dated 21 October 2016 has set aside the order of the learned trial judge in a Revision Application filed by respondent No.1. The petitioner being aggrieved by the said order of the appellate bench is before this Court in the present proceeding under Article 227 of the Constitution.

3. In nutshell the facts are :-

About thirty five years back Respondent No.1 had

instituted R.A.E.Suit No.743/2805 of 1982 seeking eviction of respondent no.2-tenant from the suit premises namely a flat on the northern side, on the third floor, Carmichael House, Carmichael Road, Mumbai, (for short 'the suit flat') interalia on the ground of causing damage to the said tenanted premises. Surprisingly as also unfortunately this suit since 1982 is pending adjudication before the learned Judge of the Small Causes Court at Bombay. On 28 September 2006, by filing interim notice No.2205 of 2006, being an application under Order 1 Rule 10 of the Code of Civil Procedure, the petitioner sought herself to be impleaded as a party defendant to the suit, on the ground that the petitioner is the 'real tenant' of the suit flat and not the respondent No.2.

4. The petitioner's case in the impleadment application was thus:- the petitioner, respondent no.1 (plaintiff), and respondent no.2 (defendant) are related to each other. The building, Carmichael House originally comprised of ground plus five floors having two flats on each floor. In or about 1955, petitioner's father Mr.Pessumal Aswani rented out one flat on the first floor of the said building at which time respondent no.1 (plaintiff) was not the owner of the building. In the year 1965, the suit building was acquired by three trusts and three individuals namely Mrs. Lachmibai Sewakram Trust,

Mrs.Nirmalabai Murli Trust, Mr.Pishu Tahilram Chellaram (since deceased) and Mr.Hotchand G.Advani (since deceased). The petitioner's father was rented out two flats on the fourth and fifth floor which were internally connected with each other. On renting out these two flats, the petitioner's father gave up tenancy of the first floor flat.

5. The petitioner was married to one Mr.Jack Sagrani, who was residing in Nigeria and London. After her marriage, the petitioner was residing in London and would visit India quite often as many of the relatives, friends, acquaintances, including her parents were in Mumbai. The petitioner's husband had no place of residence in Mumbai, therefore the petitioner was in search of an accommodation. The petitioner also wanted a flat in the vicinity of the suit building as her parents were residing in the suit building. In or about 1979 the suit flat being vacant and as the landlords were desirous of letting the same, one Mr.Murli Chellaram who was incharge of the affairs of the building and who was aware that the petitioner was on a look out for a residential accommodation in Mumbai, informed the petitioner that the suit premises were available to be let out. Mr.Murli Chellaram however stated that it will not be possible nor advisable to make out a rent receipt in the

petitioner's name, as the petitioner's father was already having three flats in the suit building. Thus, making a rent receipt in the petitioner's name for the fourth flat will not be advisable and will also create problems as another relative of the owner, was also keen on renting out the said flat. Mr.Murli Chellaram therefore suggested that the suit premises could be let out to the petitioner but the petitioner should try to find out some other person, closely connected with the family and who would be prepared to lend his name on the rent receipt and on whom the petitioner could have confidence. As the petitioner was keen on renting out the suit flat, to remain close to her parents and her sister who was daughter-in-law of Mr.Murli Chellaram, it was thought appropriate that the tenancy be created by issuing rent receipt in the name of respondent no.2 (defendant), as respondent No.2 was closely related to the petitioner's family being married to the maternal aunt of the petitioner. The petitioner had stated that they were also holding property for each other at Kashipur in Uttaranchal. The petitioner and her parents thus had full confidence in respondent no.2. Mr.Murli Chellaram was agreeable to have a rent receipt made out in the name of respondent no.2. Respondent no.2 was accordingly persuaded by the petitioner and her parents and Mr.Murli Chellaram to allow his name to be shown on the rent receipt. In these circumstances, the petitioner was let out

the suit flat and took possession of the same. However, as per the said arrangement, as arrived between respondent no.1 (plaintiff), the petitioner and respondent no.2 (defendant), the name of respondent no.2 was shown on the rent receipt. Respondent no.2 was already having residential flat in Mumbai, in a building known as 'Meher Apartments'. It was only to oblige the petitioner in view of the close family relations, that respondent no.2 had agreed to lend his name to be shown on the rent receipt. Further for the purpose of renting out the suit flat, the petitioner had discussions with her husband Mr.Jack Sagrani and to enable her to rent the suit flat, her husband transferred a sum of US \$ 75000 from his account to the swiss account of Mr.Murli Chellaram as a premium, for renting out the flat to the petitioner. Thus, the petitioner was in possession of the suit flat from the inception of the tenancy and that the petitioner was bearing all the expenses of upkeep, maintenance and renovation of the suit flat and was remitting all the expenses through proper banking channels to respondent no.2-tenant and he was disbursing the same. The marriage of the petitioner with Mr.Jack Sagrani resulted in a divorce in the year 1989. There were proceedings in the High Court of Justice in London, for financial settlement consequent upon their separation. In the said proceedings the petitioner's former husband Mr.Jack Sagrani had confirmed the fact of payment of US \$ 75000 on

petitioner's behalf for acquiring the suit flat. It is further, the case of the petitioner, that for income tax and wealth tax purposes, the petitioner had shown the address of the suit flat. She has other documents like driving licence, telephone connection, cooking gas connection, bank account, insurance policy and various other documents bearing the address of the suit flat. The petitioner's case is also that she had made correspondence for renovation, upkeepment and maintenance of the suit flat. Her stay has also been recognized in some correspondence with the landlords. Thus, to the knowledge of respondent no.1-plaintiff, the name of respondent no.2/defendant, was used merely for the purpose of the rent receipt. The eviction suit in question (1982 suit) as instituted by respondent no.1 against respondent no.2 will directly affect the petitioner's rights of tenancy on the suit flat. In the absence of the petitioner, the suit cannot be effectively adjudicated as the suit is filed against a wrong person. Thus, the petitioner was a necessary party to the suit.

6. The petitioner also contended that at the end of the year 2005, there were meetings between the tenants and the landlords of the building for converting tenancy into ownership and for establishing a condominium of the building Carmichael House. As the tenancy rights are likely to be converted into ownership, the

petitioner was advised that from the taxation point of view and for protection of the petitioners rights, it was necessary for the petitioner to put up correct facts in the pending eviction proceedings in regard to the suit flat and and assert her tenancy rights, so that no complication happens at a later stage when the conversion from the tenancy rights into ownership rights would take place. Accordingly, the petitioner was advised to make an application in the eviction suit filed by respondent no.1, and get her impleaded as a party defendant to the suit. The petitioner therefore is the real tenant and mere issuance of rent bill in favour of respondent no.2 is not conclusive to establish the relationship that of tenant and landlord.

7. The petitioner's impleadment application was opposed on behalf of the landlord/respondent no.1 by filing a reply. Respondent no.1 contended that the petitioner's application was frivolous as also mischievous, and was filed with the sole intention to delay the adjudication of the 1982 suit and continue to deprive respondent no.1 of his entitlement to the suit premises. Respondent no.1 denied that the petitioner was at any time a tenant or a real tenant of the suit flat or that the tenancy was created in her favour. It is the case of respondent no.1 that the suit flat was earlier let out to one Mr.Ratan Lal who was the original tenant and who by his letter

dated 28 February 1979 informed Mr.Murli Chellaram that he was surrendering his tenancy in favour of the defendant (respondent no.2). Mr.Ratan Lal had also pointed out that respondent no.2(tenant) was earlier occupying the suit flat as his licensee. Respondent No.1 contended that it was ill conceivable that the suit flat was rented out by respondent no.1 to the petitioner. Respondent no.1 stated that in respect of flats on the fourth floor and the fifth floor, the petitioner's brother Mr.Ravi Aswani was the tenant and therefore, there was no impediment to make a rent receipt in the name of the petitioner, had the petitioner really taken the flat on rent. It is stated that the case which is tried to be made out by the petitioner was never the case of the defendant (respondent no.2) in the written statement, as filed in the suit, as also in the companion eviction Suit No.949/2123 of 1995. Respondent no.1 has contended that it was significant that although according to the petitioner, she was divorced from her husband in the year 1989 the petitioner never asserted her right of tenancy in the suit flat nor at any point of time, the petitioner thought it appropriate to bring this fact to the notice of the court or respondent no.1. It was further contended that it was indeed surprising for the petitioner to make out such a case without any material whatsoever to substantiate the same and assert that the petitioner be impleaded as a party to the suit. Respondent No.1

stated that, as a matter of fact, it has been a consistent case of respondent no.1 that the defendant (respondent no.2), had acquired alternate accommodation and was not using the suit premises for the purpose for which it was let out, on which ground the suit for eviction was instituted by respondent no.1. The case that respondent no.2 had taken a rent receipt in his name only to oblige the petitioner was denied by respondent no.1. It is stated that in fact from the correspondence exchanged between the advocates for respondent no.1 and respondent no.2, it was clear that respondent no.2 was the tenant of the suit flat. It is stated that a false case was put up by the petitioner that she is the real tenant of the suit flat. It is further contended that the case of Mr.Murli Chellaram receiving rent receipt of US \$ 75,000 was completely alien to the contract of tenancy which was between respondent no.1 and respondent no.2. Mr.Murli Chellaram had nothing to do with the suit flat in his individual capacity. It was further contended that the question of accepting such premium is also not possible, as the law prohibited recovering any premium from the tenant and hence, the question of petitioner paying any premium would not arise. It was contended that the petitioner had also failed to annex any document to show the alleged transfer of US \$ 75000 or any receipt, to show that the transfer was made for acquiring tenancy right of the suit premises. The case of

remittance put up by the petitioner also had no relevance having taken place after filing of the eviction suit. It was contended that it was clear that such case of remittance is made out only to create some evidence. As regards the documents as relied upon by the petitioner, respondent no.1 contends that all the documents are of the period subsequent to filing of the suit which would show that the petitioner was trying to create evidence of possession of the suit premises. As regards the contention about the meeting between the landlords and tenants for conversion of tenancy into ownership, the same is denied by respondent no.1. It is denied that the petitioner was present for any meeting as alleged. In paragraph 14 of the reply, there is a categorical denial by respondent no.1 of the petitioner's case that respondent no.2's name was lent on the rent receipt. Respondent No.1 denied that the petitioner had rights of any nature whatsoever in the suit flat, and hence, the question of the result of the suit affecting the alleged rights of tenancy of the petitioner, would not arise. Further the petitioner's contention of a settled possession of the suit flat was also denied. Respondent No.1 contended that petitioner was thus not a necessary party to the suit. It is contended by respondent no.1 that the intention of the petitioner was to prolong the old proceedings. It was contended that the petitioner presence before the Court was not necessary to adjudicate the issues involved

in the suit and that the application was frivolous.

8. The learned trial Judge after hearing the parties on this impleadment application of the petitioner, by an order dated 25 August 2009 held that though the rent receipts were issued in favour of respondent no.2 – tenant, nonetheless the documents post filing of the suit as produced were sufficient to show the petitioner's possession of the suit flat for a long time. The learned trial judge referring to the decision of the learned Single Judge of this court in ***“Gulab Babusaheb Bargiri Vs. Executive Engineer, M.S.E.B. & Ors”***¹ observed that the principle of '*dominus litus*' cannot be applied in all the cases. The relevant observations on the basis of which the impleadment application was allowed by the learned trial judge, can be found in paragraph 12 of the order which reads thus:-

“12. By this application applicant wants plaintiff to implead her as defendant. Which defences will be available and which will not be available to her is not to be decided at this stage. Applicant has produced sufficient documents to show her possession on suit premises for a long time. No doubt, as pointed out by learned advocate, these documents are of the period during lis pendence. But only on that count, at this stage, it cannot be said that the applicant has created these documents for delaying the proceedings. As observed in the case of Gulab Babusaheb Bargiri cited by applicant, that when third party comes to the Court seeking impleadment, it is different incident than the defendant's asking for such impleadment. It is observed that principle of *dominus litus* cannot be applied in all cases.

Considering the material placed on record, ratios

1 2001(1) Mh.L.J.63

laid down in cited cases and submissions of both sides, I hold that the applicant needs to be impleaded as a party defendant. To give full opportunity of context and to avoid multiplicity of the proceedings the application is necessary to be allowed. The submissions of learned advocate for plaintiff cannot be accepted. The submissions of learned advocate for applicant hold merits... ..”

9. Respondent No.1 -landlord being aggrieved by the said order dated 25 August 2009 passed by the learned trial judge, approached the appellate bench of the Small Causes Court, in a revision application as filed under Section 29(3) of the Bombay Rent Act, on several legal and factual grounds contending that the order passed by the learned trial judge was perverse and illegal. Some of the grounds as urged on behalf of respondent no.1 in the revision can be set out as under:-

(i) The learned trial judge had failed to decide the proposition as to whether the petitioner was either a necessary or proper party to the suit and more particularly in view of the clear provision of Order 1 Rule 10 of the Civil Procedure Code.

(ii) The principle that the plaintiff is *dominus litis* and thus the petitioner could not have joined as a party to the suit against the wish of the plaintiff, is not considered in the correct perspective as per the settled principles of law on this doctrine.

(iii) The application for impleadment was filed on 28 September 2006 by the petitioner more than seventeen years after the

petitioner's own showing that she had become entitled to tenancy rights in the year 1989. In an application under Order 1 Rule 10 of C.P.C, the question of limitation is always significant to be decided , considering the law as laid down in “*Alkapuri Co-op. Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) through LRs.*”²

(iv) Under Section 18 of the Bombay Rent Act,1947, payment and acceptance of such premium was prohibited and constituted an offence and as such a case of payment of premium could not have been pleaded and accepted by the learned trial judge.

(v) The case of the petitioner that respondent no.2 – tenant has merely lent his name for the purpose of creation of tenancy in her favour and that she is a real tenant of the suit premises, cannot be legally recognized inasmuch as such a plea for benami tenancy is not tenable as held in the decision of this Court in the case “*M.S.Shastri Vs. Hilla M.Batliwalla & Anr*”³.

(vi) In a suit of the landlord (respondent no.1) against the tenant (respondent no.2) for eviction and recovery of possession, a third party cannot be joined or impleaded to enlarge the scope of the landlord's suit or change the complexion of the suit. Considering the nature of the suit, the petitioner was not a necessary party for the decision of the question involved in the suit.

2 AIR 2009 SC 1948

3 1989(1) Bom.C.R.138

(vii) The petitioner was always free to establish her claim and title as a tenant in independent proceedings.

(viii) The plea of Benami tenancy could not have been decided by the Small Causes Court exercising the jurisdiction under Section 28 of the Bombay Rent Act and it was necessary for the petitioner to file appropriate proceedings before the competent court.

(ix) The impleadment application of the petitioner was nothing but an attempt to prolong the suits i.e. the first suit of 1982 and the second suit of the year 1995.

10. The appellate bench of the Small Causes Court by the impugned judgment and order dated 21 October 2016 accepting the case of respondent no.1 allowed the revision application and set aside the order passed by the learned trial judge. It was observed that there was no material on record whereby the petitioner would be required to be held as a proper and necessary party, as the documents as placed on record and relied by the petitioner were pertaining to the period during which the suit was pending. It was observed that in any case these documents had no independent bearing upon the issue of eviction. It was observed that the learned trial Judge had overlooked that respondent no.1 (plaintiff) was *dominus litis* and the petitioner in the facts of the case could not have been impleaded in

the proceeding, against the wish of respondent no.1-plaintiff. It was further observed that the application for impleadment was at a belated stage and the learned trial Judge was swayed away by the alleged arrangement during the divorce proceedings of the petitioner and her husband of the year 1989. It was observed that neither the petitioner nor the husband of the petitioner Mr.Jack Sagrani had a locus standi in the proceedings of the suit or privity of contract in so far as the tenancy in question is concerned. It was further observed that the plea that the petitioner was real a tenant was a plea of a “benami tenancy”, only to seek an entry in the suit proceedings, and the same was not sustainable under the rent legislation, as also in view of the decision of this Court in ***M.S.Shastri Vs. Hilla M.Batliwalla & Anr.*** (supra). It is further observed that the defendant (respondent no.2)in the written statement or anywhere else had not put forth that respondent no.2 was not the real tenant or in possession of the suit flat. On the contrary respondent no.2 was defending the suit as the tenant of respondent no.1. Thus, the case was of a rival claim of tenancy as set up by the petitioner. It was observed that accepting such a plea would amount to changing the scope of the suit at the behest of the petitioner who is a third party, by converting the eviction suit into a tenancy declaratory suit. It was observed that the petitioner could have approached the appropriate

court to seek a declaration of her tenancy rights. It was observed that the suit in question was filed in the year 1982, the application of the petitioner was not an application under Order 6 Rule 17 of the C.P.C., but under Order 1 Rule 10 of the C.P.C., and therefore, the period of limitation was also required to be considered, as the petitioner for the first time had made such a plea of tenancy in the suit in the year 2006, and thus the application of the petitioner was required to be held as barred by limitation. As regards the contention of the petitioner that the revision as preferred by respondent no.1 was not maintainable, relying on the decision of the Full Bench of this court in the case “*Bhartiben Shah & Anr. Vs. Gracy Thomas & Ors.*”⁴ it was observed that the order as passed by the learned trial Judge directing impleadment of the petitioner as a party respondent affected substantive rights of respondent no.1-plaintiff by which the petitioner foisted herself as a party defendant to the suit in question. Thus, the contention on the basis of the said decision of the Court that the revision was not maintainable, was rejected.

11. On the above background, the petitioner being aggrieved by the above order passed by the appellate bench of the Small Causes Court has preferred this Writ Petition. Mr.Thorat, learned Senior

4 2013(2) Bom.C.R.1

Counsel for the petitioner assailing the impugned order has made the following submissions:-

(i) The revision as preferred by respondent no.1 and decided by the appellate bench was not maintainable inasmuch as the order passed by the learned trial Judge directing impleading of the petitioner as defendant no.2 was an order passed on the application under Order 1 Rule 10 and thus was a procedural and discretionary order for which the revisionary jurisdiction could not have been invoked by respondent no.1. This submission is being supported relying on the decision of the Full Bench of this Court in ***Bhartiben Shah & Anr. Vs. Gracy Thomas & Ors.*** (*supra*)

(ii) The impugned order overlooks the settled position in law that the endeavour of the court should be to avoid multiplicity of proceedings. If the impugned order as passed by the appellate bench is accepted, then the same would require the petitioner to file independent proceedings which would lead to multiplicity of the proceedings.

(iii) The appellate bench has overlooked the legal position that the rent receipt does not conclusively prove that a person in whose favour it is issued, would become a tenant. The plea as taken by the petitioner that respondent no.2 (defendant) was not real tenant was

an acceptable plea.

(iv) The issue of delay is not relevant in considering the application under Order 1 Rule 10 of the CPC.

(v) Respondent no.1 had not raised the plea of benami tenancy in the reply filed to oppose the petitioner's impleadment application and hence, such a plea could not have been accepted.

(vi) The appellate bench ought to have held on the basis of the documents that the petitioner was in fact the tenant of the suit flat.

In support of these submissions, Mr.Thorat, learned Senior Counsel for the petitioner has placed reliance on the decisions of this Court in the case “*Umar Alli Chougalle & Ors. Vs. Dr.A.H.K.Jumani*”⁵; “*Sh.Srirang Subraia Kamat Tarcar & Ors. Vs. The Administrative Tribunal & Ors.*”⁶; “*Gulab Babusaheb Bargiri Vs. Executive Engineer, M.S.E.B. & Ors.*”(supra), and “*Chandrakant Dharma Bhonu Vs. Pandurang Ramchandra Dandekar & Anr.*”⁷ as also the judgment of the Supreme Court in the case “*Savitri Devi Vs. District Judge, Gorakhpur & Ors.*”⁸;

5 Civil Revision Appln.No.1953 of 1962, Order dt.2.3.1968

6 All India Rent Control Journal VIII-1991(2), 252

7 2004 Vol.106(4) Bom.L.R. 680

8 AIR 1999 SC 976

12. Per contra Mr.Gorwadkar, learned Senior Counsel for respondent no.1/landlord would submit that the impugned order passed by the appellate bench is well founded and is on a correct appreciation of facts and the law. Mr.Gorwadkar submits that the contention as urged on behalf of the petitioner that the revision as preferred before the appellate bench was not maintainable, cannot be accepted as the Full Bench of this Court in ***Bhartiben Shah & Anr. Vs. Gracy Thomas & Ors*** (supra) has held that once the substantive rights of the parties under the Bombay Rent Act were affected and endangered, the appellate bench was very well within its power to exercise its revisionary jurisdiction. Mr.Gorwadkar would further submit that as rightly held by the appellate bench, the attempt on the part of the petitioner to file an impleadment application in the year 2006 was a belated attempt of pursuing, the so called legal rights, which had accrued to the petitioner in the year 1979 to be asserted in the year 2006. Mr.Gorwadkar would submit that the observation that the application of the petitioner itself was barred by limitation, would be correct in the facts of the case, considering the decision of the Supreme Court in “***Alkapuri Co-op. Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) through LRs.***” (supra), Mr.Gorwadkar submits that in fact the attempt of the petitioner by making an application for impleading her as defendant no.2 to the

suit is in the nature of a back-door entry of the petitioner to assert a claim which the petitioner otherwise cannot sustain in independent proceedings. It is submitted that if the petitioner was conscious of the fact that she is a tenant, then the petitioner ought to have adopted appropriate proceedings seeking declaration of the petitioner's right as a tenant at the appropriate time and as permissible in law. It is submitted that having not done so, the appellate bench is correct in concluding that the adjudication of her rights in the suit of respondent no.1-landlord would be changing the scope of the suit. Mr.Gorwadkar submits that the first suit (R.A.E.Suit No.743/2805 of 1982) and the second suit (R.A.E.Suit No.949/2123 of 1995) as instituted by respondent no.1, are on independent grounds, the first suit is on an acquisition of alternate premises, by respondent no.2-tenant, causing damage to the suit premises etc, and second suit on the ground of non user. Mr.Gorwardkar submits that admittedly in the written statement filed on behalf of respondent no.2-tenant on 6 October 1982, there is not a whisper on behalf of the respondent no.2 that since 1979, respondent no.2-tenant is not in occupation of the premises but it is the petitioner who was enjoying the suit flat as a tenant. Mr.Gorwadkar, therefore, submits that any dispute inter se between respondent no.2 and the petitioner cannot be a subject matter of the suit in question

as instituted by respondent no.1, in which the relief is to seek eviction of respondent no.2 tenant. Mr.Gorwadkar submits that the principle of *dominus litis* has been appropriately recognized by the appellate bench in reversing the order passed by the learned trial judge. It is submitted that thus there is no perversity in the findings as recorded by the appellate court inasmuch as the appellate bench has correctly appreciated that the documents on which the petitioner sought to assert her rights of tenancy in the suit flat were the documents post filing of the suit and thus, no credence can be granted to such assertion. Mr.Gorwadkar further submits that in any event there is no privity between respondent no.1-landlord and the petitioner of any nature and thus, the petitioner was surely not a necessary or a proper party to the suit. In support of his contentions, Mr.Gorwadkar has placed reliance on the decisions in “*Nandkishor Savalaram Malu (dead) through L.Rs. Vs. Hanumanmal G.Biyani (Dead) through L.Rs.*”⁹ and “*M.S.Shastri vs. Hilla M.Batliwalla & Ors.*”¹⁰

13. I have heard the learned Counsel for the parties and with their assistance, I have perused the orders as passed by the learned trial judge as also the impugned order passed by the appellate bench,

9 2017(3) Mh.L.J. 37

10 1989(1) BomCR 138

and the pleadings and the documents as placed on record.

14. At the outset, it may be noted that the petitioner's application was an application under Order 1 Rule 10 the C.P.C. seeking impleadment in the eviction suit instituted by respondent no.1/landlord in the year 1982 ((RAE Suit No.743/2805 of 1982). This suit came to be instituted by respondent no.1 against respondent no.2 on the ground that respondent no.2-tenant had acquired alternate premises as also was guilty of undertaking some demolition, amounting to waste of the premises. It is not in dispute that the another suit came to be instituted by respondent no.1 seeking eviction of respondent no.2 -tenant on the ground of non user being suit no. 949/2123 of 1995. It is not in dispute that both these suits are contested by respondent no.2-tenant in his independent capacity. In these suits written statements are filed by respondent no.2 in which respondent no.2 has nowhere stated that it is the petitioner who is in occupation of the premises or for that matter any rights are created in the petitioner much less that the petitioner is enjoying the occupation or possession of the premises as a tenant. This undisputed position in my opinion is fatal to the impleadment plea as raised by the petitioner in the impleadment application. This for the reason that the petitioner is asserting and setting up an altogether

different plea and a plea hostile to the plea of the tenant who is asserting his own rights. If this be the position, then, such dispute is completely alien to respondent no.1's suit which is instituted against respondent no.2 – tenant for ejectment on the ground available to evict the tenant under the Bombay Rent Act. Such a plea certainly would change the basic character of respondent no.1's suit.

15. There is another significant aspect namely that the petitioner has very consciously asserted in the impleadment application, as noted above, that she has been inducted in the premises in the year 1979 and for that matter the rights are further crystallized in the year 1989 when her husband Mr.Jack Sagrani has made payment of US \$ 75000 in favour of Mr.Murli Chellaram. Although it is a correct observation of the appellate Bench that such a payment can have no relevance as it is not a payment to respondent no.1 for anything to do between the petitioner and respondent no.1 pertaining to the flat, nonetheless what is material is that with this consciousness, the petitioner failed to assert her right to initiate independent proceedings to claim any tenancy either against respondent no.1-landlord or against respondent no.2-tenant. Thus there is much substance in the submission of Mr.Gorwadkar that the petitioner having failed to assert her basic right, for such long lapse

of time, is now attempting a back door entry seeking adjudication of her rights as a tenant, which in any event is not permissible to be done in the eviction suit filed by respondent no.1. Mr.Gorwadkar would be right in contending that determination of the rights of the petitioner who has no privity with respondent no.1-landlord was completely alien to the eviction suit of respondent no.1. The effect of the order passed by the learned trial Judge permitting impleadment of the petitioner, in my opinion, would completely change the structure and scope of the suit as instituted by respondent no.1.

16. Further it is well settled that the plaintiff is '*dominus litus*' that is a master, or having dominion over the case and is a person who has carriage and control of an action. The learned appellate bench has appropriately recognized this principle observing that this was a case where the petitioner was trying to foist herself in a old pending suit for the first time in the year 2006 setting up a case that respondent no.2 – defendant is not the real tenant and that the petitioner is the real tenant.

17. It was appropriate for the learned appellate bench to observe that the plea of the petitioner as seen from several averments in the impleadment application was nothing but a plea of benami

tenancy being asserted by her. The decision of the learned Single Judge of this Court in *M.S.Shastri Vs. Hilla M.Batliwalla & Anr.* was appropriately relied by respondent no.1 wherein the Court has observed that if a benami transaction was recognized in creation of a tenancy, then, the basic feature of leases will stand vanished. The learned Single Judge in considering the plea of benami transaction qua a lease has made the following observations:-

“9. The 1st aspect of the question is as to whether it is open for a person to contend that a person who is mentioned in the lease-deed as a tenant is only a benamidar and further, to come out with such contention not against a third party but against the landlord.

In first place, I find it to be an untenable proposition even on first principles. In my opinion, the tenancy relationship is not only a property relationship, but also a personal relationship. It gives rise not only to rights *in rem*, but also rights *in personam*. A lease is no doubt a property and creation of lease does amount, in a sense, transfer of property. But it is not an absolute transfer; in a sense that a sale or gift is an absolute transfer. Under section 10 of the Transfer of Property Act, a transfer subject to a condition of limitation absolutely restraining a transferee or any person claiming under him from transferring or disposing of his interest in the property gives rise to the effect that the condition or limitation is void. This means that no one can sell or mortgage a property on the condition that the transferee will not, in this turn, further transfer the same. But this Rule is subjected to an exception by said Section 10 itself, because said Section 10 further provides that a lease may contain a condition for the benefit of the lessor prohibiting transfer of the lessor's right to any other person. This is the precise reason why a lessee can be prohibited by the lessor prohibiting him from assigning the lease or from creating a further sub-lease. The rationale behind this law is that a lessor is entitled to say that he will lease the land to “A” but not to “B”. He is fully within his right to choose the persons to whom he would give the property on lease. He can give it to “A” and refuse to give it to “B” and no one can ask him as to why he is making such discrimination. No one can prevail upon the

lessor to choose his lessee. That is the basic feature of the transaction of lease and law relating to the lease.

If a benami transaction was recognised in the law of Lease, this entire basic feature of leases will vanish, I will take a simple illustration: "B" approaches "A" for lease for his land. 'A' has a face set not to lease it to 'B'. 'B' cannot set up 'C' as a benamidar to take lease from 'A' and contend against 'A' in the future that 'C' was only a benamidar and that 'B' was the real lessee. The lessor's right to choose the personnel of his lessee is, thus, wholly defeated by such benami transaction. Such transactions, therefore, cannot be countenanced by the law itself.

Moreover, in any event, it cannot be countenanced at least against the landlord. A landlord cannot be told by a 3rd party that when his lessee took the lease from him, he was in fact cheating him and that the real lessee was the 3rd party and that the lessee was a mere benamidar. The lease would be voidable on this account itself, because it is brought about by such fraud. The lessor never wanted it to give to the 3rd party and by practising fraud on the lessor the 3rd party proposes to take that lease. It will be wholly a voidable transaction. As to what will happen if the lessor has no objection to the benami nature is not for me to consider at this stage. I keep my fingers crossed on the question whether a person can tell rest of the world, other than the landlord, that he is the real tenant in respect of certain property belonging to the landlord and not the person shown as the lessee in the Lease Deed executed between the lessor and the person shown in the lease as a lessee. Against the landlord in any event, such a contention is just not tenable.

I may hasten to observe that there may be cases where the landlord himself may be a party to such a benami transaction, that he knows that the person named as a lessee is only a benamidar and that he was agreeable to the name of the real tenant being concealed behind the screen of the benamidar. I do not wish to decide as to what would be the legal position in such a case. Point is that in the absence of any such plea or evidence it would not be open for any person to go on cocking snozes at the landlord telling him that he had been made a fool of and that the real tenant was somebody else. "

The contention of Mr.Thorat is that the observations in last paragraph of the above decision of the learned Single Judge would assist the

petitioners, however, in my opinion, they would not assist the petitioner, as there is no material in the present case to show that respondent no.1 – landlord has in any manner accepted the petitioner as a real tenant. There is not an iota of material, for the petitioner to make out any case can rely on the last paragraph of the above observations. In any case the paragraph which Mr.Thorat relies does not lay down any legal position. In any event this cannot be an assertion of the petitioner in an eviction suit as filed by respondent no.1.

18. As regards the contention as urged on behalf of the petitioner that the rent receipt would not conclusively decide the rights of tenancy relying on the unreported judgment of the learned Single Judge of this Court in the case *Umar Alli Chougalle & Ors. Vs. Dr.A.H.K.Jumani* (supra). The contention cannot be accepted. This was a case in which a dispute arose under the provisions of Order XXI Rule 100 of the C.P.C where the petitioners had asserted a case in the execution proceedings that they had taken room No.3, from opponent no.1 who was the owner of the said building and that the room was taken alongwith the several persons, and it was agreed between them that the receipt for the rent paid, should be made out only in the name of one of them namely Idris Yakub Chougule. It is

in that context the Court was examining the plea of co-tenancy and in such facts and circumstances, the Court observed that if the rent bills are made in the name of one, tenancy right may be possessed by another or by one in whose name rent bill is made alongwith the others. Surely, the case in hand is not the one where the petitioner is asserting any co-tenancy, nor the present proceedings are arising is an issue as raised in the execution proceedings.

19. The decision of the Goa Bench of this Court in the case '*Sh.Srirang Subraia Kamat Tarcar & Ors. Vs. The Administrative Tribunal & Ors.*'(supra) also would not help the petitioner to support the proposition that the petitioner was claiming an independent tenancy and therefore, she is required to be impleaded as defendant to the suit. This for the reason that this decision does not take into consideration Section 4 of the Benami Transaction (Prohibition) Act,1988 or the consequence of the said provision. It also does not consider the decision of the learned Judge of this Court in the case *M.S.Shastri Vs. Hilla M.Batliwalla & Anr.* (supra) which deals with the application of Section 4 of the Benami Transaction (Prohibition) Act,1988. In the present case the facts are completely different. Further reliance on the decision in "*Sh.Srirang Subraia Kamat Tarcar & Ors.*" would be misconceived as in the said case the

petitioners were stated to be bonafide tenants by the original tenant who was living in the premises since 1964. It is in this context the Court had accepted the case of the petitioners therein that they were necessary parties to the eviction action initiated by the landlord.

20. On behalf of the petitioner reliance is placed on the decision of the Supreme Court in the case *Savitri Devi Vs. District Judge, Gorakhpur & Ors.* (supra) to support the contention that Order 1 Rule 10 of the C.P.C. enables the court to add any person as a party, at any stage of the proceeding, provided such person is a necessary party in order to enable the Court to effectually and completely adjudicate and settle the questions involved in the suit and to avoid multiplicity of the proceeding. There can be no dispute on the proposition which is laid down in this decision. However, the question remains as to whether the petitioner is a necessary party on the nature of the case asserted by her. In my opinion, the observations of the Supreme Court in paragraph 11 referring to the decision in the case “*Ramesh Hirachand Kundanmal V. Municipal Corporation of Gr.Bombay*”¹¹ would support respondent no.1, wherein the Supreme Court holds that the plaintiff is “*dominus litis*” and not bound to sue every possible adverse claimant in the same

¹¹ (1992)2 SCC 524

suit and that addition of parties is a matter of judicial discretion, which is required to be exercised in the facts and circumstances of a particular case. The Court observed that it is only when the person concerned has direct interest in the action, only in such a situation a party can be impleaded. In the said case respondent Nos.3 to 5 who had moved an application for impleadment had substantial interest inasmuch as the defendants thereunder had sold some shares in the land to the respondents under a registered sale deed and in view of that sale deed respondent 3 to 5 had moved an application under Order 1 Rule 10 of the CPC for impleading them as party to the suit. They had paid the sale consideration before executing the sale deed as also the possession of the subject matter of the sale deed was handed over to them. It is in this context the Court has made observations in paragraphs 2 to 11. On these facts itself the said decision is of no assistance to the petitioner.

21. Further the reliance of the petitioner on the decision of the learned Single Judge of this Court in the case “***Gulab Babusaheb Bargiri Vs. Executive Engineer, M.S.E.B. & Ors.***” (supra) would also not assist the petitioner as in the facts as noted by the Court in paragraph 8 of the said decision, in an earlier suit respondent nos.3 and 4 therein, were made parties as the electricity connection was in

the name of respondent nos.3 and 4 and through which electricity connection the plaintiff was running a power-loom. This suit was dismissed on merit. After this a second suit in question came to be filed on the same cause of action. In the paragraph describing the cause of action to file the suit, the plaintiff therein clearly stated that the electricity connection was standing in the name of respondent no.3. However, respondent nos.3 and 4 were not made party to the subsequent suit and thus they moved an impleadment application which came to be allowed by the Court. It is in these facts the Court examined the issue of “*dominus litis*” and the exceptions therefor on the legal principles as contained in paragraph 7 of the said direction. There can be no dispute, however, as noted above, this decision in the present facts would not in any manner assist the petitioner.

22. In my opinion the reliance on behalf of the petitioner on the decision of the learned Single Judge of this Court in the case “***Chandrakant Dharma Bhonu Vs. Pandurang Ramchandra Dandekar & Anr.***” (supra) is also not well founded. In the said case the court observed that the petitioner was directly and substantially affected by the unauthorised, construction which is alleged to be carried out by respondent no.1, wherein the grievance of the petitioner was that inaction of the Corporation was due to the clout

wielded by respondent no.1. The petitioner had filed an application for impleadment in a suit which was filed by respondent no.1 which came to be rejected by the learned trial Judge. On this conspectus, the Court examined the issue of “*dominus litis*” to say that undoubtedly the plaintiff is “*dominus litis*” and that it is on the principle which has been laid down in ***Vimadalal, J. in Jivanlal Damodardas Wani Vs. Narayan Ukha Salil***¹² contending the facts of the case the Court observed that having regard to the provisions of Order 1 Rule 10 of the CPC, it cannot be said that the application of impleadment which was moved by the petitioner in the facts of the case, was misconceived. It was observed that that the petitioner was directly and substantially concerned and affected by the proceedings filed before the City Civil Court, as the petitioner was the owner of the adjoining structure to that of respondent no.1. These facts clearly show that this decision was wholly in applicable to the facts of the present case.

23. Both the learned Senior Counsel have placed reliance on the decision of the Full Bench of this Court in the case “***Bhartiben Shah & Anr. Vs. Gracy Thomas & Ors.***” (supra) on the issue of maintainability of the revision application. Mr.Thorat, learned Senior

12 AIR 1972 Bom.148

Counsel for the petitioner has placed reliance on this decision in support of his contention that the revision would not be maintainable before the appellate bench against the order passed by the court on the application under Order 1 Rule 10 of the CPC, as it is a procedural and discretionary order. However Mr.Gorwadkar, learned Senior Counsel for respondent no.1 would contend that the revision was maintainable inasmuch as the order passed by the learned trial judge on the impleadment application affected the substantial rights of respondent no.1. In my opinion, considering the observations of the Full Bench as made in paragraph 63, Mr.Gorwadkar would be correct in his contention that the revision would be maintainable as the order as passed by the trial court, in the present case affected the substantive rights of respondent no.1, as it is a case where the petitioner sought to foist herself to be impleaded as a defendant, a consequence of which was that the nature, character and the scope of the plaintiff's suit for eviction and possession, against respondent no.2 was sought to be altered, the petitioner raising an issue of declaration that she is the real tenant of the suit flat. As noted above, such a cause was an independent cause if it had so arisen to the petitioner, and for which the petitioner always had a remedy, to adopt appropriate proceedings in accordance with law. The observations of the Full Bench of this Court, in paragraph 63 of the decision, in my

opinion, would assist respondent no.1 so as to conclude that the revision application was certainly maintainable, in the facts of the present case. This also for the reason that the substantive rights of respondent no.1 under the Bombay Rent Act to assert an entitlement to a decree would stand prejudiced and affected by completely changing the nature of the suit, if the plea of the petitioner was to be accepted which was to raise an altogether new question which do not at all arise in the suit of respondent no.1. Such plea would certainly affect the foundation of the case of respondent no.1. It would be appropriate to note the observations in paragraphs 63, 84, 85, 86 and 87 which reads thus:-

“63. We agree that Section 29(3) of the Old Rent Act and Section 34(4) of the New Rent Act are not restricted only to orders for possession or rent, but at the same time it does not mean that all non- appealable orders of the Special Court under the Rent Act are revisable. It is true that orders may not be orders for possession or fixation or recovery of rent, but the orders must directly affect the substantive rights of the parties under the Rent Act or some other substantive law and not merely affect the rights of the parties under a procedural law like CPC or Evidence Act. Looking to the language of section 29(3) of the Old Rent Act and section 34(4) of the New Rent Act ("that the decree or order was made according to law"), we see no justification for restricting revisions to orders affecting substantive rights only under the Rent Act.

... ..

84. In the result, therefore, our answer to question No.2 referred for our consideration is as under:-

A revision application under Section 34(4) of the Maharashtra Rent Control Act, 1999 is not maintainable in respect of a procedural order passed under the Code of Civil Procedure in a suit arising out of Maharashtra Rent Control Act, if such order does not affect the rights of parties under the Maharashtra Rent Control Act or any other substantive law. While an order to be revisable need

not necessarily be an order for possession or fixation or recovery of rent, nevertheless, the order sought to be revised must directly affect the substantive rights and liabilities of parties under the Maharashtra Rent Control Act or any other substantive law, but not merely rights under a procedural law like the Code of Civil Procedure or the Evidence Act.

85. For an order to be revisable under section 34(4) of the Maharashtra Rent Control Act, the order must affect the very existence of the suit or the foundation of the party's case in their pleadings and not merely a procedural order, not affecting the substantive rights of parties, though such procedural order may ultimately affect the strength or weakness of the case of the aggrieved litigant which is to be finally determined at the trial while passing the decree in the suit or final order in the proceeding.

86. Following are instances of revisable orders.

- (i) an order refusing leave to amend the plaint or written statement, where the proposed amendment is for assertion of rights or liabilities under the Rent Act or any other substantive law
- (ii) an order rejecting an application for restoration of the suit under Order 9 Rule 4 of the CPC
- (iii) an order allowing or rejecting an application for a declaration that the suit has abated
- (iv) an order refusing to extend the time for filing a written statement
- (v) an order for deleting an issue pertaining to rights or liabilities under the Rent Act, or any other substantive law. This list is illustrative and not exhaustive.

87. Following are instances of orders which would not be revisable orders:-

- (i) an order granting leave to amend plaint or written statement
- (ii) an order granting extension of time to file written statement
- (iii) an order raising additional issue
- (iv) an order made for production of documents or discovery or inspection.
- (v) an order directing a plaintiff/defendant to furnish better and further particulars
- (vi) an order issuing or refusing to issue a commission for examination of witnesses.
- (vii) an order issuing or refusing to issue summons for additional witness or document
- viii) an order condoning delay in filing documents, after the first date of hearing.

- (ix) an order of costs to one of the parties for its default
- (x) an order granting or refusing an adjournment
- (xi) an order allowing an application for restoration of the suit under Order 9 Rule 4 of CPC.

This list is also illustrative and not exhaustive.”

24. Considering the facts of the case, one more aspect which is significant and which is required to be noted is the specific plea as asserted by the petitioner in the impleadment application justifying her impleadment. The same can be found in paragraph 14 of the application wherein the petitioner says that the need for impleadment has arisen as the tenancy rights are now being converted into ownership rights and as set out by her in the said paragraph and not for any other purpose. Paragraph 14 of the application reads thus:-

“14. Recently, during the end of the year 2005, meetings were held between the tenants and the landlords of the suit building for the purpose of converting tenancy into ownership rights in favour of respective tenants. An offer was made by tenants to the landlords in September 2005 for the purpose of conversion of tenancy rights of each of the tenants into ownership rights and for establishing a condominium of Carmichael House. The building Carmichael house requires major repairs. It was though that by converting the tenancy right into ownership one, required funds for the repairs would be generated easily. Thus, from the amounts so collected agreed amount due to the landlords would be paid and also repairs to the building would be carried out. Tenants also sought legal opinion under the MHADA Act to get the tenanted premises converted into ownership as the building is a pre 1940 construction. Tenants were advised that they could acquire the ownership rights either by negotiations with the landlords or by making an application for acquiring the building under the MHADA Act. Tenants were also advised that tenants rights to acquire the property under MHADA was under challenge

before the Supreme Court. In this view of the matter, several negotiations have been held and are going on with the landlords. Since the tenancy rights are likely to be converted into ownership rights, I am advised that from the taxation point of view and from the other points of view and for protection of my rights, it would be necessary for me to now put the correct facts in the proceedings now pending relating to the suit flat and assert my tenancy rights in respect thereof so that no complications arise at a later stage when the conversion from the tenancy rights to the ownership rights take place. Accordingly, I am now advised to make an application before this Hon'ble Court setting out the real and correct facts regarding tenancy and to get myself impleaded as a party to this suit."

It is surprising as to how the petitioner could have made these averments when admittedly no independent proceedings were filed by her to seek a declaration of her rights as a tenant except for the fact that the petitioner has some other motives, as these averments reflect. Secondly it cannot be overlooked that if such a plea is accepted, an assertion which is completely alien to the requirement of law for the court to be satisfied to consider any application under Order 1 Rule 10 of the C.P.C. would be accepted. A plain look at the averments in paragraph 14 (supra) of the impleadment application, in my opinion, reveals the real intention of the petitioner.

25. Thus there is much substance in the contention as urged on behalf of respondent no.1. The reliance of Mr.Gorwadkar on the recent decision of the Supreme Court in "*Nandkishor Savalaram Malu (dead) through L.Rs. Vs. Hanumanmal G.Biyani (dead)*"

through L.Rs.” (supra) is apposite, in contending that the only necessary party to the suit in question was respondent no.2 -the tenant, and the petitioner would not become a necessary or a proper party. This was a case in which the appellant had impleaded defendant no.1 who was an employee of the tenant firm. The tenant firm had suffered a decree, however, the suit was dismissed against defendant no.1. Aggrieved by the learned trial Judge not passing a decree against defendant no.1, plaintiff no.2 filed an appeal before the learned District Judge who allowed the appeal and decreed the suit against all the defendants and held that defendant no.1 being an employee of the firm is bound by the decree passed against the firm and its partners (defendant nos.2 to 9). The High Court in revision upset the order passed by the learned District Judge and maintained the order passed by the learned trial Judge. This order of the High Court came to be challenged in the proceedings before the Supreme Court. It is in this context, their Lordships of the Supreme Court made following observations in paragraph 30 which read thus:-

“30. As a matter of fact, in our view, it was not necessary for the appellants to have impleaded defendant no.1 in the present rent proceedings. The reason being that in rent proceedings the lessee/tenant is the only necessary or/and proper party and none else. A person, who claims through lessee/tenant, is not a necessary party”.

26. Further Mr.Gorwadkar, learned Senior Counsel for

respondent no.1 would be correct in submitting that the Court in considering the impleadment application under the provisions of Order I Rule 10 of CPC for impleadment of a third party, the question of limitation becomes relevant considering the provisions of Order I Rule 10 Sub-rule (5) of Code of Civil Procedure. This for the reason that by such impleadment, the basic cause which was asserted at the time of filing of suit and in the present case in the year 1982 when the suit came to be instituted by respondent no.1 is sought to be altered by the impleadment application of the petitioner. The effect of amendment, therefore, relates back to the basic cause of action which accrued to respondent no.1 in the year 1982 and for that matter in the year 1995 when the second suit came to be filed. Mr.Gorwadkar's reliance on the decision of the Supreme in *Alkapuri Co-op. Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) through LRs.* (supra) in supporting this proposition, is apposite. The Supreme Court in a similar context has made the following observations:-

“15. It is neither in doubt nor in dispute that the court's jurisdiction to consider an application for amendment of pleading is wide in nature, but, when, by reason of an amendment, a third party is sought to be impleaded not only the provisions of O.VI R.17, Code of Civil Procedure (C.P.C.) but also the

provisions of O.I R.10, C.P.C. would come into play.
When a new party is sought to be added, keeping in
view the provisions of sub- rule (5) of Rule 10 of
Order I, C.P.C., the question of invoking the period of
limitation would come in.” (emphasis supplied)

27. In the light of the above observations, this Writ Petition lacks merit. It is accordingly rejected.

(G.S.Kulkarni, J.)