

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.692 OF 2016
with
CAA/873/2016
IN
APPEAL FROM ORDER NO.692 OF 2016**

Ms.Dilshad Bohra ... Appellant
Vs.
Mrs.Zaitoon Abdul Hamid Antulay ... Respondent

**with
APPEAL FROM ORDER NO.170 OF 2015
WITH
CAA/216/2015
IN
APPEAL FROM ORDER NO.170 OF 2015**

Mrs.Zaitoon Abdul Hamid Antulay ... Appellant
Vs.
Ms.Dilshad Bohra ... Respondent

Mr.Pradeep Havnur for the Appellant in AO/692/2016 and for Respondent in AO/170/2015

Mr.Asad Bukhari for Appellant in AO/170/2015 and for Respondent in AO/692/2016

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: AUGUST 14, 2017**

P.C. :

1. The original plaintiff and the original defendant in Suit No.4212 of 2009 have filed these two Appeals from Order against the same order dated 11.11.2014 passed by the learned Judge of

the City Civil Court at Greater Mumbai in Notice of Motion No.2220 of 2010 in S.C. Suit No.4212 of 2012. (For the sake of clarity, both the parties are hereinafter referred to by their original status as plaintiff and defendant in Suit No.4212 of 2012).

2. The plaintiff has filed the Suit for possession, declaration and injunction against the defendant. He claims that the defendant is residing in flat No.3 in one building known as Sajun building at Nagpada, Mumbai, admeasuring a carpet area of 1200 sq.ft. She is a trespasser and, therefore, she prayed for possession of the said premises, for appointment of Court Receiver and also for injunction and other prayers. In the suit, she moved a Motion seeking temporary relief under Order 39 Rule 1 of the Civil Procedure Code. The said Motion was contested by the defendant denying the fact that she is a trespasser and claimed that she is lawfully occupying the said premises. The learned Judge after hearing the parties, allowed the said Motion partially and directed the defendant not to create third party interest or part with the possession of the suit flat till the disposal of the suit. The learned Judge has also directed the defendant to deposit an amount of Rs.25,000/- per month in the Court as compensation from the date

of the order in the Motion. Aggrieved by the said order, both the plaintiff and the defendant have filed these appeals.

3. The learned Counsel for the appellant/original defendant has submitted that the trial Court has erred in passing the order of directing the defendant to deposit in Court a sum of Rs.25,000/- per month by way of compensation, and it is illegal as there are neither pleadings to that effect nor such relief is prayed for by the plaintiff. He submitted that the learned Judge cannot go beyond the pleadings and cannot pass any order.

4. In support of his submissions, he relied on the judgments of the Supreme Court in **Siddu Venkappa Devadiga vs. Smt.Rangu S. Devadiga & Ors.**¹; **Shehla Burney (Dr.) & Ors. vs. Syed Ali Mossa Raza (dead) by LRs & Ors.**² and **Cotton Corporation of India Ltd. vs. United Industrial Bank Ltd. & Ors.**³.

5. The learned Counsel further submitted that the trial Court has not arrived any *prima facie* conclusion as to from which date the appellant/defendant is a trespasser. Under such circumstances, holding the defendant as a trespasser is wrong.

1 (1977) 3 SCC 532

2 (2011) 6 SCC 529

3 (1983) 4 SCC 625

He submitted that she has been occupying the suit premises as a tenant. He further relied on the rent receipt which was issued in her favour in 1992. He further submitted that an amount of Rs.3,000/- was paid by her as arrears of the rent to the landlord. She has filed RAD Suit No.240 of 2013 before the Small Causes Court wherein she had sought a declaration about her tenancy and the interim order passed in the said suit is challenged by her before the appellate Bench of the Small Causes Court. He has submitted that the said order directing the defendant to pay Rs.25,000/- monthly compensation is erroneous and is to be set aside. He has further submitted that the calculation or fixing of any monthly compensation of Rs.25,000/- by the trial Court is baseless in the absence of any documentary proof in respect of valuation and hence, it is to be set aside.

6. Per contra, the learned Counsel for the respondent/plaintiff has grievance only in respect of quantum of the compensation fixed by the trial Court. He submitted that the suit flat is situated in Nagpada in south Mumbai and admittedly, the carpet area of the flat is 1200 sq.ft. and thus, the amount of Rs.25,000/- is too meagre and instead an amount of Rs.1,50,000/- per month

from the date of filing of the suit should have been fixed by the Court.

7. Heard submissions, perused the citations relied on by the learned Counsel for the appellant/defendant and the impugned order alongwith the order dated 28.7.2009 passed by the learned Judge of the Small Causes Court in RAN Application No.52 of 2004 so also in RAD Suit No.240 of 2013 dated 28.3.2014.

8. In the case of **Cotton Corporation of India Ltd. vs. United Industrial Bank Ltd. & Ors.** (supra), the Supreme Court has held that though power to grant injunction is an inherent power, it is subject to statutory provisions. The observation in the case of **Siddu Venkappa Devadiga vs. Smt.Rangu S. Devadiga & Ors.** (supra), is culled out wherein the Supreme Court has held that the Court cannot borrow the outside things which go beyond the pleadings and the Court cannot itself make a new case which is not pleaded or the subject matter of the trial.

9. On perusal of the two orders, it appears that the Small Causes Court has not given any finding in favour of the appellant/defendant declaring her as a tenant of the suit premises. She has filed R.A.D. Suit before the Small Causes Court which is

still pending. However, during the pendency of the said suit, interim application was under section 9A of the Civil Procedure Code was filed by defendant No.2 alongwith multiple prayers and the application was partly allowed. In RAD Suit No.240 of 2013, an application below exhibit 25 was filed wherein the plaintiff has sought permission to deposit the rent in the Court and the said application was rejected by order dated 10.2.2015 and the Civil Court has directed her to deposit Rs.25,000/- towards unlawful use of the suit flat. The Small Causes Court while dismissing the RAN application has held that there was no relationship between the landlord and tenant between the defendant and the plaintiff. On perusal of the pleadings and the prayers in the suit so also the prayers in the Notice of Motion though no specific prayer is made regarding compensation for the unlawful use of the premises, by fixing the amount of compensation, the Court has not borrowed any other outside material or has not gone beyond pleadings or has itself created a new case and hence, it is not covered under the ratio laid down in the case of **Siddu Venkappa Devadiga** (supra) and **Cotton Corporation of India Ltd.** (supra).

10. Under Order 39 Rule 1 of the Civil Procedure Code, the trial Court has discretionary power and is expected to give relief based on the principles of equity. *Prima facie*, the Court has rightly considered that on the basis of the findings given by the Small Causes Court, no such relationship of landlord and tenant is brought before the trial Court and on the basis of relevant documents, some amount of compensation had to be fixed.

11. The submissions of the learned Counsel for the appellant/plaintiff about the enhancement of the said amount cannot be considered as the appellant / plaintiff did not produce any document before the trial Court to substantiate his prayer of compensation of amount of Rs.150,000/- and, therefore, the view taken by the trial Court of granting monthly compensation of Rs.25,000/- cannot be faulted with.

12. Hence, both the Appeals from Order are dismissed. If the amount of compensation @ Rs.25,000/- per month is deposited, the plaintiff is allowed to withdraw the said amount. If at all, the defendant succeeds in getting any order in her favour in respect of her declaration as a tenant, then, as per the order of the Small Causes Court, the amount of rent will be adjusted and

that issue can be decided by the Small Causes Court or the Civil Court.

13. In view of the dismissal of the Appeals from Order, Civil Applications are also disposed of.

(MRIDULA BHATKAR, J.)