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

CIVIL REVN. APPLICATION NO. 314 OF 2016

Shaikh Ismail Mohammed.

... Applicant.

V/s.

Shree Tirthankar Company and Anr.

... Respondents.

Mr. A.S. Tungare i/b. Amit Tungare & K.N. Marathe for the Applicant.

Mr. Sameer Bhalekar for the Respondent 1.

Ms. Aarti Nimbalkar for Respondent No.2.

CORAM : N.M. Jamdar, J.

23 February, 2017.

Oral Order :-

By this Revision Application, the Applicant has challenged the concurrent judgments and orders passed by the learned Small Causes Court Judge, Mumbai and the Appellate Bench of Small Causes Court, Mumbai, whereby the Suit filed by the Respondent – landlord has been decreed and the Appeal filed by the Applicant has been dismissed.

2. The Respondent filed the T.E. & R. Suit No. 4/4 of 2007 against the Applicant in respect of plot of land admeasuring 370 sq. mtrs. situated at Goregaon, Mumbai. According to the Respondent, the Suit property was let out to the original tenant on 27 February 1953 up to 31 December 1987. The notice of quit was sent on 7 October 2006. The Respondent prayed that since the Applicant did not hand over the possession of the suit premises and the Applicant had lost protection of the Maharashtra Rent Control Act, 1999, the Applicant be directed to hand over the possession of the suit property. The learned Small Causes Court Judge, by judgment and order dated 5 February 2009, decreed the suit. Thereafter, an Appeal No. 78 of 2009 was filed by the Applicant before the Appellate Bench of Small Causes Court which was dismissed on 25 February 2016. Thereafter, the present Revision Application is filed.

3. The learned Counsel for the Applicant submitted that the Respondent – Plaintiff had earlier filed a R.A.E. & R. Suit No. 183/430 of 1999 against the Applicant in respect of the very same cause of action and the suit was dismissed by the learned Small Causes Court Judge. He submitted that in the plaint filed in the R.A.E. & R. Suit No. 183/430 of 1999, the Respondent had admitted the Applicant as tenant even of the structures and after the enactment of the Act of 1999, the present suit is filed only in respect

of the plot of the land. He submitted that the Respondent cannot be permitted to resile away from his categorical stand that the Applicant is the tenant of the structure as well. He submitted that the present suit is appeared by principles of *res judicata* as well as the Respondent is estopped from taking a stand that the Applicant is not a tenant of the structure. He relied upon the decisions of the Apex Court in the cases of *Tandon Brothers v/s. State of West Bengal*¹, *Gaiv Dinshaw Irani & Ors. v/s. Tehmtan Irani & Ors.*² and *State of Bihar v/s. B.L. Agarwalla and Anr.*³. The learned Counsel also contended that there is the evidence on record to show that the Applicant is a tenant of the structure.

4. The learned Counsel for the Applicant has placed emphasis on the plaint filed in the earlier suit. The plaint filed in the earlier suit is placed on record. In paragraph 1 the Respondent has described himself as the landlord of the plot of land and hand mentioned two Municipal houses and thereafter has stated that the Plaintiff is the landlord in respect of the open plot of land admeasuring 370 sq. mtrs. Bearing C.T.S. No. 171/39 to 63 and Municipal House No.1606/130 and 1607/131, situated at Gogate Wadi, Aarey Road, Goregaon (East), Mumbai – 400 063 of which the Defendant is a monthly tenant at Rs.65/- per month. The said open plot of land is hereinafter referred to 'as the suit premises'

1 2001(5) SCC 664

2 2015 (2) All M.R. 456

3 AIR 1966 Patna 410

annexing at Exhibit 'A' the sketch showing the suit premises. The boundaries of the suit premises were described at East Side C.T.S. No. 171 Rahimatalli Vajdali Chawl and Gopal Mahadev Khote Chawl, West Side C.T.S. No. 171 Road, North Side C.T.S. No. 171, Rahamatali Vajidali Chawl and Rahamatali Akbarali Chawl, South Side C.T.S. No. 171, Nala.

5. Perusal of the plaint shows that the first para is only regarding the description of the property. There is a reference to the Defendant as a monthly tenant. However, emphasis in the paragraph is what is on what is the exact subject matter of the suit. Thereafter, all the pleadings in the plaint are in reference to the Suit Premises. From this paragraph in the plaint it cannot be said that there is unequivocal assertion on the part of the Respondent admitting that the Respondent has admitted the Applicant as tenant of the structure as well. In this plaint the Suit Premises were an open plot of land. Apart from this paragraph there is no other averment in the plaint that the Applicant has been accepted as a tenant of the structure.

6. When the present suit was filed, in the written statement stand that is taken that the description of the suit property is not proper. The argument which is sought to be advanced is not put fourth in the written statement which is the same terms which has

been argued. The perusal of the decision of the learned Small Causes Court Judge will show that even the decision in the earlier suit was not placed before the learned Small Causes Court Judge and this part was not argued. It was placed on record in the Appeal by filing an application, at the fag end of the Appeal. Unless there is a categorical admission that the Respondent was a tenant of the structures in the earlier plaint, the principle of estoppel which sought to be pressed in service by the learned Counsel for the Applicant relying on these decisions cannot be accepted. Furthermore, in the earlier suit which was disposed of on 13 April 2006, the Applicant had not filed a written statement. The learned Small Causes Court Judge had disposed of the suit as copy of the notice of termination along with acknowledgement was not filed. No document was filed by the Respondent – Plaintiff and that nothing was placed on record to show that the Respondent was in arrears of rent. There is no discussion as to whether the Applicant was the tenant of the structure. The suit proceeded on the basis that the suit property is described as open plot of land and the suit was dismissed on the ground that the notice was not placed on record. Present Suit is filed after the enactment of the Maharashtra Rent Control Act, 1999.

7. Therefore, if the enquiry is to be conducted independently to find out whether the Applicant was tenant of the structure, which both the Courts have carried out the pleadings of

the Applicant himself in the present litigation would show that his stand is that the structure bearing existence much prior to the letting out of the property to him. In reply to the notice given under Section 106 of the Transfer of Property Act, 1882, the Applicant had admitted that an open plot was taken on rent. An affidavit has been filed before the Municipal Authorities by the Applicant in which also the Applicant asserts the same position. If both the Court have found that the stand of the Applicant himself shows that the Applicant was not a tenant in respect of the structure, in the revisional jurisdiction, the assessment of evidence cannot be interfered with. No concrete evidence is shown to demonstrate that the Applicant is the tenant of the structure. In fact the documents of the Applicant furnished are to the contrary. It was open to the learned Small Causes Court Judge and the Appellate Bench to give more weightage to the stand taken by the Applicant in his reply and in his affidavit and merely because another view is possible on assessment of evidence, interference in revisional jurisdiction is not possible.

8. Therefore, neither there was any bar of *res judicata* nor principle of estoppel is attracted. Both the Courts, recorded a finding of fact that the Applicant is not a tenant of the structure and the open plot, being exempted from the provisions of the Act, both the Courts are rightly proceeded to pass the impugned order. In the

circumstances, the Revision Application cannot be entertained and is accordingly rejected.

9. At this stage, the learned Counsel for the Applicant seeks condonation of the ad-interim relief, which is the statement made by the learned Counsel for the Respondents. The learned Counsel for the Applicant states that there are certain tenants in the suit structure and he will not create any fresh tenancies. Though I am inclined to grant ten weeks' time, considering the fact that some time will be required for copy of the order, the decree will not be executed for period of twelve weeks on the condition that the Applicant will file the affidavit/undertaking specifying that the Applicant will not create any fresh tenancies or any rights in the property.

10. If the affidavit/undertaking is not filed within period of three weeks, the decree will stand executable forthwith.

(N.M. Jamdar, J.)