

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

CIVIL REVISION APPLICATION NO.810 OF 2014

**Mrs. Jyotsna Khudabux Irani and anr. : Applicants
versus
Mrs. Mothaben Wd/o. Kunverji Chheda & ors. : Respondents.**

**ALONG WITH
CIVIL REVISION APPLICATION NO.811 OF 2014**

**Farouk Sheriar Irani and anr. : Applicants.
versus
Mrs. Mothaben Wd/o. Kunverji Chheda & ors. : Respondents.**

**Mr. Vivek R Walawalkar a/w Mr. Sameer R Bhalekar and Mr. Yogesh B
Pawaskar i/by Mr. V S Kapse for the Applicants in Civil Revision
Application No.810 of 2014**

**Mr. Tehemton Dalal for the Applicants in Civil Revision Application No.811
of 2014.**

**Ms. Sheeja John i/by M P Savla & Co. for the Respondent Nos. 2 to 6 in
both the Civil Revision Applications.**

**CORAM : R. M. SAVANT, J.
DATE : 13th APRIL 2017**

P.C.

1 At the outset the learned counsel for the Applicants Shri Vivek Walawalkar seeks leave to amend Civil Revision Application No.810 of 2014 so as to incorporate a challenge to the Order dated 29/04/2014 passed by the

Appellate Bench of the Small Causes Court rejecting the Application (Exhibit 28). Leave granted. Amendment to be carried out forthwith.

2 The above Civil Revision Applications take exception to the judgment and order dated 29/04/2014 passed by the Appellate Bench of the Small Causes Court by which order the Appeal filed by the Applicants herein being Appeal No.4 of 2012 came to be dismissed and resultantly the decree passed by the Trial Court in T.E. & R. Suit No.20/27 of 2004 dated 21/12/2011 came to be confirmed.

3 The Applicants herein are claiming through the original sub lessees. The Respondent Nos.1 to 6 are the assignees from the original lessee one Tulsidas Gopalji Charitable and Dalkeshwar Temple Trust (for short “the said Trust). The lease in favour of the said Trust was executed by the Secretary of State for India in Council on 28/07/1875 which lease is in respect of a plot of land admeasuring 36518 sq.yards. Out of the said larger portion, the said Trust had created a sub lease vide Indenture of Lease dated 11/08/1934 in respect of a small portion of the suit premises i.e. Plot Nos.210 and 212 admeasuring about 605 sq.yards in favour of Mr. Boman Khodabux Irani and Mr. Khodabux Aspandiar Irani. Thereafter Boman Khodabux Irani by Deed of Assignment dated 01/10/1934 assigned his leasehold rights in favour of Khodabux Lohrasp Irani i.e. grandfather of the Defendants i.e. the Applicants

herein. Out of the said leasehold rights 50% rights assigned in favour of Khodabux devolved upon his son Sheriar Irani. Thereafter Khusru Irani brother of Sheriar assigned his remaining 50% leasehold rights in favour of his brother Sheriar Khodabux Irani i.e. father of the Defendants. By Indenture of Lease dated 15/10/1968 the trustees of the trust have assigned their leasehold rights in respect of the larger plot of land which includes the suit property in favour of the Plaintiffs for a consideration of Rs.Eight Lakhs. The Trustees have accordingly vide letter of attornment dated 11/12/1970 informed the father of the Defendants that they have sold or assigned their leasehold rights to the Plaintiffs. Hence Sheriar Irani, father of the Defendants, has become the sole tenant in respect of the suit premises and the Plaintiffs i.e. the Respondent Nos.1 to 6 herein are the landlords.

4 The Plaintiffs as the landlords terminated the tenancy of the Defendants in respect of the said plot of land by issuing advocate's notice dated 19/07/2003. After the said notice of termination the Plaintiffs filed the suit in question for the eviction of the Defendants being T.E. & R. Suit No.20/27 of 2004. In the plaint of the said suit, the Plaintiffs have described the suit property as an open plot of land bearing Plot Nos.210 and 212 admeasuring about 605 sq. yards bearing Cadastral Survey No.3A/124 of Mazgaon Division, Municipal "E" Ward No.E-4817(2-3), 43-43A, Mazgaon Road, 9-9B, Mazgaon and Dockyard Road situated at corner of Balwantsingh Dhodi Marg and

Champashi Bhimji Marg, Tulsiwadi, Mazgaon, Mumbai – 400 010. It is further averred in paragraph 4 of the plaint that the suit premises are an open plot of land and in the said circumstances the provisions of the Maharashtra Rent Control Act, 1999 do not apply to the suit premises, and that the Defendants are therefore not entitled to protection under any Rent Control Legislation. In the said suit the Plaintiffs have sought the relief by way of prayer clause (a) that the Defendants be ordered and decreed to vacate and hand over vacant and peaceful possession of the suit premises i.e. open plots of land i.e. Plot No.210 & 212 admeasuring about 605 sq.yards bearing cadestral Survey No.3A/124 of Mazgaon Division and bearing Municipal “E” Ward No.E-4817 (2-3), 43-43A, Mazgaon Road, 9-9B, Mazgaon & Dockyard Road situate at the corner of Balwantsingh Dhodi Marg and Champashi Bhimji Marg, Tulsiwadi, Mazgaon, Mumbai – 400 010 to the Plaintiffs.

5 In the said suit the Defendant No.1 filed his Written Statement. In paragraph 14 of the said Written Statement it was stated that the Defendants vehemently deny that the suit premises is an open plot land. It is further stated that the Plaintiffs have deliberately and dishonestly with ulterior motive and malafide intention described the suit premises as an open plot of land. It was further stated in the said paragraph 14 that what has been vested in favour of the sub-lessee with regard to the suit property is an open plot of land together with structures and buildings standing thereon. It was further stated that the

sub-lessees of the Governor of Maharashtra have been specifically vested with the suit property which includes the open land as also the buildings and structures standing thereon. In paragraph 20 of the Written Statement it is averred that the Defendant denies the right of the Plaintiffs to seek eviction of the Defendants on the ground that the suit premises are an open plot of land.

6 On the basis of the aforesaid pleadings the Trial Court i.e. the learned Judge of the Small Causes Court framed the issues. Having regard to the assertion of the Plaintiffs that the the demised premises are an open plot of land, and denial of the same by the Defendants, which had the consequence of impinging upon the jurisdiction of the Trial Court, the Trial Court amongst the issues framed, also framed an issue as to whether it had the jurisdiction to try the present suit.

7 Before the Trial Court, the parties led oral evidence of a witness each on either side. The Plaintiffs produced the documentary evidence to buttress their case that the lease was of an open plot of land. The Trial Court on the basis of the evidence on record and especially having regard to the covenants in the lease deed, concluded that it had the jurisdiction to try the suit. The Trial Court whilst arriving at the said conclusion recorded a finding that the lease granted was of an open plot of land and the case of the Defendants that the lease was of a plot of land with structure thereon could

not be accepted in the light of the documentary evidence on record which has been referred to by the Trial Court in its judgment and order. The Trial Court accordingly decreed the T.E. & R. Suit No.20/27 of 2004 by its judgment and order dated 21/12/2011.

8 The Defendants i.e. the Applicants in the above Civil Revision Applications aggrieved by the decreeing of the said suit by the Trial Court, challenged the same by filing an Appeal being Appeal No.4 of 2012. In the said Appeal, the decree passed by the Trial Court was stayed by the Appellate Bench of the Small Causes Court. The Appellants in the said Appeal i.e. the Defendants thereafter in the year 2014 filed an Application (Exhibit 28) for being permitted to lead additional evidence by invoking Order XLI Rule 27 of the Code of Civil Procedure. In the said Application (Exhibit 28) the ground made out was that on a search of the cupboard, the Appellants i.e. the Defendants have come across the documents which are material for determining whether the lease was only of a plot of land or a plot of land with structure thereon. The said documents were listed from A to K in the said Application. In so far as the first 9 documents are concerned, they were relating to the Property Card, Property Tax paid in respect of the demise premises. The said Application (Exhibit 28) was replied to on behalf of the Respondents i.e. the original Plaintiffs. The said Application was considered by the Appellate Bench of the Small Causes Court and by order dated 29/04/2014

rejected the same. The said Application has been rejected inter-alia on the ground that the said Application does not satisfy or meet the requirements of Order XLI Rule 27 of the Code of Civil Procedure inasmuch as the Appellate Bench of the Small Causes Court observed that whether the said additional evidence is necessary to decide and pronounce judgment is a discretion to be exercised by the Court judicially taking into consideration the relevance of the documents, and in the facts of the said case, the Appellate Bench of the Small Causes Court observed that it does not deem it so. The said Application (Exhibit 28) is also rejected on the ground that the said documents would not make any difference having regard to the contents of the lease deed. The said order dated 29/04/2014 is also taken exception to by way of the above Civil Revision Applications.

9 However, it is required to be noted that the said Application was also adjudicated by the Appellate Bench of the Small Causes Court along with the Appeal. In so far as the Appeal is concerned, the Appellate Bench of the Small Causes Court went threadbare into the finding recorded by the learned Judge of the Small Causes Court on the issue as to whether the demised premises was only a plot of land or a plot of land with structure thereon. The Appellate Bench of the Small Causes Court adverted to the covenants of the lease deed which according to the Appellate Bench of the Small Causes Court were an indicia as to whether the lease was only of a plot of land or a plot of

land with structure thereon. The Appellate Bench of the Small Causes Court on such consideration confirmed the finding of the Trial Court that the lease was only of a plot of land and not a plot of land with structure thereon. However, the Appellate Bench of the Small Causes Court sustained the ground urged on behalf of the Defendants questioning the locus standi of the Plaintiffs on the basis of the derivative title of the Plaintiffs, on the ground that the Plaintiffs have derived title on the basis of an unregistered document. However, the Appellate Bench of the Small Causes Court upheld the locus standi of the Plaintiffs to file the suit on another ground namely in the capacity of being the co-owners. As indicated above the Appellate Bench of the Small Causes Court has by the impugned judgment and order dated 29/04/2014 dismissed the Appeal and has thereby confirmed the decree passed by the Trial Court.

10 On behalf of the Applicants in Civil Revision Application No.810 of 2014 Shri Vivek Walawalkar would firstly make submissions as regards rejection of the Application (Exhibit 28) filed under Order XLI Rule 27 of the Code of Civil Procedure. It was the submission of the learned counsel that the Appellate Bench of the Small Causes Court has erred in rejecting the Application (Exhibit 28) filed under Order XLI Rule 27 of the Code of Civil Procedure when the documents sought to be produced by the said Application could have been crucial to the issue which arose in the proceedings. The

learned counsel would seek to reiterate the case of the Applicants i.e. the original Defendants before the Appellate Bench of the Small Causes Court to contend that the lease was of a plot of land with structure in respect of which contention the learned counsel sought to place reliance on the recitals of the said lease deed. The learned counsel would contend that the documents which have been annexed to the Application (Exhibit 28) would buttress the case of the Applicants/Defendants that there was a structure on the plot of land. In support of the said contention, the learned counsel for the Applicants Shri Walawalkar sought to place reliance on the judgment of the Apex Court in the matter of Suryakumar Govindjee v/s. Krishnammal and others reported in (1990) 4 SCC 343.

11 The learned counsel Shri Dalal appearing for the Applicants in Civil Revision Application No.811 of 2014 would adopt the submissions of Shri Walawalkar, however in addition would contend that the Appellate Court has wrongly rejected the Application (Exhibit 28) filed under Order XLI Rule 27 of the Code of Civil Procedure when the plan (Tika Plan) which the Appellants i.e. the Applicants herein sought to produce show the existence of structure on the plot of land. The learned counsel in support of his submission that the Application (Exhibit 28) ought to have allowed relied upon the judgment of the Apex Court in the matter of K. Venkataramiah v/s. Seetharama Reddy and others reported in AIR 1963 SC 1526.

12 Per contra the learned counsel appearing for the Respondent Nos.1 to 6 original Plaintiffs Ms. Sheeja John would support the decree passed by the Trial Court as confirmed by the Appellate Bench of the Small Causes Court. The learned counsel would seek to draw this Court's attention to the various documents which are on record and which are marked as exhibits . The learned counsel especially drew this Court's attention to the map which was marked as Exhibit 51 which is a part of the lease deed on which the plot of land admeasuring 605 sq. yards i.e. the suit premises has been delineated. It was the submission of the learned counsel that the said documents unequivocally point out that the lease was of a plot of land and not a plot of land with structure thereon, as on the Map at Exhibit 51 there is no structure appearing on the delineated land.

13 Having heard the learned counsel for the parties, I have considered the rival contentions. The question that arises for consideration is, whether this Court is required to interfere with the decree of possession in its revisionary jurisdiction under Section 115 of the Code of Civil Procedure with the concurrent orders passed by the Courts below. As indicated above both the Trial Court as well as the Appellate Bench of the Small Causes Court have returned findings on the basis of the material on record and especially the covenants in the lease deed that the lease was of a plot of land and not a plot

of land with structure. Though a valiant attempt was made by the learned counsel for the Applicants Shri Vivek Walawalkar to prove the contrary namely a plot with a structure was leased out. In my view, the said attempt must fail in view of the unambiguous terms of the lease deed and the plethora of documents on record amongst which is the document at Exhibit 51 which is the most crucial document as it is a map of the plot of land admeasuring 605 sq. yards which is delineated on the said map. This delineation would have to be considered in the context of the fact that the said 605 sq. yards is delineated out of the larger plot of land admeasuring 36518 sq. yards which was leased out by the Secretary of State for India in Council to the said Trust. The said Map (Exhibit 51) which is part of the lease deed dated 11/08/1934 does not show the existence of any structure. In my view, there is sufficient evidence on record to come to a conclusion that what was leased out was a plot of land and not a plot of land with structure thereon. This is notwithstanding the fact that no evidence contrary to the terms appearing in a written document can be led. Since the Courts below have held that the lease was only of a plot of land, the Applicants i.e. the Defendants are not entitled to the protection of the Rent Act.

14 In so far as the Application (Exhibit 28) is concerned, as indicated above, the same was filed on 07/03/2014 i.e. two years after the Appeal was admitted. The said Application is founded on the fact that the documents mentioned therein were found in the cupboard by one of the Defendants and

hence they could not be produced. The said justification for non-production of the documents would have to be considered in the context of the fact that the battle lines were clearly drawn between the Plaintiffs and the Defendants when the Plaintiffs asserted that the lease was of an open plot of land, and the Defendants asserted in the Written Statement that it was a plot of land with structure. The Defendants were therefore very well aware of the case that they had to meet at the trial. However, the Defendants did not produce the said documents which they sought to produce vide the Application (Exhibit 28) whilst the matter was pending before the Trial Court. They also did not produce the documents when the Appeal was admitted in the year 2012, but sought to produce them much later in the year 2014. The reason put forth by the Applicants i.e. the Defendants for not producing the documents at an earlier stage does not sound credible. This is in so far as the delay in filing the Application is concerned.

As indicated above, the Appellate Bench of the Small Causes Court has rejected the Application on the ground that the said documents which are sought to be produced would not make any difference having regard to the contents of the lease. This Court endorses the view taken by the Appellate Bench of the Small Causes Court. Prima facie the said documents would not make any difference having regard to the covenants in the lease deed which are clear and unambiguous. The recitals in the lease deed on which reliance

was sought to be placed by the learned counsel for the Applicants Shri Vivek Walawalkar is misconceived, as the said recitals only give a description of the larger property which was leased out to the original lessee by the Secretary of State for India in Council. In so far as the judgment of the Apex Court in *Suryakumar Govindjee's* case (supra) is concerned, the same would not aid the Applicants in their endeavour to prove that the lease was of a plot of land along with structure. The factual situation in the said case was different than the factual situation in the present case. In the said case there was a composite lease of the land with structure. It is in the said context that the said judgment was rendered. In so far as the judgment in *K Venkataramiah's* case (supra) is concerned, the said judgment is an exposition of the Apex Court on the parameters to be kept in mind whilst exercising jurisdiction under Order XLI Rule 27 of the Code of Civil Procedure. In the facts of the present case, it cannot be said that the Appellate Bench of the Small Causes Court has erred in not exercising jurisdiction under Order XLI Rule 27 of the Code. Hence the said judgment would also not aid the Applicants.

15 In the light of the aforesaid, no case for interference in the revisionary jurisdiction of this Court is made out. The above Civil Revision Applications are accordingly dismissed.

16 At this stage the learned counsel for the Applicants in both the

Civil Revision Applications Shri Vivek Walawalkar and Shri Tehemton Dalal seek stay of the instant order. In the facts and circumstances of the present case, the instant order is stayed for a period of 8 (eight) weeks from date.

[R.M.SAVANT, J]