IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 32 OF 2017

M/s. Bhavan Jivraj Co. Private Limited ...Applicant
Versus
Ranchhoddas Lotwala Foundation, Thru. Trustees & Ors ...Respondents

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Mr.N.P.Wagle i/b. Ms.Snehal R.Modi, for the Applicant.

Ms.Neha Mehta i/b. Neha Mehta & Co., for the Respondents.

CORAM : G. S. KULKARNI, J.

DATE : DECEMBER 11, 2017

P.C.:

Heard the learned Counsel for the parties. This is an application of the tenant who suffers an eviction decree passed by the Appellate Bench of the Small Causes Court in Appeal No.470 of 2010.

2. It is not in dispute that by virtue of lease deed dated 14 December 1954 the applicant was inducted as a tenant of the suit premises by the Respondent No.1-trust. It is also not in dispute that the lease expired in the year 1984. In the suit in question (RAE Suit No.609/1114 of 2004) instituted by Respondent No.1-landlord seeking eviction of the applicant, the two basic grounds were raised seeking a decree of eviction and possession, firstly of non payment of municipal taxes by the applicant-defendant and the secondly of sub-letting of the suit premises without prior

written permission of the respondents-plaintiffs. The relevant clauses in the lease deed creating obligation on the tenant to pay the taxes and not to create third party rights, are clauses II(b) and (f) which read thus:-

> "II. The Lessee doth hereby covenant with the Lessor as follows:-
> .. … ..
> (b) To pay all rates, taxes, fees, levies, assessments, dues, duties, impositions and outgoings including water, electrical and other charges of every description now payable hereafter to become payable in respect of the demised premises.
> … … …
> (f) Not to sublet, under-let, assign, transfer or otherwise part with the possession of the demised premises or any part thereof or any other structure or structures erected thereon or any part thereof or alter the nature of these presents without the previous consent in writing of the Lessor which consent the Lessor will not unnecessarily withhold in case of a respectable and responsible provided such sub-letting or under-letting is allowed by the Rent Act or any other Act for the time being in force relating to the immovable properties in the City of Bombay and Provided further that upon every such assignment for the residue of the term the Lessee shall within three months after receipt of every such assignment or assurance from the Registrar's office give notice of such assignment to the Lessor by delivering to and leaving with the Lessor a complete copy thereof with all particulars of date, parties, stamp, registration therein entered and such other particulars as may be required by the Lessor AND PROVIDED ALSO that notwithstanding any such assignment the Lessee shall continue to be liable to pay the rent hereby received and perform and observe the covenants terms and conditions herein contained until the Lessee shall have been specifically freed from such obligation by the Lessor in writing."

3. Respondent no.1-plaintiff thus in paragraph 4 of the plaint clearly averred that under the said lease deed dated 14 December 1954 there was a clear obligation on the applicant-lessee to pay all rates, taxes, levies, assessments, dues, duties, imposition and outgoings including water, electrical and other charges of every description. It was averred that the respondents/plaintiffs had made inquiries of the dues of property tax and

repair cess with the Municipal Corporation, by their letters dated 16 October 2002 and 12 November 2002 and were informed by the Municipal Corporation by its dated 30 December 2002 that the suit property was attached on 21 July 2001 under Warrant of attachment No.CAR-15 of 2001-02 for arrears and non-payment of the municipal taxes payable from October,2000 amounting to more than Rupees One lakh. Also in paragraph 5 of the plaint the respondents-plaintiffs averred that by virtue of non payment of the taxes the applicant was in clear breach of the terms and conditions of the lease dated 14 December 1954. As regards the second ground, the plaint averred that the applicant-defendant had sub-let, transferred and/or otherwise created third party interest in the suit property, contrary to the provisions of the Rent Act and were profiteering by such sub-lease, transfer and or by creating such third party interest in the suit property. The respondents-plaintiffs contended that the applicant/defendant had thus lost protection under the Rent Act, on the said two grounds.

4. In the written statement the applicant-defendant while dealing with paragraph 4 of the plaint in regard to non payment of taxes, simplicitor made a statement that they were regularly paying taxes of the suit property to the Municipal Corporation. As regards the second ground of creating of third party interest, the applicant-defendant although denied

of any sub-letting however averred that third party interest was created in the suit premises with the knowledge and written consent of the respondents-plaintiffs.

5. Learned Trial Judge dismissed the suit. In the respondent's appeal against the judgment of the trial Court, the appellate Bench, considering the evidence on record, however, reversed the findings of the trial Court. The appellate Bench held that the learned trial Judge has completely overlooked that there was an obligation on the part of the applicant-defendant to pay municipal taxes as it was clear from the materials and evidence that the applicant-defendant was a defaulter and had not complied with its obligation to pay municipal taxes. It is observed that there was also a clear admission on behalf of the applicant-defendant of non-compliance of the said obligation by making payment of taxes directly with the Municipal Corporation. Once the warrant of attachment was issued it was enough proof of non-payment of property taxes. As regards the other ground of sub-letting, the appellate Court framed a specific point being point No.4 which reads thus:-

> “4. Whether respondent tenant proves that he created third party interest with the knowledge and written consent of the landlord?”

Considering the evidence on record the appellate Court held that though the applicant had averred that there was a consent of the respondents to induct a third party, however, no evidence was placed on record to show that any consent was obtained from the landlord much less in writing, before creating such third party interest. The appellate Court thus held that though the applicant-defendant had come with a specific case that a third party interest was created in the suit premises with the knowledge and written consent of the landlord, however, the applicant failed to adduce any evidence on a consent as granted by the respondents/plaintiffs so asserted by the applicant-defendant. It was observed that initial burden to prove unlawful sub-letting was on the respondents' shoulder and which came to be shifted on the applicant-defendant when a statement is made in the written statement that the sub-letting was with the knowledge and written consent of the landlords. Accordingly, for want of any evidence on record from the applicant-defendant, the finding of the learned Trial Judge on this issue of sub-letting was negatived.

6. Learned Counsel for the applicant/defendant in assailing the impugned judgment of the Appellate Bench submits that the applicant had duly discharged his obligation to pay the municipal taxes. It is submitted that there were documents to show that the demand for which warrant of attachment was issued by the Municipal Corporation for non-payment of taxes was met by the applicant/defendant and evidence to that effect was placed on record of the suit. Learned Counsel for the petitioner however is

not in a position to dislodge the factum of there being arrears of property taxes as also could not dislodge the evidence of notices being issued by the Bombay Municipal Corporation to the respondents-plaintiffs for payment of the outstanding property taxes and the consequent warrant of attachment issued in that regard. The relevant documents being “Exhibit 19” dated 16 October 2002, “Exhibit 20” dated 12 November 2002 and “Exhibit 22” dated 16 November 2002. The finding of facts on the basis of this evidence can be seen in paragraph 19 of the judgment of the Appellate Bench. The default in payment of taxes was also sought to be justified on the ground of financial hardship.

7. Learned Counsel for the applicant on the second issue namely of sub-letting has drawn my attention to the appeal memo as filed by the respondents-plaintiffs before the Appellate Court to contend that the ground of sub-letting was given up by the respondents. It is submitted that on the basis of the averments as made in the petition, the Court has in fact *suo motu* taken up the issue and has framed point No.4. On this issue, it is next submitted that the applicant-defendant had addressed a letter dated 5 January 1973 to the respondents-plaintiffs seeking permission of the respondents-plaintiffs to create third party interest in the suit premises and that such permission was granted by the respondents, by letter dated 7 June 1973. Thus, there was written permission granted to the respondents

to create third party rights. It is therefore, submitted that the judgment of the appellate court needs to be set aside on the issue of sub-letting. However, in making the said submission learned Counsel for the applicant-defendant does not dispute that the said letters were not part of the record before the courts below.

8. The above submissions as made on behalf of the applicant-defendant are opposed on behalf of the respondents. On the second issue of sub-letting, it is submitted that at no point of time either before the Trial Court or before the Appellate Court was there any application made on behalf of the respondents-plaintiffs that the issue of sub-letting was given up. The learned Counsel for the respondents/plaintiffs submits that it is clear from the grounds in the appeal memo and more particularly grounds (a) and (b) of the appeal memo that the respondents had contended that the trial Court had erred in dismissing the suit and ought to have decreed the suit as also the finding as arrived at by the trial Court was contrary to the evidence on record and the legal position and deserves to be set aside. Learned Counsel for the respondents would further contend that in fact all the issues as considered by the Appellate Court, were argued on behalf the parties and further a specific point for determination in regard to the third party interest was framed. It is further submitted that this argument is being advanced for the first time in this application and this should not be

permitted. It is submitted that at no point of time an application was moved by the applicant-defendant before the trial Court to seek review of the impugned order so as to assert that such issue was given up by the respondents-plaintiffs. It is submitted that the two documents that is letters dated 5 January 1973 and dated 7 June 1973 which are the alleged letters of the applicant seeking permission to create party interest and the so called permission dated 7 June 1973 of the respondents were never part of the record, nor any application was filed at any time to bring such document on record either before the trial Court or the Appellate Court. It is submitted that for the first time a completely new case is now sought to be made out on behalf of the applicant in this civil revision application.

9. Having heard the learned Counsel for the parties and having perused the impugned judgment of the appellate Court, the plaint, written statement, documents and the evidence as placed on record, I am of the opinion that there is no perversity whatsoever in the findings as recorded by the appellate Court on both the grounds on which the suit of the respondents has been decreed. The finding as recorded by the appellate Court on the ground of the applicant-defendant not paying municipal taxes to the Bombay Municipal Corporation, is appropriately proved in view of the evidence as placed on record. It is not in dispute that the Bombay Municipal Corporation had issued a warrant of attachment due to non

payment of property taxes. The documents in this regard which stand proved are a sufficient evidence to come to a conclusion that the property taxes were not paid by the applicant. As noted above, Clause II(b) of the lease deed is clear and it was certainly an obligation on the applicant-defendant to pay all the taxes and charges. Admittedly in view of the Municipal Corporation issuing warrant of attachment on the ground of taxes being not paid, the respondents had clearly proved that there was a breach and non compliance of the obligation as casted on the applicant-defendant under the lease deed. Thus, the findings in that regard are based on correct appreciation of evidence requiring no interference.

10. As regards the second ground in regard to the applicant-defendant creating third party interest in the suit premises, there is much substance in the contention as urged on behalf of the respondents-plaintiffs. Admittedly, there is no material as placed on record by the applicant-defendant that the respondents-plaintiffs had given up the contention of the applicant-defendant creating of third party right. Further there is no order either of the courts below, recording any such consent, between the parties on this issue. It is quite clear that the Appellate Court had framed a specific point to adjudicate this particular issue and has considered and tested the finding of the learned trial Judge rendered on this issue. It is significant that there is no written consent of the

respondents-plaintiffs that the respondents-plaintiffs had given up such plea. In any case there is no express material to show that such plea for any acceptable reason and as a matter of record was given up by the respondents/plaintiffs. Hence a case of estoppel on this issue was never raised by the applicant-defendant. This apart the Appellate Court has clearly observed that it was admitted on behalf of the applicant-defendant that third party rights were created and that the applicant-defendant could not prove that the written consent of the respondents-plaintiffs was obtained. In my opinion, when there was no evidence on this count from the applicant, there cannot be any perversity in the findings recorded by the Appellate Court that the applicant had failed to discharge its burden to prove that prior consent was obtained by the applicant from the respondents-plaintiffs before creating third party rights. Significantly, the documents on the basis of which such argument is being made for the first time in this proceeding, were never part of the record before the trial Court, no attempt whatsoever was made by the applicant-defendant to bring those documents on record before the Courts below. In this situation, such a case as urged on behalf of the applicant for the first time in these proceedings is impermissible as also cannot be accepted. In fact introducing such case in this proceeding appears to be clearly an afterthought on the part of the applicant. The intention of the applicant is clearly to enjoy the suit property despite clear material on record that it had lost the protection as would be available under the Rent Act on both the counts. The appellate Court has appropriately and legally exercised jurisdiction vested in it by law. There is no perversity in the findings as recorded by the appellate Court.

11. The learned Counsel for the applicant submitted that in regard to some other property this Court has admitted Civil Revision Application No.31 of 2017. However, on a query being made to the learned Counsel for the applicant, he clearly conceded that the impugned judgment in the present case is an independent judgment and not connected with the other case and therefore, this petition could be independently heard and accordingly, this application was argued.

12. In the light of the above discussion, I find no merit in the Civil Revision Application. It is accordingly dismissed.

13. The applicant-defendant shall vacate the suit premises within a period of ten weeks from today, failing which the respondents-plaintiffs are free to proceed in execution.

(G.S. KULKARNI, J.)