

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.25 OF 2016
WITH
CIVIL APPLICATION NO.245 OF 2016

Motilal Hirji Shah (since deceased)	]	
Smt. Rita Motilal Shah & Anr.	]	Applicants
Versus		
M/s. S.B. Builders & Developers through	]	
its partner Mr. Arvind Shah & Anr.	]	Respondents

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Mr. Suraj S. Shah, for Applicants.
Ms. Meetal Savla i/b Piyush M. Shah, for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 3RD APRIL, 2018.

P.C.

Heard Mr. Suraj Shah, learned Counsel for the applicants and Mr. Piyush Shah, learned Counsel for respondent No.1 at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicants, hereinafter referred to as “defendants No.1 (A) to 1(B)” have challenged the judgment and decree dated 18th November, 2015 passed by the Appellate Bench of the Court of Small Causes at Mumbai in (2A) Appeal No. 34 of 2012. By that order, the Appellate Court allowed the appeal preferred by respondent No.1, hereinafter referred to as “plaintiffs” and quashed and set side the judgment and decree dated 25th April, 2012 passed by the learned Judge, Court Room No.12 of the Small Causes Court at Mumbai in R.A.E. Suit No.691/1177 of 2001 and decreed the

suit of the plaintiffs under Section 16(1) (e) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. Initially, Salim Mohamed Matcheswala and Mohamed Hanif Mohamed Matcheswala (for short “original plaintiffs”) trustees of Haji Abdulla Noormohmed Matcheswala Charitable Trust (for short 'Trust') claiming to be landlords of the property known as Abdul Building No.3 situate at 41-49, Dr. Babasaheb Ambedkar Road, Parel, Mumbai 400 013 (for short 'suit building') instituted suit against Motilal Hirji Shah and Premji Hemraj Gala, inter alia, contending that Late Ravji Velji Shah was monthly tenant of the Trust in respect of Room Nos. 18-19, Second Floor, Abdul Building (for short 'suit premises’) of the suit building.

4. The plaintiffs contended that Defendant No.1 is the heir and legal representative of Ravji Velji Shah (original tenant). It is the case of the plaintiffs that defendant No.2 is an illegal occupant of Room No.18. Defendant No.1 has sublet, given on leave and licence, parted with possession, and transferred his right, title and interest in respect of the suit premises in favour of defendant No.2. The original plaintiffs, therefore, sought decree of eviction against the defendants on the ground that defendant No.1 has unlawfully sublet the suit premises to defendant No.2 and is profiteering out of the suit premises. Defendant No.1 has committed breaches of the terms and conditions of the tenancy.

5. During pendency of the suit, the original plaintiffs had sold, transferred, conveyed their rights, title and interest in respect of the suit building by virtue of Indenture of assignment dated 12th December, 2006 in favour of M/s. S.B. Builders and Developers (hereinafter referred to as “plaintiffs”).

6. Defendant No.1 filed written statement dated 4th June, 2003 resisting the suit. Defendant No.2 filed written statement dated 23rd September, 2003 resisting the suit. On the basis of the pleadings, the learned trial Judge framed issues. The parties adduced evidence. The learned trial Judge held that the plaintiffs proved that defendant No.1 has unlawfully sublet, given on leave and licence, parted with possession and transferred his rights, title and interest in respect of the suit premises to defendant No.2. The learned trial Judge held that the plaintiffs proved that defendant No.1 is profiteering out of the suit premises. The plaintiffs also proved that defendant No.1 has committed breaches of the terms and conditions of the tenancy rights and that the suit is maintainable. The learned trial Judge, however, held that the plaintiffs are not entitled to possession of the suit premises as defendant No.2 is in exclusive possession over Room No.18 long before 1973 and is a protected tenant. The learned trial Judge also further held that as defendant No.2 established possession since long before 1st February, 1973, the suit filed by the original plaintiffs in the year 2001 was not instituted within the period of 12 years from the date of accrual of cause of action and thus, the plaintiffs are not entitled to decree of possession. The learned trial Judge accordingly dismissed the suit.

7. Aggrieved by this decision, the plaintiffs instituted appeal before the Appellate Bench of the Small Causes Court. By the impugned order dated 18th November, 2015, the Appellate Court allowed the appeal as indicated earlier and directed defendants No.1 and 2 to hand over vacant and peaceful possession of the suit premises to the plaintiffs within two months from the date of the judgment. The Appellate Court also directed inquiry for mesne profits under Order-XX, Rule-12 of the C.P.C. It is against this order, defendants No.1(A) and 1(B) have instituted the present Civil Revision Application u/s 115 of the C.P.C.

8. In support of this application, Mr. Suraj Shah submitted that the learned trial Judge held that the plaintiffs proved that defendant No.1 Motilal Hirji Shah has unlawfully sublet Room No.18 and parted with possession in favour of defendant No.2, Premji Hemraj Gala. The learned trial Judge further held that the plaintiffs proved that defendant No.1 is profiteering out of the suit premises and that the plaintiffs proved that defendant No.1 has committed breach of terms of conditions of tenancy. On one hand, the learned trial Judge held that defendant No.1 had unlawfully sublet the suit premises to defendant No.2 and on the other held that defendant No.2 is a protected tenant. The learned trial Judge further held that the suit is barred by limitation.

9. Mr. Suraj Shah has taken me through the trial Court's judgment. After appreciating the evidence on record, the trial Court held that defendant No.2 is occupying Room No.18 prior to 1st February, 1973 and is a protected tenant. As against this, the Appellate Court came to the conclusion that defendant No.2 is a protected tenant and is occupying Room No.18 prior to 1st February, 1973 only on the basis of admission of D.W.1. The Appellate Court considered the documentary evidence in the form of birth certificate at Exhibit 39 electricity bills at Exhibit 40 (1) and 40 (2), marriage registration certificate Exhibit 41, Ration Card at Exhibit 42 and came to the conclusion that defendant No.2 did not establish that father of defendant No.2 was in possession of the suit premises prior to 1st February, 1973. Mr. Suraj Shah has invited my attention to the birth certificate of Mahendra Hemraj Gala which shows that he was born on 27th May, 1958 and that he is brother of defendant No.2. In the birth certificate, address of Hemraj Gala, father of defendant No.2 and Mahendra is shown as "Abdulla Building No.3, II Floor". It conclusively establishes the fact that defendant No.2 is residing in Room No.18 where his brother Mahendra was born in the year 1958. The Appellate Court was, therefore, not justified in holding that defendant No.1 had unlawfully sublet the suit premises and that defendant No.2 is not a protected tenant.

10. Mr. Suraj Shah has also invited my attention to Civil Application No. 245 of 2016. The suit was initially instituted by the original landlord Salim Mohamed Matcheswala and others. They were deleted and in their place, M/s S.B. Builders and Developers, a partnership Firm was brought on record. The suit was dismissed by the trial Court on 25th April, 2012. Aggrieved by that decision, M/s. S.B. Builders and Developers preferred Appeal which was allowed on 18th November, 2015. However, during pendency of the suit, M/s. S.B. Abodes Private Limited was incorporated under Part IX of the Companies Act, 1956 as a Private Limited Company. He has invited my attention to the incorporation certificate dated 28th April, 2011 issued by the Registrar of the Companies, Maharashtra, Mumbai as also the Director's report and the balance-sheet of M/s. S.B. Abodes Private Limited for the year ending 31st March, 2013 and in particular, Note 9 "Inventory-Work-in-progress. At Sr. No.1, the suit building is mentioned. In short, he submitted that during pendency of the suit itself, the plaintiffs M/s. S.B. Builders and Developers, partnership Firm was divested of its ownership and the landlord was M/s. S.B. Abodes Private Limited. The partnership firm and Private Limited Company are distinct and separate entities in the eyes of law. The said fact was not within the knowledge of defendants No.1 (A) and 1(B) and consequently, could not be brought on record in the trial Court as also the Appellate Court. He submitted that as the decree was passed in favour of entity which is not landlord of the suit premises, the decree passed by the Appellate Court in favour of M/s. S.B Builders and & Developers is a nullity and as such is liable to be set aside.

11. On the other hand, Mr. Piyush Shah supported the impugned order. He submitted that the birth certificate of Mahendra though mentions address as "Abdulla Building No.3, II Floor" it does not mention Room No.18. He submitted that the Appellate Court has considered this aspect in paragraph

17 and observed that the suit premises namely Room No.18 and 19 are not specifically mentioned in the birth certificate. It was further observed that even if it is assumed for the sake of arguments that Mahendra was born in the suit building, still further evidence is required to show that since then the premises were occupied by defendant No.2 as on 1st February, 1973. He, therefore, submitted that the Appellate Court rightly discarded the birth certificate.

12. Mr. Piyush Shah submitted that Mansukhlal Gala and Arvind Shah were partners of the plaintiffs. The following persons are the shareholders of M/s. S.B. Abodes Private Limited. He submitted that;

- [1] Chhaya Gala is wife of Mansukhlal Gala,
- [2] Nikita Shah is wife of Arvind Shah
- [3] Jayantilal Shah is father of Arvind Shah.
- [4] Ratanben is mother of Arvind Shah.

He submitted that thus M/s. S.B. Abodes Private Limited is a family concern of the partners of the plaintiffs. He submitted that the Company is converted under Part-IX of the Companies Act, 1956 from a partnership firm carrying on business of builders, developers etc under the partnership name S.B. Developers to a Company S.B. Abodes Private Limited on 20th April, 2011. The business of the Companies is that of Builders, Developers and Infrastructure Developers and Contractors. He, therefore, submitted that the contention advanced on behalf of defendant No.1(A) and defendant No.1(B) that the decree passed in favour of the plaintiffs is a nullity and as such, is liable to be set aside is wholly mis-conceived.

13. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As far as trial Court is concerned, the trial Court observed in paragraph 22 that the defendant No.1 Motilal admitted in his cross-examination that father of

defendant No.2 was residing in Room No. 18 prior to his birth. Defendant No.2 was born in the year 1955. On the basis of admission given by defendant No.1, the learned trial Judge came to the conclusion that defendant No.2 and his family members were residing in Room No.18 prior to 1st February, 1973. Thus, defendant No.2 is a protected tenant.

14. As against this, the Appellate Court considered the documentary evidence indicated hereinabove and discussed each document. In so far as Ration Card at Exhibit 42 is concerned, that is of the year 1993 and not of 1973 or prior to that period. As far as birth certificate at Exhibit 39 of Mahendra is concerned, the Appellate Court observed that he is brother of defendant No.2. The suit premises is situate in Abdulla Building on the second floor. The address is also shown in the certificate. However, suit Room 18 and 19 are not shown in the birth certificate. It was further observed that even for the sake of arguments, it is assumed that his brother was begotten in the suit building still further evidence was required to show that since then premises was occupied prior to 1st February, 1973 by defendant No.2. The Appellate Court found that there is no document to establish possession of defendant No.2 prior to 1st February, 1973.

15. That apart, in paragraph 2 of the written statement, defendant No.1 Motilal specifically asserted that the suit premises were acquired by his grandfather Late Ravji Velji Shah. Grandmother of defendant No.1 had a sister. Hansraj Nathu, father of Mahendra and defendant No.2 was the husband of that sister. Due to this relation, at the request of his grandmother and grandfather, defendant No.1 permitted and allowed Hansraj Nathu and his family to use and occupy Room No.18 gratuitously without charging anything for a temporary period. Thus, because of relationship between the patties Mahendra taking birth in the suit building that by itself will not establish the

fact that defendant No.2 was residing as on 1st February, 1973.

16. The Appellate Court also dealt with the marriage certificate of the defendant which took place in the year 2001. This also does not establish possession of defendant No.2 prior to 1st February, 1973. In paragraph 19, the Appellate Court observed that the finding of the trial Court that defendant No.2 is in possession of the suit premises prior to 1st February, 1973 is based only upon admission of defendant No.1. In short, the Appellate Court after appreciating evidence on record, in particular documentary evidence came to the conclusion that defendant No.2 has not established his possession over Room No.18 prior to 1st February, 1973.

17. The Appellate Court considered the following decisions:

- [1] Mani Nariman Daruwala Vs. Phiroz N. Bhatena, AIR 1991 Supreme Court 1494.
- [2] Board of Trustees of the Port of Mumbai Vs. Byramjee Jeejeebhoy Pvt. Ltd & Anr, 2011 (4) Mh. L. J. 556.

The Appellate Court observed that the plaintiffs have to discharge burden of proof that defendant No.1 has parted with possession in favour of defendant No.2. The plaintiffs have discharged that burden. It was for defendant No.2 to establish that he is occupying the suit premises prior to 1st February, 1973 and is a protected tenant. The Appellate Court after considering the material on record has held that defendant No.2 has not adduced cogent and convincing evidence. The learned trial Judge on the basis of admission of defendant No.1 held that defendant No.2 is a protected tenant. The Appellate Court accordingly set aside the trial Court's judgment and decreed the suit.

18. In view thereof, I do not find that the Appellate Court has committed any error in decreeing the suit. In view thereof, as also having

regard to the fact that the said case was not even put either before the trial Court or the Appellate Court, for the first time, in the Civil Revision Application, the said case cannot be taken into consideration. In view thereof, during the course of hearing, I suggested Mr. Shah for filing Review Application before the Appellate Court. Upon taking instructions from applicant No.1 who is present in the Court, he states that applicant No.1 does not desire to file Review Application.

19. In view thereof, no case is made out for invocation of powers under section 115 of the C.P.C. During the course of hearing, defendant No.2 had surrendered possession of the suit premises i.e Room No.18 to the plaintiffs. The present application is filed by defendants No.1(A) to 1(B) who are legal representatives of original defendant No.1. Defendants No.1(A) to 1(B) are not in a position to demonstrate that the findings recorded by the Appellate Court are perverse being based on no evidence or that on the basis of evidence on record, no reasonable or prudent person would have come to the conclusion arrived at by the Appellate Court. Defendants No.1(A) to 1(B) are not in a position to show that the findings are contrary to the evidence on record. Merely because another view is possible that, by itself, is no ground for exercising the powers under section 115 of C.P.C. In the result, the Civil Revision Application fails and the same is dismissed.

20. In view of disposal of main application, Civil Application No.241 of 2016 does not survive and is disposed of. Order accordingly.

21. At this stage, Mr. Shah orally prays for stay of 8 weeks from today. He assures that within two weeks from today, defendants No.1(A) to (B) and all the adult family members residing in the suit premises will file usual undertaking in this Court after giving advance copy to the other side

incorporating therein that:

- [a] they are in possession and nobody else is in possession of the suit premises;
- [b] they have neither created third party interests nor parted with possession of the suit premises;
- [c] they will hereafter neither create third party interests nor part with possession of the suit premises;
- [d] within two weeks from today, defendants No.1(A) and 1(B) will deposit arrears of rent, if any, in this Court, under under intimation in writing to the learned Counsel for the plaintiffs.
- [e] in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will hand over vacant and peaceful possession of the suit premises to the plaintiffs;

22. In view thereof, notwithstanding dismissal of the Civil Revision Application, eviction decree shall not be executed subject to the defendants No.1(A) and 1(B) filing the undertaking in the aforesaid terms within two weeks from today, this order shall remain stayed for the period of eight weeks from today. List the Petition for reporting compliance on 24th April, 2018.. Interim order dated 17th March, 2017 prohibiting the plaintiffs from creating third party interest shall remain in force. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendants No.1(A) and 1(B) commit breach of any of the conditions of the undertaking, the plaintiffs will be at liberty to proceed with the matter in accordance with law. Order accordingly.

[R.G. KETKAR, J.]