

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2731 OF 2018

Surekha Niranjana Wadhwa and others. | Petitioners

Vs.

Ateeq Anwar Agboatwala and others. | Respondent

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Mr. Ajay Panicker a/w Hemali Kulne i/b Ajay Law Associates, for
Petitioner.

Mr. P.K. Dhakephalkar, Sr. Advocate a/w Mr. Jaydeep Deo, for
Respondents No.1,2 and 4 to 6.

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CORAM : R.G. KETKAR, J.

DATE : 13TH MARCH, 2018.

P.C.

Heard Mr. Panicker, learned Counsel for the petitioners
and Mr. Dhakephalkar, learned Counsel for respondents No.1,2 and 4
to 6 at length.

2. By this Petition under Article 227 of the Constitution of
India, the petitioners have challenged the judgment and order dated
3rd May, 2017 passed by the learned Judge, Court Room No.8 at Small
Causes Court, Mumbai below Exhibit 17 in MARJI No.315 of 2011 in
R.A.E. Suit No.647/963 of 2010. By that order, the learned trial Judge
partly allowed the application and kept the matter for framing issues

and for proceeding further. Aggrieved by that decision, the petitioners preferred Revision Application No.221 of 2017 before the Appellate Bench of Small Causes Court, Mumbai. By order dated 21st December, 2017, Appellate Court rejected the Revision Application and maintained trial Court's order. It is against these orders, present Writ Petition.

3. In support of this Petition, Mr. Panicker submitted that respondents (hereinafter referred to as 'plaintiffs') had instituted suit against Mrs. Bhanumati w/o Narottam Chapsi (hereinafter referred to as 'defendant') to recover possession of Shop No.4, situate at Ground Floor, 11A, Muzzafarbad Hall, Proctor Road, Mumbai – 400 007 (for short 'suit premises') u/s 16 (1) (n) and 15 of the Maharashtra Rent Control Act, 1999 (for short 'Act'). He submitted that Probate Petition No.745 of 1993 was instituted in this Court by Chittaranjan Narottamdas Negandhi for obtaining Probate of the Will of the defendant who died at Mumbai on or about 14th May, 1992. He submitted that the petitioners have also produced copy of death certificate of the defendant. The plaintiffs had instituted the suit in the year 2010 when the defendant had already expired. The suit was decreed on 15th January, 2011. In paragraph 2, the learned trial Judge noted that the defendant was served by substituted service. Despite service, she failed to appear and file written statement. An ex-parte decree was passed against her on 15th January, 2011. He submitted that basically the decree passed against a dead person and is a nullity. He submitted that the petitioner was dispossessed on 3rd May, 2011. He invited my attention to the Bailiffs report dated 3rd May, 2011 which also records that after completing the work, after putting lock on the shutter door of the suit premises, one person Ashwin Niranjan

Wadhwa claimed that he is owner of the suit premise. Mr. Panicker submitted that even Bailiff noted possession of the petitioner.

4. Mr. Panicker invited my attention to the application made the petitioners Order-XXI, Rule-99 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), inter alia, praying for restoration of possession of the suit premises putting the petitioner in possession of the suit premises and for setting aside ex-parte decree dated 15th January, 2011 passed in the suit against the dead defendant and for restraining the plaintiffs, their agents and servants from inducting any third party and/or creating any third party rights in the suit premises. Pending that application, the petitioner took out application Exhibit 17, inter alia, praying for dismissing the suit filed against dead defendant and setting aside ex-parte decree dated 15th January, 2011 against dead defendant and for restoration of the suit premises to the petitioners. The petitioner also in the alternative prayed for postponing the issue of dismissal of the suit setting aside ex-parte decree along with Main MARJI Application and for framing issues as required under Order-XIV, Rule-5 of C.P.C so as to lead evidence in the matter. He submitted that instead of dismissing the suit and setting aside ex-parte decree, the learned trial Judge partly allowed the application and framed issues on 19th June, 2017 at Exhibit 20. He submitted that respondents are not disputing the fact that defendant died in the year 1992. If that be so, the Courts below should have allowed the prayer made by the petitioner for dismissal of the suit and for setting aside ex-parte decree. In other words, no trial is required as the fact about death of the defendant in the year 1992 is not in dispute. He, therefore, submitted that Petition requires consideration.

5. On the other hand, Mr. Dhakephalkar submitted that the petitioners have filed application under Order-XXI, Rule-99 being MARJI No.315 of 2011 and the same is pending. Pending that proceeding, the petitioner filed application Exhibit 17. He submitted that basically the petitioner has claimed that he was put in possession by the plaintiff's trustees with the consent of the original tenant Mr. Narottamdas Chapsi, as licensee of the suit premises in the year 1964. He submitted that basically claim made by the petitioner is itself in dispute. In other words, the plaintiffs did not admit that the petitioner is in any way concerned with the suit premises or he is in possession of the suit premises. It is, therefore, necessary for the petitioners to establish his entitlement qua the suit premises. He, therefore, submitted that the learned trial Judge rightly allowed the application in part and accordingly framed issues. He, therefore, submitted that no case is made out for interfering with the orders of the Courts below.

6. I have perused the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that the petitioner has filed application under Order-XXI, Rule-99 for restoration of the suit premises and the said application is pending. It is also not in dispute that pending this proceeding, the petitioner filed application Exhibit 17 for the reliefs already noted above. The petitioner is claiming that the trustees of the plaintiff with the consent of the original tenant Mr. Narottamdas Chapsi had inducted him as a licensee of the suit premises in the year 1964. This fact is disputed by the respondents. In view thereof, petitioner will have to establish his entitlement qua the suit premises. Even if, it is accepted that the suit was decreed ex-parte on 15th January, 2011 against a dead person that by itself will not entitle the

petitioner to claim possession of the suit premises. The petitioner will have to establish his entitlement qua the suit premises.

7. Understood thus, I do not that the Courts below committed any error in partly allowing the application Exhibit 17 filed by the petitioner and framing issues. On 19th June, 2017. issues are also famed. Hence, Petition fails and as such, the same is dismissed with no order as to costs.

8. It is made clear that I have not expressed any opinion on merits of the case. The learned trial Judge will decide MARJI Application No.315 of 2011 taken out under Order-XXI, Rule-99 of C.P.C on the basis of the evidence on record and in accordance with law un-influenced by the observations made herein. Order accordingly.

[R.G. KETKAR, J.]