

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.5041 OF 2016

Chandulal Shamji Rathod (since deceased)]

Naina Chandulal Rathod & Ors.] Petitioners

Vs.

Nirmala Vithalbhai Parmar] Respondent

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Mr. Saiprasad Dudhane i/b Mr. M.A. Dudhane, for Petitioners.
Mr. Kantilal H. Kanojia, for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 25TH JULY, 2018.

P.C:

Heard Mr. Dudhane, learned Counsel for the petitioners and Mr. Kanojia, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as “plaintiffs” have challenged the judgment and order dated 29th January, 2016 passed by the Appellate Bench of the Court of Small Causes at Mumbai below Exhibit 7 in (P) Appeal No.29 of 2015. By that order, the Appellate Court allowed the application made by the respondent, hereinafter referred to as 'defendant' under Order-XLI, Rule-5 of the Code of Civil Procedure, 1908 (for short 'C.P.C') and stayed eviction decree dated 26th November, 2014 passed by the learned trial Judge in L.E. Suit No.65/75 of 2008 subject to the respondent herein depositing the amount of contractual rent @ Rs. 234/- per month on or before 10th day of every succeeding calender month commencing from December, 2014, among other directions.

3. Rule. Mr. Kanojia waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

4. In support of this Petition, Mr. Dudhane invited my attention to paragraphs 6 and 7 of the impugned order. He submitted that in paragraph 6, the Appellate Court held that decision in the case of **Atma Ram Properties (P) Ltd Vs. Federal Motors (P) Ltd, (2005) 1 SCC 705** cannot be made applicable. The Appellate Court was of the view that the plaintiffs are the tenants and not landlords of the suit premises. The plaintiffs are liable to pay contractual rent to their landlord and therefore, they are not entitled to make profit out of the suit premises and/or claim compensation at the prevailing market rent. It would amount to illegally profiteering which in fact deprecated under the Rent Act.

5. In paragraph 7, the Appellate Court held that as the plaintiffs are liable to pay contractual rent to their landlord, respondent is also liable to pay amount of contractual rent to the plaintiffs, who, in turn, would be at liberty to pay the same to the landlord. This will amount to imposing liability of payment of contractual rent upon the respondent herein.

6. Mr. Dudhane submitted that the learned trial Judge after a full-fledged trial held that the defendant is a gratuitous licensee and that the defendant did not establish that she is tenant in respect of the suit premises. As the respondent has suffered eviction decree, the Appellate Court has to proceed on the premise that she is in wrongful possession of the suit premises and accordingly has to determine compensation while considering the application for stay under Order-XLI, Rule-5. He submitted that there is no

question of plaintiffs' profiteering illegally as observed in paragraphs 6 and 7. Hence, Petition requires consideration.

7. On the other hand, Mr. Kanojia supported the impugned order. He submitted that the plaintiffs are not the landlords of the suit premises and, therefore, the Appellate Court rightly passed the impugned order directing the respondent to deposit contractual rent @ Rs. 234/- per month.

8. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, the plaintiffs came with the case that the defendant is a gratuitous licensee. As against this, defendant came with the case that she is a tenant in respect of the suit premises. After a full-fledged trial, the learned trial Judge held that the plaintiffs proved that the defendant was their gratuitous licensee in respect of the suit premises and that the defendant failed to establish that she is tenant in respect of the suit premises. While considering the application for stay under Order-XLI, Rule-5, the Appellate Court has to bear in mind findings recorded by the trial Court. After holding that the defendant is a gratuitous licensee and not a tenant, the learned trial Judge has passed eviction decree and directed the defendant to hand over vacant and peaceful possession of the suit premises. The Appellate Court will, therefore, have to proceed on the premise that the defendant is in wrongful possession of the suit premises and accordingly determine the compensation. The Appellate Court has not properly applied ratio laid down in the case of **Atma Ram Properties (P) Ltd** (supra). As noted earlier, the Appellate Court observed that directing the defendant to pay compensation as per the prevailing market rent would amount to plaintiffs illegally profiteering. The Appellate Court failed to appreciate that interim compensation which is fixed as per the prevailing market rent is required to be deposited in the Court and the same is ordinarily not allowed to be withdrawn

by the plaintiffs. While deciding the appeal finally, the Appellate Court has to pass appropriate order in respect of amount so deposited as and by way of interim compensation. It, therefore, cannot amount to plaintiffs illegally profiteering.

9. In view thereof, impugned order cannot be sustained and is accordingly set aside. Exhibit 7 is restored to the file of the Appellate Court for deciding it afresh. The parties shall appear before the Appellate Court on 6th August, 2018 and for that purpose, no fresh notice be issued to them. The Appellate Court will fix a suitable date and decide the application within 4 weeks from the date so fixed. The Appellate Court to decide the application on its own merits and un-influenced by the observations made in this order. All contentions of the parties on merits are expressly kept open. Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]