IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5649 OF 2018

Kadamgiri Estates Private Ltd. ...Petitioner
Versus
Ms. Binafer Batliwala alias
Binafer Lovji Malegam ...Respondent

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Mr.V.A. Thorat, Senior Advocate a/w. Vaibhav Sugdare i/b. Mahimtura & Co. for the Petitioner.
Mr. Y.S. Jahagirdar, Senior Advocate a/w. S.S. Kanetkar, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 8th OCTOBER, 2018

P.C.

1. Heard Mr.V.A. Thorat, learned Senior Counsel for the petitioner and Mr.Y.S. Jahagirdar, learned Senior Counsel for respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the judgment and decree dated 5.12.2009 passed by the learned 5th Additional Judge, Small Causes Court at Pune in Civil Suit No.30/2002 as also the judgment and decree dated 5.1.2018 passed by the learned District Judge-12, Pune in Civil Appeal No.215/2010. By these orders,

the Courts below had dismissed the suit instituted by the plaintiff invoking the grounds under Sections 16(1)(a), 16(1)(b) and 16(1)(c) of the Maharashtra Rent Control Act, 1999 (for short, 'Act') read with Section 108(o) of the Transfer of Property Act, 1882.

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

4. In support of this Petition, Mr. Thorat submitted that in support of the case of the plaintiff that the defendant had erected permanent construction without written permission of the plaintiff, PW-3 Jayesh Pravinchandra Shah was examined at Exhibit-125. During the course of his evidence, PW-3 produced negatives as also photographs. The learned trial Judge, however, did not mark those documents as exhibits except the bills. He submitted that in ground No.23 of the appeal memo filed before the District Court, this point was specifically raised. Apart from that, even in paragraph-40 of the written argument dated 16.12.2017, this contention was raised. The learned District Judge, however, did not deal with this contention at all.

5. Mr. Thorat invited my attention to paragraph-18 of the

District Court's order, wherein the learned District judge observed that in the cross-examination DW-1 admitted that in lease deed dated 6.7.1971, there is no mention of pourch admeasuring 162 sq. ft. let out to her father. He submitted that the learned District Judge discarded the evidence of Court Commissioner on the ground that if the pleadings of the parties are taken into consideration, there is no evidentiary value value to the opinion expressed by the Court Commissioner. Merely because the Court Commissioner describes the structure and opines that it is a permanent one, conclusion cannot be drawn that the defendant has made a permanent structure on the tenanted premises without written consent of the landlord. In paragraph-32, the learned District Judge observed that the Court Commissioner was expected only to inspect the structure and report about its nature. He is not expected to express his opinion. In the present case, the Court Commissioner in his report dated 12.4.2004, as well as in the oral evidence opines about said structure being a permanent one and said opinion is not binding on the Court.

6. The matter was heard on 1.10.2018 and at the request of learned Counsel for the respondent it was adjourned till today.

7. Upon taking instructions from the respondent, Mr. Jahagirdar

submits that by consent of the parties the order dated 5.1.2018 passed by the learned District Judge should be set aside and the appeal may be restored to the file of the learned District Judge for deciding it afresh. He submitted that the negatives as also the photographs produced by PW-3 Jayesh Pravinchandra Shah may be marked as Exhibits.

8. Mr. Thorat submits that the petitioner will not press the ground of nuisance under Section 16(1)(c) of the Act. It, however, may be clarified that the grounds invoked by the petitioner under Sections 16(1)(a) and 16(1)(b) of the Act are no way affected.

9. In view thereof, by consent of parties, Petition is disposed of in following terms :

i. Impugned order dated 5.1.2018 passed by the learned District Judge-12, Pune in Civil Appeal No.215/2010 is set aside. Civil Appeal No.215/2010 is restored to the file of the learned District Judge.

ii. The negatives as also the photographs produced by PW-3 Jayesh Pravinchandra Shah shall be marked as Exhibits by the learned District Judge.

iii. The petitioner shall not press the ground of nuisance under Section 16(1)(c) of the Act and it is made clear that this will not affect the grounds invoked by the petitioner under Sections 16(1)(a) and 16(1)(b) of the Act.

iv. It is made clear that this Court has not expressed any opinion on the merits of the case. All contentions of the parties on merits are expressly kept open.

v. The learned Counsel for the parties assure that the parties will appear before the learned District Judge on 22.10.2018 and for that purpose no fresh notice be issued. As this is the second remand, the learned District Judge is requested to fix a suitable date and dispose of the appeal within six months from fixing suitable date.

vi. R & P shall be transmitted forthwith to the District Court.

vii. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)

Pradipkumar Prakashrao Deshmane
Digitally signed by Pradipkumar Prakashrao Deshmane
Date: 2018.10.09 13:54:10 +0500