

Sunil D. Chafekar and others	...	Applicants
Vs.		
Lata Bhagwandadas Patel and others	...	Respondents

Mr. G. S. Godbole, Senior Advocate i/b. Mr. V. Thaker for Applicants.
Mr. L. R. Odhekar i/b. Mr. Rupesh S. Ghadi for Respondents No.1 to 3.

CORAM : R. G. KETKAR, J.
DATE : JUNE 6, 2018

P.C. :

Heard Mr. Godbole, learned Senior Counsel for the applicants and Mr. Odhekar, learned Counsel for the respondents No.1 to 3 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants No.2 to 4', have challenged the judgment and decree dated 10/11.11.2018 passed by the learned Judge, Court Room No.32 of the Court of Small Causes at Bombay in T.E.R.Suit No.33 of 2002 as also the judgment and decree dated 01.02.2017 passed by the Appellate Bench of the Small Causes Court at Bombay in Appeal No.27 of 2009. By these orders, the Courts below decreed the Suit instituted by the respondents No.1 to 3, hereinafter referred to as 'plaintiffs', and directed the defendants to deliver the vacant and peaceful possession of a piece of portion of land admeasuring 225 sq.yards in the property bearing Survey No.443, C.T.S.No.1114, Hissa No.2 of Village Malad situate at Chincholi Bunder, Link Road, behind Bhagwandas Chawl known as Alumulla Khan Compound, Malad (West), Mumbai 400 054 (for short 'suit property') by removing structures thereon to the plaintiffs within a period of three months from the date of the order.

3. Plaintiffs had instituted Suit against defendant No.1-Mohammed Hussein Ismail Harun and the present applicants / defendants No.2 to 4 for recovery of possession of suit property inter alia on the ground that the suit property originally belonged to one Bhagwandas Makanji Patel, since deceased. Plaintiffs are the heirs and legal representatives of Bhagwandas M. Patel. Defendant No.1 is the tenant of the suit property. Defendant No.1 made unauthorized constructions on the suit property without permission of the Municipal Corporation as also without permission of the plaintiffs. After coming into force of the Maharashtra Rent Control Act, 1999 (for short 'Maharashtra Rent Act'), no protection is available to the defendant No.1 in respect of the suit property, it being the open piece of land.

4. Plaintiffs issued letter dated 27.07.2001 terminating the tenancy and calling upon the defendant No.1 to quit, vacate and deliver the peaceful possession of the suit property. Copies of the said notice was also sent to the defendants No.2 to 4. Defendant No.1 gave reply dated 27.08.2001. Defendants No.2 to 4 also gave separate replies on 27.08.2001 denying the contents of the notice dated 27.07.2001. Plaintiffs, therefore, instituted Suit against defendants for recovery of possession of the suit property.

5. Defendant No.1 filed written statement exhibit-11 inter alia contending that agreement was made on 01.04.1974 between Bhagwandas Makanji Patel (since deceased) as owner on one part and Alimulla Abdul Wahab Khan and defendant No.1 on the other. The Suit is instituted only against defendant No.1. Alimulla is not a necessary party viz. not impleaded as defendant. The Suit is, therefore, bad for non-joinder of joint tenant namely, Alimulla Abdul Wahab Khan. Defendant No.1 further contended that as the said land is an agricultural

land, Small Causes Court has no jurisdiction to try and entertain the Suit. Rest of the contents in the plaint were denied. Defendants No.2 to 4 filed separate written statements vide exhibits-12 to 14 raising identical contentions. It was contended that the tenancy of the structure was created in their favour with the full knowledge, express and implied consent and concurrence of plaintiffs and their predecessor in title. Defendants No.2 to 4 are protected under the erstwhile Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Bombay Rent Act') as also Maharashtra Rent Act.

6. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. The learned trial Judge held that as the suit property, being open land, was let out to defendant No.1, he lost protection of the Act. Plaintiffs established that the tenancy of the defendant No.1 is duly terminated by valid notice and that Suit is not bad for non-joinder of Alimulla Abdul Wahab Khan. The learned trial Judge held that defendant No.1 failed to prove that Small Causes Court has no jurisdiction to entertain and try the Suit. The learned trial Judge decreed the Suit.

7. Aggrieved by this decision, defendant No.1 preferred Appeal No.36 of 2010. Defendants No.2 to 4 preferred Appeal No.27 of 2009. Appeal preferred by the defendants No.2 to 4 was dismissed by the Appellate Court on 01.02.2017. It is against these orders, defendants No.2 to 4 have instituted the present C.R.A. It has come on record that appeal preferred by the defendant No.1 was compromised between him and the plaintiffs (paragraph 17 of the Appellate Court judgment).

8. In support of this Application, Mr. Godbole reiterated the contentions that were advanced before the Courts below. In particular, he submitted that plaintiff's predecessor in title - Bhagwandas Makanji

Patel had entered into agreement on 01.04.1974 with defendant No.1 and Alimulla Abdul Wahab Khan. However, plaintiffs did not implead Alimulla Abdul Wahab Khan. The Suit is, therefore, bad for non-joinder of a necessary party. He submitted that in terms of agreement dated 01.04.1974, the Courts below were not justified in splitting up the tenancy in the sense that the learned trial Judge has observed in paragraph 17 that in the reply dated 27.08.2001, defendant No.1 admitted that 225 sq.yard land was let out to him and 775 sq.yard land was let out to Alimulla Khan. He submitted that plaintiffs and defendant No.1 cannot orally agree for splitting up of the tenancy in view of the written agreement.

9. Mr. Godbole further submitted that even otherwise, the Small Causes Court has no jurisdiction to entertain and try the Suit, as basically, the suit property is an agricultural land. Even on this count, the Courts below were not justified in passing the decree on the ground that Suit is instituted under Section 41 of the Presidency Small Cause Courts Act, 1882. He further submitted that the order of the Appellate Court mainly deals with the unauthorized construction allegedly made by the defendant No.1 and has not dealt with the various contentions raised by the defendants No.2 to 4 in the Appeal. He, therefore, submitted that application requires consideration.

10. On the other hand, Mr. Odhekar has supported the impugned orders and submitted that after appreciating the evidence on record, the Courts below have concurrently held that defendant No.1 was tenant in respect of open piece of land admeasuring 225 sq.yards and that Alimulla Khan was tenant in respect of remaining 775 sq.yards. The Courts below have passed decree only to the extent of 225 sq.yards and defendants No.2 to 4 have admitted that they are the tenants of defendant No.1. He, therefore, submitted that no case is made out for

interfering with the impugned order.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, Bhagwandas Makanji Patel had entered into agreement on 01.04.1974 with defendant No.1 and Alimulla Khan in respect of 1000 square yards of Survey No.443, C.T.S.No.1114, Hissa No.2 of Village Malad situate at Chincholi Bunder, Link Road, behind Bhagwandas Chawl known as Alumulla Khan Compound, Malad (West), Mumbai 400 054. Plaintiffs had issued notice dated 27.07.2001 to the defendants. The relevant portion of paragraph 1 of that notice reads thus,

“1. You know that my clients are landlords and owners in respect of the property bearing S.No.443, C.T.S.No.1114, Hissa No.2 of Village Malad situate at Chincholi Bunder, Link Road, behind Bhagwandas Chawl known as Alimulla Khan compound, Malad (West), Mumbai 400 064. You know that one Mr. Alumalla Abdul Wahab Khan and yourself had taken a land admeasuring about 1000 sq.yards from my said clients. You are further aware that thereafter, with the consent of the landlords and owners, there was a division of the said land and that you became the tenant in respect of the land admeasuring 225 sq.yards and the said Shri Alumulla Abdul Wahab khan became the tenant in respect of the land admeasuring 775 sq.yards. You are further aware that the said bifurcation was done in the year 1983 and necessary brick masonry wall was made to separate the areas of land of 225 sq.yards and 775 sq.yards. You also know that the late Shri Bhagwandas M. Patel had given a declaration dated 30th October, 1985 to that effect and that aspect is admitted by you as well as the said Shri Alumulla Abdul Wahab Khan.

(emphasis supplied)”

12. Defendant No.1 gave reply on 27.08.2001. Paragraph 2 of that reply reads thus,

“2. With reference to para 1 of your letter our client admits the contents thereof that the tenancy was created in his favour by the agreement referred therein and it was split up subsequently which was confirmed by the declaration as

stated in your letter. It is also correct that our client has been paying a monthly rent of Rs.25/- for the land admeasuring 225 sq.yards let out to him.

(emphasis supplied)”

13. The learned trial Judge has considered this aspect in paragraph 17 of the impugned order. After perusing the reply dated 27.08.2001, the learned trial Judge observed that the defendant No.1 admitted that 225 sq.yards land was let out to him and 775 sq.yards land was let out to Alimulla Khan. This clearly establishes that specific portion i.e. specific area separately was given to the defendant No.1 and to Alimulla Khan. Defendants No.2 to 4 also admitted in their written statement that they are the tenants of defendant No.1 and not of Alimulla Khan. Plaintiffs have also sought eviction of specific area of 225 sq.yards, which is let out to the defendant No.1. The learned trial Judge also noted that plaintiffs have instituted separate Suit for recovery of possession of remaining 775 sq.yards against other tenants to Alimulla Khan and he is therefore, not necessary party.

14. The Appellate court, in paragraph 17, noted that defendants have sought possession of suit property admeasuring 225 sq.yards, which was let out to the defendant No.1. Section 7(9) of the Maharashtra Rent Act defines the expression 'premises', which reads thus,

7. Definitions.- In this Act, unless there is anything repugnant to the subject or context,-

(9) “premises” means any building or part of a building let or given on licence separately (other than a farm building) including,-

- (i) the gardens, grounds, garages and out-houses, if any, appurtenant to such building or part of a building,
- (ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof, but does not include a room or other accommodation in a hotel or lodging house;

15. A perusal of the above definition clearly shows that open piece of land is not included within the definition of the expression 'premises'. Thus, the Courts below rightly came to the conclusion that protection of the Maharashtra Rent Act is not available to the defendant No.1. Apart from that, defendants No.2 to 4 also admitted that they are not tenants of the plaintiff but are the tenants of the defendant No.1. Defendant No.1 erected the superstructures on the open piece of land admeasuring 225 sq. yards and inducted defendants No.2 to 4. In India, concept of dual ownership is well recognized. In the case of ***Dinkar S. Vaidya Vs. Ganpat S. Gore***, AIR 1981 Bombay 190, the learned Single Judge has dealt with the concept of dual ownership. In paragraph 45, it was observed thus,

“45. We have to consider the aggregate effect of all the above mentioned authorities for examining the legal position in this behalf. Before weighing and examining the above authorities, it will be convenient at this stage to examine the first principles to which the question, in the ultimate analysis, relates. It is a matter of first principles that in India the doctrine of dual ownership is recognised. This doctrine means that the owner of the land is not necessarily presumed to be the owner of the structure standing upon it. In this respect Indian Law is at variance with English Law. In England the doctrine of superficies solo edit is recognised, meaning thereby that there is a presumption that the owner of the land is the owner of the structure on the land as well. This question becomes relevant in the context of the fact that in India the owner of the structure is frequently a lessee in respect of the land and the owner of the land has no interest whatsoever in the structure at all. The owner of the structure lets out the structure to his own tenants. The question then arises as to what is the right of the tenant of the structure vis-a-vis the land.”

16. In view thereof, it has to be concluded that there is not privity of contract between the plaintiffs on one hand and defendants No.2 to 4 on the other. Plaintiffs have validly terminated tenancy of the defendant No.1. Defendants No.2 to 4, who are tenants of the superstructure constructed by the defendant No.1, cannot claim any protection. I,

therefore, do not find any merit in the submission of Mr. Godbole that Suit is bad for non-joinder of Alimulla Khan and that defendants No.2 to 4 are protected under the Maharashtra Rent Act.

17. Mr. Godbole submitted that the Small Causes Court has no jurisdiction to entertain and try the Suit as basically, the suit property is an agricultural land. It is not possible to accept this submission. The Appellate Court has considered this aspect in paragraph 15. A perusal of the agreement dated 01.04.1974 clearly shows that the land was let out to the defendant No.1 for carrying out business and for erection of structures. In other words, the land was not let out for agricultural user / purposes. The Appellate Court considered the definition of 'premises' under Section 5(8) of the Bombay Rent Act and observed that clause (a) of Section 5(8) of the Bombay Rent Act lays down that 'premises' means 'any land not being used for agricultural purposes'. A perusal of the agreement clearly shows that the land was not let out for agricultural purpose but was given for business purpose and for erecting the structures. I, therefore, do not find that the Courts below committed any error in holding that the Small Causes Court has jurisdiction to entertain and try the Suit. In the light of the aforesaid discussion, I do not find that the Courts below committed any error in decreeing the Suit. Defendants No.2 to 4 were not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants No.2 to 4 were also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, Application fails and the same is dismissed.

(R. G. KETKAR, J.)