

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.4621 OF 2018**

Benita Anthony Fernandes & Anr.] Petitioners

Vs.

Veronica Vasant Patel & Anr.] Respondents

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Mr. B.K. Raje, for Petitioners.

Mr. Ranjit Thorat, Sr. Advocate i/b The Laureate, for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 10TH JULY, 2018.

P.C:

Heard Mr. Raje, learned Counsel for the petitioners and Mr. Thorat, learned senior Counsel for respondent No.1 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 15th February, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai (Bandra Branch) in Misc. Appeal No.1 of 2018. By that order, the Appellate Court allowed the appeal preferred by the first respondent, hereinafter referred to as “applicant” and quashed and set aside the judgment and order dated 28th August, 2015 passed by the learned Judge, Court Room No.34 of the Court of Small Causes at Mumbai (Bandra Branch) in Misc. Notice No.57 of 2011 in R.A.E & R Suit No.80/127 of 2007. The Appellate Court made absolute the said notice and also set aside ex-parte decree dated 3rd November, 2008 passed in R.A.E Suit No.80/127 of 2007. The

Appellate Court further directed the plaintiffs to re-deliver vacant and peaceful possession of Room No.1, Jefferine Chawl, Marol Village, Bhandarwada, Marol, Mumbai 400 059 (for short 'suit premises') after the appeal period is over.

3. **Rule.** Mr. Palav waives service. Having regard to the fact that respondent No.1 is the only contesting respondent, notice of Rule on respondent No.2 is dispensed with. In view of 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. Raje strenuously contended that Misc. Notice filed by the applicant itself is not maintainable. He submitted that no decree was passed against the applicant as applicant was not party in the suit instituted by the plaintiffs against Omprakash Verma, who is tenant in respect of the suit premises. In other words, he submitted that the applicant is a third party. He further submitted that by order dated 2nd July, 2013, Misc. Notice filed by the applicant was treated as one under Order-XXI, Rule-97 r/w Rule-98 of the Code of Civil Procedure, 1908 (for short 'C.P.C'). Even if, the application is treated as under Order-XXI, Rule-97 r/w Rule-98, still it is not maintainable.

5. Mr. Raje submitted that by well reasoned order, the learned trial Judge dismissed the notice. He has invited my attention to deposition of P.W.1 at Exhibit 22. In the cross-examination, P.W. 1 admitted that she came to reside in the suit premises on 25th December, 1991. The plaintiffs inducted her in the suit premises. She denied that eviction decree is passed against defendant Omprakash Verma. She volunteered that Omprakash Verma was not a tenant of the suit premises when eviction suit was filed by the plaintiffs. She

was inducted by Benita Anthony Fernandes in the suit premises. He submitted that a perusal of the evidence of P.W.1 shows that the applicant has claimed to be tenant in respect of the suit premises. In other words, applicant did not claim that she is a lawful sub tenant in the suit premises. He submitted that as basically the notice itself was mis-conceived, the Appellate Court was not justified in allowing the appeal. Mr. Raje has taken me through the judgments of the Courts below.

6. On the other hand, Mr. Thorat supported the impugned order. He invited my attention to the agreement dated 30th March, 1989 executed between Jeffrin Cresto, son of Nicholas Cresto (landlord) on one hand and defendant Omprakash Verma on the other and in particular clause (4) thereof which reads thus;

“4. The party of the First Part hereby consents to the party of the Second Part to sub-let, part with the possession and/or create third party interest in the said room No.1 and the party of the First Part will have no objection for the same”.

Mr. Thorat has invited my attention to the agreement dated 25th December, 1991 between Omprakash Verma on one hand and the applicant on the other and in particular to the following recital;

“AND WHEREAS the Landlord of the said premises by specific agreement dated 30-3-1989 executed between the Landlord Mr. Jaffrin Crasto and the first party herein increased the monthly rent of the said premises from Rs. 25/- p.m to Rs. 30/- p.m and under clause 4 of the said agreement permitted the first party to sub-let part with possession of create third party interest in the said premises”.

As also clause (3) which reads thus;

“The first party declares that he has right to create third party interest in the said premises as per the agreement dated 30-3-1989”.

He also invited my attention to the notice dated 30th December, 1992 issued by Ms. Benita Carolone Cresto, daughter of Jeffrin Cresto to contend that though the plaintiffs were aware that applicant is in possession of the suit premises, still she was not impleaded in the suit and ex-parte decree was obtained against the tenant who was not in possession.

7. Mr. Thorat submitted that in view of section 7 (15) (a) (iii), the applicant is inducted as a sub tenant in pursuance of the agreements dated 30th March, 1989 and 25th December, 1991. He, therefore, submitted that no case is made out for interfering with the impugned order.

8. In rejoinder, Mr. Raje submitted that clause 6 of the agreement dated 25th December, 1991 provides that defendant Omprakash Verma agreed to co-operate and sign all other application or paper in case further required by the landlord for the transfer of rent bill of the said premises in the name of the applicant. He submitted that this agreement does not amount to defendant surrendering tenancy rights in the suit premises. In other words, he submitted that defendant continues to be tenant in the suit premises and in the evidence, the applicant also claims to be tenant in the suit premises. In any case, he submitted that the Appellate Court was not justified in setting aside ex-parte decree. The Appellate Court should have restored the suit after impleadment of the applicant for proceeding further in accordance with law.

9. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. From the record, it is evident that on 30th March, 1989, Jeffrin Cresto, son of Nicholas Cresto had entered into agreement of tenancy with defendant Omprakash Verma. Jeffrin Cresto being party of first part consented to Omprakash Verma being party of

the second part to sublet, part with possession and/or to create third party interest in the suit premises and that party of the first part will have no objection for the same.

10. A perusal of the agreement dated 25th December, 1991 and in particular recital extracted hereinabove shows that reference was made to the agreement dated 30th March, 1989 executed between the landlord Jeffrin Cresto and the defendant/tenant Omprakash Verma as also clause 4 of the said agreement that permitted defendant Omprakash Verma to sublet, part with possession or create third party interest in the suit premises. Clause 3 extracted hereinabove shows that the defendant Omprakash Verma declared that he has right to create third party interest in the suit premises.

11. Section 7 (15) (a) (iii) reads thus;

7. Definitions. In this Act, unless there is anything repugnant to the subject or context,
 (15)'tenant' means any person by whom or on whose account rent is payable for any premises and includes_
 (a) such person,_
 (i)...
 (ii)...
 (iii)Who is a sub-tenant permitted under a contract by the permission or consent of the landlord, or

A perusal of the definition of the 'tenant' extracted hereinabove shows that tenant means any person by whom or on whose account rent is payable for any premises and includes a person who is a sub-tenant as permitted under a contract or by the permission or consent of the landlord.

12. A conjoint reading of the agreements dated 30th March, 1989 and 25th February, 1991 leaves no room for doubt that the applicant has been inducted as a sub tenant in terms of these agreements. A perusal of the notice

dated 30th December, 1992 (Exhibit 32) issued by plaintiffs to the applicant also shows that the plaintiff was fully aware of the fact that the applicant is in possession of the suit premises. The Appellate Court has also referred to the agreements dated 30th March, 1989 and 25th February, 1991. The Appellate Court also recorded a categoric finding that the plaintiffs were aware of possession of the applicant over the suit premises and despite that the plaintiffs did not implead applicant in that suit. In paragraph 24, the Appellate Court referred to various documents relied on by the applicant showing her possession in the suit premises since 1991. Suit is instituted in the year 2007. In view thereof, I do not find that the Appellate Court committed any error in setting aside ex-parte decree as also ordered the plaintiffs to hand over vacant possession of the suit premises to the applicant.

13. Mr. Raje submitted that as the applicant was not party to the suit, Misc. Notice filed by her is not maintainable. If Misc. Notice is filed under Order-XXI, Rule-97 of the C.P.C, it can be filed only by a person who is in possession of the suit premises. Even, it is filed under Order-XXI, Rule-97 r/w Rule-98, still it is not maintainable. I do not find any merit in either of these submissions. A perusal of the prayers made in the application shows that it is essentially for setting aside ex-parte decree as also for restoration of possession of the suit premises. Misc. Notice is referable to the provisions of Order-IX, Rule-13 and Order-XLI, Rule-99 of C.P.C.

14. As noted earlier, the Appellate Court has set aside ex-parte decree and directed the plaintiffs to hand over possession of the suit premises to the applicant. In my opinion, after setting aside the ex-parte decree, the Appellate Court should have restored R.A.E & R Suit No.80/127 of 2007 and ordered plaintiffs to implead applicant herein as a defendant to the suit and further directed the trial Court to proceed with the suit in accordance with law.

Hence, the impugned order deserves to be modified in the following terms;

- [1] Misc. Notice No.57 of 2011 in R.A.E & R Suit No.80/127 of 2007 is made absolute.
- [2] The judgment and order passed by the learned trial Judge in Misc. Notice No.57 of 2011 in R.A.E & R Suit No.80/127 of 2007 dated 28th August, 2015 is hereby set aside.
- [3] Ex-parte decree passed on 3rd November, 2008 in R.A.E & R Suit No.80/127 of 2007 is hereby set aside.
- [4] R.A.E & R Suit No.80/127 of 2007 is restored to file of the trial Court.
- [5] The plaintiff shall implead applicant as defendant No.2 in the suit within four weeks from today.
- [6] The learned trial Judge will proceed with the suit in accordance with law.
- [7] Rule is partly made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]