Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

CIVIL REVISION APPLICATION [ST] NO.13198 OF 2018

Balurghat Transport Company Ltd.	]	Applicant
Vs.		
Rawal Investment Pvt. Ltd.	]	Respondent

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Mr. S. Shamim i/b Shamim & Co., for the Applicant.
Mr. Mayur Khandeparkar i/b Khaitan Legal & Associates, for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 10th OCTOBER, 2018.

P.C:

Heard Mr. Shamim, learned Counsel for the applicant and Mr. Khandeparkar, learned Counsel for the respondent at length.

2. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicant, hereinafter referred to as "defendant" has challenged the judgment and decree dated 4th February, 2011 passed by the learned Judge, Court Room No.19 of the Court of Small Causes at Mumbai in T.E. & R Suit No.6/8 of 2004 as also the judgment and decree dated 1st February, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in (P) Appeal No.21 of 2011. By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as "plaintiff" and directed the defendant to hand over entire first floor of the building known as "Shamik Chambers" A Rawal House situate at 3, Devji

Ratansey Marg, Mumbai – 400 009 (for short 'suit premises') within a period of three months from the date of the order, failing which the plaintiff is entitled to recover possession by following due process of law.

3. In support of this application, Mr. Shamim submitted that the plaintiff claimed to have issued notice of termination dated 14th October, 2002 at Exhibit 12 and that the said notice was purportedly replied on behalf of the defendant by D.S. Dubey & Associates on 25th October, 2002 at Exhibit 13. He submitted that the defendant never instructed and/or authorized D.S. Dubey & Associates to give reply on behalf of the defendant. He invited my attention to paragraph 16 of the Appellate Court judgment where the Appellate Court observed that the defendant has not explained as to how D.S. Dubey and Associates could send reply on behalf of the defendant without being instructed and that too, along with demand draft. The defendant did not examine anybody from D.S. Dubey & Associates. He submitted that the Courts below wrongly placed burden on the defendant to establish the said fact. If the plaintiff has produced the notice and reply purportedly given on behalf of the defendant, burden was on the plaintiff to establish the said fact.

4. Mr. Shamim further submitted that the plaintiff had thereafter issued notice dated 31st July, 2003 at Exhibit 13. As the plaintiff has issued subsequent notice on 31st July, 2003, the first notice purportedly issued on 14th October, 2002 stands waived. He invited my attention to paragraphs 23 and 25 of the Appellate Court's judgment. In paragraph 23, the contention of the defendant that the first notice dated 14th October, 2002 was waived was recorded. In paragraph 25, the judgment relied on by the defendant namely **Tayabali Jaffarbhai Tankiwala V/s Messrs. Asha & Co., and another, 1970 (1) Supreme Court Cases 46** was considered. The Appellate Court observed in paragraph 29 that as the defendant has denied receipt of the notice dated 31st

July, 2003, they cannot take advantage of waiver of the first notice. He, therefore, submitted that application requires consideration.

5. On the other hand, Mr. Khandeparkar submitted that after receipt of the notice dated 14th October, 2002, the defendant not only gave reply on 25th October, 2002 but also enclosed demand draft in a sum of Rs. 33,428/-. He invited my attention to paragraphs 12 and 17 of the written statement and submitted that in the entire written statement, the defendant did not come with the case that they never instructed D.S. Dubey & Associates to give reply on 25th October, 2002 as also they did not issue demand draft in the sum of Rs. 33,428/- to the plaintiff. He, therefore, submitted that the Appellate Court rightly observed in paragraph 16 that feeble attempt was made on behalf of the witness of the defendant that the defendant did not send such reply. He, therefore, submitted that no case is made out for interfering with the impugned orders.

6. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. A perusal of the written statement filed by the defendant does not even remotely indicate that the defendant took up a plea that the reply dated 25th October, 2002 to the notice of the plaintiff dated 14th October, 2002 was given by D.S. Dubey & Associates without any instructions and/or authorization by the defendant. It is material to note that along with the reply even demand draft in the sum of Rs. 33,428/- was enclosed. It is in that context, the Appellate Court has recorded a finding in paragraph 16 of the impugned order. I do not find that the Appellate Court committed any error in that regard.

7. In so far as the contention that the first notice dated 14th October, 2002 stands waived in view of the plaintiff's issuing subsequent notice dated

31st July, 2003 is concerned, the defendant denied receipt of the said notice. The Appellate Court has considered this aspect in paragraph 29 and held that by notice dated 14th October, 2002, the plaintiff has validly terminated tenancy of the defendant. After perusing the notice dated 14th October, 2002, I do not find that the Appellate Court committed any error in recording the finding that the plaintiff has validly terminated tenancy of the defendant. The defendant has denied receipt of the notice dated 31st July, 2003 and the Appellate Court, therefore, held that the defendant cannot take advantage of ground of waiver as they have denied receipt of the said notice.

8. It is material to note that the defendant did not dispute that its paid up share capital exceeds Rs.1 crore. In the light of the aforesaid discussion, I do not find that the Courts below committed any error in passing the impugned orders. The defendant is not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to the evidence on record. The defendant is not in a position to demonstrate that on the basis of the evidence on record, no reasonable or prudent person would have reached conclusions arrived at by the Courts below. No case is made out for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

9. At this stage, Mr. Shamim orally prays for continuation of ad-interim order granted on 2nd May, 2018 for a period of 12 weeks from today. He states that the Directors of the defendant-Company will file usual undertaking in this Court within 2 weeks from today, after giving advance copy to the other side incorporating therein that:

[a] they are in possession and nobody else is in possession of the suit premises;

[b] they have neither created third party interest nor parted with possession of the suit premises;

[c] they will hereafter neither create third party interest nor part with possession of the suit premises;

[d] within two weeks from today, the defendant will deposit arrears, if any, in this Court, under intimation in writing to the learned Counsel for the plaintiff.

[e] in case they are unable to obtain suitable orders from the higher Court within 12 weeks from today, they will hand over vacant and peaceful possession of the suit premises to the plaintiff.

10. In view thereof, notwithstanding dismissal of the Civil Revision Application, subject to the defendant filing the undertaking in the aforesaid terms within two weeks from today,ad-interim order granted on 2nd May, 2018 shall continue for a period of 12 weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendant commits breach of any of the conditions of the undertaking, ad-interim order shall stand vacated without further reference of the Court.

11. List the Application for reporting compliance on 31st October, 2018.

[R.G. KETKAR, J.]