

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 366 OF 2017

Shri. Ramsingar Rajkishor Pande

(Since Deceased)

1(A) Smt. Asharphadevi wd/o. Ramsingar

Pande and others

...Applicants

Versus

Shree Tirthankar Company

...Respondent

....

Mr. Pradeep J. Thorat, Advocate for the Applicants.

Mr. Sameer R. Bhalekar, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 10th APRIL, 2018

PC.

1. Heard Mr.PJ. Thorat, learned counsel for the applicants and Mr.Sameer Bhalekar, 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 applicants, hereinafter referred to as the 'defendants' have challenged the judgment and decree dated 4.5.2017 passed by the Appellate Bench of the Small Causes Court at Mumbai (Bandra) in P-Appeal No.19/2015. By that order, the Appellate Court allowed the appeal preferred by the respondent, hereinafter referred to as the 'plaintiff' and quashed and set aside the judgment and decree dated 28.7.2015 passed by the learned Judge, Court Room

No.32 of the Court of Small Causes at Bombay (Bandra Branch) in T.E. & R. Suit No.6/7 of 2007. The appellate Court decreed that suit and directed the defendants to hand over vacant and peaceful possession of open piece of land admeasuring 11½ sq. ft. x 16 sq. ft. bearing C.T.S. No.187(Part) situate near Harishankar Mishra Chawl, Gogte Wadi, Aarey Road, Goregaon (East), Mumbai – 400 063, on which Municipal House No.1618(4)/142(9) is situate to the plaintiff within two months. The Appellate Court rejected the cross-objection filed by the defendant insofar as the finding recorded by the learned trial Judge to the effect that the defendant admitted in the cross-examination that open piece of land was let out to his deceased father. The Appellate Court also ordered inquiry into the *mesne* profits under Order XX Rule 12 of C.P.C.

3. In support of this application, Mr. Thorat invited my attention to the notice dated 28.9.2006 issued by the plaintiffs through Advocate. In the concluding paragraph of that notice it was asked to treat that notice under Section 15(2) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). Mr. Thorat submitted that this notice cannot be construed as a notice under Section 106 of the Transfer of Property Act, 1882 (for short, 'T.P. Act'). Once the plaintiff has issued notice through Advocate specifically mentioning Section 15(2) of the Act, it is not open to the plaintiff to contend that the said notice is under Section 106

of the T.P. Act.

4. Mr. Thorat invited my attention to the description of the suit premises in paragraphs-1 and 2 of the plaint as also in paragraphs-1 and 2 of the written statement. The defendant has specifically contended that the suit premises is not properly described and the description is not in compliance of Order VII Rule 3 of C.P.C. In fact the learned trial Judge dismissed the suit substantially on the ground that the description of the suit premises was not in conformity with Order VII Rule 3 of C.P.C. He has invited my attention to the findings recorded by the learned trial Judge in paragraphs-22 & 23 where the trial Court held that when the description of the suit premises is not correct and proper so as to sufficiently identify it, the eviction decree cannot be passed. The plaintiff is, therefore, not entitled to eviction of the defendants.

5. Mr. Thorat submitted that though in the plaint the plaintiff asserted that the open piece of land was let out to the defendant, the rent receipt at Exhibit-18 shows that what was let out to the defendant was a structure. In view thereof, the trial Court as also the Appellate Court were not justified in holding that what was let out to the defendant was open piece of land and consequently the defendant is not entitled to protection under the Act. For all these reasons, he submitted that the application requires consideration.

6. On the other hand, Mr. Bhalekar supported the impugned order. He invited my attention to the admission given by DW-1 Dr. Brijeshkumar R. Pandey during the course of cross-examination. In cross-examination, DW-1 Dr. Brijeshkumar admitted that open piece of land was let out to his father. He submitted that the learned trial Judge also recorded a categorical finding that what was let out to the defendant was open piece of land and that the defendant is not entitled to protection of the Act. The learned trial Judge, however, dismissed the suit on the ground that the description of the suit premises is not correct and proper so as to sufficiently identify it. As against this, the Appellate Court has considered this aspect in paragraphs-24 to 29. After appreciating the evidence on record, the Appellate Court came to the conclusion that the description given by the plaintiff in paragraph-1 of the plaint is sufficient to identify the property in dispute.

7. As far as notice dated 28.9.2006 is concerned, he invited my attention to paragraph-4 of the plaint as also paragraph-6 of the written statement. He submitted that the learned trial Judge while dismissing the suit also held that the plaintiff proved that the tenancy of the defendant was terminated by legal and valid notice dated 28.9.2016. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

8. 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, as far as notice dated 28.9.2006 is concerned, the learned trial Judge while dismissing the suit also held that the plaintiff proved that the tenancy of the defendant was terminated by legal and valid notice dated 28.9.2016. The learned trial Judge has considered this aspect from paragraphs-10 to 17. In particular, in paragraph-11, the learned trial Judge dealt with the submission advanced on behalf of the defendant that the termination notice was issued under Section 15(2) of the Act and not under Section 106 of T.P. Act. In paragraph-12, the learned trial Judge observed that from perusal of the notice dated 28.9.2006, it appears the intention of the plaintiff was to terminate the tenancy of the defendant. So it cannot be construed as a notice under the Act. The learned trial Judge also held that the RPAD returned with endorsement 'unclaimed' , which amounts to valid service.

9. In so far as the Appellate Court is concerned, the Appellate Court has considered this aspect in paragraph-15 and observed that merely because the notice mentions that it was issued under Section 15(2) of the Act it cannot be treated under T.P. Act. From the contents of that notice the plaintiff terminated the tenancy of the defendant in

respect of the suit premises by issuing notice. The Appellate Court observed that the party cannot suffer for wrongly mentioning or committing mistake in mentioning the provisions of law. Thus the Courts below after appreciating the evidence on record have concurrently found that the notice issued by the plaintiff was under Section 106 of the T.P. Act and mentioning of Section 15(2) of the Act was a mistake on the part of the plaintiff and his Advocate. I, therefore, do not find that the Courts below committed any error in that regard.

10. As far as the premises which was let out by the plaintiffs to the defendant is concerned, in the cross-examination DW-1 Dr.Brijeshkumar clearly admitted that open piece of land was let out to his father. Though the trial Court dismissed the suit, the trial Court also held that what was let out to the defendants was open piece of land. The Appellate Court also considered this aspect in paragraph-22 of the order and held that what was let out to the defendant was open piece of land. Mr. Thorat submitted that there is no admission of the defendant in the written statement. As noted earlier, during the course of cross-examination DW-1 Dr.Brijeshkumar has admitted that open piece of land was let out to his father. I, therefore, do not find that the Courts below committed any error in reaching this conclusion.

11. Mr. Thorat submitted that the Appellate Court was not justified in holding that the description given by the plaintiff in paragraph-1 by the plaintiff is sufficient to identify the property in dispute. It is in this regard necessary to refer to the description of the suit premises in paragraphs-1 & 6 of the plaint, which is to the following effect :

- “1. That the Plaintiff abovenamed are the landlords of the property more particularly being an open plot of land admeasuring 11.1/2' x 16' bearing CTS No.187 part situated near Harishanker Mishra Chawl, Gogate Wadi, Aarey Road, Goregaon (East), Mumbai – 400 063 which property hereinafter be referred to as “the Suit property/the Suit premises”. Hereto relied, annexed and marked as “Exhibit-A colly are the copies of Property Registered Card along with the CTS Plan.”
- “6. That the Defendant was let out an open piece/plot of land admeasuring 11'1/2 x 16' feet total admeasuring 184 square feet whereupon the Defendant has constructed a structure which is numbered as Municipal House No.1618(4)/142C standing on the Suit premises belonging exclusively to the Defendant.”

12. The Appellate Court has considered this aspect from paragraphs-24 to 29. In paragraph-26, the Appellate Court referred to the description given in paragraph-1 of the plaint as also the fact that Municipal house number which is standing on the suit premises was also referred in paragraph-6 of the plaint. The rent receipt at Exhibit-18 reveals about the total area of the suit premises as also the Municipal

house number. The defendants also did not dispute the fact that open piece of land was let out to them by the plaintiff. It was also not in dispute that the structure which was let out to the defendant has been given Municipal house No.1618(4)/142(9) of City Survey No.187. The Appellate Court, therefore, came to the conclusion that the description given by the plaintiff is sufficient to identify the suit premises. Even rent receipt Exhibit-18 relied by Mr. Thorat also shows that what was let out was open land and the portion 'room no.' is struck out. Thus the finding of the Appellate Court is based upon appreciation of evidence on record. It is, therefore, not possible for this Court to interfere with these findings in exercise of the power under Section 115 of C.P.C.

13. The defendants are not in a position to demonstrate that the findings recorded by the Appellate Court are perverse, being based upon no evidence or that they are contrary to the evidence on record. The defendants are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Courts. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. C.R.A. fails and the same is dismissed with no order as to costs.

(R. G. KETKAR, J.)