IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.377 OF 2018

Irfan Ibrahim Noor Mohhamed and another … Applicants
Vs.
Mulchand Premji shah and others … Respondents

Mr. Pradeep J. Thorat for Applicants.
Mr. Anuj Narula i/b. Jhangiani Narula & Associates for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JULY 30, 2018

P.C. :

Heard Mr. Thorat, learned Counsel for the applicants and Mr. Narula, learned Counsel for the respondent No.1 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.1 and 2', have challenged the judgment and decree dated 20.10.2016 passed by the learned Judge, Court Room No.35 of the Court of Small Causes at Mumbai (Bandra Branch) in R.A.E.Suit No.694 of 2007 as also the judgment and decree dated 04.05.2018 passed by Appellate Bench of the Small Causes Court in (2a) Appeal No.22 of 2017. By these orders, the Courts below decreed the Suit instituted by respondents No.1 and 2, hereinafter referred to as 'plaintiffs' and directed the defendants No.1 and 2 and respondent No.3, hereinafter referred to as 'defendant No.3', to deliver vacant and peaceful possession of shop No.3 admeasuring about 3' x 6' situate in Varandah of House No.1, Pali Village on the plot of land bearing C.T.S. No.F/638 of Village Pali, Taluka Andheri and bearing Municipal House No.H-5358 situate at 1, Pali Village, Bandra (West), Mumbai 400 050 (for short 'suit premises'). The Courts below decreed the Suit instituted by the plaintiffs

under Sections 16(1)(c) and 16(1)(e) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. In support of this Application, Mr. Thorat strenuously contended that the Courts below were not justified in passing the decree under Section 16(1)(c) of the Act. He submitted that the Suit is instituted in the year 2007. Plaintiffs claim that they are carrying on their business from shop No.2, which is in their use and occupation. Shop No.2 is adjacent to the suit premises namely, shop No.3. He submitted that the Registration Certificate of Establishment issued under Bombay Shops and Establishments Act, 1948 for the year 2010 shows that business of retail plywood and timber and laminates was carried out from shop No.2. Other Registration Certificate of Establishment for the year 2011 shows that business of opticians was carried out in shop No.2. He also invited my attention to paragraph 5 of the written statement where defendants denied that plaintiffs are carrying on business in shop No.2 as falsely alleged by them. In paragraph 11(c), defendants contented that plaintiffs never carried on business from shop No.2. He submitted that, therefore, there was no question of defendants causing nuisance and annoyance to the plaintiffs. Plaintiffs did not examine any neighbouring or adjoining occupier to establish the ground of nuisance and annoyance. As the plaintiffs did not establish that there were carrying on business from shop No.2, the Courts below were not justified in passing eviction decree under Section 16(1)(c).

4. Mr. Thorat further submitted that in any case, unless the Competent Court records conviction for allowing the premises to be used for immoral or illegal purposes, the Courts were not justified in passing decree under Section 16(1)(c). He submitted that the decree under Section 16(1)(c) can be passed only when the tenant has been

guilty of conduct which is a nuisance or annoyance to the adjoining or neighbouring occupier, or **has been convicted of using the premises or allowing the premises to be used for immoral or illegal purposes**. In other words, the conviction is sine qua non for using the premises or for allowing the premises to be used for illegal or immoral purpose. As in the present case, defendants are not convicted by the Competent Court, the Courts below were not justified in passing eviction decree under Section 16(1)(c). He also relied upon the decision of this Court in ***Caitan D'souza Vs. Jerbai S. C. Dinshaw***, **AIR 1972 Bom.117**, and in particular paragraph 8 thereof. He also invited my attention to the decision of the Apex Court in ***Anirudha Ramakrishna Karlekar Vs. Jankibai R. Bedekar***, **1991 (1) SCC 649**, and in particular paragraph 6 thereof.

5. In so far as the ground under Section 16 (1)(e) of the Act is concerned, he submitted that plaintiffs alleged that defendants No.1 and 2 are the tenants in respect of the suit premises and that they have unlawfully sublet the suit premises to the defendant No.3. Defendant No.3 is an employee of defendants No.1 and 2. Thus, defendants No.1 and 2 did not part with possession of the suit premises and were in control of the suit premises. Defendant No.3 being an employee of defendants No.1 and 2 cannot claim to have control or in exclusive possession of the suit premises and consequently, the Courts below were not justified in passing decree under Section 16(1)(e) of the Act. He invited my attention to the following portion of the cross-examination:

> "It is not correct to say that, Defendant No.3 was not working as a employee in the shop and we have falsely stated so in the Written Statement and evidence. It is not correct to say that, I have not mentioned the salary of Defendant No.3 in the Written Statement and evidence, as I was not paying him any salary."

6. The Courts below have wrongly interpreted this portion of the

cross-examination to come to the conclusion that defendants No.1 and 2 did not pay any salary to the defendant No.3 and thus did not establish that defendant No.3 was their employee. He, therefore, submitted that application requires consideration.

7. On the other hand, Mr. Narula supported the impugned orders. He submitted that plaintiffs are carrying on business from shop No.2, which is adjacent to the suit premises. To substantiate this plea, plaintiffs have produced electricity bills of July 2007, August 2007, September 2007, October 2007 and December 2007. He submitted that charge-sheet under Section 173 of the Code of Criminal Procedure, 1973 was filed against defendant No.3 under Sections 51 and 63 of the Copyright Act, 1957. Defendant No.3 was arrested. He filed application for bail before the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai. By order dated 02.04.2007, defendant No.3 and other accused were enlarged on bail subject to their giving undertaking that in the course of their business till the trial of the case is pending, they would restrain from possessing or selling of cartridges and they would be made available for inquiry and interrogation as and when necessary before the investigating officer. In pursuance thereof, defendant No.3 filed undertaking dated 07.04.2007. He submitted that raid was carried out by the investigating agency and counterfeit cartridges were found in the suit premises. He further submitted that conviction is not sine qua non for passing a decree under Section 16(1)(c) of the Act.

8. In so far as the ground under Section 16(1)(e) is concerned, he submitted that defendants No.1 and 2 admitted presence of defendant No.3 in the suit premises and came with the case that defendant No.3 is their employee. He has taken me through paragraphs 8 and 11(a) of the written statement. Defendants No.1 and 2 contended that defendant No.3 is working under them. In paragraph 11(a), it is contended that

defendant No.3 is employee of defendants No.1 and 2 who assists them in carrying on business from the suit premises as defendant No.3 has knowledge of stationery business. Defendants No.1 and 2 pleaded that they are paying remuneration to the defendant No.3 for his services. He invited my attention to the affidavit of evidence of defendant No.1 Irfan Ibrahim Noor Mohhamed, who was examined as D.W.1. In paragraph 9, D.W.1 deposed that since the year 2003 or thereabout till 2012, the suit premises was run in the name of Maruti Stationery & Xerox. The said business was run by the defendant No.1 and his brother. In the year 2012, defendant No.1 closed the business of selling stationery items as it was not yielding profits. Defendants No.1 and 2 removed defendant No.3 from service and he is no longer working for them. From 2013 till date, defendants No.1 and 2 are running new business of sale and services of mobiles in the name and style of Prince Collection. As against this, in the cross-examination, D.W.1 admitted that defendants No.1 and 2 have never dealt with the work of stationery. They are also not aware about stationery business and do not know percentage of profit in stationery business. D.W.1 though admitted that he knows where defendant No.3 was residing, he stated that he is not going to examine defendant No.3.

9. Mr. Narula submitted that father of defendants No.1 and 2 died in the year 2002. For the period from 2002 to 2008, licence was not renewed. After the demise of their father. Suit was instituted in the year 2007 and the licence was renewed in the year 2008. He submitted that D.W.1 admitted that cheque for renewal of licence was not issued either from his account or from his wife's account. He admitted that the licence was renewed by him or defendant No.2 only after filing the present Suit. Receipts exhibit-63 collectively shows that number of employees is 'Nil'. In paragraph 3, D.W.1 admitted that defendants No.1 and 2 have no knowledge of any business than dealing in business of beef and meat.

He is personally not aware about the mobile business. He, therefore, submitted that no case is made out for interfering with the impugned orders.

10. 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, the plaintiffs have instituted Suit invoking grounds under Sections 16(1)(c) and 16(1)(e) of the Act. The plaintiffs have alleged that defendants No.1 and 2 have unlawfully sublet the suit premises in favour of defendant No.3. Defendant No.3 is carrying on illegal business of selling counterfeit ink cartridges of reputed companies. The police have raided the suit premises and found out counterfeit goods from the suit premises. Defendant No.3 was also arrested. It has also come on record that the charge-sheet is filed against defendant No.3 under Sections 57 and 63 of the Copyright Act, 1957. Defendant No.3 was arrested and was enlarged on bail subject to the defendant No.3 and other accused filing undertaking. In pursuance of order dated 02.04.2007 passed by the learned Metropolitan Magistrate enlarging defendant No.3 on bail, defendant No.3 filed undertaking dated 07.04.2007 to the effect that till disposal of the case and during the pendency of the case, he will not possess and sell any cartridges in the suit premises or anywhere else.

11. The learned trial Judge has considered this ground in paragraph 16. In paragraph 16, the learned trial Judge observed that plaintiffs have brought on record the certified copy of the proceedings of police case No.822/PS/07 filed against the defendant No.3 for carrying on business in the suit premises and keeping there counterfeit stationery namely cartridges of reputed companies. The plaintiffs have also produced undertaking given by the defendant No.3. In paragraph 18, the learned

trial Judge observed that plaintiffs have established that defendant No.3 is carrying on illegal business in the suit premises by selling the counterfeit ink cartridges of reputed companies illegally and during the course of raid in the suit premises, the Investigating Officer has found out counterfeit goods from the suit premises. The learned trial Judge also noted that defendant No.3 was arrested. Thus, defendants have caused nuisance and annoyance to the plaintiffs by their acts.

12. The Appellate Court has considered this ground in paragraph 20. In paragraph 20, the Appellate Court observed that it is an undisputed fact that offence was registered against the defendant No.3 for selling fabricated stationery material and that he has given undertaking before the learned Magistrate. In paragraph 22, the Appellate court referred to registration of police case No.822/PS/07 against defendant No.3 for carrying on an illegal business at the suit premises and selling counterfeit stationery namely cartridge of reputed companies. The police arrested defendant No.3 and the said case is pending. It was further observed that plaintiffs are carrying on business in shop No.2, which is adjacent to the suit premises and it has definitely caused nuisance and annoyance to the plaintiffs. Thus, after appreciating the evidence on record, the Courts below have concurrently held that plaintiffs have established the ground of nuisance and annoyance under Section 10(1)(c) of the Act. Mr. Thorat submitted that basically, plaintiffs have not examined any any neighbouring or adjoining occupier to prove the ground of nuisance and annoyance under Section 16(1)(c). Apart from that, plaintiffs have also not established that they are carrying on business in shop No.2, which is adjacent to the suit premises namely shop No.3. It is not possible to accept this submission. As noted earlier, plaintiffs have produced electricity bills for the months of July 2007 to December 2007 which clearly establishes their case that they are

carrying on business from shop No.2. My attention was drawn to the examination-in-chief of P.w.1 and in particular paragraph 2 and cross-examination conducted on 22.09.2014. Mr. Thorat submitted that plaintiffs had inducted one Shyamlal and his brothers in shop No.2 and the bills in respect of shop No.2 are only from March, 2008 which do not establish the fact that plaintiffs were carrying on business at the time of institution of the Suit. I do not find any merit in this submission. In paragraph 2 of the examination-in-chief, P.W.1 Mulchand Premji Shah (plaintiff No.1) has produced in all 4 electricity bills. In the cross-examination, P.W.1 was not confronted with the fact that these electricity bills do not pertain to the suit premises or that electricity bills from March 2008 onwards are pertaining to the suit premises. Though it is sought to be contended on the basis of an admission given in the cross-examination of P.W.1 that shop No.2 was in occupation of Shyamlal and his brothers, P.W.1 also deposed that tenants in shop No.2 surrendered the premises in and around 2006. Even this statement was not sought to be contradicted by defendants No.1 and 2 by producing the evidence.

13. Mr. Thorat submitted that conviction is sine qua non for passing decree under Section 16(1)(c) of the Act. As in the present case, charge-sheet is filed against the defendant No.3 and the defendant No.3 is not convicted till date, the Courts below were not justified in passing decree on the ground of nuisance and annoyance under Section 16(1)(c) of the Act. Section 16(1)(c) reads thus,

> 16. When landlord may recover possession.
>
> (1) Notwithstanding anything contained in this Act but subject to the provisions of Section 25, a landlord shall be entitled to recover possession of any premises if the court is satisfied-
>
> (a) …
>
> (b) …
>
> (c) that the tenant, his agent, servant, persons

> inducted by tenant or claiming under the tenant or, any person residing with the tenant has been guilty of conduct which is a nuisance or annoyance to the adjoining or neighbouring occupier, or has been convicted of using the premises or allowing the premises to be used for immoral or illegal purposes or that the tenant has in respect of the premises been convicted of an offence of contravention of any of the provisions of clause (a) of sub-section (1) of section 394 or of section 394-A of the Mumbai Municipal Corporation Act, or of sub-section (1) or of section 376 or of section 376-A of the Bombay Provincial Municipal Corporations Act, 1949, or or section 229 of the City of Nagpur Municipal Corporation Act, 1948; or of section 280 or of section 281 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships act, 1965; or

14. A perusal of the above extracted provision shows that a landlord is entitled to recover possession of any premises if the Court is satisfied-

(a) that the tenant, his agent, servant, persons inducted by tenant or claiming under the tenant or, any person residing with the tenant-

(i) has been guilty of conduct which is a nuisance or annoyance to the adjoining or neighbouring occupier,

OR

(ii) has been convicted of using the premises,

OR

(iii) allowing the premises to be used for immoral or illegal purposes,

OR

(b) that the tenant has in respect of the premises been convicted of an offence of contravention of any of the provisions of clause (a) of sub-section (1) of section 394 or of section 394-A of the Mumbai Municipal Corporation Act, or of sub-section (1) or of section 376 or of section 376-A of the Bombay Provincial

> Municipal Corporations Act, 1949, or or section 229 of the City of Nagpur Municipal Corporation Act, 1948; or of section 280 or of section 281 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships act, 1965;

15. Mr. Thorat submitted that the conviction has to be recorded for using the premises or allowing the premises to be used for illegal or immoral purposes. In other words, the eviction should be either for using the premises or allowing the premises to be used for illegal or immoral purposes. It is not possible to accept this submission for more than one reason. A perusal of this provision shows that conviction for using the premises for immoral or illegal purposes and conviction for offence of contravention of Sections 394(1)(a) or 394-A of the M.M.C. Act is not a sine qua non for the purpose of proving the case under Section 13(1)(c). It is evident that the above provision is made in order to ensure that the tenant or any person inducted by him is a law abiding citizen vis-a-vis the premises and he should not disturb or interfere with the normal, reasonable and comfortable life of his neighbours. His conduct should not lead to lower the reputation of the landlord in the society. Apart from that, it is common knowledge that the criminal trial takes a long time for completion. Even the rate of conviction in India is extremely poor. In some cases, acquittal is recorded by giving benefit of doubt. If the contention of Mr. Thorat is accepted then the eviction suit will be required to be kept in abeyance till the conviction is recorded. Even if the accused is convicted by the trial Court, he can carry the matter upto the Apex Court. This will certainly defeat the object of Section 16(1)(c) thereby depriving the landlord to have decree thereunder.

16. I am supported in this view by the decision of this Court in ***Dattatraya Savlaram Ghadigaonkar Vs. Satyapal Uttamchand***

Chaudhary, **2011 (6) Mh.L.J. 500**. In paragraph 28, the learned Single Judge of this Court (Coram: V. M. Kanade, J.) extracted Section 13(1)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and thereafter observed thus,

> " If a plain meaning is to be given to the said provision, conviction for using the premises for immoral or illegal purposes and conviction for offence of contravention of section 394(1)(a) or 394A of B.M.C. Act is not a sine qua non for the purpose of proving the case under section 13(1)(c). It is sufficient if the landlord establishes that the conduct of the tenant is causing nuisance or annoyance to the neighbouring or adjoining occupiers. It is obvious that the said provision had been made in order to ensure that the tenant should be a law abiding citizen vis-a-vis the premises and he should not unduly disturb or interfere with the normal, reasonable and comfortable life of his neighbours. So far as the nuisance is concerned, it will not be possible to give any precise or universal formula of what activities constitute nuisance. However, it can be said that if what is being done interferes with the neighbours in the comfortable and convenient enjoyment of their premises then such a conduct can be held to be causing nuisance. The word "nuisance" has been defined in the Municipal Corporation Act as under:-
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> > "Nuisance includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance, or offence to the sense of sight, smelling, or hearing or which is, or may be dangerous to life or injurious to health or property."
>
> So far as the expression "annoyance" is concerned, it is difficult to make any distinction between nuisance and an annoyance but as both the words have been used side by side, an annoyance would mean something less than a nuisance. Both these expressions have wide amplitude concerning a variety of facts and circumstances and cannot be fenced by definite meaning. A reasonable apprehension of a nuisance from the acts done by the neighbour in a manner which will produce an interference with the pleasurable and reasonable enjoyment of the adjoining house would fall within the word "nuisance or annoyance".

17. In view thereof, I do not find that the Courts below committed any error in passing decree under Section 16(1)(c) of the Act.

18. In so far as decree under Section 16(1)(e) is concerned, the presence of defendant No.3 is admitted. Defendants No.1 and 2 came with the case that defendant No.3 is their employee and that they are paying remuneration to him. The Courts below have considered the case made out by the defendants No.1 and 2 and have held that defendants No.1 and 2 have not established that defendant No.3 was their employee. The Courts below have considered several aspects while reaching to this conclusion. Even otherwise, I do not find that the plaintiffs have established that defendant No.3 was their employee. D.W.1 admitted that since the year 2003 or thereabout till 2012, the suit premises was run in the name of Maruti Stationery & Xerox. The said business was run by defendants No.1 and 2. The said business was closed in the year 2012 as the business of selling stationery items was not yielding any profits. As against this, in the written statement of defendants, they come out with the case that defendant No.3 is working under defendants No.1 and 2 (paragraph 8) and that defendant No.3 being an employee assists defendants No.1 and 2 in carrying on business from the suit premises as defendant No.3 has knowledge of stationery business. Defendants No.1 and 2 pleaded that they are paying remuneration to the defendant No.3 for his services. Though in the evidence, defendants No.1 and 2 came with the case that the said business was closed down in the year 2012, the written statement dated November 2013 shows otherwise.

19. That apart, in the cross-examination, defendants No.1 and 2 admitted that they have not done work of stationery. They are not aware about stationery business. D.W.1 admitted that he does not know percentage of profit in stationery business. Though he knew address of defendant No.3, he stated that he is not going to examine defendant

No.3. It is also material to note that in the Receipts at exhibit-63, the number of employees shown is 'Nil'. Thus, from the evidence on record, it is abundantly clear that defendant No.3 was carrying on business of stationery. Defendants No.1 and 2 also admitted that they have no knowledge of any business than dealing in business of beef and meat. D.W.1 also admitted that he is not personally aware about the mobile business. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit under Section 16(1)(e) of the Act.

20. In the light of the aforesaid discussion, I do not find that the Courts below committed any error in decreeing the Suit. Defendants No.1 and 2 were not in a position 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.1 and 2 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. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

21. At this stage, Mr. Thorat orally applies for continuation of ad-interim order in terms of prayer clause (c) for a period of 12 weeks from today. He assures that within two weeks from today, defendants No.1 and 2 and all adult members using the suit premises will give usual undertaking with 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 interests nor parted with possession of the suit premises;

(c) they will hereafter neither create third party interests nor part with possession of the suit premises;

(d) they will clear the arrears of rent, if any, within 2 weeks from today and will go on paying rent till handing over of possession;

(e) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

22. In view thereof, notwithstanding dismissal of the C.R.A., subject to the defendants filing the undertaking in the aforesaid terms and clearing arrears of rent, if any, within two weeks from today, with advance copy to the other side, ad-interim order dated 16.07.2018 shall remain in force for a period of twelve 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 defendants commit breach of any of the conditions of the undertaking, respondents will be at liberty to proceed with the matter in accordance with law. In case, defendants are unable to obtain suitable orders from higher Court within a period of twelve weeks and do not hand over possession of the suit premises to the respondents, the respondents will be at liberty to proceed with the matter in accordance with law. Order accordingly.

23. List the Application for 'reporting compliance' on 20.08.2018.

(R. G. KETKAR, J.)

Minal Parab