

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE SIDE JURISDICTION  
WRIT PETITION NO. 12274 OF 2018**

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|--------------------------------------------------------------------------------------------------|---|-------------|
| Ramdular Mishrilal Soni and others.                                                              | ] | Petitioners |
| Vs.                                                                                              |   |             |
| Arun Satyanarayan Sharma and another.                                                            | ] | Respondents |
| <b>WITH<br/>CIVIL APPLICATION NO.2352 OF 2018<br/>WITH<br/>CIVIL APPLICATION NO.2353 OF 2018</b> |   |             |
| Ramdular Mishrilal Sonar and others.                                                             | ] | Petitioners |
| Vs.                                                                                              |   |             |
| Arun Satyanarayan Sharma and another.                                                            | ] | Respondents |

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Mr. Cyrus Pooniwala a/w Aniket Worlikar a/w N. Ghosh i/b Deven Dwarkadas & Partners, for Petitioners.  
None for the Respondents.

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**CORAM : R.G. KETKAR, J.**

**DATE : 30TH OCTOBER, 2018.**

**P.C.**

Not on board. At the request of Mr. Pooniwala, taken up for admission.

2. Heard Mr. Pooniwala, learned Counsel for the petitioners at length.

3. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants' have challenged the judgment and decree dated 10<sup>th</sup> August, 2015 passed by the learned Judge, Court Room No.36 of the Court of Small Causes at Mumbai (Bandra Branch) in L.E Suit No.588 of 1987 as also the judgment and decree dated 2<sup>nd</sup> May, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in

P.S.C.C Appeal No.18 of 2015. By these orders, the Courts below decreed the suit instituted by the respondents, hereinafter referred to as “plaintiffs” and directed the defendants to handover possession of room in Satyanarayan Sharma Stable situate at Khotwadi, Santacruz (West), Mumbai – 400 054 (for short 'suit premises') to the plaintiffs within a period of two months from the date of the order.

4. In support of this Petition, Mr. Pooniwala submitted that the Courts below committed serious error in decreeing the suit. He submitted that in fact original defendant **Mishrilal** Sonar (for short 'Mishrilal') was a protected tenant by virtue of Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). Mishrilal was in occupation of the suit premises prior to 1<sup>st</sup> February, 1973 and the said fact is established from the evidence of the plaintiffs' witness. He has invited my attention to the evidence of plaintiff No.3 Ramesh Satyanarayan Sharma who was examined as P.W.1. In the cross-examination, he deposed that his date of birth is 12<sup>th</sup> May, 1956. He was about 14 to 15 years old when deceased defendant **Mishrilal** had come to reside in the suit premises. He submitted that if this evidence is considered, it will substantiate claim of the defendants that deceased Mishrilal was occupying the suit premises prior to 1<sup>st</sup> February, 1973. He also invited my attention to the notice dated 28<sup>th</sup> September, 1987 issued on behalf of Rajdevi Sharma w/o of Satyanarayan Sharma and the reply dated 6<sup>th</sup> October, 1987 given by the defendants. In reply, it is stated that defendant Mishrilal is tenant in respect of the suit premises from the year 1972 at the monthly rent of Rs.15/-. In paragraph 2 of affidavit of plaintiff No.2 Arun Satyanarayan Sharma for carrying out amendment in the plaint, it is specifically stated that defendant Mishrilal expired on 11<sup>th</sup> January, 2007 leaving behind respondents above named who are residing and occupying the suit premises after the death of original **tenant** as also in the order dated 17<sup>th</sup>

July, 2010 passed by the learned trial Judge below Exhibit 16. That order was passed on the application for condonation of delay in filing written statement by defendant No.1(b). In paragraph 3, the learned trial Judge observed that in the meantime, the original **tenant** died and his heirs and legal representatives are brought on record. Relying on this, Mr. Pooniwala submitted that the plaintiffs accepted that deceased **Mishrilal** was inducted as a tenant and was occupying the suit premises prior to 1<sup>st</sup> February, 1973.

5. Mr. Pooniwala further submitted that in paragraph 19, the Appellate Court committed serious error in referring to cut off date as “1<sup>st</sup> February, 1972” instead of “1<sup>st</sup> February, 1973”. He submitted that as the original defendant Mishrilal was occupying the suit premises prior to 1<sup>st</sup> February, 1973, he is a protected tenant and, therefore, the Courts below were not justified in decreeing the suit on the premise that the defendant is the gratuitous licensee in respect of the suit premises. He, therefore, submitted that the Petition requires consideration.

6. I have considered submissions advanced by Mr. Pooniwala. I have also perused the material on record. It is the case of the plaintiffs that during the lifetime of original plaintiff Satyanarayan Sharma, Mishrilal was allowed to occupy room in stable free of charge as a caretaker of deceased Satyanarayan Sharma to look after his cows and buffaloes. As against this, it is the case of the original defendant Mishrial that he is occupying the suit premises as a tenant prior to 1<sup>st</sup> February, 1973. In order to establish possession of the defendants prior to 1<sup>st</sup> February, 1973, burden is essentially on them to establish the said fact. The defendants came with the case that they were paying monthly rent of Rs. 25/- to the deceased plaintiff Satyanarayan Sharma and he was not issuing rent receipt. Even if, I accept this this submission and despite paying rent, deceased plaintiff Satyanarayan Sharma was not issuing rent receipt, no

material is produced by the defendants to establish their possession in the suit premises prior to 1<sup>st</sup> February, 1973. No iota of evidence is produced to substantiate that Mishrilal occupied the suit premises prior to 1<sup>st</sup> February, 1973. Reliance is placed on cross-examination of P.W.1 Ramesh Sharma to contend that he deposed that his date of birth is 12<sup>th</sup> May, 1956. He was 14 to 15 years old when Mishrilal had come to reside in the suit premises. This aspect is considered by the Courts below. In paragraph 19, the Appellate Court did not accept the said contention. In the first place, it was observed that by mathematical calculation the date of possession cannot be determined as the probable age was deposed by P.W.1 Ramesh Sharma and the material fact is that defendant No.1(b) came with the specific case that he came in possession of the suit premises in 1975. As defendant No.1(b) specifically contended that he came in possession of the suit premises in the year 1975, it cannot be accepted that they were in occupation of the suit premises prior to 1<sup>st</sup> February, 1973. Even if, I accept submission that cut off date is wrongly mentioned, no material is produced to substantiate the plea of the defendants that Mishrilal was in possession of the suit premises prior to 1<sup>st</sup> February, 1973. As mentioned earlier, burden is essentially on the defendants to establish that they are protected tenant as they are occupying the suit premises prior to 1<sup>st</sup> February, 1973. No iota of evidence is adduced in support of this submission. The Courts below after appreciating the evidence on record have concurrently held that the defendants are occupying the suit premises as a caretaker to look after cows and buffaloes. The plaintiffs permitted defendants to use the premises free of charge and thus, they are gratuitous licensee.

7. For the reasons recorded in the impugned orders, I do not find that the Courts below committed any error in passing the impugned orders. The defendants are not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the

basis of the material on record, no reasonable or prudent person would have come to the conclusion arrived at by the Courts below. The defendants are not in a position to show that the findings are contrary to the evidence on record. Merely because on the basis of the material on record, another view is possible that, by itself, is no ground for exercising powers under Article 227 of the Constitution of India. No case is made out for interfering with the impugned orders. Hence, the Petition fails and the same is dismissed.

8. In view of dismissal of the main Petition, Civil Application No.2352 of 2018 filed by the respondents for withdrawing the amount of compensation does not survive and as such is dismissed. Civil Application No.2353 of 2018 filed by the respondents for expediting hearing of the Petition does not survive and the same is dismissed.

9. At this stage, Mr. Pooniwala orally applies for stay of eviction decree for a period of 8 weeks from today. He assures that on or before 2<sup>nd</sup> November, 2018, the defendant and all his adult family members residing/using the suit premises will file usual undertaking in this Court 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) in case they are unable to obtain suitable orders from the higher Court within 8 weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents/plaintiffs.

10. In view thereof, notwithstanding dismissal of Writ Petition, eviction decree shall not be executed for a period of 8 weeks from today. It is made clear that in case the defendants do not file undertaking or commit breach of any of the clauses of the undertaking, interim order shall stand vacated without further reference of the Court. Order accordingly.

11. List the Petition for reporting compliance on **2<sup>nd</sup> November, 2018.**

**[R.G. KETKAR, J.]**