

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**Civil Revision Application NO. 256 OF 2017**

Dr. Mrs. Louisa Pinto@ Pareira (deceased)

And Anr

...Applicants

*Versus*

Kamalakant Vishnuprasad Joshi(deceased)

And Ors

...Respondents

....

Mr.Pradip R. Kadam, Advocate for the Applicants.

Mr. Sameer M. Tendulkar, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 31<sup>st</sup> JULY, 2018

P.C.

1. Heard Mr.Pradip Kadam, learned counsel for the applicants and Mr.Sameer Tendulkar, learned counsel for the respondents, 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 'plaintiffs', have challenged the judgment and decree dated 16.1.2008 passed by the learned Judge, Court Room No.10 of the Court of Small Causes Court at Bombay in R.A.E. Suit No.1454/4129 of 1989 as also the judgment and decree dated 7.3.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Appeal No.182/2008 . By

these orders, the Courts below dismissed the suit instituted by the plaintiffs invoking the grounds under Sections 13(1)(b), 13(1)(e) and 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act').

3. In support of this application, Mr. Kadam strenuously contended that the Courts below committed serious error in declining to pass decree under Section 13(1)(b) of the Act. He submitted that the plaintiffs have established that defendants No.1 & 2 have carried out permanent construction by constructing two cabins in the suit premises. The Courts below, however, held that two cabins are wooden cabins and, therefore, do not amount to carrying out construction of permanent nature. He submitted that the said finding is not supported by any evidence on record and, therefore, is a perverse finding.

4. Insofar as the ground of un-lawful sub-letting by defendants No.1 & 2 in favour of defendants No.3 & 4 and the ground of non-user by the defendant for more than six months immediately preceding the date of filing of the suit is concerned, he invited my attention to the bailiff's reports dated 8.1.1990 and 11.1.1990.

5. Relying upon these reports dated 8.1.1990 and 11.1.1990 Mr.Kadam submitted that defendants No.1 & 2 are not using the suit

premises and in fact they are carrying on business at the address of Joshi Brothers, Khadilkar Road, Bombay on 8.1.1990 and 11.9.1990. In the report dated 8.1.1990, it is stated that the bailiff has served copy of the writ summons on defendant No.1 at the address of Joshi Brothers, Khadilkar Road, Bombay on 8.1.1990 at 4:40 p.m. In so far as defendants No.3 and 4 are concerned, the report shows that the bailiff went in search of these defendants at ground floor, Dominic House, Gaiwadi, Girgaum on 8.1.1990 at 5:00 p.m., but, they were not found and the house was found locked. Upon enquiry with their neighbour Husain, the bailiff was informed that they will be available after 6:30 p.m.

6. Insofar as the report dated 11.1.1990 is concerned, it shows that the bailiff went to serve copy of the summons along with plaint on defendant No.2 at 4<sup>th</sup> floor, room No.31, Mugbhat Lane, Girgaum, Bombay on 11.9.1990 at 4:45 p.m. but was not found. Insofar as defendants No.3 & 4 are concerned, it is reported that he tried to serve defendants No.3 & 4 at ground floor, Dominic House, Gaiwadi, Bombay on 11.1.1990 at 5:15 p.m. but they were not found and the house was found locked. Upon enquiry with neighbour he was informed that they will be available at 6:30 p.m..

7. Relying upon these reports dated 8.1.1990 and 11.1.1990, Mr. Kadam submitted that defendants No.1 & 2 are not using the suit premises and in fact they are carrying on business at the address of Joshi Brothers. Insofar as defendants No.3 & 4 are concerned, it clearly establishes the case of the plaintiffs that after parting possession by defendants No.1 & 2, defendants No.3 & 4 are using the suit premises. Thus the grounds of non-user as also unlawfully sub-letting is established. He, therefore, submitted that the Courts below committed serious error in dismissing the suit. The application, therefore, requires consideration.

8. On the other hand, Mr. Tendulkar supported the impugned orders. He submitted that after appreciating the evidence on record, the Courts below concurrently declined to pass decree under Section 13(1) (b) of the Act on the ground that the plaintiffs failed to establish that defendants No.1 & 2 carried out permanent additions or alterations in the suit premises. The Courts below have found that two wooden cabins are constructed which are not of a permanent nature. Insofar as the ground of unlawful sub-letting and non-user are concerned, he invited my attention to the list of documents from pages-120 to 127 as also the findings recorded by the Appellate Court in paragraph-29. In paragraph-29, the Appellate Court observed that defendants No.1 & 2 had

produced electricity bill at Exhibit-12 collectively which shows that the electric meter installed in the suit premises recorded electric consumption for the period w.e.f. 5.1.1989 to 7.12.1989, 4.7.1991 to 7.8.1991 and 11.9.1992 to 4.11.1992 and, therefore, it cannot be said that the suit premises was locked or unused. He submitted that voluminous documentary evidence produced on record clearly establishes that defendants No.1 & 2 are using the suit premises and that the plaintiffs have failed to establish the ground of non-user as also the ground of un-lawful sub-letting by defendants No.1 & 2 in favour of defendants No.3 & 4. Merely because the suit summons is served on defendant No.1 at the address of Joshi Brothers, Khadilkar Road, Bombay that by itself will not establish that defendant No.1 is not using the suit premises and that he has unlawfully sub-let the suit premises to defendants No.3 & 4.

9. 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 Courts below have concurrently held that the plaintiffs have not established the ground under Section 13(1)(b) of the Act. The Courts below have held that two wooden cabins are constructed in the suit premises which are not of a permanent nature. Said finding is based upon appreciation of evidence on record.

It, therefore, cannot be said that said finding is recorded in the absence of any evidence or that it is not supported by any evidence on record. In view thereof, I do not find that the Courts below have committed any error in declining to pass the decree under Section 13(1)(b) of the Act.

10. Insofar as the ground under Section 13(1)(k) of the Act is concerned, defendants No.1 & 2 have produced voluminous documents on record to substantiate that they are using the suit premises. As against this, the plaintiffs have not produced any positive evidence, save and except relying upon the bailiff reports. In fact a perusal of the impugned order indicates that the plaintiffs did not rely upon the bailiffs reports in the Courts below and for the first time the argument is advanced in this Court relying upon the bailiffs reports. The bailiff's reports by itself will not establish the case of the plaintiffs about non-user of the suit premises by defendants No.1 & 2 and also unlawfully sub-letting the suit premises to defendants No.3 & 4. In view thereof, no case is made out for invocation of powers under Section 115 of C.P.C. Hence, Civil Revision Application fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)

Pradipkumar  
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Digitally signed  
by Pradipkumar  
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