

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 360 OF 2018**

Manmohan Gayaprasad Chourasia & Anr.] Petitioners

Vs.

Rakesh Sadashiv Chorasias & Ors.] Respondents

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Mr. A.A. Sapre i/b D.B. Savant, for petitioners.
Mr. Induprakash Tripathi, for respondents.

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CORAM : R.G. KETKAR, J.

DATE : 4TH JUNE, 2018.

P.C.

Heard Mr. Sapre, learned Counsel for the petitioners and Mr. Tripathi, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as “defendants” have challenged the judgment and order dated 10th July, 2017 passed by the learned Judge, Court Room No.26 of the Court of Small Causes at Mumbai below Exhibit 25 in L.E. Suit No.46/50 of 2012. By that order, the learned trial Judge rejected the application Exhibit 25 made by the defendants for framing additional issues which are to the following effect;

- “i. Whether the Defendants prove that their late father, Shri Gayaprasad Ramlal Chaurasia was in possession of the suit premises on or before 1st February, 1973?

- ii. Whether the Defendants prove that their late father, Shri Gayaram Ramlal Chaurasia was entitled for protection of the Bombay Rent Control Act, 1947?
- iii. Whether the Plaintiffs prove that the suit filed in the present form viz: Licensee Eviction Suit is maintainable?"

3. In support of this Petition, Mr. Sapre invited my attention to the copy of the plaint in the suit instituted by the respondents/plaintiffs. The plaintiffs have alleged that the defendants are gratuitous licensees in respect of Shop No.4, Ground Floor, opposite 1st Carpenter Street, Building No.509/521, 137, Falkland Road, P.B. Marg, Bhandari Street, Mumbai 400 004 (for short 'suit premises'). The suit premises admeasures 217 square feet carpet area and situate in C.T.S No.3042, B.M.C Ward No.217, 'C' Ward, Bhuleshwar Division, C.S. Reg. No.74. He submitted that as against this, defendants while resisting the suit have contended in the written statement that father of the defendants had instituted suit for declaring him a lawful and protected tenant. Before defendant's father coming in occupation of the suit premises, his maternal uncle was in use, occupation and possession of the suit premises prior to 1944. The defendants' father thereafter came in the suit premises sometime in the year 1944. The defendants are claiming through them being their family members and as such are protected under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Bombay Rent Act') and the Maharashtra Rent Control Act, 1999 (for short 'Maharashtra Rent Act').

4. Mr. Sapre invited my attention to the issues framed by the learned trial Judge on 4th December, 2015. The learned trial Judge, however, did not frame any issue on the basis of the facts pleaded by the defendants in the

written statement. He submitted that issues arise when a material proposition of fact and law is affirmed by one party and denied by the other. Material propositions are those proposition of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other forms the subject of a distinct issue. As the learned trial Judge did not frame any issue based on the pleadings of the defendants, the defendants took out application Exhibit 25 for framing additional issues. The learned trial Judge, however, by the impugned order rejected the application. He submitted that in view of provisions of Order-XIV, Rule-1 of the Code of Civil Procedure, 1908, the impugned order deserves to be set aside thereby allowing the application made by the defendants.

5. On the other hand, Mr. Tripathi supported the impugned order. He submitted that Gayaprasad Chourasiya had instituted R.A.D suit in the year 1975 for declaration that he is a joint tenant in respect of the suit premises along with Sadashiv Chorasias. The learned trial Judge decreed the suit on 23rd March, 2001. Aggrieved by that decision, the plaintiffs, herein preferred appeal before the Appellate Bench of the Court of Small Causes at Mumbai. By order dated 10th February, 2009, the appeal preferred by the plaintiffs herein was allowed and the trial Court's decree was set aside. Against that order, the defendants herein preferred Civil Revision Application No.625 of 2009. It was, however, dismissed on 15th February, 2010 for non removal of office objections. He submitted that issues which have been raised in the written statement were also raised in the declaratory suit filed by Gayaprasad and the same have been answered against the defendants herein. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have instituted suit alleging that the defendants are gratuitous licensees in respect of the suit premises. In the suit, plaintiffs have specifically referred to the earlier litigation initiated by Gayaprasad by filing R.A.D Suit in the Court of Small Causes at Mumbai. It is also asserted that the Appellate Court dismissed the suit and the said order was confirmed by this Court in C.R.A No.625 of 2009 on 15th February, 2010. It is not in dispute that till date, C.R.A which was dismissed for non removal of office objections is not restored. Thus, as on today, order passed by the Appellate Court on 10th February, 2009 dismissing declaratory suit is in force and has thus attained finality.

7. Once, the plaintiff's suit for declaration of co-tenancy is dismissed, question of plaintiffs claiming protection either under the Bombay Rent Act or under the Maharashtra Rent Act cannot be allowed to be agitated over and again. The plaintiffs have alleged that the defendants are gratuitous licensee in respect of the suit premises. It would be open to the defendants to assert and prove that they are not gratuitous licensee. Understood thus, I do not find that the learned trial Judge committed any error in rejecting the application.

8. The learned trial Judge rejected the application principally on the ground that the suit is instituted by the plaintiffs under the Presidency Small Causes Courts Act 1882. Issues which are sought to be framed by the defendants are under the Bombay Rent Act and they are beyond the purview of the Presidency Small Causes Courts Act, 1882. On this ground also, it cannot be said that the learned trial Judge committed any error in rejecting the application Exhibit 25. Hence, Petition fails and the same is dismissed.

9. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]