

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.8767 OF 2018

M/s. Indomech Marketing Co.] Petitioner

Vs.

Pushpa Lalit Kabra and others.] Respondents

.....

Mr. Vineet Naik, Sr. Advocate a/w Mr. Ayaz Bilawala & Ms. Shweta Dali i/b M/s. Bilawala & Co., for Petitioner.

Mr. Simil Purohit a/w Manish Doshi i/b Vimadalal & Co., for Respondents No.1 to 3.

.....

CORAM : R.G. KETKAR, J.

DATE : 29TH AUGUST, 2018.

P.C.

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

2. Heard Mr. Naik, learned Sr. Counsel for the petitioner and Mr. Purohit, learned Counsel for respondents No.1 to 3.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 22nd February, 2018 passed by the learned Judge, Court Room No.15 of the Court of Small Causes at Mumbai below Exhibit 45 in R.A.E. Suit No.608/1008 of 2011 as also the judgment and order dated 11th July, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.265 of 2018. By these orders, the Courts below partly allowed application Exhibit 45 filed by the defendant under Order-XIV, Rule-5 of the Code of Civil Procedure, 1908 (for short 'C.P.C') for framing additional issue and deletion of one issue. The learned trial Judge modified Issue No.2.

4. Rule. Mr. Doshi waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

5. Mr. Naik has restricted his challenge to the present petition only in respect of not framing issue as regards bar of limitation in respect of ground of change of user. Mr. Naik has invited my attention to issues framed by the learned trial Judge on 16th December, 2013. He invited my attention to paragraph 6 of the plaint where the plaintiffs referred to notice dated 22nd June, 1988 issued to the original tenant. The plaintiffs alleged that the defendants have been storing and keeping very big huge and hazardous machineries in the suit premises though the suit premises was let out for office use only. He also invited my attention to notice dated 22nd June, 1988 issued by M/s. Eruch E. Engineer & Co. to M/s. Indomach Marketing Company where reference was made to an Indenture of sub-lease made on 1st December, 1981 between M/s. Eruch E. Engineer & Co. and M/s. Indomach Marketing Company. It was further contended that M/s. Indomach Marketing Company was permitted to use the premises for the purpose of office. It is further asserted that though M/s. Indomach Marketing Company was under an obligation to use the premises for the purpose of office only, they have been using the same for storing and keeping very big huge and hazardous machineries in the premises. Mr. Naik invited my attention to paragraph (f) of the written statement where reference is made to the letters dated 22nd June, 1988, 11th July, 1988, 26th October, 1991, 16th December, 1991 and 17th January, 1992 being the correspondence exchanged between Advocates of plaintiffs and defendant. He submitted that in the written statement the defendant has not specifically raised plea that ground of change of user is barred by limitation. He relied on section 3 of the Limitation Act as also

paragraph 6 of the plaint to contend that on the basis of the assertions made in paragraph 6 of the plaint, the learned trial Judge ought to have framed issue viz: whether ground of change of user is barred by limitation?

6. On the other hand, Mr. Purohit supported the impugned order. He relied on following decisions;

[1] **The State of Maharashtra Vs. M/s. Ashoka Buildcon Limited in Arbitration Appeal No.3 of 2009 along with Arbitration Appeal No.4 of 2009 with Civil Application No.27 of 2011 in Arbitration Appeal No.4 of 2009** on 1st April, 2013 by this Court (Coram: R.D. Dhanuka, J.) and in particular paragraph 13 as also;

[2] **Narne Rama Murthy Vs. Ravula Somasundaram and others, (2005) 6 Supreme Court Cases 614** and in particular paragraph 5 thereof to contend that when the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved.

7. He submitted that in the present case, the defendant did not take plea that the ground of change of user is barred by limitation. He, therefore, submitted that the learned trial Judge was justified in not framing issue of limitation in respect of ground of change of user. He submitted that in any case, the ground of change of user is a continuous cause of action attracting section 22 of the Limitation Act, 1963. Finally, he submitted that if the Court is inclined to frame additional issue in this regard, all contentions of the parties may be left open and the learned trial Judge may be directed to dispose of the suit in a time bound manner.

8. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. In paragraph 6 of the plaint, the plaintiffs asserted thus;

“6.The Plaintiffs state that as per the records available with them, the original tenant M/s. Eruch D. Engineer & Co., had issued notice dated 22.6.1988 in respect of the suit premises to the Defendants stating that the Defendants were habitual defaulters in payment of rent and never used to pay rent in respect of the suit premises in time. The Defendants have been storing and keeping very big huge and hazardous machineries in the suit premises although the suit premises was let out for office use only. The wooden boxes containing machineries are very often opened with great unbearable noise and the same continues whole sealing. It was a great nuisance and annoyance to the neighbouring occupants. It is also noticed that the said boxes found to be kept underneath the landing of the staircase in hazardous manner, unlawfully and space adjacent thereto, although it was not adomised premises Handcarts were also found near the open space near the stair case. It is found that while removing the handcrafts and boxes containing heavy machinery the Defendants have been causing great damage to the walls of the building and flooring of the same to great extent. In view of the said acts, the original tenant M/s. Eruch D. Engineer & Co. terminated the Agreement of sub-lease dated 1.12.1981 by the notice dated 22.6.1988 calling upon the Defendants to vacate the suit premises and hand it over to original tenant within 30 days of the receipt of the said notice dated 22.6.1988. The Defendants by their Advocate's reply dated 11.7.1988 denied that they have committed breach of any of terms of tenancy. The record in respect of the suit premises further indicate that Defendant by their Advocate's letter dated 26.10.1991 called upon the original tenant to extend the term of sub lease for the further period of 10 years commencing from 1.12.1991 on the terms and condition as set out in the Indenture of sub lease. The original tenant by their letter dated 17.1.1992, did not agree to the new additions to the said draft by way of rider-I and II, but called upon the Defendants execute said renewal within the same conditions and terms as agreed in the prior Agreements dated 1.12.1981. Hereto annexed and marked Exhibit B and C are the copies of the notice dated 22nd June, 1988

addressed by the Advocates for the earlier owners of the said Property and reply dated 11th July 1988 of the Defendants Advocates”.

The plaintiffs have also enclosed notice dated 22nd June, 1988 and reply dated 11th July, 1988 of defendant at Exhibit B and C colly respectively. A perusal of paragraph 6 extracted hereinabove as also notice dated 22nd June, 1988 *prima facie* shows that the plaintiffs have contended that the suit premises was given for the purpose of office only and instead of using the suit premises for the purpose of office, the defendants are storing huge, big and hazardous machineries in the suit premises. It is in that context, the learned trial Judge should have framed issue on limitation in respect of ground of change of user. Mr. Purohit relied on paragraph 13 of the decision in the case of **The State of Maharashtra** (supra), to contend that plea of limitation being a mixed question of fact and law has to be raised with details in the pleadings so as to give an opportunity to the other side to meet with such plea.

9. In the present case, *prima facie* from a perusal of the paragraph 6 of the plaint itself, in my opinion, the learned trial Judge should have framed issue of limitation. In view thereof, decisions relied on by Mr. Purohit do not advance case of the plaintiffs. Hence, the following order:

[1] Impugned orders are modified and the following issue is framed;

“Whether ground of change of user set up by the plaintiffs is barred by limitation?

[2] As the plaintiffs have already filed affidavit of evidence, liberty is reserved to them to file additional affidavit of evidence to cover issue of limitation *qua* ground of change of user.

- [3] The parties will be at liberty to adduce evidence in support of this issue as well.
- [4] All contentions of the parties on merits including contention of the plaintiffs that it is a continuous cause of action and that correspondence was made between previous landlord and tenant are expressly kept open.
- [5] As plaintiffs No.1 and 2 are age of 59 years and they have invoked ground of bona fide requirement under section 16 (1) (g) of the Maharashtra Rent Control Act, 1999 liberty is reserved to them to make application before the trial Court to dispose of the suit in a time bound manner. If such application is made, the learned trial Judge will pass an appropriate order thereon.
- [6] Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]