

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.225 OF 2018

Ms. Hind Mahila Stores	]	Applicant
Vs.		
Prabhakar Gangadhar Deshmukh	]	Respondent

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Mr. Anantkumar Gore, for Applicant.
Mr. P.S. Dani, Sr. Advocate i/b Rohit Joshi, for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 23RD JULY, 2018.

P.C:

Heard Mr. Gore, learned Counsel for the applicant and Mr. Dani, learned Sr. Counsel for the respondent at length.

2. By this application under section 115 of the Code of Civil Procedure, 1908, (for short 'C.P.C'), the applicant, hereinafter referred to as 'defendant' has challenged the judgment and decree dated 28th April, 2010 passed by the learned 2nd Joint Civil Judge (Junior Division) Alibaug in Regular Civil Suit No.84 of 2003 as also the judgment and decree dated 19th December, 2016 passed by the learned Ad-hoc District Judge-1 Raigad-Alibaug in Civil Appeal No.85 of 2010. By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as "plaintiff" and directed the applicant, hereinafter referred to as 'defendant' to hand over vacant and peaceful possession of shop premises on the eastern side situate on the ground floor of House No.972 standing on City Survey No. No.617, 618A within the limits of Alibaug Municipal Council.

3. Rule. Mr. Joshi 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.

4. In support of this application, Mr. Gore invited my attention to the cross-examination of the plaintiff's witness Dr. Prabhakar Gangadhar Deshmukh. During the course of cross-examination, he deposed that after filing of the suit, he carried out construction of an area which is more than area in possession of tenants. New construction was carried out in the year 2005. he admitted that he did not intimate the fact of carrying out new construction. He was shown certified copy of the sanctioned plan and he admitted that the said plan pertains to his property. He, however, could not disclose as to how much construction of additional area was carried out by him. The plan was marked as Article-A.

5. Mr. Gore submitted that the learned trial Judge should have marked this plan as Exhibit instead of marking it as an Article-A. He further submitted that as far as question of hardship is concerned, the learned District Judge did not record any finding in that regard. He invited my attention to paragraph 22 of the District Court's judgment.

6. Mr. Dani submitted that after taking inspection of the original record, it transpires that sanctioned plan marked as an Article-A is not part of the record. He has tendered sanctioned plan wherein the additional construction is shown for residential use. He, therefore, submitted that even otherwise, additional construction cannot be used for running a dispensary.

7. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, a sanctioned plan was specifically shown to the plaintiff's witness. Instead of marking this plan as exhibit, the learned trial Judge marked that document as Article-A. In my opinion, the learned trial Judge should have marked this plan as exhibit and read in evidence. The sanctioned plan is duly proved. A perusal of the impugned orders does not indicate that the Courts below have discussed this aspect at all. That apart, a perusal of the District Court's judgment shows that the learned District Judge has not discussed question of comparative hardship. As the suit was decreed by the Court's below only under section 16 (1) (g) of the Maharashtra Rent Control Act, 1999, the learned District Judge being the last fact finding Court, ought to have recorded finding on the question of comparative hardship.

8. Mr. Dani submitted that the matter may be remitted to the District Court and the learned District Judge may be directed to record a finding as regards bona fide requirement considering the sanctioned plan which was erroneously marked as Article-A. The learned District Judge may be directed to record a finding on the question of comparative hardship.

9. In view thereof, order dated 19th December, 2016 passed by the learned District Judge in Civil Appeal No.85 of 2010 is set aside. Civil Appeal No.85 of 2010 is restored to the file of the District Judge. As sanctioned plan marked as an Article-A is not forming part of the original record, Mr. Dani assures that he will tender plan sanctioned by Alibaug Municipal Council which is marked as an Article-A before the District Court. The learned District Judge shall mark sanctioned plan referred in cross-examination of the plaintiff's witness which is marked as Article-A as Exhibit and will proceed on the premise that it is duly proved. The parties will also address as to whether the bye-laws/Municipal Rules and Regulations of Alibaug Municipal Council do not permit user of the ground floor premises for commercial purpose and permit only residential user. The learned District Judge will consider this aspect as also will record finding on the question of comparative hardship.

10. The learned Counsel for the parties assure that they will appear before the District Court, Alibaug on 13th August, 2018 and for that purpose, no fresh notice be issued to them. After appearance of the parties, the learned District Judge will fix suitable date and proceed to dispose of the appeal as early as possible and in any case, within three months from the date so fixed. All contentions of the parties on merits are expressly kept open. Registry shall forthwith transmit the original record to the District Court, Alibaug.

11. Rule is made absolute in the aforesaid terms with no order as to costs.

[R.G. KETKAR, J.]