

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY*****CIVIL APPELLATE JURISDICTION*****CIVIL REVISION APPLICATION NO. 616 OF 2017****Asha Prabhakar Jadhav & Ors.****..... Applicants****VERSUS****Shrikant Sitaram Jadhav****..... Respondent**

Dr.A.Chandrachud, i/b. Mr.Anand Prakash Khanduri for the Applicants.

Mr.J.S.Kini, i/b. Mr.Suresh Dubey for the Respondent.

**CORAM : R.D. DHANUKA, J.****DATE : 11<sup>th</sup> SEPTEMBER, 2018****P.C.**

By this civil revision application filed under section 115 of the Code of Civil Procedure, 1908 the applicants (the original defendants) have impugned the order dated 1<sup>st</sup> July, 2017 passed by the City Civil Court in Notice of Motion No.820 of 2017 *inter alia* praying for appointment of the the Court Receiver, High Court and to restore the possession of the three rooms admeasuring 950 sq.ft. adjacent to the suit premises to the applicants and for other reliefs.

2. The respondent (original plaintiff) had filed a suit bearing S.C.Suit No.4818 of 2007 before the Bombay City Civil Court *inter alia* praying for a declaration that the action of the defendants in the said suit i.e. the petitioners herein harassing the original plaintiff and seeking to oust him from the suit premises was illegal, bad in law and incorrect and for other reliefs.

3. In the said suit, the parties have filed consent terms annexed at Ex.D to the petition. It was agreed by and between the parties that the room described in paragraph (3) of the order be sold in private auction by the parties in the manner prescribed in the said consent terms.

4. The defendants applied for execution of the said consent terms. The Court Receiver, High Court, Bombay came to be appointed in respect of the suit property. The petitioners filed First Appeal (St) No. 18551 of 2014 before this court. By an order dated 27<sup>th</sup> August, 2014, this court admitted the said first appeal. In the said first appeal, a civil application was filed by the applicants herein. By an order dated 30<sup>th</sup> November, 2016 passed by this court, the said Civil Application No.3935 of 2016 came to be disposed of. This court observed that the appropriate executing court will have to render a finding and it would be appropriate and in the interest of justice that the applicants herein be permitted to file an application before the appropriate executing court seeking restoration of the possession of the area claimed by the applicants as an excess of the suit premises. Pursuant to the said order, the applicants filed a notice of motion before the City Civil Court *inter alia* praying for various reliefs referred to aforesaid.

5. By an order dated 1<sup>st</sup> July, 2017, the learned City Civil Court Judge dismissed the said notice of motion on various grounds.

6. Dr.Chandrachud, learned counsel for the petitioners invited my attention to some of the annexures to the civil revision application and

more particularly the averments made in the plaint and a letter addressed by the Municipal Corporation pursuant to the application made by the petitioners under the provisions of Right to Information Act confirming that the area of the tenement which was originally owned by the Municipal Corporation and was tenanted in favour of the father of the parties was admeasuring 280 sq.ft. He submits that the parties had entered into the consent terms only in respect of 280 sq.ft. area and not in respect of the larger area i.e. the area admeasuring 950 sq.ft. area and thus the decree could not have been executed for area admeasuring 280 plus 950 sq.ft.

7. Learned counsel invited my attention to the order passed by this court in Civil Application No.3935 of 2016 on 30<sup>th</sup> November,2016 and would submit that this court had granted liberty to the applicants to file a notice of motion for adjudication of the actual area of the such property.

8. In his alternate submission, it is submitted that if this court comes to the conclusion that the impugned order passed by the learned trial court does not warrant interference, the applicants be granted liberty to apply for declaration by invoking provisions 23 Rule 3A of the Code of Civil Procedure, 1908 that the applicants were under a *bonafide* mistake that the consent terms were only in respect of the area of 280 sq.ft. and not 280 plus 950 sq.ft.

9. Mr.Kini, learned counsel for the original plaintiff on the other hand would submit that though the actual area tenanted in favour of the

father of the parties by the Municipal Corporation was 280 sq.ft., there was an extension of area which was admitted by both the parties. He submits that the applicants were fully aware that the consent terms were not only in respect of the 280 sq.ft. area but also the portion admeasuring 950 sq.ft.

10. Learned counsel placed reliance on the cross examination of the applicant no.2 in the Execution Application No.184 of 2014 and would submit that the applicants have admitted in the execution application that there was additional area in addition to 280 sq.ft. He submits that the said witness admitted in his evidence that he did not have any documentary evidence that his father has constructed the additional area.

11. Insofar as the order passed by this court on 30<sup>th</sup> November,2016 in Civil Application No. 3935 of 2016 is concerned, it is submitted by the learned counsel that pursuant to the said liberty granted by this court, the applicants have already filed a notice of motion for seeking restoration of the additional area and thus there is no question of granting any further leave to the applicants to file an additional application by invoking the provisions of 23 Rule 3A of the Code of Civil Procedure, 1908. He submits that the findings rendered by the learned trial judge being not perverse, cannot be interfered with by this court in this civil revision application filed under section 115 of the Code of Civil Procedure, 1908.

12. A perusal of the record indicates that though the Municipal

Corporation may have granted tenancy in respect of the area 280 sq.ft. to the father of the petitioner, in the cross examination of the applicant no.2 before the executing court, the witness has admitted that the excess construction was made in the suit property. It was further deposed by the said witness that the said access construction was made by his father. However, in paragraph (37) of the cross examination, the witness has admitted that he did not have any documentary evidence to show that his father has made construction. For going to the suit premises from the front side, the applicants have to pass through the room C and from the back side through room A. The witness admitted that he was not aware of anything as after the consent terms, he was residing at Airoli. The witness admitted that he had signed the consent terms after understanding the terms.

13. A perusal of the order passed by the learned trial judge indicates that the learned trial judge has considered the oral as well as documentary evidence and has rejected the notice of motion filed by the applicants. The learned trial judge has also held that whatever construction is made will become a part of the suit premises and it cannot be segregated. I do not find any infirmity in the impugned order passed by the learned trial judge.

14. Insofar as the alternate submission of Dr.Chandrachud, learned counsel for the applicants that his clients be granted permission to invoke Order 23 Rule 3A of the Code of Civil Procedure, 1908 is concerned, in my view, the applicants having lost in the notice of motion and having failed to prove that the area of the suit premises was

only 280 sq.ft. and not 280 sq.ft. plus 950 sq.ft. and in the cross examination, the witness has admitted that the consent terms was signed after understanding the consent terms. No such opportunity can be granted to the applicants to invoke Order 23 Rule 3A and to have a second chance to prove their case.

15. In my view, the civil revision application is thus devoid of merits and is accordingly dismissed. No order as to costs.

**[R.D. DHANUKA, J.]**