

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 558 OF 2018
WITH
Civil Application No.608 of 2018
IN
Civil Revision Application NO. 558 OF 2018

Lucia Anthony Pareira	...Applicant
<i>Versus</i>	
Mr. Maria Gomes	
and others	...Respondents

....
Mr. Vincent X. D'Silva, Advocate for the Applicant.
Mr. Vikas Murudkar, Advocate for Respondents No.1 to 4.

....

CORAM : R. G. KETKAR, J.

DATE : 29th OCTOBER, 2018

P.C.

1. Heard Mr. Vincent D'Silva, learned counsel for the applicant and Mr. Vikas Murudkar, learned counsel for respondents No.1 to 4, 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 No.2' has challenged the judgment and decree dated 23.12.2013 passed by the learned Judge, Court Room No.9 of the Court of Small Causes at Bombay in L.E. Suit No.185/214 of 2007 as also the judgment and decree dated 20.8.2018 passed by the Appellate Bench of

the Court of Small Causes at Bombay in Appeal No.407/2015. By these orders, the Courts below decreed the suit instituted by the plaintiffs and directed defendant No.2 and respondent No.5, hereinafter referred to as defendant No.1 to hand over vacant and peaceful possession of Flat No.301, 3rd floor, B Wing, Our Lady of Lourdes Co-operative Housing Society Ltd., situate in property bearing E.P. No.557 of TPS No.III, Marinagar, Opp. Mahim Railway Station, Mahim, Mumbai – 400 016 (for short, 'suit premises') to the plaintiffs within three months from the date of the order.

3. The plaintiffs have instituted the suit against the defendants *inter alia* contending that Guilerminha Albert Fernandes (**Guilerminha**) was the tenant in respect of Room No.32, Rosary Block No.6, Mari Nagar Colony, Mahim (West), Mumbai 400 016 (for short, 'old premises'). St. Michael's Church Properties, Marinagar, a Trust was the landlords. In the year 1953, she had acquired the old premises on tenancy basis. During that time, defendant No.1 who is her real brother was minor and was residing with his parents. After the marriage, the plaintiff and her husband started living in the old premises for a couple of years. Defendant No.1 fell in bad company and was contributing nothing towards his family and the parents of the plaintiff were helpless. They had lost their residential premises. In view of their weak financial

condition, they requested the plaintiff herein to accommodate them in the suit premises. Accordingly the plaintiff allowed her parents and defendant No.1 to reside in the suit premises. In the year 1979, defendant No.1 married defendant No.2. She allowed defendants No.1 and 2 to reside in the suit premises. In the year 1996, the landlords gave the development right in respect of the property in which the old premises is situate to one M/s. Suraj Estate Developers Pvt. Ltd. (for short, 'developer'). Defendant No.1 behind back of the plaintiff made attempt to claim the permanent alternate accommodation in his name. On getting this information, the plaintiff vide letter dated 17.1.1996 requested the developer to enter into agreement with her for permanent alternate accommodation being the lawful tenant in respect of the old premises.

4. As per the agreement, the developer agreed to allot the suit premises. The plaintiff was shown as member of the society after formation of the society. The developer, however, dishonestly and with malafide intention and with a view to pleasing defendant No.1 handed over possession of the suit premises to defendant No.1. In the meantime, defendant No.2 instituted a suit, namely, S.C. Suit No.1951/2004 in the City Civil Court *inter alia* contending that she is in use, occupation and possession of the old premises since the year 1953

in possession of the suit premises. She apprehended that the plaintiff herein will dispossess her from the suit premises forcibly and sought injunction not to dispossess her from the suit premises without following due process of law. The plaintiff made statement in the City Civil Court that she will follow due process of law by taking appropriate eviction proceedings against the defendants before the competent Court of law. The City Civil Court recorded said statement and disposed of the suit. It is thereafter the plaintiff has instituted present suit *inter alia* contending that defendant No.1, who is her brother is a gratuitous licensee.

5. Defendant No.1 though was served with the suit summons did not file written statement. Defendant No.2 filed written statement and resisted the suit. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. The parties went for the trial. After considering the evidence on record, the Courts below held that the plaintiff proved that she was the tenant of the old premises and that she allowed the defendants to use the old premises as licensee. Defendant No.2 failed to establish that she became owner of the suit premises. The Courts below also held that defendant No.2 failed to establish that the suit is barred by law of limitation and that the suit is bad for non-joinder of the Trustees of the landlord Church and the

Developer. It is against these orders, defendant No.2 has instituted present application.

6. In support of this application, Mr. D'Silva has advanced following contentions :

- (i) The suit is clearly barred by limitation;
- (ii) The suit is also bad for non-impleadment of the necessary parties, namely, the landlords and the developer;
- (iii) Defendant No.2 became owner by adverse possession.

7. Mr. D'Silva further submitted that defendant No.2 filed examination in chief. She was however not in position to face the cross-examination as she was to leave for Germany. After cross-examination was partly taken, the learned trial Judge passed order on 27.11.2013 recording that defendant No.2 is not attending the Court since last three to four days. Hence, evidence of defendant No.2 is closed. The matter thus proceeded further for arguments. On 12.12.2013, defendant No.2 filed application on the ground that she has gone abroad and, therefor, sought adjournment of the proceedings for a period of four weeks. The plaintiffs objected that application. By order dated 12.12.2013, the learned trial Judge rejected the application on the ground that from the Rozanama it revealed that since five to six dates, defendant No.2 was not present as also her Advocate was absent.

Evidence of defendant No.2 was closed by the Court. The trial of the suit is at the fag end. The suit is more than five years old. Considering this, the learned trial Judge rejected the application and kept the matter for further arguments on the next date.

8. In view of Order XVII Rules 2 and 3 of C.P.C., the course adopted by the learned trial Judge was impermissible. Elaborating this submission, Mr. D'Silva submitted that in view of Order XVII Rule 3(b) read with Order XVII Rule 2 of C.P.C., the learned trial Judge ought to have proceeded under Order IX Rule 6 of C.P.C. and passed order to the effect that 'suit to proceed exparte against defendant No.2. He submitted that as that order is not passed the entire trial is vitiated. He submitted that after 1996 the plaintiff never made any complaint and allowed defendant No.2 to remain in possession. Thus after her marriage in 1979 with defendant No.1, defendant No.2 continued to reside in the old premises. In lieu of the old premises, suit premises was allotted and after allotment of the suit premises, defendant No.2 continued in possession of the suit premises. Thus defendant No.2 became owner by adverse possession. Though the plaintiff started residing separately in other tenanted premises since 1979, she has no connection whatsoever with the old premises. The suit is instituted in the year 2007 and is, therefore, clearly barred by limitation.

9. On the other hand, Mr. Murudkar supported the impugned orders. He submitted that after appreciating the evidence on record the Courts below have concurrently decreed the suit. Hence no case is made out for interfering with the impugned orders.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the Courts below have decreed the suit and held that the defendants are gratuitous licensee in the suit premises. Insofar as the contention that the suit is barred by limitation is concerned, a perusal of paragraph-10 of the trial Court's order shows that the learned trial Judge over-ruled that objection on the ground that defendant No.2 did not give any specific evidence on the issue of limitation. Defendant No.2 did not depose how the suit is not within limitation and what provision of Limitation Act is applicable for the relief claimed in the suit. Moreover the evidence led by defendant No.2 on this point is not tested during her cross-examination and, therefore, the evidence of defendant No.2 is not helpful to prove that the suit is barred by limitation.

11. Insofar as the Appellate Court is concerned, the Appellate Court observed in paragraph-79 that PW-1 during his cross-examination admitted that the defendants were firstly requested to vacate the old

premises in 1979, but, they did not do so and no action for their eviction was taken. PW-1 volunteered that the defendants requested that they may be permitted to occupy the old premises till they acquire suitable premises for themselves. Appellate Court observed that the stand of PW-1 is consistent with the pleadings in the plaint. I do not find that the Courts below committed any error in that regard. It is not in dispute that defendant No.1 is the real brother of the plaintiff **Guilerminha**. In such state of affairs, it is not abnormal on her part to accede to the request made by her brother to allow them to occupy the old premises till such time they find alternate premises. That apart, the Appellate Court also noted that defendant No.2 instituted suit No.1951/2004 in City Civil Court at Bombay seeking injunction against the plaintiff from dispossessing them from the suit premises without following due process of law. In that suit, the plaintiff made statement that she will follow due process of law and accordingly has instituted present suit in the year 2007. In view thereof, it cannot be said that the suit is barred by law of limitation.

12. Insofar as other contention that the suit is bad for non-joinder of necessary parties, namely, the landlord Trust and the developer is concerned, the Courts below concurrently held that the suit is not bad for non-joinder of necessary party. I do not find any good reason to take

a different view.

13. Insofar as the contention as regards defendant No.2 becoming owner by adverse possession is concerned, a perusal of the written statement shows that no such plea was taken by defendant No.2. Basically the ingredients constituting plea of adverse possession are lacking in the present case. I, therefore, do not find any merit in the submission of Mr. D'Silva of defendant No.2 becoming owner by adverse possession.

14. Mr. D'Silva relied upon Order XVII Rules 2 and 3 of C.P.C., which read thus:

**“ORDER XVII
ADJOURNMENTS**

2. Procedure if parties fail to appear on day fixed.--

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation.--Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.-- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary

to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,--

- (a) if the parties are present, proceed to decide the suit forthwith, or
- (b) if the parties are, or any of them is, absent, proceed under rule 2.”

15. He submitted that in view of Order XVII Rule 3(b) read with Order XVII Rule 2 of C.P.C., the learned trial Judge ought to have proceeded under Order IX Rule 6 of C.P.C. and passed order to the effect that 'suit to proceed exparte against defendant No.2. He submitted that as that order is not passed the entire trial is vitiated. I do not find any merit in this submission. Explanation to Rule 2 of Order XVII clearly shows that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on the date of hearing of the suit, the Court may, in its discretion, proceed with the case as if such party were present.

16. As mentioned earlier, defendant No.2 did not remain present to face the cross-examination on 2-3 occasions. In view thereof, the learned trial Judge passed the order on 27.11.2013 to following effect:

“Defendant No.2 is not attending the Court since last 3 to 4 dates. Hence, evidence of defendant no.2 is closed. Matter is to proceed for argument.”

17. Thus, the learned trial Judge in terms of explanation to Rule

2 of Order XVII of C.P.C. has exercised the discretion and directed the matter to proceed further for arguments. In view thereof, I do not find any merit in the submission of Mr. D'Silva that the learned trial Judge has not followed the procedure laid down under Order XVII Rules 2 and 3 of C.P.C.

18. The Courts below after appreciating the evidence on record held that the defendants are gratuitous licensees and decreed the suit. After considering the material on record, I do not find that the Courts below committed any error in passing the impugned orders. Defendant No.2 is not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendant No.2 is also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, Civil Revision Application fails and the same is dismissed with no order as to costs.

19. At this stage, Mr. D'Silva orally applies for stay of the eviction decree for a period of twelve weeks from today. Mr. D'Silva states that the defendant No.2 is in possession and she has neither created third

party interest nor parted with the possession of the suit premises. She will hereafter neither create third party interest nor part with the possession. He further states that defendant No.2 and all adult family members residing with her are ready and willing to give usual undertaking within four weeks from today. Learned Counsel for the respondents opposes said prayer.

20. Having regard to the fact that defendant No.2 desires to challenge this order before the Apex Court, in my opinion, ends of justice would be met by staying the execution of the eviction decree for a period of twelve weeks from today subject to the applicant/defendant No.2 and all adult members residing with her giving usual undertaking to this Court within four weeks from today with advance copy to other side incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises; and
- (iv) that in case the applicant is unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondents.

21. In view thereof, notwithstanding dismissal of Civil Revision Applications, this order shall remain stayed for a period of twelve weeks from today, subject to the applicant filing undertaking in the aforesaid terms within four weeks from today, with copy in advance to the other side. In case the applicant does not file undertaking in the above terms within four weeks from today, the interim order shall stand vacated without further reference to the Court. It is further made clear that if defendant No.2 commits any breach of the undertaking, interim order shall stand vacated without further reference to the Court. In view of dismissal of the C.R.A., Civil Application No.608/2018 for stay of the impugned orders does not survive and is also disposed of as such.

22. List the application for reporting compliance on **17.12.2018**.
Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)