

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.653 OF 2016

Devichand Kasturji	]	
(since deceased)	]	
1(a) Smt. Devibai Wd/o Devichand Jain	]	
and others.	]	Petitioners
Vs.		
Kamaladevi Shivmurath Singh	]	
(since deceased)	]	
1. Mr. Rajkumar Shivmurath Singh	]	
and others.	]	Respondents

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Mr. Yogeshwar S. Bhate, for Applicants.

Mr. Tushar Dahibawkar i/b Dahibawkar & Co., for Respondents No.1,2 and 4.

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CORAM : R.G. KETKAR, J.

DATE : 19TH MARCH, 2018.

P.C.

Heard Mr. Bhate, learned Counsel for the Applicants and Mr. Dahibawkar, learned Counsel for respondents No.1,2 and 4 at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicants, hereinafter referred to "defendants" have challenged the judgment and decree dated 6th February, 2012 passed by the learned Judge, Court Room No.21, Court of Small Causes at Mumbai in R.A.E & R Suit No.102/216 of 1998 as also the judgment and decree dated 5th August, 2016 passed by the Appellate Bench of Small Causes Court at Mumbai in (2-a) Appeal No.16 of 2012. The learned trial Judge decreed the suit under Section 12 and declined to pass decree under Section

13 (1) (e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). The Appellate Court decreed the suit under Section 12 and 13(1) (e) of the Act. It is against these orders, the defendants have instituted present Civil Revision Application.

3. The controversy between the parties is in respect of Shop No.62 on the ground floor of House No. 62 of Kamathipura, 3rd lane, Mumbai- 400 008 (for short 'suit premises'), The plaintiffs had issued demand notice dated 3rd November, 1997 by registered post acknowledgment (for short 'R.P.A.D') as also Under Certificate of Posting (for short 'U.P.C'). It is the case of the plaintiffs that the defendant has failed and neglected to pay monthly rent @ Rs. 225.75 paise from 1st March, 1993 and also failed and neglected to pay property tax @ Rs.60/- per month from 1st April, 1996. Notice sent by R.P.A.D returned with remark “not claimed, returned to sender”. The notice sent by U.C.P did not return. Another copy of the notice was tried to be served upon the defendant personally, but as he was not found, the said copy was pasted on the door of the suit premises. In spite of service of demand notice, defendant failed and neglected to reply or comply with it. The plaintiff, therefore, claimed possession on the ground of arrears of rent for more than six months as contemplated by section 12 of the Act.

4. The plaintiff further contended that the defendant has unlawfully sublet, transferred or assigned the suit premises and parted with possession. The plaintiff accordingly claimed possession on the ground of unlawful subletting as contemplated under Section 13 (1) (e) of the Act.

5. The defendant resisted the suit by filing written statement dated 26th January, 1999. He denied that he had failed and neglected to pay arrears of rent and permitted increases from 1st March, 1993 and property tax from

1st April, 1996 as alleged by the plaintiff. He further denied that he had unlawfully sublet and/or parted with possession of the suit premises. Defendant denied receipt of the demand notice dated 3rd November, 1997. It is the case of the defendant that on 5th November, 1997, he had left Mumbai to his native place for change of climate due to his old age as per the advice of his family Doctor. The defendant returned to Mumbai in or about second week of January, 1998. Consequently, there was not question of service of any demand notice on him. The plaintiffs' representative got the endorsement managed on the notice. The demand notice is not served as required by section 106 of The Transfer of Property Act, 1882.

6. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. The learned trial Judge decreed the suit under Section 12 by holding that the defendant was in arrears of rent in respect of the suit premises for more than six months and that the demand notice was duly served on the original defendant. The learned trial Judge, however, held that the plaintiff failed to prove that original defendant unlawfully sublet the suit premises.

7. Aggrieved by this decision, the defendants preferred Appeal and the plaintiffs preferred Cross Objection No. 17 of 2012. By the impugned order dated 5th August, 2016, the Appellate Court dismissed the appeal and allowed Cross Objection. The Appellate Court directed defendants No. 1(a) to 1(e) to hand over vacant and peaceful possession of the suit premises to the plaintiffs. It is against these orders, defendants No.1(a) to 1(e) have instituted the present Civil Revision Application.

8. In support of this application, Mr. Bhate strenuously contended that the Courts below committed serious error in decreeing the suit. He

submitted that on behalf of the plaintiffs Rajkumar Singh filed affidavit of examination-in-chief. The said witness claimed that he was given power of attorney by his brothers. He submitted that basically the power of attorney dated 15th March, 1999 is not validly executed. He has taken me through the Power of Attorney which records thus;

“Before me,

ATTESTED BY ME,

sd/-

M.T. Raitnani

Notary, Gr. Bombay.

He has taken me through the cross-examination of P.W.1 conducted on 5th March, 2010. In cross-examination, P.W.1 had deposed thus;

“I had given instructions for preparing power of attorney Exh.27 which is now shown to me. I had given said instructions in March, 1999. The stamp paper of Exh.27 is in the name of my elder brother Suresh Kumar Singh. We had gone to Notary Advocate M.T. Ratnani regarding the power of attorney. I do not recollect the address of his office at that time. My two brothers, my sister and myself had gone to Notary for registration of the power of attorney. We had put signatures in the Notary Register maintained in the office of Notary Advocate Mr. Ratnani. It is true to say that Registration number from the Notary Register is not mentioned in the power of attorney Exh.27. It is not true to say that we had never signed notary register by going to the office of notary. It is not true to say that we have signed the document Exh.27 in the office of my Advocate”.

9. Relying on the above extracted portion in the cross-examination, Mr. Bhate submitted that P.W.1 admitted that registration number from the notary register is not mentioned in the Power of Attorney Exhibit 27. He relied upon Rule-11 of Notary Rules, 1956 and in particular sub rule (2) of rule 11 which requires maintenance of a notarial register in prescribed form No.XV by the Notary. P.W. 1 specifically admitted that registration number from the

notary register is not mentioned in the Power of Attorney.

10. Mr. Bhate submitted that the Courts below ought to have discarded the evidence given to P.W.1 Rajukumar Singh on behalf of respondents No.2 to 4 as the said Power of Attorney is not the Power of Attorney in the eyes of law as per the following decisions of this Court;

[1] **H.K. Taneja & Ors. Vs. Bipin Ganatra, 2009 (3) Bom. C.R. 363.**

[2] **M/s. KBC Pctures Vs. A.R. Murgadoss & Ors, 2009 (2) ALL MR 108.**

11. Mr. Bhate further submitted that the Courts below committed serious error in decreeing the suit under Section 12 of the Act. He submitted that in fact the defendant had filed standard rent application in the year 1975 i.e much prior to alleged demand notice dated 3rd November, 1997. He submitted that on 11th July, 2002, the learned trial Judge passed scrutiny order directing the defendant to deposit entire arrears of rent on or before 30th October, 2002. Arrears of rent as on that date came to Rs.58,325.50 paise. The defendant deposited the entire arrears of rent on 27th October, 2002 that is two days before the stipulated period. He further submitted that issues were framed on 22nd April, 2008. As the standard rent application was filed thereby disputing the rent claimed by the plaintiffs as also as per the scrutiny order dated 11th July, 2002, the defendant was regularly depositing the rent, the Courts below were not justified in passing the decree on the ground of arrears of rent.

12. As far as the ground of unlawful subletting is concerned, the learned trial Judge declined to pass decree. He has taken me through the cross-examination of the defendant to contend that the Appellate Court committed

serious error in observing that the defendant has admitted unlawful subletting. He, therefore, submitted that the Civil Revision Application requires consideration.

13. On the other hand, Mr. Dahibawkar supported the impugned orders. He submitted that the Courts below concurrently found that the demand notice was duly served upon the defendant. The Courts below also did not accept the contention of the defendant that he left Mumbai on 5th November, 1997 and came back to Mumbai in or about second week of January, 1998. That apart, the Appellate Court after perusing the material on record observed that the defendant committed persistent defaults in depositing monthly rent in the trial Court. Even during pendency of the appeal, the defendants were in arrears of rent twice for which they have filed application Exhibit 10 and 12. Even on the date of decision of the appeal, the defendants were in arrears of rent for the month of July, 2016. He, therefore, submitted that the Courts below having found that default observed that the defendants are in arrears of rent. No case is made out for interfering with this part of the order.

14. As far as unlawful subletting is concerned, he has taken me through paragraphs 43 to 49 of the Appellate Court order and submitted that after considering the admissions of the witness of the defendant in the cross-examination, the Appellate Court held that the defendant has parted with possession, thus, has unlawfully sublet the suit premises.

15. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. A perusal of the impugned orders shows that the defendant did not raise contention as regards execution of power of attorney in favour of P.W.1 either in the trial

Court or before the Appellate Court. Section 85 of the Indian Evidence Act, 1872 reads thus;

“85.Presumption as to Powers-of-attorney-. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, [Indian Consul] or Vice-Consul or representative of [Central Government] was so executed and authenticated”.

16. Mr. Bhate relied on the decision of **H.K. Taneja** (supra). In that case, the learned Single Judge referred to Rule-11(2) of the Notaries Rules 1956 as also Form No. XV. It was observed that the purpose of this rule is to relate each notarized document to serial number in notarial register required to be maintained by each notary in prescribed form. Hence, serial number of entry must be put on document to collate entry with document. In case of dispute factum of notarization would have to be separately proved by applicant since, unlike registration, there is no presumption of execution of a notarized document.

17. In the case of **K.B.C Pictures** (supra), in paragraph 15, the learned Single Judge observed that a notary is required to keep record of all notarial acts performed by him and note serially in a notarial register to be maintained by him, all the notarial acts performed by him. The agreement, though it purports to bear notarial stamp, seal and the signature of the notary, does not bear the serial number at which the notarial act of signing and sealing was recorded by him in the notarial register. A copy of the relevant entry, if any, in the notarial register required to be maintained by law (sic) is not produced. In the circumstances, the purported notarisation does not raise any presumption in favour of the plaintiff.

18. As noted earlier, the defendant did not agitate this point in the Courts below. In fact at the threshold, the defendant should have objected to deposition of P.W.1 on the ground that he was not given valid power of attorney. If defendant would have raised this objection at the threshold, P.W 1 was required to produce notary register for claiming presumption u/s 85 of the Indian Evidence Act, 1872. Defendant did not raise this objection at the time of evidence of P.W.1. Not only that, they did not raise this contention in the Courts below. It is, therefore, too late now in the day to raise this contention for the first time before this Court. I, therefore, do not find that the decisions relied on by Mr. Bhate, in any way, advance the case of the defendant.

19. As far as ground of default is concerned, the defendant contended that he was not served with demand notice dated 3rd November, 1997. With the assistance of the learned Counsel appearing for the parties, I have perused the envelope through which the demand notice was sent as also endorsement made on the registered acknowledgment. A perusal of the endorsement on the envelope as also the acknowledgment shows that that the envelope and acknowledgment bear following endorsement;

“N.C (not claimed) , returned to the sender”.

20. The learned trial Judge has referred to various decisions and in particular decision of this Court in the case of **David K.N Vs. S.R. Chaubey (Chaturvedi) 2003 (4) Bom. C.R. 612** and held that the plaintiff is entitled to claim presumption u/s 114 (e) of the Indian Evidence Act, 1872 and section 27 of the Bombay General Clauses Act. Though the defendant claimed that he was out of Mumbai from 5th November, 1997 and returned to Mumbai in the second week of January, 1998, no material is produced to substantiate this contention. The Courts below have concurrently held that the demand notice was duly served on the defendant and the defendant has not rebutted the

presumption. In view thereof, I do not find any merit in the submission of Mr. Bhate that the demand notice was not served on the defendant.

21. In so far as the ground of default is concerned, it is no doubt true that the scrutiny order was passed on 11th July, 2002 directing the defendant to deposit arrears of rent on or before 30th October, 2002. It also appears that the defendants has deposited arrears of rent on 27th October, 2002. As noted earlier, issues were framed on 22nd April, 2008. In paragraph 29, the Appellate Court noted that the defendant failed to pay arrears of rent for the month of September, 2008 . He took out notice Exhibit 39 for depositing monthly rent and for condonation of delay. Again, defendants fell in arrears of rent from 1st April, 2009 to 31st October, 2009 for which they took out another notice below Exhibit 46. Again, defendant took out notice below Exhibit 50 for condonation of delay in depositing the arrears. The Appellate Court, therefore, observed that the record reveals that there were persistent defaults in depositing the monthly rent in the trial Court. Even during the pendency of the appeal, the defendants fell in arrears of rent twice for which they took out two applications vide Exhibits 10 and 12. Even on the date of decision of the appeal, the defendants were in arrears of rent for the month of July, 2016. In view thereof, I do not find that the Courts below committed any error in passing the decree u/s 12 of the Act.

22. In so far as the ground of unlawful subletting is concerned, the trial Court declined to pass decree on that ground. A perusal of discussion from paragraphs 42 to 49 of the Appellate Court shows that the Appellate Court considered the admissions given by the defendant's witness. In particular, defendant's witness admitted that he has no documentary evidence in respect of consulting business in the suit premises. He, further submitted that the articles kept in the suit premises do not belong to him. The Appellate Court,

therefore, concluded that the plaintiffs have proved presence of third persons whose goods and articles are lying in the suit premises. The Appellate Court accordingly held that the plaintiffs have established the ground of unlawful subletting. The said finding is based on the evidence on record. It cannot be said that the said finding is not supported by evidence on record. In my opinion, the Appellate Court was fully justified in passing decree u/s 13 (1) (e) of the Act. Thus, the Courts below on appreciating the evidence on record have concurrently decreed the suit u/s 12 of the Act. The Appellate Court has also decreed the suit u/s 13 (1) (e) of the Act.

23. In the light of the aforesaid discussion, I do not find that the Courts below committed any error in decreeing the suit. The defendants are not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to the evidence on record. The defendants are not in a position to demonstrate that on the basis of the evidence on record, no reasonable or prudent person would have reached conclusions arrived at by the Courts below. In view thereof, no case is made out for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

24. At this stage, Mr. Bhate orally prays for stay of the order for period of eight weeks from today. He assures that defendants and all the adult family members residing with them will file usual undertaking in this Court within two weeks from today, after giving advance copy to the other side incorporating therein that;

- (a) they are in possession and nobody else is in possession of the suit premises;
- (b) they have neither created third party interests nor parted with possession of the suit premises;

- (c) they will hereafter neither create third party interests nor part with possession of the suit premises;
- (d) within two weeks from today, applicants will deposit the entire arrears, if any, in the Small Causes Court Mumbai in the account of R.A.E. Suit No.102/216 of 1998 under due intimation to the respondents.
- (e) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

25. Subject to the applicants filing the undertaking in the aforesaid terms within two weeks from today, this order shall remain stayed for a period of eight weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today, and/or in case applicants commit breach of any of the conditions of the undertaking, the respondents will be at liberty to proceed with the matter in accordance with law. In case, defendants are unable to obtain suitable orders from higher Court within a period of eight weeks and do not hand over possession of the suit premises to the plaintiffs, the plaintiffs will be at liberty to proceed with the matter in accordance with law. Order accordingly.

26. List the Civil Revision Application for reporting compliance on 9th April, 2018.

[R.G. KETKAR, J.]