

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 28 OF 2015

Mr. Shahnawaz Khan Sarfaraz Khan

...Applicant

Versus

Mr. Iqbal Patel (since deceased)
through L.Rs.

...Respondent

....

Mr. Nitin V. Gangal a/w. Namita M. Mestry and Prabhavatsam Balan,
Advocate for the Applicant.

Mr. Y.E. Mooman, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 20th JUNE, 2019

P.C.

1. Heard Mr. Nitin Gangal, learned counsel for the applicant and Mr.Y.E. Mooman, learned counsel for the respondents, at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908, the applicant, hereinafter referred to as the 'defendant', has challenged the judgment and decree dated 11.9.2009 passed by the learned Judge, Court Room No.14 of the Court of Small Causes at Bombay in R.A.E. Suit No.1200/1997 as also the judgment and decree dated 14.11.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai (A-1) Appeal No.581/2009. By these

orders, the Courts below decreed the suit under Sections 12, 13(1)(a) and 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act') and directed the defendant to hand over possession of room No.3 on the first floor of the plaintiff's building at 21, Temkar Street, Mumbai – 400 008 (for short, 'suit premises').

3. The respondent, hereinafter referred to as the 'plaintiff', instituted suit *inter alia* contending that the defendant is the monthly tenant @ Rs.76.55 paise. The defendant is not ready and willing to pay rent and is in arrears of rent from March, 1996. By notice dated 7.4.1997, the plaintiff called upon the defendant to pay the arrears of rent. Thus, the defendant is a willful defaulter as contemplated by Section 12 of the Act.

4. The plaintiff further contended that the defendant without consent of the plaintiff in writing as also Mumbai Municipal Corporation has constructed a loft, W.C. and converted Mori into bath-room. The defendant has also unauthorizedly installed a huge water storage tank which resulted in heavy leakage on the ground floor. The defendant has also installed an Hydraulic water pump to draw the water, with the result that while working the said pump the entire building is shaking. The building where the suit premises is situate is old and these unauthorized acts of the defendant have impaired the stability of the

building.

5. The defendant filed written statement Exhibit-7 resisting the claim of the plaintiff. The defendant denied the allegations in respect of arrears of rent. The defendant contended that the suit building was under repairs in 1995-96. However, the major portion of the repair work carried out by MHADA was incomplete. During the course of repair works i.e. the backside of the suit building, the entire portion of the bath-room which is in the suit premises was demolished and it was required to be repaired. The defendant contended that the suit premises is a single room admeasuring 150 sq. ft. wherein a small bath-room admeasuring 2 ft. X 6 ft. is there since inception. The bath-room was reconstructed by MHADA during the course of repairs.

6. The defendant further contended that there is water storage tank for the personal use of the defendant resting on the wooden top which is over the bath-room. He denied construction of loft. The defendant contended that it is a merely a top made of a wood for keeping water tank over the same. He also denied installation of hydraulic water pump and prayed for dismissal of the suit.

7. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence. After considering the evidence on record, the learned trial Judge decreed the

suit and held that the plaintiff proved that the defendant has failed and neglected to pay the arrears of rent for a period of six months despite service of demand notice and that the defendant is not ready and willing to pay the rent. The learned trial Judge accordingly decreed the suit under Section 12 of the Act.

8. The learned trial Judge further held that the plaintiff proved that the defendant has carried out additions and alterations of permanent nature in the suit premises without the consent in writing of the plaintiff and that the defendant has caused waste and damage to the suit premises.

9. Aggrieved by this decision, the defendant preferred appeal. The Appellate Court affirmed the findings of the trial Court and dismissed the appeal. It is against these orders, the defendant has instituted present C.R.A.

10. In support of this application, Mr. Gangal submitted that the Courts below committed serious error in decreeing the suit under Section 12 of the Act. He submitted that the plaintiff issued demand notice dated 17.4.1997. In the entire notice the plaintiff has not raised demand calling upon the defendant to pay the arrears of rent. He relied upon following decisions :

- (i) **Mahalinga Bandappa Vs. Venkatesh Waman, AIR 1957 Bom 201;**
- (ii) **Sonubai Vs. Yellawa S. Doddamani, 1993 Bombay Rent Cases 298,**
to contend that in the absence of any demand raised in the notice, the demand notice is invalid. And that the Courts below were not justified in passing the eviction decree under Section 12 of the Act.

11. Insofar as the eviction decree under Sections 13(1)(a) and 13(1)(b) of the Act is concerned, Mr. Gangal has taken me through the findings recorded by the Courts below. He submitted that the Courts below proceeded on the premise that the defendant had admitted construction of loft. The Courts below failed to appreciate that the additions and alterations were made for the beneficial enjoyment of the suit premises. He relied upon the decision in **Alisaheb Abdul Latif Mulla Vs. Abdul Karim Abdul Rahman Mulla and others, 1981 Mh.LJ 734** and in particular paragraph-26 thereof to contend that if the work has been effected so as to enable the person using the premises for a better enjoyment and beneficial use of the same premises, if there is no change in the form of the structure, if there is no different use by the erection of the structure than the one which is already being carried out in the premises, then notwithstanding that the work was carried out in durable materials and is of such a type or nature as is done in case of

permanent structures, it would not follow that what was done was an erection of a permanent structure. He, therefore, submitted that the Courts below were not justified in passing eviction decree under Sections 13(1)(a) and 13(1)(b) of the Act. He, therefore, submitted that the application requires consideration.

12. On the other hand, Mr. Mooman supported the impugned orders. He submitted that after appreciating the evidence on record as also considering the notice dated 7.4.1997 issued by the plaintiff, the Courts below have concurrently passed eviction decree under Section 12 of the Act. He submitted that the notice dated 7.4.1997 mentions that the defendant is a monthly tenant @ 76.55 paisa. It also mentions that the period of arrears of rent from October, 1996 to March, 1997 @ Rs.76.55 paisa totally amounting to Rs.995.15. The notice also terminates tenancy of the defendant. Thus, the notice dated 7.4.1997 is a valid notice. He relied upon following decisions :

- (i) **Rakesh Kumar and another Vs. Hindustan Everest Tool Ltd., AIR 1988 SC 976** to contend that notice has to be read in appropriate logical way. The notice must be read in common sense point of view bearing in mind how such notices are understood by ordinary people.

- (ii) **Kantilal Ravji Mehta and another Vs. Sayarabai Chhaganlal Kering, 2003(3) Mh.L.J. 52**, and in particular paragraph-6 thereof, to contend that the demand notice must be construed not with a desire to find faults in it, which would render it defective, but it must be construed “*resmagis valeat quam pereat*.”

13. Insofar as the eviction decree under under Sections 13(1) (a) and 13(1)(b) of the Act is concerned, Mr. Mooman submitted that the Courts below after appreciating the evidence on record have concurrently held that the defendant has constructed loft of a permanent nature in the suit premises by using wooden joints of 4 ft. x 4 ft. and length of 6 ft. covering an area of 18 sq. ft.. The wooden joints are embedded in the wall by demolishing the part of wall of area 6” x 6” and this loft is rested on brick masonry wall of 6 ft. in height. Said construction is carried out without the written permission of the plaintiff. The Courts The Courts below also considered the submission of the defendant that the bath room since inception was in the suit premises. The Courts below noted that since inception the area of the bath room was 2 ft. X 6 ft. and the present size of the bath-room is 4 ft. x 6 ft. which amounts to permanent construction. He, therefore,

submitted that no case is made out for interfering with the impugned orders.

14. 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 plaintiff had issued notice dated 7.4.1997. A perusal of this notice shows that in paragraph-1, the plaintiff asserted that the defendant is a tenant of the suit premises @ monthly rent of Rs.76.55 paise. In paragraph-2, the plaintiff asserted that the defendant is in arrears of rent from March, 1996 to March, 1997 @ Rs.76.55 paise per month totally amounting to Rs.995.15 paise. In paragraph-3, the plaintiff has alleged unauthorized additions and alterations carried out by the defendant without written permission of the plaintiff as also of the Corporation. The defendant has constructed a loft in the suit premises. He has constructed WC and converted mori into bath-room, amongst other things. The plaintiff, therefore, asserted that the defendant has rendered himself liable for ejectment from the suit premises. In paragraph-4, the plaintiff called upon the defendant to quit, vacate and deliver possession of the suit premises occupied by the defendant at the end of next month after the current month of tenancy failing which ejectment proceedings will be adopted. On reading of the notice as a whole I do not find that the plaintiff has raised demand in the

notice.

15. What is required under Section 12(2) is not mere mention of arrears of more than six months or may be less than six months but what is required is demand of such rent and since there being no demand, the notice cannot be construed as notice under Section 12(2) of the Act. I find that the reliance placed by Mr. Gangal on the decision of **Sonubai** (supra) is well placed. As the notice dated 7.4.1997 did not raise demand the Courts below were not justified in decreeing the suit under Section 12 of the Act.

16. This brings me to the eviction decree passed under Sections 13(1)(a) and 13(1)(b) of the Act. The Courts below after appreciating the evidence on record have concurrently held that without written consent in writing of the plaintiff, the defendant has constructed loft of a permanent nature in the suit premises by using wooden joints of 4 ft. x 4 ft. and length of 6 ft. covering an area of 18 sq. ft.. The wooden joints are embedded in the wall by demolishing the part of wall of area 6" x 6" and this loft is rested on brick masonry wall of 6 ft. in height. Said construction is carried out without the written permission of the plaintiff.

17. The Courts below also found that the bath-room since inception was admeasuring 2 ft. x 6 ft. and the present size of the bath-

room is 4 ft. x 6 ft. which amounts to permanent construction. Thus, the defendant has also extended the existing bath-room. In paragraph-21, the Appellate Court recorded the conclusions and held that the plaintiff has sufficiently proved permanent construction of loft and the bath-room by the defendant.

18. Mr. Gangal relied upon the decision in **Alisaheb Mulla** (supra). In paragraph-19 of that report, the learned Single Judge referred to various decisions and more particularly the decision of Hon'ble Mr. Justice Malvankar in Sp. C.A. No.121/1968 decided on 25th/26th January, 1972. The learned Judge therein had laid down three criteria for determining whether a particular structure or work is a permanent structure coming within the mischief of clause (b) of Section 13 sub-section (1). The first of that criteria was the intention of putting up a structure, the mode and degree of annexation to the existing structure and whether such annexation considered from the point of view of the structure during removal smaller or greater damage would be done to the premises. The purposes for which the structure was erected was also considered as a further criteria. Whether the structure was of such a kind that it would last for long and was not intended for the purposes of temporary enjoyment of the premises but was a permanent addition is also a consideration The third criteria which was

laid down, was the nature of the materials in which the work was carried out and lastly, which is also a part of the third criteria the time for which the structure was likely to endure.

19. Applying the principles laid down in *Malvankar, J.* to the facts of the present case, I am satisfied that the Courts below were justified in passing eviction decree under Sections 13(1)(a) and 13(1)(b) of the Act.

20. The defendant 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. The defendant 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. No case is made out 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.

21. At this stage, Mr. Gangal orally applies for continuation of the ad-interim order for a period of eight weeks from today. He states that the applicant is in possession and nobody else is in possessions. He has neither created third party interest nor parted with the possession.

He will hereafter neither create third party interest nor part with the possession. He further states that the applicant and all adult family members using the suit premises are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

22. Having regard to the fact that applicant desires to challenge this order before the Apex Court, in my opinion, ends of justice would be met by continuing the ad-interim order for a period of eight weeks from today subject to the applicant and all adult members using the suit premises giving usual undertaking to this Court within two 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;
- (iv) that they will pay the arrears of rent, if any, to the respondent within two weeks from today; and
- (v) that in case the applicant is unable to obtain suitable orders from the higher Court within eight weeks from today, they will deliver vacant and peaceful possession of the suit premises to the respondent.

23. In view thereof, notwithstanding dismissal of Civil Revision Application, the ad-interim order shall continue for a period of eight weeks from today, subject to the applicant filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. It is made clear that in case the applicant does not file undertaking in the above terms and/or commits breach of any of the clauses of the undertaking, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)