

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**Writ Petition NO. 4291 OF 2019**

Smt. Bhagwanibai Mamchand Bagoria  
(since deceased) through L.Rs.  
and others

...Petitioners

*Versus*

Shri. Hariram Banwari Kirad

...Respondent

....

Mr. Anand H. Singh, Advocate for the Petitioners.

Mr. Nilesh Tank, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 08<sup>th</sup> APRIL, 2019

P.C.

1. Heard Mr. Anand H. Singh, learned counsel for the petitioners and Mr. Nilesh Tank, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the order dated 26.2.2019 passed by the Appellate Bench of the Small Causes Court at Bandra, Mumbai below Exhibit-32 in (A-1) Appeal No.4/2014. By that order, the Appellate Court allowed the application made by the respondent, hereinafter referred to as the 'plaintiff' and issued injunction restraining the defendants, their agents, servants or any person claiming through them from making any sort of unlawful work in the suit premises beyond the area as described in the

present application, till final decision of the appeal; appointed Advocate Smt.Anita (Ranjna) R. Kadam as a Court Commissioner for visiting the suit premises after intimating both the parties and their Advocate and ascertain the actual and factual work in progress in suit premises and take the measurements of the work of the suit premises and submit her report along with map subject to the plaintiff depositing an amount of Rs.5,000/- towards the Commission fees.

3. In support of this Petition, Mr. Anand strenuously contended that the Appellate Court committed serious error in passing the impugned order. He submitted that the plaintiff had instituted suit against the defendants invoking the grounds under Sections 15, 16(1) (a), 16(1)(b), 16(1)(e), and 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short, 'Act') as also under Section 108(o) of the Transfer of Property Act, 1882 (for short, 'T.P. Act'). Though the plaintiff alleged that the defendants have erected structure of permanent nature in the suit premises without consent in writing, in paragraph-4 of his affidavit of examination-in-chief the plaintiff had given up the ground of additions and alterations as also change of user. He has also invited my attention to the letter dated 23.1.2019 addressed by the plaintiff to the Deputy Superintendent of Police, Kherwadi police station, Bandra (E), Mumbai and the letter dated 24.1.2019 to the Ward Officer, H/East Ward (Building Department) of the Municipal Corporation of Greater

Mumbai (for short, 'Corporation'). He submitted that the plaintiff has described that the defendants are the tenants in respect of area admeasuring 40 ft. X 19 ft.. He also invited my attention to paragraph-3 of the written statement filed by the defendants where the defendants contended that the actual size of the structure/suit premises was 40 ft. X 19 ft. In other words, Mr. Anand submitted that even as per the contention of the plaintiff the area of the suit premises is 40 ft. X 19 ft. and thus there is no additions and alterations and/or repair works being carried out by the defendants.

4. Mr. Anand further submitted that after the impugned order was passed the defendants filed application Exhibit-36 for stay of the impugned order. By order dated 26.2.2019, the Appellate Court stayed the execution and operation of the order passed below Exhibit-32 for a period of one month. By a subsequent order dated 25.3.2019 below Exhibit-38, the Appellate Court further extended the stay for a period of two weeks as the Writ Petition was kept by this Court on 29.3.2019. He submitted that it is the statutory right of the defendants to challenge the order adverse to their interest and, therefore, the Appellate Court was justified in staying its own order and thereafter extending it further.

5. On the other hand, Mr. Tank supported the impugned order. He submitted that along with the application the plaintiff had produced the photographs showing that the defendants are carrying

out additions and alterations in the suit premises. The Appellate Court was, therefore, justified in appointing the Court Commissioner as also issuing injunction restraining the defendants from carrying out additions and alterations. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the record indicates that the defendants relied upon clauses-9 and 15 of the tenancy agreement, which permit them to carry out tentable repairs. Clauses-9 and 15 read thus :

“9] The Tenants are permitted to carry out additions, alterations and changes etc. of temporary / permanent nature and to raise height as per B.M.C. rules and bye laws, at their own cost for beneficial use of the said premises. The structure on the land demised to the tenants has a door & window at the back side of the structure at the western side. The Tenants covenant and agree to close the existing door and window by removing them and by constructing the wall in their place as and when the landlord construct a boundary wall behind the said structure. However, if there is any increase in the property tax on account of the aforesaid changes, the rent shall increase in proportion to the said increase in property tax.

15] The demised premises are consisting of structure and open space in front of the said structure as aforesaid and the land lord hereby grants his PERMISSION and gives his NO OBJECTION, to the tenants, if they desire to extend the existing structure in the said open space. The present

clause shall be considered as NO OBJECTION given by the landlord and the same if required can be produced by the tenants for obtaining necessary permission for construction of the desired extended structure from the concerned department or authorities. The cost of such constructions shall be borne by the tenants alone and the same shall be at the risks of the tenants and landlord shall not object or interfere in any manner whatsoever in this respect.”

7. During the course of hearing, I specifically made enquiry with Mr. Anand as to whether the defendants have obtained requisite permissions from the Corporation. Upon taking instructions from the defendants, he states that no permission is obtained by the defendants from the Corporation. Thus, the reliance placed by the defendants on clauses-9 and 15 of the tenancy agreement does not advance their case.

8. In paragraph-15 of the impugned order, the Appellate Court after considering the submissions advanced by the defendants on clauses-9 and 15 observed that, “the respondents (plaintiffs) have further permitted them (defendants) to carry out temporary / permanent additions and alterations and changes, so also, to change the dimensions of suit premises. The interpretation of these clauses will be subject matter of final hearing.” In my opinion, the Appellate Court committed serious error in that regard. As noted earlier clauses-9 and 15, extracted hereinabove, required the defendants to obtain permission from the Corporation. The Appellate Court should have concentrated on

the aspect as to whether the defendants have obtained permission from the Corporation and once the answer is in the negative then there is no question of interpretation of clauses-9 and 15.

9. In paragraph-9, the Appellate Court noted that “Whether the work carried out by the defendants in the suit premises amounts to tenantable repairs or amounts to additions and alterations of permanent nature can only be decided after the work in progress in suit premises is inspected and comes on record.”

10. In paragraph-13, the Appellate Court referred to Section 28 of the Act which gives right of inspection to the landlord. Mr. Anand fairly submitted that he is not challenging clause-3 of the operative part of the impugned order appointing Court Commissioner. That apart, for the reasons recorded in paragraphs-13 and 14, I do not find that the Appellate Court committed any error in appointing Court Commissioner.

11. In paragraph-16, the Appellate Court observed that by allowing application will not prejudice the defendants in any manner. If at all the defendants have not obtained permission from the Corporation and they are not carrying out any additions and alterations in the suit premises, certainly no prejudice will be caused to them. In view thereof, I do not find that the Appellate Court committed any error in passing the impugned order.

12. That brings me to the order dated 26.2.2019 passed by the

Appellate Court below Exhibit-36. By that order, the Appellate Court stayed its own order for a period of one month. By a subsequent order dated 25.3.2019 below Exhibit-38, the Appellate Court further stayed its own order for a period of two weeks. In my opinion, the Appellate Court committed serious error in passing the orders dated 26.2.2019 and 25.3.2019. The Appellate Court failed to notice that by staying its own order injunctioning the defendants from carrying additions and alterations for a period of one month, the defendants would have completed the additions and alterations in the meanwhile. Once the Appellate Court, after considering the material on record issued injunction, in no circumstances it could have stayed its own order.

13. Subject to above, the petition fails and the same is dismissed. It is made clear that the Appellate Court will decide the appeal on its own merits uninfluenced by the observations made in this order. All contentions of the parties on merits are expressly kept open.

14. Registry is directed to transmit an authenticated copy of this order to the Appellate Bench of Small Causes Court at Bandra, Mumbai comprising of Smt. S.J. Ramgadiya, Addl. Chief Judge & Smt. C.P. Jain, Judge, Court Room No.31). Order accordingly.

(R. G. KETKAR, J.)