

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.336 OF 2019

Ramchandra Daji Ganjekar through his son
Prakash Ramchandra Ganjekar ... Applicant
Vs.
Dattatray Ganpat Kotavdekar ... Respondent

Mr. V. S. Kapse for Applicant.
Mr. M. H. Chandan for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 31, 2019

P.C. :

Heard Mr. Kapse, learned Counsel for the applicant and Mr.Chandan, learned Counsel for the respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant', has challenged the judgment and decree dated 31.01.2017 passed by the learned trial Judge in R.A.E.Suit No.1409 of 2009 as also the judgment and decree dated 26.04.2019 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.150 of 2017. By these orders, the Courts below decreed the Suit instituted by the respondent under Section 16(1)(a) of the Maharashtra Rent Control Act, 1999 (for short 'Act') read with Section 108(o) of the Transfer of Property Act, 1882 (for short 'T.P.Act') and Section 16(1)(b) of the Act and directed the defendant to handover vacant and peaceful possession of premises admeasuring about 10' x 15' with tin-sheet bathroom of 5' x 8' on a land bearing C.T.S.No.132 of Village Kurla, Behind Kanji Sheth Chawl, Match Factory Lane, Kurla, Mumbai 400 070 (for short 'suit premises').

3. In support of this Application, Mr. Kapse submitted that initially, plaintiff did not invoke grounds under Section 16(1)(a) of the Act read with Section 108 (o) of T.P.Act and also Section 16(1)(b) of the Act. A plaint was amended and thereafter, the additional issues were framed on 16.02.2016 covering ground under Section 16(1)(a) and (b) of the Act. He submitted that the Courts below in fact did not deal with the ground under Section 16(1)(a) of the Act. He further submitted that defendant had sought permission of the Mumbai Municipal Corporation (for short 'Corporation') in the year 1991 and carried out the construction in pursuance of the permission granted by the Corporation. The Suit is instituted in the year 2009. Thus, the plaintiff had waived the grounds under Sections 16(1)(a) and 16(1)(b) of the Act. He has invited my attention to paragraph 5 of the plaint and paragraph 8 of the written statement. He also relied upon explanation to Section 16(1)(b) of the Act to contend that as the defendant had obtained permission of the Corporation, it was not incumbent for the defendant to obtain permission of the landlord in writing as the alleged structure falls in explanation to Section 16(1)(b) of the Act.

4. On the other hand, Mr. Chandan supported the impugned orders and submitted that after appreciating the evidence on record, the Courts below have decreed the Suit. He has taken me through the impugned orders.

5. 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 trial Court's order shows that the learned trial Judge has considered grounds under Section 16(1)(a) and (b) of the Act from paragraph 23 onwards. The learned trial Judge dealt with the contention about the waiver of the plaintiff and held in paragraph 30 that

it cannot be said that the right availed to the plaintiff is waived. Apart from the reasoning given by the learned trial Judge, a perusal of the written statement does not even remotely indicate that defendant has raised the plea of waiver. In paragraph 25, the learned trial Judge referred to the permission granted by the Corporation in the year 1991 to carry out repairs to the suit premises. The defendant was given further permission on 06.07.2009. In paragraph 27, the learned trial Judge had drawn distinction between Sections 14 and 16(1)(b) of the Act. In paragraph 28, the learned trial Judge observed that in pursuance of Section 14 of the Act, defendant could not have carried out tenantable repairs to the suit premises by putting a new tin-sheet in place of old tin-sheet. However, instead of doing so, defendant has erected the brick masonry wall by removing the old tin-sheet by digging the foundation. The said walls are strengthened by putting iron beams as is evident from photograph at exhibit-11. Thus, from the admission given by the defendant, it is clear that he had erected a structure of permanent nature on the suit premises without plaintiff's permission in writing. The learned trial Judge further held that the activities of the defendants of removing old tin-sheet and constructing brick masonry wall at that place amounts to waste and damage to the plaintiff's property.

6. In so far as the Appellate Court is concerned, the Appellate Court has dealt with these grounds in paragraphs 13 and 14. After re-appreciating the entire evidence on record, in paragraph 14, the Appellate Court concluded that under the guise of carrying out tenantable repairs, the defendant had erected brick masonry wall by removing the entire original structure, increased height of the suit premises and constructed a mezzanine floor, which is nothing but the additions and alterations as contemplated by Section 16(1)(b) of the Act. The Appellate Court held that defendant had carried out permanent

additions and alterations in the suit premises and had caused waste and damage to the plaintiff's property.

7. It is evident from the record that the defendant had admitted that the entire old structure of the suit premises was made of tin-sheets and after demolishing the entire original structure, he has constructed brick masonry walls in place of tin-sheet. The identity of the suit premises is altered altogether. Mr. Kapse submitted that this was done with due permission of the Corporation and is covered by explanation to Section 16(1)(b) of the Act. It is not possible to accept this submission. Section 16(1)(b) with explanation read thus,

16. When landlord may recover possession.-

(1) Notwithstanding anything contained in this Act but subject to the provisions of section 25, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(b) that the tenant has, without the landlord's consent given in writing, erect on the premises any permanent structure.

Explanation.- For the purpose of this clause, the expression "permanent structure" does not include the carrying out of any work with the permission wherever necessary, of the municipal authority, for providing a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation, a fall ceiling, installation of air-conditioner, an exhaust outlet or a smoke-chimney; or

8. A perusal of the above extracted provision shows that for the purpose of Section 16(1)(b), the expression "permanent structure" does not include carrying out of any work with the permission wherever necessary, of the municipal authority, for providing **a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation, a fall ceiling**, installation of air-conditioner, an exhaust outlet or a smoke-chimney. Thus, the demolition of the patra shed by putting up a brick masonry walls will not be

covered by the explanation. In view thereof, I do not find that the Courts below committed any error in decreeing the Suit. In so far as plea of waiver is concerned, it is a question of fact. It must be expressly pleaded and clearly proved. The defendant has not raised plea of waiver in the written statement nor led evidence. The defendant was 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 was 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 evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

9. At this stage, Mr. Kapse orally applies for stay of eviction decree for a period of 12 weeks from today. He assures that within 2 weeks from today, defendant and all adult family members residing in / using the suit premises will furnish undertaking with 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) they will go on depositing the interim compensation @ Rs.5000/- per month in the Appellate Court under intimation in writing to the learned Counsel for the respondent;
- (e) in case they are unable to obtain suitable orders from the higher Court within 12 weeks from today, they will hand over

vacant and peaceful possession of the suit premises to the respondent.

10. In view thereof, notwithstanding dismissal of the Application, subject to the defendant filing undertaking in the aforesaid terms within two weeks from today, eviction decree shall not be executed for a period of twelve 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 defendant commits breach of any of the conditions of the undertaking, interim order shall stand vacated without further reference to the Court. In case, defendant is unable to obtain suitable orders from higher Court within a period of twelve weeks and does not hand over possession of the suit premises to the plaintiff, the respondent will be at liberty to proceed with the matter in accordance with law.

11. List the C.R.A. for reporting compliance after three weeks.

(R. G. KETKAR, J.)

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