

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

CIVIL REVISION APPLICATION NO.575 OF 2018

Bagalkot Udyog Limited	]	
(formerly Kanoria Industries Limited)	]	Applicant
Vs.		
The Cricket Club of India	]	Respondent

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Mr. Vijay Thorat, Senior Advocate a/w Karan Thorat, Levi Ruben, Sushant Arora, Maneesh Trivedi i/b Vigil Juris , learned Counsel for the Applicant.

Mr. Vineet Naik, Senior Advocate i/b Mr. Anand Gandhi, learned Counsel for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 18TH MARCH, 2019.

P.C.

Heard Mr. Thorat, learned Senior Counsel for the applicant and Mr. Naik, learned Senior Counsel for respondent No.1 at length.

2. Mr. Thorat seeks leave to delete respondents No.2 to 7 on the ground that they are no more in possession. In view thereof, leave to delete respondents No.2 to 7 is granted. Amendment shall be carried out forthwith.

3. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicant hereafter referred to as 'defendant No.1' has challenged the judgment and decree dated 27th July, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in P. Appeal No.354 of 2016. By that order, the Appellate Court dismissed the appeal preferred by defendant No.1 and confirmed the judgment and decree dated 20th June, 2016 passed by the learned trial Judge in T.E. & R Suit

No.231/262 of 2007. Respondent No.1, hereinafter referred to as 'plaintiff' has instituted suit against defendant No.1 and respondents No.2 to 7 for recovery of possession of premises admeasuring 2867 square feet or thereabout on the 6th floor, Block No.1 of the property known as 'Stadium House' forming part of Brabourne Stadium situate at Veer Nariman Road, Mumbai 400 020 (for short 'suit premises'), *inter alia*, on the ground that share capital of defendant No.1 exceeds Rs.1,00,000,00/- (Rs. One Crore) and therefore, defendant No.1 is exempted from the provisions of the Maharashtra Rent Control Act, 1999 (for short "Maharashtra Rent Act"). The plaintiff has legally and validly terminated tenancy of defendant No.1. The Courts below have decreed this suit. Against these orders, defendant No.1 has instituted the present C.R.A.

4. Rule. Mr. Gandhi waives service on behalf of defendant No.1. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. The matter was heard at length on 12th March, 2019. Mr. Thorat submitted that the plaintiff had instituted R.A.E. Suit No.309/1077 of 1989 on or about 10th March, 1989 for recovery of possession of the suit premises invoking grounds under section 12 and 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Bombay Rent Act'). The suit was dismissed in default on 18th October, 2003. After coming into force of the Maharashtra Rent Act, the plaintiff instituted T.E & R Suit No.282/337 of 2000, *inter alia*, contending that share capital of defendant No.1 exceeds Rs.1,00,000,00/-. On 1st September, 2004, the plaintiff has unconditionally withdrawn T.E & R Suit No.282/337 of 2000 without taking liberty to file a fresh suit on the same cause of action. The plaintiff has instituted the present suit viz; T.E. & R Suit No.231/262 of 2007 on the same cause of action. He,

therefore, submitted that the present suit instituted by the plaintiff is not maintainable.

6. Mr. Thorat further submitted that defendant No.1 was declared as a sick unit by Board for Industrial and Financial Reconstruction (for short 'BIFR') on 20th June, 2000. On 28th May, 2007, Draft Rehabilitation Scheme for Revival of defendant No.1 was submitted by the Industrial Development Bank of India (for short 'IDBI') to BIFR. On 28th June, 2007, the plaintiff issued terminating notice under section 106 of the Transfer of Property Act, 1882 (for short "T.P Act"). On 20th September, 2007, BIFR passed order to the effect that the provisions of sanctioned scheme and the scheme of arrangement/demerger shall come into immediate effect, that is to say, with effect from 20th September, 2007. The face value of the shares was reduced by 90% i.e face value of the shares was made Rs.1/- instead of Rs.10/- each. He submitted that factually the face value of the shares was reduced on 5th February, 2008. In view of the order of BIFR passed on 20th September, 2007 to the effect that the scheme shall come into immediate effect, the share capital of defendant No.1 is deemed to have been reduced below Rs.1,00,000,00/- (Rs. One Crore). The Courts below were, therefore, not justified in decreeing the suit.

7. Mr. Thorat has invited my attention to the findings recorded by the Appellate Court and in particular paragraphs 52 and 53. In paragraph 52, the Appellate Court held that principle of *res judicata* is not applicable to the present suit, as the earlier suit was not decided on merits. In paragraph 53, while dealing with contention about withdrawal of earlier T.E.& R Suit No.282/337 of 2000 unconditionally without obtaining liberty to file a fresh suit on the same cause of action, the Appellate Court was of the view that the present suit is not based on the same cause of action.

8. On the other hand, Mr. Naik supported the impugned orders. He submitted that it is no doubt true that earlier the tenancy was terminated on 14th July, 2000. The plaintiff had thereafter accepted the rent from defendant No.1. After withdrawal of the suit of 2000, fresh notice under section 106 of the T.P. Act was issued on 28th June, 2007. Defendant No.1 gave reply on 26th July, 2007. In paragraph 1 of that reply, defendant No.1 asserted that they continue to be monthly tenants of the suit premises on a monthly rent of Rs. 2642.20 . Thus, the plaintiff had waived earlier notice of 2000 and, therefore, the present suit is maintainable. He relied on sections 111 (h), 113 and 116 of the T.P. Act as also decision of Delhi High Court in **MEC India Pvt. Ltd Vs. Lt. Col. Inder Maira, 80 (1989) Delhi Law Times, 679**. In short, he submitted that the notice issued on 14th July, 2000 was waived and the fresh suit is instituted on the basis of the notice dated 28th June, 2007 terminating the tenancy. He, therefore, submitted that the Courts below were fully justified in holding that despite the fact that earlier the suit was withdrawn by the plaintiff unconditionally without obtaining liberty to file a fresh suit on the same cause of action, the present suit is maintainable and is not hit by Order XXIII, Rule-1 (4) (b) of the C.P.C.

9. The matter was adjourned so as to enable Mr. Naik to take instructions as to whether the plaintiff is agreeable for setting aside the impugned order as point of waiver was not agitated before the Courts below. Upon taking instruction, Mr. Naik states that the impugned order passed by the Appellate Court may be set aside and the Appellate Court may be directed to dispose of the appeal in a time bound manner. All the contentions of the parties on merits including contention of the plaintiff as regards waiver of notice may be expressly kept open.

10. In view thereof, by consent of the parties, the impugned order dated 20th July, 2018 passed by the Appellate Court in appeal is set aside. Appeal is restored to its original position before the Appellate Court. The Appellate Court is requested to dispose of the appeal within three months from fixing suitable date of hearing.

11. Learned Counsel for the parties assure that the parties will appear before the Appellate Court on 1st April, 2019 and for that purpose, no fresh notice be issued to them. The Appellate Court shall fix a suitable date and dispose of the appeal within a period of three months from that date. All contentions of the parties on merits including contention of waiver of notice are expressly kept open. Rule is made absolute accordingly with no order as to costs.

[R.G. KETKAR, J.]