

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.641 OF 2018

Dattakumar Prashuram Acharya and another ... Applicants
Vs.
Balmukund Parshuram Acharya through
LRs and others ... Respondents

Mr. Kashinath K. Jadhav with Mr. Jitendra K. Jadhav for Applicants.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 6, 2019

P.C. :

Heard Mr. Jadhav, learned Counsel for the applicants at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants No.9 and 8 respectively', have challenged the judgment and decree dated 31.07.2018 passed by the Appellate Bench of the Small Causes Court in (R) Appeal No.54 of 2011. By that order, the Appellate Court decreed the Suit instituted by the first respondent, since deceased, hereinafter referred to as 'plaintiff', and quashed and set aside the judgment and decree dated 27.07.2011 passed by the learned trial Judge in R.A.D. Suit No.2518 of 1997. The Appellate Court decreed the Suit and declared that late Balmukund Parshuram Acharya (for short 'Balmukund') is lawful tenant in respect of Room No.18-AB, Venkateshprasad, N. C. Kelkar Road, Dadar, Mumbai 400 028 (for short 'suit premises'). In view of death of the original plaintiff- Balmukund and consent of his legal heirs, Vaishali Balmukund Acharya is declared as lawful tenant in respect of the suit premises. The Appellate Court also directed defendants No.1 and 2 / landlords to transfer the rent receipt in respect of the suit premises in the name of Vaishali Balmukund Acharya from the name of the original tenant late Parshuram V. Acharya, forthwith.

3. Balmukund instituted R.A.D. Suit No.2518 of 1997 inter alia contending that Parshuram V. Acharya, father of the plaintiff and defendants No.3 to 9 had acquired double room namely 18 A-B in or around the year 1945. The tenancy consists of 4 rooms i.e. one bed room admeasuring 10' x 20', 1 store room admeasuring 8' x 10', 1 kitchen admeasuring 10' x 12' and 1 hall admeasuring 12' x 20', 6 galleries and 2 enclosed passages. Parshuram V. Acharya expired on 04.02.1981. At the time of his death, plaintiff Balmukund along with his family and his mother Smt. Rukmini P. Acharya was residing with the deceased as the only members of his family and continued to reside in the suit premises uninterrupted for the last 16 years or thereabout. The plaintiff's mother also expired on 31.07.1996 and thereafter plaintiff continued to reside in the suit premises along with his wife and children. The plaintiff further contended that at the time of death of Parshuram V. Acharya, defendants No.3 to 9 i.e. the other sons and daughters were not residing in the suit premises and were residing at the addresses shown in the cause title of the plaint. They have, therefore, no legal right in the suit premises under Section 5(11)(c)(i) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). They were impleaded in the Suit as defendants being the legal heirs of the deceased tenant although they have no right, title and interest in the suit premises.

4. Initially, the Suit was filed only against 8 defendants. The learned trial Judge dismissed the Suit on the ground of non-joinder of defendant No.9. Aggrieved by that decision, Appeal was carried and the Appellate Court set aside the trial Court's order and directed the plaintiff to implead defendant No.9 - Dattakumar P. Acharya (for short 'Dattakumar'). Accordingly, defendant No.9 was impleaded in the Suit.

5. Defendants No.1 and 2 / landlords filed written statements and additional written statements. Defendants No.3 to 8 filed written

statement. Defendant No.9 also, after his impleadment, filed written statement. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. By order dated 27.07.2011, the learned trial Judge dismissed the Suit. Aggrieved by that decision, plaintiff Balmukund preferred appeal. During the pendency of the appeal, he died and his son Durgadas was brought on record. By the impugned order, the Appellate Court, as indicated earlier, has allowed the appeal. It is against this order, defendants No.9 and 8 have instituted the present C.R.A.

6. In support of this C.R.A., Mr. Jadhav strenuously contended that the findings recorded by the Appellate Court are perverse. He has invited my attention to paragraph 23 of the impugned order where the Appellate Court, after perusing the evidence of P.W.2 Dattakumar (defendant No.9 in Suit) observed that there is a reference to letters dated 11.07.1976 and 22.11.1976. Mr. Jadhav submitted that these documents were tendered in the form of compilation at the time of hearing of the appeal. He has invited my attention to grounds (S) and (T) and submitted that the correspondence referred in the impugned judgment was not exhibited but simply marked for identification. As the judgment of the Appellate Court considers documents, which were not exhibited but simply marked for identification, the findings based on this correspondence are perverse. He has taken me through the evidence of P.W.2- Dattakumar as also written statement filed by Dattakumar - defendant No.9 on 03.11.2008, after he was impleaded as defendant No.9.

7. I have considered the submissions advanced by Mr. Jadhav. I have also perused the material on record. As mentioned earlier, the trial Court dismissed the Suit. The Appellate Court has decreed the Suit. In paragraph 22, the Appellate Court noted that the plaintiff Balmukund came with the case that at the time of death of original tenant

Parshuram, he was the only family member residing with the deceased. The Appellate Court observed that there is no dispute that defendants No.4 to 8 are daughters of deceased Parshuram and they were married prior to 1975. They were residing at their matrimonial home at the time of death of Parshuram. It is also admitted fact that defendant No.3 Vedvyas was not residing with Parshuram at the time of his death. The question remained only about entitlement of defendant No.9.

8. In paragraph 23, the Appellate Court referred to the examination-in-chief of Durgadas, son of Balmukund. He deposed that defendants No.3 to 8 were not residing at the time of plaintiff Balmukund's death as members of the family. Defendant No.9 - Dattakumar has been residing at A-4, Nandan Co-operative Housing Society, Veer Savarkar Marg, Mahim, Mumbai since 1976 or thereabout. He was asked to leave the suit premises for his anti family activities. P.W.1 relied upon the correspondence between late Parshuram and Dattakumar. In the examination-in-chief of P.W.2 Dattakumar, letters dated 11.07.1976 and 22.11.1976 are referred. P.W.2 admitted that those letters were written by him to Parshuram and the contents thereof are true and correct. He also admitted the handwriting of his father in the letter dated 'nil'. The Appellate Court observed that from these letters, it appeared that deceased Parshuram and Dattakumar were not in good terms. Dattakumar was claiming share in the property.

9. The Appellate Court also referred to the notice dated 20.12.1976, which was given by Parshuram through his Advocate to Dattakumar. By that notice, the licence granted Parshuram to Dattakumar to stay with him was revoked and he was asked not to visit residence of Parshuram and to remove all belongings and vacate the suit premises. In paragraph 25, the Appellate Court noted that defendant No.9 admitted that in the year 1976, he was working with Avery India Limited. He admitted

receipt of notice issued through Advocate. The Appellate court referred to partition Suit No.8361 of 1988 filed in the City Civil Court. The plaintiff also instituted L.E.Suit No.55/63 of 1997 against the defendant No.9 to vacate the premises at Nandan Co-operative Housing Society. In that Suit, defendant No.9 filed written statement. He denied that he was residing with the plaintiff as family member as their father was living at Khandke Building. He admitted that he is staying in A-4, Nandan Co-operative Housing Society, 224 Veer Savarkar Marg, Mahim, Mumbai , since 1969. Even the letter issued by that Society to Advocate for the plaintiff shows that the defendant No.9 has been occupying flat No.4 in the said Society from 1980. In paragraph 27, the Appellate Court referred to the evidence of Dattakumar dated 11.01.2015. The Appellate Court observed that the contentions raised by the defendant No.9 in the written statement as well as affidavit are contrary to documents, namely, letters exchanged between Parshuram and defendant No.9. After considering the evidence on record, the Appellate Court decreed the Suit.

10. Mr. Jadhav submitted that the correspondence relied by the Appellate Court does not form part of the record and they were not exhibited. I do not find any merit in this submission. A perusal of evidence of P.W.2 Dattakumar shows that the letters are specifically referred in his evidence and they were also marked as exhibits 'F' and 'G' respectively.

11. Mr. Jadhav relied upon the decision of the Apex Court in ***Vasant Pratap Pandit Vs. Anant Trimbak Sabnis***, 1994 (3) SCC 481, and in particular paragraphs 13 and 14 as also decision of this Court in ***Saraswatibai Dnyanoba Paigude Vs. Shrikant Baburao Dhamale***, 2016 (5) Mh.L.J. 885.

12. In the case of **Vasant Pratap Pandit** (*supra*), the principal question that fell for consideration was whether tenancy rights under the Act can be devised by a Will. Ancillary thereto arose the question whether the words 'assign' and 'transfer' in Section 15 of the Act include bequest. In paragraph 14, the Apex Court observed thus,

(14) From a plain reading of Section 5(11)(c)(i) it is obvious that the legislative prescription is first to give protection to members of the family of the tenant residing with him at the time of his death. The basis for such prescription seems to be that when a tenant is in occupation of premises the tenancy is taken by him not only for his own benefit but also for the benefit of the members of the family residing with him. Therefore, when the tenant dies, protection should be extended to the members of the family who were participants in the benefit of the tenancy and for whose needs as well the tenancy was originally taken by the tenant. It is for this avowed object, the legislature has, irrespective of the fact whether such members are 'heirs' in the strict sense of the term or not, given them the first priority to be treated as tenants. It is only when such members of the family are not there, the 'heirs' will be entitled to be treated as tenants as decided, in default of agreement, by the court. In other words, all the heirs are liable to be excluded if any other member of the family was staying with the tenant at the time of his death. ...”

13. Mr. Jadhav also relied upon the decision in **Saraswatibai Dnyanoba Paigude** (*supra*) and contended that the Appellate Court held that the relationship between Dattakumar and Parshuram were strained. Equally, he submitted that the relationship of Balmukund and mother Rukmini were strained. Balmukund, therefore, cannot claim to be a tenant.

14. In the present case, the Appellate Court, after appreciating the evidence on record, recorded a finding of fact that Balmukund along with his family was residing at the time of death of the original tenant Parshuram. Parshuram died on 04.02.1981 and plaintiff's mother Rukmini died on 31.07.1996. From the material on record, it evident that

Balmukund along with his family was in possession of the premises at the time of death of mother Rukmini. In view thereof, decision in **Vasant Pratap Patil** (*supra*) really advances the case of the plaintiff.

15. In so far as the reliance on the decision of **Saraswatibai Dnyanoba Paigude** (*supra*) is concerned, equally, I do not find any merit in this submission as basically plaintiff along with his family was residing with his mother Rukmini in the suit premises at the time of her death on 31.07.1996 and defendants No.9 and 8 were not residing in the suit premises either at the time of death of Parshuram on 04.02.1981 or at the time of death of Rukmini on 31.07.1996.

16. After considering the material on record, I do not find that the Appellate Court committed any error in passing the impugned order. Defendants No.9 and 8 were not in a position to demonstrate that the findings recorded by the Appellate Court are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants No.9 and 8 were also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Court. Hence, Application fails and the same is dismissed.

17. At this stage, Mr. Jadhav orally applies for stay of this order for a period of 8 weeks.

18. As mentioned earlier, plaintiff had filed Suit for declaration of his tenancy rights. As the decree passed is of a declaratory nature, the request for stay cannot be considered. Hence, oral application is rejected. Order accordingly.

(R. G. KETKAR, J.)