

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.635 OF 2018

Vivek Charandas Khare ... Applicant
Vs.
Hashim Salebhai Saheb Safiyuddin (decd)
and others ... Respondents

Mr. Devang D. Parmar for Applicant.
Mr. R. D. Soni a/w. Ms Uma Sharma i/b. Dharam & Co. for Respondent No.3.

CORAM : R. G. KETKAR, J.
DATE : MARCH 26, 2019

P.C. :

Heard Mr. Parmar, learned Counsel for the applicant and Mr.Soni, learned Counsel for the respondent No.3 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 order dated 07.06.2018 passed by the Appellate Bench of the Small Causes Court in Miscellaneous Appeal No.290 of 2017. By the impugned order, the Appellate Court dismissed the appeal preferred by the defendant against the order dated 21.06.2017 passed by the learned trial Judge below exhibit-18 in R.A.E.&R. Suit No.502/855 of 2001.

3. R.A.E.&R.Suit No.502/855 of 2001 was instituted by Hashim Salebhai Saheb Safiyuddin - plaintiff No.1 and Jeevanji Salebhai Saheb Safiyuddin - plaintiff No.2 through their Constituted Attorney Mr.Sanjay Gaurishankar against the defendant on or about 06.06.2001. The plaintiffs sought possession of shop No.3, ground floor, Lucky House 272, Shadhid Bhagat Singh Road, Fort, Mumbai 400001 (for short 'suit premises') from the defendant. The verification was made by Sanjay

Gaurishankar Sharma as Constituted Attorney of the plaintiffs. Along with the plaint, Power of Attorney dated 09.06.1997 was enclosed. The defendant filed written statement some time in September 2001 resisting the Suit. It was contended that H. H. Dr. Syenda Mohammed Burhanuddin Saheb was the landlord of the building namely, Lucky House, Shahid Bhagatsingh Road, Mumbai 400 001. It appears that during the pendency of the Suit, defendant was directed to deposit the arrears of rent @ Rs.330/- per month from January 1998 till November 2002 within four weeks from the date of the order and to continue to deposit the monthly rent @ Rs.330/- from December 2002 onwards. The defendant had deposited Rs.62,115/- for the period from January 1998 to January 2015. Plaintiff No.1 died in the year 2012. Plaintiff No.2 died in the year 2014. On 13.01.2015, Suit was dismissed on the ground of abatement. The defendant, therefore, filed application exhibit-9 for withdrawal of the amount of arrears of rent deposited by him in the trial Court. By order dated 26.02.2016, the learned trial Judge allowed the application and directed return of the amount lying in Ledger No.9 deposited by the defendant to him. The defendant thereafter filed application exhibit-6 inter alia praying for issuing direction to the alleged Constituted Attorney Mr. Sanjay Sharma to deposit the amount along with compound interest, costs of the application and for taking criminal action against him. By order dated 02.03.2017, the learned trial Judge allowed the application partly and directed the Constituted Attorney, Sanjay Gaurishankar Sharma to pay within one month Rs.19,089/- with simple interest at the rate of 6% p.a. from the date of withdrawal of amount.

4. The Constituted Attorney Sanjay Sharma filed application exhibit-18 seeking review of the order dated 02.03.2017 passed below exhibit-6. By order dated 21.06.2017, the learned trial Judge allowed the

application. Aggrieved by this decision, defendant preferred Miscellaneous Appeal No.290 of 2017. By the impugned order, the Appellate Court has dismissed the appeal. It is against this order, defendant has instituted the present C.R.A.

5. In support of this Application, Mr. Parmar has submitted that basically, the plaintiffs are not landlord and owner of the suit premises. Shri. Sanjay Sharma had instituted the Suit in the capacity of their Constituted Attorney on the basis of forged and fabricated Power of Attorney. He submitted that basically, the property belongs to H. H. Dr. Syenda Mohammed Burhanuddin Saheb, sole Trustee of Dawat E Hadiya Trust. He has also invited my attention to the notice dated 13.07.2001 issued by the Special Land Acquisition Officer, Mumbai Building Repairs and Reconstruction Board (for short 'Board') inviting objections / suggestions from the occupiers, owners and mortgagors, if any. He has also invited my attention to the order dated 13.08.2014 passed by the learned trial Judge below exhibit-91 in the Suit. He submitted that the entry in the Register shows that Advocate N. M. Bilve has withdrawn Rs.19,089/- on 11.03.2003. Mr. Parmar further submitted that the record from the Small Causes Court is missing. Even the application made on behalf of the plaintiffs is not traceable. That apart, order was passed on 16.10.2002 on the basis of which Advocate N. M. Bilve has withdrawn the amount. As the amount was deposited by the defendant and the Suit is dismissed as abated, the Courts below ought to have directed refund of that amount along with compound interest. The Courts below have not properly appreciated the contention advanced by the defendant. The impugned order may be set aside and the matter may be remitted to the trial Court.

6. On the other hand, Mr. Soni has invited my attention to the cause

title of the C.R.A. where defendant has described respondent No.1-Hashim Salebhai Safiyuddin as deceased and respondent No.2-Jeevaji Salehbhai Safiyuddin as also deceased. Respondent No.3 is impleaded as their Constituted Attorney. As respondents No.1 and 2 have expired, the agency of the third respondent also came to an end. He has also invited my attention to the finding recorded by the Appellate Court in paragraph 6 which shows that the amount of Rs.19,089/- was withdrawn on 11.03.2003 by the then Advocate for the plaintiff Mr. N. M. Bilve. In other words, respondent No.3 had not withdrawn that amount. The amount was withdrawn during the life-time of plaintiff No.1 and plaintiff No.2. Respondent No.3 Sanjay Gaurishankar Sharma cannot be the agent of the agent, namely of Mr. N. M. Bilve. He, therefore, submitted that no case is made out for interfering with the impugned order and Application is liable to be rejected on the ground of maintainability.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In the present Application, respondents are impleaded as under:

1. Hashim Salebhai Saheb Safiyuddin (deceased))
2. Jeevanji Salebhai Saheb Safiyuddin (deceased))
3. Both adults, Occupation Business through their)
- their C.A.Sanjay Gaurishankar Sharma &)
- Ravindra Gaurishankar Sharma (deceased))
- adults, residing at Lucky House, 272, Room No.17)
- & 18, 1st Floor, S.B.S.Road, Fort,Mumbai 400 001.)

8. It has come on record that respondent No.1-plaintiff No.1 died in the year 2012. Respondent No.2-plaintiff No.2 died on 10.08.2014. A perusal of the cause title extracted hereinabove shows that respondent No.3 Sanjary Sharma is impleaded in his capacity as Constituted

Attorney of respondents No.1 and 2. As respondents No.1 and 2 have expired, respondent No.3 cannot continue to represent respondents No.1 and 2 as their Constituted Attorney. Civil Revision Application is, therefore, wholly misconceived. Though matter was adjourned to enable the applicant to carry out necessary amendment, no such efforts were made. That apart, in paragraph 6 of the impugned order, the Appellate Court has referred to the Ledger Entry maintained by the Cash Department of the Small Causes Court. The amount of Rs.19,089/- was withdrawn by the then Advocate of the plaintiffs Mr. N. M. Bilve. The amount was withdrawn during the life-time of plaintiff No.1 and plaintiff No.2. Thus, the amount was withdrawn by the Advocate on behalf of the plaintiffs. No attempt is made for proceeding against plaintiffs. In view thereof, no relief can be granted against the respondent No.3, who did not withdraw the amount. It will, therefore, be open to the defendant, if so advised, to proceed against estate of the plaintiffs for recovery of amount of Rs.19,089/- along with interest. Subject to this, Application fails and the same is dismissed.

(R. G. KETKAR, J.)

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