

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 121 OF 2019

M/s. Indian Asbestos Cement Products,
And another

...Applicants

Versus

Shri. Laxman Waman Patil

...Respondent

**WITH
Writ Petition NO. 2183 OF 2019**

....

Mr. Raju D. Suryawanshi, Advocate for the Applicants/Petitioners.

Mr. Kailas Dewal i/b. Mr. Jayesh Joshi, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 27th FEBRUARY, 2019

P.C.

1. Heard Mr.Raju D. Suryawanshi, learned counsel for the applicants and Mr.Kailas Dewal, learned counsel for the respondent, at length.

2. C.R.A. No.121/2019 takes exception to the judgment and order dated 29.9.2018 passed by the learned District Judge-6, Thane in Misc. Civil Appeal No.111/2012 as also the judgment and decree dated 24.3.2009 passed by the learned District Judge-3, Thane in Civil Appeal No.42/2001. By order dated 29.9.2018, the learned District Judge dismissed the Petition filed by the applicants, hereinafter referred to as the 'defendants' seeking review of the judgment and decree dated

24.3.2009 passed in Civil Appeal No.42/2001. Civil Appeal No.42/2001 was allowed by the learned District Judge on 24.3.2009 by setting aside the judgment and decree dated 10.1.2001 passed by the learned trial Judge in R.C.S. No.1094/1995. The learned District Judge decreed the suit instituted by the respondent, hereinafter referred to as the 'plaintiff', under Section 13(1)(g) and 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act') and directed the defendants to deliver the possession of the suit premises to the plaintiff within three months from the date of the order, failing which the plaintiff will be entitled to recover possession thereof in accordance with law.

3. Writ Petition No.2183/2019 takes exception to the order dated 29.9.2018 passed by the learned District Judge in Misc. Civil Application No.110/2012. By that order, the learned District Judge dismissed said application filed by the defendants for restoration of cross-objections No.133/2005.

4. Rule in both proceedings. Mr.Dewal waives service. Having regard to the narrow controversy raised in these proceedings as also at the request and by consent of the parties, Rule is made returnable forthwith and the proceedings are taken up for final hearing.

5. As the parties in both the proceedings are common and the

common questions of law and facts arise in these proceedings the same can conveniently be disposed of this common order. The relevant and material facts, giving rise to filing of the present proceedings, briefly stated, are as under.

6. The subject matter of present proceedings is a plot of land bearing Survey No.143, Hissa No.4 (Part), admeasuring about 2500 square yards i.e. 2090 square meters at village Mira, Taluka and District – Thane (for short, 'suit premises'). The parties executed lease agreement in March, 1973. On or about 16.10.1993, the plaintiff instituted suit for possession of the suit premises invoking ground of arrears of rent as contemplated by Section 12 of the Act. By judgment and decree dated 10.1.2001, the learned trial Judge dismissed the suit. The plaintiff preferred Civil Appeal No.42/2001. During pendency of the appeal, the plaintiff took out application Exhibit-18 for amending the plaint and invoked the ground under Section 13(1)(g), namely, the plaintiff requires the suit premises bonafide and reasonably for personal use as also ground under Section 13(1)(k) namely non-user. By order dated 9.10.2013, application Exhibit-18 was allowed. In pursuance thereof, the plaintiff amended the plaint. By order dated 12.8.2004, the learned District Judge framed following additional issues :

- “1. Does the Plaintiff require the suit premises reasonably and bonafide for own use and

- occupation as pleaded in para 8 of the plaint ?
2. Who will suffer greater hardship by passing the decree than refusing to pass it ?
 3. Whether the suit premises are not used for the purpose for which they are let out for many years next prior to the filing of the suit ?”

7. The learned District Judge invoked the powers under Order XLI Rule 25 of C.P.C. and directed the trial Court to take evidence for deciding the additional issues and transmit the findings to the District Court.

8. On 14.10.2005, the learned trial Judge after recording the evidence transmitted the findings on the additional issues to the District Court. The defendants filed Misc.Civil Application/Appeal No.133/2005 on or about 12.12.2005 challenging the judgment / reasons and findings dated 14.10.2005 recorded by the learned trial Judge on the additional issues. On 5.1.2006 the defendants filed purshis at Exhibit-7 for treating Misc. Civil Application No.133/2005 as cross-objection in Civil Appeal No.42/2001 filed by the plaintiff. On the same day, application was filed by the defendants at Exhibit-8 before the learned District Judge reiterating his request that Misc. Civil Application No.133/2005 be treated as memo of objection in Appeal No.42/2001 as both are related to each other.

9. Rozanama dated 7.2.2009 in M.C.A. No.133/2005 shows that Advocate for the appellant was absent. Junior Advocate for the

appellant was present. Rozanama dated 7.2.2009 records presence of Advocate Matkar for the appellant. Application for adjournment was filed and was granted as a last chance. Hearing of the appeal was deferred till 21.2.2009 for arguments.

10. Rozanama of 21.2.2009 shows that the Advocates for both sides were present. The purshis was filed by the Advocate for the Appellants/defendants for withdrawing the appeal. Order below Exhibit-1 was passed disposing of the Misc. Civil Application as withdrawn and the proceedings was closed. All court fee stamps were cancelled.

11. After dismissal of the Misc. Civil Application, by order dated 24.3.2009, the learned District Judge allowed the appeal as indicated earlier. During the course of the judgment, the learned District Judge observed in paragraph-10 that as the defendants have failed to file any cross appeals, the findings will have to be confirmed.

12. In paragraph-11, the learned District Judge observed that after receipt of the findings on the additional issues from the trial Court the defendants should have filed cross appeal challenging those findings if aggrieved. Even without there being any cross appeal the Appellate Court can consider the objections to those findings if referred by the defendants during the course of the arguments and could show how the

findings could not have been arrived at on the basis of the evidence oral as well as documentary. The learned District Judge further observed that Advocate Metkar for the defendants during the course of arguments even did not whisper about findings on the additional issues. He did not argue on those points to show that the findings on the additional issues were not based on oral or documentary evidence and the conclusion is not correct. The learned District Judge, on his own, had gone through the evidence on record and decreed the suit of the plaintiff. This is one of the orders impugned in present C.R.A..

13. The defendants filed Petition under Order XLVII of C.P.C. for reviewing order dated 24.3.2009 passed by the learned District Judge in Civil Appeal No.42/2001. By order dated 29.9.1998, the learned District Judge dismissed Review Petition. This order is also challenged in C.R.A. Apart from filing Petition seeking review of the order dated 24.3.2009, the defendants filed Misc. Civil Application No.110/2012 for restoration of the cross-objections No.133/2005. By order dated 29.9.2018, the learned District Judge rejected the restoration application. It is against this order, the defendants have instituted Writ Petition No.2183/2019.

14. In support of these proceedings, Mr. Suryawanshi submitted that the purshis Exhibit-14 dated 21.2.2009 was signed by one Advocate

Dongre, who was not authorized to represent the defendants. The Vakalatnama on behalf of the defendants was filed by Advocates Rajiv Matkar and Dhananjay Pawar. In short, he submitted that Advocate Dongre was not authorized to file purshis Exhibit-14 dated 21.2.2009 before the District Court. He submitted that the purshis Exhibit-14 was filed seeking leave to withdraw M.C.A. No.133/2005 and liberty was sought to proceed with appropriate remedy before the appropriate Court. The learned District Judge passed following order :

“In view of pursis Exh-14, M.C. Appeal is disposed off as withdrawn.

Sd/-
21.2.2009”

15. Mr. Suryawanshi submitted that the learned District Judge was not justified in disposing off M.C.A./cross-objections as withdrawn without granting liberty as prayed for. The learned District Judge could have rejected the purshis seeking permission to withdraw cross-objections with liberty to file appropriate proceedings or could have allowed that purshis thereby permitting the defendants to withdraw cross-objections with liberty to adopt appropriate proceedings. The learned District Judge could not have partly granted relief claimed in the purshis. By simply permitting the defendants to withdraw the cross-objections, they are precluded from adopting appropriate proceedings challenging the findings recorded by the learned trial Judge on

additional issues on 14.10.2005. Thus, the course adopted by the learned District Judge was wholly impermissible. He submitted that in fact in view of purshis dated 5.1.2006 at Exhibit-7 and application dated 5.1.2006 at Exhibit-8, the defendants had requested the learned District Judge to treat Misc. Civil Application No.133/2005 as cross-objections in appeal No.42/2001. In short, he submitted that as the order dated 21.2.2009 suffers from total non-application of mind, said order requires to be set aside thereby restoring the cross-objections filed by the defendants in Civil Appeal No.42/2001 preferred by the plaintiffs, to its original position.

16. Mr. Suryawanshi further submitted that the defendants were totally unaware of the purshis dated 21.2.2009 filed by Advocate Dongre who was not authorized to represent them. It is only after going through the impugned order dated 24.3.2009, they came to know about disposal of cross-objections as withdrawn. He, therefore, submitted that the impugned orders may be set aside thereby restoring Civil Appeal No.42/2001 as also cross-objections filed by the defendants to the file of the learned District Judge for deciding it afresh in accordance with law. He further states that in case the Court accedes to the request of the defendants, the defendants will extend full cooperation for disposal of the proceedings in a time bound manner.

17. On the other hand, Mr. Dewal has supported the impugned orders. He has invited my attention to paragraph-10 of Misc. Civil Application No.110/2012 filed by the defendants for restoration of the cross-objections, where reference is made to the purshis dated 5.1.2006 at Exhibit-7 praying for treating M.C.A. No.133/2005 as cross-objections to Civil Appeal No.42/2001 as also order dated 5.1.2006 passed by the learned District Judge. Defendants also made reference to the application dated 5.1.2006 at Exhibit-8 to the effect that both appeals are related to each other and, therefore, in the interest of justice the M.C.A. No.133/2005 be treated as cross-objection in Civil Appeal No.42/2001. The learned District Judge by order dated 5.1.2006 allowed said application and ordered that M.C.A. No.133/2005 be treated as cross-objection in Civil Appeal No.42/2001.

18. Mr. Dewal also invited my attention to purshis at Exhibit-7 dated 5.1.2006 and application at Exhibit-8 dated 5.1.2006 filed by the defendants. He further submitted that it is too late in the day now to the defendants to contend that Advocate Dongre was not authorized to represent the defendants and file purshis for withdrawal of M.C.A. on 21.2.2009. The defendants have taken conscious decision of withdrawal of the cross-objections and said request was acceded to by the learned District Judge. He, therefore, submitted that no case is made out for

interfering with the impugned orders.

19. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, Advocate for the defendants Mr. Dongre had filed purshis at Exhibit-14 on 21.2.2009. Said purshis reads thus :

“In The District Court of Thane At Thane
M.C.A. No.133/05

1] M/s. Indian Asbestos Cement Products.

V/s

2] Shri Laxaman Vaman Patil

Pursis for withdrawal

May it please Your Honour

The caption matter is wrongly filed in this Hon'ble Court. The liberty to withdraw this matter with leave to proceed appropriate remedy before appropriate court may please be granted.

Sd/-

21/2/09

Advocate for Appellant”

20. On the same day, the learned District Judge passed following order :

“In view of pursis Exh-14, M.C. Appeal is disposed off as withdrawn.

Sd/-

21.2.2009”

21. The content of the purshis that “The caption matter is wrongly filed in this Hon'ble Court” is wholly misconceived. Defendants had already filed purshis and application both dated 5.1.2006 at

Exhibits-7 & 8 respectively to treat M.C.A. as cross-objections in Civil Appeal No.42/2001. Cross objections are necessarily required to be filed in the same Court where appeal is filed by the other side. Be that as it may, in my opinion, the order dated 21.2.2009 passed by the learned District Judge disposing M.C.A. as withdrawn is totally perverse and is passed without application of mind. A perusal of the purshis shows that the defendants sought leave to withdraw the cross-objections with liberty to adopt appropriate remedy before the appropriate Court. The learned District Judge could have allowed the purshis in its entirety thereby permitting the defendants to withdraw cross-objections with liberty to adopt appropriate proceedings before the appropriate forum. In the alternative, the learned District Judge could have dismissed the purshis thereby refusing permission to withdraw the cross-objections as also liberty to adopt appropriate proceedings. The learned District Judge was not justified in simply permitting the defendants to withdraw the cross-objections without reserving liberty to adopt appropriate proceedings before the appropriate forum. Because of the order dated 21.2.2009, the defendants, for all times to come are precluded from challenging the findings recorded by the learned trial Judge on additional issues on 14.10.2005. In my opinion, the order dated 21.2.2009 passed by the learned District Judge cannot be sustained and

as such is liable to be set aside. Once that order is set aside, Misc. Civil Application No.133/2005 stands restored to the file of the learned District Judge. As mentioned earlier, the defendants had filed purshis dated 5.1.2006 at Exhibit-7 and application dated 5.1.2006 at Exhibit-8 for treating Misc. Civil Application No.133/2005 as cross-objections to Civil Appeal No.42/2001 filed by the plaintiffs. The learned District Judge in fact had allowed the purshis and also application on the same day. Once Misc. Civil Applicaation No.133/2005 is restored to the file of the learned District Judge, it is not necessary to consider the legality of the impugned orders.

22. Even otherwise, a perusal of the order dated 29.9.2018 passed in Misc. Civil Application No.111/2012 and the order dated 29.9.2018 passed in Misc. Civil Application No.110/2012 for restoration of the cross-objections shows that the learned District Judge had adopted hyper technical approach. In paragraph-14 of the order passed in Misc. Civil Appeal No.111/2012, the learned District Judge observed that “Admittedly the defendants (applicants therein) neither paid requisite court fee in MCA No.133/2005 for claiming to be as cross objection nor paid requisite stamp in Review Petition”. In my opinion, the learned District Judge could have called upon the defendants to pay the requisite court fees as also stamp in the proceedings in stead of

dismissing on this technical ground.

23. In view thereof, the orders dated 29.9.2018 passed in M.C.A. No.111/2012 and 110/2012 are required to be set aside. It is also necessary to set aside the order dated 24.3.2009 allowing Civil Appeal No.42/2001 as said order was passed on the premise that the defendants did not file cross-objections challenging adverse findings against them. As the cross-objection is restored to the original position, the order dated 24.3.2009 is also required to be set aside. Hence, C.R.A. and W.P. are disposed of in the following terms :

- i. Judgment and decree dated 24.3.2009 passed by the learned District Judge in Civil Appeal No.42/2001 is set aside. Civil Appeal No.42/2001 is restored to the file of the District Court for deciding it afresh.
- ii. The order dated 29.9.2018 passed by the learned District Judge in Misc. Civil Appeal/Application No.111/2012 dismissing the petition filed seeking review of the order dated 29.3.2009 is set aside.
- iii. The order dated 29.9.2018 passed by the learned District Judge in Misc. Civil Application No.110/2012 for restoration of the cross-objection is set aside.
- iv. Misc. Civil Application No.133/2005 shall be treated as cross-

objections to Civil Appeal No.42/2001 filed by the plaintiff. Defendants shall pay the deficit Court fees, stamp etc. within four weeks from today.

- v. The learned counsel for the parties agree that the parties will appear before the learned District Judge on 11.3.2019 and for that purpose no fresh notice be issued to them. The learned District Judge is requested to dispose of Civil Appeal and the cross-objections as expeditiously as possible and in any case within six months from fixing a suitable date of hearing.
- vi. All contentions of the parties on merits are expressly kept open.
- vii. Rule is made absolute in aforesaid terms with no order as to costs.
- viii. Order accordingly.

(R. G. KETKAR, J.)