

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application (Stamp) NO. 32765 OF 2018

Mr. Hayyat Badshah

...Applicant

Versus

Smt. Rukmani Krishna Turbhekar

...Respondent

....

Mr. Joel D'Souza a/w. R.M. Vanoo i/b. Iqbal Qureshi, Advocate for the Applicant.

Mr. R.M. Haridas, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 04th MARCH, 2019

P.C.

1. Heard Mr. Joel D'Souza, learned counsel for the applicant and Mr.R.M. Haridas, learned counsel for the respondent, at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908, the applicant, hereinafter referred to as the 'defendant' has challenged the judgment and decree dated 13.7.2011 passed by the learned trial Judge, Court room No.12 of the Court of Small Causes at Mumbai in R.A.E. & R. Suit No.384/664 of 2002 as also the judgment and decree dated 30.5.2018 passed by the Appellate Bench of the Small Causes Court at Bombay in (A-1) Appeal No.83/2011 and Cross Objection Exhibit-15 in that appeal.

3. The respondent, hereinafter referred to as the 'plaintiff', has instituted suit for recovery of possession of room No.4, Turbhekar

Chawl, situate at C.T.S. No.128, 128/1 to 5 of village Trombay, Taluka Kurla, Mumbai Suburban District, Trombay, Mumbai – 400 088 (for short, 'suit premises') invoking the grounds under Sections 15, 16(1)(b) and 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). By order dated 13.7.2011, the learned trial Judge decreed the suit under Sections 15 and 16(1)(b) of the Act. The learned trial Judge declined to pass decree under Section 16(1)(g) of the Act. Aggrieved by the eviction decree, the defendant preferred appeal challenging the decree passed on grounds 15 and 16(1)(b) of the Act. The plaintiff filed cross objection as the learned trial Judge declined to pass decree under Section 16(1)(g) of the Act. By the impugned order, the Appellate Court dismissed the appeal preferred by the defendant and allowed the cross-objection filed by the plaintiff. The Appellate Court decreed the suit under Sections 16(1)(b) and 16(1)(g) of the Act and declined to pass decree under Section 15 of the Act. It is against these orders, the defendant has instituted present Civil Revision Application.

4. In support of this application, Mr. D'Souza strenuously contended that the foundation of the suit filed by the plaintiff is the notice dated 21.4.2001 (Exhibit-27). In paragraphs-1, 3 and 4, the plaintiff repeatedly contended that the defendant is in possession of room No.2. He submitted that in the plaint initially filed, the plaintiff reiterated that the defendant is the tenant of room No.2. However,

during pendency of the suit, the plaintiff amended the plaint and substituted room No.2 by room No.4. He submitted that as the foundation of the suit itself is defective, the Courts below were not justified in passing the eviction decree on the ground under Section 16(1)(b) of the Act.

5. Mr. D'Souza invited my attention to the findings recorded by the learned trial Judge in paragraphs-16 to 21 as also the findings recorded by the Appellate Court in paragraphs-14 and 16 of the impugned orders dealing with ground under Section 16(1)(b) of the Act. In paragraph-17, the learned trial Judge referred to the certified copy of the register produced at Exhibit-44. In that extract, room number of the premises where demolition was carried out is not mentioned. The learned trial Judge however proceeded on the premise that the defendant has admitted in his written statement that the officer of the BMC had demolished the room which was in defendant's possession. Mr.D'Souza has taken me through the written statement filed by the defendant where the defendant denied that he illegally and unauthorizedly extended the room by constructing brick walls with AC cement sheet roof by encroaching upon open space situate in front of the suit premises. The defendant categorically came with the case that the suit premises is at it is since inception of tenancy and the defendant never made alterations and additions in the suit premises.

6. Mr. D'Souza further submitted that in the entire plaint, the plaintiff has not given dimensions or area of the suit premises and the alleged extension carried out by the defendant. In short he submitted that the plaintiff never gave any details about the area of the tenanted premises and the extension allegedly carried out by the defendant.

7. Mr. D'Souza submitted that insofar as the judgment of the Appellate Court is concerned in paragraph-16, the Appellate Court observed that as the defendant admitted that BMC has demolished some part of the suit premises, he is liable for eviction without any evidence being filed by the plaintiff. He submitted that the approach of the Appellate Court, with respect, is erroneous. He, therefore, submitted that the Courts below were not justified in passing eviction decree under Section 16(1)(b) of the Act.

8. Insofar as the ground under Section 16(1)(g) of the Act is concerned, Mr. D'Souza submitted that the learned trial Judge declined to pass the decree on that ground. As against this, the Appellate Court has considered this ground from paragraphs-17 to 20. In paragraph-17, the Appellate Court dealt with the case made out by the plaintiff as regards reasonable and bonafide requirement. In paragraph-18, the Appellate Court referred to as many as 17 judgments. In paragraph-20, the Appellate Court thereafter recorded its conclusion. In short, he submitted that without reappreciating the entire evidence on record as

also without recording any finding, the Appellate Court passed the decree of eviction under Section 16(1)(g) of the Act. He, therefore, submitted that the findings recorded by the Appellate Court for decreeing the suit under Section 16(1)(g) of the Act being perverse, application requires consideration.

9. On the other hand, Mr. Haridas supported the impugned orders. He submitted that insofar as the eviction decree under Section 16(1)(b) of the Act is concerned, the Courts below have concurrently decreed the suit. Insofar as the decree under Section 16(1)(g) of the Act is concerned, he submitted that having regard to the members in the family of the plaintiff and the premises presently in his occupation, the Appellate Court was justified in passing the decree of eviction under Section 16(1)(g) of the Act. He, therefore, submitted that no case is made out for interfering with the impugned orders.

10. 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, the plaintiff invoked the grounds under Sections 15, 16(1)(b) and 16(1)(g) of the Act. The trial Court decreed the suit under Sections 15 and 16(1)(b) and declined to pass decree of eviction under Section 16(1)(g) of the Act. As against this, the Appellate Court declined to pass decree under Section 15 of the Act and passed eviction decree under Sections 16(1)(b) and 16(1)(g) of

the Act. No argument was advanced before me as regards eviction decree passed under Section 15 of the Act. Insofar as the eviction decree under Section 16(1)(g) of the Act is concerned, the trial Court declined to pass decree. The Appellate Court has considered this aspect in paragraphs-17 to 20. In paragraph-17, the Appellate Court noted that the plaintiff came with the case that the suit premises is reasonable and bonafide required for use of his family. There are eleven members in the plaintiff's family and the premises where they are present residing is extremely insufficient to meet their family need. The Appellate Court thereafter proceeded to consider the contention of the defendant that the plaintiff has 5000 sq. ft. open space around their house at their disposal and the financial condition of the plaintiff is sound in order to acquire another premises. As against this, the defendant is not so financially sound.

11. The Appellate Court thereafter considered various decision in paragraph-18 and finally observed in paragraph-20 thus :

“20. Considering above evidence on record by keeping in mind the above mentioned position of the law it is neither the Court nor the tenant is supposed to presume need of the landlord as malafide. Since in this case the plaintiff have pleaded their need we do not find any reason to doubt or disbelieve it. Hence, we answer point No.3 in the affirmative. There is no reason to disbelieve need of the plaintiff in that situation if the decree on the ground of requirement is refused there will be great hardship to the plaintiff. Hence, we answer point No.4 accordingly.”

12. A perusal of paragraph-20, extracted hereinabove, shows that the Appellate Court without reappreciating the evidence on record, without discussing the evidence on record as also without recording any reason decreed the suit under Section 16(1)(g) of the Act. In my opinion, the Appellate Court was not justified in passing the eviction decree under Section 16(1)(g) of the Act more so when the trial Court declined to pass decree under Section 16(1)(g) of the Act. If the trial Court has declined to pass decree under Section 16(1)(g) of the Act and Appellate Court was inclined to pass decree even on that ground, the Appellate Court was under obligation to reappreciate the entire evidence on record. The Appellate Court has failed to exercise the powers in that regard.

13. In the case of **C. Venkata Swamy Vs. H.N. Shivanna (Dead) by Legal Representatives and others**, (2018) 1 SCC 604, the Apex Court has considered various decisions, namely,

- (i) **Kurian Chacko v. Varkey Ouseph** , AIR 1969 Ker 316
- (ii) **Santosh Hazari v. Purushottam Tiwari**, (2001) 3 SCC 179
- (iii) **Madhukar v. Sangram**, (2001) 4 SCC 756
- (iv) **H.K.N. Swami v. Irshad Basith**, (2005) 10 SCC 243
- (v) **Jagannath v. Arulappa**, (2005) 12 SCC 303
- (vi) **B.V. Nagesh v. H.V. Sreenivasa Murthy**, (2010) 13 SCC 530
- (vii) **SBI v. Emmsons International Ltd.**, (2011) 12 SCC 174
- (viii) **Union of India v. K.V. Lakshman**, (2016) 13 SCC 124.

14. In paragraph-11, Apex Court observed thus :

“11. It is a settled principle of law that a right to file first appeal against the decree Under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first Appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the Appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first Appellate Court to appreciate the entire evidence and arrive at its own independent conclusion, for reasons assigned, either of affirmance or difference.”

In view thereof, the Appellate Court was not justified in passing eviction decree under Section 16(1)(g) of the Act.

15. Insofar as the decree under Section 16(1)(b) of the Act is concerned, the learned trial Judge has considered this ground in paragraphs-16 to 21. In paragraph-17, the trial Court dealt with the written statement filed by the defendant. In the written statement, the defendant contended that since inception of the tenancy the room is as it is and he never extended any portion of the suit premises and never encroaching open space in front of the suit premises and **the plaintiff have made false and bogus complaints with managing the BMC and Police and demolished the part of the premises illegally and unauthorizedly which is existing since last forty year**. The defendant contended that the room or suit premises is as it is since inception of tenancy and he never made any alteration and addition in the suit premises and the plaintiff never gave any details about the same.

[emphasis supplied]

16. It is relevant to note that if at all it is the case of the defendant that since inception the premises is in the same condition and there is no extension, there is no explanation worth the name as to why the defendant did not take any steps against the plaintiff and the officers of the Corporation for demolishing the tenanted premises. It is in this context, the learned trial Judge observed in paragraph-17 that the defendant has admitted demolition of part of the suit premises by officers of the Corporation. The learned trial Judge, therefore, observed that the contention of the plaintiff that the officer of the Corporation has partly demolished the structure raised by the defendant, appears to be quite probable and reliable.

17. The learned trial Judge also referred to the certified copy of the register Exhibit-44 and in particular Sr. No.2786 where there is reference about notice bearing No.ME/B-II/354(A)/508/2000-2001 and also about the name of the defendant and the description of the unauthorized work. The plaintiff also examined PW-3 Abhimanyu Pawaskar, Officer of BMC. PW-3 deposed about the notice number and its date in his evidence which is reflected in the copy of register Exhibit-44. The learned trial Judge observed that during the course of cross-examination, the evidence of this witness was not materially shattered. The defendant contended that there is no reference of room number in the copy of register Exhibit-44. The learned trial Judge observed that

considering the specific number of notice and its date mentioned in the register Exhibit-44 and the similar number and date deposed by the witness, non-mentioning of room number in Exhibit-44 is not of much importance particularly when the defendant admitted this fact in his written statement. I do not find that the learned trial Judge has committed any error in arriving at this conclusion.

18. In paragraph-19, the learned trial Judge has referred to the photographs produced on record vide Exhibits-81/1 to 8 and 30/1 to 6. The photographs at Exhibits-30/1 to 6 were produced by the plaintiff. Said photographs were referred by the Advocate for the defendant to the plaintiff during cross-examination and therefore they were marked as Exhibits. The learned trial Judge observed that the very fact that those photographs were confronted to the plaintiff's witness during cross-examination is sufficient to hold that the photographs are of the suit premises. The learned trial Judge observed that the photographs produced by the defendant are of the year 2009 and the photographs produced by the plaintiff are of 22.10.2000 i.e. prior to filing of the suit. After considering the photographs, the learned trial Judge recorded a categorical finding that the defendant has raised a structure on the open space situate in front of the suit premises. In paragraph-20, the learned trial Judge also recorded a finding that the construction carried out by the defendant is of permanent nature.

19. Insofar as the judgment of the Appellate Court is concerned, the Appellate Court has dealt with this ground in paragraphs-14 and 16. In paragraph-16, the Appellate Court observed that it is an admitted position that BMC has demolished some part of the suit premises. The Appellate Court thereafter proceeded to consider the evidence of PW-3 BMC officer Mr. Pawaskar who substantiated the case of demolition. The Appellate Court also observed that no evidence was produced on record to show either to substantiate that the so called structure was there since inception of the tenancy, or it was consented by the plaintiff. Thus, the Appellate Court after reappreciating the evidence on record, has affirmed the finding of the learned trial Judge on the ground under Section 16(1)(b) of the Act.

20. The defendant is not in a position to demonstrate that the findings recorded by the Courts below on the ground of eviction under Section 16(1)(b) of the Act are perverse, being based upon no evidence or that they are contrary to the evidence on record. The defendant is 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 basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, Civil Revision Application fails and the same is dismissed with no order as to costs.

21. At this stage, Mr. D'Souza orally applies for continuation of the interim order dated 4.1.2019 for a period of three months from today. Mr.D'Souza states that the applicant is in possession and nobody else is in possessions. He has neither created third party interest nor parted with the possession. He will hereafter neither create third party interest nor part with the possession. He further states that the applicant and all adult family members residing in the suit premises are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

22. Having regard to the fact that applicant desires to challenge this order before the Apex Court, in my opinion, ends of justice would be met by continuing the interim order dated 4.1.2019 for a period of three months from today subject to the applicant and all adult members residing in the suit premises giving usual undertaking to this Court within two weeks from today with advance copy to other side incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that they will pay the arrears of rent, if any, to the respondent

within two weeks from today; and

- (v) that in case the applicant is unable to obtain suitable orders from the higher Court within three months from today, they will deliver vacant and peaceful possession of the suit premises to the respondent.

23. In view thereof, notwithstanding dismissal of Civil Revision Application, interim order dated 4.1.2019 shall remain in force for a period of three months from today, subject to the applicant filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. It is made clear that in case the applicant does not file undertaking in the above terms and/or commits breach of any of the clauses of the undertaking, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)