

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 104 OF 2019

Rujana Shiva Perumal Mudaliar

...Applicant

Versus

Leelabai Baburao Gaikwad

...Respondent

....

Mr. Rajesh S. Datar, Advocate for the Applicant.

Mr. Aswini R. Singh, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 24th APRIL, 2019

P.C.

1. Heard Mr. Rajesh Datar, learned counsel for the applicant and Mr. Aswini R. Singh, learned counsel for the respondent, at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as the 'defendant', has challenged the judgment and decree dated 25.1.2010 passed by the learned Judge, Court Room No.17 of the Court of Small Causes at Mumbai in R.A.E. & R. Suit No.53/98 of 1999 as also the judgment and decree dated 10.9.2018 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.130/2010. By order dated 25.1.2010, the learned trial Judge decreed the suit filed by the respondent, hereinafter referred to as the 'plaintiff', invoking the grounds under Sections 12, 13(1)(b) and 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short,

'Act') and directed the defendant to hand over vacant and peaceful possession of room No.4, Gaikwad Sadan, Gamdevi Road, Bhandup (West), Mumbai – 400 078 (for short, 'suit premises') to the plaintiff within a period of three months from the date of the order. The learned trial Judge also ordered enquiry into mesne profit as per Order XX Rule 12 of C.P.C. to be held from the date of the order till delivery of vacant possession of the suit premises to the plaintiff.

3. Aggrieved by this decision, the defendant preferred appeal. By order dated 10.9.2018, the Appellate Court confirmed the decree under Sections 12 and 13(1)(b) of the Act and declined to pass the decree under Section 13(1)(g) of the Act. It is against these orders, the defendant has instituted present C.R.A.

4. In support of this application, Mr. Datar submitted that the suit was filed on behalf of the plaintiff by her husband on the basis of the Power of Attorney. The husband of the plaintiff, however, did not enter witness box. The plaintiff gave another Power of Attorney to her son who entered witness box. He submitted that the Power of Attorney executed by the plaintiff in favour of her son is defective as it does not mention Serial number of Notary. The Power of Attorney was also not notarized. The seal of the Notary was to the effect that the document was attested and not notarized. He submitted that there is non-compliance of Notary Rules. In short, he submitted that on the basis of

the defective Power of Attorney, the son of the plaintiff could not have deposed on behalf of the plaintiff. The evidence adduced by the son of the plaintiff, therefore, deserves to be discarded. He further submitted that the contents of the plaint are not proved as the husband of the plaintiff, who was also her Power of Attorney, did not enter witness box.

5. Mr. Datar further submitted that the suit premises is situate in an area which is declared as slum area under the Maharashtra Slum Areas (Improvement, Clearance And Redevelopment) Act, 1971 (for short, 'Slum Act'). He relied upon the declaration dated 5.10.1979 issued under the Slum Act. The plaintiff instituted the suit without complying the requirements laid down under Section 22 of the Slum Act. The Courts below were, therefore, not justified in decreeing the suit.

6. Mr. Datar has taken me through the impugned orders passed by the Courts below and submitted that the Courts below were not justified in passing decree under Sections 12 and 13(1)(b) of the Act.

7. On the other hand, Mr. Singh supported the impugned orders. He submitted that the Courts below after considering the evidence on record have decreed the suit. Insofar as the contention of the defendant that son of the plaintiff was not competent to depose in view of the defective Power of Attorney is concerned, the Appellate

Court has considered this aspect in paragraph-22. In paragraph-22, the Appellate Court noted that PW-1 Vijay is son of the plaintiff. He is admittedly residing with the plaintiff. He has knowledge of the facts of the case and the developments. He has deposed on every aspect in the matter. In such circumstances, his evidence cannot be described as he is having personal knowledge.

8. Insofar as the contention based on declaration under Section 4 of the Slum Act is concerned, he submitted that on 30.6.1977 the Competent Authority declared the area where the suit premises is situate as slum area amongst other areas. Said declaration was challenged by filing appeal before the Slum Tribunal. By order dated 14.6.1979, the Tribunal allowed the appeals and set aside the declaration dated 30.6.1977. He submitted that on 5.10.1979 notification was issued under the Slum Act. The note appended to that notification, however, clarified that this notification will not be applicable to the properties in respect of which the appeals against declaration dated 30.6.1977 were preferred before the Slum Tribunal and where the declarations were set aside by the Tribunal.

9. In the present case, by order of the Tribunal dated 14.6.1979 the declaration dated 30.6.1977 was set aside. It is nobodies case that after 5.10.1979 any declaration is made. In view thereof, he submitted that as the notification dated 30.6.1977 was set aside, it is

not incumbent on the plaintiff to comply Section 22 of the Slum Act.

10. Insofar as the contention about the Courts below committing error in passing eviction decree under Sections 12 and 13(1)(b) of the Act is concerned, he submitted that after appreciating the evidence on record, the Courts below have concurrently decreed the suit on these grounds. He, therefore, submitted that no case is made out for interfering with the impugned orders.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. By order dated 1.4.2019, the parties were directed to address on the question as to whether the respondent/plaintiff can support the eviction under Section 13(1)(g) of the Act without filing cross objections in view of the decision in **Banarsi Vs. Ramphal, (2003) 9 SCC 606**. Mr. Singh submitted that the plaintiff is not pressing the decree under Section 13(1)(g) of the Act.

12. Insofar as the contentions of the defendant that the contentions raised in the plaint are not proved by examining the husband of the plaintiff and that Power of Attorney given by the plaintiff in favour of her son is defective are concerned, a perusal of the plaint shows that the plaintiff has claimed possession of the suit premises *inter alia* contending that she requires the suit premises reasonably and bonafide for use and occupation of herself and her

family members. Her family is very big consisting of about 30 members and all are residing in the premises in her occupation and present room of the plaintiff is very small and insufficient. Thus the plaintiff has claimed possession of the suit premises on the ground that the premises in her occupation are insufficient as there are 30 members in her family. It is not in dispute that PW-1 Vijay is son of the plaintiff and is residing with the plaintiff. It is in that context, the Appellate Court recorded a finding in paragraph-22 to the effect that PW-1 Vijay has knowledge of the facts of the case and developments. He has deposed on every aspect of the matter. In view thereof, even if I accept the submission of Mr. Datar that the Power of Attorney given by the plaintiff in favour of PW-1 was defective, his evidence cannot be discarded. PW-1 has personal knowledge. For the reasons recorded in paragraph-22 of the Appellate Court, I do not find any merit in the submissions of Mr. Datar.

13. Insofar as the contention that the suit premises is situate in the slum area is concerned, it is no doubt true that initially on 30.6.1977, declaration was made under Section 4 of the Slum Act. The area where the suit premises is situate was also declared as slum area. Said declaration was, however, challenged by filing appeal before the Slum Tribunal. By order dated 14.6.1979, the Tribunal set aside the notification. On 5.10.1979 the notification was issued. The note appended to that notification is to the following effect :

“This Notification will, however, not be applicable to the properties in respect of which Appeals against the aforesaid declaration dated 30.06.1977 have been preferred to the Slum Tribunal and are subject to injunction from it or where the declaration have been set aside by the Tribunal.”

14. A perusal of this note clearly shows that the notification dated 5.10.1979 is not applicable as the declaration dated 30.6.1977 is set aside by the Tribunal. I, therefore, do not find any merit in the submission of Mr. Datar that the suit is not maintainable in view of Section 22 of the Slum Act.

15. Insofar as the grounds of eviction are concerned, the learned trial Judge has considered the ground under Section 12 of the Act from paragraphs-20 to 29. It has come on record that the plaintiff has issued demand notice dated 24.3.1995 calling upon the defendant to pay entire arrears of rent from March, 1994 to February, 1995 @ Rs.24/- excluding permitted increases and municipal taxes, amounting to Rs.288/-. The defendant gave reply on 25.4.1995 and denied her liability of payment of rent and claim of the plaintiff. The plaintiff filed suit on 21.1.1999. The defendant filed written statement on 8.6.1999 vide Exhibit-29. Issues were framed on 7.4.2003. On the same day, the defendant took out interim notice No.1879/2003 for depositing arrears of rent in the Court. Section 12(3) of the Act reads thus :

“12. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and

permitted increases .--

(1) xxxx

(2) xxxx

(3) No decree for eviction shall be passed by the Court in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and together with simple interest on the amount of arrears of such standard rent and permitted increases at the rate of nine per cent, per annum; and thereafter continues to pay or tenders in Court regularly such standard rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the Court.

Provided that, the relief provided under this sub-section shall not be available to a tenant to whom relief against forfeiture was given in any two suits previously instituted by the landlord against such tenant.”

16. A perusal of the above extracted provision shows that if on the first date of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and together with simple interest on the amount of arrears of such standard rent and permitted increases @ 9% per annum, the Court is precluded from passing the eviction decree. In the present case, the defendant has filed application on 7.4.2003 for depositing the arrears of rent in the Court. The issues were framed on 7.4.2003 and therefore this is the first date of hearing. Thus the defendant did not comply the requirements laid down in Section 12(3) of the Act.

17. In paragraph-21, the learned trial Judge observed that the

receipt at Exhibit-7 revealed that the defendant had deposited rent for the period from 12.8.2004 to 8.11.2005 and thereafter from January, 2006 to December, 2006. Though the defendant contended that the defendant had deposited the rent upto date (i.e. on the date of passing of the trial Court's order), but, no receipt or any material is placed on record except Exhibit-7. Thus during pendency of the suit, the defendant was not regularly depositing the rent.

18. As far as the Appellate Court is concerned, the Appellate Court has considered this aspect from paragraphs-25 to 35. In paragraph-32, the Appellate Court noted that though the defendant claimed to have remitted the amount by money-order, it was returned back as money-order was sent at the address of Jolly Sadan and not on the address of Gaikwad Sadan. The conduct of the defendant in tendering the rent does not appear bonafide.

19. In paragraph-33, the Appellate Court noted that the defendant has not complied the provisions of Section 12 of the Act and thereby rendered herself for eviction. In paragraph-34, the Appellate Court noted that the issues were framed on 7.4.2003 and the defendant took out interim notice on the same day. The Appellate Court, therefore, held that the defendant was not ready and willing to pay the rent and also there is non-compliance of Section 12(3) of the Act. The findings recorded by the Courts below are based upon the appreciation of

evidence on record. The findings cannot be termed as perverse either based on no evidence or contrary to evidence on record. I, therefore, do not find that the Courts below have committed any error in decreeing the suit under Section 12 of the Act.

20. As far as the decree under Section 13(1)(b) of the Act is concerned, the learned trial Judge has considered this aspect from paragraphs-30 to 37. The Appellate Court has considered this ground from paragraphs-36 to 42. In paragraph-39, the Appellate Court referred to the evidence of PW-2 Vinodkumar and observed that from the evidence it is clear that construction of B.M. wall, rolling shutters and carrying out construction was substantiated. DW-1 Ranjana also admitted that there was partition wall between shop and roof and shop is fitted with rolling shutter to the entrance of room. The evidence adduced by the plaintiff supported their claim about carrying out construction without seeking consent of the plaintiff and in violation of the permission granted by B.M.C. to her. The Appellate Court also turned down the submission of the defendant that she carried out tenantable repairs for the purpose of safety and to prevent damage to the suit premises from rain water by observing that the BMC would not have revoked its permission and would not have directed her to demolish the said construction. In paragraph-42, the Appellate Court has observed that the defendant had constructed B.M. wall, raised the

height of the premises and has placed rolling shutters in the garb of carrying out repairs of roof which has collapsed due to heavy rains. Such construction by no stretch of imagination can be said to be a temporary construction or structure. Thus, the findings recorded by the Courts below are based on evidence on record.

21. Thus, after considering the material on record, I do not find that the Courts below have committed any error in passing the decree under Sections 12 and 13(1)(b) of the Act. The defendant is not in a position to demonstrate that the findings recorded by the Courts below 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, no case is made out for invocation of powers under Section 115 of C.P.C. Civil Revision Application fails and the same is dismissed with no order as to costs.

22. At this stage, Mr. Singh seeks permission to withdraw the amount of contractual rent and compensation deposited by the defendant in the Small Causes Court at Mumbai. In view thereof, the plaintiff is permitted to withdraw the amount of contractual rent and

compensation deposited by the defendant in the Small Causes Court at Mumbai unconditionally.

23. At this stage, Mr. Datar orally applies for stay to the eviction decree for a period of three months from today. Mr.Datar 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 using/residing in the suit premises are ready and willing to give usual undertaking within three weeks from today. Learned Counsel for the respondent opposes said prayer.

24. 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 staying eviction decree for a period of three months from today subject to the applicant and all adult members using the suit premises giving usual undertaking to this Court within three 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 of the suit premises;
- (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 three 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.

25. In view thereof, notwithstanding dismissal of Civil Revision Application, eviction decree shall remain stayed for a period of three months from today, subject to the applicant filing undertaking in the aforesaid terms within three 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 on 7.6.2019. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)