

Mr. Pradeep Thorat a/w. Mr. Soura Subha Ghosh and Ms Parinaz Nagporwala i/b. M/s. Hariani & Co. for Petitioner.
Ms Shivani Khanna i/b. FZB & Associates for Respondents.

P.C. :

2. This Petition takes exception to the order dated 03.12.2018 passed by the learned Judge, Court Room No.10 of the Court of Small Causes at Bombay below exhibit-44 in R.A.E.Suit No.1104/1977 of 2004. By that order, the learned trial Judge allowed the application made by the respondents under Section 28 of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the petitioner-defendant to allow the plaintiffs to take inspection of the flat admeasuring 1856.75 sq.ft. situate on the second floor of Banoo Manor, Dady Seth, 2nd Cross Lane, Chowpatty, Mumbai 400 007 (for short 'suit premises') with liberty to take measurement and photographs of the entire suit premises along with their plumbers, servants, agents, representative namely, Vinay Jha from inside by opening the outer door main lock of the suit premises and also by opening all locks on any of the rooms inside the suit premises including all toilets and WCs to find out leakage. The learned trial Judge also appointed Mr. Darayas P. Chacha, Advocate as a Court Commissioner for inspection of the suit premises. The Court

Commissioner is directed to submit report on the leakage thereof and the nature and condition of the suit premises with photographs.

3. Rule. Ms Khanna waives service for the respondents. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. Respondents-plaintiffs have instituted Suit for recovery of possession of the suit premises inter alia on the ground of non-user as contemplated by Section 16(1)(n) of the Act as also on the ground that defendant has committed acts contrary to the provisions of clause (o) of Section 108 of the Transfer of Property Act, 1882 (for short 'T.P. Act') read with Section 16(1)(b) of the Act. Defendant has filed written statement dated 22.12.2004 resisting the Suit. Plaintiffs thereafter amended the plaint and incorporated paragraph 20-A inter alia contending that in paragraphs 8, 9 and 13, defendant has denied plaintiffs' title. Thus, plaintiffs are entitled to evict the defendant on the ground of denial of their title also.

5. Defendant took out application exhibit-35 for framing additional issue. By order dated 23.07.2013, the learned trial Judge allowed the application exhibit-35. Issues No.2 and 3 at exhibit-10 were deleted and following issues were framed as additional issues:

- “I] Whether the plaintiffs prove that they are landlords of the suit premises?
- II] Whether the defendant has denied the title of the plaintiffs and the plaintiffs are entitled for decree of eviction?
- III Whether the plaintiffs prove that the defendant has carried out additions and alterations of permanent nature in the suit premises?”

6. During the pendency of the Suit, plaintiffs took out application for inspection of the suit premises on or about 30.10.2018. Along with the application, plaintiffs annexed following documents:

- i. letter dated 19.10.2018 addressed by the plaintiff No.1 to the defendant (page 57);
- ii. letter dated 19.10.2018 addressed by the plaintiff No.1 to the defendant (page 56);
- iii. letter dated 23.10.2018 addressed by the plaintiff No.1 to the defendant (page 59);
- iv. letter dated 26.10.2018 addressed by the plaintiff No.1 to the defendant (page 60);
- v. letter dated 20.10.2018 addressed by the defendant to the plaintiff No.1 (page 66), enclosing therewith photographs of leakage from the third floor flat.

7. Defendant filed reply dated 15.11.2018 opposing the application. By the impugned order, the learned trial Judge has allowed the application, as indicated earlier. It is against this order, defendant has instituted the present Petition.

8. In support of this Petition, Mr. Thorat submitted that the learned trial Judge has discarded several judgments relied by the defendant to contend that the application filed by the plaintiffs is for collection of evidence, which is liable to be rejected. The learned trial Judge rejected that submission by observing that the said authorities are not applicable as they are in respect of appointment of Court Commissioner to make local investigations as per Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). He submitted that the learned trial Judge has also directed the Commissioner so appointed to submit report on the leakage thereof and the nature and condition of the suit premises with photographs. The said direction is also liable to be set aside. At the

highest, Commissioner may prepare the report and submit it to the plaintiffs instead of submitting the report to the Court. He submitted that as on date, there is no water leakage from the suit premises, and therefore, it is not necessary to permit plaintiffs to take inspection of the suit premises.

9. Mr. Thorat submitted that in paragraph 8 of the written statement, defendant contended that plaintiffs have not even disclosed as to how and when they have become the owners of the suit building, and landlords of the defendant in respect of suit premises. No attornment letter has been issued to the defendant at any time and no rent of the suit premises has been recovered by the plaintiffs from the defendant. The defendant contended that no rent has been collected by the plaintiffs from any of the tenants in the suit building. The defendant has put the plaintiffs to the strict proof of the derivative title of the plaintiffs in respect of the suit premises and their right to file the suit against the defendant. He further submitted that in pursuance of application exhibit-35 filed by the defendant for framing additional issues, by order dated 23.07.2013, the learned trial Judge framed additional issues. He, therefore, submitted that unless and until, plaintiffs establish their ownership of the suit premises as also relationship of landlord and tenant between the parties, the learned trial Judge was not justified in allowing the application. He has taken me through the impugned order, and in particular paragraph 14. He further submitted that the learned trial Judge failed to appreciate that the application was made by the plaintiffs when their witness was under cross-examination. For all these reasons, he submitted that the Petition requires consideration.

10. On the other hand, Ms Khanna supported the impugned order. She relied upon the decision of this Court in ***Kamlabai Laxman Mutraj Vs. Bherumal Verimal Haran***, 2009 (2) Mh.L.J. 213, and in particular

paragraphs 5 and 6 thereof. She submitted that the learned trial Judge was justified in directing the Court Commissioner to submit the report. She submits that plaintiff No.1 is present in the Court. On instructions, she states that instead of appointing Advocate as Court Commissioner, plaintiffs will appoint licensed Architect for inspection of the suit premises.

11. 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 Suit is instituted invoking the grounds under Section 16(1)(n) and 16(1)(b) of the Act read with Section 108(o) of the T.P. Act. Mr. Thorat contended that unless and until relationship of landlord and tenant is established by the plaintiffs, the learned trial Judge was not justified in allowing the application. I do not find any merit in this submission. In paragraph 10 of the written statement, defendant contended that plaintiffs requested in the year 2003 about carrying out certain repairs / renovations to be carried out especially in the toilet areas of the suit premises as there was leakage from the suit premises to the first floor. Plaintiffs further claimed that there was also leakage from the suit premise to their office on the first floor. It was at the request of the plaintiffs that the repair / renovation of the toilets and other areas in the suit premises was undertaken. Thus, prima facie, defendant recognized the status of the defendant as a landlord otherwise defendant would not have acceded to the request of the plaintiffs. In paragraph 14 of the impugned order, the learned trial Judge also observed that there is no dispute that plaintiffs are the landlords of the suit premises and the defendant is a tenant. Section 28 of the Act reads thus,

“28. Inspection premises.- The landlord shall be entitled to inspect the premises let or given on licence, at a reasonable time after giving prior notice to the tenant, licensee or occupier.”

12. It is material to note that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 was repealed and the present Act is brought in force from 31.03.2000. In the old Act, there was no provision enabling the landlord to take inspection. The said lacuna is removed by incorporating Section 28 in the Act. Thus, Section 28 of the Act recognizes right of the landlord to take inspection of the premises let or given on licence at a reasonable time, after giving prior notice to the tenant, licensee or occupier, as the case may be. In the present case, a perusal of the record indicates that plaintiffs had given notice to the defendant-tenant for inspection of the suit premises. The defendant has resisted the application by relying upon the judgments referred in paragraph 10. The decisions relied by the defendant were in respect of appointment of Commissioner under Order XXVI, Rule 9 of C.P.C. In paragraphs 5 and 6 of **Kamlabai Laxman Mutraj** (*supra*), the learned Single Judge has observed thus,

“5. I am of the view that the Inspection just cannot be a mere formality of a visual inspection of the premises. It is always with some purpose and intention. The landlord in a given case may take with him the competent person including architect or a person who can record the condition of the premises which includes the Commissioner appointed by the Court or such other person. Once there is a clear and specific provision provided under the Maharashtra Rent Act, the general provision of appointment of C.P.C. cannot be read into it to restrict the right of the Landlord to inspect the premises. There may be joint inspection also.

6. In this background, in such proceedings when the landlord moved the application for appointment of Commissioner for proper measurements and inspection of the premises, it just cannot be treated an application as contended under Order 26 Rule 1 of the CPC only.”

13. I respectfully agree with the view taken in the above decision. In view thereof, the learned trial Judge has rightly held in paragraph 14 that authorities cited by the defendant are not applicable while considering the application made under Section 28 of the Act.

14. That brings me to the contention of Mr. Thorat that the learned trial Judge was not justified in directing the Commissioner to submit report on the leakage thereof and the nature and condition of the suit premises with photographs. He also invited my attention to the report dated 13.11.2018 of A. D. Shintre Consultants, Architects and Consulting Engineers to contend that as on date, there is no leakage from the third floor and consequently, there should be no leakage from the second floor onwards.

15. I do not find any merit in the submission of Mr. Thorat that Commissioner so appointed should not be directed to submit a report. As held by this Court in **Kamlabai Laxman Mutraj** (*supra*), inspection of the suit premises is not a mere empty formality of a visual inspection of the premises. It is always with some purpose and intention. If the Commissioner so appointed takes inspection of the record, he is bound to prepare record and submit it to the Court lest it will be contended that Commissioner even did not visit the suit premises for inspection. The very purpose of inspection is to prepare notes and report so as to facilitate decision in the matter.

16. Ms Khanna, on instructions, states that plaintiffs will appoint licensed Architect for inspection of the suit premises instead of Advocate as a Court Commissioner.

17. In view thereof, impugned order is partly modified. Clause 3 of the operative part of the order dated 03.12.2018 stands deleted and in its place, plaintiffs are at liberty to appoint licensed Architect for inspection of the suit premises. Rule is partly made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)