

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.68 OF 2019

Dr. Madan Ramvilas Somani,
Age 74 years, Occu. Doctor,
R/o H. No.2286, Somani Bhavan,
Near Sarvamat press, Ward No.7,
Shrirampur, District Ahmednagar ... APPLICANT
(Orig.Deft.No.2/Appellant)

VERSUS

1. Samit Abhaykumar Muttha,
Age 38 years, Occu. Business,
R/o Shivaji road, Jain Sthanak,
Ward No.3, Shrirampur,
District Ahmednagar
2. Mangal Vitthal Zavar,
Age 59 years, Occu. Household,
R/o Geeta Bhavan, Shivaji Road,
Shrirampur, District Ahmednagar
3. Snehal Vitthal Zavar,
Age 27 years, Occu. Education,
R/o Geeta Bhavan, Shivaji Road,
Shrirampur, District Ahmednagar
4. Dr. Ashish Madan Somani,
Age 45 years, Occu. Doctor,
R/o Chaitanya Accident Hospital,
Khatod Market, Ward No.4, Shivaji Road,
Shrirampur, District Ahmednagar
5. Dr. Sau. Archana Ashish Somani,
Age 43 years, Occu. Doctor,
R/o Chaitanya Accident Hospital,
Khatod Market, Ward No.4, Shivaji Road,
Shrirampur, District Ahmednagar
6. The State of Maharashtra
(Copy to be served on Govt. Pleader,
High Court of Bombay,
Bench At Aurangabad) ...**RESPONDENTS**
(No.1 Orig. Plaintiff)
Nnos.2 to 5 Orig.Defts.)

((2))

.....
Shri Nikhil S. Jaju, Advocate for applicant
Shri V.S. Bedre, Advocate for respondent No.1
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CORAM: R.G. AVACHAT, J.

Date of reserving judgment : 30th September, 2019

Date of pronouncing judgment : 3rd February, 2020

J U D G M E N T :

Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel appearing for the parties.

2. The challenge in this revision application is to the judgment and decree dated 21/10/2016, passed by the Court of 2nd Jt. Civil Judge, Junior Division, Shrirampur, in a suit being Regular Civil Suit No.116/2005, and affirmed by the Court of District Judge-1, Shrirampur in Regular civil Appeal No.63/2016, on 7/12/2018.

By the impugned judgment and decree, the applicant and respondents No.2 to 5 have been directed to hand over vacant possession of the suit premises to the respondent No.1/ landlord. The original defendant No.2 is, therefore, before this Court.

3. Heard Mr. Jaju, learned counsel for the applicant and Mr. Bedre, learned counsel for respondent No.1. Perused

the impugned judgments.

The suit premises are a shop Block (G-6), in Municipal House No.4896, situated at Shrirampur, District Ahmednagar. It originally belonged to one Prataprao Boravake and his better half - Pramodini. The respondent/ landlord purchased the suit premises from them under a registered sale deed dated 13/7/2004. The original defendant No.1 - Vitthal was in occupation of the suit premises as a tenant. He would run electrical appliances shop in the suit premises. Pending the suit, he passed away. His legal representatives were brought on record.

4. The respondent/ landlord filed the suit for possession of the suit premises on the grounds of sub-letting, non-user, bonafide requirement and permanent construction. The trial Court decreed the suit on all the grounds, except permanent construction. The appellate Court confirmed the judgment and decree passed by the trial Court on the grounds of sub-letting and non-user of the suit premises. The appellate Court negatived the claim for possession of the suit premises on the ground of bonafide requirement. The appellate Court disagreed with the findings of the trial Court in not granting the relief of possession on the ground of permanent construction. It set aside the said finding and has

passed the decree for possession on the ground of permanent construction.

5. The case of the respondent/ plaintiff in short was that, the original defendant No.1 sub-let the suit premises to his son-in-law (applicant – defendant No.2) for running of his medical clinic therein. Thus, the original tenant did not use the suit premises for a period over six months next before filing of the suit. It was also the case of the respondent/ landlord that the defendant No.1/ tenant demolished eastern wall of the suit premises, fixed/ installed an iron staircase so as to have an access to upstairs premises, a room within room (suit premises) was made (sub-shop) for purpose of running a Pathology Laboratory besides construction of a water tank.

6. The suit was contested on the ground of having been barred by limitation. It was also the case of the applicant and other contesting defendants that the applicant came into possession of the suit premises since before 1/2/1973 and that too with the consent of original landlord/s. The alleged construction was stated to be not of a permanent nature. It was also raised/ made with an express consent of the original landlord.

7. Mr. Nikhil S. Jaju, learned counsel would submit that there was no cause of action for filing the suit. The

applicant has been a protected tenant on account of having been inducted since before 1/2/1973. His induction in the suit premises was with the consent of original landlord/s. A medical clinic has been run in the suit premises with an express consent of original landlord/s. The appellate Court ought to have given reasons for upsetting the finding of the trial Court on the issue of permanent construction. Burden of proof was wrongly placed on the contesting defendants. Some material documents were sought to be produced before the trial Court. The Court, however, declined permission for such production. Although the applicant unsuccessfully challenged the said order in a Writ Petition, it being an interlocutory order, the said issue can very well be raised in the Writ Petition. The respondent/ landlord did not prefer any appeal against the judgment and decree refusing his claim for possession on the ground of permanent construction. The appellate Court, therefore, ought to have ignored the said claim. The respondent/ landlord did not examine original landlords of the suit premises. The courts below, therefore, ought to have raised an adverse inference against the respondent/ landlord. The original landlord/s had never ever raised any objection as regards occupation of the applicant in the suit premises and whatever alterations made therein. Had there really been any breach committed by the applicant, it

would have reflected in the sale deed, whereunder the respondent/ landlord purchased the suit premises from erstwhile landlord/s. Whatever grounds were available for eviction, have to be deemed to have been waived by erstwhile owners of the suit premises. Number of witnesses had been examined by contesting defendants. For no reason, evidence of these witnesses has been disbelieved. Some of the witnesses were adjacent occupants. There can be no distinction between reliable oral evidence and documentary evidence. The Trial Court ought to have relied upon oral evidence of the witnesses examined on behalf of the applicant. In view of learned Advocate, findings recorded by both the Courts prima facie need to be interfered with. He, therefore, urged for admission of the revision application.

8. Shri V.S. Bedre, learned counsel appearing for respondent No.1/ landlord brought to the notice of this Court, an invitation card of inauguration of a hospital in a newly constructed big premises by the applicant.

9. I have considered the submissions made by learned counsel appearing for the applicant. Admittedly, the suit premises originally belonged to one Prataprao Boravake and his better half Pramodini. Original defendant No.1 was a tenant, in possession of the suit premises. He would run a

shop of electrical appliances. The respondent/ plaintiff purchased the suit premises under registered sale deed dated 13/7/2004.

10. Respondent No.4 is son of the applicant while the respondent No.5 is wife of respondent No.4. Undisputedly, the original tenant / defendant No.1 parted with exclusive possession of the suit premises in favour of the applicant. It is thus said to be a case of subletting. The applicant came with a case of having been in possession of the suit premises since 1970 with the consent of original landlord/s. According to the applicant, he has been running his O.P.D. Clinic in the suit premises since his induction. The Trial Court found the case of the applicant to be inconsistent with the evidence on record. The applicant did not examine the original landlord of the suit premises. The name of original defendant No.1 figures as a tenant in the sale deed executed between original landlord/s and the plaintiff/ respondent. As such, there is no evidence to suggest the original landlord/s to have ever recognised the applicant to be a tenant of the suit premises.

11. It was the case of the applicant that as he came into possession of the suit premises since before 1/2/1973, he became a protected tenant. There is, however, no evidence to indicate the applicant to have been in possession since

before the aforesaid date. The applicant came with a case to have come into possession of the suit premises in the year 1970. There is, however, evidence to indicate that, from August 1971 to January 1972, he did practice at G.T. Hospital, Mumbai. From February 1972 to 31/3/1972, he served with the Orthopaedic Department of the said hospital. In June 1971, the University issued him eligibility certificate and in August 1972, the Indian Medical Council issued him Good Standing Certificate. There is also evidence to indicate him to have done post-graduation (Master in Surgery) in the year 1972. Since the applicant had been serving and taking education as well in Mumbai during the years from 1970 to 1972, the trial Court has rightly found him to have not come into possession of the suit premises for running of his O.P.D. Clinic since 1970.

12. True, that there is some evidence to indicate the applicant to have been in possession of the suit premises from 1975 till date. Necessarily, the original defendant No.1/tenant had not been using the suit premises for the purpose for which those were let for a period of six months preceding the institution of the suit. The Trial Court has granted decree on both these counts. The appellate Court has confirmed the same.

13. It appears that, in the written statement, a ground of limitation had been raised (Article 67 of the Limitation Act). It appears that, the applicant did not press for the same. No issue in that regard was framed. It appears that, the applicant did not insist the Trial Court for framing of such issue. Even there being no issue, the applicant could have raised the said ground in his submissions before the Courts below since the suit for possession on the ground of subletting appears to have been filed long long after the period of 12 years was over when the cause of action had accrued. No one else but the applicant has to blame himself. It also appears that, though ground of waiver has been faintly mentioned, it was not argued before the Courts below. I have found the findings on both the aforesaid issues consistent with the evidence on record. It is reiterated that, the issue of limitation or waiver appear to have been given up.

14. So far as regards decree on the ground of permanent construction is concerned, it is to be stated that, the said ground is available in view of Section 16(1)(b) of the Maharashtra Rent Control Act, 1999. The provision reads thus:-

“That the tenant has, without landlord’s consent given in writing, erected on the premises any permanent structure.”

15. Admittedly, neither the applicant nor the original tenant have come with a case to have had obtained written consent of the original landlord/s for erecting on the suit premises any permanent structure. The respondent/ plaintiff has come with a specific case that after 23/10/2001, the applicant and contesting defendants demolished some portion of eastern wall of the suit premises. They fixed a door to have access the property of defendants No.3 and 4. They had also constructed one X-Ray room and water tank, erected an iron staircase in the suit premises, made a sub-premises in the suit premises for the purpose of running Pathology Lab. The applicant did not dispute making of this construction. It is his case that this was done with the consent of the original landlord/s. As stated above, the Statute requires written consent of the landlord for making on the suit premises any permanent construction. At the cost of repetition, it is stated that, no such consent in writing has ever been obtained. Those constructions and alterations have been made post October 2001 i.e. not long before the respondent/ plaintiff purchased the suit premises. The right accrued to the original landlord/s to seek eviction of the tenant on all or any of the grounds envisaged by the Rent Act are available to his transferee except to recover arrears of rent (Section 109 of

Transfer of Property Act).

16. The Trial Court had negated the claim for possession on the ground of permanent construction. The appellate Court has, however, reversed the finding. Since the decree was in favour of the plaintiff/ respondent, he was not required to file an appeal or cross-objection for taking exception to the findings negating his claim for possession on the ground of permanent construction.

17. In my view, considering the nature of construction/ alterations made in the suit premises, the appellate Court was justified in reversing the findings recorded by the Trial Court in that regard. By no stretch of imagination, the construction/ acts – demolition of eastern portion of wall, making sub-room in the suit premises, by means of bricks and cement for the purpose of running Pathology Lab, erecting an iron staircase for approaching to the upper floor, creating an X-Ray Room, fitting new door and creating approach way to the premises purchased by the applicant's son and his daughter-in-law (respondents No.4 and 5) is found to have changed the identity of the suit premises. The finding recorded by the appellate Court in this regard is consistent with the evidence on record.

18. So far as regards lost opportunity to produce

additional evidence is concerned, it is to be stated that, after the Trial Court denied the applicant permission to produce some documentary evidence, a Writ Petition had been filed challenging the said order. The Writ Petition came to be dismissed. A review of the order passed in the Writ Petition was sought for. The applicant was unsuccessful therein. The said issue, therefore, cannot be reopened in this Civil Revision Application.

19. Under the aforesaid facts and circumstances, I do not find any jurisdictional error or any perversity in findings recorded by the Trial Court on the issue of subletting and non-user. I also do not see any reason to hold the first appellate Court to have committed any jurisdictional error in granting decree for possession, inter alia on the ground of permanent construction. The applicant is a medical practitioner. His son and daughter-in-law (respondent No.4 and 5) have also been in the same profession. The applicant has been running his O.P.D. Clinic in the suit premises for little over 35 years. The respondents No.4 and 5 have been running their hospital on the upstairs premises. The applicant, therefore, appears to have intended to cling to the suit premises. The respondent/plaintiff could make out a case for eviction of the applicant from the suit premises.

20. There is thus no merit in the revision application. The same is, therefore, dismissed. Rule discharged. Interim relief, if any, stands vacated.

(R.G. AVACHAT, J.)

21. At the request of learned counsel for the applicant, time of five months is granted for vacating the suit premises, with a condition that the applicant shall furnish an undertaking to that effect before the trial Court.

(R.G. AVACHAT, J.)

fmp/-