

jsn

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.551 OF 2022

Universal Metal Refinery Co.

...Applicant

Versus

Malti Wd/o. Lt. Gajanan M. Churi
(Since deceased) & Ors.

...Respondents

Mr. Nishant Shashidharan with Nivit Srivastava and Amit Haikar i/b.
Maniar Srivastava Associates for the Applicant.

Robin Jaisinghani with Jacinta Esani Pal i/b. Jacqueline D'silva for
the Respondents.

CORAM : R.I. CHAGLA J.

DATE : 15TH DECEMBER, 2022.

ORDER :

1. Heard learned Counsel for parties.
2. By this Civil Revision Application, the Applicant is challenging the judgment and order dated 10th November, 2022 of the Appellate Bench of the Small Cause Court at Mumbai (Bandra Branch) which has upheld the judgment and order of the Trial Court dated 5th May, 2012 as well as challenging the order of the Appellate

Bench dated 10th November, 2022, by which the application for producing additional evidence under Order 41, Rule 27 Code of Civil Procedure, 1908 was rejected.

3. The challenge of the Applicant with regard to the impugned judgment and order dated 10th November, 2022 passed by the Appellate Bench of Small Causes Court, Mumbai by which the judgment and decree of the Trial Court had been upheld and the Appeal was dismissed is on the ground that the issue as to maintainability of the Suit being T.E. Suit No.15/24 of 2008 had been erroneously answered in the affirmative by the Appellate Bench.

4. Mr. Nishant Shashidharan, the learned Counsel appearing for the Applicant presses two grounds of challenge to the impugned judgments and orders of the Lower Court, one with regard to the maintainability of the Suit which has been answered in the affirmative and the other on the rejection of the Application for adducing additional evidence under Order 41 Rule 27 of the Code of Civil Procedure.

5. With regard to the first ground of challenge, Mr. Shashidharan has referred to the issues framed by the Appellate

Bench and in particular the issue at Point 2 viz. “whether the present Suit is maintainable” and which was answered in the affirmative. The Appellate Bench has considered the submissions of the Applicant herein that one Shri S.N. Desai was also joint owner and that he is not joined as a party in the present Suit, hence the Suit is bad for non-joinder of necessary party. The Appellate Bench held that presuming it to be correct that S.N. Desai is also co-owner of part of the suit premises, it is settled position of law that co-owner can file the Suit without impleading all co-owners in the Suit, hence the Suit cannot be thrown away merely on the ground that S.N. Desai is not made a party.

6. Mr. Shashidharan has referred to the further finding of the Appellate Bench in paragraph 37 of the impugned judgment and order where it is held that presuming that the Applicant/Defendant is correct as to the Suit being not maintainable without joining all co-owners, the disagreement of Shri S.N. Desai for filing the Suit is not placed on record. Further, all co-owners need not be joined in the eviction Suit, hence, the Suit is not barred for non-joinder of necessary party. In any event the Defendants admit that their predecessor was inducted by the Plaintiff’s predecessor into the Suit

property. The Appellate Bench had relied upon the decision of the Supreme Court in the case of *M/s. Indian Umbrella Manufacturing Co. and Ors. Vs. Bhagabandel Agarwalla (Dead) by Lrs. Smt. Savitri Agarwalla & Ors.*¹ in this context.

7. Mr. Shashidharan has submitted that the Suit property was leased by the original owner Sitaram Narayan Desai to one Mahadev Narayan Churi by writing dated 1st July, 1947. The Respondents claim under Mahadev. The said Mahadev had thereafter let out the Suit premises to one Chunilal Dayabhai Patel with liberty to carry out construction thereof suitable to his business. By a consent decree in Suit No.6223 of 1970 filed by the original owner against Mahadev in this Court, the suit premises was distributed between the original owner and Mahadev such that portion of the suit premises admeasuring 662.8 sq. mtrs. came to the share of the original owner and balance to the share of Mahadev.

8. Mr. Shashidharan has referred to the Written Statement wherein reference has been made to the aforementioned proceedings between the predecessors of the Plaintiffs viz. Mahadev and the original owner viz. S.N. Desai and in which the decree was passed

¹ 2004 (1) RCJ 1(SC).

and land distributed between the parties and property card amended accordingly. A portion of the Suit premises went back to the original landlord S.N. Desai. Accordingly, he has submitted that the pleadings in the written statement should have been considered by the lower Court, particularly in view of the issue raised that the Suit was not maintainable as it has been filed by the Plaintiffs claiming to be the exclusive owners of the Suit property and without joining the co-owner.

9. Mr. Shashidharan has relied upon the decision of this Court in ***Suresh G. Ramnani Vs. Aurelia Ana Da Piedade Miranda and Ors.***² This Court in the said decision had considered a Suit which had been filed by the Plaintiffs as exclusive owner where factually there were other co-owners whom the Plaintiffs had not acknowledged. This Court noticed that the the present Plaintiffs had not claimed co-ownership. In fact there was no dispute that the Plaintiffs were indeed co-owners and sued as such. This Court had considered a decision of the Supreme Court in the case of ***Mohinder Prasad Jain V. Manohar Lal Jain***³ which concerned a Suit filed by the co-owner which was held to be maintainable in law. It was not

² Second Appeal No.98 of 2013 decided on 30th January, 2019.

³ (2006) 2 SCC 724

necessary for the co-owner to show before initiating the eviction proceedings before the Rent Controller that he had taken option or consent of the other co-owners. However, in the event of the co-owner objecting, the same may be a relevant fact. In that case, nothing had been brought on record to show that the co-owners had objected to the eviction proceedings initiated by the Respondent therein. Though this decision was cited, this Court in the said decision considered that the Plaintiff by claiming exclusive ownership, this went critically to the frame of the Suit, and as to its maintainability, a question that indubitably goes to the root of the matter.

10. Mr. Shashidharan has submitted that in the present case the Plaintiff has also claimed exclusive ownership of the Suit property thereby not acknowledging the other co-owners of the Suit property. He has further submitted that the Appellate Bench of the Small Causes Court has not given proper appreciation to the Suit being filed by one co-owner claiming to have exclusive ownership of the Suit properties. This is not a case where the Plaintiff has pleaded that he is the co-owner of the Suit property. The decision relied upon by the Appellate Bench in *M/s. Indian Umbrella Manufacturing Co. and Ors.*

(Supra) is not applicable as that was a case where one of the co-owners as co-owner filed Suit for eviction against the tenant. He has submitted that the Appellate Bench had thus not considered whether the Plaintiff could have filed the Suit claiming to be exclusive owner of the Suit property despite there being another co-owner of the suit property.

11. Mr. Shashidharan has thereafter made submissions with regard to the second ground of challenge pressed which is with regard to the impugned order of the Appellate Court dated 10th November, 2022 rejecting the application of the Applicant to produce additional evidence under Order 41 Rule 27 of the CPC. He has submitted that the reasoning given for not allowing the rent receipt dated 11th May, 1950 to be brought on record is erroneous. He has submitted that the Applicants herein have in their application clearly stated the reason for producing additional evidence by way of rent receipt. The Applicant had originally taken the stand in the written statement that they were owners of the structure on the Suit property in view of their not having rent receipts in their possession to contend otherwise. It is only upon one of the rent receipts being found by the Applicant that the Application had been made for production of the

additional evidence by way of rent receipts under Order 41 Rule 27 of the CPC. The Appellate Court has gone on the premise that a contrary stand is being taken by the Applicant as they had in the written statement pleaded that they were owners of the structure on the suit property and now by producing additional evidence they want to plead and prove that open land with structure was given to them on rent and the Suit is not maintainable. The Appellate Court has accordingly held that such contrary stand cannot be allowed at this stage.

12. Mr. Shashidharan has relied upon the decision of the Supreme Court in the case of *Sanjay Kumar Singh Vs. State of Jharkhand*⁴, wherein the Supreme Court held that the additional evidence may be allowed by the Appellate Court if such evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record. The Supreme Court had relied upon *A. Andisamy Chettiar vs. A. Subbaraj Chettiar*⁵ wherein it is held that the admissibility of the additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the Applicant

⁴ (2022) 7 Supreme Court Cases 247.

⁵ (2015) 17 SCC 713

had an opportunity for adducing such evidence at an earlier stage or not but it depends on whether the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or any other substantial cause. He has submitted that in the present case the additional evidence sought to be produced has a direct and important bearing on the main issue as to the maintainability of the Suit and in view of the decision of the Supreme Court in the case of ***Sanjay Kumar Singh (Supra)*** such additional evidence ought to have been allowed to be produced by the Applicant and by not allowing production of such evidence, the impugned order of the Appellate Bench dated 10th November, 2022, requires to be set aside.

13. Mr. Jaisinghani, the learned Counsel appearing for the Respondents has submitted that there is no ground for interference with impugned order under Section 115 of the Code of Civil Procedure, 1908. The Supreme Court has held in the case of ***Ratilal Balabhai Nazar Vs. Ranchhodbhai Shankarbhai Patel & Anr⁶*** that even in the case of erroneous construction placed upon a statute by the Trial Court would not amount to exercising jurisdiction illegally and / or with material irregularity and would not furnish a ground for interference under Section 115 of the CPC.

⁶ AIR 1966 Supreme Court 439 (V 53 C 92)

14. Mr. Jaisinghani has submitted that in the present case, it is well settled that in the event of the relationship between the parties being that of landlord and tenant, only the landlord could terminate the tenancy and institute the suit for eviction. The tenant in such suit is estopped from questioning the title of the landlord to the Suit premises under Section 116 of the Evidence Act. Though this would be at the commencement of the tenancy, under general law in a Suit between landlord and tenant, the question for title to the lease property is irrelevant. He has relied upon the decision of the Supreme Court in *Sri Ram Pasricha Vs. Jagannath and Ors.*⁷ in this context. The Supreme Court went on to hold that it is inconceivable to throw out a Suit on the account of non-pleading of other co-owners as such.

15. He has further relied upon the decision of the Supreme Court in the case of *Mohinder Prasad Jain Vs. Manohar Lal Jain*⁸ wherein the Supreme Court held that a Suit filed by a co-owner is maintainable in law. It is not necessary for the co-owner to show before initiating the eviction proceedings before the Rent Controller that he had taken option or consent of the other co-owners. However,

⁷ (1976) 4 Supreme Court Cases 184.

⁸ (2006) 2 Supreme Court Cases 724.

in the event a co-owner objects thereto, the same may be a relevant fact. In that case, nothing was brought on record to show that the co-owners of the Respondent therein had objected to eviction proceedings initiated by the Respondent therein. The Supreme Court has relied upon its prior decision in *M/s. Indian Umbrella Manufacturing Co. and Ors. (Supra)* which was also relied upon in the impugned order.

16. Mr. Jaisinghani has submitted that concurrent finding had been arrived at by the lower Court. Further, the Appellate Court has on the basis of the settled law held that there was nothing on record in the present case to show that S.N. Desai who was alleged to be a co-owner of the Suit property had objected to the filing of the Suit by the Plaintiff as owner of the Suit property. The Appellate Court has held that even if there was a dispute in so far as title to the landlord is concerned, the disagreement of S.N. Desai as alleged co-owner was not placed on record and thus the Suit is not bad for non-joinder of necessary party. He has accordingly submitted that there is no merit in the Civil Revision Application and that it is to be rejected.

17. Mr. Jaisinghani has made submissions on the second

challenge raised by the Applicants in the Civil Revision Application i.e. to the order dated 10th November, 2022 passed by the Appellate Bench of Small Causes Court which had rejected the application under Order 41 Rule 27 of the CPC. He has submitted that the Defendant who is the Applicant herein had in the Written Statement as well as in the correspondence taken a stand that the structure on the Suit property were owned by the Applicant. This stand was a consistent stand taken by the Applicant and which was now sought to be departed from on the basis of one rent receipt which was sought to be adduced as additional evidence under Order 41 Rule 27 of the CPC. He has submitted that a single rent receipt had been sought to be produced by the application. The only statement in the application in support of producing the rent receipt under Order 41 Rule 27 of the CPC is that the Applicant could not lay his hands on the rent receipt to show that rent had been charged by the landlord in respect of the structure with the land appurtenant thereto. This is considering that the Suit land was leased to the Applicant in the year 1947. He has submitted that this clearly is a blatant attempt to depart from the case of the Defendants that they were the owners of the structure. He has submitted that there is no diligence shown by the Applicant. The Application has been considered by the Appellate

Court in the impugned order dated 10th November, 2022 to be a contrary stand and has been rightly not allowed.

18. Having considered the rival submissions, it is to be noted that the impugned judgments and orders of the lower Court are concurrent orders. Both the Trial Court and Appellate Court have answered the issue as to whether the present Suit is maintainable in the affirmative. The contention raised by the Applicant who is the Defendant in the T.E. Suit No.15/24 of 2008 filed before the Small Causes Court is that the Plaintiff had filed the Suit as owner of the Suit property in spite of one S.N. Desai having co-ownership in the Suit property and the fact of which had not been mentioned in the Plaint. In view thereof, the Suit is bad for non joinder of necessary party. In my view, this contention has been correctly not accepted by the Appellate Court as well as by the Trial Court. The Court below has considered the law laid down by the Supreme Court in *M/s. Indian Umbrella Manufacturing Co. and Ors. (Supra)* which has been followed in *Mahindra Prasad Jain (Supra)* and which is on the point of non-joinder of a co-owner. The Supreme Court has held that when one co-owner files Suit for eviction against tenant, he does so on his behalf in his own right and as an agent of the other co-owners. The

consent of the other co-owners is assumed as taken unless it is shown that the other co-owner was not agreeable to eject the tenant and the Suit was filed inspite of his disagreement.

19. The Lower Court in the present case has considered the evidence on record as well as the documents which had been produced in arriving at the finding that the Suit is maintainable and that the Defendants have failed to establish that there was any disagreement of S.N. Desai who they claim was the co-owner of the Suit property. Further, the Court below has held in light of the settled law that all co-owners need not be joined in an eviction Suit and thus the Suit is not bad for non-joinder of necessary party.

20. The Applicant had raised a dispute with regard to the title of the landlord in respect of the entire Suit property. The Court below has held that in view of the Defendants admitting that their predecessor was inducted by the Plaintiff's predecessors, they cannot deny the title of the landlord. This issue is squarely covered by the decision of the Supreme Court in ***Sri Ram Pasricha (Supra)***, wherein the Supreme Court had held that in a Suit between landlord and tenant the question of title to the lease property is irrelevant. The tenant cannot deny that the landlord had title to the premises at the

commencement of the tenancy. This is provided in Section 116 of the Evidence Act. Hence, there is no merit in the contentions of the Applicants that the Respondents could not claim to be the owners/landlords of the suit property.

21. Further, there has to be limited interference with the order of the lower Court in exercise of Revisional jurisdiction under Section 115 of the Code of Civil Procedure. The Supreme Court in *M/s. DLF Housing and Construction Co. (P) Ltd., New Delhi Vs. Sarup Singh & Ors.*⁹ has in paragraph 5 held thus :

The position thus seems to. be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of

⁹ 1969(3) Supreme Court Cases 807.

law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under s. 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under s. 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal.

22. Thus, it is not open for this Court exercising revisional jurisdiction under Section 115 of the CPC to correct the errors of or fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try a dispute itself. In the present case, I find no error in the impugned judgments and orders of the Lower Court and on the contrary the Appellate Bench of the Small Causes as well as the Trial Court have followed the settled law in not going into the title of the Suit property. There is also no dispute with regard to the Applicant's predecessors being the tenant of the Respondents' predecessors. Further, there is no dispute that

rent collected was in respect of the Suit property i.e. the land and which rent receipts have been issued by the Respondents' predecessors to the Applicant's predecessors.

23. Considering that the Applicant / Defendants in the Suit had raised the issued of non consent by the co-owner of the Suit property, it was for the Defendants to establish such non-consent. The decision relied upon by the Appellate Bench of this Small Causes Court, namely *M/s. Indian Umbrella Manufacturing Co. and Ors. (Supra)* has been followed in the decision of the Supreme Court in *Mohinder Prasad Jain (Supra)* and which clearly hold that the consent of the other co-owner is assumed unless it is shown that the other co-owner was not agreeable to eject the tenant and the Suit was filed inspite of disagreement. Thus, there is no infirmity in the finding of the Appellate Bench of the Small Causes Court that in view of the Defendants not establishing and / or placing on record any disagreement of S.N. Desai who they claim to be the co-owner, the Suit filed by the Plaintiff as owner of the Suit property cannot be found fault with.

24. The decision of the learned Single Judge of this Court relied upon by the learned Advocate for the Applicant namely, *Suresh*

Ramnani (Supra), is entirely inapplicable to the facts of the present case. In that case, there was no dispute that the Plaintiff was co-owner of the Suit property. In fact, the Suit had been filed claiming exclusive possession inspite of the other co-owners of the Suit property and there was objection from the other co-owners to such Suit being filed by excluding the other three branches of the family who were entitled to a share in the larger property following the Rectification Deed. The relief sought for in the Suit would enure to all co-owners without joining them. It is in context of these facts that the Court held that there was a fatal defect in the Plaint, never cured.

25. In view of the above findings, the Civil Revision Application in so far as it challenges the impugned judgment and order dated 10th November, 2022 passed by the Appellate Bench of Small Causes Court which has upheld the judgment and order of the Trial Court dated 5th May, 2022 does not require any interference in revisional jurisdiction.

26. Further I do not find any merit in the challenge of the Applicants to the impugned order dated 10th November, 2022 passed by the Appellate Bench of the Small Causes Court which had rejected the application of the Applicant herein under Order 41 Rule 27 of the

CPC for producing additional evidence. In my view the impugned order dated 10th November, 2022 has correctly rejected the application. The defense of the Applicant / Defendants in the T & E Suit No.15/24 of 2008 was that they were owners of the structures on the Suit property. This is a defense taken in the Written Statement filed by the Applicant / Defendants. Thus, the issue in the Suit filed by Respondents / Plaintiff was with regard to the suit property i.e. the open land and in respect of which the Applicant / Defendants admitted that they were the tenants. The documents on record which were placed before the Lower Court included the correspondence dated 4th September, 2003 from the Advocate of the Defendants to the Advocate of the Plaintiff and which proceeds on the premise that what is stated in the prior correspondence dated 12th September, 2002 addressed by the Advocate for the Defendants represents true facts and they have denied any allegation contrary thereto. In the correspondence dated 12th September, 2002, the Advocate for the Defendants has stated that the Defendants were the owners of all the structures constructed by them and which are existing on the Suit property. Further, the evidence in the Trial Court also proceeds on that premise. Given the defense of the Applicant / Defendants in the Written Statement, supported by the documents and evidence on

record, the Appellate Bench of the Small Causes Court has held that by allowing the Applicant to adduce evidence under Order 41 Rule 27 would result in taking a contrary stand by the Applicant / Defendants and which cannot be allowed at the stage of the Appeal.

27. Further, in the application filed by the Applicant / Defendants, in paragraph 2, the deponent Mr. Tajas S. Gheewala, partner of the Applicant and Defendant in the Suit has stated that during the pendency of the Suit, the Applicant could not lay his hands on the rent receipts and show that the rent had been charged in respect of the structure with appurtenant land thereto. The deponent has stated that he has recently found one rent receipt at his residence when he started cleaning work and went through some old files at his residence. Under these circumstances, he has stated that the original rent receipts could not be produced at the time of filing of Affidavit of Evidence. The statement made in the application has correctly not been accepted by the Appellate Bench of the Small Causes Court.

28. Considering that the Defendants were tenants of the Suit premises since the year 1947, it is extraordinary that the Defendants have in February, 2014 filed an application wherein one

purported rent receipt in respect of the structure has been produced. By seeking to adduce such evidence under Order 41 Rule 27 of CPC, the Applicant/Defendants are taking a mutually destructive stand from that pleaded in the Written Statement which it is well settled cannot be allowed to be taken.

29. The decisions relied upon by the Applicants under Order 41 Rule 27 which includes the decision of the Supreme Court in *Sanjay Kumar Singh (Supra)* where evidence has a direct and important bearing on the main issue in the Suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record then such application to adduce additional evidence may be allowed. This decision is inapplicable to the facts in the present case. On the contrary in the present case the application to adduce the additional evidence in the form of rent receipt dated 11th May, 1950 allegedly in respect of the structures on the Suit property has not been allowed by the Appellate Bench as this would result in the Applicant / Defendants taking contrary stand at the stage of Appeal which would cause serious prejudice to the other side, if such documents are allowed to be brought on record. Thus, I find no infirmity in the impugned order dated 10th November, 2022 passed

by the Appellate Bench of the Court of Small Causes which has correctly rejected the Application for allowing the Applicant to adduce the additional evidence under Order 41 Rule 27 of the CPC.

30. Accordingly, the Civil Revision Application is dismissed. There shall be no order as to costs.

31. Mr. Shashidharan applies for stay of this judgment and order by which the Civil Revision Application has been dismissed. He has submitted that there is a stay operating from 7th September, 2012 till 8th December, 2022 and has sought for continuation of the stay. In view of the findings in this impugned judgment and order, the application for stay is rejected.

[R.I. CHAGLA J.]