

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 43 OF 2023

Sk. Chand S/o. Sk. Kadar Qureshi
@ Sandu, Deceased Through Lrs.

1. Sk. Nayeem S/o. Sk. Chand
Age – 47 years, Occ: Business,
2. Sk. Kaleem S/o. Sk. Chand
Age – 61 years, Occ: Business,
3. Sk. Irshad S/o. Sk. Chand
Age – 50 years, Occ: Business,

All R/o. House No. 1-23-98,
Champa Masjid, Kaisaiwada,
Shah Bazar, Aurangabad.

...Applicants
(Orig. Defendants)

Versus

1. Syed Moinuddin S/o. Syed
Fakruddin @ Mahdmiya,
Age : 70 yrs, Occ: Business,
2. Fakri Mahajabeen @ Gesurdas
W/o. Syed Mehboob,
Age : 34 yrs, Occ: Business

Both R/o. House No. 4-10-65,
Behind New Raja Rexine House,
Near Dargah Hazrat Nizamuddin,
Shahgunj, Aurangabad 431001.

...Respondents
(Orig. Plaintiffs)

Mr. S. S. Deshmukh, Advocate h/f Mr. A. S. Kulkarni,
Advocate for the Applicants.

Mr. A. P. Bhandari, Advocate for Respondents.

CORAM : R.M. JOSHI, J.

DATED : APRIL 12, 2023

JUDGMENT

1. This Revision is filed under Section 115 of the Code of Civil Procedure (for short '**CPC**') taking exception to the judgment and order dated 22nd November, 2022 passed in Rent Appeal No. 1/2017 dismissing the Appeal filed by the Applicants under Section 34 of the Maharashtra Rent Control Act (for short '**Rent Act**') whereby judgment and order dated 25th August, 2015 passed in Rent Suit No. 04/2009 directing eviction of defendants from suit premises and to pay arrears of rent, was confirmed. Applicants are legal representatives of original defendant in suit. Parties are referred to by their nomenclature in the suit.

2. The facts narrated by defendants in the present application can be summarized as under:

Plaintiffs filed suit for eviction of defendants from the suit premises with the averments that the defendant is tenant in respect of the same on monthly rent of Rs. 2,450/- and he defaulted in payment of rent to the plaintiffs. Plaintiffs claim that notice under Section 15 of the Rent Act was issued to the defendant and since it was not complied, suit came to be filed

for eviction and for arrears of rent. In the said suit, defendant appeared and denied the contentions of plaintiff. It is also denied that he has defaulted in payment of rent and in fact there is averment that the plaintiff refused to accept rent from 2009 and did not issue notice to the defendant in respect of default of rent.

3. Plaintiff no. 1 – Syed. Moinuddin examined himself, however, defendant failed to cross-examine plaintiff and his testimony went unchallenged. Further no evidence was led by defendant in the suit. The said suit came to be decreed on 25th August, 2015 in absence of defendant or his Advocate. Against the said judgment, rent Appeal No. 1 of 2017 came to be filed. During pendency of appeal, LR's of original defendant were brought on record and they claimed to have received vital and important information that the plaintiffs have misrepresented to their father that they are landlord/authorised persons to recover rent of the suit property and in fact, said property is a Dargah which is declared as Waqf through notification issued in that regard. It is also contended that all

shops are tenanted premises and every tenant was under the impression that the plaintiffs are authorized to recover rent on behalf of Waqf Board. It is further contended that the applicants/LR's of original defendant are in possession of the suit property since 1972 and since beginning they have deposited the rent of the suit premises with plaintiffs from time to time. It is also claimed that in Rent Suit no. 20 of 2014 against Nizamuddin Shikshan Sanstha, said misrepresentation by the plaintiffs was revealed to them. It is stated that before the First Appellate Court, none appeared for the applicants/defendant and by judgment dated 22nd January, 2020, the said Rent Appeal No. 01 of 2017 came to be dismissed. Applicants challenged the said judgment by referring Civil Revision Application No. 118/2021 before this Court, which came to be allowed and the rent appeal was relegated back to the Appellate Court for decision afresh.

4. It is further contended that after the order of remand, applicants filed application for production of additional document Exh. 28 and the said application

was decided to be considered at the time of final hearing by the Appellate Court. During the pendency of Appeal, another application was filed for amendment of written statement Exh. 30. It is contended that after by judgment and order dated 22nd November, 2022 rent appeal was dismissed. With these contentions, present application is filed challenging impugned judgment on the grounds specifically set out in paragraph 4 (I to XXVIII).

5. Learned Counsel for the Applicants/Defendant contended that the plaintiffs had no *locus standi* to file suit for recovery of the suit premises as it is not pleaded that the plaintiffs are landlords in respect of suit property. In this connection, he referred to definition of landlord under Section 7 of the Rent Act, and averred that in absence of pleadings to the effect the plaintiffs are landlords the suit under Section 15 ought not to have been decreed by the Rent Court. He also drew attention of this Court to the Revision Application filed before this Court bearing no. 118/2017 wherein an order was passed permitting production of document. According to him, once the said

documents were allowed to be placed on record, it was obligatory on the Appellate Court to consider those documents for the purpose of decision of Appeal. It is also stated that the order passed by this Court allowing the said application and setting aside the order passed by the Appellate Court and remanding Appeal for decision afresh need to be read conjointly. He further took pains to draw attention of the Court to the applications filed before the First Appellate Court i.e., application for production of document under Order XLI, Rule 27 (Exh. 33) and application for amendment of written statement (Exh. 28). It is argued that though an order passed by the First Appellate Court, the application for production of documents would be taken into consideration at the time of judgment, however, the Appellate Court has failed to take same into account and as such, prejudice has been caused to the applicants/defendants. It is further argued that once the applicants are brought on record being legal heirs of original defendants in view of provisions of Order XXII, Rule 4 of CPC, they are entitled to file written statement and said right has been denied to them by the First Appellate Court. Finally, it is argued that the

suit property is waqf property, and therefore, there is a bar of jurisdiction of Civil Court in view of Section 83 and 85 of the Waqf Act. In support of his submissions, he relied on following judgments: Mangat Ram and Another Vs. Sardar Meharban Singh and Others, (1987) 4 SCC 319 (on point of relationship of landlord/tenant), Rajendra Tiwary Vs. Basudeo Prasad and Another, (2002) 1 SCC 90 (determination of title of parties), Chakreshwari Construction Private Limited Vs. Manohar Lal, (2017) 7 SCC 212 (amendment and additional evidence at appellate stage), Madan Mohan Singh Vs. Ved Prakash Arya, (2021) 5 SCC 456 (rent agreement and proof of tenancy), Sanjay Kumar Singh Vs. State of Jharkhand, (2022) 7 SCC 247 (admissibility of evidence under Order XLI, Rule 27 CPC), Estralla Rubber Vs. Dass Estate (P) Ltd, (2001) 8 SCC 97, & Karan Kapoor Vs. Madhuri Kumar, (2022) 10 SCC 496 (amendment of pleadings).

6. This Court has carefully considered arguments and case law cited supra.

7. At the outset, this Court needs to consider that this is an application under Section 115 of CPC

and not an appeal. Though it is argued on behalf of Defendant that practically this Court is a last Court, which can appreciate the evidence, however, considering the fact that no Second Appeal has been provided against the judgment and order of the Appellate Court under Rent Act, this Court cannot assume jurisdiction as second Appellate Court and enlarge scope of Revision contemplated by Section 115 of CPC. While exercising the said jurisdiction the Court has to see whether the Court below has exercised jurisdiction not vested in it by law or has failed to exercised jurisdiction so vested. It is also not open for the Court to interfere in the impugned judgment and order unless it is found that the exercise of jurisdiction by the Court below is illegal or with material irregularities. Needless to say that only in such circumstances it is open for this Court to cause interference in the impugned judgment and order and it is not permissible to re-appreciate evidence or substitute its findings to the one recorded by the Rent Appellate Court.

8. In order to appreciate the arguments advanced by the Counsel for the Applicant one needs to take into

consideration the pleadings of the parties before the trial Court. It is pleaded by the plaintiffs that defendant is tenant of two shops and boundaries are described that towards east, west and south shop of landlord is situated. It is specifically pleaded that the tenancy is as per English Calendar and rent is to payable month to month. It is alleged that since the beginning the defendant is not regular in payment of Rent and commits defaults in the payment of Rent. There is averment to the fact that the defendant lastly paid rent on 15.09.2008 till 30.07.2006. Plaintiff also claim to have issued notice to the defendant on 29.10.2008 calling upon him to repay arrears of rent. The said notice was neither replied nor complied by defendant. In the light of these averments, original defendants filed written statement accepting that he is tenant of the suit shop. He only disputed the quantum of rent. In paragraph 4 of the written statement it is specifically stated that defendant paid rent to the plaintiffs, which was refused by them. It is further averred that plaintiff sometime gave receipts and sometime accepted the rent without issuing receipts. Thus, from the pleading of the written statement it

does not appear that the defendant raised any challenge to the fact that the plaintiffs are landlords of the defendant in respect of the suit premises. Consequently, this issue never appeared for consideration, being not in dispute.

9. The arguments of the Counsel for Defendant that the plaintiff has not pleaded that they are landlords now derived the said title, cannot be considered at this stage in absence of challenge mere to in the suit. Perusal of the definition of the landlord in Section 7(3) of the Rent Act indicates that it is so wide to include a person who is for time being receiving rent. In the facts of the case and in particular for want of challenge to the status of plaintiff as landlord coupled with admission of the defendant that he used to pay rent to the plaintiffs, there is no room for doubt that plaintiffs are landlord and the defendant is the tenant in respect of the suit premises. Pertinently in paragraph 7.8 of the application, LR's of defendant have also categorically stated that they are in possession of the suit property since 1972 and since beginning they have paid rent of

the suit premises to the plaintiffs from time to time. These admissions of the defendants are sufficient to discard the submissions challenging the *locus standi* of the plaintiffs to file suit.

10. Much stress is laid upon the order passed by this Court in Civil Revision Application No. 118/2017 and order passed in Civil Application No. 12553/2021 to canvass that since the documents were allowed to be brought on record, the First Appellate Court ought to have considered the same while deciding the Appeal. In this regard, perusal of the said civil application shows that the documents were sought to be placed on record only for the purpose of decision of Civil Revision Application. In the said context the application was allowed. The Civil Revision Application was decided by setting aside the judgment passed by the First Appellate Court. It is further necessary to take note of the fact that the judgment of the Appellate Court was not set aside on merits, however, since the Appellate Court decided the Appeal in absence of the Appellants on merit, it was held that such decision is not sustainable and on this sole ground appeal was

relegated back for decision afresh. Perusal of the order in civil revision application shows that it was only expected of First Appellate Court to decide the Appeal afresh in accordance with law. The fact of taking document on record for the purpose of deciding the civil revision application cannot be treated as an order under Order XLI, Rule 2 of CPC. In fact the defendant filed separate application before First Appellate Court under Order XLI, Rule 27 for taking the said documents on record and this fact shows consciousness of defendant to the fact that the order of taking the said documents on record in civil revision application was inconsequential to the decision of the Appeal.

11. With regard to the application Exh. 33 under Order XLI, Rule 27 of CPC is concerned, the Appellate Court has taken into consideration the said application and has recorded reason for not accepting the same. It is pertinent to note that Order XLI, Rule 27 prohibits production of additional evidence whether oral or documentary in Appellate Court, unless the party seeks to produce the same establishes that notwithstanding

the exercise of due diligence such evidence was not within his knowledge and could not be produce by him at any prior time.

12. Perusal of application made before the Appellate Court indicates that there is absolutely no whisper about the due diligence being shown by the defendant. The said application, on the contrary, shows that the in the year 2014 even the applicants had knowledge about the said documents however, they offer no explanation for not producing it before the trial Court before passing judgment and decree dated 25th August, 2015. In view of this fact, no fault can be found, if the First Appellate Court has considered application not fit to entertain. In considered view of this Court, the judgment cited supra in case of Chakreshwari and Sanjay (supra) are cannot be applicable to the present case in view of material difference in facts involved therein.

13. With regard to the application for amendment of written statement is concerned, the Appellate Court has dealt with the said issue in the impugned judgment and order. In fact the Court has dealt with application

Exh. 27, 28 and 33 i.e., application for production of additional documents, amendment to written statement and amendment to appeal memo. These applications were rejected by the First Appellate Court for the reason that they are filed after huge delay.

14. Learned Counsel for Respondent/Plaintiffs pointed out that this is a case wherein suit was originally decreed and same was challenged by filing M.A.R.J.I. No. 80/2010 wherein the said decree was set aside by order dated 12.10.2011 and granting one more opportunity to the defendant with a direction to deposit 25% of the decretal amount. The said order was challenged in Appeal, which was dismissed. Even thereafter in spite of opportunities before the trial Court the original defendant for almost four years did not contest the suit and which ultimately came to be decreed in favour of plaintiff. In the light of these facts, observations made by the Appellate Court rejecting those applications on the ground of delay cannot be faulted with.

15. It is contention of the Counsel for the Applicant that in view of Order XXII, Rule 4(2), the

applicants have brought themselves on record as legal representatives of the original defendant and they have right to make any defense. No doubt, a person who is added as party has every right to file written statement, however, the same is always subject to the provisions and restrictions contained by Order VIII. By amendment to Rule 1 time limit is specified for filing of the written statement. The purpose of the said amendment is to ensure that the parties do not drag the litigation. Herein this case, admittedly the applicants/LR's of defendant were brought on record in the year 2017. The amendment to the written statement is sought by filing application on 16th September, 2022. In view of this fact, delay caused in making such application becomes relevant. Rejection of the said application on the ground of delay, therefore, is not erroneous.

16. It is also pertinent to note that applicants by proposed amendment were intending to retract admissions given by the original defendant in his written statement. Even if it is accepted that in Order XXII, Rule 4, Sub-Rule 2 added party is permitted to

make his defense, however, the same has to be appropriate to his character as LR's of deceased defendant. Herein this case, applicants have stepped into shoe of original defendant and in the said character only it was permissible to take defense. In no circumstances, applicants could have been allowed to amend written statement to retract admissions in written statement, which would displace plaintiffs case.

17. With regard to the objection that the suit property is a waqf property, there cannot be dispute about the position of law that prior to the amendment to Section 83 of the Waqf Act in the year 2013, the suit between landlord and tenant even in respect of waqf property would lie before the competent Rent Court and not before Waqf Tribunal. Thus, even if the contention of the applicants is accepted that the suit property is a waqf property, that would not affect the jurisdiction of the Rent Court since the suit is instituted in the year 2009 i.e., much prior to amendment of 2013.

18. Considering the limited jurisdiction of this

Court under Section 115 of CPC it is impermissible for this Court to substitute findings recorded by the Appellate Court since they are found in consonance with the pleadings, material evidence on record, taking into account facts and circumstances of the case and related law. Hence, it is not a fit case wherein this Court can exercise its jurisdiction to cause interference in the impugned judgment and order. In the result, application stands dismissed with costs.

(R.M. JOSHI, J.)

Malani