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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 110 OF 2016

Vijaykumar Durgaprasad Agrawal
and others.

...Applicants

-Versus-

Kamalabai Hariram Sharma

...Respondent

...
Ms.A.S. Jadhav h/f Mr. P.R. Katneshwarkar - Advocate for
applicants.

...
CORAM : GAURI GODSE, J.
DATE : 17th February, 2023

PER COURT :

1. This revision application is filed by the defendants/tenants for challenging the concurrent decree for eviction on the ground of sub-letting and non-user.
2. Respondent ("plaintiff") filed Regular Civil Suit No. 114 of 1989 for possession of the suit premises being House property bearing Municipal House No. 2249 and 2249/1, C.T.S. No. 1756 at Bhusawal. It is the case of the plaintiff that the original tenant of the suit premises was one Durgaprasad. It was further contended that defendant nos.1, 2 and 4 were heirs and legal representatives of deceased Durgaprasad and defendant no.5 was the sub-tenant. It was also contended that the heirs and legal

representatives of deceased tenant were not residing in the suit premises.

3. The applicants/original defendants appeared in the suit and filed written statement. It was not disputed that Durgaprasad was the original tenant of the suit premises. However, it was contended on behalf of defendant no.5 that he was always residing along with Durgaprasad, and that, defendant no.5 was statutory tenant in respect of the suit premises. Defendants had denied that the suit premises was kept locked and also denied that it was not being used.
4. Trial Court recorded a finding that the plaintiff proved that defendant nos.1 to 4 had created sub-tenancy in favour of defendant no.5. Trial Court recorded a positive finding that defendant nos.1 to 4 have not used the suit premises for the purpose for which it was let out for continuous period of more than 6 months. Hence, learned 2nd Joint Civil Judge, Junior Division, Bhusawal decreed the suit on the ground of sub-letting of the suit premises by defendant nos.1 to 4 in the name of defendant no.5 and also on the ground of non-user. Learned trial Judge also passed the decree on the ground of carrying out permanent construction in the suit premises.

5. Being aggrieved by the decree of eviction passed by the Trial Court, all the defendants had preferred Civil Appeal No.265 of 2014 (Old Civil Appeal No.160 of 2010). Learned District Judge-2, Bhusawal by judgment and decree dated 31st December, 2015 dismissed the appeal preferred by the defendants and confirmed the decree of eviction on the ground of sub-letting as well as non-user. With respect to the prayer for eviction on the ground of permanent construction, the first appellate court reversed the findings of the Trial Court.
6. The learned counsel for the applicants submitted that though the original tenancy was in the name of Durgaprasad, defendant no.5 being brother was always residing along with the original tenant/Durgaprasad as well as their father since beginning. It was thus submitted that defendant no.5 was a statutory tenant and he being brother of Durgaprasad, was residing in the suit premises along with him as a family member. Learned counsel further submitted that the ground of non-user is also not properly appreciated by both the Courts. She submitted that though, children of Durgaprasad and defendant no.5 had shifted to their own premises, Durgaprasad and defendant no.5 were always residing in the suit premises and hence, the case

with respect to non-user was erroneously decided by both the Courts. She thus submitted that the facts as pleaded would show that defendant no.5 was always residing in the suit premises hence, there could not have been any decree passed with respect to sub-letting and non-user.

7. Learned counsel for the applicants also argued that the respondent-landlady had never stepped into witness box to lead evidence and the evidence that has been led is through her power of attorney holder. Hence, she submitted that evidence on behalf of respondent/landlady through her power of attorney holder should not have been accepted by both the Courts.
8. I have considered the submissions. Since the decree for eviction is on the ground of subletting and non-user, I have examined both the judgments only with reference to the said grounds. Perusal of the record shows that applicants in their written statement had denied that the suit premises is kept locked and is not being used. It was their contention that defendant no.5 was a statutory tenant and hence had denied the prayer made for eviction on the ground of sub-letting as well as non-user.
9. With respect to the submissions made that defendant no.5 was statutory tenant, the claim made by defendant no.5 was only on

the point that he was always residing along with original tenant in the suit premises. However, it was also contented that defendant no.5 was a statutory tenant with respect of the suit premises and hence he was not sub-tenant. It is not disputed that the original tenant of the suit premises was Durgaprasad. Thus, there is no question of defendant no. 5 being a statutory tenant, when it was contented that he was residing along with the original tenant. When there was no case made out with respect to any independent or any joint tenancy rights by defendant no.5 and once it was admitted that Durgaprasad was the original tenant, the theory of defendant no.5 being a statutory tenant cannot be accepted. If there is nothing on record to show that there is any independent right created in favour of defendant no.5 the case of the respondent-landlady with respect to defendant nos.1 to 4 creating sub-tenancy in favour of defendant no.5 is rightly accepted by both the Courts. In fact, both the courts have also referred to provisions of section 5(11) (c) of the Bombay Rent Control Act, 1999 and have held that defendant no.5 has failed to prove that he had any tenancy right with respect to the suit premises. In such circumstances, I do not

find any error in the findings recorded by both the courts with respect to creation of sub-tenancy in favour of defendant no.5.

10. With respect to the submissions made on the point of decree that is passed on the ground of non-user, it is necessary to refer to the findings recorded by the Trial Court in paragraph no.32 of the impugned judgment, where it is specifically recorded that defendant nos.1 to 4 had started residing in the premises other than the suit premises. Trial Court on appreciation of evidence, has also held that there was no evidence provided to show that defendant no.5 was residing in the suit premises along with Durgaprasad. Once there was a finding recorded that the original tenant and/or heirs and legal representatives of Durgaprasad i.e. defendant nos.1 to 4 had left the suit premises, I do not find any fault in the findings recorded that the suit premises is not being used by the tenants for the purpose for which it was let out. The contentions with respect to defendant no.5 occupying the suit premises is concerned, it is rightly held that defendant no.5 is sub-tenant and the case of defendant no.5 with respect to statutory tenancy is rightly not accepted by both the Courts. Defendant no.5 has not entered the witness box and has failed to

adduce any evidence in support of the case made out with respect to independent tenancy rights.

11. With respect to the submission made by the learned counsel for the applicants that the respondent/landlady had never stepped into witness box to lead evidence and the evidence that has been led is through her power of attorney holder, is concerned, I do not see any reason as to why the oral evidence led through the power of attorney cannot be relied upon. Even though the respondent/landlady has not herself stepped into witness box, in view of the admitted facts regarding the original tenancy in favour of Durgaprasad and the pleadings with respect to the premises not being used by the original tenant, it was not required for the respondent/landlady to herself step into witness box and lead the evidence. The evidence led through power of attorney holder is regarding the fact on the point of defendant nos.1 to 4 residing at some other premises, which is not within any personal knowledge of the landlady alone. Hence, the said pleadings can be supported by oral evidence of the power of attorney holder. In such circumstances, I do not find any error with the reasoning recorded by both the Courts on the ground of sub-tenancy as well as non-user.

12. The Trial Court has dealt with the issue in respect of submission made by defendant no.5 that he was statutory tenant by referring to the provisions of section 5 of the Bombay Rent Act with respect to the premises being occupied by the sub-tenant on or before 1st February, 1973. After considering the evidence on record, both the Courts have come to the conclusion that there is sub-tenancy created by defendant nos.1 to 4 in favour of defendant no.5. In such circumstances, I do not find it necessary to exercise the limited jurisdiction under section 115 of the Code of Civil Procedure, 1908 for interfering with the concurrent findings recorded by both the Courts. There is no merit in the civil revision application. Hence, civil revision application is dismissed.

[GAURI GODSE, J.]