

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.179 OF 2022**

Bharati Naishad Curumsey and Anr Applicants.

V/s

Shri Niraj Shailesh Gandhi
and Others Respondents.

Mr. Y.S. Jahagirdar, Senior Counsel with Mr. Shailendra S. Kanetkar
a/w Mr. Yash Dewal for the Applicants.

Mr. Vijaysinh M. Thorat, Senior Counsel with Mr. Sandeep Sharma
a/w Mr Omprakash Kamwal a/w Mr. Ameet Gandhi for the
Respondents.

CORAM: NITIN W. SAMBRE, J.

**ORDER RESERVED ON: DECEMBER 23, 2022
ORDER PRONOUNCED ON: JUNE 08, 2023**

PC.:-

1] Non-applicant Nos. 1 to 4 being Trustees of Family Trust, preferred RAE Suit No.356/754 of 1992 for eviction of Applicants i.e. Defendant Nos. 3 and 4, so also original Non-applicant No.5 i.e. 5(a) to 5(d) i.e. Defendant No.1(a) to 1(d). The said suit was in relation to the property bearing Flat No.1 in Palmera Building situated at Altamount Road, Mumbai – 400 026. The said suit for eviction came to be decreed vide judgment and order dated 27/11/2018 passed by the learned Judge, Small Causes Court, Mumbai.

2] The present Applicants feeling aggrieved preferred an appeal being (A-1)Appeal no.63 of 2019, whereas Non-applicants/Plaintiffs preferred cross-objections vide Exhibit-17 in the said Appeal. Appeal preferred by the Applicants came to be dismissed vide impugned judgment dated 28/3/2022, whereas cross-objection came to be allowed with directions to carry out inquiry in mesne profits as per Order 20 Rule 12 of the Civil Procedure Code.

3] Facts necessary for deciding present Revision are as under:-

4] Parties hereto shall be referred to as per their nomenclature in the suit.

5] Plaintiffs claim to be the landlords having interest in the property by virtue of their status as trustees as per Indenture of Settlement dated 27/08/1964. It is the case of the Plaintiffs that suit premises was let out to original Defendant No.1 for his use and occupation, who paid rent upto 10/7/1969 when Court Receiver came to be appointed by Bombay High Court Suit No.367 of 1966.

6] Since the suit property was mortgaged with Oriental Fire and General Insurance Company Limited, for recovery of their mortgage dues, aforesaid suit came to be initiated in which Court Receiver took possession of the building from Plaintiffs on 10/7/1969. After Plaintiffs deposited entire amount due to the said Insurance Company, High Court in the aforesaid suit discharged the Court Receiver on 3/3/1988 and as such Court Receiver handed over possession of the building to the Plaintiffs.

7] As a sequel of above, Plaintiffs demanded rent through advocate's communication dated 16/8/1988. It is alleged that, on Defendant No.1 paying rent in compliance with the aforesaid demand, his status as that of statutory tenant came to be confirmed. It is further alleged that Defendant No.1 unlawfully inducted present Applicants viz Defendant Nos. 2, 3 and 4. Communication came to be issued on 2/9/1991 seeking details of Defendants. Defendant No.1 claimed that he had rented out the suit premises to the present Applicants i.e. Defendant Nos. 2, 3 and 4 with the full knowledge and consent of Mr. Shantikumar Gandhi who was acting on behalf of

Plaintiffs at the relevant time.

8] As such, it is alleged that since Defendant No.1 has illegally and unlawfully given suit premises on license to the other Defendants, suit came to be initiated seeking decree for eviction, on the ground that Defendant No.1 is not using the suit premises for the purpose for which the same was let out continuously for last six months immediately preceding filing of the suit. It is also claimed that Defendants have parked old Car bearing Registration No.BMX 9724 in the passage of the suit building, thereby causing nuisance and hardship to the occupants including Plaintiffs. It was also alleged that Defendants have erected permanent structure and carried out alterations, hence violation of Section 108 Clause (o) of the Transfer of Property Act, 1882 was also claimed. Plaintiffs also claimed that alternate accommodation is available to the Defendants. According to the Plaintiffs, suit premises are required for bonafide use as his family is finding it difficult to accommodate in the existing premises.

9] As against above, original Defendant No.1, after his death, was represented through Defendant Nos. 1(a) to 1(d) who have failed to

file their Written Statement. As such, suit came to be proceeded without their being Written Statement. Defendant Nos.2, 3 and 4 have alleged in their Written Statement that necessary parties are not added to the suit. As such, suit is bad for non-joinder of necessary parties. They have claimed that after appointment of the Court Receiver, as referred to above, rent was paid to the Court Receiver. They have admitted about parking of the car in compound and not in the passage. They have claimed that they would suffer great hardship if the suit is decreed.

10] Based on the above pleadings, Small Causes Court framed following issues:

<u>Sr. No.</u>	<u>Issues</u>	<u>Findings</u>
1.	Whether the plaintiffs prove that the suit premises were not being used by the original defendant No.1 without reasonable cause for more than six months immediately preceding the date of filing of the suit?	In the affirmative
2.	Whether the plaintiffs prove that the original defendant No.1 had illegally and unauthorisedly sublet or unlawfully given on licence the suit premises and thereby violated the provisions of the Bombay Rent Control Act?	In the negative
3.	Whether the plaintiffs prove that the defendants have erected in the suit premises a permanent structure without their consent?	In the negative

3A.	Whether the plaintiffs prove that the defendants have committed acts contrary to the provisions of Clause (o) of the Transfer of Property Act?	In the affirmative
4.	Whether the suit is bad for non-joinder of necessary and proper parties?	In the negative
5.	Whether the plaintiffs prove that tenant has after coming into operation of the Bombay Rent Act, built acquired vacant possession of or been allotted a suitable residence?	In the affirmative
6.	In alternative if it is concluded that the suit premises were lawfully sublet by the original defendant No.1 then, whether the plaintiffs prove that the amount charged by the tenant for the suit premises was in excess of the standard rent and permitted increases in respect of the suit premises or that the tenant had received any fine, premium, other like sum or consideration in respect of the suit premises?	Does not survive because of finding of Issue No.2.
7.	Whether the plaintiffs prove that the defendant has been guilty of conduct which is nuisance and annoyance to the adjoining or neighbouring occupiers?	In the negative
8.	What order and decree	Suit is decreed with costs.

11] On behalf of Plaintiffs, Plaintiff No.3-Ameet entered into witness box after submitting his examination-in-chief at Exhibit-74 and was subjected to cross-examination by Defendant Nos. 2, 3 and 4, whereas on behalf of Defendants, Defendant No.4-Nimesh submitted his examination-in-chief at Exhibit-103 and was subjected to cross-examination at the behest of the Plaintiffs. Small Causes Court after appreciating pleadings and evidence recorded findings that Plaintiffs proved that suit premises were not being used by Defendant No.1

without reasonable cause for continuously six months preceding the date of filing of the suit. It has also recorded a finding that by parking the vehicle in the passage, Defendants have violated Section 108(o) of the Transfer of Property Act and has also recorded finding of alternative accommodation acquired by the Defendants and accordingly decreed the suit.

12] Feeling aggrieved, (A-1)Appeal No.63 of 2019 was preferred by Defendant Nos. 3 and 4, whereas cross-objections were preferred by original Plaintiffs. Appeal of the Applicants came to be dismissed with costs, whereas cross-objections came to be allowed, thereby directing inquiry into mesne profit under Order 20 Rule 12 of the Civil Procedure Code.

13] Mr. Jahagirdar, learned Senior Counsel for the Applicants would urge that in the year 1972 Leave and License Agreement executed with Vasantbai Kooverji had expired, whereas Vasantbai herself expired on 21/01/1973. According to him, on 1/2/1973 by amendment in Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947) [For short the “Rent Act”), Section 15A

came to be introduced and licensee who was in possession of the property was conferred status of protected tenant. In the aforesaid factual background, he would urge that suit for eviction for subletting , violation of provisions of Section 108(o) of the Transfer of Property Act for damaging the property is not maintainable. According to him, since Applicants were in possession of the suit premises by virtue of Leave and License Agreement, they are entitled for protection under Section 15A of the Rent Act. According to him, Section 15A came to be inserted by Maharashtra Act No.17 of 1973 in the Rent Act. He would invite attention of this Court to Section 5(4A) of the Rent Act which defines “licensee”. According to him, there was subsisting license and as such Applicants became tenants within the meaning of Section 5(11)(bb) of the Rent Act. He would urge that conduct of the parties, particularly Defendant No.1, is required to be taken into account. He would urge that Defendant No.1 has accepted license fees from Applicants i.e. Defendant Nos. 3 and 4 after cut off date i.e. 1/2/1973 and that being so pursuant to subsisting Leave and License Agreement, Applicants get protection under the Rent Act. He would further urge that in the absence of there being any prayer for

mesne profit, both the Courts below have committed an error, thereby granting/ordering mesne profit in the matter.

14] Mr. Thorat, learned Senior Counsel for the Respondents would urge that it is a settled position of law that license is inheritable and Applicants are not original licensees. According to him, on 1/2/1973, there was no license subsisting and as such Applicants cannot claim benefit of Section 15A of the Rent Act. So as to substantiate his contention, he has drawn support from the judgment of the Apex Court in the matter of *D.H. Maniar and others vs. Waman Laxman Kudav* reported in **(1976) 4 SCC 118**. Mr. Thorat would urge that issue canvassed by Counsel for Applicants/Tenants as regards protection under Section 15A of the Rent Act is wholly covered by aforesaid judgment of the Apex Court. He would further urge that Revision is liable to be dismissed with costs.

15] I have appreciated aforesaid rival submissions. Applicants/Tenants are claiming that Leave and License Agreement was executed on 8/7/1970 for a period of 11 months by Yusuf Patel i.e. original tenant in favour of Vasantbai Koooverji. The second Leave and License

Agreement was executed on 2/6/1971 for a period of 11 months and said agreement expired in April, 1972. According to them, since May 1972 Vasantbai was residing in the suit premises irrespective of the fact that license was not continued and said Vasantbai expired on 21/1/1973. Fact remains that Vasantbai was never inducted as licensee in the suit premises by Plaintiffs but Vasantbai claimed to be licensee of original Defendant No.1.

16] Section 15A was introduced by Maharashtra Act 17 of 1973 with effect from 1/2/1973, thereby granting protection to those licensees who were in occupation of suit premises on 1/2/1973. Section further provided that such licensee shall be deemed to have become tenant of the landlord. Definition of “licensee”, so also of “tenant” as provided under Section 5(4A) and 5(11) respectively was amended. It is further claimed that Rent Act came to be amended vide Maharashtra Act No.18 of 1987, thereby amending sub-section 2 of Section 15, which provided that prohibition against sub-letting of the whole or any part of the premises shall be deemed to have had no effect before 1/2/1973. As a sequel, sub-tenancy of tenant who is

continued in possession on the deemed date i.e. 1/2/1973 is deemed to be valid and effectual for all purposes and as such tenant cannot be evicted under Section 13(1)(e) of the Rent Act.

17] If we appreciate the aforesaid legal submissions, for which support is also drawn from the judgment of the Apex Court in the matter of *Hiralal Vallabram vs. Sheth Kusturbhai Lalbhai and others* reported in **1967 SCC 1853**, particularly paras 6 and 7, the fact about Applicants were never licensees of the suit premises is not in dispute. It was Vasantbai who had claimed to be licensee of original Defendant No.1 and Applicants are claiming to be legal heirs of said Vasantbai. Position of law that a license cannot be inherited disentitles the Applicants for seeking relief of protection of status as that of tenant under the Rent Act. The judgment in the matter of *Hiralal Vallabram*, cited supra relied on by the Applicants will be of hardly any assistance in the aforesaid backdrop. Fact remains that in the judgment of *Hiralal*, findings recorded were based on pleadings of trespasser. Fact remains that Plaintiffs have sued the original tenant viz Defendant No.1 so also sub-tenant is before the Small Causes Court. That being so, judgment in the matter of *Hiralal* will be hardly

of any assistance.

18] In the case in hand, Court of Small Causes, after appreciating evidence has recorded findings that Exhibit-80 Leave and License Agreement was executed between Defendant No.1 and grandmother of Defendant No.2 on 8/7/1970 for a period 8/7/1970 to 7/6/1971, where as Exhibit-81 Leave and License Agreement was executed from 8/6/1971 to 7/5/1972. As such, Defendants are claiming to be in possession since 1970. Small Causes Court, so also Appellate Court accordingly have recorded a finding that if the aforesaid documents at Exhibits-80 and 81 are considered and interpreted, Applicants cannot draw any benefit out of the same, as the interest created by virtue of Leave and License Agreement cannot be transferred or inherited.

19] In this backdrop, if we appreciate the law laid down by the Apex Court in the matter of *D.H. Maniar*, cited supra, the Apex Court dealt with entire gamut of the matter, particularly while interpreting provisions of Section 5(4A) and Section 15A(1) of the Rent Act and has recorded following findings:

“10. It is thus clear beyond doubt that in order to get the advantage of Section 15A of the Bombay Rent Act, the occupant must be in occupation of the premises as a licensee as defined in Section 5(4A) on the first of February, 1973. If he be such a licensee, the non-obstante clause of Section 15A(1) gives him the status and protection of a tenant in spite of there being anything to the contrary in any other law or in any contract. In other words, even as against the express terms of the subsisting contract of licence the licensee would enjoy the benefits of Section 15A. But if he is not a licensee under a subsisting agreement on the first of February, 1973, then he does not get the advantage of the amended provision of the Bombay Rent Act. A person continuing in possession of the premises after termination, withdrawal or revocation of the licence continues to occupy it as a trespasser or as a person who has no semblance of any right to continue in occupation of the premises. Such a person by no stretch of imagination can be called a licensee. If, therefore, the respondent was not a licensee under a subsisting agreement in occupation of the premises on the first of February, 1973 he could not take shelter under Section 15A of the Bombay Rent Act. The trial Judge -found against him. Apart from the position that this was essentially a question of fact and a finding on which could not be interfered with by the High Court in exercise of its revisional power under Section 115 of the Code of Civil Procedure, the High Court has done so, as we shall point out, by committing such gross errors of law and fact that we were constrained in the beginning of our judgment, though very reluctantly, to make some strong observations against the judgment of the High Court.”

20] Both the Courts below have concurrently recorded finding of fact that Defendant No.1 is not using the suit premises for more than six months immediately preceding date of the suit for the purpose for which it was let out to him. Both the Courts below have also recorded finding inferring that conduct of the Applicants is contrary to provisions of Clause (o) of Section 108 of the Transfer of Property Act. The Appellate Court has noticed that Applicants neither entered into Leave and License Agreement with Defendant No.1 nor any such Agreement is brought on record. Rather evidence of the witnesses of the Applicants in categorical terms establishes a fact about non-existence of any Leave and License Agreement inter se between Applicants and original Defendant No.1 or Applicants and the Plaintiffs. In the aforesaid backdrop, both the Courts below were justified in recording finding that Applicants are not entitled for protection under Section 15A of the Rent Act.

21] In this view of the matter, findings recorded by both the courts below on the Applicants not being entitled for protection under Section 15A of the Rent Act cannot be faulted with.

22] As far as claim of the Applicants that in absence of prayer for mesne profit in the plaint, Appellate Court ought not to have proceeded to direct inquiry in the mesne profit pursuant to provisions of Order 20 Rule 12 is concerned, fact remains that for passing order for inquiry under Order 20 Rule 12 of CPC in the matter of mesne profit, express prayer is not required to be made. It is always open for the Court to grant such relief in the absence of any express prayer. Such relief is consequential one to the grant of main relief. As such, inquiry in the mesne profit can always be ordered. Appellate Court has given sufficient reasons for passing an order of causing inquiry in mesne profit under Order 20 Rule 12 of CPC by drawing support from catena of judgments referred to in its judgment. As the order directing inquiry into mesne profit is based on the legal provisions and the judgments, I do not see any reason to cause any interference, thereby observing that order is without jurisdiction.

23] Revision which lacks merits accordingly fails and same stands dismissed.

24] After pronouncement of order, Counsel for the Applicants seeks continuation of interim relief till 31st July, 2023.

25] Since nobody is appearing for Respondents today to object the aforesaid prayer, same is granted. The interim relief which is in operation in the Revision Application would continue to operate till 31st July, 2023.

[NITIN W. SAMBRE, J.]