

Dusane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.377 OF 2017

Smt. Usha Udaysing Jagtap ...Appellants
& Ors.

V/s.

Mr. Anis Ahmed Akbar Sayyed ...Respondent

Mr. Clive D'Souza for Appellants.

Mr. Osman Chishty for Respondent.

CORAM: MADHAV J. JAMDAR, J.
DATE: 10th JANUARY, 2023

P.C.:

1. Heard Mr. D'Souza learned Counsel appearing for the Appellants and Ms. Chishty, learned Counsel appearing for the Respondent.

2. Mr. D'Souza submitted that the following are the substantial questions of law involved in this Second Appeal:

(1) Whether the learned Courts erred in not considering that by virtue of the compromise arrived at between the parties in Civil Suit No. 1373 of 1972 Khatija Sultan waived her tenancy rights in the suit premises?

(2) Whether the learned Courts failed to consider that the Respondent was not entitled to tenancy rights under Section 5(11)(c) of the Bombay Rent Act during the lifetime of his mother Shaha Sultan Akbar Sayeed, sister of Sadruddin Aga ?

(3) Whether the learned Courts failed to consider that the Respondent could not be a member of the deceased Khatija Sultan's family under Section 5(11)(c) of the Bombay Rent Act during the life time of his mother who was the sister of Khatija Sultan ?

(4) Whether the learned First Appellate Court erred in not considering that the Respondent who claims to be a tenant of the Appellants in respect of the suit premises under Section 5(11)(c) of the Bombay Rent Act can also claim to be a member of the deceased Khatija Sultan's family as a caretaker and foster son under Section 5(11) (c) of the Bombay Rent Act ?

3. Mr. D'Souza relied on genealogy of the family members of the Defendants, who are the present Respondents. The said genealogy is reproduced hereinbelow:

<u>Genealogy</u>			
Cumberali Aga (Father) (Original Tenant)			
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 Sons		 Daughters	
1	Abbas Cumberali Aga (dead)	1	Khatija Aga (died on 22.8.1995. Married name: Khatija Sultan Kazi

2	Hyderali Cumberali Aga (died on 19.7.1983)	2	Zeenat Aga (dead), Married name : Zeenat, Married to Sindhi										
3	Saddruddin Cumberali Aga (died on 23.11.1990)	3	Shahsultan Ahmed Akbar Sayeed. Marirried to Muslim (dead) 										
4	Ali Cumberali Aga (dead) Hyderali Tenant from 1972 to 1983 Sadrudin C. Aga Tenant from 1984 to 1990		<table><tr><td>SON</td><td>DAUGHTER</td></tr><tr><td>-----</td><td>-----</td></tr><tr><td> </td><td> </td></tr><tr><td>1. Anis Akbar Sayeed</td><td>1.Saida Akbar Sayeed (dead)</td></tr><tr><td>2. Zulfikar Akbar Sayeed</td><td></td></tr></table>	SON	DAUGHTER	-----	-----			1. Anis Akbar Sayeed	1.Saida Akbar Sayeed (dead)	2. Zulfikar Akbar Sayeed	
SON	DAUGHTER												
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1. Anis Akbar Sayeed	1.Saida Akbar Sayeed (dead)												
2. Zulfikar Akbar Sayeed													

4. He submitted that Cumberali Aga was the original tenant and present Defendants i.e. Anis Akbar Sayeed (who is grandson), the present Defendant i.e. the Respondent cannot claim protection under Section 5 (11)(c) of the Bombay Rent Act.

5. To appreciate the substantial questions of law as submitted by Mr. D'Souza, it is necessary to set out certain factual aspects. The Appellants are the owners of the suit premises and one Cumberali Aga was the tenant. He expired on 19th May 1972 leaving behind Hyder Ali Cumberali Aga and daughter Khatija Aga as surviving heirs.

6. Earlier Suit was filed bearing Civil Suit No. 1373 of 1972 only against Hyder Ali Cumberali Aga for possession. The said Suit was withdrawn with liberty to file another suit on same cause of action, as other legal heirs of Cumberali Aga were not

made parties to the said suit. Thereafter compromise was recorded between the parties and Hyder Ali Cumberali Aga and Sadruddin Cumberali Aga were to be treated as tenants and Khatija was to reside in the suit premises without claiming any tenancy rights. Said Hyderali Cumberali Aga passed away on 19th July 1983 and Saddruddin Aga passed away on 23rd November 1990. The above genealogy on which Mr. D'Souza relied clearly show that after the death of Hyder Ali Aga and Saddruddin Aga, Khatija Aga became the tenant.

7. It appears that another Suit bearing Civil Suit No. 1892 of 1984 was filed against Saddruddin Aga and Khatija Aga and the said Suit was decreed declaring Sadruddin as a tenant of suit premises as Khatija Sultan had consented that the rent receipt be issued in the name of Saddruddin Aga. However, in the judgment passed in said Suit No.1892 of 1984, the Trial Court also recorded that Khatija Sultan had also become tenant in respect of suit premises.

8. As set out hereinabove, said Saddruddin Aga passed away on 23rd November, 1990 and another Suit was filed bearing Civil Suit No. 32 of 1991 by the landlords against Khatija Sultan admitting her to be as tenant to restrain her from inducting, transferring or assigning her interest. The present Respondent Anis Sayeed is the son of Shahu Sultan Ahmed Akbar Sayeed

i.e. sister of Khatija Sultan and he was staying in the suit premises since the lifetime of above Saddruddin. The said facts are recorded in paragraph 21 of the judgment passed by the learned First Appellate Court. Said Khatija Sultan passed away on 22nd August 1995 and therefore, Civil Suit No. 32 of 1991 abated. Thereafter the present suit was filed on 11th December 1996 bearing Special Civil Suit No. 39 of 1997 against said Anis seeking possession.

9. It is the contention of the Appellants that said Anis has become trespasser, however, both the Courts have found that the said Anis has become the tenant under the provisions of Sections 5 (11)(c) of the Bombay Rent Act and therefore, he cannot be evicted by terming him to be the trespassers.

10. The view taken by the learned Trial Court and the learned First Appellate Court is the correct view in the facts and circumstances of the present case and in view of relevant provisions of law i.e. Sections 5 (11)(c) of the Bombay Rent Act.

11. Sections 5 (11)(c)(1) contemplates that in relation to any premises let for residence, when the tenant dies, any member of tenant's family residing with the tenant at the time of his death or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court becomes tenants.

12. It is the contention of Mr. D'Souza that Khatija Sultan was the tenant and Anis is the son of sister of Khatija Sultan and therefore, cannot be the member of Khatija's family. However, it is to be noted that the term "member of family" as contemplated under Section 5(11)(c) is very broad term and it is not restricted to only legal heirs and representatives of the deceased tenant. In fact the learned First Appellate Court has relied on the judgment of the Supreme Court in the case of **K.V. Muthu Vs. Angamuthu Ammal**¹, wherein even the foster son has been treated as tenant as the member of the family of the tenant. Therefore, there is no substance in the substantial questions of law as submitted by Mr. D'Souza.

13. For the reasons stated above, the Second Appeal is dismissed, however, with no order as to costs.

BHALCHANDRA
GOPAL
DUSANE

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(MADHAV J. JAMDAR, J.)

1 AIR 1997 SC 628