

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

**CIVIL REVISION APPLICATION NO.240 OF 2023
WITH
INTERIM APPLICATION NO.4560 OF 2023
IN
CIVIL REVISION APPLICATION NO.240 OF 2023**

1. Padmakar Badriparasad Dube	)	
(Deceased)	)	
2. Smt. Premadevi Padmakar Dubey	)	
Age:75 and Occupation: not known	)	
Residing at Shop No.1-2-3, Ground	)	
Floor, Gopal Niwas, Building No.7-A,	)	
Plot No.168, Kherwadi, Bandra (East),	)	
Mumbai 400 051.	)	Applicants
		... (Org.Defendant)

V/s.

1.Smt. Sonibai wd/o Chunilal Badsawal	)	
(Deleted) Aged about 80 years,	)	
Occupation: Housewife	)	
2. Radheshyam S/o. Chunilal Badsawal	)	
Aged about 45 years,	)	
Occupation : Mason, Both adults,	)	
Indian Inhabitant of Mumbai, Residing	)	
at Plot No.4, Kherwadi, Bandra (East),	)	
Mumbai 400 051.		Respondents
		... (Org. Plaintiffs)

Mr. Pradeep Thorat a/w G.C. Singh h/f Ms. Richa V. Singh,
Advocate for the Applicants.
Adv. Beejal Chowlara a/w Mr. Manoj R. Badsawal, for the
Respondents.

CORAM : RAJESH S. PATIL, J.

RESERVED ON : 20 OCTOBER 2023

PRONOUNCED ON : 19 JANUARY 2024

JUDGMENT:-

1. This Civil Revision Application is filed by original defendant challenging the judgment and decree dated 13 April, 2022 passed by the Appellate Bench of the Court of Small Causes at Bombay, thereby passing a decree of possession of suit premises.
2. The Applicant herein is the original defendants in a suit for eviction filed by the Respondent / Plaintiff. The plaintiff before filing the present proceedings had filed a suit for eviction on the grounds of arrears of rent and other reliefs being R.A.E. & R. Suit No.417/916 of 1997. It is the plaintiff's case that thereafter the defendant had given an oral undertaking that he will not breach any of the terms of the tenancy and they will pay the rent time to time; therefore according to the plaintiff considering the undertaking given by the defendant they withdrew the R.A.E. & R. Suit No.417 /916 of 1997.
3. The plaintiff in the year 2005 filed a second suit for eviction as regards Shop No.1, Shop No.2 and Shop No.3, admeasuring 10.3 ft x 10 ft, 10 ft x 12 ft and 8 ft x 10 ft respectively together with a room on the rear side of Shop Nos. 2 and 3 admeasuring 10 ft x 20 ft of Gopal Niwas (for short "suit premises"). The purpose of use of the suit premises was dual i.e. commercial and residential and the monthly rent of the suit premises was fixed at Rs.900/- per month inclusive of permitted increases. The suit initially was filed by the plaintiff no.1 and plaintiff no.2 however during the pendency of the suit, the plaintiff no.1 died. Therefore only

plaintiff no.2. continued with the suit. So also, the original defendant died during the pendency of suit therefore his name was deleted and his legal heirs i.e. Premadevi was brought on record.

4. The plaintiff has averred that before filing of the suit he had issued a notice dated 31 December, 2004, demanding therein the arrears of rent of Rs.19,900/- payable upto the month of December 2004. The suit for eviction was filed on 29 November, 2005 claiming an amount of Rs.27,900/- being the arrears of rent, as a ground for eviction, so also the ground of 'execution of permanent structure' in the suit premises without permission of the landlord, 'nuisance' and on the ground of 'subletting' were averred. It was mentioned in the plaint that the defendants have sublet Shop No.3 to Gulabchand Vrahaspati. The plaintiff sought eviction of the defendants on all the four grounds.

5. The defendant appeared in the matter and filed their written statement, and denied the contentions as mentioned in the plaint. It was denied that the common walls were removed from the suit premises. It was also denied that the defendant has constructed additional room near the staircase of the suit premises. It was denied that the defendant was causing any kind of nuisance and annoyance to the nearby residents. It was also denied that the defendant has subletted the suit premises. After filing of the written statement, the defendant also filed additional written statement and one more additional written statement during the pendency of the suit.

6. Thereafter issues were framed and the parties led their

evidence. The plaintiff no.2 entered the witness box and gave evidence on behalf of the plaintiff. So also, the plaintiff examined one Mr. Aral Nicholas Rodrigues (advocate/ Court Commissioner), and Dr. Virendra Vishnu Mohite, Medical Officer of Health, H(E) Ward, BMC. All the three witnesses were cross examined by the defendant's advocate. Thereafter the defendant examined his Constituted Attorney Gulabchand Vrahaspati Dubey as per Ex.129 and 141. The defendants also examined DW No.2 Lalchand Trilochand Mishra in support of its pleadings as made in the written statement.

7. Thereafter submissions were made by respective counsel of the parties and the matter was closed for arguments. After both the parties made their submissions, the Trial Court by its judgment and order dated 13 January, 2020, held that the plaintiff was not able to prove that he is a landlord and that the defendant is his tenant in respect of the suit premises. So also the ground of default and nuisance were rejected by the Trial Court. However, as regards the grounds of unlawful subletting, of Shop No.3 of the suit premises, the Trial Court held that the said issue of subletting of Shop No.3, has been proved. So also it was held that the ground of additions and alterations have been proved by the plaintiffs. Therefore even though the issue nos.4, 6 and 7 were held in favour of the plaintiff, as the Trial Court came to the conclusion that the relationship of the landlord and the tenant has not been proved by the plaintiff, the suit was dismissed by the Trial Court.

8. Being aggrieved by the dismissal of the suit, the landlord filed an appeal before the Appellate Bench of the Court of Small

Causes at Bombay. The Appellate Bench framed the points for determination including the point “whether the plaintiff has proved the relationship of the landlord and tenant”. The Appellate Bench after hearing both the parties by its judgment and decree dated 13 April, 2022, held that the plaintiffs have proved the relationship of landlord and tenant existed between Plaintiff and Defendant in respect of the suit premises. It was further held that defendant was in arrears of rent and that the defendant had carried out additions and alterations of permanent nature in the suit premises. Further it was held that the defendant had unlawfully subletted suit premises to one Gulabchand Vrahaspati Dubey. Hence, a decree of possession was passed against the defendant.

9. Being aggrieved by the judgment and decree passed by the Appellate Bench, the defendant filed the present Civil Revision Application under section 115 of the Code of Civil Procedure, 1908.

SUBMISSIONS :

10. Mr. Pradeep Thorat on behalf of the original defendant/applicant herein, made his submissions:-

(i) Mr. Thorat submitted that the suit premises was owned and belonged to Ram Gopal Badsawal, the step brother of the plaintiff no.2. And the said fact can be seen from the consent terms entered into between the plaintiff no.2 and Mr. Ram Gopal Badsawal (the stepbrother of the plaintiff no.2). Therefore, the Trial Court had rightly held that the relationship of the landlord and the tenant

between the parties had not been established. Hence, a suit under the Rent Act for eviction was not maintainable. However, the Appellate Court without considering the facts on record had reversed the decree passed by the Trial Court.

(ii) Mr. Thorat further submitted that the demand notice was never served upon the defendant. Hence, decree on the ground of arrears of rent, could have never been passed.

(iii) Mr. Thorat further submitted that there was no question of defendant depositing rent in the Court as there was no relationship of landlord and tenant between the parties.

(iv) He further submitted that in the second written statement dated 17 February 2011 the defendant has categorically disputed that the plaintiff is not an absolute owner.

(v) Mr. Thorat further submitted that there was no subletting on behalf of the original tenant as Gulabchand Vrahaspati and Subhashchand Vrahaspati were the nephews of the original tenants and they were helping the tenant in his business. Both Gulabchand and Subhaschand had lost their father. Therefore they were the responsibility and in care of their uncle, (the tenant). Therefore, there can't be any subtenancy in favour of the nephews of the tenant. Therefore, there was no ground of subletting.

(vi) Mr. Thorat further submitted that if there is any change in the premises for the betterment of the premises, then it will not amount to change of a permanent nature in the suit premises.

(vii) Mr. Thorat further submitted that the Commissioner Report

is neither supported by any evidence nor the Commissioner has been examined by putting him into the witness box to prove his report.

(viii) Mr. Thorat in support of his submissions, relied upon three authorities :-

(a) *Bijendranath Bhargava Vs. Harsh Wardhan*, reported in **1988 (1) SCC 454**,

(b) *Venkatlal Pitte vs. Bright Bros. (Pvt.) Ltd*, reported in **1987 (3) SCC 558** and

(c) Judgment of Bombay High Court in *Sukhlal Chunilal Bhagani vs. Harish Suvarne*, reported in **1998 (5) Bom. C. R. 266**.

11. In response Mrs. Beejal Chowlara made her submissions on behalf of the respondents / landlords:-

(i) Mrs. Chowlara submitted that both the Courts concurrently held that the grounds of subletting had been proved. So also the grounds of additions and alterations has been proved. The trial Court did not grant the decree of possession only on the basis that relationship of landlord and tenant was not proved by the plaintiff. However, the Appellate Court has rightly held that the relationship of the landlord and tenant existed as regards to the suit premises and by concurrently holding that the grounds of additions and alterations had been proved. So also the grounds of arrears of rent having been proved, the Appellate Court had rightly decreed the suit for possession.

(ii) Mrs. Chowlara submitted that the demand notice was rightly

sent at the last known address of the defendant. The defendant did not reply to the said notice, and amongst other grounds the suit filed on the ground of arrears of rent, the defendant did not come forward and deposit rent in Court.

(iii) Mrs. Chowlara further submitted that as far as additions and alterations are concerned, both the Courts had concurrently held that the grounds of additions and alterations had been duly proved by the plaintiff. She further submitted that the plaintiff had examined three witnesses and proved that the defendant had made additions and alterations of permanent nature in the suit premises.

(iv) Mrs. Chowlara further submitted that the plaintiff had examined his witness and had submitted that the defendant had subletted Shop No.3 to a third party. She further submitted that all the licences of the suit premises were in the name of the third party and not in the name of the defendant. She further submitted that this was enough to prove that there was subletting of the suit premises. She submitted that the case put up by the defendant that the persons to whom the subletting was done were like his sons. However, no such document was brought on record to prove that there was any kind of an adoption. So also the fact that the licences were transferred in the name of the said three nephews proved that there was subletting.

(v) Mrs. Chowlara further submitted that the suit was filed by the plaintiffs. Plaintiff no.1 being the mother of plaintiff no.2 and as the plaintiff no.1 had died during the pendency of the suit,

therefore, the suit was continued only by plaintiff no.2. She further submitted that in a suit between plaintiff no.2 and the step brother, there was a decree passed but further there was an agreement between both the parties, when there was exchange of the premises. The suit premises came in favor of plaintiff no.2 and the first and the second premises went in the share of the step brother of the plaintiff. She further submitted that this fact was well known to the defendant as defendant was paying rent of the suit premises to the plaintiff no.2. She further submitted that there was no denial to this fact that the defendant was paying rent to the plaintiff. She further submitted that in the proceedings for Rent Act for eviction, what is contemplated is a relationship of the landlord and the tenant and there is no need that a person should be the owner of the premises in order to file a suit for eviction as the Rent Act contemplates that a person need not be the owner to file a suit for eviction. She further submitted that in fact the defendant in the written statement had never denied the title of the plaintiff. It was only by way of document which the defendant titled as additional written statement, when for the first time the title of the plaintiff was questioned by the defendant. She further submitted that the Appellate Court has rightly come to the finding that relationship of the landlord and the tenant existed between the parties and therefore a suit for eviction could be passed.

(vi) Mrs. Chowlara cited two judgments in support of her submission :-

- (a) *Omprakash vs. Mishrilal* reported in *1987 (1) SCC 458* and
- (b) *Dhulichand vs. Jagmender Dass*, reported in

1990 (1) SCC 169.

ANALYSIS AND CONCLUSION:-

12. I have heard both the counsel. The counsel have taken me through the documents on record including the impugned judgments.

13. In the present suit, the grounds for eviction were ‘arrears of rent’, ‘additions and alterations of permanent nature’ nuisance and ‘subletting’. The plaintiff nos.1 and 2 had filed a suit for eviction under the Rent Act and the plaintiff no.1 was the mother of the plaintiff no.2 who died during the pendency of the suit. Therefore, the suit was further conducted only by the plaintiff no.2, also as L.R. of Plaintiff No.1. The defendant in the written statement has not raised any kind of objection about the relationship between the parties. However, by way of additional written statement, the defendant raised the issue about the relationship between the parties. The defendant contended that the suit premises was in a building consisting of ground plus two floors and the plaintiff no.2 was the owner of first floor and the second floor as per the consent decree passed in the suit filed by the plaintiff no.2 against his step brother. It is pertinent to note here that after passing of the consent decree in the suit, the parties i.e. the plaintiff no.2 in the present proceedings and his step brother, they had entered into an agreement whereby they had mutually amongst themselves had agreed and had exchanged the premises. The ground floor premises coming in the share of plaintiff no.2; and plaintiff no.2 who was owner of the premises of the first floor and the second

floor gave away the said premises to the step brother. It is an admitted fact that the defendant was paying rent of the suit premises to the plaintiff No.1. after there was exchange of premises between the plaintiff no.2 and his step brother. Even in the written statement no such objection was taken by the defendant and only by way of subsequent written statement, such an objection was raised. In para no.4 of Written Statement dated 27 November 2007, the defendant mentioned that, “The Defendant says that inspite of repeated requests, the Plaintiff no.2 did not give the particulars regarding permitted increases.” It also needs to borne in mind, that plaintiff no.2, is son of plaintiff no.1, who continued with the suit also as legal heir of plaintiff no.1. According to me, the Appellate Court has rightly come to the conclusion that the plaintiff had proved the relationship between the parties that being of landlord and tenant in respect of the suit premises. Therefore, according to me, there is no reason to interfere with the finding recorded by the Appellate Court being the last fact finding Court.

14. As regards the ground of ‘subletting’, both the Court had concurrently held that the plaintiff had proved the ground of subletting. It is the case of the plaintiff that the defendant had sublet Shop No.3 in favour of his two nephews. The defendant came up with the case that there cannot be subletting in favour of the nephews as a matter of fact the nephews who were just helping the original tenant in his business. It is the matter of record that the licence of the suit premises were transferred in the name of the nephews of the original tenant. If for the sake of

argument it is presumed that the nephews were just helping the original defendant in his business, there was no need to transfer the licence of the suit premises in favour of the nephews. The written Statement dated 27 November 2007, is signed by nephew of tenant. The second and third Written Statement are signed by another nephew of the tenant.

15. The Supreme Court in case of ***Omprakash*** (supra) has held that subletting can even be by handing over possession of the premises in favour of the nephews. Para No.31 of the said judgment reads as under:-

(31) Viz-a-vis the aspect of sub-letting, we are inclined to concur with the finding of the Trial Court that Motichand,, who was the nephew of the original defendant,, had been inducted in the suit premises as a sub-tenant. Further as it is a matter of record that the original defendant had constructed his own house elsewhere where he has been residing with his wife, the accommodation of his nephew Motichand in the suit premises did amount to sub-letting and the same having been done without the knowledge and approval of the landlords, this too provided a ground for his eviction therefrom. Additionally, even if the deposit of arrears of rent in full by the original defendant at the time of institution of the suit is construed to be valid, in the face of his own house elsewhere, he is not entitled to the protection from eviction under the proviso to sub-section 4 of Section 20. To be elaborate, under sub-section 4 of Section 20, as referred to herein above, if a tenant, at the first hearing of the suit, unconditionally pays or tenders to the landlord the entire amount of rent and damages for use and occupation of the building due from him together with interest thereon @ 9% per annum and the landlords' costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-section 1 of Section 30, the court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on the ground of default. The proviso thereto predicates that this benefit would not be available to a tenant who or any member of his family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area. Apart from the fact that no evidence is forthcoming to attest that

the requirements of sub-section 4 of Section 20 had been fully complied with, the construction of his own house elsewhere, as is evident from the record, did dis-entitle the original defendant and now the respondents to avail the benefit of such protection, as contemplated by the Act.

16. Supreme Court in the judgment of *Dhulichand* (supra) has held that tenant allowing his relative to do business in the suit premises would also amount to subletting. Paragraph Nos 4 and 5 of the said judgment reads as under:-

(4) The facts in this case as found by the Rent Control Tribunal which was accepted by the High Court are that the concern M/s Hira Lal Sri Bhagwan is the sole proprietary concern of Sri Bhagwan, that Sri Bhagwan has been carrying on that business in the premises in dispute, that Duli Chand-tenant had no interest in the business, that Sri Bhagwan is in exclusive possession of the property, that tenant-Duli Chand works at another shop, M/s Aggarwal Hardware and Mills Stores with his younger son, that there was no plea of concurrent user of the premises by the tenant nor there is any plea that Sri Bhagwan is a licensee, that occasionally the tenant-Duli Chand was seen sitting in the shop and that the tenant had not retained any control over the same. These facts clearly support the finding of Appellate Tribunal and High Court that the tenant had parted with legal possession of the shop to the said Sri Bhagwan.

(5) The learned counsel for the appellant, however, contended that Sri Bhagwan was not the adopted son of Hira Lal and that by permitting the son to carry on business it could not be stated that he had parted with the legal possession of the premises. In this connection, he drew our attention to the decision of this Court in *Lakshman Singh Kothari v. Smt. Rup Kanwar*¹ wherein this Court had held that in order that an adoption may be valid under Hindu law there must be a formal ceremony of giving and taking by the natural parent and the adopted parent after exercising their volition to give and take the boy in adoption and that such an evidence of a valid adoption is not available in this case. The Appellate Tribunal and the High Court have dealt with the evidence available in this case in detail and came to the conclusion that Sri Bhagwan was adopted by Hira Lal. It is not necessary for us to rely on the evidence available or the findings as proof of a valid adoption under Hindu law but the evidence and the findings are enough to show that though Duli Chand and Sri Bhagwan are father and

1 (1962) 1 SCR 477: AIR 1961 SC 1378

natural son, it is not possible to invoke any presumption that they constituted a Joint Hindu Family. It may also be mentioned that in the written statement the tenant had not pleaded specifically that he and Sri Bhagwan, constituted a Hindu Joint Family, that they are in joint possession,, that either the business is joint family business or Sri Bhagwan was permitted to use the premises for carrying on any business as licensee remaining in joint possession. The evidence on adoption is thus to be treated only relevant for the purpose of considering the question whether the tenant has not retained any control over the premises and that he has parted with the possession, and we do think that the courts below erred in relying on the same for this purpose.

[Emphasis Supplied]

According to me the landlord has succeeded in proving the said ground of 'subletting'. In the light of above analysis in my opinion there is no need to interfere with the concurrent findings recorded by both the Court.

17. Both the courts have concurrently held that the tenant had made "additions and alterations in the suit premises". For that purpose the tenanted, the landlord has examined its witness. The said witness had given his evidence that the tenant had made additions and alterations by removing the walls of the three suit premises and making the three shop premises into one. So also there was encroachment made by the tenant. Therefore the original size of the suit premises was increased by the tenant. In such a case, it was a clear case of additions and alterations of permanent nature. Therefore in my opinion both the Courts have rightly come to the conclusion that there were additions and alterations made in the suit premises.

17.1 In *Brijendra Nath (Supra)*, the facts were that the eviction ground was of material alternation in suit premises without permission. The material alteration pleaded was of balcony of wooden construction. During the pendency of suit the Landlord had sold the premises, therefore the new Landlord was aware of the pending suit, therefore it was contended that the new Landlord indirectly purchased the litigation. So also in non-examination of earlier Landlord it was recorded that, *“no notice was given for the reason that the Defendant had said that when they would vacate the show room they would remove the balcony. On their saying so, I did not have any objection about the balcony. On the eastern side there is a window. I do not know its length and breadth. This is correct that this window was constructed in the year 1964. The cost of construction of the window amounting to Rs.199.85/- has been paid by me to the defendant. The balcony gets light and air through this window”*. In this circumstance, the Supreme Court held that the wooden structure does not amount to material alteration which could give a cause of action of eviction. In the judgment of *Venktlal Pittie (supra)*, the permanent structure alleged were construction of lofts, several rooms and construction of pillars and stanchions into the flooring. The Trial Court and the Appellate Court had granted eviction decree of the tenant on the ground of permanent construction. However, High Court reversed the concurrent findings of the Courts below. Supreme Court set aside the Judgment and Order of the High Court and restored the order of the Appellate Bench of Small Causes, there by granting

order for possession and mesne profits.

17.2 Supreme Court, in the above judgment, has restored the order of possession. However, there are observation on how the question whether the structure is a permanent or not should be judged. Considering the facts involved in the present case the trial Court and Appellate Court have held in my opinion interference under Section 115 of CPC is unwarranted.

17.3 The facts in the judgment of Single Judge of Bombay High Court Shubhlal Chunilal Ghagani (supra), were quite different. The Trial Court had deserve the suit on grounds of arrears and permanent alterations, however the Appellate Court had reversed the findings of Trial Court, thereby dismissing the suit, High Court while confirming the findings of Appellate Court, held that it was not even the allegation of the landlord that because of the alleged alterations, any damage is caused to the findings or its utility is impaired in any way.

Since, the facts in the above judgment were quite different, then the present proceedings, the observation made in the above judgment will not be applicable to the present proceedings.

18. As regards the ground of arrears of rent, the Appellate Court has held that the notice was rightly sent to the defendant at the last known address and therefore it should be presumed that the notice was duly served upon the defendant. Admittedly the demand notice which sent by the landlord was addressed to the last known address of the defendant and there was no reply to the said notice.

19. In fact, the Trial Court in its judgment has held that the demand notice was served upon the defendant but considering the non existence of the relationship of the landlord and tenant, the landlord is not entitled to claim rent from the defendant. The Appellate Court has considered the fact that the notice was duly exhibited and the notice was sent at the last known address of the defendant. The notice being returned with remark “Not Claimed”. The Appellate Court further considered that admittedly the defendant has not deposited any rent in the Court. Therefore, the ground of eviction of arrears in rent is duly proved. Bombay High Court in the judgment of *Krishna Ramchandra Jadav Vs. Smt. Shankar Ajmal*² held that notice packet returning with remark “unclaimed”, ‘intimation’ and ‘not claimed’, it should be presumed that the notice is served. In another judgment of Bombay High Court in *Tirathdas Pokhardas Kalda vs. Suribai Assumal Moolchandani and Ors*³ it was held that notice packet returned back with endorsement like “not claimed” or “unclaimed or nor found”, it is apparent that initial burden is upon person sending notice to show that he did all that was necessary to get notice served upon other side. Once he establishes this, the burden shifts to other side to show that the endorsement are incorrect. Therefore, I am of the opinion that there is no need for me to interfere with the findings recorded by the Appellate Court.

20. In view of my findings recorded above, in my view no case is made out by the tenant to interfere with the judgment and decree passed by the Appellate Court, hence, in my judgment there is no

² 2005 (4) Mh.L.J. 577

³ 2007 (2) Mh.L.J. 307

force in the submissions made by the tenant and this Civil Revision Application must fail and is hence dismissed. No cost.

(RAJESH S. PATIL, J.)

At this stage, advocate for the applicant seeks stay to the execution of this judgment. The request made by the applicant is opposed by the landlord's counsel. The suit is of the year 2005 and the landlord is not able to enjoy the fruits of the decree. The request made by the advocate for the applicant for stay is hence rejected.

(RAJESH S. PATIL, J.)