



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 283 OF 2021
WITH
INTERIM APPLICATION NO.14251 OF 2023
IN
CIVIL REVISION APPLICATION NO. 283 OF 2021

1. Kamleshkumar Madhavprasad Kanojiya
Aged : 47 years, Occu.: Ironing Business,
Indian Inhabitant,
 2. Gulabchand Madhavprasad Kanojiya
Aged: 55 years, Occu.: Ironing Business,
Indian Inhabitant,
*(since deceased through is heirs and legal
representataive)*
 - 2(a) Smt. Santaradevi Gulabchand Kanojiya-wife,
Age:57 years,
 - 2(b) Shri Dineshkumar Gulabchand Kanojiya-son,
Age:27 years,
Both R/at Piparkundi, Govara, Taiyabpur,
Kaushabi, Uttar Pradesh 212 201
 3. Jitendrakumar Madhavprasad Kanojiya
Aged: 32 years, Occu.: Ironing Business,
Indian Inhabitant,
All at Between Building No.9 and 10,
Navjivan Society, Lamington Road,
Mumbai 400 008
- ... Applicants.
(Ori.Defendant)

Versus

The Navjivan Co-operative Housing Society
Limited, a co-operative Housing Society,
registered under the Maharashtra Co-operative
Housing Societies Act, Bombay having their
registered office at Building No.6, 1st Floor,
Navjivan Society, Lamington Road,
Mumbai 400 008

... **Respondent.**
(Orig.Plaintiff)

WITH
CIVIL REVISION APPLICATION NO. 284 OF 2021

Gangadin s/o.Shri Ramprasad Nirmal
Aged : 79 years, occu.: Ironing,
Between Building No.9 and 10,
Navjivan Society, Lamington Road,
Mumbai 400 008

... **Applicant.**
(Ori.Defendant)

Versus

The Navjivan Co-operative Housing Society
Limited, a co-operative Housing Society,
registered under the Maharashtra Co-operative
Housing Societies Act, Bombay having their
registered office at Building No.6, 1st Floor,
Navjivan Society, Lamington Road,
Mumbai 400 008

... **Respondent.**
(Orig.Plaintiff)

Mr. Rajesh Parab, Advocate for the Applicants.
Mr. Rajesh B. Jain a/w Mr.Rohit Jain and Ms.Neha R.Doshi, i/by
Legal Juris, Advocates for the Respondent.

CORAM : SHARMILA U. DESHMUKH, J.
Reserved on : December 18, 2023
Pronounced on : January 02, 2024

JUDGMENT :

1. Rule. With consent of parties, Rule made returnable forthwith and taken up for final hearing.

2. The Civil Revision Applications arise out of the judgment and decree of the Appellate Court dated 8th October, 2021 reversing the dismissal of the suit by the Small Causes Court and decreeing the suit by eviction. As common issue arises in both the Revision Applications, with the consent of the parties, the same were heard together and is being disposed of by this common judgment. For the sake of convenience, the parties are referred to by their status before the Trial Court.

3. The plaintiff which is a co-operative housing society had instituted the eviction suit before the Small Causes Court seeking eviction of the defendant. The suit premises is open space existing between the Building Nos.9 and 10 of the Navjivan Housing Co-operative Society, 6, Lamington Road, Mumbai 400 008. It was pleaded that suit premises being open space, the provisions of the Maharashtra Rent Control Act, 1999 (for short, the “*Act of*

1999”) is not applicable. That by notice dated 4th April, 2017, the tenancy has been terminated. It was pleaded that the defendants are in arrears of rent since June, 1993. That the suit premises being open space, the protection of the Act of 1999 is not available to the defendants.

4. The defence of the defendants was that in respect of the open space, they had filed declaratory suit in the year 1993 which was decreed by the judgment of the trial Court dated 9th August, 1999 and the Defendants have been declared as tenants in respect of the open space. That the suit premises is governed by the old Act i.e. The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, the “*Act of 1947*”), and the new Act is not applicable to the defendants. It was also contended that the defendants had offered the monthly rent but the plaintiff has refused to accept the same and the defendants are always ready and willing to pay the monthly rent of the suit premises.

5. The parties went to trial and the plaintiff examined the

Secretary of the Society. In the cross-examination, it is admitted that the defendants had earlier filed a declaratory suit, which was decreed and has not been set aside by any Court. The suggestion given in the cross-examination is that the tenancy is in respect of the suit premises was created under the Act of 1947 and there cannot be any termination under the Maharashtra Rent Control Act, 1999 (for short, "*Act of 1999*").

6. The defendant examined himself and deposed as to the earlier declaratory suit. He deposed that he is entitled to the protection of the Act of 1999, as the tenancy rights accrued under the Act of 1947 is not washed out after the introduction of the Act of 1999. The trial Court by the judgment and decree dated 2nd March, 2020 considered the earlier declaratory suit of the 1993 filed by the defendants by which the defendant has been decreed as tenant of the suit premises and held that the Act of 1999 has prospective effect and not retrospective effect as regards the old tenancy prior to the Act of 1999. The Trial Court held that there is no question of termination of tenancy and

dismissed the suit, as against which an appeal was filed by the defendants. The Appellate Court vide judgment dated 8th October, 2021 considered that the evidence of the plaintiff that the Defendant is not paying rent right from 1993 has gone unchallenged. The Appellate Court held that the suit was filed under Section 41 of the Presidency Small Cause Courts Act, 1882, and the premises is an open space of land and even if the notice has been given on 4th April, 2017 after commencement of the Act of 1999, owing to the nature of the suit premises, the Act of 1999 could not have been made applicable to the present case. The Appellate Court held that the defendant was not a protected tenant under the Act of 1999 and if the tenancy is terminated it has to be under the provisions of the Transfer of Property Act, 1882. The Appellate Court held that there is no issue about the prospective or retrospective application of the Act of 1999 and reversed the findings of the Trial Court.

7. Heard Mr. Parab, learned counsel for Applicants and Mr. Jain, learned counsel for the Respondent.

8. Mr. Parab, learned counsel appearing for the Applicants submits that by the decree passed in declaratory suit of 1993, the defendant has been declared as a tenant on 9th August, 1999. He submits that the challenge against the said decree has been negated by this Court and as such, the declaration of tenancy has attained finality. He submits that the tenancy having been confirmed in the previous proceedings, the provisions of the Act of 1999 are not attracted as the Act does not have retrospective effect. He submits that this aspect was rightly considered by the trial Court. He submits that not being governed by the Act of 1999, the provisions of the Transfer of Property Act will apply and for the purpose of termination, the Civil Court will have jurisdiction. Learned counsel for the Applicants relies upon the decision in the case of *Radhakisan Ramnath Malpani vs. Rajesh Dattatrya Mahajan and Ors.* reported in *2013 (4) Mh.L.J 266*.

9. *Per contra*, Mr.Jain, learned counsel appearing for the Respondent submits that in RES Application No.1 of 2013 filed by the Applicant for restoration of the essential services, it is

pleaded that the relationship of the Applicant and the Respondent is a tenant and landlord and the subject matter also falls within the provisions of the Act of 1999. He points out to the judgment of the Small Causes Court in RES Application No.1 of 2015, that as the open space does not come within the purview of premises as defined under Section 7(9) of the Act of 1999, the application is not maintainable before this Court. He submits that after the new Act of 1999 came into force, the Defendant lost the protection of the Rent Act and was governed by Transfer of Property Act. In support of his submission, he relies upon the decisions in the following cases:

- (a) *Pradeep Advertising Agency, Nagpur vs. Sri Aurbindo Circle, Registered Society*, reported in 2015 (2) Mh.L.J 167,
- (b) *Messrs Auto Hirers & Anr. vs. Commerce Centre Co-operative Society Ltd.*, reported in 2018 (5) Bom. C.R.644;
- (c) *Savitribai Vishnupant Vaske & Ors.vs. Faruk Abdulrahim Patel & Ors.*, reported in 2011 (4) Bom. C.R.738;
- (d) *Maharaji wd/o. Bajrangi Vishwakarma & Ors. vs. Sayeedai w/o.Haji Sayyad Gani*, reported in 2006 (2) ALL.M.R.133.

10. The issue which arises for consideration in the present case, is whether in view of the declaration of tenancy of the Defendant in respect of the open space under the Act of 1947, tenancy of the Defendant is protected, even after the Act of 1999 came into force. For that purpose, it will be necessary to refer to the definition of “*premises*” under Section 7(9) of the Act of 1999, which reads thus:

*“(9) **premises**” means any building or part of a building let or given on licence separately (other than a farm building) including,-*

(i) the gardens, grounds, garages and out-houses, if any, appurtenant to such building or part of a building,

(ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof,

but does not include a room or other accommodation in a hotel or lodging house;”

11. It is evident from the definition of the premises that

open space let out or given on license is not covered by the definition of the premises under Section 7(9) of the Act of 1999. In the present case, it is not disputed that the declaration of tenancy is in respect of the open space was under the Act of 1947. The effect of the declaration of the tenancy under the Act of 1947 *vis-à-vis* the termination of tenancy after the introduction of the new Act of 1999 will have to be considered. By the termination notice given after the Act of 1999 come into force, the tenancy of the defendant has been terminated. The suit seeking eviction has been filed under Section 41 of the Presidency Small Cause Courts Act, 1882, which confers jurisdiction on the Court to entertain the suits between the licensor and licensee or landlord and tenant relating to the recovery of the possession of any immovable property or recovery of any license fees or rent thereof. The exception to sub-Section (1) can be found in sub-Section (2), that the same will not apply to suits or the proceedings to which the provisions of the Act of 1947 applies. By the Act of 1999, which was brought into force on 31st March, 2000, the defendant has lost

the protection available to it as a tenant under the erstwhile Act of 1947, by virtue of the definition under the new Act of 1999, omitting '*open space*' from definition of premises. In view of the change in the statutory position by the introduction of the Act of 1999, the relationship of the parties was governed by the provisions of the Transfer of Property Act. It is not the case of the defendant that the termination notice did not comply with the provisions of Section 106 of the Transfer of Property Act. The only contention which has been raised that his tenancy being protected under the Act of 1947, the same could not be taken away by the subsequent Act of 1999. The contention is liable to be rejected, in view of the repeal of the Act of 1947 by the Act of 1999 and by virtue of Section 7(9) of the Act of 1999, by which the said Act is not applicable to open space.

12. The issue is no longer *res-integra* and has been decided by this Court in the case of ***Messrs Auto Hirers*** (supra). The facts of that case are identical to the facts of the present case. In the facts of that case, the tenancy was in respect of the triangular

plot and the tenant therein had also obtained a declaration of tenancy. The learned Single Judge considered the definition of premises under Section 7(9) of the Act of 1999 and held that the open space of land would not fall within the definition of the ‘premises’. Relying upon the decision in the case of ***Savitribai Vishnupant Vaske*** (supra), where the learned Single Judge has held that the position that emerges is that w.e.f. 1st April, 2000, the Bombay Act stood repealed by the Act of 1999 and the Act of 1999 is applicable. However, by virtue of Section 7(9) of the Act of 1999, the said Act is not applicable to an open land and the parties are governed by provisions of the Transfer of Property Act. The learned Single Judge considered the notice of termination of tenancy under the provisions of Transfer of Property Act, and declined to exercise its revisional jurisdiction.

13. The facts of the present case are identical to the facts in the case of ***Messrs Auto Hirers & Anr.*** (supra), and I am respectfully bound by the said decision. As regards the decision in the case of ***Radhakisan Ramnath Malpani*** (supra), relied upon

by the learned counsel appearing for the Applicants, in that case, the learned Single Judge was considering the issue as to whether the ordinary jurisdiction of the Civil Court was available to pass a decree for eviction between the landlord and the tenant in respect of the open land on the ground of lease coming to an end by efflux of time. In that case, the Appellate Court had held that the landlord cannot be compelled to institute the proceedings before the Rent Controller for grant of permission to issue notice as contemplated under Clause 13 (1)(b) of C.P. and Berar letting of premises on Rent Control Order, 1949 (for short, "Rent Control Order"). It is in the context of the submission raised whether the Rent Control Order would apply and there being non compliance of obtaining written permission, the suit was not maintainable. The learned Single Judge considered the provisions of the Rent Control Legislation and held that the remedy was to file a suit invoking ordinary jurisdiction of the Civil Court. In that case, the provisions of Section 41 of the Presidency Small Cause Courts Act, was not in consideration of the learned Single Judge, which gives jurisdiction to the Small

Causes Courts to entertain and try all suits and proceedings relating to recovery of possession of any immovable property situated in greater Bombay. The facts of the case are clearly distinguishable and do not apply to the present case. On the other hand, the decision in the case of *Messrs Auto Hirers & Anr* (supra), is squarely applicable to the facts of the present case.

14. Resultantly, there is no perversity or illegality or material irregularity in the impugned order. Revision Applications are without merit and stand dismissed. In view of the dismissal of the Revision Applications, Interim Applications do not survive and stand disposed of.

(Sharmila U. Deshmukh, J.)

15. At this stage learned counsel appearing for the applicants seeks extension of interim relief granted vide order dated 14th December, 2021. Since the interim relief is operative from the year 2021, I am inclined to extend interim relief for further period of 8 weeks subject to an undertaking being filed by the

applicants within a period of two weeks in this Court that if appropriate orders are not obtained from the Apex Court within a period of 8 weeks, they will handover vacant and peaceful possession of the premises to the Respondent.

(Sharmila U. Deshmukh, J.)