

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

CIVIL REVISION APPLICATION NO.464 OF 2024

Lokmitra Sahakari Printing and
Publishing Society Ltd.

...Applicant

V/s.

Bombay Cotton and Yarn Co. Pvt.
Ltd.

...Respondent

Mr. Kishor Patil *i/b. Mr. Onkar Vrendra Warange for the Applicant.*

Mr. Mayur Khandeparkar *for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

Judgment reserved on : 12 December 2024.

Judgment pronounced on : 19 December 2024.

Judgment:

1) Revisionary jurisdiction of this Court under the provisions of Section 115 of the Code of Civil Procedure, 1908 (**the Code**) is invoked to set up a challenge to the judgment and order dated 11 March 2021 passed by the Appellate Bench of the Small Causes Court, Mumbai, allowing (A-1) Appeal No.232 of 2010 and setting aside judgment and decree dated 19 March 2010 passed by the Small Causes Court, Mumbai in R.A.E. Suit No.865/1585 of 1998. The Small Causes Court had dismissed Plaintiff's Suit for eviction of the Defendant on the ground of unauthorised additions and alterations.

The Appellate Court has accepted the ground of unauthorised additions and alterations and has decreed the Suit directing Defendant to handover possession of the suit premises to the Plaintiff with further direction that the Plaintiff would be entitled to *mesne* profits in respect of the suit premises from the date of filing of the Suit by conduct of enquiry under Order XX Rule 12 of the Code.

2) Briefly stated, facts of the case are that Plaintiff is the owner of Block No. A-18, 1st floor, Shri Ram Industrial Estate, G.D. Ambekar Road, Wadala, Bombay- 400 031 (**suit premises**). Defendant was initially inducted as licensee in the suit premises in the year 1964 and apparently acquired status of a protected tenant. Plaintiff instituted R.A.E. Suit No.865/1585 of 1998 seeking recovery of possession of the suit premises from the Defendant on the ground that the Defendant constructed permanent structure of loft in the suit premises without the consent of the landlord. Plaintiff also states that the Defendant had defaulted in payment of rent. Defendant filed written statement *inter alia* contending that it had sought permission and 'no objection' of the Plaintiff for construction of the loft, which was refused by the Plaintiff without reasonable cause. That the loft has been regularised by the Municipal Corporation of Greater Mumbai (**MCGM**) and that Plaintiff had acquiesced in the construction of loft by the Defendant. Plaintiff amended the Suit incorporating paragraphs 3A to 3C in the plaint by adding pleadings relating to restrictive covenant in Indenture of Lease executed with the MCGM of not erecting any structure without consent of MCGM and act of Defendant in construction of loft endangering the lease in favour of the Plaintiff. Defendant filed additional written statement contending

for the first time that the loft was constructed by it in May-1984 and that the Suit was thus barred by limitation.

3) Based on the pleadings raised by parties, Trial Court framed issues. Both sides led evidence in support of their respective claims. After considering the pleadings, documentary and oral evidence, the Trial Court proceeded to dismiss the Suit answering the issues relating to construction of permanent structure (loft), committing act of waste as well as default in payment of rent in the negative. The Trial Court held that the Suit was barred by limitation as the construction of loft was completed in the year 1984.

4) Plaintiff filed Appeal No.232 of 2010 before the Appellate Bench of the Small Causes Court challenging the Trial Court's decree dated 19 March 2010. The Appellate Court has held that Plaintiff acquired knowledge about construction of loft by the Defendant in the year 1987 and that therefore, as per provisions of Article 67 of the Limitation Act, 1963, Suit was filed within the limitation of 12 years. The ground of default in payment of rent was not pressed by the Plaintiff. Accordingly, the Suit is decreed by the Appellate Court on solitary ground of erecting permanent structure without consent of the landlord. The Appellate Court has directed Defendant to handover possession of the suit premises to the Plaintiff within three months. The Appellate Court has also held the Plaintiff to be entitled to *mesne* profit from the date of filing of the Suit by conducting enquiry under Order XX Rule 12 of the Code. Aggrieved by the judgment and decree dated 11 March 2021 passed by the Appellate Bench of Small Causes Court, Mumbai, Petitioner initially filed Writ Petition No.3773 of 2021, which has subsequently been converted into Civil Revision

Application. By order dated 23 August 2024, this Court has stayed execution of possession warrant. With the consent of the learned counsel appearing for the parties, the Revision Application is taken up for final disposal.

5) Mr. Kishor Patil, the learned counsel appearing for the Revision Applicant would submit that the Appellate Court has erred in reversing well considered decision of the Trial Court, which had dismissed the Suit by rejecting both the grounds of default in payment of rent as well as erecting permanent structure without landlord's consent. That the ground of default in payment of rent is ultimately given up by the Plaintiff before the Appellate Court, which leaves only the issue of construction of permanent structure. He would submit that Defendant proved before the Trial Court that the loft has been constructed in the year 1984 by leading evidence of the person, who actually caused the construction. That internal correspondence of MCGM clearly reflects existence of loft in the suit premises in the year 1987, which completely belies the false plea raised by Plaintiff about loft being constructed in the year 1993. That the Trial Court had rightly dismissed the Suit as being barred by limitation. That the Appellate Court has erroneously applied the test of acquisition of knowledge by the Plaintiff for determining the period of limitation. That Article 66 of the Limitation Act is attracted in the present case. That in any case, Plaintiff clearly acquiesced in construction of the loft and in fact assisted the Defendant in getting the same regularised. He would therefore pray for setting aside the decree passed by Appellate Court and for dismissal of the Suit.

6) Revision Application is opposed by Mr. Mayur Khandeparkar, the learned counsel appearing for the Respondent-

Plaintiff. He would submit that the Appellate Court has rightly decreed the Suit by rejecting fallacious defence raised by the Defendant for the first time in the additional written statement about cause of construction of loft in the year 1984. That the original written statement was silent about the exact time when the loft was constructed and construction of loft in the year 1984 was raised only by way of additional written statement as a matter of afterthought. That it is well settled position of law that the additional written statement can be filed only *qua* the amended averments in the Plaint. That the pleadings relating to cause of construction in the year 1984 had absolutely no relation to any of the amended pleas incorporated in the Plaint. He would rely upon judgment of Full Bench of Delhi High Court in ***Kedar Nath & Ors. V/s. Ram Prakash & Ors.***¹

7) Mr. Khandeparkar would further submit that consent of the landlord sought for by the Defendant for construction of the loft was expressly rejected by letter dated 30 September 1982. That thereafter there is absolutely no communication between Plaintiff and Defendant till 15 June 1994 when Defendant sought 'no objection' for regularisation of loft by MCGM. That the Trial Court has answered the issue of absence of consent of the landlord in favour of the Plaintiff and against the Defendant and that the said findings have attained finality. That the Appellate Court has rightly rejected the defence of construction of loft in the year 1984. That landlord is not supposed to have knowledge of every unauthorised act of the tenant and the period of limitation for filing Suit for eviction would begin only from the date of acquisition of knowledge by the Plaintiff of unauthorised construction. The landlord is not expected to inspect the tenanted

¹. 1999 (48)DRJ (FB) 589

premises everyday and in the event if any construction is clandestinely carried out behind the back of the landlord, it cannot be contended that passage of period of 12 years would result in legalising the unauthorised work by the tenant. Mr. Khandeparkar would further submit that the Appellant has rightly applied provisions of Article 67 of the Limitation Act and computed the period of limitation from the date of acquisition of knowledge of unauthorised construction. That Plaintiff acquired knowledge of existence of loft for the first time on 16 May 1989 when MCGM addressed letter to the Plaintiff indicating presence of loft in the suit premises. Therefore, the Suit instituted in the year 1998 is perfectly within limitation. He would rely upon judgment of this Court in ***Sudha Madhusudan Lanjekar since deceased by heirs Ashok Madhusudan Lanjekar and Others V/s. Shashikant Gajanan Pathare since deceased by heirs Anjali Shahshikant Pathare and Ors.***² in support of his contention that period under Article 67 of the Limitation Act would commence from date of acquisition of knowledge of unauthorised construction.

8) Lastly, Mr. Khandeparkar would submit that Appellate Court has undertaken the exercise of marshalling of the evidence for rejecting fallacious defence of construction of loft in the year 1984 and has correctly held that Plaintiff acquired knowledge of construction of loft at the highest in the year 1987. He would submit that in absence of any error in exercise of jurisdiction or perversity in the findings of the Appellate Court, this Court would be loath in interfering in well considered judgment of the Appellate Court in exercise of its

². 2012(2) Mh.L.J. 153

revisionary jurisdiction. He would pray for dismissal of the Revision Application.

9) Rival contentions of the parties now fall for my consideration.

10) The Appellate Court has decreed Plaintiff's Suit on solitary ground of erecting permanent structure without landlord's consent under the provisions of Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (**BRC Act**). There is no factual dispute about the position that loft has been constructed by the Defendant in the suit premises. Defendant also does not dispute the position that construction of loft is covered by the expression 'permanent structure' within the meaning of Section 13(1) (b) of the BRC Act. Defendant also admits the position that he had sought consent of the landlord for construction of loft by letter dated 29 September 1982 and that the same was categorically refused by the landlord by letter dated 30 September 1982. It is also a matter of fact that Defendant did not plead in his original written statement that construction of loft was carried out in the year 1984. This defence was raised for the first time through additional written statement filed on 11 January 2007 after Plaintiff amended the Plaint. Plaintiff amended the Plaint for the purpose of incorporating pleadings with regard to threat suffered by it from MCGM about termination of lease on account of act of Defendant in constructing the loft. While dealing with the amended pleadings, Defendant raised a pleading in paragraph 4 of the additional written statement that the loft was constructed in May-1984. Mr. Khandeparkar has relied upon judgment of Full Bench of the Delhi High Court in ***Kedar Nath***

(supra) in which the Full Bench has summed up the conclusions in paragraph 22 of the judgment as under:

22. To sum up, we are of the opinion that:

- (i) merely because an amendment has been allowed in the plaint, the defendant does not get a right and certainly not an unbridled right to file a new written statement;
- (ii) any additional pleading cannot be at variance or inconsistent with the original pleading;
- (iii) a pleading inconsistent with or in departure from an original pleading can be allowed only by way of amendment subject to the leave being granted by the Court under Order 6, Rule 17, CPC.
- (iv) Order 6, Rule 17, CPC applies to amendment in the plaint and the written statement-both. **It applies to amendments sought for by one party and also to consequential amendments in the pleading sought for by the opposite party.** Any amendment whether original or consequential, shall be only by the leave of the Court.

(emphasis and underlining supplied)

11) It is therefore, sought to be contended on behalf of Respondent-Plaintiff that only consequential amendment in the written statement could be permitted after amendment of the Plaint. This plea is raised on behalf of Plaintiff to discard the pleading in additional written statement about construction of the loft in the year 1884. However, it becomes difficult to hold that the additional pleading of construction of loft in 1984 had absolutely no connection with the amended plaint. The additional pleadings in the amended Plaint relate to allegation of construction of loft. In fact, in paragraph 3(C) of the amended Plaint Plaintiff added an averment that the Defendant unauthorisedly and without requiring permission erected permanent structure in the suit premises. Therefore the additional defence raised in additional written statement, which also related to construction of loft, cannot be said to be totally de-linked from the

amended pleadings in the Plaint. In any case, Defendant sought to raise legal defence of limitation and for that purpose, he indicated the timeline when the loft was constructed. No objection was raised by the Plaintiff for incorporation of such additional pleadings. Plaintiff did not file any proceedings for striking off any pleadings in the written statement. Therefore, it is too late in a day to now complain about Defendant raising additional pleadings about construction of loft in May-1984.

12) The moot question for determination before the Trial and the Appellate Courts and which again arises for determination before this Court is the starting point for applying the period of limitation provided for in either Article 66 or 67 of the Limitation Act. According to Mr. Khandeparkar and as per the findings recorded by the Appellate Court, Article 67 of the Limitation Act would apply to the present case. It would be apposite to reproduce Articles 66 and 67 of the Limitation Act as under:-

	Description of suit	Period of limitation	Time from which period begins to run
66.	For possession of immovable property when the plaintiff has become entitled to possession by reason of any forfeiture or breach of condition	Twelve years.	When the forfeiture is incurred or the condition is broken
67.	By a landlord to recover possession from a tenant.	Twelve years.	When the tenancy is determined.

13) In my view, if the landlord seeks to recover possession from tenant by service of simple notice of determination of tenancy, Article 67 of the Limitation Act would apply. On the other hand, if the tenant attracts forfeiture of tenancy by any of his actions or commits breach of condition of tenancy (not requiring formal notice of

forfeiture and when the act itself amounts to forfeiture of tenancy) and for such act landlord demands possession of premises, Article 66 of the Limitation Act would apply. Since the present case involves filing of Suit for recovery of possession of suit premises on the ground of breach of condition of tenancy by construction of loft, provisions of Article 66 of the Limitation Act would apply. It is well settled position of law as enunciated by the Constitution Bench judgment in ***Dhanapal Chettiar Versus. Yesodai Ammal*** ³ that service of notice for determination of statutory tenancy governed by rent control Act is not necessary for maintaining a suit for ejectment. Thus, the time for filing Suit by the Plaintiff would begin to run on the date when the forfeiture was incurred or condition is broken. In my view, therefore, the date of acquisition of knowledge of unauthorised construction may not really be relevant and in ordinary circumstances, the Suit ought to have been filed within 12 years from the date of cause of construction.

14) Next issue of determination is the exact time when the loft is constructed by Defendant. Plaintiff is silent in the Plaint about the time when the loft was constructed. However, in his evidence Plaintiff's witness-Harsh Kotecha stated that the loft was constructed after July 1993. On the other hand, Defendant pleaded in the additional written statement that the loft was constructed in May 1984.

15) The stand of the Plaintiff that the loft was constructed after July-1993 (though not supported by foundational pleadings) is ultimately found to be false on account of letters dated 9 December

³ (1979) 4 SCC 214

1987 and 9 January 1988 of MCGM. Letter dated 9 January 1988 exchanged between Ward Officer (Estates) Department and Ward Officer F/N ward indicates presence of loft in Unit No. A18, which are the suit premises. The said letter also refers to Office Memo dated 9 December 1987 in which also existence of loft was apparently reflected. Thus, it is conclusively proved and Mr. Khandeparkar fairly does not dispute that loft has been constructed prior to 9 December 1987. Plaintiff thus, attempted to set up a false case in his evidence that loft was constructed after July-1993.

16) Faced with the situation that MCGM's office memo dated 9 December 1987 reflects existence of loft in the suit premises, Plaintiff has taken a position that the period of limitation will have to be computed from the date of acquisition of knowledge about construction of loft by the Defendant. It is difficult to lay down an absolute proposition of law that in every case period of limitation must be computed from the date of construction of unauthorised structure by a tenant. In a given case the tenant may clandestinely carry out construction without the knowledge of the landlord and it will be too iniquitous to dismiss the Suit of landlord only on account of passage of period of 12 years from the date of cause of construction where Plaintiff had absolutely no knowledge of erection of unauthorised construction. In the present case however, there are several factors for inferring that Plaintiff knew about construction of the loft and acquiesced in such construction.

17) Defendant applied for permission of construction of loft on 29 September 1982. Though Plaintiff refused the permission by letter dated 30 September 1982, the refusal could be attributed to the

covenants of Lease Deed with MCGM putting an embargo on carrying out any construction in the building. It appears that Defendant went ahead and constructed the loft in May-1984 which act got noticed in MCGM's Memo dated 9 December 1987 and 9 January 1988. It is difficult to believe that MCGM would know about construction of the loft, but not the landlord. The landlord was informed about existence of loft in various units of the building of MCGM by letter dated 16 May 1989. MCGM called upon Plaintiff to take corrective actions. Far from taking any action against the Defendant or any other tenants, Plaintiff participated in regularisation process by forwarding to MCGM letter of the Society on 12 March 1991. By Society's letter dated 11 March 1991 Architect was appointed for regularisation of various lofts in Shri Ram Industrial Estate building. Far from raising any objection about construction of loft, Plaintiff actually assisted the society and members in getting the loft regularised by forwarding society's letter to MCGM on 12 March 1991. Further correspondence between Plaintiff and MCGM buttress the position that Plaintiff has assisted the Defendant in getting the loft regularised from MCGM. This is clear from Plaintiff's letter dated 5 September 1996 informing MCGM that society's Architect was in touch with MCGM for regularisation of the breaches and requested MCGM not to take any action for termination of Lease. Thus, till 5 September 1996, Plaintiff was actually assisting the Defendant in regularising the loft. The loft has ultimately been regularised by MCGM by letter dated 13 November 2000. It is therefore, difficult to hold that Plaintiff had any reservation of the construction of the loft. Conduct of the Plaintiff is such that knowledge on his part about construction of loft in the year 1984 will have to be inferred in the facts and circumstances of the case.

18) There is yet another angle from which the case needs to be viewed. Conduct of the Plaintiff clearly constitutes waiver or acquiescence in respect of construction of loft. Plaintiff, who was all along assisting Defendant in getting the loft regularised, filed a Suit in the year 1998 for eviction of the Defendant on the ground of construction of loft. Therefore, combined effect of passage of period of limitation together with Plaintiff's tacit consent/ acquiescence in construction of loft would clearly disentitle him from filing a Suit for eviction of Defendant. MCGM's letter dated 9 January 1988 reflects that loft / mezzanine floors have been constructed in as many as 54 units of the building. This is yet another factor, which indicates acquiescence on the part of Plaintiff in construction of loft in various units of the building and particularly in the suit premises.

19) The conspectus of the above discussion is that the Suit filed by the Plaintiff seeking eviction of Defendant on the ground of construction of loft is by way of an afterthought since Plaintiff participated in the process of regularisation of loft, which has subsequently been regularised by MCGM during pendency of the Suit. In such circumstances, the tenant cannot be made to suffer a decree for eviction where Plaintiff has encouraged the tenant in getting the loft regularised. The loft is no longer an offending structure under the town planning laws. Plaintiff-landlord has exhibited acquiescence in construction of loft and has tolerated its presence for a long period. Defendant has led evidence of person actually causing construction of the loft. His evidence is erroneously discarded by the Appellate Court. In absence of any evidence being produced by the Plaintiff about construction of loft being carried out in July- 1993, the

Appellate Court ought to have appreciated that Defendant had produced some evidence in support of construction of loft in May-1984 as against complete lack of pleadings as well as evidence on the part of the Plaintiff about the exact time of construction of loft.

20) Reliance by Mr. Khandeparkar on judgment of Division Bench of ***Sudha Madhusudan Lanjekar*** (supra) does not cut any ice. The case involved allegation of illegal change of usage and in the facts of that case, held that period of limitation would run from the date of acquisition of knowledge and change in the usage. Even if the principle of acquisition of knowledge by the Plaintiff about unauthorised construction is accepted for computing period of limitation, the evidence on record shows that Plaintiff had knowledge of cause of construction by the Defendant prior to the year 1987.

21) In my view, therefore, the Trial Court had rightly dismissed the Suit of the Plaintiff. The Appellate Court has committed patent error in reversing the decree passed by the Appellate Court. Findings recorded by the Appellate Court not only suffer from vice of perversity, but it has exercised jurisdiction with material irregularity. Decree passed by the Appellate Court is clearly unsustainable and liable to be set aside.

22) The Civil Revision Application therefore succeeds and I proceed to pass the following order:

- (i) Judgment and order dated 11 March 2021 passed by the Appellate Bench of the Small Causes Court, Mumbai, in (A-1) Appeal No.232 of 2010 is set aside and judgment and decree dated 19 March 2010 passed by the Small Causes

Court, Mumbai in R.A.E. Suit No.865/1585 of 1998 is confirmed.

(ii) R.A.E. Suit No.865/1585 of 1998 is dismissed.

23) Civil Revision Application is allowed in above terms. Considering the facts and circumstances of the present case, there shall be no orders as to costs.

[SANDEEP V. MARNE, J.]