

(2017) 11 GUJ CK 0028
In the Gujarat High Court
Case No : 345 of 2017

L.H. OF ABDUL SATTAR ABDULBHAI

APPELLANT

Vs

RUKAIYABIBI ABDULGANI

RESPONDENT

Date of Decision : 27-11-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 2 Rule 2](#), [Order 23 Rule 1\(4\)](#) -
Bombay Rent Act, 1960, Section 29(2), Section 13(1)(b)

Citation : (2017) 11 GUJ CK 0028

Hon'ble Judges : Bela M. Trivedi

Bench : Single Bench

Advocate : CHINMAY M GANDHI, ?MB GANDHI, KV SHELAT

Judgement

1. Both the Civil Revision Applications arise out of the same proceedings between the same parties, and therefore, were being heard together and are being decided by this common judgement.

2. In Civil Revision Application No.8 of 2016, the applicants have challenged the judgement and decree dated 7.12.2015 passed by the appellate Bench of Small Causes Court at Ahmedabad in Civil Appeal No.96 of 2014, whereby the appellate Court has dismissed the appeal and confirmed the judgement and decree dated 3.7.2014 passed by the Judge, Small Cause Court No.8, Ahmedabad in HRP Suit No.1807 of 2007, decreeing the suit of the plaintiff - the respondent herein. This Court while admitting the Civil Revision Application No.8 of 2016 had not granted any interim relief to the applicants - original defendants, and therefore, the respondent filed execution proceedings seeking execution of the judgement and decree passed by the appellate Bench in Civil Appeal No.96 of 2014. In the Execution Petition being No.16 of 2016, the executing Court issued possession warrant vide the order dated 10.3.2017 against the applicants, and therefore, the applicants had filed Appeal from Order being No.9 of 2017 before the appellate Bench of Small Causes Court, which

dismissed the said Appeal from Order vide the order dated 5.8.2017. Being aggrieved by the said order, the applicants have preferred Civil Revision Appeal No.345 of 2017.

3. The facts in nutshell giving rise to the present proceedings are that the suit premises was let out by the respondent-plaintiff to the original tenant Abdul Sattar Abdulbhai, predecessor of the present applicants. In HRP Suit No.1074 of 1982 filed by the plaintiff, the standard rent at Rs.25/- per month was fixed for the suit premises and the original tenant was made liable to pay all taxes. The respondent plaintiff filed another suit being HRP Suit No.1007 of 2005, seeking permanent injunction against the tenant for restraining him from removing the roof of iron sheet and making any kind of permanent construction in the said premises. In the said suit the Court had appointed Commissioner and granted status quo as per the Commissioner's report. Thereafter, the defendant in the said suit i.e. original tenant having given an undertaking that he would maintain status quo as per the Commissioner's report, the plaintiff landlady had withdrawn the said suit.

4. The respondent plaintiff thereafter filed the present suit being HRP Suit No.1807 of 2007 seeking recovery of the possession of the suit premises alleging inter alia that the defendant had carried out the construction of terrace and had changed the identity of suit premises by removing the roof of iron sheet. It was also alleged that the defendant had not paid the standard rent for more than six months. The trial Court, after framing the issues at Exh. 14, and appreciating the evidence on record, decreed the suit on the ground that the defendant tenant had, without landlady's consent given in writing, erected on the suit premises the structure of permanent nature as contemplated in Section 13(1) (b) of the Bombay Rent Act. The trial Court, however, held that the plaintiff had failed to prove that the defendant was the tenant in arrears for the period more than six months. The trial Court, therefore, vide the judgement and decree dated 3.7.2014 directed the defendants - applicants herein, who are the legal heirs of the original defendant-tenant, to hand over the possession of the suit premises. Being aggrieved by the said judgement and decree the applicants had preferred the Civil Appeal before the appellant forum, which was dismissed vide the impugned judgement and decree dated 7.12.2015. As stated earlier, these two revision applications are the fallout of the said proceedings.

5. The learned Advocate Mr.Gandhi appearing for the applicants vehemently submitted that the respondent - plaintiff had not entered into the witness box, and therefore, had failed to prove the pleadings in the light of the provisions contained in the Evidence Act . He further submitted that the documents produced by the

respondent - plaintiff also could not be said to have been proved merely on the admission of the defendants, inasmuch as mere endorsement of the defendants for exhibiting the documents of the plaintiff does not tantamount to the proof of the contents of the documents in view of the ratio laid down by the Supreme

Court in case of Salt Tarajee Khimchand and Ors. Vs. Yelamarti Satyam and Ors., reported in AIR 1971 SC 1865. According to Mr.Gandhi, both the Courts below had committed an error of law in mis-appreciating the evidence on record and more particularly the reports of the Commissioners appointed by the Court. If the said reports were appreciated in the right perspective, it clearly transpired that no such construction of permanent nature was carried out by the applicants and that only some repairing work was done as the suit premises was very old and in dilapidated condition. Pressing into service the provisions contained in Order XXIII Rule 1(4), he submitted that the previous HRP Suit No.1007 of 2005, seeking injunction against the applicants - defendants was withdrawn by the respondent - plaintiff, on the settlement having taken place between the parties, and therefore, the subsequent suit alleging that the applicants had put up construction of permanent nature was not maintainable. He also submitted that the respondent - plaintiff had failed to claim possession in the earlier suit of injunction, and therefore, the subsequent suit for possession was also barred by Order II Rule 2 of CPC. Drawing the attention of the Court to the points of determination raised by the appellate Bench, he submitted that the same were framed and decided without any application of mind by the appellate Bench.

6. Lastly, Mr.Gandhi submitted that the executing Court had also issued possession warrant without any application of mind, though the Civil Revision Application against the impugned judgement and decree was pending before the High Court. Mr.Gandhi has relied upon certain judgements, which shall be dealt with herein after.

7. Mr.K.V. Shelat, learned Advocate for the respondent, per contra, submitted that there being concurrent findings of facts recorded by both the Courts below, this Court should not interfere with the same, exercising limited revisional jurisdiction under Section 29(2) of the said Act, more particularly in view of the decision of the Supreme Court in case of Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh, reported in (2014) 9 SCC 78. Taking the Court to the judgements and decrees passed by the Courts below, as also the Commissioners reports at Exh.52 and 68, he emphasized that the applicants had carried out the construction of permanent nature, and therefore, both the Courts below had rightly

passed the decrees against them under Section 13(1)(b) of the said Act. According to Mr.Shelat, though the respondent had filed her affidavit in lieu of the examination-in-chief, due to her ill-health she could not remain present for cross-examination, and therefore, her husband was examined, who was managing the affairs of the said premises. He further submitted that the documents produced by the respondent - plaintiff were exhibited by the Court on the endorsement made by the learned Advocate for the applicants - defendants, admitting the same, including the reports of Commissioners, which clearly established about the permanent nature of construction put up by the

applicants. Mr.Shelat also submitted that earlier the suit was filed for permanent injunction only, as the original tenant was trying to put up permanent construction, which suit was withdrawn on the tenant having given an undertaking before the Court that he would not carry out further construction. The said suit did not bar the filing of the substantive suit for recovery of possession.

8. Lastly he submitted that the typographical mistake found in the points of determination raised by the appellate Court pales into insignificance as the appellate Court had, after careful and elaborate examination of evidence confirmed the judgement and decree passed by the

9. Before dealing with the rival submissions it may be noted that during the course of hearing, the Court in order to elucidate the truth about the nature of construction allegedly carried out by the applicants had appointed the Commissioner as per the order dated 22.8.2017. The Court being not satisfied with the work carried out by the Commissioner, he was again directed to visit the premises and prepare the report. Accordingly, the Commissioner has prepared the report and also submitted the photographs of the suit premises.

10. Much emphasis has been given by Mr.Gandhi, learned Advocate for the applicants on the fact that the suit filed by the respondent - plaintiff seeking eviction was barred under Order II Rule 2 read with Order XXIII Rule 1(4) of CPC. Now, as transpiring from the record, earlier the suit being HRP No.1007 of 2005 was filed by the respondent - plaintiff seeking permanent injunction as the original tenant, predecessor of the applicants was allegedly trying to remove the iron sheet roof and carry out other construction of permanent nature. Since the said suit was filed during the process of making construction, the respondent - plaintiff had rushed to the Court for preventing the defendant tenant from carrying out the construction of permanent nature, which according to her was being made without her consent and which otherwise was changing the identity of the premises. In the said suit, the said tenant filed an undertaking not to carry out any further construction, and therefore, the said suit was withdrawn by the respondent landlady. She thereafter filed this substantive suit for eviction on the ground that the tenant had carried out permanent construction in the suit premises without her consent in writing, and that he was also the tenant in arrears of rent for more than six months. Such a substantive suit seeking recovery of possession could not be said to be barred either under Order XXIII Rule 1(4) or under Order II Rule 2 of CPC. Since tenant was carrying out construction without landlady's permission in writing allegedly changing the very identity of the premises, she had no alternative remedy, but to rush to the Court seeking permanent injunction immediately. Since the said suit was filed during the process of alleged construction of permanent nature, it was imperative for the respondent landlady to stop construction. At that time, the question of seeking possession under Section 13(1)(b) did not arise, and therefore, it could not be said that the plaintiff had

omitted to sue in respect of, or intentionally relinquished her claim for possession of the suit premises as contemplated under Order II Rule 2, nor could it be said that the plaintiff had abandoned part of her claim or withdrawn her claim, so as to preclude her from instituting a fresh suit, as contemplated under Order XXIII Rule 1(4) of CPC.

11. So far as the oral as well as documentary evidence adduced by the respondent - plaintiff is concerned, it appears that the respondent - plaintiff, after filing the affidavit in lieu of her examination-in-chief had not remained present for cross-examination, and her husband Abdulgani was examined as the witness of the plaintiff. The documents, including the reports of the Commissioners, produced by the plaintiff in the suit were admitted by the learned Advocate appearing for the applicants - defendants, and therefore, they were exhibited for being read in evidence by the trial Court.

12. Mr.Gandhi had sought to canvass that the plaintiff herself having not stepped into the witness box, not only her affidavit filed in lieu of examination-in-chief was required to be discarded, the evidence of her husband also could not be relied upon, he being neither the power- of-attorney holder, nor the administrator of the suit premises. The Court does not find any force in the said submission. The husband of the plaintiff, Abdulgani in his evidence at Exh.45 had categorically stated that his wife was not keeping good health, and therefore, was not in a position to come to the Court, however, he was fully conversant with the facts of the case as he was taking care and administering the suit premises since last many years. It is pertinent to note that the definition of landlord as contained in Section 5(3) of the said Act also

includes the person, who for the time being is receiving or is entitled to receive the rent in respect of the suit premise. Hence, merely because the plaintiff had not offered herself for cross-examination after filing the affidavit in lieu of examination-in-chief, evidence of other witness, who was her husband managing the affairs of the suit premises could not be discarded.

13. As regards the alleged construction, the trial Court relying upon the evidence on record and more particularly the reports of the Commissioner at Exh.52 and 68 had observed as under:-

"13. For the present situation of the suit premises the defendant No.1 in cross-examination has stated that paiki two rooms, one room has iron-sheet roof and one room has "T" girder and stones over wooden rafter. The commission report lying on record vide Exh.52 shows that room of Mark-"a" has roof of stones over the wooden rafter while commission report vide Exh.68 shows that room at Mark-"a" has corrugated iron-sheet over wooden rafter. The commission report vide Exh.52 has been carried out on 18.5.2005 while commission report vide Exh.68 has been carried out on 4.4.2013 therefore, in above set of facts and in view of the statement of the defendant No.1 it is accepted that room at Mark-"a" has corrugated iron-sheet over the wooden

rafter. Against the commission report at Exh.52 shows the situation that in room of Mark-"b" has T-girder and stones over the wooden rafter. The similar situation has been also observed by the Court commissioner in the report at Exh.68 which is carried out in the present suit, further the way to go to terrace (Dhaha) is also noted same in both reports. Further the observations of the Court commissioner in report vide Exh.52 in para "4" has shown that the Court commissioner on 18.5.2005 has observed new breaks cement wall nearby gap of admeasuring about 2- x 3 ft., these situation is also observed by the Court commissioner in report at Exh.68. The Court commissioner in report at Exh.52 has also observed cement plaster of flooring of (Dhaba) terrace. It was also observed by the Court commissioner while reported in Exh.68. The above evidence on record established that initially in the suit premises there was roof of country tiles over wooden rafter afterwards roof of iron- sheet and at present existence of roof over the T-girder and stones over the wooden rafter and cement plaster over the terrace (Dhaba) in room of Mark-"b" since the time of commission on 18.5.2005. The said alteration in the suit premises cannot be said renovation or repairing work. The existence of T-girder and stones over the wooden rafter and cement plaster at terrace (Dhaba) amounts to permanent construction."

14. The appellate Court has also after elaborately discussing the said evidence in the light of the reports of the Commissioners at Exh. 52 and 68 had observed as under:-

"10. ... While comparing the commissioner's punchnama prepared in the present suit which is produced at Ex.68 with the report of the commissioner produced vide Ex.52 made in HRP Suit No.1007/2005, it transpires that as per Ex.68, the floor is made by cement plaster on the part from where on can go from the gap put over the bath-room. No such construction is found there in the punchnama Ex.52. It is also seen that there are angles on that part and the household of the defendants are put there, which shows that the defendants are using that portion. The learned trial Judge has rightly observed all these differences made by the defendants and came to the conclusion that the defendants have made construction of permanent nature."

15. In view of the above, it clearly transpires that in well appreciated judgements, both the Courts below had come to the categorical conclusion that the applicants - defendants had

made construction of permanent nature as contemplated under Section 13(1)(b) of the said Act. It is not the case of the applicants that they had obtained written consent from the respondent landlady before carrying out the said construction. The report of the Commissioner appointed by this Court also broadly corroborates the said reports of the Commissioners appointed by the trial Court. Under the circumstances, the Court does not find any illegality or infirmity in the concurrent findings of facts recorded by both the Courts below. It is true that the points for determination framed by the appellate Court

reflects some non-application of mind, which according to Mr.Shelat are typographical mistakes, nonetheless the appellate Court having discussed the entire evidence in detail and confirmed the findings recorded by the trial Court, the Court does not find such error or irregularity as material irregularity, which would require interference of this Court.

16. It is needless to say that the scope of revision under Section 29(2) of the Bombay Rent Act is very limited. The examination or consideration of evidence by the High Court in revisional jurisdiction under the Bombay Rent Act is confined to find out as to whether the finding of facts recorded by Courts below is according to law and does not suffer from any error of law, as held by the Supreme Court in the case of Hindustan Petroleum Corporation Ltd. (supra).

The Court does not find any error of law in the findings of facts recorded by the Courts below, warranting interference of this Court.

17. Mr.Gandhi has also failed to point out any illegality or infirmity in the impugned order dated 5.8.2017 passed by the appellate Court in Appeal from Order No.9 of 2017 arising out of the execution proceedings.

18. In that view of the matter, both the Civil Revision Applications being devoid of merits deserve to be dismissed, and are dismissed. Rule is discharged.

1. After pronouncement of the judgment, learned advocate Mr.Gandhi for the applicants submits that the applicants shall vacate the suit premises, being the residential premises, if some reasonable time is granted.

2. Mr. Shelat, learned advocate for the respondent has no objection if reasonable time is granted.

3. Considering the submissions, it is directed that the applicants shall vacate the suit premises on

or before 31.05.2018 and each of the applicants shall file undertakings within one week from today on usual terms.

4. The applicants shall serve the copies of the undertakings to learned advocate Mr.Shelat, learned Advocate for the respondent.

5. It is clarified that if the undertakings are not filed as directed within one week, the respondent shall be at liberty to proceed with the execution of the decree.