HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CIVIL REVISION APPLICATION No. 51/2018

Shaikh Wasim Shaikh Ismail,
Aged about 62 years, Occ. Business,
R/o Ashok Nagar, Akot File, Akola
at Present Akola Chakki, Mubarak Pura,
Murtizapur, Dist. Akola. **APPLICANT**

.....VERSUS.....

Mohammad Faiyyaz Noor Mohammad,
Age about 42 years, Occ. Business,
R/o Haji Nagar, Akot Fail, Akola,
Tq. and Dist. Akola. **NON-APPLICANT**

Shri D.R. Goenka, counsel for the applicant.
Shri M.G. Sarda, counsel for the non-applicant.

CORAM : A.S. CHANDURKAR, J.

DATE ON WHICH ARGUMENTS WERE HEARD : 12TH OCTOBER, 2018.
DATE ON WHICH JUDGMENT IS PRONOUNCED : 02TH NOVEMBER, 2018.

JUDGMENT

The Civil Revision Application is **ADMITTED** and heard finally with the consent of the learned counsel for the parties.

2. This civil revision application has been filed by the original plaintiff who is aggrieved by the judgment of the appellate Court in Regular Civil Appeal No.3 of 2017 whereby the said appeal has been allowed and the suit filed by the applicant herein seeking eviction of the non-applicant has been dismissed.

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3. As per the plaint averments, it is the case of the applicant that the suit property admeasures 400 square feet alongwith constructions standing thereon. The said constructions are a shop admeasuring about 10 Feet X 10 Feet and a room admeasuring 8 Feet X 8 Feet. According to the plaintiff, he is the owner of Plot No.59 which admeasures 1000 square feet. The non-applicant had filed Special Civil Suit No.78 of 2008 which was a suit for declaration that the non-applicant had a right to purchase the suit property from the present plaintiff on the basis of an agreement dated 10.02.2005. It was pleaded that in that suit it was held that the non-applicant was a tenant of the suit property and he was not liable to be dispossessed without following the due process of law. Rent payable was Rs.400/- per month. The non-applicant was in arrears of rent and taxes from 01.07.2005. The plaintiff therefore on 16.11.2009 and thereafter on 30.11.2009 issued notices demanding arrears of rent. The defendant replied to the aforesaid notices on 25.02.2010 and remitted an amount of Rs.25,100/- towards the claim as made. As the entire arrears were not cleared and the plaintiff had a *bona fide* need of the suit premises, he filed suit for eviction of the defendant under provisions of Section 15 and 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short, 'the said Act').

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4. The defendant filed his written statement and raised a plea that the lease in question was granted for an open plot on which construction was carried out by the defendant. As the defendant was the owner of the structure, no decree for eviction could be passed against him as the structure was not owned by the plaintiff and the suit as filed was not maintainable. It was also averred that as the lease was for the open plot, the provisions of the said Act were not applicable.

5. The trial Court after considering the evidence on record held that construction was carried out by the defendant and thereafter the agreement dated 10.02.2005 at Exhibit 63 was entered into. After the construction was made by the defendant, rights were conferred on him by the plaintiff and the defendant was paying rent of Rs.400/- per month. It was further held by considering the evidence on record that the defendant was tenant of the open plot alongwith the structure standing thereon. Thus, the provisions of the said Act were applicable and after finding that the plaintiff had made out ground for eviction as pleaded, the suit came to be decreed. The trial Court also observed that the issue with regard to irrevocable tenancy of the defendant as sought to be canvassed by the defendant by relying upon the earlier adjudication in Special Civil Suit No.78 of 2008 did not amount to *res-judicata*.

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6. The defendant being aggrieved filed an appeal challenging the decree for eviction. The plaintiff also filed a cross appeal on the ground that the trial Court failed to pass a decree for arrears of rent though it was found that the defendant was in arrears of rent. In the appeal, the plaintiff also filed an application under provisions of Order XLI Rule 27 of the Code of Civil Procedure, 1908 seeking permission to place on record documents by way of additional evidence.

7. The appellate Court on re-appreciating the evidence came to the conclusion that on the basis of the earlier litigation, the plaintiff had given possession of the open plot to the defendant. Thereafter, the defendant had made construction and hence on that basis the provisions of the said Act were not applicable as the dispute related to open land. The appellate Court further held that on the basis of the license, the defendant had made the construction which thus became irrevocable and therefore the suit was liable to be dismissed. Accordingly, the appeal was allowed and the suit was dismissed holding the same to be not maintainable under the said Act. Being aggrieved, the original plaintiff has filed the present civil revision application.

8. Shri D.R. Goenka, learned counsel for the applicant, submitted that the appellate Court committed a serious error in coming to

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the conclusion that the provisions of the said Act were not applicable on the premise that the open plot had been let out to the defendant. Referring to the agreement at Exhibit 63, it was submitted that on a plain reading of the same, it was clear that on the entire plot admeasuring 1000 square feet, the defendant had erected construction to the extent of 10 Feet X 10 Feet at his expense and on the area admeasuring 6 Feet X 10 Feet a column alongwith plinth was constructed by the defendant. The plaintiff agreed that whenever the constructed portion would be sold, it would be only to the defendant and not anybody else. The property was thus given to the defendant on monthly rent of Rs.400/-. He submitted that in the earlier suit, being Special Civil Suit No.78 of 2008 a finding had been recorded that the defendant was a tenant of the suit property. On a plain reading of the aforesaid agreement it was clear that the same was entered into after the construction in question was carried out by the defendant and therefore the suit property was 'premises' as defined under the said Act. The trial Court rightly held the suit to be governed by the provisions of the Maharashtra Rent Control Act, 1999 and had rightly decreed the same. The finding recorded by the appellate Court otherwise was after ignoring various admissions of the defendant as well as pleadings in the suit for specific performance which was Regular Civil Suit No.460 of 2012. Even in the reply given to the statutory notice issued by the plaintiff, such plea was not taken. It was

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thus submitted that appellate Court proceeded on a wrong premise for concluding that initially the open plot was given to the defendant who thereafter erected the construction. It was then submitted that the defendant never raised a plea that by virtue of such construction the license had become irrevocable. This point was not urged even before the trial Court and the appellate Court was not justified in going into that question in the absence of any pleadings. The learned counsel placed reliance on the decisions in *Ramesh & Others Versus Pandurangrao Ratnalikar & Others* [**2007 (3) CLJ 369**] and *Geetha Varma & Others Versus V.K. Amminikutty Nambishtathiri Amma & Others* [**AIR 1995 Kerala 168**] in that regard. It was submitted that the observations made in Special Civil Suit No.78 of 2008 cannot be termed to be binding on principles of *res-judicata* as the aspect of irrevocable license was not substantially in issue between the parties in that suit. This stand was also not taken in the reply notice and the appellate Court by applying wrong principles of law proceeded to hold that the license was irrevocable. The learned counsel also referred to the decision in *Bhaurao Jagoji Junankar (Junghare) (Since dead) thr. His LRs. Vandana Moreshwar Korale & Others Versus Geetabai Panjabrao Deshmukh (since dead) thr. Her LRs. Indubai Bhimrao Deshmukh & Others* [**2013 (4) Mh.L.J. 196**] in that regard. It was further urged that the defendant having been permitted by the agreement to carry out construction, the

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same would not amount to creation of an irrevocable license on the basis of leasehold rights with the defendant, same could be terminated by resorting to the provisions of the said Act. He placed reliance on the decisions in *Chotey Lal Versus Mt.Durga Bai* [**AIR 1950 Allahabad 661**] and *Bombay Suburban Art and Craft Education Society, Mumbai & Another Versus Govind Gajanan Dabholkar & Others* [**2015 (4) Mh.L.J. 801**] in that regard. The learned counsel then submitted that the appellate Court failed to consider the application seeking permission to lead additional evidence. Similarly, the cross appeal filed by the original plaintiff was also not decided. It was thus urged that the judgment of the appellate Court suffered from jurisdictional errors which were liable to be corrected in exercise of revisional jurisdiction.

9. Shri M.G. Sarda, learned counsel for the non-applicant, supported the impugned judgment. At the outset, he submitted by relying upon the decision in *Kalidas Chunilal Patel (Dead) by LRs. Versus Savitaben & Others* [**AIR 2016 SC 3053**] that the applicant by raising various grounds based on appreciation of evidence sought to travel beyond scope of Section 115 of the Code. The same was not permissible. It was submitted that the appellate Court rightly construed the agreement at Exhibit 63 while holding that the defendant had come in possession of the open plot of land. The plaintiff had no

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right in the structure as erected and as the lease was of the open plot, it was rightly held that the provisions of the said Act would not be applicable. It was submitted that tendering of rent by the defendant was without prejudice to his rights which was clarified in the reply notice at Exhibit 92. The license in question had been rightly held to be irrevocable and reference was made to the provisions of Sections 52 and 60 of the Easements Act, 1882. It was submitted that initially the right to construct was given to the defendant and thereafter a right to occupy the constructed portion was given. This resulted in creation of an irrevocable license in favour of the defendant. It was not necessary to specifically plead the aspect of irrevocability of the license as the terms of the agreement at Exhibit 63 were very clear. The written statement as a whole had to be seen while considering defence as raised and for said purpose the learned counsel referred to the decision in *Ram Sarup Gupta (Dead) by LRs Versus Bishun Narain Inter College & Others* [**AIR 1987 SC 1242**]. He also referred to the decision in *Kamla Devi Versus Laxmi Devi* [**(2000) 5 SCC 646**] to urge that the appellate Court had rightly held that the provisions of the said Act were not applicable. In the absence of any jurisdictional error, there was no reason to interfere with the judgment of the appellate Court.

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10. I have heard the learned counsel for the parties at length and I have also gone through the records of the case. Since there has been earlier litigation between the parties with regard to the suit property itself reference to those proceedings would be necessary. Agreement dated 10.02.005 at Exhibit 63 was entered into between the parties. As per that agreement, the plaintiff was shown to be the owner of Survey No.59 admeasuring 40 Feet X 25 Feet. On the Northern portion thereof, in area admeasuring 40 Feet X 10 Feet, a construction was standing. This construction was undertaken by the defendant at his own expense. The plaintiff agreed that whenever the said construction alongwith the land would be sold, it would be offered at the market price to the defendant. That property was given to the defendant as tenant alongwith Rs.400/- per month. The defendant had filed Regular Civil Suit No.250 of 2005 seeking a declaration that he had a right to purchase the said property from the present plaintiff. In that suit, the defendant examined himself and in his affidavit dated 23.02.2006, he stated as under:-

> *"As per agreement I constructed one room admeasuring 10 X 14 and shop 10 X 10 and also developed and done pakka constructions of the column in the area 8.6 X 10 ft and 7.6 X 10 ft. While constructing the aforesaid plot I have spent huge amount and developed the plots. The defendant was agreed to sell the said plot to me and as per the agreement he also agreed that he will not sell the aforesaid property to any*

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> *other persons except me. It is submitted that, I am in possession of the aforesaid plot and residing in the suit property as a tenant.*"

In his cross-examination, he admitted that the agreement at Exhibit 63 was with regard to granting the shop and room on rent. The construction was completed prior to 09.02.2005. After considering the evidence on record, the trial Court in that suit recorded a finding in paragraph 19 of its judgment that the present defendant was in possession of area admeasuring 40 Feet X 10 Feet on the Northern side. Rent payable was Rs.400/- per month. On that basis that suit was decreed in favour of the present defendant and the plaintiff was restrained from dispossessing the defendant from the area admeasuring 400 square feet on the Northern side without following the due process of law. This adjudication has attained finality. It is thus clear that the defendant had raised a plea that the agreement in question as regards tenancy related to the shop and the room and it was with regard to 400 square feet on the Northern side.

11. In the present suit, as the agreed rent was not being paid, the plaintiff demanded the arrears from the defendant by issuing notice on 30.11.2009 which is at Exhibit 25. The arrears were demanded from 01.07.2005 and onwards. In the reply dated 25.02.2010 which is at Exhibit 92, a part of the arrears was remitted by Demand Draft. In

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paragraph 1 of the said reply, it was stated that without admitting the claim made by the plaintiff in the said notice for Rs.36,355/-, Rs.25,100/- was being sent. Thus, except the quantum of arrears, the defendant did not deny the specific statements made in the plaintiff's notice that he was the tenant of area admeasuring 10 Feet X 40 Feet as adjudicated in the earlier suit. Though it was submitted on behalf of the defendant that the claim of the plaintiff as made in the notice was not admitted, paragraph 1 of that reply merely refers to not admitting the total claim of arrears of Rs.36,355/-. As the entire arrears were not paid, the suit came to be filed. If the written statement of the defendant is seen, a plea has been raised that there was a license to make construction on the land and the lease was for the open plot on which the construction was made. The plaintiff was not the owner of the structure and hence, the suit was not maintainable. The defendant in his cross-examination admitted that he was residing in the suit property as a tenant.

12. The trial Court recorded a finding that the defendant was a tenant to the extent of 400 square feet. After the construction was made by the defendant over the suit property, the rights therein were granted by the plaintiff to him. After considering the contents of the notice between the parties it was observed that the defendant was the tenant of the open plot alongwith the structure standing thereon and therefore

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provisions of the said Act were applicable. In the light of the findings recorded in Regular Civil Suit No.250 of 2005, it was held that there was an intention to create tenancy in favour of the defendant in respect of the open plot and the structure. The construction was carried out as a tenant and not as a licensee. On that basis, it was held that the suit property was "premises" within the meaning of the provisions of Section 7(9) of the said Act.

13. The appellate Court however has not considered the entire material available on record before reversing the finding recorded by the trial Court that the provisions of the said Act were applicable to the case in hand. The effect of the exchange of notices at Exhibits 25 and 92 has been ignored. Similarly, the agreement at Exhibit 63 has been construed as a license being given to the defendant to make the construction. A perusal of that agreement clearly indicates that possession was given of the constructed portion by charging the rent of Rs.400/- per month. The finding recorded in paragraph 31 of the judgment of the appellate Court that the plaintiff had given possession of the open plot to the defendant is clearly perverse in the light of the fact that the agreement dated 10.02.2005 at Exhibit 63 states otherwise. By ignoring the evidence of the defendant recorded earlier as well as the findings recorded in Regular Civil Suit No.250 of 2005, the appellate Court proceeded to hold that the

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open plot was given on rent to the defendant on which he made construction. The trial Court having given cogent reasons on the basis of the evidence on record rightly found that the provisions of the said Act were applicable and the plaintiff had a cause of action to seek eviction of the defendant.

14. As regards the aspect of irrevocable license, the appellate Court has misconstrued the observations in Special Civil Suit No.78 of 2008. The said aspect was not a matter directly and substantially in issue between the parties so as to attract the provisions of Section 11 of the Code. Moreover, such case was not pleaded in the present proceedings and as held in *Ramesh & Others* (supra) such plea cannot be permitted to be raised without specifically pleading about the same. Moreover, as held in *Geetha Varma & Others* (supra), the provisions of Section 60(b) of the Act of 1882 would operate only if the licensee has acted upon the license and erected the structures in question. The facts of the present case are otherwise and the agreement at Exhibit 63 indicates the construction already made by the defendant. In *Chotey Lal* (supra), it was held by the Allahabad High Court that if a licensee executes a work of a permanent character under a clear understanding that he may be called upon after certain time to leave the land, he cannot plead such work as a bar against his eviction in the suit filed by the plaintiff.

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The appellate Court misconstrued the ratio of the decision in *Bombay Suburban Art and Craft Education Society, Mumbai & Another* (supra) while non-suiting the plaintiff. It has been observed therein that a lessor can grant permission to put up a construction by imposing conditions thereon. It would not amount to creation of an irrevocable license. The observations in *Kamla Devi* (supra) to the effect that if a plot with a structure is let out, the same would fall within the meaning of the term "premises" but if an open plot is given without any structure, it would not fall within the meaning of the term "premises" support the case of the plaintiff. The evidence on record indicates the open plot along with structure being let out to the defendant as per Exhibit 63. For same reason, the ratio of the decision in *Ram Sarup Gupta* (supra) does not assist the case of the defendant.

15. It is also seen that the appellate Court while deciding the appeal failed to take into consideration the application that was moved by the original plaintiff under provisions of Order XLI Rule 27 of the Code. Similarly, the cross appeal filed by the plaintiff has also not been adjudicated upon though in effect the plaintiff's suit has been dismissed. It is found that the appellate Court while allowing the appeal, has exercised jurisdiction with material irregularity in failing to consider relevant material available on record. A case for interference has thus been made

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out and while examining the material on record, jurisdiction is being exercised within the parameters of the decision in *Kalidas Chunilal Patel* (supra). It is thus held that the appellate Court erred in holding that it was only the open plot that was given on lease to the defendant and hence the provisions of the said Act were not applicable. Instead, it is held that portion of the open plot alongwith structure standing thereon had been given to the defendant at monthly rent of Rs.400/-. The subject matter of the suit was premises within the meaning of Section 7(9) of the said Act. The suit was therefore, maintainable and adjudication on merits was necessary. As the appellate Court has dismissed the suit on the ground of jurisdiction, it is found necessary to remand the appeal to the appellate Court for the fresh consideration as the findings with regard to the defendant being in arrears of rent and *bona fide* need of the plaintiff would have to be adjudicated upon.

16. Accordingly, the following order is passed.

I) The judgment in Regular Civil Appeal No.3 of 2017 dated 06.11.2017 is set aside.

II) The proceedings are remanded to the appellate Court which shall decide the appeal afresh on its own merits and in accordance with law. The parties shall appear before the appellate Court on 01.12.2018 and the appeal shall be decided expeditiously and without being influenced by any passing observations made in this judgment.

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17. The Civil Revision Application is accordingly allowed in aforesaid terms with no order as to costs.

JUDGE

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