

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 413 OF 2003.**

Rambaran Mayashankar Tiwari,  
carrying on business under the  
name and style of Bhole Shankar  
Flour Mill, at Plot No.3-A, Near  
MUKesh Kunj Building, Daftary  
Road, Pushpa Park, Malad (East),  
Mumbai 400 097.

.... Appellant.

Versus.

1. Ramkaran Kayashankar Tiwari  
(since deceased through LRs.)
  - (a) Smt.Jadavatidevi Ramkaran Tiwari,  
aged 62 years.
  - (b) Rajnarayan Ramkaran Tiwari,  
aged 45 years,
  - (c) Rajender Ramkaram Tiwari,  
aged 42 years.
  - (d) Rajesh Ramkaran Tiwari,  
aged 39 years.
  - (e) Dinesh Ramkaran Tiwari,  
aged 37 years.
  - (f) Ramesh Ramkaran Tiwari,  
aged 37 years.
  - (g) Sarvesh Ramkaran Tiwari,  
aged 31 years.All residing at Yadav Chawl,  
Janu Compound Shantaram Talao,  
Malad (East), Mumbai 400 097.
2. Parasnath Mayashankar Tiwari,  
carrying on business under the  
name and style of Bhole Shankar  
Flour Mill at Plot No.3A, Near  
Mukesh Kunj Building, Daftary  
Road, Pushpa Park, Malad (East),  
Mumbai 400 097.
3. Smt.Shantaben Bharmal Shah,  
residing at Mukesh Kunj,  
Daftary Road, Pushpa Park,  
Malad (East), Mumbai 400 097.
4. Municipal Corporation of  
Greater Mumbai, a Corporation

constituted under the Bombay  
Municipal Corporation Act, having  
their office at Mahapaliak Marg,  
Mahapalika Building, Fort,  
Mumbai 400 001.

.... Respondents.

Shri A.C.Singh i/by Shri D.R.Shah for the Appellant.

Shri R.M.Pande for Respondent No.3.

**CORAM : ABHAY S. OKA, J.**

**DATED : 31st January 2005.**

**ORAL JUDGMENT.**

1. By this Appeal from Order, the Appellant has impugned the Judgment and Order dated 10th March 2003 passed by the learned Judge of the City Civil Court at Bombay. By the said order, the learned Judge has ordered that the plaint shall be returned to the Appellant for presentation to the Court of Small Causes at Bombay under Order VII Rule 10 of the Code of Civil Procedure, 1908.

2. The Appellant instituted a suit against the Respondents praying for perpetual injunction restraining the Respondents from removing the water tap or removing and disturbing the underground cable laid down on the suit premises. The suit premises is described in paragraph No.2 of the plaint. It is an open portion of land admeasuring 12' x 22' in front of a flour mill in respect of which the Appellant and the Respondents Nos.1

and 2 are claiming rights. The case of the Appellant is that his father was the tenant in respect of the said flour mill situated on Plot No.3A near Mukesh Kunj Building, Daftary Road, Pushpa Park, Malad (East), Mumbai. The case of the Appellant is that his father died sometime in the year 1978 and on his demise, the Appellant and the Respondents Nos.1 and 2 became entitled to the tenancy rights in respect of the flour mill premises. The Respondent No.3 is the landlady of the Appellant. The case of the Appellant is that the suit premises are in his occupation and enjoyment since last more than 20 years without any sort of interference or obstruction of any nature whatsoever. It is stated in the plaint that in the suit premises there is a washing place and a water tap which are being used by the Appellant for the last more than 20 years and the Appellant has kept a drum and bucket in the said washing place. According to the Appellant the electric cable for providing power to the flour mill has been under the suit premises and there is also underground gutter in the suit premises to which small opening has been made.

3. It is further stated in the plaint that the suit premises forms part of compulsory open space and no construction is permissible thereon. His apprehension expressed in the plaint is that the Respondent No.3 was

trying to make construction on the suit premises.

4. The suit was contested by the Respondent No.3 by filing written statement. One of the contentions raised was that in view of the provisions of section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (hereinafter referred to as "the Bombay Rent Act"), the City Civil Court has no jurisdiction to entertain and try the suit. The issue of jurisdiction was framed and was tried as a preliminary issue. The said issue has been answered against the Appellant and the trial Court held that it is the Court of Small Causes which has jurisdiction to entertain and decide the suit.

5. The learned Counsel appearing for the Appellant submitted that the suit premises cannot be included in the definition of the "premises" under the Bombay Rent Act. He submitted that the suit premises cannot be termed as appurtenant to the flour mill structure in respect of which the father of the Appellant was the tenant. He submitted that the Appellant is not claiming to be in exclusive possession of the suit premises. He invited my attention to the averments made in paragraphs 4 and 6 of the plaint in support of the said contention. He has placed reliance upon several judgments to which

reference will be made at a later state.

6. The learned Counsel appearing for the Respondent No.3 submitted that the issue of jurisdiction has to be decided on the basis of the averments made in the plaint. He submitted that the averments made in the plaint clearly show that the Appellant is claiming to be in exclusive possession of the suit premises. He stated that the suit premises are admittedly abutting the flour mill premises in respect of which the Appellant is claiming to be tenant along with the Respondents Nos.1 and 2. He therefore submitted that the suit premises is appurtenant to the flour mill premises let out to the father of the Appellant and therefore, the suit premises forms part of the demised premises. He, therefore, submitted that this being a suit essentially between the tenant and landlord, only the competent Court under section 28 of the Bombay Rent Act has jurisdiction to entertain and try this suit. He relied upon certain decisions of this Court which are referred to in the later part of the Judgment.

7. With a view to appreciate the rival submissions it will be necessary to refer to the definition of the word "premises" under section 5(8) of the Bombay Rent Act, which reads as under:

(8) "premises" means-

(a) any land not being used for agricultural purpose,

(b) any building or part of a building let or given on licence separately other than a farm building, including -

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

(ii) any furniture supplied by the landlord for use in such building or part of a building,

(iii) 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;"

Section 28(1) of the Bombay Rent Act reads thus:

28. Jurisdiction of courts.

(1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but

for this provision, be within its jurisdiction,-

(a) in Greater Bombay, the Court of Small Causes, Bombay,

(aa) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and

(b) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge, the Court of the Civil Judge (Senior Division) having ordinary jurisdiction,

shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply or between a licensor and a licensee relating to the recovery of the licence free or charge and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of sub-section (2), no other court shall have jurisdiction to

entertain any such suit, proceeding or application or to deal with such claim or question."

Reading of sub-section (1) of section 28, it is apparent that if the suit is between landlord and tenant relating to recovery of rent or possession of any premises, no other Court save and except the Court defined in the said section will have jurisdiction to entertain and try the suit. Thus if the suit premises in the present suit can be said to be a ground appurtenant to the tenement in which the flour mill is being run, the suit premises will be covered by the definition in sub-section (8) of section 5 of the Bombay Rent Act and thus section 28 will squarely apply.

8. In the light of this legal position it is necessary to see whether the suit premises is covered by sub-section (8) clause (b)(i) of section 5 of the Bombay Rent Act.

9. The learned Single Judge of this Court in a Judgment reported in 1988 Mah.L.J. page 612 (Rukhaminibai Ramvilas Lahoti v/s. M/s.Muralidhar Govindram and another) was considering a question whether an open space adjoining to the demises premises is appurtenant



to the premises let and subject matter of lease. The learned Judge referred to the definition of the premises under the Bombay Rent Act. Paragraphs Nos.16 and 17 of the said decision read thus:

16. The word "appurtenant" must be understood, therefore, in the context and would mean relating or in conjunction with the premises, namely, building or part of a building. If the grounds, garages, gardens or out-houses can be said to be a part thereof or so connected with the building or part of the building let, that they must be deemed to be appurtenant, then it can be said that they are included in the lease.

17. There is also another angle to such an enquiry and that would be from the point of enjoyment of the premises and obviously for the better enjoyment of the premises. Where there is no writing delineating what was let under the lease, it is the conduct of the parties which would indicate as to what was the intention of the parties, whether a building or part of the building is let. If the conduct indicates that the grounds, garages or

out-houses were let along with the building or part of the building, then it would be clear that the intention between the parties was to do so. Even if, therefore, the reference is loosely to a building or part of a building, the ground which is appurtenant to such a building or part of the building that indicates was intended to be appurtenant to or for enjoyment thereof, would be a part of the leasehold premises. An illustration of a case in point will be where a house is let having a court-yard, the letting may indicate merely that what was let was a house and not the court-yard, which is an open space. Nevertheless if the courtyard is such which is for the beneficial enjoyment of the house in question and is for the better enjoyment thereof and is such as can be used and enjoyed with reference to the building or part of the building let, then an inference that it is appurtenant to the building or part of the building let would readily arise. Where, however such is not the case and where the open space is not only for the enjoyment of the building or part of the building which adjoins it is concerned, but it is also available and

can be used by other persons; then it is difficult to think that such open space is appurtenant to the building or part of the building. As the word "appurtenant" indicates and suggests it is joint with the building or part of the building. If such an inference or conclusion is not possible, then it is difficult to think that the open space can be held to be appurtenant to the building or part of the building."

In paragraph 17 quoted above the discussion is about whether the open space available can be used by other persons other than the tenant. If the open space is exclusively used by the tenant then it will be governed by the definition of the premises under sub-section (8)(b)(i) of section 5 of the Bombay Rent Act. However, if it can be used by other persons also it is difficult to hold that the open space is appurtenant to the building or part of the building. After considering the various decisions, the learned Judge in paragraph 20 held thus:

**".....It is, therefore, follows that where that which is used in common with others would not become a part of the concept of "premises"**

and would be, therefore, outside the pale of the definition of the word "premises" occurring in section 5, sub-section (8A)."

(Emphasis supplied).

10. Reference will have to be made to the Judgment of the learned Single Judge of this Court reported in 1989 Mah.L.J. page 51 (Omprakash Tulsiram & another v/s. M/s.H.J.Leach & Co.). The question before the learned Single Judge was if the tenant claims a right of way over private road which leads to his premises and contends that any obstruction by the land in the user thereof is interference with his right of enjoyment of the demises premises whether the Civil Court will have jurisdiction to entertain and try the suit or the jurisdiction will be of the Court as provided in section 28 of the Bombay Rent Act. The learned Single Judge after considering the submissions held in paragraph 12 as under:

12. The paramount object of the Bombay Rent Act is to give protection to the tenant against eviction and to regulate rent, repairs and amenities which are essential. The present suit is not a suit to enforce any amenity within the meaning of section 24 of the Bombay

Rent Act, and that is not anybody's case. This is also not a suit for recovery of rent or recovery of possession. Even though it could be said to be a term of tenancy being an obligation cast on the landlord as such, still, it cannot be said that there is any claim or question which are required to be dealt with under the Bombay Rent Act. In this view of the matter, I am of the opinion that the Bombay City Civil Court will have jurisdiction to entertain and try this suit as this suit does not fall under Section 28 of the Bombay Rent Act at all."

On this aspect there is one more Judgment of the learned Single Judge of this Court reported in AIR 1983 Bombay page 384 (Sakeena & others v/s. Kusumbai & others.). The learned Single Judge was considering the provisions of section 13(1)(ii) of the Bombay Rent Act. The learned Single Judge relied on a decision of the Division Bench of this Court and came to the conclusion that the provisions of section 13(1)(ii) must be broadly construed considering the intention of the Legislature to encourage construction of new buildings. The learned Single Judge held that if the said section is not liberally construed and interpreted, the landlord will

not not be able to get possession of land adjoining to or adjunct to the building even for erecting new residential buildings.

11. In the light of the law laid down by this Court essentially in the case of Rukhaminibai (supra), it will be necessary to refer to the averments made in the plaint. It is true that in paragraph 3 of the plaint the Appellant stated that he is in use, occupation and enjoyment of the suit premises for more than 20 years without any sort of interference or obstruction of any nature whatsoever. As stated earlier, the suit premises consists of an open portion of land admeasuring 12 x 22 ft. in front of the flour mill in possession of the Appellant and the Respondents Nos.1 and 2. In paragraph 4 the Appellant has stated thus:

"4. The Plaintiff states that in fact the suit premises is a compulsory open space and no constructions can be allowed on the said open space as the same has to be kept open for all purposes. The plaintiff states that under the provisions of the BMC Act, Development Control Rules and MRTPL Act no constructions can be allowed without a sanction plan, more particularly when the space is left as a

compulsory open space. As it can be seen from the plan annexed Exhibit "A" hereto that the suit premises is between the flour mill and the Daftery Road, abuts to the said Daftery Road."

In paragraph 6 of the plaint while reiterating that the suit premises is in use, occupation and enjoyment of the Appellant for the last 20 years without any interference, the Appellant has stated as under:

".....The Plaintiff, however, says that the plaintiff has no objection if the suit premises is used in common since the defendant No.3 has also set out in his letter that the open space is common passage and therefore on her own admission i.e. of the defendant No.3 she has no right to put up construction on the open space i.e. suit premises, the plaintiff has no intention of putting any construction on the suit premises and he is interested in say that the same should be used in the manner as it has been used all along."

Thus the Appellant has come out with a specific case that the suit premises forms part of compulsory open

space in which the construction cannot be allowed. He has also stated that he has no objection if the suit premises is used in common. In fact in paragraph 3 of the plaint all that the Appellant has said is that he is in use, occupation and enjoyment of the suit premises without any obstruction. A combined reading of averments in paragraphs 3, 4 and 6 of the plaint clearly shows that the Appellant does not claim that he is in exclusive possession of the suit premises. In fact there is a clear assertion that the suit premises forms part of the compulsory open space and he has no objection if it is used in common. Reliance is placed by the Appellant on the contention of the Respondent No.3 that the open space is a common passage. Therefore, if one goes by the averments made in the plaint, it is crystal clear that even the Appellant has stated that the suit premises is for common use and that the suit premises forms part of the compulsory open space i.e. space which is required to be kept open as per the relevant Development Control Rules. Going by his own case, it is obvious that the open space is not for the exclusive use of any particular occupant of the building and it has been kept as open for the benefit of all the occupants of the entire building. Therefore, the position which emerges is that the Appellant is not claiming to be in exclusive possession of the suit



premises and that he is claiming his right to use the suit premises in common with other occupants and want to prevent the landlord from making any construction on the suit premises. In fact as noted in the earlier paragraph No.5, the learned Counsel for the Appellant stated that the Appellant is not claiming to be in exclusive possession of the suit premises. Following the Judgment in the case of Rukhaminibai (supra) the suit premises cannot be appurtenant to the demised premises as contemplated by section 5(8)(b)(i) of the Bombay Rent Act. The learned trial Judge has referred to some decisions and held against the Appellant by holding that it is clear from the averments in the plaint that the suit premises is being exclusively used by the Appellant. The learned trial Judge, in my view, committed an error by holding that the suit premises is appurtenant to the structure of the flour mill.

12. In this view of the matter the Appeal succeeds and the impugned order will have to be set aside. Hence the following order:

- (i) The impugned Judgment and order dated 10th March 2003 is quashed and set aside. The preliminary issue i.e. issue No.5 framed by the learned trial Judge is answered in

the negative by holding that the City Civil Court has jurisdiction to entertain and try the suit.

(ii) The learned trial Judge will proceed further with the suit in accordance with the law.

(iii) If any interim order was operating during the pendency of the suit till the date of passing of the impugned order, as a result of restoration of the suit, the same will continue to operate till disposal of the suit. In case of any change of circumstance both the parties are at liberty to apply for variation of the said order to the trial Court.

(iv) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.