

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.242 OF 2012

Ramkishan Bankatlalji Malu,
Age 77 years, occ. Advocate,
r/o. Hanuman Chowk, Latur,
Taluka and District Latur ..Applicant

Versus

- 1] Rajkumar Nandlal Toshniwal,
Age 40 years, occ. Medical
Practice, r/o. Moti Nagar,
Latur
- 2] Manoj @ Dhiraj Nandlal
Toshniwal, Age 37,
occ. Business, r/o. Moti
Nagar, Latur
- 3] Shivpyaribai Nandlal Toshniwal,
Age 65 years, occ. Household,
R/o. Moti Nagar, Latur. ..Respondents

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Mr.P.M.Shah, Senior Counsel instructed by Mr.V.D.
Gunale, advocate for petitioner

Mr.S.P.Urgunde, advocate for respondent no.2

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CORAM : M.T. JOSHI, J.
JUDGMENT RESERVED ON : APRIL 28, 2015
JUDGMENT PRONOUNCED ON : MAY 08, 2015

JUDGMENT :

Heard both sides.

2] Aggrieved by reversal of the decree at the hands of learned Principal District Judge in appeal, thereby dismissing the suit for eviction against the tenant, the original plaintiff – landlord is before this Court.

3] The petitioner/plaintiff sought eviction from the suit shop of the respondents, on the ground that the respondents forfeited their tenancy by making default in payment of the rent and the premises is required to the plaintiff for personal *bonafide* use and occupation for himself as well as his family members.

4] Learned 4th Joint Civil Judge Senior Division, Latur, rejected the plea of default in payment of rent, but granted decree on the ground of bonafide occupation. Learned Principal District Judge, in appeal, reversed the decree rejecting both grounds.

5] The suit shop ad-measures about 30 x 15 ft. with an attic in it (wrongly described as mezzanine floor). Adjoining to the said shop, there is also

another shop of similar size. First floor is in possession of the petitioner. At the time of filing of the suit, this another shop was in possession of one Mr.Bhutada, who used to operate his shop in the name and style as "Paridhan Dresses". During pendency of the present proceedings, admittedly, said Mr.Bhutada has vacated said another shop in view of the compromise between the petitioner and said Bhutada. Present suit shop was rented to deceased - Nandlal Ramlal, father of present respondent nos.1 and 2 and husband of respondent no.3, for running a medical store. An agreement of lease was entered into in Diwali, 1998.

6] According to the petitioner/plaintiff, the rent was at the rate of Rs.4,000/- per month. The monthly tenancy was as per the Gregorian calender. The deceased tenant failed to pay the rent from 1st October, 2002 onwards. Thereafter, present respondents also failed to pay the same. In the circumstances, in the lifetime of the deceased tenant, notice dated 21st April, 2003 was served upon him thereby terminating the tenancy on the ground of

non payment of the rent as well as permissible increases. However, respondent no.2, along with a conditional letter dated 1st May, 2003, sent a cheque dated 1st April, 2013 for amount of Rs.40,000/- in favour of the petitioner. As the payment was conditional, the tender was not legal and proper. Therefore, the petitioner again sent a letter by Registered Post A.D., however, no reply from either of the respondents, was received to the petitioner. The cheque was not en-cashed. In the circumstances, the decree was sought by the petitioner on this count.

7] As regards bonafide need of occupation, the petitioner pleaded that he is a practicing advocate at Latur for more than 40 years at the time of filing of the suit. The petitioner always had his office away from the residential house. The office was situated at Hanuman Chowk and the residence was in Central Hanuman area. The office was in an old building having one floor only. Since the suit premises was situated in a commercial area, where his clients are there, he submitted that the suit

premises is suitable for his office. The present entire suit building was constructed by demolishing the earlier structure. The petitioner runs his office from the first floor. Besides him, his son has become Chartered Accountant since 1982. His office was also located in other part of the old building. After construction of the new building, he also started his office separately on the very first floor. The practice, however, has increased since then. Therefore, the first floor is not sufficient for the office of both of them. Besides this, the petitioner has been suffering from pains in the knees for which, he was operated at Thane and Mumbai. Therefore, he was advised not to climb the staircase. Besides the practice as an advocate, the petitioner is also active in extra curricular activities. In the situation, it was submitted that the suit premises is convenient for reasonable occupation as office.

8] On the other hand, according to the petitioner, the respondents have their many premises. Respondent no.1 is now a medical practitioner, who does not

require medical shop. He has built his own hospital. All the respondents are having other business premises at Latur. Besides this, many commercial complexes were being built during the period and the respondents can very well avail alternative shop at desired location. The petitioner submitted that thus, in case the decree is not granted, the petitioner would suffer greater hardship.

9] The respondents denied all the submissions made by the petitioner. It was submitted that the agreed rent was only Rs.3,000/- per month. Deceased - Nandlal had given an amount of Rs.2,50,000/- as a security deposit to the petitioner in presence of two witnesses. It was agreed that the said amount would be repaid at the time of vacation of the suit premises. No receipt was passed. Thereafter, second agreement dated 29th July, 1994 was entered into and the rent was fixed at Rs.3,300/- per month, which was, lateron in 1997, increased to Rs.3,630/- per month. The period and time of payment of rent was denied. The rent was regularly paid. Deceased - Nandlal never failed to pay the rent. since October,

2002 rent was sent by a money order with the advance payment of rent for the months November and December, 2002. The petitioner, however, did not accept the money orders and the same was returned back to the respondents. In reply to the notice, a cheque of Rs.40,000/-, against the due amount of Rs.28,000/-, was sent with the covering letter, but the petitioner did not encash the same. Hence, the submission of forfeiture of tenancy on this count, was denied by the respondents. After receipt of letter dated 19th May, 2003 from the petitioner / plaintiff, the respondents personally met him and reminded him about the security deposit, at that time, the petitioner promised that the rent amount would be deducted from the same. Again on 22nd May, 2004, a cheque of Rs.1,00,000/- was sent to the petitioner by Registered Post A.D., but the petitioner has refused to accept the same.

10] As regards the *bonafide* need of the suit premises, all the submissions of the petitioner were denied by the respondents. It was submitted that the office of the petitioner is in his own house which is

situated in Central Hanuman area. He has another office near court building near one Joshi complex. In fact, the petitioner does not attend the court regularly due to his illness and oldness. He, however, used to go to second floor of the court building and therefore, the submission that he is not able to reach his first floor office in the suit building, is false. Further, it was denied that his son also requires the suit premises. In fact, the son resides separate from the petitioner and has constructed a big bungalow in Adarsh Colony at Latur where, he operates his office and therefore, all the submissions of the petitioner were denied by the respondents.

11] On the basis of the evidence placed before the trial Court, it came to the conclusion that the petitioner has proved the case only of bonafide occupation. When the matter reached to the District Court for decision, in the meantime, certain more circumstances had taken place. The adjoining shop possessed by Mr.Bhutada was vacated by him. The grandson of the present petitioner has also become

Chartered Accountant. The respondents, therefore, amended their written statement pleading vacation of the adjoining shop by Mr. Bhutada. The petitioner did not apply for amendment of the plaint. However, at Exhibit - 83, he filed "rejoinder on further pleading" on record.

12] The then learned Additional District Judge, Latur, vide order dated 17th November, 2012, has accepted the additional pleadings and directed to annex the same to the plaint. These additional pleadings were to the effect that in spite of vacation of the adjoining shop, the necessity exist. The fact that the grandson of the petitioner started practice as a Chartered Accountant, was stated. Further the growing demands of the office of the son, by giving details regarding staff etc., was also stated. The controversy is, as to whether this can be called as proper pleading.

13] Learned Principal District Judge did not concur with the findings of the trial Court and the appeal, therefore, came to be allowed.

14] Mr.P.M.Shah, learned senior counsel instructed by Mr.Gunale, learned counsel for the petitioner, has advanced detailed submissions before me.

15] Mr.S.P.Urgunde, learned counsel for respondent no.2, submitted that the written notes of arguments along with synopsis. He submitted that in place of oral arguments the same may be perused.

16] On the basis of this material, following points arise for my determination :-

i) Whether the tenancy of the respondents is liable to be evicted for non payment of rent and permitted increased ?

ii) Whether the suit premises is required for reasonable and *bonafide* occupation of the petitioner for himself and his family members ?

iii) To whom greater hardship would be caused, if decree of eviction is passed rather than refusing it.

. My findings to the point 1 is in the negative and to the point no. 2 in the affirmative and as to point 3, to the petitioner. Present Civil Revision Application is therefore, allowed with costs, for the reasons to follow.

R E A S O N S

17] As regards the issue of default in payment of rent, both the courts below have held that the respondents were ready and willing to pay the rent. The cheque was sent in reply to the notice, which would show that it was not only for the due rent, but even for the rent of future period. By the notice, while the rent for seven months at the rate Rs.4,000/- per month i.e. Rs.28,000/- was claimed, the respondents sent a cheque of Rs.40,000/-. Further, there was no proof that the rent was settled

at Rs.4,000/- per month. Additionally, the cheque was not encashed. It was further found that the respondents, earlier, had sent the rent by money order, but that was refused.

18] Mr.Shah, submitted that the covering letter to the cheque received by the petitioner was a conditional one and therefore, the same cannot be called as a legal tender and that is the very reason for not encashing the cheque. It is however admitted that the earlier money orders sent by the respondents were refused by the petitioner. Both the courts below have forwarded elaborate reasons for not accepting the plea of the petitioner in this regard, by giving the details of each and every offer and deposit of the rent. In the circumstances, since no material irregularity in the findings is found in this regard, the plea of the petitioner that there was default in payment of rent, cannot be accepted.

19] As regards the issue of vacation of the suit shop for *bonafide* need of occupation of the petitioner, learned trial Court agreed with the

petitioner. Learned Principal District Judge, however, upon re-appreciation of the evidence, did not concur with the same.

20] As already pointed out, the record would show that there are two shops on the ground floor. During pendency of the present proceedings, another shop is vacated by another tenant. The petitioner's office is situated on the first floor. Though the respondents in their pleadings, had pleaded about other alternative premises, no proof regarding the same could be placed on record. The evidence placed by the petitioner and the admission of the respondent no. 2, would show that not only the son of the petitioner, but even his grand-son has started practice as Chartered Accountant. It was also further accepted that the son of the petitioner, namely Shivkumar, has a flourishing practice.

. The respondents have pointed towards the residential house of the son of the petitioner and explained that the son carries on his practice as a Chartered Accountant from his residential premises.

The petitioner claims that even after vacation of the adjoining shop, the need of occupation of the suit premises, still exist in view of changed circumstances i.e. flourishing practice of the son of the petitioner and grand-son also joining him. Further, evidence was also led to the effect as to how, for want of sufficient accommodation, the son is unable to accept article-ship of other persons in his office.

21] Learned Principal District Judge, however, refused to accept the said plea. According to him, after vacation of the adjoining shop, the same can be occupied by the petitioner. Further, the son or grand-son of the petitioner was not examined. Further, there is no amendment to the pleadings, but merely by way of reply to the application for amendment from the side of respondents, certain additional pleas were put and those cannot be called as pleadings and therefore, the grand-son's need is not pleaded. It was further observed that the mezzanine floor (in fact, an attic) can also be occupied and therefore, the decree granted by the

trial court in this regard, was set aside by learned Principal District Judge.

22] It is now well settled that the landlord can depose about *bonafide* need of the entire family. There is no need to examine either the son or grand-son of the petitioner. In the case of ***Bentool Steel Products Private Ltd. V/s O.M.A. Mohammed Omar & Another, (2008) 17 SCC 679***, this view has been now crystallized.

23] Learned Principal District Judge has taken much effort to show, how there are no pleadings regarding the fact that the grand-son of the petitioner has become Chartered Accountant. However, as already noted about filing of the additional pleadings by the petitioner vide Exhibit – 83 and the order of the then Additional District Judge, dated 17th November, 2012, whereby, inter-alia, it was directed to annex the said additional pleadings to the pleadings of the landlord. Once the Additional District Judge has accepted the additional pleadings and directed to annex the same to the plaint without there being any

formal application for amendment, the petitioner could not have dreamt that, as there was no application for amendment of the pleading, those facts would not be considered by learned Principal District Judge, to whom, later on, the appeal was transferred. Therefore, the reasons of learned Principal District Judge in this regard are hyper technical.

24] There is no evidence from the side of the respondents that they had, at any time, made any attempt to secure alternative accommodation once it has become known to them that the petitioner wants their eviction on the ground of *bonafide* occupation. Further, it was admitted during the evidence that respondent no.1 - Rajkumar is now a medical practitioner and he has built his own residential cum hospital cum medical store building. Further, it was also admitted that just after six months of filing of the present suit, a commercial complex, just opposite to the suit premises, was developed, however, no efforts to secure accommodation therein, was made by the respondents.

25] Mr.Shah relied on the ratio laid down in the cases of (1)*Mohd.Ayuband another Vs. Mukesh Chand*, (2012) 2 SCC 155; (2) *Rameshwar Nanakram Prajapal Vs. Sundrabai Keru Ghadage*, 2013(2) Mh.L.J. 178; (3) *Anand S. Lad Vs. Ms. Amira Abdul Razak & ors.*, 2014(3) Mh.L.J. 218; (4) *Prativa Devi Vs. T.V. Krishnan*, (1996)5 SCC 353; and (5) *Satyawati Sharma Vs. Union of India & anr.*, (2008) 5 SCC 287, and submitted that the need of the landlord to occupy the premises need not be a dire need. The landlord would be the best judge to find out as to what would be his need. Further, unless and until the court does not find that the need is merely set up and as such, *mala fide*, there is no reason to refuse the decree on this count.

26] Learned counsel for the respondents submitted that the scope of interference in revision is limited. There would be no reappraisal of the evidence on record, unless the findings are found to be perverse. Sometimes, even gross error in finding of facts cannot be gone into in revisional

jurisdiction. The authorities in this regard are quoted in the written notes of arguments submitted by learned counsel for the respondents.

27] There is no dispute regarding the principles. It is, however, found that the observations of learned Principal District Judge that the additional pleadings cannot be accepted, are against the order earlier passed in the same proceedings. Further, the observation of the District Judge regarding non-examination of the son and grand-son of the petitioner is found against the ratio of the judgment of the Division Bench of this Court, quoted supra. The trial court has concurred with the plea of the petitioner on the basis of the material before him. During pendency of the trial, while one shop was vacated, the need of the petitioner has also increased, as detailed supra. An attic was wrongly described by all the sides, including the petitioner, as a mezzanine floor, and that led the learned Principal District Judge to remark that the mezzanine floor can also be occupied by the petitioner.

28] Having considered all these facts, in my view, the reasons of learned Principal District Judge in this regard, are perverse while, findings of the trial court even after the changed circumstances, are correct.

29] In the circumstances, decree of eviction on the ground of *bonafide* and reasonable occupation of the suit premises to the petitioner, will have to be granted.

30] In the result, the following order :-

a] The decree of eviction on the ground of default in payment of rent, is hereby refused. However, decree for eviction on the ground of *bonafide* and reasonable occupation of the suit premises, is hereby granted.

b] The judgment and decree dated 3rd May, 2012 in Rent Appeal No.1 of 2009 passed by learned Principal District Judge, Latur is, therefore,

set aside and the decree passed by the trial court is hereby restored.

c] The Civil Revision Application is hereby allowed with costs throughout.

[M.T. JOSHI, J.]

31] After pronouncement of the judgment, learned counsel for the respondent requests that the effect and operation of this order may be stayed for certain period.

. Mr.Gunale, learned counsel for the petitioner opposes the same.

32] Considering all the facts on record, effect and operation of the present judgment and order is hereby stayed till 10th July, 2015.

[M.T. JOSHI, J.]