

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 194 OF 2007

Pandharinath J. Kasar
(since deceased through his Heirs and
Lrs. Smt. Kusum P. Kasar and ors) .. Applicants
vs.
Dwarkadas B. Agrawal .. Respondent

Mr. P.R. Arjunwadkar & Ms Prabhu B. i/b Mr. Chetan Damre for the Applicants.
Mr. M. S. Bhandari for Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 30 June 2015.
Date of Pronouncing the Judgment : 13 July 2015.

JUDGMENT :-

1] This Civil Revision Application challenges the judgment and order dated 19 January 2007 made by the Ad-hoc District Judge-3, Malegaon (Appeal Court) directing the eviction of the Applicants from the suit premises, on the ground that the premises were required by the Respondent-landlord reasonably and bonafide.

2] There is no dispute that the Respondent-landlord had let out the premises to the predecessor-in-title of the Applicants bearing CTS No. 7/2 ad-measuring 37 x 11 ft at Raviwar Ward, Malegaon, Nashik (suit premises) for monthly rent of Rs.50/- in order to carry out business. The Respondent-landlord instituted Regular Civil Suit No. 26 of 1991 seeking eviction *inter alia* on the grounds of default

in payment of rents, dilapidation of the suit premises and reasonable and bonafide requirement of the Respondent's son to commence a grocery business from out of the suit premises. The Applicants instituted Civil Miscellaneous Application No. 79 of 1991 seeking determination of standard rent. The two proceedings were disposed of by common judgment and order dated 21 April 2001 by the 2nd Joint Civil Judge, Junior Division, Malegaon (Trial Court) determining the standard rent at Rs.50/- per month, but declining the Respondent's claim for eviction.

3] The Civil Appeal No. 108 of 2011 instituted by the Respondent landlord was partly allowed by the Appeal Court and the decree of eviction was granted on the ground of reasonable and bonafide requirement of the Respondent's son. However, decree of eviction was denied on the ground of default in payment of rent as well as certain other grounds. The Applicants, therefore, have impugned this judgment and order dated 19 January 2007 made by the Appeal Court. The Respondent-landlord, in his affidavit-in-reply has also objected to certain findings in the judgment and order dated 19 January 2007, to the extent they decline eviction of the Applicants on ground of default in payment of rents.

4] In the aforesaid circumstances, the two issues which arise for consideration are as follows:

(a) Whether there is any error in the exercise of jurisdiction by the Appeal Court in reversing the Trial Court and ordering the eviction of the Applicants on the ground that the suit premises are required reasonably and bonafide by the Respondent-landlord ?

(B) Whether the Appeal Court has failed to exercise jurisdiction or committed any error in the exercise of jurisdiction in declining the Respondent-landlord a decree of eviction on the ground of default in payment of rents by the Applicants ?

5] In so far as the second issue is concerned, the two Courts have concurrently held that there was no default on the part of the Applicants in the payments of rent. There is no perversity in the concurrent record of such finding of fact. The material on record does indicate the Respondent-landlord and his brother were both collecting rent in respect of the suit premises. However, both were not issuing any receipts. From the account books and the records regularly maintained by the Applicants in the course of their business, it stands reasonably established that the Applicants have

regularly paid the rents in respect of the suit premises. Thereafter, the Applicants in the pending proceedings applied for determination of standard rent. In terms of the orders made in such proceedings, the rents came to be deposited by the Applicants from time to time. There is record to indicate after demand notice was received by the Applicants, the Applicants, as a matter of abundant caution did attempt to pay the rents demanded to the Respondent-landlord. However, the Respondent-landlord refused to accept the rent. The Appeal Court has also recorded the finding that the Respondent-landlord failed to prove that the Applicants were in arrears of rent and the Applicants have produced sufficient documentary evidence on record to establish that even during the pendency of Miscellaneous Application No.79 of 1991 for determination of standard rent, the Applicants have deposited the rents demanded. Further, the Respondent-landlord came up with the case of arrears for a period in excess of six months, i.e., from 1 January 1989 to December 1990. In so far as, this period is concerned, a demand notice dated 22 August 1990 was addressed by the Respondent-landlord to the Applicants. The evidence on record, however, indicates that the rents for the said period were paid and in any case offered to be once again paid in pursuance of notice dated 22 August 1990. However, it is the Respondent-landlord, who refused to accept

the same. Thereafter, there is record that such rents by way of abundant caution were deposited in the pending proceedings. All this is sufficient to deny the Respondent-landlord, any decree on the ground that the Applicants defaulted in the payment of rent or that they were not ready and willing to pay the standard rent. In the exercise of revisional jurisdiction, therefore, it is not possible to accede to the request of learned counsel for the Respondent-landlord to reappraise the material on record, in the form of rent receipts, books of account, charts and statements to ascertain whether from the year 1990 till the year 2006 (the charts pertain to the said period), there was any default on the part of the Applicants. Suffice to state that the Trial Court and the Appeal Court have concurrently recorded the findings of fact on this issue and such findings cannot be said to be without jurisdiction or vitiated by any perversity.

6] The real issue is whether the Appeal Court was justified in reversing the Trial Court and ordering eviction of the Applicants on the ground that the suit premises were required reasonably and bonafide by the Respondent-landlord for his son's grocery business. The Trial Court, has taken due note of the circumstance that the Respondent-landlord's son had an agency in the matter of PPF, NSC & LIC, for which purpose, the son would visit his clients. The Trial

Court accepted the position that it is for a landlord or the landlord's family member to decide the nature of business and the manner of its performance and that neither the tenant nor the Court can have much say in this regard. However, the Trial Court declined a decree on the grounds of reasonable and bonafide requirement mainly on the ground that at least two premises which had been let out by the Respondent-landlord to some other parties had been recovered by the Respondent-landlord and there was no explanation whatsoever as to why such premises could not be used by the Respondent's son to set up the grocery business. The Trial Court, also made reference to a suit instituted by the Respondent-landlord against Ganesh Restaurant and the decree obtained therein. The Trial Court also noted that one of the premises, of which possession was obtained during pendency of proceedings against the Applicants, was let out by the Respondent-landlord to Hiranman Sales Agency. On basis of all this material, the Trial Court recorded a finding that the requirement of Respondent-landlord was not bonafide and therefore, no decree could be granted on the said basis.

7] The Appeal Court, in reversing the Trial Court, has noted that the suit premises being in market area, were ideally suited for grocery business and therefore, notwithstanding the Respondent-

landlord having obtained possession of other premises, decree of eviction would not be denied in respect of the suit premises. Further, the Appeal Court has held that the premises which were earlier let out Taaj Saree Center, were now let out to Hiranman Sales Agency, therefore, the same are no longer available to set up any grocery shop. The premises recovered from Gangaram Sonar, which earlier housed Ganesh Restaurant are dilapidated, now open to the sky and therefore, cannot be immediately used to commence a grocery store. Primarily, on these grounds, the Appeal Court has reversed the Trial Court and granted a decree of eviction on the ground of reasonable and bonafide requirement.

8] The Appeal Court is undoubtedly, entitled to reappraise the material on record and return a finding of fact. In doing so, however, the Appeal Court cannot base its finding upon some non-existent material or upon surmises and conjectures. The finding of fact has to be consistent with the weight of evidence on record. Neither can relevant evidence be excluded from consideration nor can irrelevant or even non-existent material be taken into consideration. Besides, the Appeal Court is expected to apply the correct test and correct principle in the matters of determining reasonable and bonafide requirement. Even where reasonable and bonafide requirement is

established, consistent with mandate of Section 13(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (said Act), the Appeal Court is required to address itself to the issue of comparative hardship in its proper perspective.

9] In the present case, the Respondent in Regular Civil Suit No. 26 of 1991 had merely pleaded that his son has attained the majority and it is therefore, necessary that some arrangement is made to enable him to carry on business. In the pleadings, there was neither any reference to any intention to carry on grocery business, nor was it disclosed that the Respondent's son was already an agent in respect of finance or insurance companies. There was no reference to other premises owned or possessed by the Respondent-landlord. There is unimpeachable evidence that the premises which were earlier let out to Taaj Saree Center were recovered. The Trial Court took into consideration this fact, as one of the circumstances to deny decree of eviction on the ground of reasonable and bonafide requirement. The Appeal Court has, however, held that these premises were thereafter let out to Hiranman Sales Agency and since, the area of these premises were not indicated on record, the choice of the Respondent-landlord or his son to use the suit premises for his proposed business, cannot be questioned. Further the Appeal Court

has purported to distinguish the decision of this Court in case of *Tarachand Hassaram Shamdasani vs. Durgashankar G. Shroff & ors.*¹, on the ground that when the Regular Civil Suit No. 26 of 1991 was instituted the possession of the premises let out to Taaj Saree Center and was not with the Respondent-landlord and therefore, there was no obligation of any disclosure.

10] In my judgment, the aforesaid is hardly a satisfactory manner to discard a very significant circumstance that the Respondent-landlord did obtain possession of yet another premises and rather than use the same for the business of his son, the same were let out to Hiranman Sales Agency, which is said to be a Grey Cloth Commission Agent. Assuming that there was no obligation as to disclosure in the plaint, at least in the course of evidence, the Respondent or his son could have demonstrated why the premises earlier let out to Taaj Saree Center were not suitable for the son's business. Except for a vague and bare statement, nothing is stated in this regard. On the contrary, Dilip Kasar, the Applicant No.1B in the course of his cross-examination, has stated the description of the said premises. This witness has further deposed that even in front of the Respondent's house there is a platform ad-measuring 15 ft x 20 ft and most of the houses in the area belonging to Supekar, Agarwal,

1 2004 (Supp) Bom. C.R. 333

Nawale, Jagirdar, Heda etc., use similar platform outside their houses for the purposes of their respective business. All this evidence, has been completely ignored by the Appeal Court.

11] The Appeal Court in paragraph 11 of the impugned judgment and order has held that the area of the shop, which earlier housed Taaj Saree Center is not on record and therefore, it is not possible to ascertain whether the said premises were suitable for undertaking a grocery business. Perusal of the deposition of Dilip Kasar would indicate that the area of the said premises is on record. It has also come on record that the possession of the said premises was obtained by the Respondent landlord and thereafter, the same were let out to Hiranman Sales Agency. The Appeal Court has obviously ignored relevant evidence. The Appeal Court has also adversely commented upon the vagueness of pleadings of the Applicants, in as much as the Applicants in their written statement merely pleaded that the Respondent own several other premises. This criticism is not proper, particularly in the light of the evidence which has come on record. It is a primary duty of the Respondent landlord, who seeks the eviction of the tenant on grounds of reasonable and bonafide requirement to disclose in the pleadings the number of premises, if any, which such landlord is in possession of. The landlord, may

thereafter explain as to why the suit premises serve his requirement the best. In the present case, the Respondent landlord made no reference whatsoever to other premises owned and possessed by him. Even assuming that some of the premises were not in possession of the Respondent landlord when the suit was instituted, nothing prevented the Respondent landlord from making disclosures in the course of examination-in-chief. It has now come on record that there were sufficient premises outside the house of the Respondent landlord, which could be used for business purposes. It has also come on record that the Respondent landlord obtained possession of the premises which earlier housed Taaj Saree Centre, but such premises were let out by the Respondent landlord to Hiranman Sales Agency. It has also come on record that the Respondent landlord has obtained and continues to possess the premises, virtually touching the suit premises, which earlier housed the Ganesh Restaurant. The Appeal Court has ignored all such relevant evidence and instead, applied the incorrect tests in determining whether the requirement of the Respondent landlord was reasonable and bonafide. The manner in which, the Appeal Court has distinguished the decision of this Court in the case of *Tarachand Hassaram (supra)* is also not proper.

12] In the said decision, this Court has held that it is obligatory for the landlord to disclose in the pleadings and in his evidence the fact that he owns other premises which were capable of being used for the requirement pressed into service and further to explain that inspite of acquisition and ownership of those premises, the requirement which is pressed into service against the tenant would still survive. It is only then that the landlord would be entitled to invoke this ground and succeed in establishing his need to be bonafide and reasonable. In ***Tarachand Hassaram (supra)***, this Court has observed thus :

“.....These facts were indeed relevant for deciding the issue of bonafide and reasonableness of the requirement of the Plaintiff, but were not disclosed either in the pleadings or atleast in the examination-in-chief when the Plaintiff entered the witness box. However, were elicited only during the cross examination conducted by the Defendant-tenant. This was possible only because all these details were within the knowledge of the Defendant-tenant. In spite of such overwhelming evidence on record, the Courts below have proceeded to answer the issue of bonafide and reasonable requirement in favour of the Respondent landlord. That cannot be countenanced, to say the least.

8. To my mind, however, it is obligatory for the landlord to disclose in the pleadings and in his evidence the fact that he owns other premises which were capable of being utilized for the requirement pressed into service in the suit filed against the tenant and to further disclose and explain that inspite of those acquisitions and ownership of other premises, the requirement which is pressed into service against the tenant would still survive. It is only then the landlord would be entitled to invoke this ground and would succeed in establishing his need to be bonafide and reasonable.

9. I have no hesitation in taking the view that in the fact situation of the present case the Plaintiffs has failed to plead and also depose in his evidence (examination-in-chief) about the ownership of

other premises capable of being used for the requirement pressed into service in the subject suit. Besides, he has failed to disclose and explain that even the other premises were not sufficient to satisfy the requirement / pressed into service in the suit against the tenant. Only when the landlord pleads and proves all these material facts that the Court would be able to adjudicate fully, completely and effectually as to whether the requirement pressed into service by the landlord in the suit so filed is bonafide and reasonable. As mentioned earlier, it is well settled that the landlord is not only required to establish his need to be bonafide but also to be reasonable. If the landlord fails to plead or establish either of this ingredient then the ground under [Section 13\(1\)\(g\)](#) of the Act for eviction is unavailable to the landlord. Inherent in this test is that if the landlord has failed to disclose relevant materials in the pleading and in his evidence (examination-in-chief), de jure, the landlord has not approached the court with clean hands. In such a case, it will be the duty of the court to non-suit the landlord with regard to this ground. It will be useful to place reliance on the enunciation of the Apex court in the case of S.P. Chengalvaraya Naidu's case (supra). The Apex Court has observed that duty is cast upon the Plaintiff to disclose all the facts, it is the duty of the Plaintiff to come to Court with true case and prove it by true evidence. The Apex Court has further observed that deliberate deception with the desire of securing something by taking unfair advantage of another; it is a deception in order to gain by another's loss, it is a cheating intended to get an advantage. Further, in Paragraph 6 it has observed that, non disclosure of all the material and relevant facts at the trial tantamount to playing fraud on the Court. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. Withholding of any vital document in this case information, in order to gain advantage on the other side then he would be guilty of fraud on the Court as well as on the opposite party. Such a person can be summarily thrown out at any stage of the litigation. If this principle is to be applied to the facts of the present case, I have no manner of doubt that the Respondent-Landlord will have to be non suited on this ground. Because, it is a case of non disclosure of material facts and information, therefore, one of approaching the Court with unclean hands. And as observed by the Apex Court tantamount to playing fraud on the court as well as the opposite side. In this case sheerly because the Petitioner tenant was vigilant enough, could muster the necessary information to confront the Respondent landlord regarding his need being not bonafide and reasonable. What is relevant to note is that during the cross examination the Plaintiff not only conceded that he owns and possessed other premises, but also conceded the fact that he had filed atleast three suits against some other tenants and, in all the three suits he has succeeded in getting the decree for possession. As a matter of fact, in the cross examination the plaintiff.

has admitted that he has obtained possession in respect of ground floor premises in the building in which he is presently staying situated at 6-A Dr. Ambedkar road, from his erstwhile tenant. That premises is undoubtedly consisting of three rooms. This is crucial fact and ought to have been disclosed during the evidence since that event had happened prior to the Plaintiff entering the witness box. This fact by itself clearly indicates the need pressed into service by the landlord for himself and his family members was neither bonafide nor reasonable”.

(emphasis supplied)

13] The Apex Court in the case of **Gulabbai vs. Nalin Narsi Vohra**² has held that in appropriate cases events subsequent to the filing of the eviction suit can be taken notice of and duly considered by the Court where the same are relevant in determining the question of bonafide requirement. The Apex Court at paragraphs 25 and 27 has observed thus :

“25. On a conspectus of all these decisions rendered by this Court, it is now beyond the pale of any doubt that in appropriate cases events subsequent to the filing of the suit can be taken notice of and can be duly considered provided the same is relevant in determining the question of bona fide requirement. Therefore, the High Court was right in duly considering the new facts and circumstances that have been brought to the notice of the Court by the application for additional evidence filed under Order 41 Rule 27 of the Code of Civil Procedure and in coming to a firm finding that the plaintiff-appellant constructed a spacious bungalow where she with the members of her family had been residing, there is no reasonable and bona fide requirement for the plaintiff to get a decree of ejectment of the defendants from the suit premises in as much as the first floor of the suit premises as well as the second floor could be conveniently used for opening the office of Tax Consultancy of plaintiff's husband who previously worked with one Mr. Gandhi in a partnership firm which partnership had been dissolved after Mr. Gandhi's son came to practice with his father.”

26.

“27. In the instant appeal it has been rightly held by the High Court after considering the subsequent facts and materials brought out by

2 AIR 1991 SC 1760

the application for additional evidence that the plaintiff failed to prove reasonable and bona fide need for her occupation of the suit premises for the purpose of opening the Tax Consultancy Office of her husband, Amritlal Mutha. Considering the facts and circumstances as well as the subsequent materials brought out by the application for additional evidence, we have no hesitation in our mind to hold that the aforesaid findings arrived at by the High Court is totally unexceptionable and so the same cannot be interfered with in this appeal. It will not be out of place to mention in this connection that Amritlal Mutha, husband of the appellant has stated in the additional affidavit filed in this Court that Dr. Abhey A. Mutha, son of the appellant had purchased a flat on ownership basis in Co-partnership Society, named Amrita Kunj Cooperative Housing Society Ltd. situated at 324/5 Shivaji Nagar, Pune-410005. This, if taken notice of, will affirm the finding of the High Court that the appellant failed to prove her bona fide and reasonable need for the suit premises for opening the Tax Consultancy Office for her husband”.

14] On the aspect of comparative hardship, again, the Appeal Court does not appear to have adopted the proper tests. In the first place, the Appeal Court has not at all adverted to the financial status of the landlord and the tenants. The Appeal Court has virtually ignored the circumstance that the Applicants had deposed that besides the business activity in the suit premises, they have no other source of livelihood. The Appeal Court has ignored the deposition describing the residential quarters of the Applicants and the number of family members who reside therein. The Appeal Court has also ignored the evidence which establishes that the Respondent landlord owned and possessed other commercial premises, where, it was possible for the Respondent's son to commence a grocery business, if indeed, the requirement in this regard was a reasonable and bonafide. The Appeal Court failed to take note of the

Respondent's case that the suit premises were themselves in a dilapidated condition and that even notices had been issued by the municipal authorities for pulling down the same. Instead, the Appeal Court has proceeded to hold that the immediate adjoining premises, which housed the Ganesh Restaurant and the possession of which was already acquired by the Respondent landlord, was in dilapidated condition and therefore, could not be used for the grocery business of the Respondent's son. From the case set out by the Respondent landlord himself, if the suit premises were dilapidated, surely, some expenditure would be necessary to effect repairs before the Respondent's son would commence the grocery business therefrom. There is no explanation whatsoever as to what prevented the Respondent landlord from undertaking similar expenditure to commence grocery business from the immediate adjoining premises, which earlier housed the Ganesh Restaurant, and possession of which, was admittedly acquired by the Respondent landlord during the pendency of the proceedings. All such relevant material has been excluded from consideration by the Appeal Court in assessing the issue of comparative hardship.

15] In the aforesaid circumstances, the findings on the aspect of reasonable and bonafide requirement of comparative hardship, as

recorded by the Appeal Court are unsustainable. The same are vitiated by perversity. In recording such findings relevant and vital evidence has been completely overlooked by the Appeal Court. Incorrect tests have been applied by the Appeal Court for determining whether the requirement of the Respondent landlord was reasonable and bonafide. The Appeal Court has failed to appreciate that the eviction can be granted provided, the requirement is both reasonable and bonafide. The two requirements have to simultaneously co-exist. The Appeal Court failed to appreciate that the Respondent landlord not only had other business premises, but further such fact was suppressed in the pleadings and in the course of evidence. The Appeal Court has purported to distinguish the decision of this Court in the case of ***Tarachand Hassaram (supra)***, although, there were no circumstances permitting any such distinction. The Appeal Court has disregarded the subsequent events, even though the same were extremely relevant to determining bonafides and reasonability. The principles laid down by this Court in ***Tarachand Hassaram (supra)*** and by the Apex Court in ***Gulabbai (supra)*** have been ignored by the Appeal Court. The Appeal Court has, therefore, acted in excess of jurisdiction. In any case, the Appeal Court, in exercise of its jurisdiction has acted with illegality and material irregularity.

16] For all these reasons, the impugned judgment and order made by the Appeal Court is hereby set aside. Rule is accordingly, made absolute in terms of prayer clause (b). There shall, however, be no order as to costs.

(M. S. SONAK, J.)