

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3814 OF 1997

Viratna Vidyabanich

(since deceased by his heirs and Legal
Representatives

1A. Pornpen Sangthong and ors.) .. Petitioners

vs.

Mohan J. Jhangiani

(since deceased by his heirs and Legal
Representatives

1A. Krishna M. Jhangiani and ors.) .. Respondents

Mr. Rajesh Patil for the Petitioners.

Mr. Vineet B. Naik, Sr. Advocate a/w. Sagar A. Rane i/b Mr. Kalpesh
Joshi for the Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 04 September 2015.

Date of Pronouncing the Judgment : 08 September 2015.

JUDGMENT :-

1] This petition questions the judgments and decrees dated 25 January 1990 and 27 June 1997, made by the Trial Court and the Appeal Court ordering the eviction of the petitioners (tenants) from the suit premises *inter alia*, on the ground of default in payment of rents, change of user and reasonable and bonafide requirement.

2] Some time in the year 1969, predecessor-in-title of the respondents (landlord) inducted Thangyoo Vidyabanich, predecessor-in-title of the petitioners (tenant), as the tenant in respect of Flat No. C-5, Block No.2, Basant Park Cooperative Housing

Society, Chembur, Bombay-400 071 (suit premises). The landlord-Mohan Jhangiani by notice dated 28 April 1977, alleged default in payment of rents, demanded arrears and terminated tenancy. The landlord, thereafter instituted R.A.E. & R. suit No. 938/5489 of 1977 in the Court of Small Causes at Bombay (Trial Court) seeking recovery of possession, *inter alia*, on the ground of default in payment of rents, change of user and reasonable and bonafide requirement. All these are grounds available to a landlord to seek eviction of a tenant under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ('Rent Act'). Thangyoo Vidyabanich filed written statement in July 1978, denying the allegations in the plaint. Thangyoo Vidyabanich expired on 12 May 1980, during pendency of the suit. Upon his demise, his two sons Viratna Vidyabanich and Sumitra Vidyabanich and daughter Conchit Vidyabanich were brought on record, as his legal representatives. The record indicates that since there was some difficulty in service of notice upon son Sumitra, his name was deleted from the array of defendants.

3] Based upon the pleadings of parties, the Trial Court framed the following issues :

Issues:

1. Does plff. prove that the deft. remained in wilful arrears of compensation of the suit premises for more than six month next before the suit/
2. Does plff. further prove that the deft. changed the User of the suit premises from residence to business ?
3. Does he further prove that he requires the suit premises for his personal, bonafide and reasonable use and occupation ?
4. What is due to the plff. from the defendant towards the arrears of compensation ?
5. Is the suit as framed and filed maintainable ?
6. Does Deft. prove that he paid the compensation till March, 1967 and the agreed amount of monthly rent of the suit premises was fixed at 150/- ?
7. Does deft. further prove that the suit premises were initially given to him by the plff. for the purpose of running a guest house for the students coming from abroad ?
8. In plff. entitled to vacant and peaceful possession of the suit premises from the deft. ?
- 8a. Whether this Court has jurisdiction to entertain and try the present suit ?
- 8b. Whether the deft. No.1 proves that the suit of the plaintiff is hit by sec.86 of the C.P.C. as contended in para 5 of the W.S. ?
- 8c. Whether the deft. Nos. proves that the suit is bad for non-joinder of necessary parties as contended in para 5 of the Additional W.S. ?
- 8d. Whether the deft. No.1 further proves that the suit notice is not valid one ?
- 8e. What should be the standard rent of the suit premises ?
9. What order ?

4] The evidence was led by both parties. Mohan Jhangiani as plaintiff and Viratna Vidyabanich, son of Thangyoo Vidyabanich as defendant examined themselves. The Trial Court by judgment and decree dated 25 January 1990 decreed the landlord's suit. Appeal

No. 208 of 1990 instituted by Viratna Vidyabanich was dismissed by the Division Bench of the Small Causes Court (Appeal Court) on 27 June 1997. Hence, present petition by Viratna Vidyabanich.

5] During pendency of this petition, the respondent - Mohan Jhangiani (original plaintiff) expired and his legal representatives have been brought on record. Similarly, the petitioner-Viratna Vidyabanich also expired and his legal representatives have been brought on record. The petitioner, by order dated 21 February 2012 was granted leave to amend the written statement and introduce therein paragraphs 6-A to place on record certain subsequent events, which might have bearing on the issue of reasonable and bonafide requirement. Mohan Jhanginai prior to his demise has filed an affidavit dated 16 July 2013, in the context of subsequent developments and the same is also a part of record in the present petition.

6] Mr. Rajesh Patil, learned counsel for the petitioners, made the following submissions in support of the petition:

a] That in the present case, Thangyoo Vidyabanich (original tenant) as well as his son Viratna Vidyabanich

were the staff members or part of retinue of the Ambassador of Thailand and therefore, in terms of Section 86(1) of the Civil Procedure Code, 1908 (CPC) the suit as instituted was not competent, since admittedly, no consent of Central Government certified in writing by a Secretary to that Government had either been obtained or produced. In this regard reliance was placed upon the decisions of Hon'ble Apex Court in case of *Veb Deutfracht Seereederei Rostock (D.S.R. Lines A. Department of the German Democratic Republic Vs. New Central Jute Mills Company Limited, Calcutta*¹, *Mirza Ali Akbar Kashani vs. United Arab Republic*² and of the Division Bench of this Court in case of *K.S. Dhondy vs. Her Majesty Queen the of Netherlands & anr.*³;

b] Upon demise of Thangyoo Vidyabanichon 12 May 1980, the tenancy rights in respect of suit premises, devolved upon several legal representatives, including the two sons Viratna, Sumitra and daughter Conchit. Only three legal heirs were brought on record. There is dispute, whether or not, daughter Conchit was at all served in the

1 1994 (1) SCC 282

2 1966 AIR (SC) 230

3 2013(6) Bom.C.R. 758

proceedings. In any case, son Sumitra was never served and finally his name was deleted from array of defendants in the cause title. In such circumstances, Mr. Patil submitted that there was clear non-joinder of necessary parties. A decree of eviction against, only some of the legal heirs, and not others, was incompetent. In this regard, reliance was placed on the decisions of the Hon'ble Apex Court in case of *Textile Association India Bombay Unit Vs. Balmohan Gopal Kurup*⁴ and of the learned Single Judge of this Court in case of *B.S. Mahajan since deceased by his heirs and legal representatives vs. Chapsey R. Mistry*⁵;

c] That the decree on the ground of reasonable and bonafide requirement was vitiated by perversity. In any case, reasonable and bonafide requirement stood eclipsed on account of subsequent developments, i.e., sale of Flat No. A-6 on the ground floor of Building No.2, Basant Park to Somanis, during the pendency of the present petition;

d] That the tenant having applied for determination of standard rent within period of one month from the date of

4 1990 (4) SCC 700

5 1988 (3) Bom.C.R. 535

receipt of statutory notice under Section 12(2) of the Rent Act, by legal fiction contained in Explanation-I, the tenant ought to have been deemed to be ready and willing to pay the standard rent. Consequently, there was no scope for directing eviction on the ground of default in payment of rent;

e] That in any case, the rents having been deposited before the Trial Court, the tenant was entitled to benefit of Section 12(3) of the Rent Act and consequently, no decree of eviction on the grounds of default in payment of rent could ever have been made against the tenant; and

f] That the suit premises had been let out for user as guest house for students from Thailand. Consequently, there was no change of user and the findings to the contrary are vitiated by perversity.

7] Mr. Vineet B. Naik, learned senior advocate for the respondents, submitted that the plea based upon Section 86(1) of the CPC was never raised in the written statement filed by Thangyoo Vidyabanich in July 1978. Such plea was very vaguely raised by Viratna Vidyabanich in the written statement filed in

January 1986. Both Thangyoo Vidyabanich as well as Viratna Vidyabanich submitted to the jurisdiction of the Trial Court. Accordingly, there was no scope to entertain the plea based upon Section 86(1) of the CPC. In any case, Mr. Naik submitted that neither Thangyoo Vidyabanich nor Viratna Vidyabanich were entitled to any diplomatic immunity in absence of any general or special order of the Central Government, in terms of Section 86(4) (c) of the CPC. Further, Mr. Naik submitted that in the present case, the suit premises were never taken on lease by Thangyoo Vidyabanich or Viratna Vidyabanich and for the purposes of mission as contemplated by Article 31(1)A of the Vienna Convention and Diplomatic Relations, 1961. Therefore, there was no question of any claim to diplomatic immunity *qua* the civil jurisdiction. For all these reasons, Mr. Naik submitted that the plea based on Section 86 of the CPC deserves rejection. Reliance was placed upon the decision of the Division Bench of this Court in case of *Kenya Airways vs. Jinibai B. Heshwala*⁶, particularly in the context of waiver.

8] Mr. Naik further submitted that the estate of Thangyoo Vidyabanich, in the present case was sufficiently represented and the deletion of Sumitra made no difference. Mr. Naik submitted that in

6 1998 (3) Bom.C.R. 562 (O.S)

any case, the petitioner-Viratna Vidyabanich having deposed that he was the one residing with Thangyoo Vidyabanich in the suit premises at the time of Thangyoo Vidyabanich's demise in 1980 and further that Sumitra was always reside in Thailand and Conchit in USA, this was clearly not a case of non-joinder and necessary party. Mr. Naik submitted that such issue was not even raised or pressed before the Appeal Court.

9] Mr. Naik finally submitted that there are concurrent findings of fact recorded by the two Courts and there is no perversity demonstrated. As such, the findings of fact ought not to be disturbed in exercise of jurisdiction under Article 227 of the Constitution of India. Mr. Naik countered the submission of eclipse of reasonable and bonafide requirement by submitting that Flat No. A-6, belongs to the plaintiff's brother's wife and the same in any case, was agreed to be sold to the tenant occupying the same. Mr. Naik further submitted that all the three legal representatives of the petitioner-Viratna Vidyabanich, residing in Bangkok, Thailand and the suit premises are locked since last several years, which fact is evident from the certificate issued by the Society as also record of electricity supply. For all these reasons, Mr. Naik urged that jurisdiction under

Article 227 of the Constitution of India be not exercised in favour of the petitioners.

10] The rival contentions now fall for my determination.

11] Section 86 of the CPC, reads thus:

86. Suits against foreign Rulers, Ambassadors and Envoys. - (1) No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a foreign State from whom he holds or claims to hold the property.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the foreign State may be sued, but it shall not be given, unless it appears to the Central Government that the foreign State:-

(a) has instituted a suit in the Court against the person desiring to sue it, or

(b) by itself or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to it by this section.

(3) Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.

(4) *The preceding provisions of this section shall apply in relation to—*

- (a) *Any Ruler of a foreign State;*
- (aa) *Any Ambassador or Envoy of a foreign State;*
- (b) *Any High Commissioner of a Commonwealth country; and*
- (c) *Any such member of the staff of the foreign State or the staff or retinue of the Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf, as they apply in relation to a foreign State;*

(5) *The following persons shall not be arrested under this Code, namely:—*

- (a) *Any Ruler of a foreign State;*
- (b) *Any Ambassador or Envoy of a foreign State;*
- (c) *Any High Commissioner of a Commonwealth country;*
- (d) *Any such member of the staff of the foreign State or the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country, as the Central Government may, by general or special order, specify in this behalf.*

(6) *Where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard.*
(Emphasis supplied)

12] Sub-section (1) of Section 86 of the CPC provides that no foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government. Sub-section (2) of

Section 86 of the CPC provides for the manner and the circumstances in which the consent may be given by the Central Government. Sub-section (3) of Section 86 of the CPC provides that except with the consent of Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State. Sub-section (4) of the Section 86 of the CPC, which is very relevant for determination of the issue raised in the present petition, provides that the provisions contained in sub-sections (1)(2) and (3) of Section 86 shall apply in relation to the following :

- (a) Any Ruler of a foreign State;*
- (aa) Any Ambassador or Envoy of a foreign State;*
- (b) Any High Commissioner of a Commonwealth country; and*
- (c) Any such member of the staff of the foreign State or the staff or retinue of the Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf, as they apply in relation to a foreign State;*

13] In the present case, Thangyoo Vidyabanich in his written statement filed in July 1978 had not raised any plea based upon Section 86 of the CPC. In paragraph 1 of the written statement, there was a bald statement that the suit as filed is not maintainable and be dismissed with costs. As noted earlier, Thangyoo

Vidyabanich died on 12 May 1980. Upon his legal heirs being brought on record, his son Viratna filed written statement in January 1986. In this written statement, Viratna Vidyabanich, at paragraph 4 submitted that the suit as filed is not maintainable without the consent of Central Government in writing by a Secretary to that Government, since Thangyoo Vidyabanich (original defendant) was the retinue of the Government of Thailand and Viratna Vidyabanich, his son is the member of the staff of the Consulate General of Thailand. In the course of deposition, Viratna Vidyabaich also produced a certificate issued by Thai Government that Thangyoo Vidyabanich was representing the Thai Government, as well as an identity card issued by the Chief Secretary, State of Maharashtra to the effect that Viratna Vidyabanich was a staff member of the Consulate of Thailand. Without going into the issue as to whether documents produced by Viratna Vidyabanich during the course of his deposition are sufficient to establish that Thangyoo Vidyabanich and Viratna Vidyabanich are members of the staff or retinue of the Ambassador of Thailand or not, it is clear that the petitioners seek diplomatic immunity on basis of the claim that his father Thangyoo Vidyabanich and himself are persons referred to in Section 86 (4)(c) of CPC.

14] Section 86(4)(c) of the CPC makes reference to member of the staff of the foreign State or the staff or retinue of the Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country '*as the Central Government may, by general or special order, specify in this behalf, as they apply in relation to a foreign State*'. Such italicised portion applies only to sub-clause (c) and not to the persons referred to in sub-clauses (a), (aa) and (b) of Section 86 (4) of the CPC. It is obvious, therefore, that the legislature intended to treat differently persons referred to in sub-clauses (a), (aa) and (b) on one hand and persons referred to in sub-clause (c) on the other. The reason also appears to be obvious. When it comes to any Ruler of foreign State, Ambassador, Envoy of a foreign State or High Commissioner of a Commonwealth country, in the context of their diplomatic status and position, the legislature did not deem it fit to insist upon some general or special order from the Central Government, for the purposes of grant of diplomatic immunity to such persons. However, if immunity is to be claimed in respect of member of the staff of the foreign State or staff or retinue of the Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country, then the legislature has

deemed it appropriate that there is some general or special order of the Central Government to the said effect.

15] In the present case, as noted earlier, Thangyoo Vidyabanich, in his written statement filed in July 1978 neither claimed to be a member of the staff of foreign State of retinue of the Ambassador of Thailand nor claimed any diplomatic immunity in the suit. His son Viratna Vidyabanich, in addition 1986 has claimed immunity on the basis that he is the member of the Staff of Royal Consulate of Thailand. If this be the position, it was incumbent upon both Thangyoo Vidyabanich and Viratna Vidyabanich to plead and establish that the Central Government, by any general or special order, has conferred diplomatic immunity in terms of Section 86 of the CPC , upon them personally or at least, upon the members of the staff of Royal Consulate of Thailand. In the absence of any such pleadings and proof, there is really no question of claiming immunity in terms of Section 86(1) of CPC.

16] The provisions in Section 86 of CPC are based on the principle that the dignity and independence of the Ruler of a foreign State, Ambassador, Envoy or High Commissioner would be endangered, if

any, person is allowed to sue him at his pleasure and such a suit may cause political inconvenience and complications. The immunity under Section 86 of the CPC can be claimed by any Ruler, Ambassador or Envoy of the foreign State, or High Commissioner of Commonwealth Country on the basis of sovereignty of the State, which they rule or represent. However, when it comes to extension of such immunity to members or staff of the foreign State or the staff or retinue of the Ambassador, Envoy or High Commissioner, there must exist general or special order of the Central Government in this behalf, before such immunity is claimed under Section 86(1) of the CPC. Therefore, in the absence of any such general or special order from Central Government, there is no question of Thangyoo Vidyabanich or his son Viratna claiming immunity or urging that the suit was not maintainable, in terms of Section 86(1) of the CPC.

17] The issue can be considered from yet another perspective. Thangyoo Vidyabanich in his written statement filed in July 1978 did not seek any immunity in terms of Section 86(1) of the CPC. Rather, Thangyoo Vidyabanich submitted to the jurisdiction of the Civil Court. In these circumstances, it is reasonable to proceed on the basis that Thangyoo Vidyabanich waived immunity, if any, in terms of Section 86(1) of CPC. The Division Bench of this Court in case of

Kenya Airways (supra) has held that it is not open to the defendants to raise plea of want of consent under Section 86(1) of CPC after almost sixteen years from filing of the suit and submitting to the jurisdiction of the Court. At paragraph 15, the Division Bench observed thus:

15. In our judgment, it is not open to the defendants to raise the plea for the first time after almost sixteen years of the filing of the suit after submitting themselves to the jurisdiction of the court. They have filed their appearances and appeared in the proceedings. They have given undertakings and made statements thereby avoided appointment of Court Receiver. They have filed their respective written statements wherein this plea has not been raised. Having submitted to the jurisdiction of the Court they would be deemed to have waived their right if any under section 86 of the Code. They cannot, therefore, be permitted to raise the plea in respect of maintainability of the suit under section 86 of the Code. Present suit, thereafter, cannot be held to be 'not maintainable' on the ground of want of consent under Section 86 of the Code.

18] If Thangyoo Vidyabanich had waived the immunity, then there is no question of his legal heirs insisting upon such immunity. In any case, both Thangyoo Vidyabanich as well as his son Viratna Vidyabanich, in absence of any general or special order of the Central Government, cannot be regarded as persons to whom the provisions of sub-section (1),(2) and (3) of Section 86 of CPC, can at all apply, having regard to the provisions contained in Section 86(4) (c) of CPC.

19] There are at least three decisions⁷, however, which have taken the position that provisions of Section 86 are statutory, imperative, based on public policy and therefore, they cannot be waived. The first is the decision of Privy Council and other two decisions of the learned Single Judge of this Court. The Division Bench of this Court, however, in case of *Kenya Airways (supra)*, has held that the defendants having submitted to the jurisdiction of the Civil Court can be said to have waived immunity under Section 86(4)(c) of the CPC. In these circumstances, it is made clear that waiver is only, an additional reason, in the facts and circumstances of the present case, to reject the plea of immunity in terms of Section 86(1) of the CPC. Primarily, the petitioners have failed to make out any case that either the original defendant Thangyoo Vidyabanich or his son Viratna Vidyabanich were persons entitled to immunity under Section 86(1) of the CPC.

20] In case of *Mirza Ali (supra)*, the defendant was a foreign State, i.e., United Arab Republic and the second defendant was merely the Department of the foreign State. In these circumstances, obviously the provisions of Section 86(1) of CPC were held to be attracted.

⁷ Gaekwar Baroda State Railway Vs. Hafiz Habib-ul-Haq- AIR 1938 Privy Council 165, Thakore Saheb Khanji Kashari Khanji Vs. Gulam R. Chandbhai – AIR 1955 Bombay 449 & Bai Shakri Vs. Bapusinghji Takhatsinhji – AIR 1958 Bombay 30

The decision is clearly distinguishable, as in case with which we are concerned immunity is not claimed by any foreign State or its department.

21] Similarly, in case of *K.S.Dhondy (supra)* , the defendant was Her Majesty Queen of Netherlands and it is in this circumstance that immunity under Section 86(1) of CPC was claimed and upheld. This decision is also distinguishable, as in the facts and circumstances of the present case, the defendant does not claim to be Ruler of any foreign State.

22] In case of *Veb Deutfracht Seereederei Rostock (D.S.R. Lines) (supra)*, clear finding was entered that the appellant was a Department of German Democratic Republic and therefore entitled to immunity under Section 86(1) of the CPC. Again, for that matter the defendants in that suit have not made any such claim and therefore, the decision in case of *Veb Deutfracht Seereederei Rostock (D.S.R. Lines) (supra)*, is distinguishable.

23] The Trial Court in the present case has adverted to yet another circumstance, namely that the suit premises had not been taken on

lease by Thangyoo Vidyabanich for the purposes of Thai Consulate or the Ambassador of Thailand, but the same were taken on lease by said Thangyoo Vidyabanich his own purposes. This Court, in case of *Ms. Eva Drdakova, Consul General of Czech Republic and anr. vs. M/s. Khemka Exports Private Ltd*⁸ by reference to the provisions contained in Article 31 of the Vienna Convention and Diplomatic Relations, 1961 noted that even a diplomatic agent shall enjoy immunity from the civil and administrative jurisdiction, except in case of a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission or an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. Even the Hon'ble Apex Court in case of *Veb Deutfracht Seereederei Rostock (D.S.R. Lines) (supra)*, upon which reliance was placed by Mr. Patil has held that the immunity and protection extended to foreign State, on the basis of International Law should not be stretched to a limit so that a foreign company trading between the local limits of the jurisdiction of the court concerned, may take a plea of Section 86 although *prima facie* it appears that such company or corporation is liable to be used for any act or omission

8 CRA 262 of 2010 decided on 30/11/2011

on their part for any breach of terms of contract entered on their behalf. It is neither the purpose nor the scope of Section 86 to protect such foreign trader who have committed breach of the terms of contract causing loss and injury to the plaintiff. Again, however, it is not necessary to pursue this point any further, as neither the original defendant Thangyoo Vidyabanich nor his son Viratna have established that they were persons entitled to immunity in terms of Section 86 (4)(c) of the CPC. For all the aforesaid reasons, Mr. Patil's first contention based upon Section 86(1) of the CPC is rejected.

24] In so far as Mr. Patil's second contention is concerned, reference is required to be made to the deposition of Viratna Vidyabanich. In the first place, Viratna has deposed that he was residing with his father Thangyoo Vidyabanich in the suit premises. Further, his elder brother Mr. Sumitra is residing in Thailand and his sister Conchit is residing in Washington DC. USA. In terms of Section 5(11)(c) (i) of the Rent Act, in relation to any premises let for residence, when the tenant dies, whether the death has occurred before or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1978, any member of the tenant's family residing with the tenant at the time of his

death or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court, is to be regarded as the tenant of the suit premises. In this case, Thangyoo Vidyabanich, the original tenant expired in the year 1980. Therefore, in terms of definition contained in Section 5(11)(c)(i) of the Rent Act, Viratna on the basis of his own deposition became the tenant in respect of suit premises. The impleadment of Sumitra and Conchit, who were admittedly not residing with the original tenant Thangyoo Vidyabanich at the time of his demise, was possibly out of abundance of caution or at the highest, as proper parties. The deletion of Sumitra who is admittedly, the resident of Thailand, therefore, was by no means fatal to the prosecution of the suit. There is, accordingly, no merit in the second contention of Mr. Patil that the suit was infirm for non-joinder of or the deletion of the some necessary party.

25] In case of *Textile Association India Bombay Unit (supra)*, there was a finding of fact that the respondent was as much a tenant as the mother and other brother and therefore, ex-parte decree of eviction obtained against the mother and brother, without impleading the respondents, was illegally infirm. Similarly, in case of

B.S. Mahajan (supra), there was a clear finding that all the legal heirs of the deceased tenant had duly inherited the tenancy rights and landlord, despite being made aware of this position, had failed to implead some of the legal heirs on record. The facts and circumstances in the two decisions, do not offer any parallel to the facts and circumstances of the present case. In this case, based upon the evidence of Viratna, it was Viratna, who became the tenant in respect of suit premises, upon the demise of his father Thangyoo Vidyabanich . In any case, there was sufficient representation, insofar as legal representatives of Thangyoo Vidyabanich are concerned. Accordingly, Mr. Patil's second contention with regard to non-joinder or deletion of necessary party cannot be accepted.

26] In so far as remaining contentions of Mr. Patil are concerned, it must be noted that there are concurrent findings of fact recorded by the two Courts that the grounds on basis of which eviction was applied for, have been proved on the basis of material on record. No perversity was demonstrated in the concurrent findings of fact so recorded. Under Article 227 of the Constitution of India, this Court does not exercise any appellate jurisdiction. Therefore, unless it is demonstrated that the concurrent findings of fact are perverse, there

arises no question of any interference merely on the basis of reappreciation of the material on record.

27] The contention that the reasonable and bonafide requirement stood eclipsed on account of Agreement to sale Flat No.A-6 on the ground floor of Building Basant Park by the landlord to Somanis, cannot be accepted. The material on record, including *inter alia* the clarification in the affidavit-in-reply filed by late Mohan Jhangiani makes it clear that said Flat No.A-6 belonged to his sister in law Mrs Devi Jhangiani. The Somanis were sitting tenants of the said flat, except the two small rooms with kitchen in the passage which were in occupation of late Mrs. Devi Jhangiani. Mrs. Devi Jhangiani and her husband were looked after by Somanis family and it was therefore, their wish that said Flat No. A-6 be sold to Somanis at reasonable price. It is in these circumstances, that Mohan Jhangiani in his capacity as nominee sold the said Flat to Somanis who, in any case were sitting the tenants of the substantial portion of the said flat for last 30 years. This material, is sufficient to hold that reasonable and bonafide requirement held as proved by the two Courts, was not eclipsed.

28] On the aspect of change of user, the two Courts have concurrently held against the petitioners. No perversity in the record of finding of such fact is demonstrated. Accordingly, there is no reason to interfere with the such findings.

29] Although, there is some material on record to indicate that Thangyoo Vidyabanich (tenant) had filed proceedings for determination of standard rent, there is no material on record, at least none was demonstrated to establish that such proceedings were instituted within a period of one month from the date of receipt of statutory notice under Section 12(2) of the Rent Act. Explanation-I to Section 12 of the Rent Act provides that in any case where there is dispute as to the amount of standard rent or permitted increase recoverable under the Act, the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court. In the absence of any material to establish that such application under Section 11(3) of the Rent Act was indeed made before the expiry of period of one

month from the date of receipt of statutory notice under Section 12 (2) of the Rent Act, there is no question of the petitioner's claiming the benefit of legal fiction contained in Explanation-I. Similarly, the petitioners in the present case, cannot claim the benefit of the provisions contained in Section 12(3) of the Rent Act because there is really no material to establish that the arrears of standard rent and permitted increases were indeed deposited in the Court on the first day of hearing of the suit together with interest at the prescribed rate and that such standard rent and permitted increases were regularly paid or tendered in the Court till the suit was finally decided. In any case, since the ground of reasonable and bonafide requirement as well as the ground of change of user stands proved, there is no question of interfering with the order of eviction, based upon strained interpretation of the provisions contained in Section 12 of the Rent Act.

30] As noted earlier, Viratna died on 18 April 2015. Thereafter, the wife Pornpen, his son Witsanu and daughter Pamela were permitted to be brought on record without prejudice to the rights of respondents to raise objections that such legal heirs of Viratna are not entitled to continue with the present proceedings.

31] In Civil Application No. 1612 of 2015, taken out by said heirs for bringing themselves on record, there is a statement that petitioner No.1A Pornpen and petitioner No.1B Witsanu reside in Thailand. Petitioner No.1B Witsanu has started his own business of Fisheries in Thailand. Petitioner No.1C Pamela works with Royal Thai Consulate at Dubai. These statements are relevant, even though, the petitioners, in their Civil Application have made a casual statement that they are desirous of residing at Mumbai. These statements are relevant because Mohan Jhangiani in his affidavit-in-reply has made categorical statement that the suit premises are lying vacant since the year 2000 and that neither Viratna (while he was living) nor his wife and children have bothered to visit or enter the suit premises. No repairs are being carried out and the closed suit premises are a source of nuisance to the occupants in the building. Even electricity meters have been taken away by Reliance Energy several years ago and the Society dues are being paid by the landlord. The affidavit also states that a Power of Attorney Holder is pursuing the petition. There is no affidavit-in-Rejoinder filed by and on behalf of the petitioners. The petitioners have not made out any case warranting interference with the concurrent findings recorded by the Courts. Further, these are additional reasons as to why

equitable and discretionary jurisdiction under Article 227 of the Constitution of India need not be exercised in favour of the petitioners.

32] In view of the aforesaid discussion, there is no merit in this petition. The same is dismissed. There shall be no order as to costs.

(M.S. SONAK, J.)

CERTIFICATE

“I certify that this Judgment uploaded is a true
and correct copy of original signed Judgment.”