

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8071 OF 2014

Sushil G. Agarwal ... Petitioner
Vs.
Dinesh P. Salunke ... Respondent

WITH
CIVIL APPLICATION NO.114 OF 2016

Dinesh P. Salunke ... Applicant
Vs.
Sushil G. Agarwal ... Respondent

Mr. G. S. Godbole, Senior Advocate i/b. Mr. Parag M. Tilak for Petitioner in WP 8071 of 2014 and respondent in C.A.114 of 2016.
Mr. S. M. Railkar for Respondent in WP 8071 of 2014 and applicant in C.A.114 of 2016..

CORAM : R. G. KETKAR, J.
DATE : JUNE 22 & 24, 2016

ORDER :

Heard Mr. Godbole, learned Senior Counsel for petitioner and Mr. Railkar, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as original defendant, has challenged the judgment and decree dated 19.12.2012 passed by the learned 6th Additional Judge, Small Causes Court, Pune in Civil Suit No.146 of 2009 as also the judgment and decree dated 30.07.2014 passed by the learned District Judge-13, Pune in Civil Appeal No.165 of 2013. By these orders, the Courts below decreed the Suit instituted by the respondent, hereinafter referred to as plaintiff, under Sections 16(1)(b) and 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. On 22.05.2003, plaintiff executed registered lease deed in favour

of the defendant whereunder shop No.3 in all admeasuring 25.54 sq.mtrs. equivalent to 275 sq.ft. built up area in the building situate in City Survey No.288-A, Rasta Peth, Taluka - Pune City, District - Pune (for short 'suit premises') was given to the defendant for a period of 9 years and 11 months commencing from 01.06.2003. Recital (C) of the lease deed shows that defendant-lessee and his joint family members were carrying on the business in shops adjacent to the suit premises. Due to additional need of the premises, defendant offered to pay the lease rent of Rs.6,000/- per month and requested the plaintiff-lessor to lease-out the suit premises. Clause 2(c) permitted defendant to complete internal plastering and flooring at his cost. Clause 2(e) permitted the defendant to have necessary structural changes in the suit premises as required by him for its own business, such as to erect any permanent walls, otta, lofts, etc. at his own cost and risk subject to keeping the structural stability intact.

4. Plaintiff instituted Suit on the ground that defendant has illegally and unauthorizedly caused permanent alterations by demolishing the southern wall of the suit premises thereby amalgamating the suit premises with adjoining shop situate in the adjoining property bearing C.T.S. No.288-B, Rasta Peth. Such amalgamation is illegal, unauthorized and in breach of the terms of the lease. Plaintiff further claimed that he needs the suit premises bonafide and reasonably for the conduct of his profession. Plaintiff is the practising Advocate and the suit premises is suitable and convenient for him considering his profession. Plaintiff was in possession of certain area but that area was acquired by the Corporation for the purpose of road widening.

5. Defendant resisted the Suit by filing written statement inter alia contending that the suit premises were taken for the first time in the year

1998-1999 when it was a raw shop and defendant was to finish the construction. The said fact is also recorded in the lease deed dated 22.05.2003. Defendant submitted that there were no walls in the suit premises when it was given to the defendant. It was contended that there were only columns and beams that were existing in the shop. Defendant paid huge amount for completing the construction of walls from East and West so also to fix two shutters on the road side. Defendant also denied that without permission of the plaintiff and of Corporation, he had illegally demolished the Southern wall of the suit premises. It was contended that no such wall existed since the date of the inception of tenancy, and therefore, the question of amalgamating the suit premises with the defendant's property does not arise. No amalgamation took place, as alleged by the plaintiff. Defendant also denied that the plaintiff requires the suit premises bonafide and reasonably to conduct his profession. Plaintiff has sufficient place to carry out his legal profession. Defendant denied that some area was acquired by the Corporation for the purpose of road widening.

6. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led oral as well as documentary evidence. After considering the evidence on record, the Courts below decreed the Suit under Sections 16(1)(b) and 16(1)(g) of the Act. It is against these decisions, defendant has instituted the present Petition under Article 227 of the Constitution of India.

7. In support of this Petition, Mr. Godbole strenuously contended that perusal of the lease deed would clearly indicate that as the family of the defendant owned the shop in the adjoining building situate at City Survey No.288-B as also defendant and his family members are carrying on business in the shop adjacent to the suit premises, the suit premises

were offered to the defendant. Clause 2(c) thereof permitted the defendant to complete internal plaster and flooring at his cost. Clause 2(e) also authorized the defendant to have necessary structural changes in the suit premises as required by him for his business, such as to erect any permanent walls, otta, lofts, etc. at his cost and risk subject to keeping the structural stability intact.

8. Mr. Godbole submitted that in paragraph 9 of the written statement, defendant specifically denied allegation about carrying out unauthorized additions and alterations. In fact, when the suit premises were taken for the first time in the year 1998, it was a raw shop and defendant completed the construction. The said fact is also evident from the lease deed dated 22.05.2003. He submitted that there were no walls in the suit premises and what was given was the suit premises having only columns and beams. Defendant had spent huge money for completing the construction of walls from East and West so also for fixing two shutters on the road side. He invited my attention to paragraph 4 of the examination-in-chief of the plaintiff and the cross-examination. He also invited my attention to oral evidence of Sanjeev Suresh Agarwal examined on behalf of the defendant. Defendant is the uncle of the said witness. In paragraph 6, witness deposed that at the time of handing over possession of the suit premises, there was no wall towards Southern and Eastern side. In other words, the suit premises was an incomplete construction and that they have finished the construction of the wall.

9. Mr. Godbole submitted that the Courts below were impressed by the so called admissions of this witness during the cross-examination to the effect that “288-A and 288-B is common. Both the shops will look as one and the same”. As far as the ground of bonafide requirement is

concerned, he submitted that the learned District Judge has discussed this issue in paragraphs 15 to 18 and held that the plaintiff has sufficiently proved that he requires the suit premises bonafide and reasonably for running his advocate office. He submitted that the District Court being the last fact finding Court is expected to re-appreciate the evidence and give independent reasons. There is non-compliance of Order 41, Rule 31 of C.P.C. Mr. Godbole further submitted that plaintiff admitted that shop No.2 in C.T.S. No.288-A was in possession of one Gavate and the plaintiff sold the said shop to Gavate in the years 2005-2006.

10. On the other hand, Mr. Railkar supported the impugned orders. He invited my attention to the cross-examination of defendant's witness, and in particular paragraph 2 wherein defendant's witness admitted that when he saw the shop, it was a running shop. It was fully constructed with walls from three sides and entrance from the Eastern side. He submitted that in paragraph 6, this witness denied that only plastering, colouring and electrification work as remained when the suit premises was given to them. He denied that the Southern side of wall of the suit premises was removed by them. He further admitted that the ceiling and flooring of shop situate in 288-A and 288-B is common and both the shops will look as one and the same. He, therefore, submitted that the defendant demolished the wall on the Southern side and amalgamated the suit premises to defendant's adjoining shop at 288-B. He, therefore, submitted that the Courts below rightly passed the decree under Section 16(1)(b) of the Act.

11. As far as ground of bonafide requirement under Section 16(1)(g) is concerned, he submitted that the Courts below, after appreciating the evidence on record, have concurrently held that plaintiff has made out

ground under Section 16(1)(g) of the Act. He invited my attention to the evidence of defendant's witness wherein he stated that plaintiff is an Advocate and the suit premises is centrally located. The Court is at the distance of 3 to 3½ km from Rasta Peth. He therefore submitted that the Courts below have rightly decreed the Suit under Sections 16(1)(b) and 16(1)(g) of the Act.

12. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As far as ground under Section 16(1)(b) of the Act is concerned, Mr. Godbole relied upon clauses 2(c) and (e) of the lease deed dated 22.05.2003. These clauses read thus,

“2. LESSEE'S COVENANTS:-

c) Internal plaster and flooring of the said premises is yet to be completed and Lessee herein shall get it completed at his own cost.

e) The Lessee herein shall be entitled to have necessary structural changes in the said premises as required by the Lessee for its own business, such as to erect any permanent walls, otta, lofts etc. at his own cost and risk subject to the keep the structural stability in intact.”

13. Mr. Godbole submitted that the suit premises were let out to the defendant for the first time in the year 1998-1999. It was a raw shop and the defendant was to finish the construction. The said fact was also recorded in the lease deed dated 22.05.2003. He further submitted that there were no walls in the shop premises when it was given to the defendant for his use and occupation. In other words, there was no wall on the southern side, and therefore, there is no question of amalgamating the suit premises with the shop owned by the defendant. He relied upon clauses 2(c) and 2(e) of the lease deed dated 22.05.2003.

14. It is not possible to accept this submission. Perusal of clause 2(c)

extracted hereinabove shows that defendant was permitted to complete internal plastering and flooring of the suit premises. Perusal of clause 2(e) shows that defendant was entitled to have necessary structural changes in the suit premises as required by him for its own business and the same was clarified such as to erect any permanent walls, otta, lofts, etc. at his own cost and risk subject to keeping structural stability in tact. Clause 2(e) did not permit the defendant to demolish the existing wall. It is also inconceivable that defendant, who is a businessman, will take on lease, a shop having no walls. It is in that context, material to deal with oral evidence. In paragraph 4, plaintiff deposed that as the suit premises and the shop in CTS No.288-B in Rasta Peth are adjacent, defendant illegally and without any permission from the plaintiff and Pune Municipal Corporation demolished the southern wall of the suit shop and wall of the shop in CTS No.288-B thereby amalgamating two shops. Such amalgamation is in breach of the terms of the lease and against the provisions of law. He denied that the suit shop has no wall on the southern side, as alleged by the defendant. In the cross-examination, plaintiff's witness stated that when the suit premises were let out, the work of flooring and plastering was incomplete. He denied that he was deposing false that there was a wall between his shop and defendant's shop.

15. As far as defendant's evidence is concerned, in paragraph 6 of affidavit, defendant stated that at the time of handing over possession of the suit premises, there was no wall towards southern and eastern side. It was an incomplete construction. This is contrary to what was stated in the evidence and in particular, paragraph 7 thereof. In paragraph 7, he admitted that the ceiling and flooring of shop situate in 288-A and B is common. Both the shops look as one and the same. In other words, this clearly shows that the suit premises is amalgamated by the defendant

along with his shop, which is admittedly adjacent to the suit premises. After appreciating the evidence on record, the Courts below have held that the defendant's contention that at the time of handing over possession of the suit premises also there was no wall towards southern and eastern side cannot be accepted and at present, there is no wall by the southern side of the suit premises.

16. As far as the bonafide requirement as also the question of comparative hardship is concerned, the Courts below have held that the plaintiff has established that his requirement is both, reasonable as well as bonafide and that greater hardship will be caused to him in the event of refusing to pass eviction decree.

17. Mr. Godbole submitted that the learned District Judge, being the last fact-finding Court, ought to have considered the evidence on record and recorded the finding. He submitted that there is non-compliance of Order 41, Rule 31 of C.P.C. He submitted that even if the learned District Judge is confirming the trial Court's decree, he has to record his independent conclusions, after appreciating the evidence on record. In the case of ***Parimal Vs. Veena @ Bharti*, (2011) 3 SCC 545**, in paragraphs 25 and 26, the Apex Court has observed thus,

“25. Order 41, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate Court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts. (vide: *Moran Mar Basselios Catholicos v. Mar Poulouse Athanasius*, AIR 1954 SC 526; *Sukhpal Singh v. Kalyan Singh*, AIR 1963 SC 146; *Santosh Hazari v. Purshottam Tiwari*, AIR 2001 SC 965; *Madhukar v. Sangram*, AIR 2001 SC 2171; *G. Amalorpavam v. R.C. Diocese of Madurai*, (2006) 3 SCC 224; *Shiv Kumar Sharma v. Santosh Kumari*, (2007) 8 SCC 600; and *Gannmani Anasuya & Ors. v.*

Parvatini Amarendra Chowdhary & Ors., AIR 2007 SC 2380.)

26. The first appellate Court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial Court's judgment without opening the whole case for re-hearing both on question of facts and law. More so, the appellate Court should not modify the decree of the trial Court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate Court would fall short of considerations expected from the first appellate Court in view of the provisions of Order XLI, Rule 31 CPC and such judgment and order would be liable to be set aside. (Vide B.V. Nagesh v. H.V. Sreenivassa Murthy, (2010) 13 SCC 530)."

18. Applying the tests laid down in the above decision, the learned District Judge has substantially complied with the provisions of Order 41, Rule 31 of C.P.C. In paragraph 14, the learned District Judge has dealt with defendant illegally carrying out permanent additions / alterations as contemplated by Section 16(1)(b) of the Act. In paragraphs 15 to 18, the learned District Judge has dealt with reasonable and bonafide requirement as contemplated by Section 16(1)(g) of the Act. In paragraph 19, the learned District Judge has dealt with question of comparative hardship. In view thereof, I do not find any merit in the submission advanced by Mr. Godbole based on Order 41, Rule 31 of C.P.C.

19. Apart from that, I have already referred to evidence of the defendant's witness. He has categorically stated in paragraph 7 of his cross-examination that the suit premises is centrally located. The Court is at the distance of 3 to 3½ kms from Rasta Peth. The learned District Judge has observed in paragraph 16 that some of the area owned by the plaintiff is acquired by the Corporation for road widening and the said fact is not in dispute. In paragraph 17, the learned District Judge dealt with submission of the plaintiff and observed that the cross-examination shows that the plaintiff was constrained to call his clients at Registrar's office for registration of the documents, and sometimes, he was required

to go to his client's place in the absence of suitable place for his office. In view thereof, I do not find that the learned District Judge has committed any error in accepting the case of the plaintiff under Section 16(1)(g) of the Act. The Courts below, after appreciating the evidence on record, have concurrently decreed the Suit under Sections 16(1)(b) and 16(1)(g) of the Act. Defendant was not in a position to demonstrate that the findings recorded by the Court below are based on no evidence or that they are contrary to the evidence on record. Defendant was also not in a position to demonstrate that on the basis of evidence on record, no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. No case is made out by the defendant for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

20. Civil Application No.114 of 2016 is filed by the respondent for withdrawal of the amount deposited by the petitioner in the Court in pursuance of the order dated 21.09.2015. As I have dismissed the Petition and as there is no reply controverting the assertions made in the application, Civil Application is allowed in terms of prayer clause (a) with no order as to costs. Civil Application is disposed of.

21. At this stage, Mr. Tilak orally applies for stay of this order for the period of 12 weeks from today. He further states that the petitioner and all adult family members using the suit premises are ready and willing to give usual undertaking within two weeks from today.

22. In view thereof, notwithstanding dismissal of this Petition, this order shall remain stayed for a period of 12 weeks from today subject to petitioner and all adult family members using the suit premises giving usual undertaking within two weeks from today, after giving advance

copy to the other side, incorporating therein that,

- (i) they are in actual possession of the suit premises and nobody else is in possession;
- (ii) they have so far neither created third party interest nor parted with possession of the suit premises;
- (iii) they will hereafter neither create third party interest nor part with possession of the suit premises;
- (iv) in case they are unable to obtain suitable orders within twelve weeks from today from the higher Court, they will handover vacant and peaceful possession of the suit premises to the respondent.

23. List the Petition for compliance after three weeks.

(R. G. KETKAR, J.)

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