

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9873 OF 2016

[Converted from Civil Revision Application NO. 492 OF 2015]

Mr. Tayalal Manilal Jain

...Applicant

Versus

Mr. Narsayya Mallaiyya Mithapalli

And Ors

...Respondents

....

Mr.Ameya V. Borwankar, Advocate for the Applicant.

Mr. S.S. Kulkarni i/b. Mr. Chaitanya Nikte, Advocate for Respondents No.1 and 2.

....

CORAM : R. G. KETKAR, J.

DATE : 11th August, 2016

P.C.

1. Heard Mr.Ameya Borwankar, learned Counsel for the applicant and Mr.S.S. Kulkarni, learned Counsel for respondents No.1 and 2, at length. On the motion made by Mr.Borwankar, leave to delete respondents No.3(a) and 3(b) is granted. Amendment shall be carried out forthwith.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant hereinafter referred to as 'defendant No.2', has challenged the judgment and decree dated 6.11.2014 passed by the learned District Judge-13, Pune in Civil Appeal No.649/2008. By that order, the learned District Judge

allowed the appeal preferred by respondents No.1 and 2, hereinafter referred to as the 'plaintiffs' and quashed and set aside the judgment and decree dated 6.9.2008 passed by the learned Additional Judge, Small Causes Court, Pune in Civil Suit No.301/2005. The learned District Judge decreed the suit under Sections 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act') and directed defendant defendant No.2 to vacate the premises admeasuring 275 sq. ft. with mazenine floor situate on the ground floor of the building standing on City Survey No.39 and plot No.G-62, Gultekadi, Pune (for short, 'suit premises') to the plaintiffs within two months from the date of the order. In view of Section 7 of C.P.C., leave to convert Civil Revision Application into Writ Petition is granted. Amendment shall be carried out on or before 20.8.2016.

3. Rule. Mr. Chaitanya Nikte waives service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

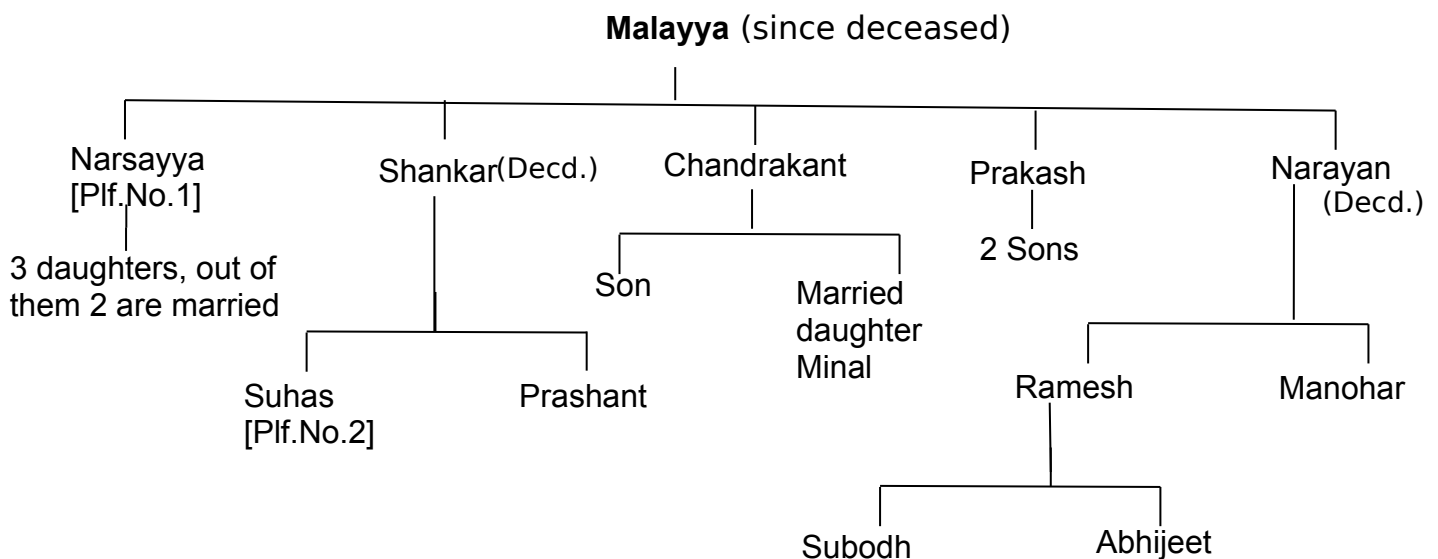
4. In support of this Petition, Mr.Borwankar submitted that the learned trial Judge dismissed the suit. As far as the ground of bonafide requirement under Section 16(1)(g) of the Act is concerned, said aspect was considered from paragraphs-13 to 18 by the trial Court. In paragraphs-16 to 18, the learned trial Judge has referred to

acquisition of several premises by the plaintiffs as also letting out some of those premises after institution of the Suit. As against this, Appellate Court has considered the ground of bonafide requirement in paragraphs-14 to 18. He submitted that the Appellate Court, however, did not record any findings as regards discussion of the trial Court in paragraphs-16 to 18.

5. As far as the ground of non-user under Section 16(1)(n) of the Act, he invited my attention to assertions made in the plaint as also in the oral evidence and submitted that except non-renewal of Shop Act Licence, there is no other material for holding that the plaintiffs have established the ground of non-user. It is submitted that in fact the suit was instituted on 15.7.2005 by the plaintiffs only against respondent No.3/defendant No.1. Defendant No.2 was not made a party. The Shop Act Licence was renewed on 27.7.2005. Defendant No.1 filed written statement on 31.10.2005. On 16.11.2006, defendant No.2 was impleaded. He submitted that in paragraph-2, defendant No.2 deposed that he is carrying on business of selling sanitary wares, tiles and building materials. He has the bank account of said business. He is also income tax payer and is holding receipts for payment of income tax. He is also in possession of the documents showing that he is purchasing the materials and thereafter selling the same

to the customers. He submitted that for establishing the ground of non-user, the plaintiffs have to lead tangible evidence and discharge initial burden. The burden then shifts on the defendant to either establish user by leading tangible evidence or make out a case for reasonable cause for non-user. In the present case, the plaintiffs have not discharged his initial burden for establishing non-user. He submitted that the application requires consideration.

6. On the other hand, Mr. Kulkarni supported the impugned order. He submitted that there are 11 members in the plaintiffs family. He has taken me through the genealogy of the plaintiffs family and submitted that initially the building situate in C.T.S. No.39 belonged to Malayya Ramayya Mithapalli and Narayan Ramayya Mithapalli. Malayya died leaving behind five sons. The genealogy is as under:



7. He has also taken me through paragraphs-15 to 18 of the District Court judgment. He submitted that once the plaintiffs raised ground of bonafide requirement, the Court has to presume that the requirement set up by the plaintiffs is both bonafide as also reasonable. The Court has also to assume that it is for the landlord to choose suitable premises for his own business and tenant cannot dictate him. Even if several premises are available to the landlords, considering his need, he can select the premises occupied by the tenants and institute suit for recovery of that premises. He submitted that after considering the evidence on record, District Court has observed in paragraph-18 that the plaintiffs have sufficiently proved that they reasonably and bonafide require the suit premises. Mr.Kulkarni disputed acquisition of premises by the plaintiffs and letting out the same to the tenants after institution of the suit.

8. As far as the ground of non-user is concerned, he submitted that though in paragraph-2 of the cross-examination of defendant No.2, he deposed that he has several documents in support of his case of user of the premises, defendant No.2 did not produce those documents and, therefore, it is a fit case to drawing adverse inference against him. Mr. Kulkarni further disputes the contention of defendant No.2 as also finding recorded by the trial

Court that after obtaining possession from Alurkar Brothers, the plaintiffs have inducted new tenants. He submitted that Alurkar Brothers have directly handed over possession to other tenant.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As far as ground of bonafide requirement is concerned, in paragraphs-16 to 18, learned trial Judge has discussed the availability of the premises to the plaintiffs. As against this, in paragraph-18, the learned District Judge observed that “neither the Court nor the defendants can dictate the terms to the plaintiffs by raising eyebrows, the moment plaintiffs asked the defendants to vacate the suit premises, merely by citing the reason that the plaintiffs let out some other premises after institution of the suit. It is for the landlord to choose suitable premises for his own business and, therefore, the tenant cannot dictate to him that he should make use of other premises falling vacant for his own business.” In my opinion, the learned District Judge should have dealt with the findings recorded by the trial Court in paragraphs-16 to 18. The learned District Judge should have discussed the availability of the premises as also their suitability to the plaintiffs. The District Court being the last fact finding Court has failed to consider the entire evidence on record

and record its independent findings. The Appellate Court is expected to reassess and reappreciate the evidence on record and thereafter record its conclusions, more so when it is reversing trial Courts judgment. In the present case, District Court has not discharged its duty.

10. As far as the ground of non-user is concerned, it is settled position in law that the initial burden is on the plaintiff to establish non-user by leading tangible evidence. After perusing the evidence adduced in that regard, *prima facie* I find that the plaintiffs have not discharged the initial burden. It is necessary for the plaintiffs to lead tangible evidence to establish the ground of non-user. It is only thereafter the burden shifts on the defendant to establish user by leading tangible evidence or non-user because of reasonable cause. As *prima facie* the plaintiffs have not discharged that burden, the impugned order cannot be sustained more so when the learned trial Judge has not accepted said ground.

11. Mr. Kulkarni states that respondent No.2 Mr. Suhas Shankarrao Mithapalli is present in the Court. He has tendered photocopy of PAN Card of respondent No.2, which is taken on record and marked 'X', for identification. Upon taking instructions from him, he states that by consent the impugned order may be set aside and the

appeal may be restored to file of the learned District Judge. Learned Counsel appearing for the parties state that the parties may be permitted to lead additional evidence either before the trial Court or before the District Court and the Appeal may be directed to dispose of in a time bound manner. Hence, by consent of parties, petition is disposed of in following terms :

- [i] Impugned judgment and decree dated 6.11.2014 passed by the learned District Judge-13, Pune in Civil Appeal No.649/2008 is quashed and set aside and appeal is restored to the file of the District Court.
- [ii] Parties are permitted to adduce additional evidence. District Court will either take evidence or direct the trial Court from whose decree appeal is preferred to take evidence and transmit the same to District Court.
- [iii] Parties agree that they will appear before the District Court, Pune on 29.8.2016 and for that purpose no fresh notice be issued to them. Learned Counsel for the parties assure that they will extend full cooperation for for leading additional evidence and such exercise shall be completed within three

months from the date of appearance of the parties before District Court.

- [iv] After recording of evidence, District Court is requested to dispose of the appeal within three months from receipt of evidence/recording of evidence.
- [v] All contentions of parties on merits are expressly kept open.
- [vi] Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)