

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 167 OF 2015

Mahesh Chandra Shrivastav, ..Applicants
since deceased, though L.Rs,
Smt. Sudha Shrivastav and Ors.

Vs

Shri Vijay Bhalchandra Bhatt and .. Respondents
Ors.

Mr.G.S.Godbole, Senior Advocate with Mr. Parag Tilak, Advocate
for Applicants.

Mr. P.S.Dani, Senior Advocate i/b Jui A. Nerurkar, Advocate for
Respondents no.1 and 2.

CORAM : R.G.KETKAR,J.
DATE : 12/07/2016

PC:

1. Heard Mr.G.S.Godbole, learned senior counsel for the
applicants and Mr.P.S.Dani, learned senior counsel for the
respondents no.1 and 2 at length.

2. By this Application under Section 115 of the Code of Civil
Procedure, 1908 (for short, 'C.P.C.'), the applicants who are heirs
of original defendant no.5, have challenged the Judgment and
decree dated 30.10.2010 passed by the learned Judge presiding
over Court Room No. 32 of the Court of Small Causes at Mumbai
(Bandra Branch) in R.A.E Suit No. 272/688 of 2002 as also the
Judgment and decree dated 27.1.2015 passed by the Appellate

Bench of the Court of the Small Causes at Mumbai in A-1 Appeal No. 4 of 2011. By these orders, the Courts below decreed the suit instituted by respondents no. 1 and 2, hereinafter referred to as 'plaintiffs', under section 16(1) (g) of the Maharashtra Rent Control act, 1999 (for short, 'Act').

3. The plaintiffs have instituted suit against respondents no. 3 to 6, hereinafter referred to as 'defendants no. 1 to 4', and Shri Mahesh Shrivastav, defendant no.5 since deceased, for recovery of possession of residential flat on the ground floor of building known as "Sukhsagar" situate at Plot no.27 (N), Jai Bharat Cooperative Housing Society Ltd, situate at 3rd Road, Khar (W), Mumbai -400052 (for short, 'suit premises'). Initially, one Shri R.R. Muzumdar was tenant of the suit premises. During his life time, he had sub-let the suit premises to defendant no.5. The plaintiffs accepted that defendant no.5 was occupying the suit premises as a lawful sub-tenant. The plaintiffs contended that their family consists of 10 members. They are in possession of two flats, consisting of one bedroom, hall, kitchen, and measuring 500 sq. feet each. Having regard to the number of members in the Family and the premises in their possession, they require the suit premises for their own use and occupation. The plaintiffs amended the complaint and contended that defendant no.5 with his family members acquired alternate accommodation being flat

no. B-101, Allan Villa Co-operative Housing Society Ltd of Village Kole Kalyan, Church Road, Kalina, Santacruz (E), Mumbai-400098.

4. Defendant no.5 resisted the suit by filing written statement. Parties led evidence. After considering the evidence on record, the Courts below decreed the suit under section 16(1)(g) of the Act. It is against these decisions, legal representatives of defendant no.5 have instituted the present Application.

5. In support of this Application, Mr. Godbole submitted that after the decision of the Appellate Court dated 27.1.2015, Ms. Vidhi Bhatt, daughter of Prashant Bhatt was married in February 2015. After the decision of the trial Court dated 30.10.2010, Dhwanisha, daughter of Vijay Bhatt was married in November 2010. He has taken me through Civil Application No.640 of 2015 filed by the applicants under Order 41, Rule 27 of C.P.C. for producing additional evidence. Mr. Godbole submitted that as of date, there are only five members in the family of the plaintiffs, viz. Vijay Bhatt (elder son of the original plaintiff), his wife Ms Kashmira Vijay Bhatt and son Ashish Vijay Bhatt and Prashant Bhatt, (younger son of original plaintiff) and his wife Ms Hema Prashant Bhatt are occupying two flats, one on the first floor of plot no.27(N) and the other on the ground floor of flat of plot no.27 (S) in Sukhsagar building. He further submitted that

mother of the original plaintiff Mangalagauri died in January 2004 and original plaintiff Bhalchandra Gajanan Bhatt expired in December, 2005. The wife of original plaintiff Ms.Manjula Bhalchandra Bhatt expired in December 2007.

6. Mr. Godbole further submitted that the plaintiffs have instituted suit for eviction of tenant Surendra H. Zaveri. He is tenant in respect of flat on first floor situate at plot no.27 (S) , Sukhsagar building. Said Surendra Zaveri expired on 1.3.2015. He submitted that though said Zaveri expired in March 2015, till date the plaintiffs have not brought on record his legal representatives.

7. Mr. Godbole further submitted that as of date, there are five members in the family of the plaintiffs and two flats are in their possession. He, therefore, submitted that the need of the plaintiffs no longer survives/subsists. In any case, even if the case of the plaintiffs that one of the sons is marriage age is accepted, as tenant Zaveri was bachelor, the said flat will be available to the plaintiffs in near future.

8. Mr. Godbole further submitted that the need pleaded by the plaintiffs is neither reasonable nor bona fide. In fact, the plaintiffs have suppressed the fact that the premises on the ground floor of plot no.27 (South) is available after the death of the mother of the original plaintiff in January 2004.

9. He further submitted that the flat in Allan Villa Co-op.Hsg.Society is acquired by son of defendant no.5, over which defendant no.5 or his legal representatives have no control. It, therefore, cannot be said that defendant no. 5 has required alternate premises or that no hardship will be caused to the defendants in the event of passing of eviction decree. For all these reasons, he submitted that the application requires consideration.

10. On the other hand, Mr.Dani supported the impugned orders. He has taken me through the reply filed by the plaintiffs opposing Civil Application No.640 of 2015. He further submitted that defendant no.5 has suppressed acquisition of flat in Allan Villa Co-op. Housing society. In fact, the plaintiffs intended to examine Mr. James Joseph Dias as their witness. However, his affidavit in examination in chief was drafted at the instance of defendant no.5 under the advice of Advocate Gupta. He has taken me through the evidence of Joseph Dias and submitted that though he stated to have acquired a flat in Allan Villa by registered agreement of sale dated 8.2.2006, he claims to have authorised Anshu Shrivastav, son of defendant no.5 to use the said flat. He, however, suppressed the factum of executing agreement of sale in examination in chief.

11. On merits, Mr. Dani submitted that even if it is accepted

that there are five members in the family of the plaintiffs, there are two couples and one son of marriagable age. They are in possession of two flats consisting of 1 BHK each admeasuring 500 sq.ft.each. In view thereof, he submitted that the requirement of the plaintiffs is both reasonable as well as bona fide. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C.

12. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. By separate order passed today, I have allowed Civil Application No. 640 of 2015. It is not in dispute that the suit premises is situate on the ground floor of Plot no.27 (N). The plaintiffs are in possession of one flat on the first floor of Plot no.27 (N) and their mother was in possession of flat on the ground floor of plot no.27 (S). It has come on record that the mother of original plaintiff died in January 2004. The plaintiffs are now in possession of two flats, one on the first floor of plot no.27 (N) and one on the ground floor of plot no.27(S). It is not in dispute that each flat is one BHK and each flat admeasures 500 sq.ft approximately. It is no doubt true that as asserted by the applicants in Civil Application No. 640 of 2015, Ms. Vidhi Bhatt, daughter of Prashant Bhatt was married in February 2015, that is to say after passing of the order of the Appellate Court. It is also

brought on record that Ms.Dhwanisha Bhatt, daughter of Vijay Bhatt was married in November, 2010, that is to say, after the trial Court's judgment. Even the defendants contend that there are five members in the family of the plaintiffs and that they are in possession of two flats in Sukhsagar building. In the reply filed by the plaintiffs, it is contended that as of date the family of the plaintiffs consists of 5 members and are in possession of two flats each admeasuring approximately 500 sq.ft comprising of 1 BHK and the same is insufficient for the requirement of the family of the plaintiffs which includes two couples and one son of marriageable age.

13. In view thereof, each couple will need a separate flat and having regard to the undisputed fact that one son is of marriageable age, he will need separate flat. Even if, Ms Vidhi Bhatt , daughter of Prashant Bhatt, was married in February 2010 and Dhwanisha, daughter of Vijay Bhatt was married in November, 2010, that does not mean that married daughters have snapped their relations with their parents. It is not uncommon that the married daughters visit their parents' house off and on. The contention advanced on behalf of the defendants that as these daughters are married, their requirement cannot be considered is concerned. I do not find any merit in this submission. The Appellate Court has considered the requirement

of the plaintiffs from paragraphs 9 to 11 as also comparative hardship in paragraphs 12 to 15. After appreciating the evidence on record, the Appellate Court held that the need pleaded by the plaintiffs is both reasonable as also bona fide and that greater hardship will be caused to the plaintiffs in case eviction decree is not passed.

14. As far as the question of comparative hardship is concerned, Mr. Godbole submitted that the acquisition of flat by Anshu Shrivastav, son of defendant no.5, cannot be considered as a suitable alternate residence. He has taken me through the order dated 23.12.2014 passed below Exhibits 1,37,40 by the Appellate Court. The said order recorded that Anshu Shrivastav had filed affidavit at Exh.40 setting out therein that he has no concern with the suit premise as he is not claiming any right in the suit premises through defendant no.5, since deceased, nor he is claiming any independent rights in the suit premises. He submitted that the acquisition of flat in Allan Villa by Anshu Shrivastav cannot be considered while deciding the question of comparative hardship.

15. The Courts below have also considered this aspect and have answered question of comparative hardship in favour of the plaintiffs. In fact, defendant no.5 or his legal representatives have not brought any material on record to show as to whether after

institution of suit they have made any sincere efforts for securing any alternate accommodation.

16. With the assistance of the learned counsel appearing for the parties, I have perused the evidence of Joseph B. Dias. In examination in chief, he deposed that he did not sell, transfer or assign flat in Allan Villa Co-op. Housing society to Mr Anshu Shrivastav or his wife Reema Shrivastav. He deposed that Anshu Shrivastav and his family are his close friends and due to his business commitments, he has to remain out of Mumbai. He has, therefore, authorized Anshu Shrivastav to look into the matter concerning his flat. He further deposed that Anshu Shrivastav and his family are allowed to use his flat as and when required by them due to their small accommodation, i.e the suit premises.

17. Perusal of the examination in chief indicates that he specifically deposed that he did not create any interest in the flat in Allan Villa in favour of Anshu Shrivastav. However, during the course of cross examination, he admitted that he entered into an agreement with one Mr. Shrivastav and that he does not have copy of the said agreement. He knows Anshu Shrivastav for more than 5 years and he is the son of person to whom he sold the flat. In other words, he deposed that he had sold the flat to defendant no. 5, father of Anshu Shrivastav. It is in this regard relevant to

consider the deed of confirmation dated 6.10.2010 which was registered on 8.10.2010. This deed of confirmation was entered into between (1) Mr Joseph A. Dias and (2) Mrs Theresa A. Dias (Vendors) and (1) Mrs Sujata Shrivastav and (2) Mr Anshu Shrivastav as purchasers. Along with this deed of confirmation, agreement of sale dated 2.10.2006 between Mr. Joseph A. Dias and Mrs Theresa A. Dias (Vendors) of one Part and Mrs Sujata Shrivastav and Mr. Anshu Shrivastav, (purchasers) of the other part was enclosed. The said deed of confirmation was executed and registered during the pendency of the suit.

18. The Appellate Court considered this aspect in paragraph 13 and observed that the affidavit in examination in chief was drafted at the instance of defendant no.5 under the advice of Advocate Gupta. Advocate for the defendants did not cross examine this witness. The Appellate Court observed that Mr. Dias had sold flat in Allan Villa to defendant no.5 and thereafter confirmation deed was executed in October 2010 and held that the flat at Allan Villa is owned by defendant no.5 and to wash out admissions given by witness Joseph Dias during cross examination on 13.8.2010, deed of confirmation was executed in October 2010. The Appellate Court further held that the defendant did not come to the court with clean hands and even though Mr Dias was examined by the plaintiffs, he deposed on

behalf of defendant no.5. The Appellate Court further observed that if at all Mrs Sujata Shrivastav and Anshu Shrivastav had purchased the flat at Allan Villa, they would have produced the evidence to show as to who has paid the money for purchase of the flat. Evidence on this point is not coming on record and, therefore, adverse inference need to be drawn against the defendants and the Appellate Court thereafter categorically recorded a finding that flat at Allan Villa is owned by defendant no.5. I do not find that the Appellate Court has committed any error in recording these findings.

19. Legal representatives of defendant no.5 were not in a position to demonstrate that the findings recorded by the Courts below are based on no evidence or that they are contrary to evidence on record. They were also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. No case for invocation of powers under Section 115 of C.P.C is made out. Hence, Application fails and the same is dismissed.

20. At this stage, Mr. Godbole orally applies for stay of this order for a period of 12 weeks from today. He states that the applicants are in possession of the suit premises and nobody else is in possession. The applicants have neither created third party interest nor parted with possession and they will hereafter

neither create third party interest nor part with possession and that they have paid rent upto date and are not in arrears.

21. Mr. Godbole assures that within two weeks from today, legal representatives of defendant no.5 and all adult family members using the suit premises will file usual undertaking in this Court, after giving advance copy to other side, incorporating therein:

(i) that they are in possession of the suit premises and nobody else is in possession;

(ii) that they have neither created any third party interest nor parted with possession;

(iii) that they will hereafter neither create third party interests nor part with possession;

(iv) that they will clear arrears of rent, if any, within 2 weeks from today;

(v) that they will not apply for further extension of time;

(vi) that in case they are unable to obtain suitable orders from higher Court within 12 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondents.

22.. Hence, subject to the applicants no.1A to 1C filing undertaking in the aforesaid terms within two weeks from today and serving copy in advance to other side, notwithstanding

dismissal of the Application, eviction decree shall not be executed for a period of 12 weeks from today. It is made clear that in case arrears of rent are not paid within two weeks from today and the undertaking in the aforesaid terms is not filed, the interim stay shall stand vacated without further reference to the Court.

23. Mr. Dani prays that the plaintiffs may be permitted to withdraw the amount deposited by the applicants in the Small Causes Court. The plaintiffs are permitted to withdraw the amount unconditionally.

24. List the Application for reporting compliance after three weeks.

25. All parties including Small Causes Court to act on the authenticated copy of this order.

(R.G.KETKAR, J.)