IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.203 OF 2016

Najib Yahyabhai Kachwalla, Son and LR
of Dr. Yahyabhai Ebrahi Kachwalla (decd) … Applicant
Vs.
Bombay Mercantile Co-operative Bank Ltd. and others … Respondents

Mr. V. A. Thorat, Senior Advocate a/w. Mr. Ruchir L. Lolat i/b. Mr. L. C. Tolat for Applicant.
Mr. N. V. Walawalkar, Senior Advocate i/b. M. H. A. Sayyid for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 10, 2016

P.C. :

Heard Mr. Thorat, learned Senior Counsel for the applicant and Mr. Walawalkar, learned Senior Counsel for respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as defendant No.3, has challenged the judgment and decree dated 25 to 28th August 2003 and the findings dated 18.03.2015 passed / recorded by the learned Judge presiding over Court Room No.8 of the Court of Small Causes at Bombay in R.A.E. Suit No.1887/6701 of 1980 as also the judgment and decree dated 16.02.2016 passed by the Appellate Bench in Appeal No.290 of 2004.

3. The learned trial Judge decreed the Suit under Section 13(1)(g) of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). Aggrieved by that decision, defendant No.3 preferred Appeal. Defendant No.2 also preferred separate appeal. During the pendency of the appeal, defendant No.3 filed application at exhibit-12

under Order 41, Rule 27 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') on the ground that during the pendency of the appeal, on or about 22.08.2008, plaintiffs had sold 3rd, 4th and 5th floors admeasuring about 20000 sq.ft. of the Uttam House, P D'Mello Road to M/s. Sainath Trading Company Limited. The appellate Court dismissed the application and thereafter proceeded to dismiss the appeals preferred by defendants No.2 and 3.

4. Aggrieved by these decisions, defendant No.3 instituted C.R.A.No.525 of 2012. By order dated 16.12.2013, the decree passed by the appellate Court was quashed and set aside and appeals preferred by defendants No.2 and 3 were restored to the file of the appellate Court. Application at exhibit-12 filed by the defendant No.3 in appeal No.290 of 2004 was allowed. The appellate Court was directed to frame issues on the question of reasonable and bonafide requirements of the plaintiffs as also on the question of comparative hardship. The appellate Court was directed to record evidence itself after framing these issues and deciding the appeal or after framing the issues, refer the same to the trial Court for recording additional evidence in terms of Order 41, Rule 25 of C.P.C. In the event of the trial Court trying such issues, it was directed to return the evidence together with the findings thereon. In terms of Order 41, Rule 26 of C.P.C., such evidence and findings was to form part of the record of the Suit. The appellate Court was thereafter directed to decide the appeal.

5. In pursuance of order dated 16.12.2013, the parties led evidence before the learned trial Judge. The learned trial Judge framed issues as to whether plaintiff proved the requirement of the suit premises and that to whom greater hardship will be caused in the event of granting or refusing to pass the decree of eviction. The parties led oral and

documentary evidence. After considering the evidence on record, the learned trial Judge recorded findings on 18.03.2015. The learned trial Judge held that plaintiff has proved its requirement and that greater hardship will be caused to the plaintiff in the event of refusal of eviction decree.

6. The evidence and findings recorded by the trial Court were placed before the appellate Court. After considering the evidence on record, the appellate Court dismissed the Appeal on 16.02.2016. It is against these decisions, defendant No.3 has instituted the present C.R.A.

7. In support of this application, Mr. Thorat submitted that defendant No.3's father was inducted in the suit premises on the basis of registered Lease Deed dated 02.02.1953. After expiry of 3years period stipulated in the lease, he continued to occupy the suit premises and thereby became deemed tenant. After the death of the original tenant, defendant No.3 is occupying the suit premises as a tenant. Defendant No.3 is a renowned Cardiologist attached to Saifee Hospital and other hospitals. In the year 1980, plaintiff instituted Suit inter alia contending that it requires the additional premises for expanding its business activities. He submitted that there are 27 properties of the plaintiff spread out all over Mumbai and 5-6 premises of plaintiff are adjoining the suit premises. Because of the maladministration and mismanagement, Board of Administrators was appointed on the plaintiff bank between 1990 and 2012. On 22.08.2008, plaintiff sold three floors i.e. 3rd, 4th and 5th floor of the Uttam House, P.D'Mello road, admeasuring 20000 sq.ft. to M/s. Sainath Trading Company Limited. He invited my attention to the correspondence addressed by plaintiff bank to the Reserve Bank of India. On 20.01.2007, Chairman and Administrator addressed a letter to the Chief General Manager, RBI

setting out therein what transpired in the meeting held on 03.02.2006 with Deputy Governor, RBI. The Deputy Governor, RBI suggested raising the share capital in order to mitigate the negative net-worth from converting deposits into share capital. As the plaintiff bank was not paying dividend to its shareholders / members for the last 17 years, there was reluctance on the part of the depositors to the said proposition. Reference as also made to Section 33 of the Multi State Co-operative Societies Act, 2002 which places restriction on the holding of shares. It provides that no member shall hold more than such portion of the total share capital of the Society (in no case exceeding one-fifth thereof) as may be prescribed in the rules of bye-laws of such Multi State Co-operative Society. Bye-law 75-C provies that the total amount of the share capital held by the members shall be subject to a maximum of one-fifth of the total paid up share capital of the bank. It was, therefore, set out that the shareholders / members of the Bank cannot subscribe to the share capital of the Bank in excess of the limits prescribed under the provisions of the Multi State Co-operative Societies Act and the bye-laws of the Bank. The said letter also sets out that plaintiff considered approaching Central Government for financial assistance as provided under Section 61(f)(g) of the Multi State Co-operative Societies Act. The said attempt did not yield any result and therefore, plaintiff examined the possibility of utilizing the properties purchased by the Bank at a time when the property prices were not so staggering for a turnaround of the negative net-worth into positive. Plaintiff Bank, therefore, constituted Committee of the Bank Executives to examine the proposition of revaluation of the properties vis-à-vis the feasibility of getting good returns in the prevailing realty market boom. One of the properties mentioned therein was Uttam House.

8. Plaintiff thereafter addressed a letter dated 04.04.2007 to the

Chief General Manager, RBI. Attention was invited to letter dated 08.03.2007 as a follow up of the proposal regarding the sale of some of the properties of the plaintiff Bank with a view to improving the net worth and reducing the accumulated losses of the Bank. Some of the properties are a kind of "**dead weight**" on the resources of the Bank and the capital realized from such properties would go a long way in the resolution of the problems facing the Bank. On 08.02.2007, a Settlement Advisory Committee convened a meeting for discussing the proposal of deriving capital out of the exceeding property of the Bank, **"which are not adequately utilized and these properties are not contributing to the capital adequacy of the Bank"**. On 18.04.2007, General Manager of RBI addressed a letter to the Administrator of the plaintiff giving no objection in disposing of the properties bank's **surplus properties** as part of the strategy for turnaround of the bank fter ensuring transparency at all levels in the procedures / deals and exploration of sale and lease back transactions.

9. Mr. Thorat submitted that the proposal as also the Minutes of the meeting clearly indicate that the Bank intended to sell the properties, which were termed as "**dead weight**" or "**which were inadequately utilized and not contributing to the capital adequacy of the Bank**" or "**surplus properties**". On one hand, plaintiff-bank is disposing of the properties which are described as either "dead weight" or "which were inadequately utilized and not contributing to the capital adequacy of the Bank" or "surplus properties", it has instituted the Suit for recovery of possession of suit premises admeasuring 1300 sq.ft. He submitted that this clearly reflects malafides on the part of the plaintiff-bank. In other words, the need set up by the plaintiff is neither reasonable nor bonafide and is tainted with malafides.

10. Mr. Thorat has invited my attention to the availability of premises in the suit building. He submitted that the suit premises is situate on the third floor. Obviously, it will not be suitable for locating safe deposit vault for which ideal place is ground floor / basement. Similarly, on the ground floor, following departments are in operation:

(a) Current Department,

(b) Savings,

(c) Cash,

(d) Security Officer Cabin, and

(e) Security Staff.

11. Having regard to the convenience of the bank customers, even these activities cannot be carried out on the third floor. He submitted that as against the Suit instituted by the plaintiff for recovery of 1300 sq.ft., they have sold 20000 sq.ft. from 3rd, 4th and 5th floors of Uttam House. Due to computerization of the bank system, the requirement of the staff is also reduced. Thus, the requirement then existed in the year 1980 stands virtually given up after sale of 20000 sq.ft. from Uttam House. He submitted that the sale made by the plaintiff was a voluntary sale and not a distress sale. He, therefore, submitted that the Courts below were not justified in passing the decree and the Application requires consideration.

12. On the other hand, Mr. Walawalkar supported the impugned orders. He submitted that between 1990-2012, because of mal-administration and mismanagement, Board of Administrators was appointed by RBI. The Committee constituted by the Bank recommended the remedial measures for reducing NPA. All the options were explored in order to mitigate the negative net worth and ultimately the Committee headed by Justice A. B. Qureshi, retired High Court

Judge, recommended deriving capital out of exceeding properties of the bank, which are not adequately utilized and thus properties are not contributing to the capital adequacy of the bank. The said recommendations were forwarded to the RBI and it is after NOC of RBI, the 3rd, 4th and 5th floors of Uttam House were sold. He submitted that 3rd, 4th and 5th floors of Uttam House were sold because of compelling reasons and therefore, it cannot be treated as voluntary sale. He further invited my attention to the findings recorded by the Courts below to the effect that by passage of time, the annual turnover of the plaintiff-bank has increased manifold. The number of branches is also increased as also capital of the plaintiff bank has also increased manifold. He submitted that the findings recorded by the Courts below are based upon appreciation of evidence, and therefore, no case is made out for invocation of powers under Section 115 of the C.P.C.

13. I have considered the rival submissions advanced by the learned Senior Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit under Section 13(1)(g) of the Act. The Suit was decreed by the learned trial Judge. In paragraph 33, the learned trial Judge noted that in the year 1953, the annual turnover of the bank was about 10 crores and in the year 1998, it is about 2000 crores. In the year 1939, when the plaintiff bank was established, the paid-up capital was Rs.10,000/- and in the year 1980, it was Rs.1 crore and in the year 1988, it was about 11 crores. 11 lac shares were fully paid up shares. In the year 1980, there were 24 branches of the plaintiff bank in Mumbai. In the year 2003, there were about 51 branches in Mumbai excluding the Head Office. It was further observed that bank has business all over India. As far as this aspect is concerned, in paragraph 53, the appellate Court has confirmed these findings.

14. As far as the sale of 3rd, 4th and 5th floor of Uttam House is concerned, after remand, the learned trial Judge has considered this aspect from paragraph 6. In paragraph 12, the learned trial Judge has considered reference of surplus property, dead weight, unutilized properties and observed that plaintiff did not submit proposal voluntarily to the RBI. In paragraph 13, the learned trial Judge observed that there were compelling circumstances for the plaintiff for selling the property of Uttam House in auction. After considering the circumstances that led plaintiff to sell the property in Uttam House, the learned trial Judge held that it was a distress sale and because of the compelling circumstances, plaintiff had to sell the property in Uttam House. After considering the evidence on record, the learned trial Judge recorded the findings in favour of the plaintiff and held that plaintiff has established that its need is both reasonable as well as bonsfide. The learned trial Judge also held that the greater hardship will be caused to the plaintiff by refusing to pass eviction decree.

15. As far as the appellate Court is concerned, the appellate Court has considered various properties in paragraph 30 onwards, after discussing each property as also considering the fact that several cases are instituted against the plaintiff bank for recovery of possession, the appellate Court held that there was no dispute that the plaintiff suffered financial crisis due to mismanagement of its banking business because of some instances of fraud and advancing unsecured loan, giving rise to NPA and loss to the Bank. In order to overcome this situation, plaintiff was compelled to sell Uttam House property under distress sale. The appellate Court has referred to the correspondence exchanged between the plaintiff bank and the RBI. After considering the evidence on record, ultimately, the appellate Court dismissed the appeal. The appellate Court also considered the submissions advanced on behalf of

the defendant No.3 on the question of sale of dead weight, unutilized properties or surplus properties in paragraph 54.

16. Thus, the Courts below, after appreciating the evidence on record, have concurrently held that plaintiff has established that it requires the suit premises reasonably and bonafide. I do not find that the Courts below committed any error in arriving at this conclusion. Defendant No.3 was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of evidence on record, no reasonable person could have come to that conclusion. Merely because, another view is possible on the basis of evidence, this Court will not be justified in exercising its jurisdiction under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

17. At this stage, Mr. Thorat orally applies for stay of the eviction decree for a period of twelve weeks from today. He states that the applicant is in possession of the suit premises and nobody else is in possession. The applicant has neither created third party interest nor parted with possession and the applicant will hereafter neither create third party interest nor part with possession. He assures that the applicant and all adult family members using/residing in the suit premises will give usual undertakings in this Court within two weeks from today with advance copy to other side, incorporating therein that:

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

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

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

(iv) they will pay arrears of rent, if any, within 2 weeks from today to the respondent-plaintiff;

(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 respondent.

18. In view thereof, notwithstanding dismissal of Civil Revision Application, eviction decree shall remain stayed for a period of twelve weeks from today subject to the applicant and all adult family members using/residing in the suit premises filing undertakings in the aforesaid terms within two weeks from today and serving copy in advance to other side. It is made clear that in case arrears upto date and compensation inclusive of 12 weeks period from today are not paid as also the undertaking in the aforesaid terms is not filed within two weeks from today, the interim order shall stand vacated without further reference to the Court.

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

(R. G. KETKAR, J.)

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