

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Civil Revision Application NO. 383 OF 2007

Vinayak Aba Sawant
(Since deceased), through L.Rs.
Shewantibai Vinayak Sawant
and others.

...Applicants

Versus

Vijay Keru Yelave

...Respondent

....

Mr. C.G. Gavnekar, Advocate for the Applicants.

Mr. Tejpal S. Ingale, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 06th June, 2016

ORAL JUDGMENT :

1. Heard Mr. C.G. Gavnekar, learned Counsel for the applicants and Mr. T.S. Ingale, learned Counsel for the respondent, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, CPC), the applicants have challenged the judgment and decree dated 2.7.2002 passed by learned Civil Judge, Junior Division, Shriwardhan in Regular Civil Suit No.39/1997 in as well as judgment and decree dated 2.2.2007 passed by learned Adhoc District Judge-1, Raigad-Alibag in Civil Appeal No.160/2002. By these orders, the Courts below

dismissed the suit instituted by Vinayak Aba Sawant, hereinafter referred to as the 'original plaintiff'.

3. Original plaintiff had instituted a suit against the respondent, hereinafter referred to as 'defendant', for recovery of possession of two rooms on the ground floor from southern side of house No.2742/1695 situate at village Shriwardhan, Taluka-Sriwardhan, District-Raigad (for short, 'suit premises'). It is the case of original plaintiff that the defendant is a monthly tenant and monthly rent is Rs.50/-. The tenancy commences as per the English calender. Defendant has paid rent upto April, 1996. The defendant has not paid education cess of Rs.59.70, Rs.48, Rs.81/-, Rs.81/-, Rs.81/-, Rs.73/-, Rs.73/- + Rs.73/- from 1987-88 to 1996-97. Defendant has also not paid rent of Rs.100/-. As the defendant did not pay the rent of Rs.100/- and education cess to the tune of Rs.635.50/-, he became defaulter.

4. Original plaintiff further alleged that in the open space abutting the suit premises, the defendant has fixed plywood partition and had made encroachment. Original plaintiff requires the suit premises *bonafide* for the business purpose of his son. Defendant has also acquired suitable alternate residence by purchasing house No.2677/1693 standing in

Survey No.164 Hissa No.4B. On these amongst other grounds, original plaintiff terminated the tenancy by issuing notice dated 26.7.1995 and demanded rent as also education cess and called upon the defendant to hand over possession. As the defendant did not comply with the notice, original plaintiff instituted the suit for recovery of possession as also for damages, rent and education cess.

5. The defendant resisted the suit by filing written statement at Exhibit-10. He admitted that monthly rent is Rs.50/-. He denied that he has to pay education cess separately. According to him, rent so fixed includes education cess. It was not agreed between the parties that the tenant has to pay education cess separately to the plaintiff. The defendant therefore contended that he is not liable to pay education cess of Rs.635/-. It was further contended that in the notice dated 21.1.1991 sent by original plaintiff and in the plaint in R.C.S. No.18/1992, original plaintiff did not mention anything about payment of education cess by tenant.

6. As far as contention about construction of plywood partition in the open space, the defendant denied the same. The defendant contended that he had fixed the same after obtaining

permission of the plaintiff. He admitted that he has purchased house No.2677/1692. He contended that said house is not suitable for residence as it is in a dilapidated condition and due to bad financial condition, he is unable to repair it.

7. On the basis of rival contentions of the parties, learned trial Judge framed issues at Exhibit-15. To prove the claim, original plaintiff examined his son Mr.Manohar Sawant as PW-1 at Exhibit-65, Mr.Maruti Vichare as PW-2 at Exhibit-145, Mr.Ramesh Pawar as PW-3 at Exhibit-146, Mr.Vikas Sawant as PW-4 at Exhibit-149 and Mr.Vijay Posture as PW-5 at Exhibit-152 and closed his evidence. The defendant examined himself as DW-1 at Exhibit-162, Mr.Manohar Dalvi as DW-2 at Exhibit-193, Mr.Khemchand Himje as DW-3 at Exhibit-196, Mr.Bhojraj Aawale as DW-4 at Exhibit-198 and Mr.Satish Gandre as DW-5 at Exhibit-200 and closed his evidence.

8. After considering the material on record, learned trial Judge dismissed the suit. Aggrieved by that decision, original plaintiff preferred Civil Appeal No.160/2002. Learned District Judge dismissed the appeal. It is against these decisions, original plaintiff has instituted above Civil Revision Application. During pendency of this Civil Revision Application, original

plaintiff expired. Civil Application No.583/2015 was taken out for bringing the present applicants being legal representatives of original plaintiff on record. By order dated 24.11.2015, said application was allowed.

9. In support of this Civil Revision Application, Mr.Gavnekar, raised following contentions :

- i. Both the Courts below committed serious error in holding that education cess is not included in the rent;
- ii. Both the Courts below committed serious error in holding that the defendant did not acquire the suitable alternate residence.

10. Elaborating the first submission, Mr.Gavnekar invited my attention to the definitions of (i) “permitted increase” in section 5(7), (ii) “standard rent” in Section 5(10)(b)(iii), as also Section 10 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). He has also taken me through the evidence of the witnesses.

11. As far as the second contention based on acquisition of suitable residence by the tenant is concerned, he submitted that the defendant admitted that he has purchased house

No.2677/1692. Once the defendant admits acquisition of alternate residence, burden is on the defendant to establish that it is not suitable. In the facts and circumstances of the present case, it cannot be said that said burden has been discharged by the defendant. He submitted that the Courts below ought to have decreed the suit on the ground that the defendant has acquired suitable alternate residence.

12. On the other hand, Mr. Ingale supported the impugned orders. He submitted that the Courts below have considered the evidence on record and in particular the evidence of PW-1 Manohar Sawant, son of original plaintiff. The Courts below have appreciated the evidence on record and have concurrently held that no material is produced on record by the plaintiff as regards payment of education cess as also proportionate education cess liable to be paid by the defendant. As far as acquisition of alternate suitable residence is concerned, after appreciated the evidence on record, the Courts below concurrently held that the premises acquired by the defendant are in a dilapidated condition and are not suitable for residence. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of CPC.

13. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. The first question that requires to be decided is whether the defendant is liable to pay education cess and whether that is included in the rent or not. Section 5(7) defines the expression "permitted increase". Section 5(10) defines the expression "standard rent" and insofar as the present controversy is concerned, relevant provision is Section 5(10)(b)(iii). Said provisions insofar as they are relevant read thus :

“5. Definitions.- In this Act unless there is anything repugnant to the subject or context,-

.....

(7) "permitted increase" means an increase in rent permitted under the provisions of this Act;

.....

10) "standard rent" in relation to any premises means,-

(a)

(b) when the standard rent is not so fixed, -
 subject to the provisions of section 11,

(i)

(ii).....

(iii) where they were first let after the first day of September 1940, the rent at which they were first let,”

14. Section 10 of the Act reads thus :

“10 - Increase in rent on account of payment of rates, etc., (1) On and after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1986, where a landlord is required to pay to Government or to any local authority or statutory authority, in respect of any premises any fresh rate, cess, charges, tax, land assessment, ground rent of land or any other levy on lands and buildings, or increase in rate, cess, charges, tax, land assessment, ground rent of land or any other levy on lands and buildings, he shall, notwithstanding anything contained in any other provisions of this Act but save as otherwise expressly provided in any other law for the time being in force, be entitled to make an increase in the rent of such premises.

Provided ,that, the increase in rent shall not exceed the amount of any such rate, cess, charges, tax, land assessment, ground rent of land or any other levy on lands and buildings, as the case may be.

(2) Where the rent is inclusive of charges for electricity and water and the landlord is required to pay any increase in these charges in respect of any premises, he shall be entitled to make an increase in the rent of such premises by an amount not exceeding the additional amount payable by him in respect of such premises on account of such increase.

(3) The amount of the increase in rent recoverable from each tenant under sub-sections (1) and (2) shall bear the same proportion as the rent payable by him in respect of his premises bears to the total amount of any such rate, cess, charges, tax, land assessment, ground rent of land or any other levy on lands and buildings, or increase in electricity or water charges, as the case may be.]”

15. As far as trial Court is concerned, this aspect is considered from paragraphs-9 to 20. In paragraph-10, learned trial Judge has considered evidence of PW-1 Manohar. After considering his evidence, learned trial Judge held that PW-1 Manohar has no knowledge of yearly education cess of the entire property. PW-1 Manohar has no knowledge of how much education cess has to be paid by each tenant. The plaintiff has also not produced documentary evidence that he has deposited education cess to the local authority. In the notice dated 25.12.1990, the plaintiff did not mention about education cess. Even in the plaint filed in RCS. No.18/1992, it was not stated that the defendant has to pay education cess separately. In paragraph-12, learned trial Judge has considered Section 10 of the Act. In paragraph-13, learned trial Judge noted that in the building where the suit premises is situate other tenant was in possession of two blocks situate on the first floor. As per Section 10(3), the landlord has to recover education cess from each tenant proportionately as per the rent of the premises. The landlord has to increase the rent and permitted increases i.e. education cess and other taxes proportionately as per the rent

and for that purpose it is necessary to bring on record entire education cess of the house property. However, there is no evidence to that effect. Learned trial Judge also recorded a categorical finding that the evidence of PW-1 Manohar reveals that he has no knowledge about the entire education cess in respect of the house where the suit property is situate. He was unable to tell share of education cess payable by each tenant. Considering this, learned trial Judge held that he has no knowledge of education cess of entire property. It is not, therefore, clear as to on what basis the plaintiff has calculated the share of the defendant of education cess to the tune of Rs.635.50/- from the years 1987-88.

16. In paragraph-14, learned trial Judge also held that the plaintiff has not explained about difference in figures of education cess mentioned in the notice dated 26.7.1995 at Exhibit-68. After considering the evidence on record, in paragraph-20, learned trial Judge held that the plaintiff has not proved that he has charged the amount of education cess proportionately on the defendant and that no specific oral evidence about payment of education cess by the defendant is

brought on record. Further the plaintiff has also not proved that he has paid the education cess to the Government.

17. As far as the Appellate Court is concerned, this aspect is dealt in paragraph-16. Learned District Judge held that the evidence does not disclose that there was any contract between the parties as regards payment of education cess. As there are other tenants in the building, it was necessary for the landlord to charge education cess proportionately as per the amount of monthly rent. However, there is nothing on record to indicate that such calculation was prepared and education cess is proportionately taken from all the tenants. Learned District Judge further held that the receipts at Exhibit-80 to Exhibit-117 did not mention anything about the education cess. The plaintiff did not give the particulars in respect of total education cess and the education cess payable by each tenant. The plaintiff also did not produce the receipts of education cess paid by him to Municipal Council, Shriwardhan. The learned District Judge observed that the learned trial Judge, therefore, rightly held that the education cess was not payable by the defendant. After considering the evidence on record, I do not find that the

Courts below have committed any error in arriving at this conclusion.

18. This brings me to the next question, namely, acquisition of suitable alternate residence by the defendant. As far as this ground is concerned, the learned trial Judge has considered this aspect from paragraphs-26 to 28. In paragraph-27, learned trial Judge considered commission report at Exhibit-205 as also evidence of Commissioner Mr. M.V. Thosar at Exhibit-201. Learned trial Judge also considered the photographs of the property produced by the plaintiff at Exhibit-74. After considering the material on record, learned trial Judge held that the house acquired by the defendant is in a dilapidated condition and is not suitable for residence. As far as Appellate Court is concerned, said aspect is considered in paragraphs-20, 22 and 28. Learned District Judge also came to the conclusion that the house purchased by the defendant is in a dilapidated condition and is not suitable for residence. The question whether the premises acquired by the defendant are suitable or not is a pure question of fact. The Courts below after appreciating the evidence on record have concurrently held that

the premises acquired by the defendant are not suitable. After considering the material on record, I do not find that the Courts below have committed any error in holding that the defendant did not acquire suitable residence. No other contention was advanced.

19. After considering the submissions advanced by the parties as also after considering the material on record, I do not find that any case is made out for invocation of power under Section 115 of CPC. The plaintiff was not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, Civil Revision Application is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs.

(R. G. KETKAR, J.)