

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

CIVIL REVISION APPLICATION NO. 258 OF 2016

Shri Vasant Dhondiram Vankudre
& Ors.

.. Applicants

Vs

Shri Amrutlal Khemchand Oswal
& Anr.

.. Respondents

Mr. N. V. Walawalkar, Senior Advocate i/b. S. M. Sabrad for the Applicants.

Mr. P. S. Dani, Senior Advocate i/b. Chetan Patil for the Respondents.

CORAM : N. M. Jamdar, J.

Date : 13 December 2016.

P.C. :

. Heard the learned counsel for the parties.

2. The Applicant has challenged the judgment and decree passed by the District Judge, Kolhapur dated 26 February 2016, in Regular Civil Appeal No. 253 of 2014 setting aside the judgment and order passed by the Civil Judge, Junior Division, Kolhapur dated 7 June 2014, whereby the learned Civil Judge dismissed the Suit No. 596 of 2009 filed by the Respondent-landlord. The learned District Judge accepted the case of the Respondent-landlord that the suit

property is needed for reasonable and bonafide need of the Respondent-landlord and his family.

3. The premises consists of both of residential and commercial uses. The residential part is on the first floor and the commercial part is the shop on the ground floor.

4. Mr. Walawalkar, the learned Senior Advocate for the Applicant firstly submitted that earlier a Suit bearing No. 485 of 2000 was filed by the Respondent seeking possession of the premises on an identical ground, pleading requirements of the family of the Respondent-landlord both for commercial as well as residential use and the suit was initially decreed, however, in Appeal the learned District Judge has held in favour of the Applicant. He submitted that the Respondent-landlord thereafter filed a Writ Petition as well as Special Leave Petition which were dismissed on 11 August 2004 and 7 November 2005. Mr. Walawalkar submitted that even assuming the earlier decision, does not constitute *res judicata* to institute the subsequent suit, a clear finding given in the earlier suit whereby the Courts unequivocally held that the Applicant had disproved the case of the Respondent-landlord, the same need could not have been pleaded again. Mr. Walawalkar relied upon the definition of “disproved” under Section 3 of the Evidence Act to contend that there is a distinction between “not proved” and “disproved”. He submitted that the reason why earlier suit was dismissed is also

pertinent, that is that the Respondent-landlord had sold the premises in his ownership in the very locality and had taken premises on rent, which no prudent person would do. It was contended that even assuming, the residential user may have undergone a change, there is no change whatsoever in respect of commercial premises as earlier also need of the son of the Respondent-landlord was pleaded. Mr. Dani the learned Senior Advocate for the Respondent on the other hand submitted that the time span between the two litigations will have to be taken note of and the subsequent events.

5. As far as subsequent suit on the ground of bonafide requirement, there is no question of any *res judicata*, in view of the decision of the Apex Court in the case of *Surajmal V/s. Radheyshyam in 1988 3 SCC 18*. The earlier suit was filed in the year 2000, the suit having been filed in the year 2009, and the Revision is being now considered in the year 2016. The present suit was instituted after 9 years. The learned District Judge, has rightly taken note that the family of the Respondent has now grown, his son has now been married and has a daughter. Daughter of the Respondent-landlord is also now college going girl. In the circumstances, the growing need of residential premises has been taken into by the learned District Judge, cannot be stated to be not bonafide.

6. As regard the commercial premises is concerned, it is no doubt correct that in the earlier round of litigation requirement of son

was also mentioned. However, the son now has grown up and married and as an independent family need to start his own business. The Respondent-landlord is conducting business in a tenanted premises and also the owner of the said premises has filed a suit one suit is decreed or one dismissed and appeals are pending. These facts do constitute a substantial change from the earlier position. As far as the selling of the shop and moving into tenanted premises are concerned that event, as on today, has occurred 16 years prior. At that particular time this conduct of the Respondent-landlord may have been found to be overwhelming enough to keep aside all other requirements of the Respondent-landlord, but by passage of time this event has lost most of efficacy and does not any more constitute a single factor that will override the need of the landlord pleaded in the present litigation. In these circumstances, except for the action of landlord selling one of the premises, which has taken place approximately 16 years ago, nothing substantial has been shown to interfere with the finding of fact that the premises are bonafide needed by the Respondent-landlord so as to interfere with the findings of fact. In the circumstances, the learned District Judge, has not committed any error of jurisdiction, neither the conclusion is perverse. The revision application, therefore, cannot be entertained and is accordingly rejected.

7. At this stage, Mr. Walawalkar orally applies for protection against eviction for a period of twelve weeks from today. On a

condition that three weeks from today, the Applicant will file usual undertaking disclosing the names of persons who are using / occupying suit premises and also file their usual undertaking, that they are in actual possession of the suit premises and nobody else is in possession, and they have so far neither created third party interest nor parted with the possession of the suit premises, and will not create any third party interest nor part with the possession of the suit premises and that they will pay the arrears of rent, if any to the respondents within three weeks from today, then notwithstanding the dismissal of the Civil Revision Application, subject to above the decree will not be executed for twelve weeks from today. In case the Applicants do not file undertaking in the above terms and/or arrears of rent are not paid within three weeks from today, the interim order shall stand vacated without further reference to the Court.

(N. M. Jamdar, J.)