

Sequeira

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

WRIT PETITION NO. 2993 OF 1995

Madhusudan Bhimrao Nandurkar

since deceased –

Through his Legal Heirs and representatives:

1. Smt.Bhagirthibai Madhusudan
Nandurkar, Age 78 -
since deceased through her L.Rs.
Petitioner No.2, 3, 5, 6.
2. Arvind Madhusudan Nandurkar,
Age 45,
3. Mukund Madhusudan Nandurkar,
Age 43,
4. Shakuntala Madhusudan Nandurkar,
Age 48,
since deceased through her L.Rs.
Petitioner No.2, 3, 5, 6.
5. Smt.Shalini Shamrao Kulkarni,
Age 53,
6. Sou.Sujata Satish Kulkarni,
Age 42,

All R/o 61-A, Navi Peth, Nandurkar
Wada, Solapur.

.. Petitioners / Ori.
Plaintiffs.

Versus

1. Purushottamdas Pranjivandas
Suratwala,
since deceased – through his L.Rs.
Respondent No.1 -a to 1-f.
- 1-a. Smt.Hansaben Purshottamdas
Suratwala,
(Solapurwala), Age-74, Occu-
Household,
R/o Mansarowar Hsg. Society,
Adagan Road, Surat, Gujarat State.
- 1-b. Smt.Geeta Vinodchandra Bagat,
Age-55, Occu. - Household,
R/o – As above.
- 1-c. Smt.Sudhaben Dineshchandra
Halwawala,
Age-53, Occu. - Household,
R/o – As above.
- 1-d. Smt.Lataben Pankaj Modi,
Age-50, Occu. - Household,
R/o – As above.
- 1-e. Shri Pradipbhai P.Suratwala
(Solapurwala),
Age-43, Occu. - Business,
R/o – As above.
- 1-f. Smt.Bhavarben Vinitkumar Kapadia,
Age-40, Occu. - Household,
R/o – As above.
2. M/s.K.I.Suratwala & Company,
partnership firm partner
Shri Ishwarlal Pranjivandas
Since deceased through his L.R's.
Respondent No.2-a to 2-d.

- 2-a. Mr.Ashok Ishwarlal Suratwala,
Age 45, Occ-Business R/o 27,
Navi Peth, Solapur.
- 2-b. Mr.Kiran Ishwarlal Suratwala,
Age 44, Occ-Business R/o 27,
Navi Peth, Solapur.
- 2-c. Mrs.Jyoti @ Amisha Ashok
Chaliyawala
Age 51, Occ-Household, R/o 11
/1695 Machhali Pith, Shahapur,
Before New Sai Temple, Surat,
- 2-d. Mrs.Swati Rajesh Gandhi,
Age 49, Occu – Household,
R/o 1001 A Suryarath Apartment
Adajan Sardar Bridge, Surat. .. Respondents

Mr. A.B. Tajane, for Petitioners.

Mr.N.J.Patil, for Respondent Nos.1 -a to 1 -f and 2-c to 2-d.

***CORAM : N.M.Jamdar, J.
Friday, 25 November 2016.***

Oral Judgment :

The Petitioners-landlords have challenged the judgment and order passed by the District Judge Solapur reversing the judgment and decree passed by the Civil Judge Senior Division, Solapur. The learned Civil Judge had decreed the suit filed by Petitioners-landlords and had directed the Respondents-tenants to hand over vacant and

peaceful possession of the suit premises.

2. The suit premises are two rooms bearing no.3 and 4 in the Municipal House No.61-A situated at Goldfinch Peth, Solapur. Regular Civil Suit No.195 of 1986 was filed by Petitioners / original Plaintiff for possession of the suit property on the ground of sub-letting by the Respondent No.1/ original Defendant No.1 in favour of Respondent No.2 / original Defendant No.2; on the ground of non-user of the premises; for causing damage to the suit property; for bonafide requirement of Petitioners; for change of user of the premises; and that the premises were required for the purpose of demolition by the Municipal Corporation. Respondent No.1 is an individual, Respondent No.2 is a partnership firm. On behalf of Petitioners five witnesses were examined. Neither Respondent No.1 and nor the partners of the Respondent No.2 stepped in the witness box and on their behalf the accountant of the Respondent No.2 firm, was examined. The learned Civil Judge, after considering the material on record and perusing the evidence led by the parties decreed the suit on the grounds of sub-letting by the Respondent No.1 to Respondent No.2, non-user of the premises, bonafide requirement of Petitioners and change of user of the premises. The claim of the Petitioners that the premises were required for immediate purpose of demolition was rejected. The learned Civil Judge held that greater hardship would be caused to Petitioners if the decree is refused. The learned Civil Judge by the Judgment and Order dated 11

May 1992 decreed the suit and directed the Respondents to hand over vacant possession of the premises. Appeal bearing No.178 of 1992 was filed by the Respondents in the District Court Solapur. The learned District Judge held that there was no subletting by the Respondent No.1 to Respondent No.2 as the premises were initially leased to the joint family consisting of Respondent No.1 and thereafter it was transferred to family business partnership of Respondent No.2. The learned District Judge held that the Respondent No.2 is protected by virtue of the amendment of the year 1987 to the Bombay Rent Act, 1947 which has protected sub-tenancies prior to 1 February 1973. As regards the change of user, the learned District Judge held that there was no change of user and the user continued to be of a shop. The learned District Judge also held that there was no non-user of the premises. As regards bonafide requirement, the learned District Judge held that the Petitioners had not proved their bonafide requirement and therefore, issue of comparative hardship did not arise, however if the issue of bonafide requirement was proved then the hardship could be caused to the Petitioners. On these grounds the learned District Judge allowed the Appeal by judgment and order dated 8 April 1994 and set aside the judgment and decree passed by the learned Civil Judge. Rule was issued in this writ petition and interim relief was granted.

3. Heard Mr.A.B.Tajane, learned counsel for the Petitioner and Mr.N.J.Patil, learned counsel for the Respondents.

4. Mr.A.B.Tajane, the learned counsel for the Petitioners has pressed this petition on the ground of bonafide requirement of the Petitioner landlord, creation of sub-tenancy by the Respondent No.1 in favour of Respondent No.2 and change of user of the suit premises from godown to a shop. As regards the contention that the premises are required for demolition by the municipal authorities, both the Courts have held against the Petitioners and Mr.Tajane has also not pressed this ground.

5. The first ground of eviction urged by Mr.Tajane is sub-letting by Respondent No.1 to Respondent No.2. It is contended that this has resulted in the breach of Section 13(1)(k) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The Petitioners have asserted in the plaint that the suit premises were given to Respondent No.1 alone for the purpose of using it as a godown and Respondent No.2 has no concern with Respondent No.1. The Respondent No.1 is not a partner of Respondent No.2. The Respondent No.1 in the year 1959, without the permission of the Petitioners created sub-tenancy in favour of the Respondent No.2. It is contended that it is partners of Respondent No.2 who are carrying on business in the suit premises, which they have no right. The Petitioners have never recognised Respondent No.2 as a tenant of the suit premises. The learned Civil Judge considered the evidence of the parties on the ground of sub-letting and took note of partnership

deed of Respondent No.2 executed on 18 February 1953. The learned Civil Judge granted decree on the ground of sub-letting. The learned District Judge reversed the finding of fact holding that the premises were initially let out to joint family of Respondent No.1 and the business of joint family in the name of K.I.Suratwala was converted into partnership. The learned District Judge held that the premises were let out to the joint family business, even though the rent receipt was executed in favour of the Respondent No.1 alone. The learned District Judge observed that the fact that though Prajivandas was the karta of the family looking at the age of the parties it had to be considered that the business was joint family business. Mr.Tajane assailed this finding contending that there was no evidence at all to demonstrate that the premises were let out to the joint family of Respondent No.1. While it is the case of Mr.Patil that the finding of fact rendered by the learned District Judge that it was let out to joint family, is correct.

6. Firstly it has to be taken note that the rent receipt was issued in favour of Respondent No.1 alone. It is the Respondent No.1 who paid the rent and kept paying the same till the year 1986. Respondent No.1 is not the partner of Respondent No.2 firm. The recital in the partnership deed of 18 February 1953 is as under -

“Whereas the said business was formerly in the ownership of Prajivandas Nathubai Suratwala as karta of the said Hindu Joint Family”

In the partnership deed itself it is mentioned that Prajivandas Nathubai Suratwala is the *karta* of the joint hindu family. The Respondent No.1 is not a karta of the joint family as per this recital. The learned Civil Judge also took note of the rent receipt issued to Respondent No.1 on 13 April 1952 which contained an embargo that the Respondent has no right to sublet the premises. The partnership registration certificate was also placed on record which contained the names of the partners. The address of the partnership was also stated in the said deed. The partnership came into existence on 19 October 1952 and therefore, it was rightly observed by the learned Civil Judge that the Respondent No.1 could not have taken the suit premises on behalf of a non-existing firm. It was also brought on record that the Respondent No.1 left Solapur and settled elsewhere and it was Respondent No.2 who carried on the business. It was Prajivandas who was the karta of the joint family. In normal circumstances, if the tenancy is taken for the joint family business, the rent receipt would be in the name of the eldest member i.e. karta of the family. The joint family consisted of four persons and why the rent receipt was taken in the name of the Respondent No.1, the junior member in the family alone, if it was a joint family business was for the Respondents to explain. Once the Petitioners had discharged the burden of demonstrating that the premises were let out to Respondent No.1 and Respondent No.2 was in occupation the burden had shifted on the Respondents. Neither the Respondent No.1 nor partners of the Respondent No.2 entered the witness box to explain the position.

Instead the Accountant of the Respondent No.2 firm was examined. This witness admittedly is not a member of the joint family. This witness admitted that there is no rent receipt in the name of Respondent No.2. Therefore, when there was no evidence led by the Respondents, as to in what circumstances the rent receipt came to be executed in favour of Respondent No.1 inspite of him not being karta, the learned District Judge could not have reversed the finding of fact that the suit premises were given to Respondent No.1 alone which stood transferred to Respondent No.2 firm.

7. Mr.Patil the learned counsel for Respondents submitted that this factual position however will not enure to the benefit of the Petitioners for a decree on the ground of subletting in view of the statutory position. Mr.Patil, the learned counsel for Respondents relied upon the decision of the learned Single Judge of this Court in the case of *Lakhichand Punamchand since deceased by heirs Pramilabai Punamchandji Ladha and ors. Vs. Thakusheth Tukaram Barse – [1991] Mh.L.J. 34*, and contended that, even assuming subtenancy was created in favour of Respondent No.2, it was admitted before 1 February 1973 in view of section 25 of the Amendment Act of 18 of 1987, no decree can be passed against the Respondent No.2 on the ground of sub-letting as rightly held by the learned District Judge. The learned Single Judge in the case of *Lakhichand* held that by virtue of Amendment Act of 18 of 1987 which came in force on 1 October 1987, amending the Bombay Rents, Hotel and Lodging

House Rates Control Act, the sub-tenancies created before 1 February 1973 stood regularised and therefore sub-tenancies created before 1 February 1973 can not be considered as illegal tenancies. In the present case, as per the finding of fact rendered by both the Courts the sub-tenancy created in favour of Respondent No.2 is prior to 1 February 1973. In these circumstances the learned District Judge was right in holding that decree could not have been passed on the ground of breach of section 13(1)(k) of the Act. The benefit of the Amendment Act 18 of 1987 will have to be extended to the Respondents.

8. Next ground urged by Mr.Tajane is breach of section 13(1)(k) of the Act, that is the change of user of the premises. It is urged by Mr.Tajane that the premises were initially let out for purpose of godown and subsequently they have been converted into shop premises. It is the contention of Mr.Tajane that there is a clear admission to that effect by the Respondents in the earlier round of litigation. The learned Civil Judge considered this aspect of the matter and noted the cross-examination of Chandrakant Pranjivandas Suratwalla in Regular Civil Suit No.483 of 1977 wherein this witness referred to the premises as being used as a godown of tobacco and matches. The learned Civil Judge found that this was a corroborative piece of evidence to buttress the case of the Petitioners. Based on this material the learned Civil Judge came to the conclusion that there was change of user. The learned District Judge reversed this finding

holding that there was no sufficient evidence placed on record that initially the premises were let out for the purpose of godown. The learned District Judge examined Exhibits 141 and 142 and found that these licenses were not for go-down but only for storage of the articles for purpose of selling the same. The learned District Judge thereafter took note of the averments of the Petitioners in the notices Exhibit Nos.123 and 124 issued on 27 April 1955 wherein the Petitioners have stated that the Respondents were tenant of the premises for the purpose of running a shop. Therefore, the Petitioners primarily relied on the admission stated to be given by one of the partners of the Respondent No.2 in the earlier round of litigation as a foundation for the case of change of user. The premises have been let out as far back as the year 1951. Therefore, for what exact purpose they were initially let, by passage of time, is not easy to determine, especially when the difference is between a godown or a shop which also requires storage of articles, is marginal. Except for the statement made in the earlier round of litigation, no other admission either in evidence in the present suit or by way of documentary evidence has been placed on record by the Petitioners. The Plaintiff himself in the notice stated that the premises were let out for the purpose of running a shop. Therefore, the learned District Judge reconciled the admission given in the other proceedings and the documentary evidence in the present case and rendered a factual finding that the premises were initially let out for a shop. The statement made in the another suit has not been found to be unequivocal by the learned District Judge

in view of the other evidence led in the present suit. There is no perversity in the approach of the learned District Judge. Also the allegation of non-user, as ground under section 13(1)(k) of the Act is based only on change of user, cannot accrue to the benefit of the Petitioner.

9. Turning now to the main point that is pressed into service by the Petitioners, that is of bonafide requirement. In the plaint Petitioners-Plaintiff have narrated the need of the Petitioners-Plaintiff stating that he is in possession of two rooms on the first floor and room on the ground floor of municipal house no.61 and also in possession of room on the first floor of municipal House No.61-B. It was stated that the family of Petitioners consists of ten members which consists of three couples and the accommodation is not sufficient for their residence and occupation. It was stated that the premises are also required for the purpose of starting business for his two sons. The Petitioners-Plaintiff and his wife are elderly and it is not possible for them to climb up to the first floor as they suffer from various ailments. It was asserted that the Respondents have ample premises and do not require the premises and the premises in their possession have been let out and Respondent No.1 has permanently settled in Surat. In furtherance of these pleadings in the plaint, oral evidence was also led by the Petitioners. The Petitioners-Plaintiff stepped in the witness box and deposed in furtherance of the need of the Petitioners. In the evidence the Petitioners-Plaintiff reiterated

that the family had ten members and the premises in their possession was not adequate. The details regarding the properties owned by the Respondents were also placed on record. On behalf of the Respondents Appayya Bassayya Hiremath, the Accountant of Respondent No.2 was examined. This witness was cross-examined by the Petitioners regarding bonafide requirement. In the cross-examination Shri Hiremath accepted that the son of the Petitioner runs his bag business in the space of 4 ft. x 4 ft. Shri Hiremath also accepted that both the sons of the Petitioner are married and the daughter and grand-son of the Petitioner - Plaintiff resides along with Petitioner - Plaintiff. He also admitted that Respondent No.1 is residing permanently in Surat. The learned Civil Judge took note of the pleadings of the Petitioners-Plaintiff and held that the bonafide requirement of the Petitioners for possession of the rooms stood proved. The learned Civil Judge took note that three couples were residing in the family of Petitioners, they require privacy and one family would require atleast two / three rooms and therefore the premises in possession of the Petitioners were insufficient and the premises also were required for the purpose of business. After holding in favour of the Petitioners on the ground of bonafide requirement, the learned Civil Judge considered the issue of comparative hardship. The learned Civil Judge held that there are various premises in favour of the Respondents. The learned Judge found that one house of the Respondents was barely 20 feet from the suit shop. The House No.29 was at the distance of 100 feet from the

suit shop for his residence. The House no.29 consisted of 21 rooms. Out of 21 rooms nine rooms were in possession of Respondent No.1 and his three brothers. Besides these properties the Respondents had godown and twenty plots, out of some plots were sold and some were still in possession of Respondents. The Respondents owned 20 to 25 rooms in Patwardhan chawl and also a three acre agricultural land and chawl of 31 rooms. The learned Civil Judge also considered the issue of goodwill and found that no hardship would be caused to the Respondents if decree on the ground of bonafide requirement is passed in favour of the Petitioners.

10. The learned District Judge, however, came to the conclusion that the Petitioners-Plaintiff had not crossed the initial threshold of proving the bonafide requirement. In the evidence the Petitioners-Plaintiff had given the number of members in the family. It was stated that there are three couples in the family of the Petitioners. The Petitioner has two sons, married daughter and the Petitioner and his wife and there are children as well. The learned District Judge came to the conclusion that there are eleven rooms, out of which eight rooms are available to the Petitioners excluding the premises in the possession of his son in law. The learned District Judge concluded that the requirement itself is not bonafide. The learned District Judge held that it is true that Respondent has ample premises and in much better financial position but issue of comparative hardship will not arise since bonafide requirement was not proved. This conclusion is

perverse. On the face of it when there are ten members in the family and out of which there are three couples, and eight rooms are available there was nothing wrong in the finding recorded by the Civil Judge that each family would require atleast two to three rooms to live comfortably. The bonafide requirement will have to be understood in conspectus of all the surrounding facts and circumstances, including the status of the parties. The ten members of the family of landlord who are forced to stay in eight rooms and their desire to have more space for residence and business is criticised as not bonafide by a tenant who has ample premises of his own and is in better financial position than the landlord. If the Respondent-tenant has various premises, plots, chawls with 21 rooms and 31 rooms and his financial position is extremely sound, then it will be absurd to hold that the desire of the Respondent-landlord to enjoy the similar level of affluence as the tenant, is not bonafide. Requirement is also of starting a shop by the sons of the Petitioner. Mr.Patil submitted that one of the son is working in the Municipal Corporation and he does not need the premises to start the business. This may be a resultant situation for non-availability of the premises. Secondly, the requirement of the landlord cannot be measured in inches and centimetres, but must be adjudged reasonably. Looking at the time span the litigation usually takes, the landlord institutes the suit considering the future need of the family. Therefore, the finding of the learned District Judge that the landlord did not cross the first step of proving the requirement itself, is a finding that cannot be

sustained.

11. Mr.Patil relying on the decision of the Apex Court in the case of *S.P.Chengalvaraya Naidu (Dead) by Lrs. Vs. Jagannath (Dead) by Lrs. and others – (1994) 1 Supreme Court Cases 1* and of the learned Single Judge in the case of *Abdul Samad Makhadum Baksh Shaikh Vs. Sudha Akant Parakhe - 1982 Mh.L.J. 647*, contended that the Petitioner landlord ought to have disclosed the rooms in his possession correctly and he had come to the Court stating that he has only 4 to 5 rooms and during the course of trial it has transpired that he has 11 rooms and therefore, the stand taken by the Petitioner landlord is fraudulent and no relief can be granted in favour of the Petitioner. In the case of *S.P.Chengalvaraya Naidu*, the Apex Court was considering the case where the Respondent-Plaintiff therein had filed an application for final decree of partition. At that time the Applicants had contested the application on the ground that the preliminary decree was obtained by fraud. The trial Judge had found that one of the parties therein, who had no right to the property, without disclosing the fact executed the lease deed and thereafter suit for partition of the property was instituted. The Apex Court examined the entire factual conspectus of the matter and came to the conclusion that there was a fraud played on the Court and thereupon proceeded to uphold the decision of the trial Court recording the same. In the case of *Abdul Samad* the learned Single Judge was considering the case wherein the landlord had not given necessary

details which were required for grant of relief under section 13(1)(g). The learned Judge found that mere pleading of the landlord that he requires the premises for his personal use is not enough. In a given case, the landlord may come to the Court with an fraudulent case and with gross suppression of facts and in such case the Court may be justified in non-suiting the landlord. But before taking a step of non-suiting the landlord on the ground of fraud or suppression of facts, the totality of circumstances must be kept in mind. In the present case the landlord had deposed in respect of the members of the family. He had stated about the rooms that were available. Thereafter he proceeded to narrate the requirement of his sons. The Petitioner stepped in the witness box and offered himself to cross-examination, which the Respondent No.1 or any partner of Respondent No.2 avoided to do. Thereafter the Respondents had full opportunity to cross-examine the Petitioner-Plaintiff and based the arguments on the cross-examination of the Petitioner-Plaintiff's witness. The learned trial Judge, based on this evidence accepted the need of the landlord while the Appellate Court did not find that the requirement existed. Therefore having once gone through the entire trial where all the parties had opportunity to present their case and that Respondents did not offer themselves for cross-examination by stepping in the witness box, looking at the equities of the matter, this is not the case where straightaway the case of the Petitioner landlord can be thrown out on the ground that initially he had stated that he had five rooms and that in the deposition it was shown that he had

shown eight rooms. Even assuming the case at the highest that eleven rooms were available, still is not sufficient for the need pleaded by the landlord. Therefore, relying on these two decisions, case is not made out in the facts and circumstances of the present case to non-suit the Petitioner landlord on the ground of non disclosure and fraud.

12. Having held that the learned District Judge was in error in concluding that the Petitioners had not proved their bonafide need, the question of comparative hardship arises. The learned District Judge has categorically held that there would be no hardship at all to the Respondents if the decree is passed on the ground of bonafide requirement, as the financial status of Respondents is very sound and that they have various properties in their possession in the city. The learned District Judge however has held that because bonafide requirement is not proved the issue of comparative hardship does not arise.

13. As regards the premises in possession of the Respondents. The witness of Respondents has accepted that the Respondent No.1 has shifted and resides permanently at Surat with his family since 1984 and the other Respondents own house no.29 which admeasures 3600 sq.ft. He has admitted that House no.29 has roads on all four sides. He has admitted that Respondents are running their business in Municipal House No.29. It is also admitted that the Respondents

own six plots situated at Bhavani Peth vary between sizes of 3000 to 3500 sq.ft. Witness admitted that the Respondents have 3 acres agricultural land. He also admits that they own a chawl which has 31 rooms. He has further admitted that the municipal house no.60 is used as godown cum-shop by the Defendants. Witness has also admitted that there are certain premises which have been let out to tenants. In these circumstances, it is clearly established that Respondents / tenants are in very good financial condition and they have substantial number of other premises available to them, contrary to the position of the Petitioners. Nothing is shown that Petitioners have any alternate premises than the one on record. This position is even accepted by the learned District Judge while dismissing the appeal of the Petitioners. A completely perverse view is taken by the learned District Judge in allowing the Respondents, who have various plots, buildings, godowns, shops to defeat the need of landlord, who has no other premises, that ten members in the family require additional two rooms, on the ground that the need itself isn't proved.

14. In the circumstances, it will have to be held that the Petitioners have proved their case on the ground of section 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act of 1987 and the learned District Judge was in error in reversing the decree on the ground of 13(1)(g) of the Bombay Rent Act, which was granted by the learned Civil Judge. In view of the above discussion the Writ

Petition deserves to be allowed, which is accordingly allowed. Rule is made absolute in terms of prayer clause (b). No order as to costs.

15. If the rent has not been paid by Respondent-landlord as urged by the learned counsel for the Petitioners then it will be open to the Petitioners to execute the same as part of the decree.

16. A prayer for stay of twelve weeks for the judgment and order was made by Mr.Patil and when it was pointed out that the protection will be upon tendering an usual undertaking, the request was not reiterated.

(N.M.Jamdar, J.)