

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5966 OF 1995

Gopal Gangadhar Pendse

.. Petitioner

-Versus-

Mrs. Hirabai Gahjanaj Mule

..Respondent

Mr. A.V.Anturkar, Senior Counsel with Mr. Prathamesh Bhargude for
petitioner

None for respondent

CORAM : R.G.KETKAR, J.
DATE : 22nd September 2016.

P.C.

1] Heard Mr. Anturkar, learned Senior Counsel for petitioner at length. Office remark shows that court notice was issued to the respondent and he is duly served. However none appears on behalf of respondent.

2] By this petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as defendant, has challenged the judgement and decree dated 25th September 1995 passed by the learned District Judge, Pune in Civil Appeal No.428 of 1993. By that order the learned District Judge allowed the appeal preferred by the respondent hereinafter referred to as the plaintiff and quashed and set aside the judgement and decree dated 31st March 1992 passed by the learned

Additional Judge, Small Causes Court, Pune in Civil Suit No.1027 of 1990. The learned District Judge decreed the suit instituted by the plaintiff and directed the defendant to deliver actual possession of the suit premises more particularly described in paragraph 1 of the plaint. The learned District Judge ordered enquiry in to the mesne profits under Order XX Rule 12(1)(c)(1) of the C.P.C. Learned Judge also granted six months time to defendant to vacate suit premises.

3] The plaintiff has instituted the suit against the defendant, inter alia, contending that the suit premises was let out to the defendant for residential use. However, the defendant has changed the user from residential to commercial and started business of massage without obtaining the requisite licence. In short the plaintiff has invoked the ground of change of user as contemplated under section 13(1)(a) of the Bombay Rent Control Act. In addition to this ground the plaintiff also invoked the ground of nuisance and annoyance to the adjoining occupiers as contemplated by section 13(1)(c) as also defendant carrying permanent additions and alterations without permission of the landlord as contemplated under section 13(1)(b). The plaintiff claimed possession on the ground that the defendant has acquired suitable alternate premises under section 13(1)(l).

4] The defendant denied the assertions by filing written statement. On the basis of pleadings of parties, the learned trial Judge framed the issues. After considering the evidence on record the learned Judge dismissed the suit. The plaintiffs preferred the appeal, which as indicated earlier, was allowed. The learned Judge held that the plaintiff has established the ground of change of user and accordingly decreed the suit. Aggrieved by this order, the defendant has instituted the present petition.

5] In support of this petition, Mr. Anturkar submitted that the learned trial Judge after appreciating the evidence on record held that the plaintiff failed to establish any of the grounds and more particularly the ground of change of user. He submitted that while allowing the appeal, the District Judge relied upon the interview given by the defendant which appeared in daily "Kesari" on 7th November 1992. The said document was not admitted in evidence and was not marked as Exhibit. As the said document was not admitted in evidence, the learned District Judge could not have relied upon the said material. That apart, the plaintiff also did not follow the procedure for leading secondary evidence as contemplated by section 65 of the Indian Evidence Act, 1872. In support of his proposition he relied upon a decision of Supreme Court in Amarnath Agarwalla Vs. Dhillon Transport Agencies, reported in 2007 (4)SCC 306

and in particular para 4 thereof.

6] He submitted that the learned District Judge could not have looked into the interview for deciding the appeal against the defendant. He further submitted that the learned Judge also did not consider the dominant user of the suit premises viz., whether the dominant user was for residential purpose or for commercial purpose. He has taken me through the impugned order and more particularly paragraphs 12 and 13 thereof. In paragraph 13, the learned District Judge dealt with the interview of the defendant published in daily “Kesari” and by considering the stray sentence in the interview held that the defendant was using the suit premises for carrying on business of Massage and, therefore, it amounts to change of user. In same paragraph the learned Judge dealt with this submission about dominant user of the suit premises and observed that the defendant did not come with the case that he is carrying on commercial activity in part of the suit premises and the dominant user of the suit premises is not changed at all. In the absence of such pleading to infer that the dominant user of the suit premises is not changed, would be a convenient case for defendant. He submitted that the approach of the District Judge is perverse and, therefore, the petition requires to be allowed. He relied upon the decision of Apex Court in the case of M/s.Atul Castings Ltd. Vs. Bawa Gurvachan Singh reported in

2001 (5)S.C.C. 133 and in particular paragraphs 13 and 14 to contend that the learned Judge ought to have considered the dominant user of the suit premises was for residential purpose.

7] I have considered the submissions advanced by Mr. Anturkar. I have also perused the oral evidence as also the impugned orders. Perusal of the record and particularly the cross examination of the defendant shows that the defendant was confronted with interview that was published in daily "Kesari" on 7th November 1992. He admitted that his interview was published in daily "Kesari". Perusal of the cross examination does not indicate that objection was raised on behalf of the defendant for putting his question. In fact, in my opinion, once the defendant admitted that his interview was published in daily "Kesari" and also did not dispute the said fact, the learned trial Judge should have marked this document as exhibit and should have admitted the same in evidence.

8] Mr. Anturkar invited my attention to the testimony of defendant wherein he deposed that he never used the suit premises for business. He is not preparing any oil in the premises and that no complaint was received from the Corporation. He used to visit the house of patients and massage them. In other words, the suit premises was used only for

residential purposes and no commercial activity is carried on in the suit premises. In fact in cross examination also he denied that he was doing massage in the suit premises.

9] It is not possible to accept this submission as perusal of cross examination coupled with newspaper cutting shows that in the interview the defendant specifically stated that patients from out of Pune are also visiting him. He has also mentioned address of suit premises. The learned District Judge has considered this aspect in paragraph 12. Learned Judge observed that in the cross examination the defendant admitted that people are visiting his premises for consultation and that he has given address of the suit premises. If these two statements are read together it gives a totally different picture. It was further observed that no material is brought on record by the petitioner to show that he has any other premises located in Pune for running the business. The learned Judge also observed that on this probability the conclusion is inevitable that the defendant is running his business in the suit premises. For the reasons recorded in paragraph 12, I do not find that the learned Judge has committed any error in holding that the plaintiff has established ground of change of user. This is to be appreciated on the backdrop of the fact that while dismissing the suit the trial Judge did not record any finding on the ground of change of user and the trial Judge has discussed

the ground of change of user from paras 10 to 13. In these paragraphs learned Trial Judge has discussed the evidence adduced by the parties in the examination in chief and in cross examination. Learned trial Judge however did not give any reasons and recorded finding in one sentence, *“that from the evidence on record, I hold that the plaintiff failed to prove her case”*. In my opinion, the learned District Judge rightly interfered with the trial court's judgement.

10] As far as the contention advanced by Mr. Anturkar that the learned District Judge did not consider the dominant user of suit premises is concerned, in paragraph 13, the learned Judge observed that no such case was pleaded by the defendant. As there was no pleading, consequently, the defendant could not have led the evidence. Even otherwise, from the evidence of the defendant, no such case is also proved. The defendant did not admit carrying on any commercial activity in the suit premises. On the other hand, the defendant emphatically contended that he is using the suit premises for residential purpose. Even that stand was maintained during the course of evidence.

11] Mr. Anturkar relied upon the decision of M/s. Atul Castings Ltd. (supra). In that case the appellant was inducted in premises consisting six bedroom house. The respondent landlord instituted the suit on the

ground of change of user. In paragraph 13 the Apex Court dealt with the issue as to whether the use of one of the room to do some office work and use of the said room as study amounts to change of user. In paragraph 14 the Apex Court dealt with the argument and observed that there was no specific clause in the agreement that the applicant shall not even use one room as study for the members of the family or shall not use one room to do any office work at home. It was further observed that there was no evidence to show that office of the appellant company was functioning or that any transaction or any regular business of the company was carried on nor public used to visit the building as the office of the company. It was further observed that it is not uncommon that the officials, executives, officers, businessmen, industrialists and people engaged in the other vocations may have some home work to do.

12] In my opinion, the said decision does not advance the case of the defendant, more so, when no case was pleaded about dominant user of the suit premises. Hence, I do not find that the learned District Judge has committed any error in allowing the appeal. The petition fails. Rule is discharged with no order as to costs.

(R.G.KETKAR, J)