

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

CIVIL REVISION APPLICATION NO. 522 OF 2016

Shri Ashok Zumbar Ware, since ..Applicants
deceased, through legal heirs
Smt. Suman Ashok Ware and
Ors.

Vs

Shri Vilas Sitaram Keshemalyani .. Respondent

Mr. Sugandh B.Deshmukh, Advocate for Applicants.

CORAM : R.G.KETKAR,J.
DATE : 19/09/2016

PC:

1. Heard Mr. Sugandh Deshmukh, learned counsel for the applicants at length.
2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), Applicants, hereinafter referred to as 'defendants', have challenged the Judgment and decree dated 4.5.2013 passed by the learned 2nd Jt. Civil Judge, Jr. Dn., Nashik in Regular Civil Suit No. 295 of 2010 as also the Judgment and decree dated 8.3.2016 passed by the learned District Judge-8 Nashik in Civil Appeal No.180 of 2013. By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as 'plaintiff', under sections 15, 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999.

3. Plaintiff has instituted suit for recovery of possession of premises consisting of two rooms on the ground floor of Municipal House No.4138, Ganeshtek, situate within the municipal limits of Nashik Municipal Corporation, (for short, 'suit premises'), inter alia, on the ground that the defendants are in arrears of rent from 1.3.1989 to 31.12.2009 to the tune of Rs. 4000/- (monthly rent @ Rs.16/-x250 months). He had issued demand notice dated 1.12.2009. The defendants received the notice, they gave reply. However, the defendants did not pay the amount claimed in the notice. The plaintiff further claimed possession on the ground of reasonable and bonafide requirement on the ground that the plaintiff and his wife are suffering from Arthritis in the knee and doctor has advised them not to climb the staircase. The plaintiff along with his wife is staying on the first floor. As the suit premises is situate on the ground floor, they require the suit premises reasonably and bonafide. The plaintiff further contended that the defendants have shifted residence in new house and they are not using the suit premises as contemplated by Section 16(1)(n) of the Act. The Courts below have decreed the suit on all these grounds. It is against these decisions, the defendants have instituted the present Civil Revision Application.
4. In support of this Application, Mr. Deshmukh strenuously contended that though the suit is instituted in the year 2010,

the learned trial Judge has referred the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. He has invited my attention to the discussion made by the learned trial Judge in the impugned orders. He submitted that this has caused seriously prejudice to the defendants. The learned District Judge, however, overruled the said contention in paragraph 15. He submitted that this point goes to the root of the matter.

5. As far as the ground of arrears of rent is concerned, he submitted that immediately on receipt of the demand notice, the defendants had remitted Rs.80/- to the plaintiff by Money Order. The plaintiff, however, refused to accept money order. The defendants, therefore, cannot be held as willful defaulters.

6. As far as the ground of bonafide requirement is concerned, he submitted that the plaintiff is residing on the first and second floor along with his wife. Instead of ordering eviction, the Courts below could have passed partial decree of eviction. For all these reasons, he submitted that application requires consideration.

7. I have considered the submissions advanced by Mr Deshmukh. I have also perused the material on record. Perusal of the impugned orders and in particular District Court's Judgment shows that the plaintiff had issued demand notice dated 1.12.2009 calling upon the defendants to pay arrears of rent at the rate of Rs.16/- per month for the period 1.3.1989 to

31.12.2009. The plaintiff claimed Rs. 4000/- covering 250 months at the rate of Rs.16/- per month. The learned District Judge observed in paragraph 6 that the defendants gave reply to the notice, which was produced at Exh.31. In other words, the defendants were duly served with the demand notice. The defendants admitted in their cross examination that they did not send money order of Rs.3984/- as demanded in the notice nor they paid the amount in the Court. Section 15(3) of the Act reads thus:-

15. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases.

(3) No decree for eviction shall be passed by the court in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases if, within a period of ninety days from the date of service of the summons of the suit, the tenant pays or tenders in court the standard rent and permitted increases then due together with simple interest on the amount of arrears at fifteen per cent per annum; and thereafter continues to pay or tenders in court regularly such standard rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the court."

8. In view thereof, I do not find that the Courts below committed any error in holding that the defendants are willful defaulters. For the reasons recorded in paragraphs 6 and 8 of the District Court's Judgment, the Courts below were justified in decreeing the suit under section 15 of the Act.

9. As far as the ground of bonafide requirement under section

16(1)(g) of the Act is concerned, the plaintiff came with the case that he and his wife are suffering from Arthritis in the knee. In support of his case, the plaintiff examined Dr. Pawar. He supported the case of the plaintiff. The learned District Judge has considered this in paragraphs 9 and 13. As far as the question of comparative hardship is concerned, the learned District Judge observed that the defendants have shifted their residence to flat no.1, Daulat Apartment, where he is residing along with his family members. As the defendants have shifted to other place, no hardship will be caused to them in the event of passing of eviction decree. The said finding is recorded after appreciating the evidence on record. In view thereof, I do not find that the Courts below have committed any error in passing eviction decree under section 16(1)(g) of the Act.

10. As far as the ground of non user is concerned, as the Courts below held that the defendants have shifted to the new premises, in particular, in paragraph 14, the learned District Judge has held that the plaintiff has proved non user of the suit premises. In view thereof, I do not find that the Courts below committed any error in passing the decree under section 16(1)(n) of the Act.

11. As far as the contention advanced by Mr. Deshmukh that the Courts below should have passed partial decree of eviction is concerned, I do not find any merit in this submission. Mr

Deshmukh was not in a position to show that such contention was advanced in the Courts below. In the case of Chetan Anand Vs. indrajeet, 2013 (3) Mh.L.J.310, learned Single Judge of this Court after exhaustively considering various decisions on this subject, has held in paragraph 38 thus:

“38. To my mind, Mr. Sakhare's reliance on this judgment of the learned Single Judge is apposite and appropriate. It is not as if in the case like the present one, the Applicants for the first time in revisional jurisdiction can urge before this Court that the Trial Court has failed to abide by the statutory mandate flowing from sub-section (2) of Section 13. For such plea being raised in revisional jurisdiction and which jurisdiction is limited, there has to be some material before the Courts below. If the materials before the Courts below rest only on the availability of other accommodation and premises to the landlord for his requirement, either of residential or non residential nature, then, the parties like the Applicants cannot claim as of right that they be permitted to raise a plea of the present nature and for the first time in the revisional jurisdiction. Concededly, there is nothing in the judgments of the Courts below or in the oral and documentary evidence, which would enable me to hold that the Applicants did request the Trial Court or the lower Appellate Court to consider passing of a partial Decree or in relation to a part of the premises. Therefore, this is a plea raised for the first time and it being a mixed question, to my mind, it would not be proper to entertain it. Assuming that Mr. Jahagirdar is right in contending that there is a mandate on the Court flowing from the legal provision, yet that mandate is required to be fulfilled by the Courts below provided the parties place before it necessary materials. The Supreme Court judgment in Badrinarayan (supra) does not dispense with such requirement, but rather reaffirms the position that the parties cannot, in the absence of all such materials, urge such a plea for the first time in a higher court. Even if there is mandate which is required to be fulfilled as urged by Mr. Jahagirdar and that mandate is to record satisfaction that no hardship would be caused either to the tenant or to the landlord, but if the Court is satisfied that having regard to all the circumstances of the case

including the question as to whether other reasonable accommodation is available for the landlord or the tenant, the greater hardship would be caused by passing the Decree than refusing it, and in relation to that mandate the Applicants have miserably failed to prove their case, then, they cannot be heard in the facts and circumstances of this case to urge that the statutory mandate is not discharged. That statutory mandate requires two things, the Court must be satisfied that no hardship would be caused to either of the parties. That hardship would not be caused by passing a Decree in respect of a part of the premises. If on the earlier point the Court is satisfied that the need of the landlord is proved and in relation to the entire premises and that need could not be satisfied because other accommodation available at his disposal is not reasonable, then, the parties like the Applicants cannot be heard to say that there is non fulfillment of the later statutory mandate, particularly when they fail to place any material in the first instance or the first available opportunity. If such pleas are raised in the highest court for the first time, they cannot be entertained without any material. That means there is no finality to proceedings. This is really the ratio of the above decisions. To my mind, the argument which has been raised before me is as a last resort to avoid consequences of the Decree. That hotel business has been settled by the Applicants in 1976 as claimed by them and has been continuing for decades from the suit premises, is no ground to hold that non fulfillment of the statutory mandate as urged by Mr. Jahagirdar vitiates the decree in this case. Once concurrent findings on the point of both reasonable and bonafide requirement and comparative hardship have been rightly rendered in favour of the Respondents, then, it is futile to urge that a partial decree should be passed. That would mean that this Court finds fault with the satisfaction that has been reached with regard to requirement of the premises by the Respondents. Once that satisfaction in this case has not been found to be vitiated by any error of jurisdiction and particularly the Courts below have not acted illegally nor they committed material irregularity, then, all the more the concurrent decrees cannot be set aside in revisional jurisdiction.'

Perusal of the above extracted portion clearly shows that the question of passing of partial decree of eviction is not a pure

question of law. It is a mixed question of law and fact and the same cannot be agitated for the first time in this Court. In view thereof, I do not find any merit in this submission as well. Hence, Application fails and the same is dismissed.

12. At this stage, Mr. Deshmukh orally applies for stay of this order for a period of eight weeks from today. He states that the applicants are in possession of the suit premises. The applicants have neither created third party interest nor parted with possession. The applicants will hereafter neither create third party interest nor part with possession. Statements are accepted. Mr. Deshmukh states that within two weeks from today, the applicants and all adult family members residing with them, will file usual undertaking in this Court, after giving advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interests nor part with possession;
- (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 8 weeks from today, they will vacate and

hand over vacant and peaceful possession of the suit premises to the plaintiff.

13. Hence, notwithstanding dismissal of Civil Revision Application, subject to the applicants and all adult family members residing in the suit premises giving undertaking in the aforesaid terms and serving copy in advance to other side within two weeks from today, this order shall remain stayed for a period of eight weeks from today.

14. Time to deposit arrears as per the order dated 2.9.2016 is extended for a period of one week from today. It is made clear that if within two weeks from today, the undertaking in the aforesaid terms is not filed within two weeks from today and arrears of rent are not paid, the interim order shall stand vacated without further reference to the Court. Order accordingly.

15. List Civil Revision Application for reporting compliance after three weeks.

(R.G.KETKAR, J.)