

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 4420 OF 1996

Shri Sadashiv Vasantryao Kashid
(since deceased) through L.Rs.

...Petitioners

Versus

Shri Chandrakant Mahadeo Dalavi
and another.

...Respondents

....

Mr.P.S. Dani, Senior Advocate a/w. S.M. Railkar, Advocate for the
Petitioners.

Mr. S.S. Patwardhan a/w. Chetan G. Patil, Advocate for the
Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 04th, 5th & 6th OCTOBER, 2016

P.C.

1. Heard Mr. P.S. Dani, learned Senior Counsel for the petitioner and Mr. S.S. Patwardhan, learned Counsel for respondent No.1, at length. None appears for respondent No.2.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and decree dated 22.7.1996 passed by the learned Additional District Judge, Kolhapur in Regular Civil Appeal No.277/1989. By that order, the learned District Judge allowed the appeal preferred by the predecessor in title of respondents No.1A)

to 1C) and quashed and set aside the judgment and decree dated 25.4.1989 passed by the learned Jt. Civil Judge, Junior Division, Kolhapur in Regular Civil Suit No.998/1977. The learned District Judge decreed the suit and directed the defendant to hand over possession of block No.175 admeasuring 30 ft. X 30 ft. with constructed three rooms situate in CTS No.1325/90 in Udyamnagar, Kolhapur, as more particularly described in paragraph-1 of the plaint (for short, 'suit property') within two months from the date of the decree. The relevant and material facts giving rise to filing of present Petition, briefly stated, are as under:

3. Respondent No.1, hereinafter referred to as the 'plaintiff', has instituted the suit against the defendant *inter alia* invoking the grounds under Sections 12, 13(1)(a) read with Section 108(o) of the Transfer of Property Act, 1882(for short, 'T.P. Act'), 13(1)(b), 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The plaintiff contended that the suit property was let out to the defendant for a period of 11 months by Kabulayat dated 1.1.1975 (Exhibit-52) with condition of payment of monthly rent of Rs.100/-. Apart from that the defendant was to bear expenses for water supply as also electricity supply. Without written consent of the plaintiff, the defendant has carried out permanent additions and alterations. The plaintiff also set up requirement in

paragraph-7 by contending that the plaintiff is physically handicapped. He was operated twice for appendix. In fact because of this, in the course of employment, he was given light work. It is difficult for him to sit for long time and carry out work of heavy duty. He requires the suit property reasonably and bonafide for carrying out his own business. The plaintiff issued demand notice dated 13.7.1977 terminating tenancy w.e.f. 31.8.1977 and claiming arrears for the period from 1.1.1977 to 31.8.1977 @ Rs.100/- per month.

4. During pendency of the suit, the plaintiff amended the plaint and incorporated paragraph-5(a). In paragraph-5(a), the plaintiff contended that the defendant has changed the user of the suit property without obtaining the plaintiff's permission and has started selling cylinders in the suit property. As the defendant has changed the user of the suit property without obtaining permission from the plaintiff, he is also entitled to decree under Section 13(1)(a) read with Section 108(o) of the T.P. Act.

5. The defendant resisted the suit by filing written statement. In paragraph-2 the defendant contended that the defendant is carrying on business of sell and purchase of scrap material. He denied that he is in arrears of rent as alleged. The defendant also denied that the suit premises are required reasonably and bonafide by the plaintiff. The

defendant specifically contended that the plaintiff has obtained possession of premises admeasuring 20' X 12' from erstwhile tenant three years back. After the plaint was amended, the defendant filed written statement *inter alia* contending that while carrying on business of sell and purchase of scrap, he was using cylinders for welding purposes. Unless the cylinders are used, he cannot carry on business of scrap. He further denied that he has changed the user of the suit premises.

6. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. The parties led oral and documentary evidence. After considering the evidence on record, the learned trial Judge dismissed the suit. Aggrieved by that decision, the plaintiff preferred appeal. By the impugned order, the learned District Judge decreed the suit under Section 13(1)(a) read with Section 108(o) of T.P.Act as also under Section 13(1)(g) of the Act. It is against this order, the defendant has instituted the present Petition.

7. In support of this Petition, Mr.Dani submitted that the learned District Judge was not justified in decreeing the suit under Section 13(1)(g) of the Act. He has invited my attention to the oral evidence of the plaintiff's witness and in particular his cross-examination. In paragraph-4 of the cross-examination, the plaintiff deposed that the plot

admeasuring 40 ft. X 80 ft.. Shed admeasuring 30 ft. X 30 ft. was constructed with side spaces each of 5 ft. by all sides. Space out of occupied place by the plaintiff was given in possession of another tenant i.e. 20 ft. X 12 ft. only. He received possession of said place prior to three months. Said place was given to the tenant to run his spare parts business. It is not correct to say that open space of 15 ft. X 40 ft is available in the suit premises and his place. The suit place is adjacent to main road. The backside portion is also attached to main road. The suit place was let out to defendant to run his business since beginning. No writing was taken from the defendant at that time of letting the premises to run only scrap business. He purchased one plot in Shahu Audyogik Vasahat to start business. Said plot is near about 5000 sq. ft. He has no reason to say as to why specific nature of business which is in his anticipation to start in suit place was not mentioned in the suit. He has not done any other business except his service. It was not correct to say that he was deposing falsely to evict the defendant without having any requirement of suit place.

8. Relying upon paragraph-4 of the cross-examination, Mr. Dani submitted that the learned District Judge did not consider availability of this premises while decreeing the suit under Section 13(1)(g) of the Act. That apart, the learned District Judge also did not consider

whether this premises are suitable and will satisfy the plaintiff's requirement. He has invited my attention to paragraph-15 of the District Court judgment. In paragraph-15, the learned District Judge observed that the plaintiff in cross-examination has admitted that he obtained possession of some rooms from the tenant but just before two years. It means, no premises was available with the plaintiff when the suit is filed. During pendency of the suit, he might have received possession of the premises from a tenant but nothing is brought on record to show that the premises obtained from other tenant is suitable for running any business after the retirement of the plaintiff or for opening his business.

9. Mr. Dani submitted that it is settled principle of law that the requirement pleaded by the plaintiff must subsist at the time of passing of the decree. The learned District Judge has observed that the premises were not available when the suit was filed and during pendency of the suit he might have received possession of the premises from a tenant. He submitted that obtaining possession from another tenant is a relevant fact while considering requirement set up by the plaintiff. That apart, the learned District Judge also has not considered purchase of 5000 sq. ft. plot in Shahu Audyogik Vasahat by the plaintiff. In fact entire judgment is silent on this aspect. The learned District Judge failed to appreciate that once the plaintiff

has acquired premises, it is for him to establish that premises so acquired are not suitable and will not meet the requirement pleaded by the plaintiff. The learned District Judge has wrongly placed burden on the defendant to establish that the premises required by the plaintiff are not suitable for running his business after retirement. He, therefore, submitted that the finding recorded under Section 13(1)(g) being perverse are liable to be set aside.

10. As far as decree under Section 13(1)(a) read with Section 108(o) of the T.P. Act is concerned, he submitted that the learned trial Judge has dismissed the suit. The learned District Judge has considered this ground in paragraphs-26 to 32. He invited my attention to Section 6 of the Act as also Section 13(1)(a) read with Section 108(o) of T.P. Act. He submitted that while considering the ground under Section 13(1)(a) read with Section 108(o) of the Act, the Court has to consider the purposes set out in Section 6 of the Act. In the present case, the learned District Judge has recorded finding as regards change of user without considering Section 6 of the Act. The learned District Judge has also not considered whether the change of purpose is detrimental to the suit premises. In support of this submission, he relied upon following decisions :

1. Dattatraya Ramchandra Sapkal v. Gulabrao Tukaram Bhosale, 1978 Mh.L.J. 545.
2. Suresh Vasant Malegaonkar v. Ramabai Keshav Gokhale and others, 2002(1) Mh.L.J. 933.

3. Gopal Shankarlal Pardeshi v. Narsayya Sadashiv Yadav, 2005(2) ALL MR 515

. Mr. Dani submitted that the impugned order, therefore, deserves to be set aside thereby dismissing the suit instituted by the plaintiff.

11. On the other hand, Mr. Patwardhan has supported the impugned order. He submitted that as far as the ground under Section 13(1)(g) of the Act is concerned, the learned District Judge has considered availability of the premises to the plaintiff in paragraph-15. He submitted that as far as acquisition of premises from another tenant is concerned, it has come in the evidence of witness Sadanand Kashid that another tenant by name Bapusaheb Chandsaheb Pakali was occupying the residential house of the plaintiff. Said tenant was using the premises for selling spare parts. The premises were vacated by Mr.Pakali prior to one and half years. Mr.Patwardhan submitted that said tenant was inducted in premises which is used for residential purposes. As against this, the plaintiff's requirement is for starting his own business. The premises in possession of the erstwhile tenant Mr.Pakali cannot be said to be a suitable premises.

12. As far as acquisition of plot admeasuring 5000 sq. ft. in Shahu Audyogik Vasahat is concerned, firstly it is 20 Kms. away from the suit premises and secondly, as of today possession of said plot is not received by the plaintiff. In

view thereof, it cannot be said that other suitable premises are available to the plaintiff which will satisfy his requirement.

13. Mr. Patwardhan further submitted that the defendant has other premises where he is carrying on his business and in the event of passing of decree, no hardship will be caused to him. He has invited my attention to paragraphs-9 and 11 of the cross-examination of the defendant's witness. He submitted that the defendant is carrying on business of foundary in Y.P. Powar Nagar where phone No.27835 is installed. He has also invited my attention to invitation card, Exhibit-105. Apart from this premises, the defendant has also purchased one plot in Shahu Audyogik Vasahat. He, therefore, submitted that apart from the fact that the defendant has several other premises for carrying on his business, his financial condition is also excellent and no hardship will be caused to him in the event of passing of eviction decree.

14. Mr. Patwardhan relied upon the decision of **Anil P. Bansal and another v. Central Bank of India & others, 2003(3) Bom. C.r. 433**, and in particular paragraph-7 thereof. In para-7 of that report, the learned Single Judge has observed that while considering the ground under Section 13(1)(g) the Court cannot started enquiry by doubting bonafides of landlord. The onus is on the tenant

to adduce positive evidence to show that the need pressed into service was malafide. There is absolutely no dispute with this proposition of law. In the present case, the question is whether the plaintiff has acquired the premises which will satisfy his need and whether the Appellate Court has considered this aspect. As noted earlier, the District Judge has failed to consider this aspect.

15. Mr. Patwardhan submitted that it is not necessary that the change of user must be detrimental to the suit premises. He further submitted that the defendant has admitted in written statement and in particular paragraph-2 itself that the suit premises was let out for carrying on business of sell and purchase of scrap material. The defendant has changed that user to selling of oxygen and acetylene cylinders. He has invited my attention to paragraph-6 of the cross-examination, wherein the defendant admitted that the suit premises was let out to him for business of scrap and foundry.

16. Thus, the plaintiff has established that though the suit premises was let out to the defendant for carrying on business of scrap and foundry, he has stopped that business and changed it over to selling of oxygen and acetylene cylinders. He submitted that oxygen and acetylene cylinders are highly inflammable which are bound to cause detrimental to the suit premises. Mr. Patwardhan

has relied upon following decisions :

1. Bright Brothers (Pvt.) Ltd. and Company v. Venkatlal G. Pittie and others, 1979 Mh.L.J. 894.
2. Kasturchand Panachand Doshi and others v. Yeshwant Vinayak Sainkar and another, 1980 Bom. C.R. 424.
3. Gurdial Batra v. Raj Kumar Jain, (1989) 3 SCC 441
4. Dashrath Baburao Sangale and others v. Kashimath Bhaskar Data, 1994 Supp (1) SCC 504.
5. Jagdish Lal v. Parma Nand, (2000) 5 SCC 44.

17. Mr. Patwardhan, therefore, submitted that no case is made out for invoking powers under Article 227 of the Constitution of India.

18. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As far as the ground of reasonable and bonafide requirement is concerned, while dealing with this ground, the learned District Judge has observed in paragraph-15 as under :

“15. On going through the documentary evidence placed on record, it does not appear that plaintiff is in possession of some other premises in addition to the suit premises. What plaintiff in the cross-examination has admitted that he obtained the possession of some rooms from the tenant, but, just before 2 years. It means no premises was available with the plaintiff when the suit is filed. During pendency of the suit he might have received the possession of premises from a

tenant, but nothing is brought on record to show that the premises obtained from the other tenant is suitable for running any business after the retirement of the plaintiff or for opening his business.”

19. Perusal of the findings recorded by the learned District Judge, shows that the learned District Judge has not considered availability of premises admeasuring about 20 ft. X 12 ft. as also acquisition of plot of 5000 sq. ft. in Shahu Audyogik Vasahat. The learned District Judge has also not recorded finding as to whether these premises are suitable to the plaintiff or not. In my opinion, the learned District Judge has ignored the relevant evidence on record. This assumes importance as the learned trial Judge has dismissed the suit by holding that the plaintiff did not establish his requirement. While reversing the trial Court's judgment, the learned District Judge was expected to appreciate the evidence on record independently and thereafter record findings. Availability of the premises which is adjacent to the suit premises as also acquisition of 5000 sq. ft. plot in Shahu Audyogik Vasahat was a relevant fact. The learned District Judge, however, failed to take into account these relevant aspects and observed that nothing is brought on record to show that the premises obtained from other tenant is suitable for running business of the plaintiff. In my opinion, it was for the plaintiff to establish that despite acquiring premises from the erstwhile

tenant, it was not suitable for carrying on business. The learned District Judge has wrongly placed burden on the defendant to establish suitability of the premises acquired by the plaintiff. The burden was on the plaintiff to establish that the premises acquired by him are not suitable and those premises will not satisfy the need of the plaintiff.

20. In the case of ***H. Siddiqui (dead) by L.Rs. v. A. Ramalingam, (2011) 4 SCC 240***, in paragraph-21 Apex Court dealt with the powers of the Appellate Court under Order XLI Rule 31 of C.P.C. while deciding the appeal. It was held that these provisions provide guidelines for the Appellate Court as to how the Court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the Appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the Appellate Court's judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the Appellate Court are well founded and quite convincing. It is mandatory for the Appellate Court to independently assess the evidence of the parties

and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. The entire evidence must be considered and discussed in detail.

21. Applying the tests laid down in the aforesaid decision, I am of the opinion that the learned District Judge has failed to discharge his duties while considering the ground under Section 13(1)(g) of the Act. The findings recorded by the learned District Judge, therefore, cannot be sustained.

22. The learned Single Judge of this Court in the case of **Suresh Vasasnt** (supra) has summarized the law on the subject. The learned Single Judge has considered the decisions in the cases of (1) Dattatraya Sapkal (supra), (2) Bright Brothers (Pvt.) Ltd., (3) Kasturchand Doshi (supra), and (4) Gurdial Batra (supra). The learned Single Judge has discussed this issue from paragraphs-12 to 19. After considering the law on the subject, in paragraph-19 it was observed thus :

“19. The Apex Court in the case of Gurdial Batra v. Raj Kumar Jain (supra) while dealing with the above part of the submission, which was also made before it, held as under:

".....The concept of injury to the premises which forms the foundation of Clause (b) is the main basis for providing Clause (b) in Section 13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in U

Po Naing v. Burma Oil Co. AIR 1929 PC 108 adopted the same consideration. The Kerala High Court has held that premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or permanently injurious to the leased property . Similarly, the Bombay High Court has held that when the lease deed provided for user work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in Section 108(o) of the Transfer of Property Act."

In view of the law laid down by the Apex Court in *Gurdial Batra v. Raj Kumar Jain* (supra), the judgment of this Court in the case of *Bright Brother and/or Kasturchand Panachand* (both cited supra) cannot be said to be a good law. Thus the findings recorded by the lower Appellate Court, that the premises were used for the purpose other than that for which it was let out, cannot stand to the scrutiny of law. In view of this, the findings recorded by the lower Appellate Court with regard to breach of Section 13(1)(a) of the Bombay Rent Act will have to be set aside. The plaint did not make out any case falling within the sweep of Section 108(o) of the Transfer of Property Act. Consequently, no evidence was led to the effect that the change of business was destructive of the purpose for which the premises was leased, the adverse findings on this issue recorded by the Courts below are thus set aside."

23. Perusal of the above extracted paragraph shows that the learned Single Judge recorded a finding that in view of the law laid down by Apex Court in *Gurdial Batra*

(supra), the judgments of this Court in the case of Bright Brother and/or Kasturchand Panachand (supra) cannot be said to be a good law. Perusal of the impugned order does not show that the learned District Judge has applied the tests laid down by Apex Court in the case of Gurdial Batra (supra). In view thereof, the impugned order cannot be sustained.

24. During the course of hearing, I indicated to the learned Counsel for the parties that as the learned District Judge has not considered the evidence on record and in particular about acquisition of the premises by the plaintiff during pendency of the proceedings as also suitability of those premises and the District Judge has not applied the tests laid down by Apex Court in Gurdial Batra (supra), the Court is inclined to remand the matter to Appellate Court. The learned Counsel appearing for the parties submitted that they would like to lead evidence after remand.

25. In view thereof, impugned order passed by learned District Judge is set aside and appeal is restored to the file of learned District Judge. Having regard to the fact that the suit is instituted in the year 1977 and because of passage of time as also as the learned Counsel for the parties indicated that they want to lead additional evidence, parties are permitted to lead additional evidence. The learned District Judge may either take such evidence, or direct the

Court from whose decree the appeal is preferred to take such evidence and to send it when taken to the Appellate Court. Appellate Court will thereafter proceed to decide the appeal. Additional evidence so recorded shall form part of the record. The learned Counsel appearing for the parties assure that they will extend full cooperation for recording additional evidence and as far as possible shall complete recording of additional evidence within three months from the date of appearance before the District Court.

26. In view thereof, Petition is disposed of in following terms :

- [I] Impugned judgment and decree dated 22.7.1996 passed by the learned Additional District Judge, Kolhapur in Regular Civil Appeal No.277/1989 is set aside and appeal is restored to the file of learned District Judge.
- [II] Parties agree that they will appear before the learned District Judge on 24.10.2016 and for that purpose no fresh notice be issued to them.
- [III] Parties are permitted to lead additional evidence.
- [IV] Learned District Judge shall either take such evidence, or direct the Court from whose decree the appeal is preferred to take such evidence and to send it when taken to the District Court. It shall form part of the record. Let that exercise be done within three months

from 24.10.2016. Parties shall extend full cooperation for recording of additional evidence.

[V] After receipt of additional evidence, Appellate Court is requested to decide appeal as expeditiously as possible and preferably within three months from date of receipt of additional evidence. All contentions of parties on merits are expressly kept open.

[VI] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)