

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition (ST) NO. 15059 OF 2016

Jami Lodge Co-operative Housing
Society Ltd.,

...Petitioner

Versus

Pestonji Fardunji Damkevala
(since deceased) and Anr.

...Respondents

....

Mr. Cyrus Ardeshir a/w. Ms. Shivani Khanna, Bharti Bhansali
i/b. FZB & Associates, for the Petitioner.

Mr. Prabhanjan Gujar, Advocate for Respondent No.2.

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CORAM : R. G. KETKAR, J.

DATE : 24th June, 2016

P.C.

1. Heard Mr.Ardeshir, learned Counsel for the petitioner
and Mr.Gujar, learned Counsel for respondent No.2, at length.

2. Rule. Mr.Gujar waives service. In view of order dated
6.6.2016 and at the request and by consent of the parties, Rule
is made returnable forthwith and the Petition is taken up for
final hearing.

3. By this Petition under Article 227 of the Constitution of
India, the petitioner, hereinafter referred to as the 'plaintiff', has
challenged the judgment and order dated 29.3.2016 passed by
the Appellate Bench of the Court of Small Causes Court at

Mumbai in Revision Application No.74/2016. By that order, the Appellate Court allowed the Revision Application preferred by respondent No.2, hereinafter referred to as 'defendant No.2' and quashed and set aside the judgment and order dated 11.9.2015 passed by the learned Judge, presiding over Court Room No.23 below Exhibit-84 in R.A.E. Suit NO.1706/1995. The Appellate Court allowed the application Exhibit-84 filed by defendant No.2 and ordered that the witness of the plaintiff be called for cross-examination by the defendant to the extent of newly added issues regarding the bonafide requirement and comparative hardship. The Appellate Court further directed defendant No.2 to adduce his additional evidence, if any, on the additional issues only.

4. The petitioner has instituted the suit against the defendants for recovery of possession of north side garage situate on plot No.618 of Dadar Matunga Estate (for short, 'suit garage'). The plaintiff has instituted Suit on or about 19.9.1995 invoking grounds under Sections 12, 13(1)(a) and 13(1)(c) and 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The defendants filed written

statement dated 14.12.1995. On the basis of the unamended pleadings, the learned trial Judge has framed issues on 21.5.2002. The issues framed read thus :

- “1. Whether the Plaintiff proves that the Defendants are not ready and willing to observe and perform the conditions of tenancy in respect of the suit premises ?
2. Whether the Plaintiff proves that the Defendant have committed the act of waste and damage injuries to the suit premises ?
3. Whether the Plaintiff proves that the conduct of the Defendants is source of nuisance and annoyance to the adjoining or neighbouring occupiers ?
4. Whether the Plaintiff proves that Defendants never used the suit premises for more than six months reasonable cause for the purpose for which it was let out to the Defendants immediately presiding the date of filing of the suit ?
5. Whether the Plaintiff proves that the Defendants have illegally transferred the suit premises or induct the third party in the suit premises ?
6. Whether the Plaintiff proves that the Defendants disclaimed the title of the Plaintiff over the suit premises ?
7. Whether the Plaintiffs are entitled for decree of possession of the suit premises ?
8. What order and decree ? ”

5. During pendency of the suit, the plaintiff preferred application for amending the plaint in the year 2007. On 10.3.2008, application was allowed permitting the plaintiffs to invoke ground of reasonable and bonafide requirement under Section 13(1)(g) of the Act. In pursuance of that order, the plaintiff incorporated paragraphs-15A and 15B of the Act and pleaded bonafide requirement as also comparative hardship. The defendants filed additional written statement dated 17.9.2010 dealing with the amended plaint.

6. As noted earlier, the plaint was amended in the year 2008. However, the issues pertaining to reasonable and bonafide requirement and comparative hardship were not framed after amending the plaint. On behalf of the plaintiffs, PW-1 Ms. Zarin Hoshang Havewala filed affidavit of examination-in-chief on 15.11.2010. The defendants cross-examined her and in particular regarding bonafide and reasonable requirement as also comparative hardship. The plaintiffs also examined PW-2 Mr.Sorab Parekh by filing affidavit of examination-in-chief on 15.10.2012. PW-2 was also cross-examined on the issue of reasonable and bonafide requirement as also comparative

hardship. The defendants also filed affidavit of evidence on 8.2.2013. It is not in dispute that the evidence of the plaintiffs and the defendants is over. It is at that stage, the plaintiffs filed application at Exhibit-79 on 12.11.2014 for framing following additional issues :

- “1. Whether the Plaintiffs prove that they require the suit premises reasonably and bonafide for their own occupation.
2. Whether greater hardship will be caused to the Plaintiffs by refusing to pass a decree for eviction than would be caused to the Defendants by passing a decree for eviction by this Hon'ble Court.”

7. By order dated 25.11.2014, the learned trial Judge framed additional issues as proposed by the plaintiff. It is at that stage, defendant No.2 filed application at Exhibit-84 *inter alia* praying for (a) the defendant be allowed to file additional written statement on the alleged ground of bonafide requirement, (b) the defendant be allowed to recall the plaintiffs witness and cross examine them on the alleged ground of bonafide requirement, and (c) the defendant be allowed to file his additional affidavit of evidence under Order XVIII Rule 4 of C.P.C.. The plaintiffs resisted the application by filing their reply

dated 18.3.2015. Defendant No.2 filed his rejoinder dated 25.3.2015.

8. After considering the material on record, the learned trial Judge rejected the application on 11.9.2015. Aggrieved by that decision, defendant No.2 preferred Revision Application, which is allowed by the Appellate Court. It is against this order, the plaintiffs have instituted present Petition.

9. In support of this Petition, Mr. Ardhesir submitted that after the plaintiffs amended the plaint and incorporated paragraphs-15A and 15B, defendant No.2 filed additional written statement dealing with the amended plaint. The plaintiffs examined two witnesses and they were cross-examined by defendant No.2. The evidence of the plaintiffs is over. Defendant No.2 filed affidavit of evidence and he is cross-examined. Defendant No.2's evidence is also over. The plaintiffs realized that the learned trial Judge did not frame issues as regards reasonable and bonafide requirement as also on the question of comparative hardship. The application was, therefore, made for framing additional issues, which was allowed. He submitted that defendant No.2 filed application

praying *inter alia* that (a) the defendant be allowed to file additional written statement on the alleged ground of bonafide requirement, (b) the defendant be allowed to recall the plaintiffs witness and cross examine them on the alleged ground of bonafide requirement, and (c) the defendant be allowed to file his additional affidavit of evidence under Order XVIII Rule 4 of C.P.C.. In fact, having regard to the material on record, defendant No.2 could not have filed application at Exhibit-84. The learned trial Judge rightly rejected the application. However, the Appellate Court committed serious error while exercising the revisional jurisdiction. He also relied upon the decision of Apex Court in the case of ***Nagubai Ammal & others v. B. Shama Rao & others, AIR 1956 SC 593*** and in particular paragraphs-7 to 11 thereof to contend that the parties have gone to the trial with knowledge about the requirement pleaded by the plaintiff as also the question of comparative hardship though such specific issues on these points were not framed by the learned trial Judge. He, therefore, submitted that the Appellate Court was not justified in allowing application Exhibit-84. He, therefore, submitted that the impugned order deserves to be set aside thereby restoring the trial Court's order dismissing

application Exhibit-84.

10. On the other hand, Mr. Gujar supported the impugned order. He submitted that the decision relied upon by the plaintiffs is dealing with the situation in the Court of appeal. In the first place, defendant No.2 has vigilantly moved this application Exhibit-84 at the stage of trial itself. Secondly, he submitted that because of the oversight/negligence on the part of the plaintiffs, they did not insist framing of issues as regards bonafide and reasonable requirement as also on the question of comparative hardship. Because of their inaction, defendant No.2 should not suffer. Thirdly, at one stage the suit was dismissed in default and it was restored nearly after eight years. The delay in not conducting the trial is not attributable to defendant No.2. He further submitted that it is only after the learned trial Judge framed additional issues, defendant No.2 took out application Exhibit-84. He, therefore, submitted that defendant No.2 cannot be held responsible for causing delay. He submitted that in any case, no prejudice would be caused to the plaintiff if defendant No.2 is permitted to file additional written statement and the witness of the plaintiff is recalled. Lastly he

submitted that defendant No.2 may be permitted to lead evidence on the question of reasonable and bonafide requirement as also on the question of comparative hardship.

11. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, originally plaintiff had invoked Sections 12, 13(1)(a) and 13(1)(c) and 13(1)(k) of the Act. In the year 2007 they took out application for amendment for adding ground under Section 13(1)(g) as also the question of comparative hardship. By order dated 10.3.2008, the application for amending the plaint was allowed. The plaintiff incorporated paragraphs-15A and 15B pertaining to reasonable and bonafide requirement and comparative hardship. It is not in dispute that defendant No.2 filed additional written statement and dealt with the amended plaint. Perusal of evidence of PW-1 Ms. Zarin Hoshang Havewala and PW-2 Mr.Sorab Parekh and in particular cross-examination shows that defendant No.2 has cross-examined the plaintiff's witnesses both on the question of reasonable and bonafide requirement as also comparative hardship. It is also not in dispute that defendant No.2 has filed

affidavit of evidence and is cross-examined. In short, the evidence of the parties is over. The plaintiff filed application for framing additional issues which were framed on 25.11.2014. At that stage, defendant No.2 filed application Exhibit-84 praying for permission to file additional written statement. In my opinion, application made by defendant No.2 was wholly misconceived. In the case of **Nagubai Ammal (supra)**, Apex Court has observed in paragraphs-10 and 11 thus:

“10. The question of lis pendens was raised by the plaintiff at the very commencement of the trial on 8-3-1947 when he went into the witness box and filed in his examination-in-chief Exhibit J series, relating to the maintenance suits, the decrees passed therein and the proceedings in execution thereof, including the purchases by Devamma. This evidence is relevant only with reference to the plea of lis pendens, and it is significant that no objection was raised by the defendants to its reception. Nay, more. On 13-3-1947 they cross-examined the plaintiff on the collusive character of the proceedings in Exhibit J series, and filed documents in proof of it. The trial went on thereafter for nearly three months, the defendants adduced their evidence, and the hearing was concluded on 2-6-1947. In the argument before the District Judge, far from objecting to the plea of lis pendens being permitted to be raised, the defendants

argued the question on its merits, and sought a decision on the evidence that the proceedings were collusive in character, with a view to avoid that operation of section [52](#) of the Transfer of Property Act. We are satisfied that the defendants went to trial with full knowledge that the question of lis pendens was in issue, had ample opportunity to adduce their evidence thereon, and fully availed themselves of the same, and that, in the circumstances, the absence of a specific pleading on the question was a mere irregularity, which resulted in no prejudice to them.

11. It was argued for the appellants that as no plea of lis pendens was taken in the pleadings, the evidence bearing on that question could not be properly looked into, and that no decision could be given based on Exhibit J series that the sale dated 30-1-1920 was affected by lis; and reliance was placed on the observations of Lord Dunedin in *Siddik Mahomed Shah v. Mt. Saran* that "no amount of evidence can be looked into upon a plea which was never put forward". The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto. The

rule applicable to this class of cases is that laid down in Rani Chandra Kunwar v. Chaudhri Narpat Singh : Rani Chandra Kunwar v. Rajah Makund Singh. There, the defendants put forward at the time of trial a contention that the plaintiff had been given away in adoption, and was in consequence not entitled to inherit. No such plea was taken in the written statement; nor was any issue framed thereon. Before that Privy Council, the contention was raised on behalf of the plaintiff that in view of the pleadings, the question of adoption was not open to the defendants. It was held by Lord Atkinson overruling this objection that as both the parties had gone to trial on the question of adoption, and as the plaintiff had not been taken by surprise, the plea as to adoption was open to the defendants, and indeed, the defendants succeeded on that very issue. This objection must accordingly be overruled.”

12. Applying the tests laid-down in the above decision to the facts of the present case, it is evident that defendant No.2 is not taken by surprise by framing two additional issues. In fact defendant No.2 was fully aware of the case made out by the plaintiff including the ground under Section 13(1)(g) of the Act as also the question of comparative hardship. Precisely with that view, defendant No.2 has cross-examined the plaintiff's two witnesses. Both the parties have gone to trial on the question of

reasonable and bonafide requirement as also comparative hardship. In my opinion, the learned trial Judge was fully justified in rejecting the application. However, the Appellate Court without considering these aspects has allowed the application. In view thereof, the impugned order cannot be sustained and is liable to be set aside.

13. Mr. Gujar submitted that in any case defendant No.2 may be permitted to lead evidence on reasonable and bonafide requirement as also on the question of comparative hardship. It is not possible to accept his request as basically application Exhibit-84 made by defendant No.2 itself was wholly misconceived. Hence, Petition succeeds and is allowed. Impugned judgment and order dated 29.3.2016 passed by the Appellate Bench of the Court of Small Causes Court at Mumbai in Revision Application No.74/2016 is set aside. Application at Exhibit-84 filed by defendant No.2 is dismissed. Rule is made absolute. Under circumstances of the case, there shall be no order as to costs. Order accordingly.

(R. G. KETKAR, J.)