

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9909 OF 2016

Sitaram Ramchandra Nakhwa & anr. ... Petitioners
V/s.
Kamal Sudhakar Sawant ... Respondent.

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Ms. Kavita A. Shah for the petitioners.

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CORAM : R. G. KETKAR, J.

DATE : 08/09/2016.

P.C.:

1. Heard Ms. Shah, learned counsel for the petitioners at length. By this petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 5.08.2016 passed by the appellate bench of the Small Causes Court at Mumbai below Exh.-01 & 25 in Appeal No.105 of 2013 in R.A.E. Suit No.895 of 2010. By that order, the appellate court allowed Exh.-25 made by the respondents (herein after referred to as 'defendants') under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short "C.P.C.") and directed the trial court to take evidence of the defendant, her witnesses and send it back to the Appellate court. The trial court has directed to complete recording of evidence as early as possible and in any case within 30 days from receipt of the order.

2. The petitioners, hereinafter referred to as "plaintiffs" filed suit on 29.04.2010 against the defendants for recovery of possession of Room No.4, House No.499-A, Tare Lane, Worli, Koliwada, Mumbai 400030 (for short, "premises") and inquiry into mesne profits, arrears of rent, unlawful subletting, reasonable and bona fide requirement and non-user.

3. The respondents, hereinafter referred to as “defendants” filed written statement on 17.03.2011 and filed an additional amended written statement on 31/01/2013. On the basis of pleadings of the party, the learned trial court framed the necessary issues. Parties led evidence. By judgment and decree dated 10.05.2013, trial court decreed the suit.

4. Aggrieved by that decision defendant no.1 preferred appeal. During the pendency of the appeal, defendant no.1 filed application below Exh. 25 under Order XLI Rule 27 of C.P.C. The plaintiffs resisted the application by filing reply. By the impugned order dated 05.08.2016, the trial court allowed the application. It is against that order, the plaintiffs have instituted the present petition.

5. Ms. Shah has taken me through the pleading of the parties, oral evidence adduced by the defendants, as also finding recorded by the trial court. She submitted that learned trial judge decreed the suit only on the ground of reasonable and bona fide requirement. She submitted that defendant no.1 filed application Exh.25 under Order XLI Rule 27 of C.P.C. In paragraph 2 of the application, defendant no.1 contended that she was unable to produce any documentary evidence inspite of due and bona fide efforts as she was not party to the transaction of creation of fresh tenancy. She alleged that the requirement of Landlord is malafide. In paragraph 4, she contended that the plaintiffs have created fresh tenancy, pending the suit in respect of additional rooms constructed by them. In paragraph 5, she contended that since she was not the party to the said transaction of fresh tenancy and further the same was not disclosed by the respondents/plaintiffs pending the suit and, therefore, she was not able to produce the same inspite of due effort from her side before the passing of the decree.

6. Defendant no.1 also contended that the application for electricity connection in respect of various newly created tenancy premises in the suit property was made prior to the decree. However connection was given after the date of decree i.e. 10.05.2013. She contended that even the new occupier in the freshly created tenancy room were came to stay only after the filling of the appeal and therefore that fact come to her knowledge when she had made application under the Right to Information Act, 2005 to the B.E.S.T. undertaking for getting information about the newly fixed electric meter in the suit chawl. Defendant no.1 contended that as she was not party to the transaction of fresh tenancy and further as the same was not disclosed by the plaintiffs pending suit, she was unable to produce the same inspite of due efforts from her.

7. Relying on the assertion made by the applicant, Ms. Shah submitted that defendant no.1 was fully aware of the creation of alleged tenancy during the pendency of the suit. She, however, did not produce this evidence during the trial. It, therefore, cannot be said that defendant no.1 satisfied the condition stipulated in Order XLI Rule 27 of C.P.C. She has invited my attention to the impugned order and submitted that no reason is given by the appellant court while allowing application Exh.25. She, therefore, submitted that the petition requires consideration.

8. I have considered the submissions advanced by Ms. Shah. I have also perused the material on record. On 29.04.2010, the plaintiffs have instituted suit against the defendants on various ground including ground of reasonable and bona fide requirement. On 31.01.2013, the defendant no.1 filed amendment written statement and contended that after filing of the suit and during the pendency of the suit, the plaintiffs

have constructed two floor on the suit property i.e. ground + two floors consisting of six rooms on the first floor and six rooms on the second floor. Two rooms on first floor were given on rent recently and four rooms on the first floor and six rooms on the second floor are lying vacant and are in possession of the plaintiffs. Defendant no.1 alleged that as plaintiffs have carried out construction the requirement of the plaintiffs does not survive. PW-1 Mr. Sitaram Ramchandra Nakhawa examined himself in support of plaintiffs' case. During the course of the cross examination, he stated that his son has given contract to a contractor to construct structure depicted in photographs produced as per list dated on 16.01.2013 on the said premises. He does not know as to whether two floors, i.e. first and second are completed. He does not know as to whether six rooms on the first floor and six rooms on the second floor have been constructed and as construction was not completed, no tenant was inducted therein. He further stated that he does not know as to whether his son has inducted any tenant. As far as defendants' evidence is concerned in paragraph 15 and 17 she reiterated the contention raised in paragraph 11(A) and 11(B) of the amended written statement.

9. As noted earlier, the learned trial judge decreed the suit as far as ground of bona fide requirement is concerned. In paragraph 34, the learned trial judge observed that there is another chawl owned by him (plaintiff no.1) opposite to the suit chawl. In his cross examination, PW-1 stated that his son (plaintiff no.2) has given contract to construct the above said structure on the suit premises. In paragraph 41, the learned trial judge observed that defendant no.1 has tried to prove that the plaintiffs have constructed additional rooms and therefore they are not in need of the suit premises. However, it is noticed that defendant no.1 has failed to show that the construction of suit premises has been

completed and the premises are now ready for occupation of the plaintiffs.

10. Aggrieved by this decision, defendant no.1 preferred appeal. Defendant no.1 filed application Exh.25 in the said appeal. In paragraph 2 of the application, she stated that the suit was decreed on the ground of reasonable and bona fide requirement. In paragraph 3, she stated as under;

“I say that in the trial court through I have specifically stated that the land lord has no bona fide need and further the same is required by him for sale purpose but was not able to produce any documentary evidence inspite of due and bona fide effort. I say that after the suit decreed respondent has constructed two more floors on the suit property.”

In paragraph 4, she stated as under;

“I say that the respondent pending the suit has created fresh tenancy in respect of the additional rooms constructed by him the detail whereof is as under.

Name	Room No.	Date of tenancy
Shashank Sadanand Tavasalkar (adm.200 Sq.Ft.)	5.	10.03.2013
Vijay Dayavant Bandivadekar (adm.200 Sq.Ft.)	6.	10.03.2013
Vinayak Narayan Kadam (adm.200 Sq.Ft.)	7.	10.03.2013
Nitin Anant Chogule (adm.200 Sq.Ft.)	8.	10.03.2013
Ramesh Sitaram Kanojia (adm.200 Sq.Ft.)	9.	30.04.2013
Ghanshyam Maruti Chogule (adm.200 Sq.Ft.)	10.	10.03.2013
Umesh Sitaram Nakhwa (adm.2400 Sq.Ft.) including terrace.	11. & 12.	10.03.2013

In paragraph 5, she stated as under;

“I say that since I was not party and further the same was not disclosed by the respondent pending the suit and therefore I was not able to produce the same inspite of due effort from my side before the passing of the decree. I say that the application for electricity connection was made prior to the decree however connection was made after date of decree i.e. 17.05.2013. I say that even the new occupier in the freshly created tenancy room

were came to stay only after the filing of the present appeal and therefore this fact come to my knowledge when I had made application under Right to Information Act, 2005 to the B.E.S.T. undertaking for getting information about the newly fixed electric meter in the suit chawl.”

11. The plaintiffs filed reply dated 02.05.2016. On perusal of the reply shows that the plaintiffs has not dealt with the assertion made in the application Exh no.25, save and except, denying the same and contending that the application is nothing but replica and repetition of Exh-13. Perusal of paragraph 4 of the application shows that defendant no.1 has given details of room numbers and also dates of commencement of tenancy in respect of as many of 7 tenants. Defendant no.1 also gave area in possession of each seven tenants.

12. It is relevant to note that the cross examination of the PW-1 was completed on 01.03.2013 and prima facie thereafter it appears that tenancies are created on 10.03.2013 and 30.04.2013. In paragraph 5, defendant no.1 specifically contended that the said fact was not disclosed by the plaintiffs during the trial.

13. While allowing the application, in paragraph 6, the Appellate court has dealt with findings recording by the learned trial judge in paragraph 41 to the effect that defendant no.1 has tried to prove that the plaintiffs have constructed additional rooms and therefore they are not in need of the suit premises. However, it is noticed that defendant no.1 has failed to show that the construction of suit premises has been completed and the premises are now ready for occupation of the plaintiffs.

14. In paragraph 7, the Appellate court observed that defendant no.1 intends to bring on record fresh information during the pendency of the suit and also information received by Right to information Act, 2005 as

also certain documents. The Appellate court observed that additional evidence is necessary and is required to pronounce judgment as per Order XLI Rule 27 (b) of C.P.C.

15. Apart from the reasons given by the appellate court, it is material to note that the creation of tenancies during the trial was within the special knowledge of the plaintiffs. The plaintiffs should have brought on record the creation of tenancies pending the suit and after passing of decree by the trial court. In fact, this was the precise reason given in paragraph 5 of the application Exh.25 made by the defendant no.1. *In the case of Tarachand Hassaram Shamdasani Vs. Durgashankar G. Shroff & others 2004 (Supp.) Bom. C.R. 333, the learned single judge of this court has observed in paragraph 8 as under;*

“8. To my mind, however, it is obligatory for the landlord to disclose in the pleadings and in his evidence the fact that he owns other premises which were capable of being utilized for the requirement pressed into service in the suit filed against the tenant and to further disclose and explain that inspite of those acquisition and ownership of other premises, the requirement which is pressed into service against the tenant would still survive. It is only then the landlord would be entitled to invoke this ground and would succeed in establishing his need to be bona fide and reasonable.”

16. In the present case, the plaintiffs neither dealt with the application Exh-25 filed by defendant no.1 effectively nor made any attempt to bring facts relating to creation of tenancy on record.

17. In view thereof, therefore, I do not find that the Appellate court has committed any error in passing the impugned order. Hence, the petition fails and the same is dismissed. The Appellate court will decide the appeal uninfluenced by the observations made in this order and the impugned order. Order accordingly.

(R. G. KETKAR, J.)