

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3757 OF 2017**

Lahu Ramchandra Naik & Ors	...Petitioners
<i>Versus</i>	
Vithal Raghunath Kamble	...Respondent

Mr Rajesh S Datar, *for the Petitioners.*
Mr Omer K Shaikh, *a/w Ms Sonali Dahorre, i/b SR Associates, for
the Respondent.*

CORAM: G.S. PATEL, J
DATED: 23rd November 2017

PC:-

1. Heard.

2. The Petitioners are the tenants aggrieved by an Appellate decree dated 21st October 2016 of the District Judge-2 at Kalyan dismissing their Regular Civil Appeal No.22 of 2009 against an original judgment and decree dated 17th January 2009 in Regular Civil Suit No.80 of 1998 filed by the Respondent for ejectment.

3. The premises in question are Room No.6, Barrack No.1359, Ulhasnagar, owned by the Respondent who says he bought them in 1972. Even at that time the Petitioners were in possession. The original Defendant was one Ramchandra Narayan Naik, and the Respondent

sought eviction against him on the ground of trespass. That suit failed and ultimately Ramchandra obtained a decree declaring him to be a tenant. Ramchandra claimed to be the owner of the premises and said that he had bought them from either the present Respondent owner or his predecessor-in-title, but the property then stood benami in the name of the present Respondent or his predecessor. This claim of ownership was rejected by the High Court.

4. Now in the present ejectment action, the case of the Plaintiff landlord was that the Defendants had paid no rent at all since 1992. The landlord issued notice and demanded arrears. There was neither response nor compliance.

5. There were other grounds taken as well, including *bona fide* requirement; that the Defendants had acquired other suitable accommodation; that the Defendants had kept the premises locked and without use for six months without reasonable cause; and that the Defendants had carried out permanent construction and alterations without permission.

6. The Defendants entered a written statement denying all contentions. As regards the rent, they specifically said that they had tendered it, but when the landlord refused to accept it, they paid that rent into Court. They also said that they had paid municipal taxes, and then went on to deny the Plaintiff's case on all the other grounds. The Trial Court took evidence.

7. An acknowledgement of service of the notice was led in evidence and marked Exhibit 59. It seems that the document then went

missing from the record, and being a piece of evidence could not obviously be reconstructed. I will return to this document and to Mr Datar's argument on behalf of the Petitioner in that regard a little later; for now it is sufficient to note that at the time when the document was led in evidence, none of the Defendants objected to it being so marked.

8. In any case, after framing issues and recording evidence, the Trial Court decreed the suit, ordered delivery of possession and decreed mesne profits at the rate of Rs.6.25 per month.

9. The Defendants appealed. The first point they took was that the notice in question under Section 12(2) of the Rent Act was not properly served on the original Defendant, and that the Trial Court did not consider this question at all. They also denied the ground of *bona fide* requirement and insisted that a question of comparative hardship ought to have been framed as a separate issue. I will dispense with the latter argument immediately. It has absolutely no substance. There is no requirement that the question of comparative hardship ought to be separately framed as an issue. All that needs to be seen is whether it has been considered adequately by the Courts below. The reason is simple. Eviction cannot be ordered only on the ground of *bona fide* requirement without a corresponding and subsequent discussion of comparative hardship. That is settled law. Equally a Court cannot merely consider comparative hardship without the Plaintiff sufficiently proving *bona fide* requirement to begin with. The two questions go hand in hand, one after the other, in that sequence, and, therefore, a separate issue only of comparative hardship is never necessary. What is required is a discernible evaluation of comparative hardship, irrespective of whether an issue on it is framed or not. If a Court fails

to evaluate comparative hardship altogether, then that might certainly be a ground of appeal irrespective whether an issue is framed or not. Conversely, if the question is considered then the fact that an issue is not framed *per se* furnishes no ground of appeal.

10. The Appellate Court framed eight points for determination. This being a regular First Appeal, the Appellate Court went about its business in the appropriate manner, considering the evidence afresh. It held against the Defendants on all but one point, viz., that the Plaintiff-landlord had not proved non-user for the past three years. On every other point that fell for determination, the Appellate Court found for the Plaintiff-landlord and thus dismissed the appeal and confirmed the decree in ejectment and for mesne profits.

11. In this Writ Petition, while assailing the appellate order, no matter which point Mr Datar assails, he must show a jurisdictional error, material irregularity or perversity. It is not sufficient for him to show this in respect of any one finding, since seven of the eight findings are against his clients; he must demonstrate an irregularity, jurisdictional error or perversity for each point held against him. If he fails to do so for each point held against him, that is sufficient reason to dismiss the petition and to confirm the decrees of the Courts below. This is the only possible approach that can be adopted in a case like this.

12. Mr Datar chooses to begin with an attack on the Appellate Court's findings on the question of notice. I understood the principal argument to be that Exhibit 59, referred to earlier, the postal acknowledgement that was admitted into evidence, having later gone

missing, the Appellate Court could not have found that the notice was properly served. I think this rather begs the question. What cannot be disputed, and is not missing from the record, is the fact that the document was in fact marked in evidence and that at that time the Defendant raised no objection to it. The Trial Court saw the document at the time when it was introduced in evidence. This is not a question of conjecture: the Trial Court observed having seen the signature of Ramchandra Naik on the document. It therefore held that the acknowledgement was duly proved. If, because of the way we chose to maintain (or not maintain), our Court records, a piece of evidence goes missing, surely a party cannot be allowed to turn that lapse to his advantage, and to completely deny evidence that was properly led, appreciated and duly recorded. Thus, when the Appellate Court said that notice was sufficiently proved, this was certainly a plausible view. In the context of what happened, it is not possible to say that the view suffers from such perversity as would warrant the interference of this Court.

13. More interestingly, there is nothing on record from the Defendants to show that in response to the demand notice they made any payment at all or that they claimed that any amount was due to be adjusted. It seems that the Defendants argued that the arrears of rent were deposited. The Appellate Court considered this as well, and found that the first payment was in June 1988, the second in November 1988 and the third in 1995. There is one other payment in 1996 and the amounts deposited vary between Rs.15/- and Rs.1,000/-. How the rent was computed was not disclosed. Whether this was an advance payment was also unclear. There were no details made

available and, indeed, the irregularity of the payments themselves seemed to bear out the landlord's case.

14. As to the remaining questions of *bona fide* requirement and permanent alterations being made, here again the discussion of the Appeal Court of the evidence is more than adequate. The Plaintiff was able to demonstrate that he and his brothers and their parents resided in one room, and that the family consisting of the landlord's wife, his brothers' wives, their children and the space was clearly insufficient. Their needs grew over time. On the other hand, there was some material about the Defendants having acquired alternative accommodation. Ramchandra died during the pendency of the original suit and was survived by two daughters, a son and his widow. The widow also died. The two daughters got married and left for their matrimonial homes. This left only Ramchandra's son, the 1st Defendant, Lahu. Now Lahu's wife was a corporator of the Ulhasnagar Corporation, and a one-time Mayor of that Corporation, with everything that this necessarily implies. She, Yashaswini, acquired another property, Barrack No.1358, Room No.7 at Ulhasnagar. She also developed that property. According to the Plaintiff, all the Defendants were living there, in fairly spacious accommodation of about five rooms. Those alternative premises are said to be larger than the suit premises. Curiously, Yashaswini's acquisition of these premises was admitted in cross-examination by Ramchandra's widow Manorama, who said that Lahu, Yashaswini and their children were living there. Other than saying that Lahu occasionally came to live with her, nothing else was shown. There was also some other evidence of Lahu and Yashaswini having acquired another Flat No.204 in Abhishek Apartment. This however was not sufficiently proved by

documentary evidence. On an overall assessment, the Appellate Court concluded that the Trial Court was not in error in finding that *bona fide* requirement was proved.

15. As to the question of alterations and additional construction, it seems that the evidence was that the Defendants constructed a bathroom with a high wall without permission from either the landlord or the Municipal Corporation (of which Yashaswini was a corporator and a Mayor).

16. Having regard to all these circumstances, I do not think it is even remotely possible to say that there is any irregularity or perversity in the findings returned by the Appellate Court or that those findings are such as would warrant the interference of this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India or even in exercise of its inherent extraordinary writ jurisdiction.

17. There is no merit in the Writ Petition. It is rejected. There will be no order as to costs.

(G. S. PATEL, J.)