

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

WRIT PETITION NO. 789 OF 1995

Ramchandra Vithoba Patil
since deceased through his heir

Yeshwant Ramchandra Patil,
residing at Village Charan,
Taluka Shahuwadi,
District : Kolhapur.

...Petitioner

Versus

- 1) Shivajirao Trimbakrao Patil
(since deceased by heirs)
- 1A) Sucheta Shivajirao Patil,
Age: 75 Yrs.
- 1B) Sushilkumar Shivajirao Patil,
Age: about 50 Years.
- 1C) Dr. Sanyogita Sushilkumar Patil,
Age: 45 Yrs, All R/o. 514/1,
Flat No. 3, T.P. Scheme No. 4,
Terna Nagar, Sagarmal, Kolhapur.
- 1D) Dr. Samarsing Shivajirao Patil,
Age: about 47 Years.
- 1E) Dr. Savita Samarsing Patil,
Age: 45 Yrs, Both R/o. Plot No. 13,
Ganga Colony, Shivajinagar
New Highway At Post Nipani,
Dist. Belgaon, Karnataka State.

2) Sambhajirao Trimbakrao Patil
Both residing at Final Plot
No. 124, E Ward, 6th Lane,
G.T.S. No. 1619/2, Rajarampuri,
Kolhapur.

...Respondents

Mr. S.G. Deshmukh, a/w Mr. Ramdas Shelke & Mr. Jayesh Joshi,
for the Petitioner.

Mr. S.C. Wakankar, i/b Mr. Vaibhav Patankar, for the
Respondents No. 1-A to 1-C.

CORAM : N.M. JAMDAR, J.
DATE : 13th January 2017

ORAL JUDGMENT :

1. This Writ Petition has been filed by the landlord challenging the judgment and order passed by the Fifth Additional District Judge, Kolhapur dated 8 July 1994 allowing the Appeal and setting aside the judgment and decree passed by the Joint Civil Judge, Junior Division, Kolhapur decreeing the Suit filed by the Petitioner-landlord for eviction of the Respondents-Defendants.

2. The Suit bearing No. 1146 of 1979 was filed by the Petitioner in the Court of Civil Judge, Kolhapur on 3 December

1979 seeking possession of the suit property which is situated at 'E' Ward, Rajarampuri, Kolhapur. The suit property is a residential property. The suit property of the Petitioner was let out to Respondent No. 1 on a monthly rent of Rs. 65/-. Respondent No. 1, that is the original Defendant No. 1. Petitioner contended in the suit that the Defendant No. 1 had illegally sublet the property to Respondent No. 2 i.e. Defendant No. 2 and the Defendant No. 1 has shifted out of the City and he was residing elsewhere. It was contended that a notice was issued to the Defendants on 24 February 1976 calling upon the Defendants to handover the possession and to pay arrears of rent, which notice was not replied to, neither the possession was handed over nor rent was cleared and therefore, the Suit had to be filed for recovery of possession of the suit premises and for recovery of arrears of rent.

3. The Written Statement was filed jointly by the Defendants. It was contended that the Defendants No. 1 and 2 are brothers and are members of a joint family. It was contended that the Defendants had not paid any rent to the Petitioner nor have taken the property from him as a tenant. It was contended that the owner of the suit property was one Bhagawant Vithoba Patil to whom the rent was paid and thereafter to his sons. It was contended that the Petitioner was not the owner of the suit property and did not have any right to file the Suit and since he was not the owner, there was no

relationship of landlord and tenant. The claim of ownership on the basis of adverse possession as against the Petitioner was also made.

4. Before the learned Civil Judge, the parties led their oral evidence. The learned Civil Judge came to the conclusion that the Defendant No. 1 had unlawfully sublet the suit premises to Defendant No. 2 and that the Petitioner had proved that he was owner of the suit property and that the Petitioner was entitled for the possession of the suit premises, since there was subletting on the part of Defendant No. 1. The claim of the Petitioner that the premises were required for his bonafide and reasonable requirement, was negatived. The learned Civil Judge also held that the Defendants failed to make deposit of amount of arrears of rent pursuant to the notice and also in the Court and the Petitioner is entitled to decree under Section 12(2)(a) of the Bombay Rent Act, 1947. Accordingly, the learned Civil Judge decreed the Suit by judgment and decree dated 31 August 1988. The Appeal bearing No. 47 of 1989 was filed by the Respondents-Defendants. The theory that the Petitioner is not the owner and landlord was again asserted by the Defendants. It was stated that the rent receipts could not be produced as the Defendants expected a finding in their favour that the Petitioner is not the owner/landlord.

5. In the Appeal, an application was filed to bring
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certain documents regarding payment of rent on record. This Application was opposed by the Petitioner on the ground that there was no reason that why such evidence was not filed earlier and the documents were being produced at the appellate stage. The learned District Judge, after hearing both the sides, held that the Petitioner is not the landlord of the suit premises and that there was no sub-tenancy created by the Defendant No. 1 in favour of the Defendant No. 2, as they were members of the joint family. The learned District Judge, accordingly, reversed the judgment and decree passed by the learned Civil Judge by the impugned judgment dated 8 July 1994. Thereafter, the present Writ Petition has been filed.

6. Heard Mr. S.G. Deshmukh, the learned Counsel for the Petitioner and Mr. S.C. Wakankar, the learned Counsel for the Respondents No. 1-A to 1-C.

7. It is the contention of Mr. Wakankar, the learned Counsel for the Respondents that since the Petitioner is not the landlord of the Respondents, which fact has been accepted by the learned District Judge, no other aspect of the matter is relevant. In the context of this submission, this issue will have to be considered first. It is in the context of the stand taken in this Court and what stand taken by the Petitioner in the Courts below will have to be noticed.

8. In the Written Statement in paragraphs 2 and 3, the Respondents-Defendants have asserted that they are not tenants of the Petitioner and they have never paid any rent to the Petitioner. It is asserted that the Defendants were paying rent to Vithoba then to Bhagawant Patil from 1964 and upto 1977 and thereafter, to the sons of Bhagawant Patil. In paragraphs 6, 8 and 10, there is a clear assertion that the Petitioner is not the owner of the suit property and therefore, did not have any right to extinguish the tenancy rights. The stand has been repeated even in the Appeal memo. As rightly contended by the learned Counsel for the Petitioner, if it is found that the Petitioner is a co-owner, then any of the co-owner can institute the Suit.

9. The definition of the 'Landlord' under Section 5(3) of the Act of 1947, upon which reliance is placed by the learned Counsel for the Respondents-Defendants, reads thus :-

“(3) " landlord" means any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not

being a tenant who from time to time derives title under a landlord; and further includes in respect of his sub-tenant, a tenant who has sub-let any premises; [and also includes in respect of a licensee deemed to be a tenant by section 15A, licensor who has given such license, [and in respect of the State Government, or as the case may be, the Government allottee referred to in sub-clause (b) of clause (1A), deemed to be a tenant by section 15B, the person who was entitled to receive the rent if the premises were let to a tenant immediately before the coming into force of the Bombay Rents, Hotel and Lodging House Rates Control, Bombay Land Requisition and Bombay Government Premises (Eviction) (Amendment) Act, 1996]].”

The definition is wide and clearly includes a person not only actually receiving the rent, but it is entitled to receive the rent.

10. It is admitted position that the suit property was owned by Vithoba and the tenancy was created by Vithoba. It is after death of Vithoba, the name of the Petitioner, as his son, was entered into the property records. The fact that the name of the Petitioner was entered into the property record is even

accepted by the learned District Judge. Therefore, when the Petitioner became owner of the suit property albeit joint owner, he was entitled to receive the rent and therefore, fell in the definition of the landlord as stipulated.

11. The reliance by the learned Counsel for the Respondents on the decision in the case of *Tribhuvanshankar Vs. Amrutlal*¹ is misplaced in the facts of the present case. It is correct to advance a proposition of law that for institution of the Suit for recovery of possession, a person must be the landlord, but once it is established that the Petitioner fell within the definition of landlord as defined under the Act this question does not arise. The learned District Judge has merely gone by the statements made by the Respondents-Defendants that they were paying the rent to Bhagawant. But once the fact that the Petitioner was co-owner of the suit property was established he had to be held as a landlord of the suit premises. It is settled law that any co-owner can file a suit for eviction of a tenant and nothing is shown that other owners had objected to this course of action. It is argued by the learned Counsel for the Respondents that the Petitioner may be one of the co-owners, but since there is no rent receipt issued by the Petitioner nor there is any agreement with the Petitioner, the Petitioner cannot be termed as a landlord. Thus, in short, it is contended that the

¹ (2014)2 SCC 788

Petitioner may be owner, but he cannot be termed as a 'landlord' as defined under Section 5(3) of the Act of 1947. The stand is that a plaintiff cannot terminate the tenancy because he is not the owner of the suit premises, is different than the stand that the Plaintiff is one of the co-owner, but the tenancy rights have been created specifically by other co-owners. It is the first stand that has been taken in this Court throughout the proceedings. It is for the first time in oral arguments a stand is being taken that fact that Petitioner is a co owner but not the Landlord. It not permissible for the defendant to take such varying stands, and even assuming it can be taken, a co owner is included in the definition of landlord, though he may not actually be receiving the rent. The finding of the District Court that petitioner was not the landlord of the premises is perverse on the face of it and will have to be set side.

12. As far as the aspect of subletting is concerned, the Trial Court has looked into this aspect in detail. The property was originally let out to Defendant No. 1. The rent receipt is not issued in the name of the Defendant no. 2. The Trial Court found that initially the Defendant No. 2 was serving in the Army and for years together he was serving out of Kolhapur. The Defendant No. 2 did not produce any documentary evidence that though he was serving outside, his family continued to reside in the suit place. No ration card was produced. No documentary evidence was produced. School certificates were

also not produced to show that they were taking education. Considering these aspects, the learned Trial Court rendered categorical finding that no reliable evidence was produced by the Defendants. Defendant No. 1, the original tenant, did not step into the witness box. In Appeal the learned district Judge overturned these findings of fact. When a detailed scrutiny of evidence was undertaken by the Trial Court, it was expected that the learned District Judge to do the same before overturning the findings. The learned Court only took into consideration the fact that the Defendants No. 1 and 2 are brothers and there is therefore a presumption about the jointness of the family. It is the contention of the learned Counsel for the Respondents-Defendants that the burden is on the Petitioner to show that there has been no partition and in fact, there has been no partition within the family. There is however, no answer to the material taken into consideration by the Trial Court that the Defendant No. 1 has shifted out of Kolhapur and no cogent evidence was produced regarding the existence of a joint family. From the fact that the Defendants are brothers, straightaway the learned District Judge drew a conclusion regarding the jointness of the family. The learned Counsel for the Petitioner is right in contending that such presumption cannot be rightly drawn regarding the property on tenancy basis merely because of the relationship between the parties. The learned District Judge has completely ignored categorical findings of facts rendered by the Trial Court before

reversing the findings on this count. In the present case the original Tenant defendant No. 1 has left the premises and has handed it over to defendant No. 2. There is no tenancy in the name of Defendant No. 2. No evidence is led show that tenancy was given to the joint family. Defendants may be brothers, the Petitioner landlord had given the tenancy to one brother. The Trial court has specifically held that there was no evidence to show that defendants were residing together. The approach of the learned District Judge on this count is clearly perverse and the finding of the Trial Court will have to be restored. Therefore, the Petitioner had made out the case for a decree on the ground of subletting.

13. Though there is no issue specifically framed by the Trial Court regarding the arrears of rent, in view of the findings rendered by the Trial Court on issue No. 3A, the Trial Court under issue No. 5 specifically recorded that the Respondents-Defendants had failed to deposit the rent and has become defaulters under Section 12(2)(a) of the Bombay Rent Act and therefore, the Petitioner was entitled to decree on that count as well. The Appeal memo has been filed by the Respondents-Defendants had contended that since the Respondents-Defendants accepted that the findings will be rendered that the Petitioner is not the owner, the rent receipts were not produced and that the Trial Court has not considered the provisions of Sections 12(3)(a) and 12(3)(b) of the Rent Act and that

incorrect findings has been recorded that the Respondents-Defendants ought to have raised dispute as regards standard rent within one month and that the demand made by the Petitioner did not fall within four corners of Section 12(3)(a). The contention of the learned Counsel for the Respondents-Defendants that the issue of default cannot be considered as no issue was framed, thus, cannot be accepted as there is a clear finding by the Trial Court which has been assailed in the Appeal Court on its own merit without making any grievance that due to non framing of issue any prejudice was caused to the Petitioner.

14. The learned Counsel for the Petitioner pointed out that it is the stand of the Respondents-Defendants that the rent was paid to deceased Bhagawant from 1964 to 1968 but no cogent evidence was led before the Trial Court as to whether in fact this amount was paid till 1968 and in any case, there is nothing on record to show that till 1976 when the notice was issued, any rent was paid. The reasons put forth by the Respondents regarding non productions of the alleged receipts cannot be accepted. The Respondents were represented through advocates ,even in this Court the entire thrust of the argument is that the Petitioner is not the landlord. Therefore, once this argument is overruled and that there is no cogent material regarding payment of rent produced in the Trial Court, the findings rendered by the Trial Court, which is not even looked at

by the learned District Judge also will have to be confirmed.

15. To conclude therefore, the findings of the learned District Judge that the Petitioner is not the landlord of the suit premises, is not correct. Case for subletting of the suit premises held to be proved by the Trial court was wrongly reversed by the district Court on an incorrect premise.

16. In this Petition, Civil Applications have been filed bearing Civil Application No. 521 of 2006 and Civil Application No. 2437 of 2010 to bring on record certain subsequent events. The learned Counsel for parties state that the subsequent events are that a bungalow has been constructed by Defendant No. 2 nearby locality. Defendant No. 1 is staying elsewhere. The plot is purchased by Defendant No. 2 and the bungalow is constructed by son of Defendant No. 2.

17. Considering ages of both the parties, matter was adjourned from time to time to find whether the dispute could be settled. Settlement talks did not materialise. Even otherwise it appears that the Respondents will not be on the streets, if a decree of eviction is passed. In these circumstances, the Petitioner is entitled to succeed. Accordingly, rule is made absolute in terms of prayer clause (a)(i) and prayer clause (a)(ii).

18. No order as to costs.

19. At this stage, the learned Counsel for the Respondents seeks ad-interim relief for a period of four weeks from today. Considering the facts that some time will be required for obtaining copy of this order, ad-interim relief is granted for a period of six weeks from today.

[N.M. JAMDAR, J.]