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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.572 OF 2013

WITH

CIVIL APPLICATION NO.475 OF 2015

Mrs. Pushpa B.Bharadwaj & Ors. ..Applicants.

V/s.

Ms. Louisa K.D'Mello & Ors. ..Respondents.

Mr.Nusrat Shah with Ema Almeida, Kevin Gala and Sanaa Shah for
the Applicants.

Ms.Eventa Gonsalves for the Respondents.

CORAM : N.M.Jamdar, J.

DATED : 19 January, 2017

ORAL ORDER

By this revision application, the Applicants have challenged the judgment and decree dated 5 April, 2013 passed by the Appellate Bench of the Small Cause Court, Mumbai in Appeal No.152/2007. By impugned judgment, order and decree the Applicants have been directed to vacate the suit premises and hand over the possession to the Respondent-landlord.

2. The suit premises are on ground floor of a bungalow

known as 'Beach Manor', situate at 24, Chimbai Road, Bandra, Mumbai. The first floor is in occupation of the Respondents and the ground floor is in occupation of the Applicants. The original owner of the suit premises i.e. Mr.Charles D'mello passed away, survived by Respondent No.1 i.e. his wife. Respondent No.2 and Respondent No.3 are the heirs of Mr.Charles D'mello. The Respondents-landlord filed the suit bearing RAE Suit No.382/1071 of 1991 on the ground of *bonafide* requirement. It was contended that the family of Respondents-Plaintiffs had a grown-up son, who was of marriageable age and he required sufficient premises to stay with his wife after his marriage. It was also stated that Plaintiff No.3, married daughter, though currently residing in Botswana, was intending to return to India with her family i.e. husband and son, who was also grown-up and considering their need, the suit premises were required. It was asserted that the financial position of the Applicants is good. Their father was a famous film actor, who has left various properties and substantial accommodation is available to them. Written statement was filed by the Applicants. A Commissioner was appointed to carry out the inspection of the suit premises and he submitted his report. The Small Causes Court, Mumbai, the learned Small Cause Judge by judgment and order dated 21 April, 2007 held that the Respondents-landlord failed to prove that the suit premises were reasonably and *bonafide* required and also that the ground of nuisance and annoyance were not made out and also that hardship will be caused to the Respondents. The learned Small Cause Court

accordingly dismissed the suit. Thereafter, the appeal was filed by the Respondents-landlord, which has been allowed by the impugned order.

3. I have heard Mr.Shah, learned counsel for the Applicant and Ms.Eventa Gonsalves, learned counsel for the Respondents.

4. Mr.Shah submitted that the Respondents-landlord has suppressed an availability of the third bedroom of substantial size which was clearly indicated in the map of the Commissioner which was not disputed and on this ground alone, the suit ought to have been dismissed, which was rightly dismissed by the learned Small Cause Judge, Mumbai. He relied on the decision of the Apex Court in the case of ¹*Kishan Chand V/s. Jagdish Pershad & Ors.* Mr. Shah contended that Plaintiff No.3 was residing in Botswana, the premises from the other tenants can be obtained by the Respondents-landlord, there is also an ancestral property in the form of bungalow available and also that there is open plot on which the Respondents-landlord can construct. He also submitted that the issue of comparative hardship has not been considered in proper perspective and that the Court has not considered the possibility of partial decree which is mandatory on the part of the Court to consider.

5. Ms.Gonsalves, learned counsel for the Respondents on the other hand submitted that the suppression, if any, is on the part

¹ (2003) 9 Supreme Court Cases 151

of the Applicants, the Appellate Court has correctly analysed the report and map of the Commissioner to hold that the availability of a third bedroom itself is clearly not proved from the map. It was submitted that the suit premises are occupied only by Defendant No.3 and Defendant No.1 and all others i.e. daughter and wife of the original tenant and others have settled abroad. Even Defendant No.3 is qualified and has deliberately not disclosed her financial status and the status of the residential permits from other countries. It was contended that no efforts were made by the Applicants to search alternate premises and no hardship would be caused to them.

6. As far as suppression of the fact is concerned, the allegation is based on non disclosure of a third bedroom and on the ground of what is stated in the plaint is that only two bedrooms are available to the Respondents-landlord. Firstly, the need of the Respondents-landlord which has been upheld by the Appellate Bench will have to be kept in mind. The need pleaded is on the part of the wife of the original landlord, her son who was unmarried and was intending to get married and third of the daughter with her husband and the grown-up son. As rightly contended by the learned counsel for the Respondents, the need of Plaintiff No.3, the daughter, cannot be simply brushed aside because she also has a share in the suit property after the death of her father. Therefore, what is sought to be pleaded on behalf of the Respondents-landlord is the need of three families with one grown-up son. Therefore, even

assuming that three bedrooms are available, the same is not sufficient for the basic need pleaded. The suppression of the fact should be of such nature that it fundamentally alters the need pleaded by the landlord. In the facts of the present case, as held by the Appellate Bench, there is no such suppression. Even though the Commissioner was appointed and a map was submitted, the decision making still remained with the Appellate Bench and the map of the Commissioner was only a piece of evidence to be considered. The learned counsel for the Respondents-landlord has pointed out from the map that shows a kitchen in a passage without any outlet for drainage and that it is not in the same position as the above position in the ground floor. This position is generally maintained for the purpose drainage. Therefore, if the Appellate Bench has taken note of this obvious anomaly, in the revisional jurisdiction, it cannot be said that the view taken by the Appellate Bench is perverse. Once that position is accepted that there is no such third bedroom but a kitchen, the decision relied upon by the learned counsel for the Applicants in the case of *Kishan Chand (supra)* is not applicable to the facts of the case.

7. As far as the open plot is concerned, it is settled law that the tenant cannot take a stand that the landlord should be driven to construct a new premises on the open plot neither it can be contended that the landlord should take possession from the other tenants. The Appellate Bench has also taken note of the complete

failure on the part of the Applicants to prove that the other bungalow was of ownership of the Respondents-landlord when a specific stand was taken that in the past, it was taken on rental basis. In the evidence, it has been deposed by Plaintiff No.3 that her family intends to return to India and they have not taken the citizenship of Botswana and that the situation in Botswana is not safe. This stand taken by Respondent No.3 cannot be said to be fanciful stand and their intention to return to India cannot be considered as not *bonafide*, especially when Plaintiff No.3 has a share in the suit property.

8. As regards the position of the Applicants is concerned, the written statement has been filed by the Applicants. In the written statement, it is stated that it is filed on behalf of all Defendants. The Appellate Bench has taken note of the cross-examination of Defendant No.3 wherein she has failed to produce that any authorization was given by Defendant Nos.1, 2, 4 and 5. In the cross-examination, various admissions have been given by Defendant No.3 in respect of her brothers i.e. other Defendants, which will indicate that they settled in United States. In view of this position, it was obligatory on the part of Defendant No.3 to place on record the Passports of these Defendants to indicate their current position. It has also been admitted that the son and daughter of the Defendant No.5 are born in United States. Having taken note of these admissions in the cross-examination, the Appellate Bench has

rendered a finding of fact that the other Defendants, brothers have settled in United States. As far as Defendant No.3 is concerned, qualification of Chartered Accountant has been admitted. Earlier employment has also been admitted. The fact that she has taken permanent residential permits in Canada in February, 2005 is also admitted. This being the social and educational status of Defendant No.3, the burden was upon Defendant No.3 to demonstrate that she and Defendant No.1, mother, will not be able to secure alternate premises. This is also indulgence because in the written statement no such separate stands have been taken by Defendant Nos.1 and 3. The written statement was filed on behalf of all the Defendants without authority. In spite of this suppression, the Applicants have been claiming that suppression is on the part of the Respondents-landlord. It is also noted that after the suit notice has been issued, the Applicants did not make any attempts for securing alternate premises. The Applicants have not placed on record their financial status. On the other hand, the assertion of Respondents-landlord regarding the sound financial status of the Applicants has remained unanswered. In these circumstances, it cannot be said that the finding of fact rendered by the Appellate Bench regarding comparative hardship in favour of the Respondents-landlord was erroneously recorded.

9. As far as reliance placed by the learned counsel for the Applicants on the decision in the case of ²*Gaur Chandra Basu &*

2 2003 (1) Bom. C.R. 438

Anr. V/s. Ruchira Ashok Sonde & Anr. to contend that it is the duty of the Court to ensure that a partial decree can be passed. The facts of the case will have to be considered. In this decision, the Court has come to the conclusion that the comparative hardship was balanced and thereafter proceeded to consider the mandate. Even otherwise, in the present case the Appellate Bench has considered the map which is produced on record and has opined that no such division is possible looking at the location. There are two floors in the bungalow which are of identical type and an integrated layout and, therefore, the view taken by the Appellate Bench that separation is not possible cannot be stated to be perverse. In these circumstances, there is no error on the part of the Appellate Bench. The findings rendered are purely finding of facts which are possible view of the matter. The revision application is, therefore, dismissed. No order as to costs.

10. The learned counsel for the Applicants submitted that even today, the Applicants are ready to hand over one room to the Respondents which will satisfy their need. As far as the contention of the Applicants that they will hand over one room from the suit premises to the Respondents is concerned, the learned counsel for the Respondents submitted that the Respondents are not ready and also it will not satisfy their need. The matter was adjourned from time to time to find out whether the parties can settle the dispute. However, the learned counsel for the parties submitted that the

matter could not be settled amicably. This course of action also does not appear to be practicable possible considering the layout of the Suit property.

11. Civil Application No.475 of 2015 has been filed by the Applicants seeking to bring on record that the Respondents-landlord have created third party rights and an advertisement has been annexed. The learned counsel for the Respondents makes a categorical statement that the Respondents have not created any third party rights whatsoever and the only intention in issuing the public notice was regarding the search of title of the property. As on today, the Respondents continue to be the owner of the suit property. This statement made by the learned counsel for the Respondents is accepted. In these circumstances, the Civil Revision Application is rejected. The civil application also stands disposed of. No order as to costs.

12. The learned counsel for the Applicants at this stage seeks protection for twelve weeks as the Applicants are desirous of pursuing the challenge further. Considering the facts and circumstances, I am inclined to grant 10 weeks time but since it will take some time to get the copy of the order, on the following conditions, the decree will not be executable for a period of 12 weeks from today:-

(a) That the Applicants will file an affidavit / undertaking/s of all

adult members in the family who are currently occupying the suit premises;

- (b) These undertaking/s will specify that they will not create any third party rights or part with the possession and clear the arrears of rent, if any;
- (c) The undertaking/s to be filed within a period of four weeks from today. However, the Applicants who are currently residing in the suit premises at Mumbai shall file the undertaking/s within a period of two weeks from today;
- (d) If the undertaking/s are not filed within the stipulated time limit, the decree will stand executed forthwith.

(N.M.Jamdar, J.)