

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3323 OF 2004

1. Shikharchand s/o Lalchand jain,
age 50 yrs, Occ. Business,
r/p near Gurudwara Road,
Kopargaon, Tq. Kopargoan, Dist.
Ahmednagar.

..Petitioner..
(orig plaintiff.)

Versus

1. Dnyaneshwar s/o Sitaram Bhavsar :
Deceased Through L.Rs.
1-a. Minakshi Dnyaneshwar Bhavsar,
age major, Occ. Housheold.

1-b. Nilesh Dnyaneshwar Bhavsar,
age major, Occ. Business,
Both R/o Kapad Bazar,
Kopargaon, Dist. Ahmednagar.
2. Parashram s/o Sitaram Bhavsar,
age major, Occ. And R/o as above.
3. Anil s/o Sitaram Bhavsar,
age major, Occ. And R/o as above.
4. Sunil s/o Sitaram Bhavsar,
age major, Occ. And R/o as above.

5. Sou Chanda w/o Arun Bhavsar,
age major, Occ. Household,
R/o c/o Arun Bhavsar, KC Bardanwale,
Raja Bazar, Jalgaon, Dist. Jalgaon.
6. Sau Manda Ishwarlal Bhavsar,
age major, Occ. Household,
R/o c/o Ishwarlal Bhavsar,
Station Road, Jalgaon, Dist. Jalgaon.
7. Sau. Sunanda Shantaram Bhavsar,
age major, Occ. Household,
r/o c/o Shantaram Bhavsar, Main road,
Shirpur, Dist. Dhule.

..Respondents..
Orig. Defendants.

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Mr Sanket S Kulkarni, Advocate for Petitioner.
Mr S S Kazi Advocate for respondent nos. 1 to 4.
Respondent nos. 5 to 7 served-absent

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Coram : N.M. Jamdar, J.
Dated : 22 November 2018.

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Oral Judgment :-

By this Petition, the petitioner-landlord has challenged the judgment and order passed by the Additional District Judge, Kopergaon in RCA No.93 of 1999 dated 3.9.2003 allowing the appeal filed by the respondent/tenant and setting aside the judgment and decree passed by the learned Civil Judge J.D., Kopergaon in RCS

No.11 of 1993.

2. The suit premises are a shop CTS No.1383, admeasuring 15' x 9' at Kopargaon Taluka Ahmednagar. The petitioner gave a notice to the respondent-tenant on 18 November 1992 seeking possession of the suit premises on the ground that the respondent is in arrears of the rent, has sublet the premises and the premises are required for bonafide use. Since the possession was not handed over, the petitioner filed RCS No.11 of 1993 in the Court of Civil Judge J.D. Kopargaon. The respondent appeared and filed a written statement. The parties examined witnesses and submitted documentary evidence. The learned Civil Judge framed issues as regards the bonafide requirement, arrears of rent, subletting and nuisance. As regards the arrears of rent, subletting and nuisance, the learned Civil Judge recorded findings against the petitioner. The petitioner did not pursue the challenge to the rejection on these grounds. The learned Civil Judge held in favour of the petitioner on the ground of bonafide requirement and observed that the petitioner is operating a shop in a stall admeasuring 8' x 4' in rental premises and that he has no other commercial premises and the comparative hardship is to the petitioner if the decree is refused. Accordingly, the learned Civil Judge decreed the suit by judgment and order dated

13.8.1999.

3. The respondent thereafter filed an appeal bearing RCA No.93 of 1999. The learned District Judge framed a sole issue regarding the bonafide requirement. The learned District Judge held that though need of the petitioner for commercial use is proved, since the petitioner had sought possession of the premises only for residential purpose, the judgment and order passed by the learned Civil Judge Junior Division will have to be set aside. The learned District Judge accordingly allowed the appeal by judgment and order dated 3.9.2003 and set aside the judgment and decree passed by the learned Civil Judge.

4. Heard Mr. S.S.Kulkarni, the learned advocate for the petitioner and Mr. S.S. Kazi, the learned advocate for respondent nos. 1 to 4.

5. Both the Courts have accepted that as for commercial purpose is concerned, the petitioner has proved his bonafide requirement. Short question arises in this petition is that whether the learned District Judge was right in holding that the petitioner had claimed the possession of the suit premises only for residential purpose. Learned counsel for the parties have also addressed the Court

on this short issue. The learned District Judge has primarily relied upon a passage in the plaint to non suit the petitioner.

6. The petitioner has placed on record that he was operating from a shop admeasuring 8' x 4' which he had taken on rent from the local authority. In this context, the learned Civil Judge had rightly referred and relied upon the decision of this Court in the case *Meenal Eknath Kshirsagar Vs. Traders and Agencies* ¹ holding that landlord is the best judge of his requirement. In the present case, it has come on record that, it is the petitioner does not even have a choice as regards the commercial premises to decide the best premises. The petitioner has no commercial premises available except the suit premises and has one rented shop/stall admeasuring 8' x 4' from where he is running the shop. It is the contention of the respondent that the petitioner has also two premises i.e. CTS No.1382 and 1383 and has three storied building. It has come on record and has also observed by the learned District Judge that these two premises are the residential premises. As regards the commercial purpose is concerned, the learned District Judge has accepted that the need of the petitioner is bonafide. Both the Courts have, therefore, held that these two premises cannot be considered as suitable for commercial purpose. The suggestion of the 11997 (1) *Mh.L.J.* 121 .

respondent that the petitioner has two more shops in the vicinity has been negated and nothing further is pointed out by the respondent that the petitioner has two shops in the vicinity. The learned District Judge in the impugned order after analyzing the rival contentions and referring to the decision cited by the parties has in fact observed thus :-

“No doubt, the finding of the learned trial court that the plaintiff is in possession of only one shop admeasuring 8' x 4' and therefore his need of the suit premises for carrying on business is reasonable and bonafide is correct.” Therefore, as regards the commercial use, there is concurrent findings by both the Courts that need of the petitioner for running a shop is reasonable.

7. Even on the assessment of comparative hardship, since the petitioner has no other commercial premises has come on record, those rental premises are just temporary stall.

8. Reverting back to the issue that has been referred in the earlier part of the decision that is whether the claim of the petitioner for commercial use can be taken away merely on the basis of certain sentences in the plaint.

9. The learned District Judge in the impugned decision has

reproduced said averments in the plaint in paragraph no.9. According to the learned counsel for respondent that these averments clearly indicate that the case of the petitioner was for residential use, while it is the contention of the petitioner that it is not specific and must be holistically with the notice and evidence lead.

10. In the notice issued by the petitioner it is stated that premises were required also for commercial use. In the plaint, the petitioner has only referred “use” without prefixing as it either residential or commercial. Thereafter, certain averments are made regarding the number of people in the family. However, in the evidence led, the petitioner has stated how premises are required for commercial purpose. The respondent has extensively cross-examined the petitioner on the need of the petitioner for the commercial purpose. As far as the respondent is concerned, respondent was fully aware, by the manner in which cross examination was conducted, that the petitioner was claiming the premises for commercial use. Both the parties also led their respective evidence centering around this need. Learned Civil Judge analyzed this evidence as regards commercial use and observed that the petitioner has proved his case that the premises are needed for commercial purpose.

11. Therefore, even after accepting that the petitioner had no other commercial premises and was running a shop from rented premises of 8'x4', and that his need was bonafide, the learned District Judge has non-suited the petitioner by recording a passage in the plaint in a restricted manner. Learned District Judge ought to have looked at the pleadings carefully which did not specifically restrict the claim to residential use. Pleadings did not indicate that the commercial need was excluded. The pleadings of the parties alongwith evidence and notices which form part of the pleadings ought to have considered totally. Instead, the learned District Judge even after accepting that need was bonafide, has set aside this decree with a conclusion that commercial use was never pleaded is, perverse. In spite having established that the petitioner is in need of premises for commercial use and being accepted so by both the Courts, since the year 1992 the petitioner is deprived of the possession of the suit premises. The order passed by the learned District Judge thus has resulted in grave prejudice to the petitioner and is required to be quashed and set aside.

12. In the circumstances, writ petition will have to be allowed. Accordingly rule is made absolute in terms of prayer clause C. No order as to costs.

13. At this stage, the learned counsel for respondent seeks stay of this order. Considering the facts and circumstances, the petitioner will not file execution proceedings for a period of eight weeks from today.

(*N.M. Jamdar, J.*)

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