

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION (ST) NO.6386 OF 2018

Chandrakant Dhondupant Ghumare	]	
(dead) through his L.Rs.	]	
1(a) Chandrakala Chandrakant Ghumare	]	
(now deceased)	]	
1(b) Amar Chandrakant Ghumare	]	
and another.	]	Applicants
Vs.		
Shobha Surendra Vaidya (deleted)	]	
Parag Surendra Vaidya and others.	]	Respondents
.....		
Mr. S.S. Redekar, for Applicants.		
Mr. Rahul S. Kate, for Respondents.		
.....		

CORAM : R.G. KETKAR, J.

DATE : 14TH MARCH, 2018.

P.C.

Heard Mr. Redekar, learned Counsel for the applicants and Mr. Kate, learned Counsel for the respondents at length.

2. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicants (hereinafter referred to as 'defendants') have challenged the judgment and decree dated 24th November, 2017 passed by the learned Ad-hoc District Judge-I, Vasai in Regular Civil

Appeal No.238 of 2007. By that order, the learned Ad-hoc District Judge allowed the appeal preferred by the respondents (hereinafter referred to as 'plaintiffs') and quashed and set aside the judgment and decree dated 19th November, 2003 passed by the learned Civil Judge, Junior Division, Vasai in Regular Civil Suit No.69 of 1998 and decreed the suit u/s 13 (1) (b) and 13 (1) (c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). The learned District Judge directed the defendants to hand over vacant possession of two rooms situate in Municipal House No.2/122, situate at Ramdevi, Tal. Vasai, District Thane, (in short 'suit premises') within 45 days from the date of the order.

3. In support of this Application, Mr. Redekar submitted that the learned trial Judge dismissed the suit. The learned trial Judge held that for establishing ground u/s 13 (1) (b), the plaintiffs did not apply for appointment of the Court Commissioner. Evidence adduced by the plaintiffs was insufficient even to establish ground u/s 13 (1) (c) of the Act.

4. Mr. Redekar submitted that in so far as the District Court is concerned, during pendency of the appeal, the plaintiffs filed application under Order XLI, Rule-27 of the Code of Civil Procedure , 1908 (for short 'C.P.C') for appointing Cadastral Surveyor from the office of DILR as Court Commissioner. The application was allowed. The Court commissioner was examined and has produced measurement maps at Exhibit 60 and 65. The said witness, however, did not specifically state whether the alleged permanent structure of platform admeasuring 4'x4' was made by the defendants. The plaintiffs did not lead any evidence to substantiate the ground u/s 13(1) (b). In any case, the alleged construction is not inside the premises let out to the defendants. Assuming that, the defendants raised permanent structure, it was for beneficial use and enjoyment of the suit premises. He has taken me through paragraphs 7 to 12 of

the District Court judgment to contend that the learned District Judge was not justified in decreeing the suit u/s 13 (1) (b) of the Act.

5. In so far as the ground of nuisance and annoyance u/s 13 (1) (c) is concerned, he submitted that the plaintiffs have issued notice on 23rd March, 1996 at Exhibit 44, inter alia, alleging that the defendants have acquired flat having two rooms and kitchen at Vasai. The plaintiffs did not allege any instances causing nuisance and annoyance in that notice. The only ground alleged in that notice was acquisition of suitable alternate accommodation as contemplated u/s 13 (1) (l) of the Act. The plaintiffs have issued second notice dated 21st August, 1997 at Exhibit 46 alleging instance of nuisance and annoyance. He has also taken me through the plaint and observations of the learned District Judge in paragraph 13 to 25.

6. Mr. Redekar submitted that following instances alleged by the plaintiffs;

- [1] original defendant's wife and other family members used to obstruct the entrance of the plaintiffs and his family members to his house by sitting in long evening hours on the steps of the entrance.
- [2] the defendant and family members used to hang clothes for drying on the way for approaching the common latrine behind the suit premises which causes difficulty to the plaintiffs; and other trivial instances.

7. Mr. Redekar relied on the decision of this Court in the case of **Suklal s/o Kalu Thorat (D) through Lrs and Ramkrushna s/o Hari Wani (D) thr. L.Rs., 2018 (2) Mh. L. J., 80**. The learned Single Judge of this Court referred to the decision in the case of **Kashinath Shankar Gambhire Vs.**

Sudha Gopal Patil and others, AIR 2000 Bom. 493. In paragraph 17, the learned Single Judge extracted paragraph 6 of **Kashinath Shankar's** case. In paragraph 18, the learned single Judge referred to the decision in the case of **P.D. Trivedi vs. Chandaben M. Shah (1999) 1 GLR 355** and extracted paragraph 9 of that judgment.

8. Mr. Redekar submitted that the plaintiffs have not established that acts, omission or conduct of the defendants cause or likely to cause inconvenience, hurt, damage which would interfere with the enjoyment of life or property. He submitted that in so far as other instances namely placing in the courtyard non vegetarian food is concerned, it has come on record that plaintiffs' another tenant Mr. Pai is a non-vegetarian. The plaintiffs have not made any grievance about non-vegetarian diet of Mr. Pai. The plaintiffs have raised grievance only against the defendants about non-vegetarian diet. In short, he submitted that the plaintiffs failed to make out any case that continuous acts of the defendants cause nuisance. He, therefore, submitted that Civil Revision Application requires consideration.

9. On the other hand, Mr. Kate supported the impugned order. He submitted that in so far as ground u/s 13 (1) (b) is concerned, the learned trial Judge declined to pass decree only on the ground that the plaintiffs did not examine Court Commissioner. During pendency of the appeal, the Court Commissioner was appointed who has submitted his report along with map which are at Exhibit 60 and 65. He submitted that after considering this material on record, learned District Judge observed that the Court Commissioner followed requisite procedure before carrying out measurements by issuing notice. He also prepared panchanama about commission work in the presence of the parties and, therefore, commission attracts presumption u/s 114 (e) of the Indian Evidence Act, 1872. The report along with measurement

maps is admissible in evidence under Order-XXVI, Rule-10 of the C.P.C. He submitted that submission that alleged construction is not in two rooms let out to the defendants and is in the courtyard and, therefore, eviction decree u/s 12 (1) (b) cannot be passed or misconceived. He invited my attention to the definition of 'premises' u/s 5 (8) of the Act. He submitted that the defendants did not come with the case that the alleged construction is for beneficial enjoyment of the premises. After considering the material on record, learned District Judge held that without obtaining prior permission of the plaintiffs, the defendants have raised construction of platform which is of a permanent nature. Learned District Judge also held that the defendants did not establish that it is made for beneficial use of the premises. He, therefore, submitted that the learned District Judge was justified in passing the decree of eviction u/s 13 (1) (b).

10. In so far as ground u/s 13 (1) (c) is concerned, the learned District Judge has considered various instances. The learned District Judge also considered the submission of the defendants that another tenant by name Mr. Pai is a non-vegetarian and against him no grievance is ever raised by the plaintiffs. He submitted that the learned District Judge has considered that Mr. Pai is not residing adjacent to the plaintiffs. After considering the evidence on record, the learned District Judge rejected that submission of the defendants and observed that placing of the remains of non-veg food in the plaintiffs courtyard by the defendants is an intentional act to cause unbearable harm to the plaintiffs. He, therefore, submitted that no case is made out for interfering with the impugned order.

11. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. In so far as ground u/s 13 (1) (b) is concerned, the learned trial Judge declined to pass

decree on that ground. It has come on record that during pendency of the appeal, Court Commissioner was appointed for carrying out inspection. He submitted the report along with measurement maps. The learned District Judge has considered this aspect from paragraphs 6 to 12. In paragraph 7, the learned District Judge held that as the commissioner has followed necessary procedure, his report and measurement maps are admissible in evidence under Order-XXVI, Rule-10 of C.P.C and also attracts presumption u/s 114 (e) of the Indian Evidence Act, 1872.

12. In paragraph 8, learned District Judge noted that the defendants have denied even existence of such platform and have not explained about its disclosure in the report of the Commissioner. The defendants have attempted to conceal this fact to hide their illegal act of raising the permanent construction of platform.

13. In paragraph 9, the learned District Judge held that the plaintiffs have established the instance of construction of platform at backside of the rented premises. The probability in such situation is found that the defendants might have constructed the said platform. In so far as submission of the defendants that the alleged construction is not made in the suit premises is concerned, I do not find any merit in this submission.

14. Section 5(8) of the Act expresses definition of 'premises' thus;

“(8) ”premises” means_

- (iii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof, but does not include a room or other accommodation in a hotel or lodging house;

15. A perusal of clause (b) (iii) of section 5(8) shows that in the definition of premises any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof is included. In the present case, the defendants have not pleaded that the construction of platform is made for more beneficial enjoyment of the suit premises. In view thereof, I do not find any merit in the submission of Mr. Redekar that as the alleged construction is not made in two rooms let out to the defendants, learned District Judge was not justified in passing the decree u/s 13 (1) (b). After perusing the findings recorded by the learned District Judge, I do not find that the learned District Judge has ignored any evidence on record or the findings are based on no evidence.

16. In so far as ground of eviction u/s 13 (1) (c) is concerned, this aspect is considered by the learned District Judge from paragraphs 13 to 25. Learned District Judge has considered each instance in paragraph 17. The learned District Judge has dealt with the aspect that the plaintiff and his family members are pure vegetarians and the defendants are placing in the courtyards the remains and wastage of the non-veg food. In paragraph 20, the learned District Judge dealt with the submission of the defendants that another tenant Mr. Pai is a non-vegetarian and the plaintiffs have not made any grievance against him. In paragraph 21, the learned District Judge held that placing of the remains of non-veg food in the plaintiffs courtyard by the defendants is an intentional act to cause unbearable harm to the plaintiffs.

17. Mr. Redekar submitted that in the earlier notice dated 23rd March, 1996 Exhibit 44, no such instances were even pleaded by the plaintiffs. It is only in the second notice dated 21st August, 1997 at Exhibit 46, these instances were pleaded and on that basis, the present suit is filed. It is material to note that the suit is instituted in the year 1998. In so far as the reliance on the

decision of **Suklal** (supra) is concerned, in paragraph 7, the learned Single Judge referred to the decision of **Kashinath Shankar** wherein it is observed that the nuisance for which an action would lie under section 13 (1) (c) is incapable of any legal definition. Nuisance ordinarily means that which annoys or hurts or that which is offensive. It includes any act, omission or conduct which causes or is likely to cause inconvenience, hurt, damage or which may interfere with the enjoyment of the life or property. Anything done which unwarrantably affects the rights of others, endangers life or health, gives offence of the senses, violates the law of decency or obstructs the comfortable and reasonable use of property amounts to nuisance. The question whether a particular act, omission or thing is nuisance or annoyance actionable in law depends on surrounding circumstances. The alleged act or omission, the mode of committing it and the consequences flowing therefrom, amount to nuisance or not at all time would be the question dependent on facts and circumstances of the case. However, one thing is certain that in order to attract the ground of eviction u/s 13 (1) (c) invariably it needs to be satisfied that the alleged nuisance is of gross and unusual character, frequent and persistent and that it would not be possible for the affected person or persons to lead normal life and it is such that one cannot ordinarily expect in household.

18. In paragraph 16, the Court observed that whether the act and conduct of the tenant amounts to nuisance or annoyance to the landlord or landlady the test should be whether a reasonable man in the circumstances of the case would feel annoyed or irritated from the conduct of the tenant. It is not fanciful desire of the landlord or the landlady which is to be taken into consideration. Applying the tests laid down to the facts of the present case as also the fact that notice Exhibit 46 was issued on 21st August, 1997, the present suit is filed in the year 1998, the learned District Judge was justified in decreeing the suit u/s 13 (1) (c). The submission of Mr. Redekar that in the

first notice no instances u/s 13 (1) (c) were pleaded does not found merit consideration in view of proximity between second notice Exhibit 46 and filing of the suit in the year 1998.

19. After considering the submissions and perusing the material on record, I do not find that the the Appellate Court committed any error in decreeing the suit. The defendants are not in a position to demonstrate that the findings recorded by the Appellate Court are perverse being based on no evidence or that they are contrary to the evidence on record. The defendants are not in a position to demonstrate that on the basis of the evidence on record, no reasonable or prudent person would have reached conclusions arrived at by the Appellate Court. Merely because on the basis of evidence on record, another view is possible that by itself is no ground for exercising the powers under Section 115 of the C.P.C. In the result, the Civil Revision Application fails and the same is dismissed.

20. At this stage, Mr. Redekar orally prays for stay of the order for a period of eight weeks from today. He assures that the defendants and all the adult family members residing with them will file usual undertaking in this Court within two weeks from today, after giving advance copy to the other side incorporating therein that;

- (a) they are in possession and nobody else is in possession of the suit premises;
- (b) they have neither created third party interests nor parted with possession of the suit premises;
- (c) they will hereafter neither create third party interests nor part with possession of the suit premises;
- (d) they will deposit the entire arrears, if any, within two weeks from today in this Court under due intimation to the

Advocate for the respondents.

- (e) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

21. Subject to the defendants filing the undertaking in the aforesaid terms within two weeks from today, this order shall remain stayed for the period of eight weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendants commit breach of any of the conditions of the undertaking, the plaintiffs will be at liberty to proceed with the matter in accordance with law. In case, defendants are unable to obtain suitable orders from higher Court within a period of eight weeks and do not hand over possession of the suit premises to the plaintiffs, the plaintiffs will be at liberty to proceed with the matter in accordance with law. Order accordingly.

22. List the Petition for reporting compliance on 4th April, 2018.

[R.G. KETKAR, J.]