

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.370 OF 2016**

Sitabai Kashiram Palyekar	]	Applicant
Vs.		
Yeshwant P. Kshirsagar (since deceased)	]	
1. Suhasini wd/o Yeshwant Kshirsagar	]	
(deleted)	]	
2. Shri Rajan s/o Yeshwant Kshirsagar & Ors.	]	Respondents

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Mr. Durgesh Kulkarni i/b Lex Firmus, for applicant.

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CORAM : R.G. KETKAR, J.

DATE : 2ND APRIL, 2018.

P.C.

Heard Mr. Kulkarni, learned Counsel for the applicant at length.

2. By this Application under Section 115 of the of the Code of Civil Procedure, 1908, the applicant, hereinafter referred to as “plaintiff” has challenged the judgment and decree dated 20th April, 2012 passed by the learned Judge, Court Room No.35 of the Court of Small Causes at Mumbai, Bandra Branch in R.A.E. Suit No.763 of 1999 as also the judgment and decree dated 11th December, 2015 passed by the Appellate Bench of the Court of Small Causes in A-1 Appeal No.2 of 2014. By these orders, the Courts below dismissed the suit instituted by the plaintiff for recovery of possession of Room No.9, admeasuring 16'x9' situate on the ground floor of Sitabai Palyekar Chawl, Gondavli Gaothan, Azad Road, Andheri (E), Mumbai – 400 009 (for

short “suit premises”) invoking grounds u/s 13 (1) (b) and 13 (1) (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

3. In support of this Application, Mr. Kulkarni strenuously contended that the Courts below committed serious error in holding that the plaintiff did not establish ground u/s 13 (1) (b) of the Act. He invited my attention to the admission given by D.W.1 Narendra Kshirsagar, son and Constituted Attorney of the defendant and in particular in cross-examination. In cross-examination, D.W.1 stated that he has maintained the conditions put up by the plaintiff as per clause II that the existing height of structure 13 feet at cable and 8 feet at front. Mr. Kulkarni invited my attention to the Commissioner's report dated 30th November, 1998 as also permission accorded by the Municipal Corporation of Greater Mumbai (for short 'Corporation') on 12th January, 1999 and in particular clause 2 and 4 thereof. He submitted that D.W.1 in his cross-examination clearly admitted that he had increased height of the structure from 9 feet to 13 feet. The Courts below, however, negated ground u/s 13 (1) (b) of the Act on the ground that there are inconsistencies in the evidence of the plaintiff and her son. He has taken me through paragraphs 30 and 33 of the Appellate Court judgment to contend that the Appellate Court erroneously held that the plaintiff did not prove ground u/s 13 (1) (b).

4. As far as ground u/s 13 (1) (g) of the Act is concerned, he submitted that the defendant in his evidence admitted that he is not residing in the suit premises and has shifted to premises at MHADA Colony at Kandivali. He submitted that the defendant did not discharge the burden on him. The defendant also did not controvert the evidence adduced by the plaintiff in support of her case u/s 13 (1) (g) of the Act. He, therefore, submitted that application requires consideration.

5. I have considered submissions advanced by learned Counsel for the applicant. I have also perused the material on record. A perusal of the permission given by the Corporation on 12th January, 1999 and in particular clause 2 thereof shows that the said clause recorded existing height of the structure 13'0" at cable and 8 feet at front was to be maintained. Mr. Kulkarni invited my attention to the sketch appended to that permission which shows that existing height is 9 feet. I do not find any merit in this submission. The Appellate Court has considered this ground from paragraphs 30 onwards. The Appellate Court considered evidence of P.W.1 Sitabai where she did not even state that existing height of the suit premises was 9 feet and the defendant under the garb of tenantable repairs in pursuance of permission dated 12th January, 1999 has increased height to 13 feet.

6. With the assistance of learned Counsel, I have also perused examination-in-chief of P.W.1. A perusal of that examination-in-chief does not even remotely indicate that P.W.1 asserted that defendant increased height from existing 9 feet to 13 feet. In paragraph 32, the Appellate Court recorded that evidence of P.W.1 Sitabai is not supported by evidence of her son Pradeep. The Appellate Court noted that the defendant was compelled to approach Corporation for tenantable repairs and on 12th January, 1999, the Corporation accorded permission subject to terms and conditions and accordingly repairs were carried out by the defendant. For the reasons recorded in paragraphs 30 to 34, I do not find that the Appellate Court committed any error while upholding the trial Court's findings u/s 13 (1) (b) of the Act. That apart, though the Commissioner was appointed and he submitted the report, the plaintiff did not examine the Court Commissioner.

7. As far as ground of reasonable requirement is concerned, both the Courts have turned down this ground. A perusal of the Appellate Court's

judgment and in particular, paragraph 27 shows that the plaintiffs possess following residential premises;

- [1] Flat No.7 in Gomati Nagri Niwara Colony, Building No. 22.
- [2] Flat No.1 on the ground floor of Sheetal Nagri Niwara Co-operative Housing Society, Santosh Nagar, Goregaon (East) Mumbai.

Not only that, plaintiff Sitabai sold flat to Sushma Tarale in the year 2003-2004 i.e after four to five years of filing of the suit. In paragraph 28, the Appellate Court considered evidence of plaintiff's son Pradeep who deposed that ground floor is surrendered to the landlord. Thus, after considering the material on record, the Appellate Court concurred with the trial Court's finding and held that the plaintiff did not establish that she requires the suit premises reasonably and bona fide and that it is a mere desire.

8. Mr. Kulkarni submitted that the Courts below committed error while answering question of comparative hardship. Defendant admitted that he is not residing in the suit premises and has shifted to MHADA Colony at Kandivali. The question of comparative hardship will come only after the plaintiff establishes that her requirement is bona fide and reasonable. In the present case, the Courts below have concurrently found that need pleaded by the plaintiff is not reasonable as she has several premises and apart from that, she had sold one flat during pendency of the suit.

9. The Courts below after appreciating the evidence on record have held in favour of the plaintiff to the extent that the suit premises is not in slum area and negatived grounds u/s 13(1) and 13 (1) (g) of the Act. Mr. Kulkarni was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of the evidence on record, no reasonable or prudent person would have come to that

conclusion. Mr. Kulkarni was not in a position to show that the findings recorded by the courts below are contrary to the evidence on record. In view thereof, no case is made out for invocation of powers under section 115 of C.P.C. Hence, application fails and the same is dismissed.

[R.G. KETKAR, J.]