

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION (ST.) NO.19044 OF 2018

Sambhu Dayabhai Patel and another ... Applicants

Vs.

Tejraj Sardarmal Jain and others ... Respondents

Mr. Mayur Khandeparkar a/w Mr. Umesh Tawani, Ms Mranal Mandhane
and Ms Hetal V. i/b. M/s. S. Ashwinikumar & Co. for Applicants.

Mr. Drupad S. Patil for Respondents.

CORAM : R. G. KETKAR, J.

DATE : AUGUST 24, 2018

P.C. :

Heard Mr. Khandparkar, learned Counsel for the applicants and Mr. Patil, 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.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 04.05.2018 passed by the learned Principal District Judge, Raigad, Alibaug in Civil Appeal No.23 of 2013. By that order, the learned District Judge allowed the appeal preferred by the respondents, hereinafter referred to as 'plaintiffs', and quashed and set aside the judgment and decree dated 21.12.2012 passed by the learned Civil Judge, Junior Division, Karjat in Regular Civil Suit No.96 of 2008. The learned District Judge directed the defendants to handover vacant possession of Shop No.323/B1/2 situate in Neral Grampanchayat, Mauje Neral, Taluka Karjat, District Raigad, more particularly described in paragraph 1 of the plaint (for short 'suit premises'), within a period of 3 months from the date of the order.

3. The plaintiff had instituted the Suit against the defendants inter

alia contending that he is carrying on business in shop admeasuring 6' x 8' ft. The brother of the plaintiff is tenant of that shop. The suit premises admeasures 367 sq.ft. The premises in possession of the plaintiff is not sufficient for carrying on his business. Plaintiff's family consists of his two sons, who are taking education. The children of the plaintiff require separate room for studies. The plaintiff further asserted that the premises in his possession are insufficient and the suit premises is required for residential purpose as well. He intends to carry on business in the front room and use rear room for residential purpose. The plaintiff has instituted Suit invoking ground under Sections 15, 16(1)(a) and 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). The defendant resisted the Suit by filing written statement inter alia contending that the premises in possession of the plaintiff are sufficient. In fact, plaintiff has purchased one shop in Pitkar building and it is in his possession. The said premises is convenient for carrying on business. The plaintiff is in possession of 3 rooms admeasuring 600 sq.ft. The said premises is sufficient to meet his requirement for residence.

4. On the basis of the pleadings of the parties, the issues were framed. The parties adduced evidence. By order dated 21.12.2012, the learned trial Judge dismissed the Suit. Aggrieved by that decision, plaintiff preferred Civil Appeal No.23 of 2013. By order dated 17.03.2017, the learned District Judge had allowed the appeal and decreed the Suit. Aggrieved by that decision, defendants preferred Civil Revision Application (St.) No.15954 of 2017 in this Court. Pending that C.R.A., defendants also took out Civil Application (St.) No.15956 of 2017. By consent of the parties, the order dated 17.03.2017 passed by the learned District Judge was set aside on 29.11.2017. Civil Appeal No.23 of 2013 was restored to the file for deciding it afresh, uninfluenced by the observations made in the order dated 17.03.2017. The learned District Judge was directed to consider the question of

comparative hardship irrespective of whether a separate issue was framed or not. The defendants were permitted to file miscellaneous application in the civil appeal, which was ordered to be considered and disposed of on its merits. This Court also directed the learned District Judge to decide the miscellaneous application before deciding the civil appeal.

5. In pursuance thereof, defendants filed application at exhibit-23 under Order XLI, Rule 27 of C.P.C. seeking production of the sale deed dated 21.01.2002 in respect of shop (Gala No.6) in Pitkar building. The defendants prayed that they may be permitted to file documents as per the list filed separately being additional evidence under Order XLI, Rule 27 of C.P.C. While deciding the appeal, the learned District Judge also decided the application under Order XLI, Rule 27, after recording that the learned Counsel appearing for the parties agreed to hear and dispose of the said application at the time of final hearing of the appeal. The learned District Judge allowed the application and considered the sale deed produced by the defendants. The learned District Judge also considered whether availability of shop premises situate in Pitkar building will diminish the requirement of the plaintiff. After considering the sale deed produced by the defendants, the learned District Judge held that plaintiff has established that his requirement is both, reasonable and bonafide and greater hardship will be caused to the plaintiff in case the eviction decree is not passed. Accordingly, the learned District Judge allowed the appeal and decreed the Suit. It is against this order, defendants have instituted the present application.

6. In support of this Application, Mr. Khandeparkar submitted that after considering the evidence on record, the learned trial Judge had dismissed the Suit. The learned trial Judge had not framed issue on the question of comparative hardship. The learned trial Judge negatived the

case of the plaintiff that defendants have changed user of the suit premises. In other words, the learned trial Judge held that the suit premises is used by the defendants for the purpose of occupation for which it was let out and that there is not change of user. For the first time, while deciding the appeal on 17.03.2017, the learned District Judge framed point No.3 relating to the question of comparative hardship. The parties did not have opportunity to lead evidence on this issue. That apart, the plaintiff had suppressed acquisition of shop premises in Pitkar building. By order dated 17.03.2017, the learned District Judge had allowed the appeal. Aggrieved by that decision, defendants preferred C.R.A. and pending that C.R.A., took out Application for adducing additional evidence. By order dated 29.11.2017, this Court disposed of C.R.A. by consent of the parties and permitted the defendants to take out miscellaneous application in the appeal that was restored. In the appeal, defendants filed sale deed dated 21.01.2002 by which the plaintiff had purchased Gala No.6 on the ground floor of House No.313 situate in the land bearing Survey No.276/1. He submitted that while allowing the C.R.A., this Court directed the learned District Judge to decide application first and thereafter proceed to decide the appeal. However, instead of deciding the application prior in point of time, the application was decided along with the main appeal. This also caused prejudice to the defendants as they were precluded from adducing evidence in support of their application under Order XLI, Rule 27 of C.P.C.

7. He has invited my attention to paragraph 8 of the impugned order where the learned District Judge recorded that the Counsel for the appellant and the respondent agreed to hear and dispose of the application at the time of final hearing of the appeal. He submitted that the concession made by the defendants' Advocate was in the teeth of this Court's order. The learned District Judge was bound by the order passed

by this Court and should have ignored the concession given by the defendants' Advocate. In any case, the learned District Judge ought to have obeyed the direction issued by this Court while disposing of the C.R.A.

8. Mr. Khandeparkar invited my attention to the finding recorded by the learned District Judge in paragraph 35. In paragraph 35, the learned District Judge recorded the submission of the plaintiff that only a small lane of two and half feet in width is there to access Gala No.6 and in such circumstances, it cannot be used for business. The Counsel appearing for the defendant submitted that to meet this allegation of the plaintiff, cross-examination of the plaintiff is a must and therefore, he may be permitted to cross-examine the plaintiff. The learned District Judge rejected that submission by observing that defendant No.1 in his cross-examination had stated that plaintiff does not have shop of his own and Gala No.6 is a godown. The learned District Judge, therefore, rejected the submission on the ground that as the witness of the defendant has admitted that Gala No.6 is used for godown purposes, it is not necessary to permit the parties to adduce evidence.

9. Mr. Khandeparkar further submitted that the learned District Judge also declined to pass decree on the ground of change of user. Thus, the Courts below concurrently held that defendants did not make change of user of the suit premises from godown to any other purpose. As against this, the plaintiff has sought possession of the suit premises for composite purpose, namely for commercial as also for residential. As the Courts below have declined to pass decree on the ground of change of user, the decree passed under Section 16(1)(g) cannot be sustained. It amounts to recording inconsistent finding by the learned District Judge. He also submitted that as the plaintiff had suppressed availability of Gala No.6 in Pitkar building, he did not approach the Court with clean

hands. As the plaintiff suppressed material facts, the learned District Judge was not justified in decreeing the Suit under Section 16(1)(g). In support of this proposition, he relied upon the decision of this Court in ***Vasant M. Gujar Vs. Baitulla Ismail Shaikh*, 2015 (5) Bom.C.R.243**, and in particular paragraphs 58 to 64. For all these reasons, he submitted that application requires consideration.

10. On the other hand, Mr. Patil supported the impugned order. He submitted that in paragraph 9 of the written statement, defendants specifically asserted acquisition of shop premises in Pitkar building and that it is convenient for carrying on business by the plaintiff. Though in paragraph 10, defendants asserted that plaintiff is in possession of three rooms admeasuring 550 to 600 sq.ft., it has come on record that plaintiff is in possession of 367 sq.ft. and to that effect, plaintiff had produced an assessment extract at exhibit-35 for the year 2007-08. As against this, though in the cross-examination, defendants reiterated that premises in possession of the plaintiff admeasures 600 sq.ft., no documentary evidence was placed on record to that effect.

11. Mr. Patil further submitted that plaintiff is carrying on business in shop admeasuring 6' x 8' ft., which is a tenanted premises of his brother. Having regard to the requirements of the plaintiff, namely plaintiff's two sons are pursuing course of Chartered Accountancy and Engineering, one of the sons of the plaintiff is married and has a son, members in the family of the plaintiff, the premises presently in occupation namely, 367 sq.ft. is not sufficient to meet his residential requirement. As far as the requirement of plaintiff for carrying on business is concerned, witness of the defendants admitted that Gala No.6 is used for godown purpose. In other words, witness of the defendant did not depose that plaintiff is using the said premises as a shop. In support of these submissions, Mr. Patil relied upon the decision of this Court in ***Kisanrao Madhavrao***

Bartakke Vs. Narayan Dhondi Shete, 1978 Mh.L.J. 859, and in particular, paragraphs 24 and 26 thereof.

12. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It has come on record that plaintiff is carrying on business in a tenanted premises admeasuring 6' x 8'. The brother of the plaintiff is a tenant of the said premises. As against this, the suit premises admeasures 367 sq.ft. A perusal of paragraphs 4 and 5 of the plaint shows that plaintiff has contended that his family consists of his wife and two sons, who are taking education. The premises presently in his occupation is not sufficient. The suit premises consists of two rooms. The front room can be used by him for commercial purpose and rear room can be used for residential purpose. It has also come on record that during the pendency of the proceedings, one of the sons of the plaintiff is married and has a son. The other son has completed engineering course. The other son is pursuing Chartered Accountancy. The learned District Judge has considered the requirement from paragraph 27 onwards. The learned District Judge noted that plaintiff requires the premises for expansion of his business as also for his residence. In paragraph 28, the learned District Judge noted that the plaintiff is carrying on business in premises where his brother Anil Patel is tenant. The area in possession of the plaintiff is 6' x 8'. As against this, the area in possession of the defendants is 471 sq.ft. In paragraph 32, the learned District Judge dealt with Gala No.6 admeasuring 327 sq.ft. in Pitkar building. The learned District Judge considered the question whether defendant should be permitted to lead additional evidence.

13. A perusal of the order dated 23.06.2017 passed by this Court (Coram : B. P. Colabawalla, J.) in C.R.A. (St.) No.15954 of 2017 shows that the time was sought for filing C.A. for producing the document

which according to the defendants goes to the root of the matter. The said document has a direct bearing on the finding of bonafide requirement. In pursuance thereof, defendants filed C.A.(St.) No.18954 of 2017. By order dated 29.11.2017, C.R.A. was disposed of by consent of the parties. The defendants' C.A.(St.) No.18954 of 2017 filed before this Court was permitted to be filed as a miscellaneous application in the Civil Appeal. A perusal of that order does not indicate that defendants requested this Court to permit them to adduce oral evidence. Even the order does not specifically grant permission to adduce oral evidence.

14. A perusal of the application exhibit-23 filed by the defendants in the District Court shows that defendants intended to produce sale deed dated 21.01.2002. In paragraph 5, it was observed that the said document has a direct bearing on the finding regarding bonafide requirement along with the comparative hardship. It was further asserted that if they are permitted to file additional evidence, plaintiff would get an opportunity to adduce the rebuttal evidence. The defendants, therefore, prayed that they may be permitted to file a document as per list filed separately being additional evidence under Order XLI, Rule 27 of C.P.C. A perusal of application under Order XLI, Rule 27 does not remotely even indicate that defendant prayed for permission to adduce oral evidence. All that defendant prayed was for production of the sale deed. In paragraph 8, the learned District Judge recorded that the learned Counsel for the appellant (plaintiff herein) and the learned Counsel for the respondents (defendants herein) agreed to hear and dispose of the application exhibit-23 at the time of final hearing of the appeal. In other words, no prayer was made for adducing oral evidence. The learned District Judge had allowed production of the sale deed as is evident from paragraph 32. The learned District Judge thereafter proceeded to consider whether the requirement of the plaintiff is diminished on account of acquisition of Gala No.6. It is in that context, the learned

District Judge noted that defendant's witness admitted in cross-examination that plaintiff does not have shop of his own and Gala No.6 is used as godown. The learned District Judge also noted in paragraph 35 that an access to the said premises is of two and half feet in width, and in such circumstances, it cannot be used for business.

15. Mr. Khandeparkar submitted that request made on behalf of the defendants to cross-examine plaintiff's witness about access of lane of 2 and ½ ft. width to the premises in Pitkar building was noted and the said prayer was turned down. In the light of discussion in paragraphs 13 and 14 above, in my opinion, the learned District Judge rightly turned down the said request. Even if I accept the contention of the defendants that the said premises can be used as a shop, it has come on record that plaintiff's sons are of marriageable age. One of his sons got married during the pendency of the proceedings, and has a son. That apart, the other son has completed the engineering course. In addition to the requirement of the plaintiff's son, plaintiff has also pleaded his own requirement as he is carrying on business in shop admeasuring 6' x 8' which is a tenanted premises. The learned District Judge has considered requirement of the plaintiff namely, residential as also commercial. In paragraph 38, the learned District Judge concluded that plaintiff needs the suit premises for expansion of his business. From paragraphs 39 to 46, the learned District Judge considered requirement of the plaintiff for residential purpose and answered in favour of the plaintiff. In paragraph 45, it was observed that the learned trial Judge declined to pass decree only on the ground that plaintiff failed to bring on record that he is running shop in the said premises at the mercy of his brother and that his brother has asked him to vacate the suit premises or that there was imminent danger of vacating the suit premises. The learned District Judge observed that admittedly, plaintiff is carrying on his business in the tenanted premises. If he wants to start business in his own premises,

it cannot be said that the need of the plaintiff is unreasonable.

16. As far as the question of comparative hardship is concerned, the learned District Judge has considered this aspect in paragraphs 47 to 49 and held that greater hardship will be caused to the plaintiff in case the eviction decree is refused.

17. Mr. Khandeparkar relied upon the decision of this Court in **Vasant M. Gujar** (*supra*), and in particular paragraphs 58 to 64 thereof. In paragraph 58, the learned Single Judge referred to the decision of **Tarachand Hassaram Shamdasani Vs. Durgashankar G. Shrof, 2004 (Supp.) Bom.C.R. 333**. In paragraph 60, the learned Single Judge observed that the Courts below had returned findings on the aspect of reasonable and bona fide requirement in quite of perfunctory manner. The Courts below had permitted themselves to be particularly influenced by the circumstances that the landlord Baitulla Shaikh resided in the house, which is owned by his mother-in-law. As against this, the plaintiff had pleaded requirement of his two sons. It was further observed that the pleadings with regard to the need of residence was sketchy. The landlords are hoteliers having hotels like Blue Star and Lucky Restaurant at Mahabaleshwar itself. The landlords and their family members are engaged in several businesses like STD Booth, sale of handicrafts etc.. One of the landlords has been the President of Municipal Council of Mahabaleshwar. The record indicated that the family members of one of the landlords had served in Municipal Council in some capacities or the other. In contrast, the tenant Gujar, who resides in suit premises, was engaged in sale of 'Panipuri' and other road side snacks. In my opinion, in the facts and circumstances of the present case, the said decision has no application.

18. After considering the material on record, it is evident that the plaintiff is in possession of following premises:

- (i) residential premises on the first floor admeasuring 367 sq.ft. above the suit premises;
- (ii) shop premises admeasuring 6' x 8', which is a tenanted premises;
- (iii) godown admeasuring 327 sq.ft.

19. The family of plaintiff consists of plaintiff himself, his wife and two sons. Out of which, one son is married having wife and son. The other son is of marriageable age. One son is pursuing Chartered Accountancy and other son has completed engineering course. The plaintiff has contended that residential premises in his possession are insufficient. He intends to use front room for commercial purpose and rear room for residential purpose. The residential premises admeasuring 367 sq.ft. can be used by his married son and his family. The sons can use the godown premises admeasuring 327 sq.ft. for pursuing their profession.

20. Thus, after considering the material on record and submissions advanced by the learned Counsel for the parties, I do not find that the learned District Judge has committed any error in passing the eviction decree. The defendants are not in a position to demonstrate that the findings recorded by the learned District Judge are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the District Court. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

21. At this stage, Mr. Tawani orally applies for stay of the eviction decree for a period of 12 weeks from today. He assures that within two weeks from today, defendants and all adult members using the suit

premises will give usual undertaking with 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 interest nor parted with possession of the suit premises;
- (c) they will hereafter neither create third party interest nor part with possession of the suit premises;
- (d) they will clear the arrears of rent, if any, within 2 weeks from today and will go on paying rent till handing over of possession;
- (e) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

22. In view thereof, notwithstanding dismissal of the Application, eviction decree shall not be executed for a period of 12 weeks from today subject to the defendants filing the undertaking in the aforesaid terms and clearing arrears of rent, if any, within two weeks from today, with advance copy to the other side. 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 ad-interim order shall stand vacated without further reference to the Court. In case, defendants are unable to obtain suitable orders from higher Court within a period of twelve weeks and do not hand over possession of the suit premises to the respondents, the respondents will be at liberty to execute the decree in accordance with law apart from initiating contempt proceedings. Order accordingly.

22. List the Application for 'reporting compliance' on 14.09.2018.

(R. G. KETKAR, J.)