

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION (ST.) NO.171 OF 2019

Terence Leo (decd) thru Robert James Leo ... Applicant
Vs.
Stella Mukadam (decd) thru Salvador P.
Mukadam and others ... Respondents

Mr. J. M. D'Silva for Applicant.
Ms Georgina Salvador Mukadam, Respondent No.1(d) in person.

CORAM : R. G. KETKAR, J.
DATE : MARCH 20, 2019

P.C. :

Heard Mr. D'Silva, learned Counsel for the applicant and
Ms Mukadam, respondent No.1(d) in person at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant has challenged the judgment and decree dated 12.09.2014 passed by the learned trial Judge in R.A.E.Suit No.228/631 of 1987 as also the judgment and decree dated 09.10.2018 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.34 of 2015. By these orders, the Courts below decreed the Suit instituted by the respondents, hereinafter referred to as 'plaintiffs', under Sections 13(1)(g) and 13(1)(l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') and directed the applicant, hereinafter referred to as 'defendant', to handover vacant and peaceful possession of flat No.3 in the building known as 'Stella Villa', Joseph Braz Colony, Orlem, Malad (West), Mumbai - 400 064 (for short 'suit premises').

3. The Suit was instituted by Stella Mukadam, since deceased, inter alia, contending that she is the owner and landlady of the building

known as 'Stella Villa'. The defendant Terence Leo was the monthly tenant of the suit premises. The agreed rent was Rs.100/- per month exclusive of all permitted increases and water charges. The plaintiff contended that she requires the suit premises for her personal use and occupation. The present accommodation possessed by her is insufficient for herself and her family members. The family of the plaintiff consists of herself, her husband, two sons and one daughter and all are of marriageable age. It appears that during the pendency of the Suit, original plaintiff Stella died. Her husband Salvador P. Mukadam was brought on record as plaintiff No.1. Sons - Colin and Augustine were brought on record as plaintiffs No.2 and 3 respectively. Daughter Georgina Salvador Mukadam was brought on record as plaintiff No.4. The original plaintiff came with the case that her son Colin, plaintiff No.2 is of 34 years of age. Plaintiff No.3, Augustine is of 32 years of age. Both are of marriageable age. They require the more premises for adjustment of better half of their sons. Plaintiff Stella is having a younger daughter (plaintiff No.4, Georgina). The suit premises is inadequate and insufficient for accommodating all the family members. The income of the plaintiff is not so high that she could purchase another premises for her sons and daughter. Her sons and daughter cannot get married because of lack of accommodation. The original plaintiff further came with the case that defendant has acquired the premises on the first floor of Francis Co-operative Housing Society at Malad (West) and is not residing in the suit premises since 1983. Thus, the original plaintiff claimed possession of the suit premises on the ground of reasonable and bonafide requirement as contemplated by Section 13(1)(g) as also acquisition of alternate residence by the tenant as contemplated by Section 13(1)(l) of the Act.

4. The defendant resisted the Suit by filing written statement at

exhibit-7. It appears that during the pendency of the Suit, original defendant-tenant died leaving behind defendants No.1(a) Ann Leo, 1(b) Lionel Leo, 1(c) Robert James Leo and 1(d) Chad Lawrence Leo. The present application is filed by the defendant No.1(c), Robert James Leo. The defendant contended that the present Suit is not maintainable as plaintiff Stella had already instituted R.A.E.Suit No.985/5027 of 1975. On the oral application made on behalf of the plaintiff, the Suit was allowed to be withdrawn on 10.12.1986 without obtaining leave to file fresh Suit on the same cause of action. The defendant contended that as the fresh Suit was instituted on the same cause of action, the Suit is liable to be dismissed on the ground of maintainability. The defendant further contended that the plaintiff as well as her family members possess sufficient accommodation. Flat No.1, in the building where the suit premises is situate was vacated by the tenant. Instead of occupying the said flat, plaintiff had let out the same on tenancy basis to the third party. Apart from that, plaintiff is also having property at Gorai. Both the sons of the plaintiff- Colin and Augustine are having their own accommodation. Thus, the present accommodation is sufficient for the plaintiffs. The defendant also contended that premises at Francis Co-operative Housing Society at Malad (West) were purchased by the defendant No.1(d) in the name of his mother. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues at exhibit-9. The parties adduced evidence. After considering the evidence on record, the learned trial Judge held that plaintiff proves that she require the suit premises reasonably and bonafide for her personal use and occupation and the greater hardship will be caused to the plaintiff if the eviction decree is not passed. The learned trial Judge held that plaintiff proves that the defendants have acquired suitable alternate accommodation. Thus, the learned trial Judge decreed the Suit under Sections 13(1)(g) and 13(1)(l) of the Act. The learned trial Judge held

that defendants failed to prove that the Suit is not maintainable.

5. Aggrieved by this decision, defendants preferred appeal. The Appellate Court dismissed the Appeal. It is against these orders, defendant No.1(c) Robert James Leo has instituted the present Civil Revision Application.

6. In support of this Application, Mr. D'Silva strenuously contended that earlier Suit instituted by the plaintiff was withdrawn on 10.12.1986 unconditionally. In view of Order XXIII, Rule 1(4)(b), plaintiff is precluded from instituting any fresh Suit on the basis of the same cause of action. The Courts below were, therefore, not justified in passing the eviction decree. Mr. D'Silva submitted that Power of Attorney deposed on behalf of the plaintiff that principal could have entered witness box and deposed. Even the Power of Attorney did not authorize the witness to depose on behalf of the principal. Mr. D'Silva submitted that the Courts below committed error in holding that the greater hardship will be caused to the plaintiff in the event of refusal to pass eviction decree. He has invited my attention to paragraph 1 of the plaint where the plaintiff herself referred to her filing of the Suit in the year 1975 and withdrawal of that Suit on 10.12.1986. The plaintiff has pleaded her requirement in paragraph 2 of the plaint. He invited my attention to the written statement filed by the defendant-tenant. In paragraph 2 of the written statement, it was specifically contended that in R.A.E.Suit No.985/5027 of 1975, issues were framed on 12.06.1986. The Suit was taken up for hearing on 05.12.1986 and evidence was being recorded. Plaintiff-Stella stepped into the witness box and evidence was adduced by her. On 05.12.1986, the matter was part heard and was adjourned to 10.12.1986 for further examination-in-chief of the plaintiff. On 10.12.1986, the plaintiff withdrew the Suit unconditionally.

7. Mr. D'Silva has also taken me through the findings recorded by the Courts below while dealing with the ground of reasonable and bonafide requirement as also the examination-in-chief of plaintiff No.4- Georgina, and in particular paragraph 3 thereof. In paragraph 3, she deposed that the monthly income of the plaintiff's son, daughter and daughter in law is not sufficient for our day to day needs. It is not possible for the plaintiff and / or her family to purchase another accommodation as they have no sufficient finance to buy a house. As against this, in the cross-examination, P.W.1 deposed that she cannot answer whether she is paying income tax or not. She cannot say whether any other member of her family are subject to income tax. Plaintiff No.3 Augustine is working for Hotel Hilton Towers, Nariman Point since 30 years as front office staff. She could not tell his salary. P.W.1 was also asked question whether she pays income tax. She answered that question by saying that this is her personal matter and no relevancy with the case. She was further asked whether she was able to produce her Income Tax Returns. She replied by saying no need to produce the same. She was further asked whether her brother Augustine pays income tax, which she replied by saying this is his personal matter and has no relevancy with the case. In short, he submitted that plaintiffs' financial condition is sound so as to purchase any other premises.

8. He submitted that basically, the Courts below ought to have held that the need pleaded by the plaintiffs is neither reasonable nor bonafide. In so far as the ground of acquisition of of suitable alternate accommodation under Section 13(1)(l) of the Act is concerned, he submitted that the premises are not purchased by the tenant, and therefore, the Courts below were not justified in passing the eviction decree.

9. On the other hand, Ms Georgina Mukadam supported the impugned orders. She submitted that after appreciating the evidence on record, the Courts below have concurrently decreed the Suit under Sections 13(1)(g) and 13(1)(l) of the Act, and therefore, no case is made out for interfering with the impugned orders.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the Courts below have decreed the Suit under Sections 13(1)(g) and 13(1)(l) of the Act. In so far as the judgment of the trial Court is concerned, the learned trial Judge has considered the ground of reasonable and bonafide requirement from paragraphs 18 to 27. After considering the evidence on record, the learned trial Judge held that plaintiffs have established their case that they require the suit premises reasonably and bonafide for personal use and occupation and accordingly, answered the issue in the affirmative. In so far as the comparative hardship is concerned, the learned trial Judge has considered this aspect from paragraphs 42 to 46. The learned trial Judge noted that defendant No.1(b) is the citizen of Canada and is presently residing at Abudhabi along with his family. Defendant No.1(d) is residing in New York along with his family and he is working there. Defendant No.1(c) is working in reputed company at Mumbai and his wife is also working with J. P. Morgan. At present, only defendants No.1(a) and 1(c) along with his family is residing in India and they are having their own two flats. Hence, no hardship will be caused to the defendants, in case the eviction decree is passed against them.

11. In so far as the ground of acquisition of suitable alternate accommodation is concerned, the learned trial Judge has considered this aspect from paragraphs 28 to 41 and held that defendants have acquired

suitable alternate accommodation for their residence.

12. As far as the judgment of the Appellate Court is concerned, the Appellate Court has considered the ground of bonafide and reasonable requirement from paragraphs 24 to 29 and held that the requirement of the landlord is reasonable and bonafide. The issue of comparative hardship was dealt with by the Appellate Court in paragraph 30. The Appellate Court held that greater hardship will be caused to the plaintiffs in case the eviction decree is not passed.

13. In so far as the ground of acquisition of suitable alternate residence is concerned, the Appellate Court considered this aspect from paragraph 31 to 43. After appreciating the evidence on record, the Appellate Court held that defendant No.1(a) has flat in Francis Co-operative Housing Society in her name and another flat at Tiara Co-operative Housing Society in the name of the defendant No.1(d). Thus, after re-appreciating the evidence on record, the Appellate Court upheld the findings recorded by the trial Court.

14. Mr. D'Silva submitted that financial condition of plaintiffs is sound and they can purchase any other premises. It is not possible to accept this submission. It is settled principle of law that when the plaintiffs come with the case of bonafide requirement, the Court has to presume that the requirement pleaded by the plaintiffs is reasonable and bonafide and it is for the defendant to establish that the requirement pleaded by the plaintiffs is malafide. The burden is on the defendant to prove the said fact. It is also settled principle of law that the plaintiff landlord is the best judge and defendant cannot dictate terms to the landlord to occupy particular premises. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit under Sections 13(1)(g) and 13(1)(l) of the Act. In view thereof, no case

is made out for invocation of powers under Section 115 of the C.P.C.

15. At this stage, Mr. D'Silva states that applicant Robert James Leo is present in the Court. He has tendered photocopy of his Driving Licence, which is taken on record and marked 'X' for identification. Upon taking instructions from him, he states that applicant will not press this C.R.A. if six months time to vacate the suit premises is given to him. He states that within two weeks from today, applicant and all adult family members residing with him will give 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 30.09.2019 or till handing over of possession, whichever is earlier;
- (e) They will not seek further extension of time for handing over possession;
- (f) They will hand over vacant and peaceful possession of the suit premises to the respondents on or before 30.09.2019.

16. In view thereof, C.R.A. is disposed of as not pressed. The eviction decree shall not be executed upto and inclusive of 30.09.2019 subject to the applicant and all adult family members residing with him filing undertaking in the aforesaid terms within two weeks from today with advance copy to the other side.

17. List the Application for 'reporting compliance' on 10.04.2019 at 3.00 p.m.

(R. G. KETKAR, J.)

Minal Parab