

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.45 OF 2019
WITH
CIVIL APPLICATION NO.62 OF 2019

The Municipal Corporation of Greater Mumbai ... Applicants
Vs.
Sahanika Trading Private Limited ... Respondents

Mr. Girish Godbole, Senior Advocate a/w. Ms Shital Mane i/b. Mr. Jernold J. Xavier for Applicants.

Mr. Ranjit Thorat, Senior Advocate i/b. Mr. Pramesh Vakil a/w. Ms Priyanka Bhandari a/w. Ms Sapna Sharma for Respondents.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 25, 2019

P.C. :

Heard Mr. Godbole, learned Senior Counsel for the applicants and Mr. Thorat, learned Senior 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 06.02.2018 passed by the learned Judge, Court Room No.7 of the Court of Small Causes at Mumbai in R.A.E.Suit No.1372 of 2015 as also the judgment and decree dated 26.11.2018 passed by the Appellate Bench of the Small Causes Court in A1 Appeal No.245 of 2018. By these orders, the Courts below decreed the Suit instituted by the respondents, hereinafter referred to as 'plaintiffs' invoking the grounds under Sections 15, 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the defendants to handover possession of premises No.14 to 17 situate on the first and entire second floor of Raoji Sojpal Chawl No.1 situate at Tokersey Jivraj Road, Sewree (West), Mumbai 400 015 (for short 'suit premises').

3. The plaintiffs came with the case that the suit premises was let out to the defendants for the purpose of running school and office. The defendants are in arrears of rent for the period from 01.07.2013 and permitted increases from 01.09.1972 till date. The plaintiffs, therefore, sought eviction under Section 15 (arrears of rent). The plaintiffs further contended that they require the suit premises to start their office and also to start business of food products for which they want to hire more employees. The Directors of plaintiffs have experience and also capacity to start a new business. The plaintiffs require the suit premises to start various other activities such as redevelopment of the suit premises, starting other business for which the suit premises would be ideal for the plaintiffs. Thus, the plaintiffs claimed possession under 16(1)(g) (reasonable and bonafide requirement).

4. The plaintiffs further contended that the defendants are not using the suit premises continuously for a period of more than 6 months prior to filing of the Suit for the purpose for which they were let out to the defendants without reasonable cause. [Section 16(1)(n) of the Act]

5. The defendants filed written statement inter alia denying the requirement of the plaintiffs. The defendants denied the allegations about non-user of the suit premises by contending that due to lack of students, the defendants are not using the suit premises.

6. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence. After considering the evidence on record, the Courts below decreed the Suit as indicated earlier. It is against these orders, defendants have instituted the present Application.

7. In support of this Application, Mr. Godbole submitted that the

Courts below committed serious error in decreeing the Suit under Section 15 of the Act. He submitted that in the present case, no demand notice was issued by the plaintiffs to the defendants. Mr. Thorat does not dispute the said position. I find merit in the submissions of Mr. Godbole. In view thereof, the Courts below were not justified in passing the eviction decree under Section 15 of the Act.

8. In so far as the decree on the ground of bonafide and reasonable requirement is concerned, Mr. Godbole has invited my attention to paragraphs 7 and 10 of the plaint where the plaintiffs pleaded their requirement. He submitted that in the plaint, the plaintiffs have pleaded requirement of Directors and not of the Company. In a case of a private limited company, requirement of the company is necessary, unlike case of partners in a partnership firm. He has invited my attention to paragraph 6(f) of the written statement where defendants denied the requirement of the plaintiffs.

9. Mr. Godbole submitted that during the course of cross-examination of P.W.1, Karan Deepak Shah, Director of the plaintiffs, he admitted that plaintiff company had filed more than 25 eviction proceedings and in most of the proceedings, plaintiff company had succeeded. He submitted that having regard to the fact that plaintiff company had succeeded in eviction proceedings, the need pleaded by the plaintiffs no longer subsists. He submitted that the plaintiffs did not establish that their requirement is reasonable and bonafide.

10. As far as the ground of non-user is concerned, Mr. Godbole invited my attention to paragraphs 4 and 12 of the plaint as also paragraph 6(c) of the written statement. He has invited my attention to paragraphs 5 to 10 of Civil Application No.62 of 2019 by which defendants have sought leave to amend the written statement in

accordance with the Schedule appended at exhibit-B to the application. He submitted that because of lack of co-ordination between the respective departments of the defendants, though broad averments regarding non-user of the suit premises and its supportive reasons were pleaded, the relevant documents remained to be pleaded and produced before the trial Court. The documents which are produced along with the application, namely, resolution about fall / drop in the number of students, attendance registers, communications with Education Officer regarding fall / drop in number of students clearly constitutes sufficient cause for non-user of the suit premises. He submitted that defendants have made out a case under Order XLI, Rule 27 of C.P.C. for production of additional evidence. The list of documents sought to be produced is at Exhibit-C of the application. He, therefore, submitted that the Courts below were not justified in passing the eviction decree under Sections 16(1)(g) and 16(1)(n) of the Act.

11. On the other hand, Mr. Thorat supported the impugned orders. In so far as the ground under Sections 16(1)(g) of the Act is concerned, he submitted that it is settled principle of law that once the plaintiff approaches the Court with the case of the reasonable and bonafide requirement, the Court has to presume in favour of the plaintiff and cannot look into the requirement with suspicion. It is for the defendant to prove that the need pleaded by the plaintiff is neither reasonable nor bonafide and in fact is mala fide. He has taken me through the written statement and the oral evidence of the defendants to contend that no such case was made out by the defendants.

12. In so far as the ground of non-user is concerned, Mr. Thorat submitted that the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit. He submitted that from the documents produced along with the application, it is evident that the

school that was run in the said premises is shifted to Prabodhankar Thakarey Hindi School, Sewree, Mumbai. He further submitted that no case is made out either for amending the written statement under Order VI, Rule 17 or for producing additional evidence under Order XLI, Rule 27 of C.P.C.

13. Mr. Thorat submitted that in so far as the eviction Suits are concerned, out of 25 Suits filed by the plaintiffs, in 16 Suits, ex-parte decrees have been set aside and the said Suits are pending. In so far as the remaining 9 Suits are concerned, applications for setting aside ex-parte decrees are pending. In short, he submitted that plaintiffs have not received possession of the premises in those Suits. He, therefore, submitted that no case is made out for interfering with the impugned orders. Mr. Godbole submitted that no such case was argued before the Courts below.

14. I have considered the rival submissions advanced by the learned Senior Counsel appearing for the parties. I have also perused the material on record. In so far as the ground under Section 16(1)(g) of the Act is concerned, in paragraphs 7 and 10, plaintiffs contended that they require the suit premises for their own use and occupation and to start their own office for various activities. In order to maintain and manage plaintiffs' said property i.e. 51 structures comprising of several tenants in Rawji Sojpal Chawl, they require the suit premises to start their office. They are also interested in starting another business of food products for which the plaintiffs require the suit premises. Plaintiffs want to hire more employees to start business of food products. It is further contended that plaintiffs require the suit premises to start various other activities such as redevelopment of the suit property and starting other business for which the suit premises would be ideal for the plaintiffs to have their office. The plaintiffs further contended that as the defendants

are not using the suit premises more than 6 months preceding the filing of the Suit, no hardship will be caused to them in case the eviction decree is passed.

15. In paragraph 6(f), defendants merely denied the assertions made by the plaintiffs in paragraphs 7 to 9. P.W.1 - Karan Deepak Shah reiterated the requirement in examination-in-chief. In the cross-examination, he deposed that plaintiff-company have 8 staff members excluding the Directors. All the 8 staff members are not working from the office, namely, 1/3, Raviji Sojpal Compound, Tokersey Jivraj Road, Seweree, Mumbai. Some of the staff members are working from their residential premises. Earlier, the office of the plaintiff company was at the residence of the original promoter. The office premises were on rental basis and the plaintiff company has shifted to this office in the year 2011 and the area of the office is approximately 200 sq.ft.

16. It is no doubt true that in the cross-examination, he deposed that plaintiffs had filed approximately 25 eviction proceedings and in most of the proceedings, plaintiffs succeeded. It is however, not brought on record either by the plaintiffs or the defendants as regards outcome of these 25 eviction proceedings. Be that as it may, the defendants did not bring on record any material to indicate that plaintiffs had received possession in 25 eviction proceedings. In fact, it was after posing question to P.W.1 during the course of his cross-examination about filing of various proceedings, the defendants ought to have brought material on record about securing possession in pursuance thereof so as to substantiate its case that bonafide need no longer subsists. No attempt was made to confront the witness during the course of cross-examination.

17. In so far as the evidence of the defendants' witness on the

question of Section 16(1)(g) is concerned, the evidence of D.W.1, Bapurao Pundalik More, Administrative Officer, F/South does not throw any light on this aspect. In fact, burden is on the defendants to prove that the need pleaded by the plaintiff is neither reasonable nor bonafide and in fact is mala fide. No such attempt was made by the defendants' witness. The Courts below have considered the ground of bonafide requirement and decreed the Suit. In so far as the trial Court's order is concerned, the learned trial Judge has considered this ground from paragraphs 15 to 18. In paragraph 18, the learned trial Judge dealt with evidence of P.W.1 on the point of bona fide requirement. The learned trial Judge observed that evidence of P.W.1 is not rebutted by the defendants by giving a single suggestion to him. In so far as the question of comparative hardship is concerned, the learned trial Judge has considered this issue from paragraphs 19 to 22 and answered the issue in favour of the plaintiffs.

18. In so far as the judgment of the Appellate Court is concerned, the Appellate Court has considered the grounds of reasonable and bonafide requirement as also comparative hardship from paragraphs 24 to 32 and answered these points in favour of the plaintiffs. After re-appreciating the evidence on record, in paragraph 32, the Appellate Court noted that in the present case, no evidence is adduced by the defendants denying bonafide and reasonable need of the plaintiffs for business purpose nor there are any suggestion in cross-examination of P.W.1. The Appellate Court also noted that the suit premises is in locked condition since last 5-6 years and therefore, no hardship will be caused to the defendants in case eviction decree is passed. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit under Section 16(1)(g) of the Act.

19. In so far as the ground of non-user under Section 16(1)(n) of the

Act is concerned, the learned trial Judge has considered this ground from paragraphs 9 to 14. The learned trial Judge considered decision of ***Dunlop India Limited Vs. A. A. Rahna, (2011) 5 SCC 778***. In paragraph 14, the learned trial Judge observed that defendants did not file electricity bills, telephone bills, attendance register, etc. to show that the school was running since before 6 months of filing of the Suit. In fact, D.W.1 admitted that since last 5 to 6 years, school is not running. The learned trial Judge also observed that plaintiffs proved that defendants are not using the suit premises without any reasonable cause for the purpose for which they were let out for a continuous period of six months immediately preceding the date of the filing of the Suit.

20. In so far as the judgment of the Appellate Court is concerned, the Appellate Court has considered this ground from paragraphs 15 to 23 and after re-appreciating the entire evidence on record, affirmed the findings of the trial Court. In paragraph 19, the Appellate Court dealt with evidence of D.W.1 Bapurao Pundalik More and observed that the said witness admitted that he does not have any documentary evidence to show that the suit premises is being used by the defendants. On the contrary, the admitted that the suit premises is being locked and unused since last 5 to 6 years. Thus, after considering the evidence on record, the Courts below have decreed the Suit under Section 16(1)(n) of the Act.

21. The defendant have taken out C.A.No.62 of 2019 for amending the written statement as also for production of additional evidence. As mentioned earlier, the Suit is instituted in the year 2015. Thus, defendants will have to satisfy the conditions in proviso to Order VI, Rule 17 of C.P.C. No such attempt is made for satisfying the conditions stipulated in proviso to Order VI, Rule 17 of C.P.C. Proviso to Order VI, Rule 17 lays down that no application for amendment shall be allowed

after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The defendants did not file any application for amendment during the pendency of the trial albeit after commencement of trial or even during the pendency of the appeal. In the case of ***Vidyabai Vs. Padmalatha*, 2009 (4) Mh.L.J. 30**, the Apex Court has observed in paragraphs 7 and 8 thus,

“7. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), the Parliament inter alia inserted a proviso to Order VI Rule 17 of the Code, which reads as under:

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, viz., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfill the said pre-condition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness, in our opinion, would amount to 'commencement of proceeding'.

22. In paragraph 7, the Apex Court has observed that proviso to Order VI, Rule 17 of C.P.C. is couched in a mandatory form. The Court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied, namely, the Court must come to a conclusion that in spite of due diligence, the parties could not have raised the matter before the commencement of the trial. In paragraph 8, it observed that the date on which the issues are framed is the date of

first hearing. Provisions of C.P.C. envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination in chief of the witness will amount to commencement of proceedings.

23. Applying the tests laid down in the aforesaid decision to the facts of the present case, it has to be concluded that defendants have not made out a case of due diligence. The defendants have not given any explanation for not filing application for amending the written statement under Order XLI, Rule 27 of C.P.C. in the Appellate Court. Thus, the defendants are not entitled to amend written statement.

24. In so far as the permission to lead additional evidence under Order XLI, Rule 27 of C.P.C. is concerned, in the case of ***Union of India Vs. Ibrahim Uddin, (2012) 8 SCC 148***, the Apex Court has exhaustively dealt with the provisions of Order XLI Rule 27 of C.P.C. from paragraphs 36 to 51. In paragraph 36, it was observed that the general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 Code of Civil Procedure enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.

25. In paragraph 38, it was observed that Order XLI, Rule 27 does

not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. In paragraph 39, it was observed that It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. In the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. In paragraph 40, it was observed that the inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. In paragraph 41, it was observed that the words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence that this rule will apply, e.g. when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment. The Apex Court held that an application for taking additional evidence has to be considered with circumspection, provided it is covered under either prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. The power so conferred upon the Court

by the Code ought to be very sparingly exercised and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case.

26. Applying the tests laid down by the Apex Court to the facts of the present case, it has to be concluded that no case is made out for production of additional evidence either under clause (aa) or clause (b) of Order XLI, Rule 27 of C.P.C. The defendants have not given any explanation for not filing application for amending the written statement under Order XLI, Rule 27 of C.P.C. in the Appellate Court.

27. It is also material to note that due to the reduction in the number of the students taking admission in the said school, it was merged in Prabodhankar Thakarey Hindi School, Sewree, Mumbai. The suit premises was let out to the defendants for running school and office. The defendants, therefore, could have used the suit premises for office purpose. However, no such attempt was made in the Courts below or even in this Court accepting the case of the defendants about reduction of the students. For all these reasons, I am of the opinion that no case is made out for interfering with the impugned orders. Civil Application No.62 of 2019 fails and the same is dismissed. Civil Revision Application No.45 of 2019 also fails and the same is dismissed.

28. At this stage, Mr. Godbole orally applies for stay of the eviction decree for a period of 12 weeks from today. He assures that within 3 weeks from today, defendants will file 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 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 pay arrears of rent, if any, to the plaintiffs within three weeks from today; and
- (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 plaintiffs;

29. In view thereof, notwithstanding dismissal of the Application, subject to the defendants filing the undertaking in the aforesaid terms as also clearing arrears of rent, if any, within three weeks from today, the eviction decree shall not be executed for the period of twelve weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within three weeks from today and/or in case defendants commit breach of any of the conditions of the undertaking, this interim order shall stand vacated without further reference to the Court.

30. List the Application for reporting compliance on 25.03.2019.

(R. G. KETKAR, J.)

Minal Parab