

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION [STAMP] NO.7098 OF 2019

Narayan Govind Mahale and another.	]	Applicants
Vs.		
Bhogilal M. Shah (since deceased)	]	
1(a) Asha Bhogilal Shah and others.	]	Respondents

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Mr. A.N. Nasikwala, learned Counsel for the Applicants.
Ms. Preeti H. Gada, learned Counsel for Respondents No.1(a) to 1 (e).

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CORAM : R.G. KETKAR, J.

DATE : 12th APRIL, 2019.

P.C:

Heard Mr. Nasikwala, learned Counsel for the applicants and Ms. Gada, learned Counsel for respondents No.1(a) to 1(e) 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 No.1(a) and 1(b)” have challenged the judgment and decree dated 16th December, 2011 passed by the learned trial Judge in R.A.E. Suit No.1296 of 1990 as also the judgment and decree dated 17th January, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai in (A-1) Appeal No.21 of 2012. By these orders, the Courts below decreed the suit instituted by the respondents, hereinafter referred to as “plaintiffs” under sections 13 (1) (g), 13 (1) (k) and 13 (1) (l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') and directed the defendants to hand over vacant and peaceful possession of Room No.4 situate on the ground floor

of Nene Building situate at 301, Rajaram Mohanroy Road (Charni Road), opposite Albless Bunglow, Bombay 400 004 (for short 'suit premises') to the plaintiffs.

3. In support of this application, Mr. Nasikwala strenuously contended that the Courts below committed serious error in decreeing the suit. The plaintiffs have instituted suit on 9th April, 1990 alleging ground of change of user as contemplated by section 13 (1) (a) and non user as contemplated by section 13 (1) (k) of the Act. The plaintiffs became owner of the building where the suit premises is situate on 27th November, 1989. Thus, at the time of filing of the suit, no cause of action accrued in favour of the plaintiffs for invoking ground of non user.

4. In so far as the ground of change of user of the suit premises from residential to commercial is concerned, Mr. Nasikwala submitted that from the material on record, it would be evident that the suit premises was let out for commercial purpose. The suit premises are used for ironing business i.e Green Laundry. As the suit premises is not let out for residential purpose, the Courts below were not justified in decreeing the suit on the ground of change of user. He further submitted that the Courts below committed serious error in passing eviction decree on the ground of acquisition of suitable alternate residential premises. As the suit premises was not let out for residential purpose, the said ground was not available to the plaintiffs.

5. Mr. Nasikwala submitted that the Courts below were not justified in passing eviction decree under section 13 (1) (g) of the Act i.e on the ground of reasonable and bona fide requirement. He invited my attention to paragraph 6 of the plaint wherein in one line, the plaintiff asserted that they personally require the suit premises for their use and occupation. However, in the

evidence, the plaintiffs tried to improve case by deposing that the suit premises is required for the purpose of the Trust.

6. Mr. Nasikwala has taken me through the pleadings and evidence of the parties. He has also relied on the electricity bill produced at Exhibit 68 where the suit premises is described as Shop No.4 to contend that tariff 03 is for commercial use.

7. On the other hand, Ms. Gada supported the impugned orders. She submitted that the building where the suit premises is situate was purchased by the plaintiff on 27th November, 1989. The plaintiffs have specifically asserted that the suit premises was let out for residential purpose to defendant No.1. The plaintiffs have invoked ground of non user by contending that defendant No.1 is not using the suit premises for a continuous period of more than six months preceding the date of the suit for the purpose for which it was let out. Defendant No.1 is not using the suit premises since quite long time. Defendant No.1 has kept the suit premises locked and is residing elsewhere. She further invited my attention to the written statement filed by original defendant Ms. G.V. Mahale. In paragraph 2, original defendant contended that the suit premises was taken for the purpose of business of Green Laundry from the inception by her Late husband. The suit premises were let out for business purpose and the premises are used for business openly and to the knowledge of the landlords.

8. As against this, defendant No.2 in paragraph 4 of the written statement dated 17th January, 2005 admitted that the suit premises has been used by him for residential purpose. Defendant No.2 contended that the suit premises is used by him for residential purpose since the same has been let out to him by defendant No.1. She submitted that written statement is verified by

Devyani B. Nayak. Ms. Gada has also invited my attention to the evidence of Devyani B. Nayak who was examined on behalf of defendants No.1(a) and 1(b). In paragraph 3 of her affidavit of examination-in-chief, she deposed that the suit premises has been used for ironing business i.e Green Laundry when the said Laundry was in exclusive and in existence. In paragraph 7 of her examination-in-chief, it was stated that defendants No.1(a) and 1(b) do not have any shelter or any roof in Mumbai except the suit premises and the need of the suit premises of defendants No.1(a) and 1(b) is greater than the plaintiffs requirement as they do not have residential accommodation or roof in Mumbai.

9. Ms. Gada submitted that after appreciating the evidence on record, the Courts below concurrently found that the suit premises were let out for residential purpose. Defendant No.1 Radhabai Govind Mahale has permanently shifted to Bangaluru. Defendant No.2 is carrying on business in the suit premises which amounts to change of user. As defendant No.1 shifted from Mumbai to Bangaluru, it also amounts to non user by the tenant. The Courts below were, therefore, justified in passing eviction decree on the ground of non user.

10. Ms. Gada further submitted that P.W.1 Yatin Bhogilal Shah was not cross-examined in respect of the statements made in paragraphs 19 and 20 of the affidavit of examination-in-chief. In other words, paragraphs 19 and 20 of the affidavit of examination-in-chief of P.W.1 remained unchallenged. The Courts below were, therefore, justified in passing eviction decree under section 13 (1) (g) of the Act. She, therefore, submitted that no case is made out for interfering with the impugned orders.

11. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, the Courts below have decreed the suit under section 13 (1) (g), 13 (1) (k) and 13 (1) (l) of the Act. In so far as ground of reasonable and bona fide requirement under section 13 (1) (g) of the Act is concerned, P.W.1 Yatin Shah deposed requirement in paragraphs 19 and 20 of his examination-in-chief dated 9th July, 2008. Careful scrutiny of the cross-examination of P.W.1 does not indicate that he was cross-examined in respect of paragraphs 19 and 20. In other words, the statements made by P.W.1 Yatin Shah in paragraphs 19 and 20 remained unchallenged.

12. In so far as the trial Court is concerned, the learned trial Judge has considered this ground in paragraphs 29 and 30. In paragraph 29, the learned trial Judge noted that P.W.1 is one of the trustees and beneficiaries of the trust. He requires the suit premises for personal use as well as for the use of other beneficiaries who are residing at Mumbai and out of India. He has no independent residence in Mumbai. The office of the Trust is in the suit building and hence, suit premises is more convenient for them for their trust purpose as well as for their own residence whenever they come to Mumbai. The learned trial Judge noted that though P.W.1 Yatin Shah is cross-examined at length by the defendants, his evidence was not shaken on material points.

13. In so far as the Appellate Court is concerned, the Appellate Court has considered this ground in paragraph 30. In paragraph 30, the Appellate Court noted that the case of the plaintiffs that they require the suit premises for their own use and occupation is neither rebutted nor contradicted by adducing cogent evidence. Version of the plaintiffs remained unchallenged. In view thereof, I do not find that the Courts below committed any error in passing the decree under section 13 (1) (g) of the Act.

14. In so far as question of comparative hardship is concerned, the learned trial Judge has considered this aspect in paragraph 31 and held that greater hardship will be caused to the plaintiffs in the event of refusing to pass eviction decree. The Appellate Court affirmed this finding in paragraph 30. Thus, the Courts below considered the ground of non user as also change of user and acquisition of suitable alternate residence by defendant No.1. Considering this aspect, the Courts below have held that no hardship will be caused to the defendants in case, eviction decree is passed.

15. In so far as other grounds namely change of user and acquisition of alternate suitable residence is concerned, on one hand, the plaintiffs claimed that the suit premises was let out for residential purpose and on the other, the defendants contended that it was let out for commercial purpose. It is interesting to note that Devyani B. Nayak acted as Constituted Attorney of defendants No.1(a) and 1 (b) as also she verified written statement of in the capacity of Constituted Attorney of defendant No.2. In paragraph 4 of the written statement of defendant No.2, it was admitted that he has been using the suit premises for residential purpose. Defendant No.1 had let out the suit premises to him for residential purpose. Mr. Nasikwala submitted that in the cross-examination, P.W.1 Yatish Shah admitted that he has no documentary evidence to show that the suit premises was let out for residential purpose. He has relied on Exhibit 68 namely bill issued by BEST to contend that suit premises was let out for commercial purpose. He further submitted that the Appellate Court did not record any finding as to whether the suit premises was let out for residential purpose or commercial purpose.

16. It is not possible to accept this submission. In paragraph 28, the trial Court recorded a categorical finding based on the admissions given in the written statement by defendant No.2 as also admissions given by Devyani

Nayak that the suit premises was let out to defendant No.2 for residential purpose since beginning. A perusal of cross-examination of D.W.1 Devyani Nayak shows that the suit building and Building No.299 are different. Business of Green Laundry was carried on in building No.299 and not from the suit premises. In paragraph 20, the Appellate Court also noted that deposition of Devyani Nayak that the suit premises is the only shelter for them in Mumbai, Thus, the finding recorded by the Courts below that the suit premises was let out for residential purpose is based upon evidence on record and cannot be said to be perverse.

17. It has come on record that the original tenant is not residing in the suit premises. Mr. Nasikwala submitted that the plaintiffs had no cause of action to invoke ground of non user as they acquired the suit premises on 30th September, 1992 and the suit is filed on 9th April, 1990. It is not possible to accept this submission. The plaintiffs specifically asserted that the suit premises was purchased by Conveyance Deed dated 27th November, 1989 from Bombay Cloth Merchant Company Limited. In paragraph 4, the plaintiffs specifically asserted that defendant No.1 is not using the suit premises since quite long time. Defendant No.1 had unlawfully sublet the suit premises to defendant No.2. Defendant No.1 is residing elsewhere. The learned trial Judge had considered the ground of non user and acquisition of alternate residence from from paragraphs 21 to 28 and held that those grounds are established. The Appellate Court has discussed this aspect in paragraphs 22 to 25 and 29 and affirmed the findings of the trial Court. Thus, the Courts below after considering the material on record have decreed the suit on the ground of non user, change of user and acquisition of suitable alternate residence. The said findings are based upon evidence on record.

18. In view thereof, I do not find that the Courts below committed any error in passing the impugned orders. It cannot be said that the findings recorded by the Courts below are contrary to the material on record. Defendants No.1(a) and 1(b) are 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 material on record, no reasonable or prudent person would have come to the conclusion arrived at by the Courts below. Defendants No.1(a) and 1(b) are not in a position to show that the findings are contrary to the evidence on record. Merely because on the basis of the material on record, another view is possible, that by itself, is no ground for invocation of powers under section 115 of the C.P.C.. In the result, Application fails and the same is dismissed.

19. At this stage, Mr. Nasikwala orally applies for stay of eviction decree for a period of 12 weeks from today. He assures that within two weeks from today, defendants No.1(a) and 1(b) and all the adult persons occupying the suit premises will file usual undertaking in this Court 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 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] within two weeks from today, they will deposit arrears of compensation, if any, @ Rs.12,000/- fixed by the Appellate Court till handing over possession in this Court.
- [e] in case defendants No.1(a) and 1(b) are unable to obtain suitable orders from the higher Court within 12 weeks

from today, they will hand over vacant and peaceful possession of the suit premises to the respondents/plaintiffs.

20. In view thereof, notwithstanding dismissal of the C.R.A, subject to the applicants filing undertaking in the aforesaid terms within two weeks from today, eviction decree shall not be executed for a period of 12 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 applicants commit breach of any of the conditions of the undertaking, interim relief shall stand vacated without further reference of the Court. The plaintiffs are permitted to withdraw the amount deposited by the defendants towards compensation Order accordingly.

[R.G. KETKAR, J.]