

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION (ST.) NO.18304 OF 2019

Yasinalibhai Gulamabbas Badami and others ... Applicants
Vs.
The Municipal Corporation of Greater Bombay ... Respondent

Mr. Sajjad H. Patel for Applicants.
Mr. G. S. Godbole, Senior Advocate a/w. Ms Shital Mane a/w.
Mr.Santosh Parad i/b. J. J. Xavier for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 15, 2019

P.C. :

Heard Mr. Patel, learned Counsel for the applicants and
Mr.Godbole, learned Counsel for the respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the applicants have challenged part of judgment and decree dated 30.11.2013 passed by the learned trial Judge in R.A.E.Suit No.498 of 1995 in so far as declining to pass the decree on the ground of *bonafide* requirement as also the judgment and decree dated 13.11.2018 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.A1/422 of 2014 in R.A.E.Suit No.241/498 of 1995 dismissing the Appeal. By these orders, the Courts below decreed the Suit instituted by the applicants, hereinafter referred to as 'plaintiffs', under Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') and directed the respondent, hereinafter referred to as 'defendant', to handover vacant and peaceful possession of rooms No.8 to 14 situate on the first floor of the building at 165/67, Nisanpada Road, Dongri, Mumbai - 400 009 (for short 'suit premises') to the plaintiffs. As the learned trial Judge declined to pass decree under Section 13(1)(g) of the Act, plaintiffs preferred

appeal being (A-1) Appeal No.422 of 2014. By order dated 17.11.2018, the Appellate Court dismissed the appeal. Plaintiffs have filed above C.R.A. challenging the judgment and decree passed by the Courts below declining to pass decree under Section 13(1)(g) of the Act.

3. Rule. Mr. Godbole waives service for the respondent. In view of the narrow controversy raised in this Petition and at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. In support of this C.R.A., Mr. Patel submitted that plaintiffs instituted Suit under Section 13(1)(g) of the Act. Section 13(1)(g) of the Act reads thus,

“13. When landlord may recover possession.-

(1) Notwithstanding anything contained in this Act but subject to the provisions of sections 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by a person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purposes of the trust; or”

5. He submitted that Section 13(1)(g) can be divided in two parts, namely,

(i) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by a person for whose benefit the premises are held; or

(ii) where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purposes of the trust.

6. He submitted that the Courts below declined to pass eviction decree under Section 13(1)(g) of the Act on the following grounds:

- a. that Khoja Shia Isna Ashari Primary School is not a Public Charitable Trust and is a religious Trust. The Trust does not fall in the latter part of Section 13(1)(g);
- b. that there are 11 properties owned by the Trust; and
- c. that plaintiffs did not produce the Trust Deed.

7. He submitted that the Courts below proceeded on the premise that as the Trust is a religious Trust and is not a Public Charitable Trust, it falls in the first category under Section 13(1)(g) of the Act. He submitted that the plaintiffs had produced Registration Certificate as also the Rules and Regulations governing the Trust. The plaintiffs have filed Change Reports and Bye-laws. He submitted that in fact it has come on record that plaintiffs are running primary school since 1938 and in the year 1960, the school was recognized by the Government. He relied upon the decision in *Bora Brothers Vs. Prshavanath Digambar Jain, 2002 (2) ALL MR 570* to contend that the plaintiffs' Trust being a religious institution for religious and educational purpose is a 'public charitable trust'. The Courts below committed serious error in proceeding on the premise that the Trust falls in the first category under Section 13(1)(g) of the Act.

8. On the other hand, Mr. Godbole submitted that basically the appeal preferred by the plaintiffs against the trial Court's decree in so far as denying decree under Section 13(1)(g) was not maintainable. He submitted that Section 96 of the C.P.C. lays down that appeal lies from every decree passed by Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court. In the present case, the trial Court had passed eviction decree under Section 13(1)(k) of the Act although it declined to pass eviction decree under Section 13(1)(g) of the Act. He submitted that the appeal against a finding is not maintainable. The right course available to the plaintiffs

was to file cross-objections in the appeal filed by the defendant. Having chosen not to file cross-objections and even having chosen not to request the Appellate Court to treat substantive appeal as cross-objections, the Appellate Court was not justified in entertaining the appeal on merits. In view thereof, the present C.R.A. is not maintainable.

9. In support of this submission, Mr. Godbole relied upon decision in ***Banarsi vs. Ramphal*, 2003 (9) SCC 606**, and in particular paragraphs 7 to 11 thereof. In paragraph 7, the Apex Court reproduced unamended and amended provisions of Order XLI, Rule 22 of C.P.C. In paragraph 8, the Apex Court referred to Sections 96 and 100 of C.P.C., which provide for an appeal against original decree and decree passed in appeal respectively. The Apex Court held that no appeal lies against a mere finding and Sections 96 and 100 of C.P.C. provide for appeal against decree and not against the judgment. He, therefore, submitted that basically the appeal filed by the plaintiffs in the Appellate Court itself is not maintainable. In view thereof, C.R.A. is not maintainable.

10. On the other hand, Mr. Patel submitted that the defendant did not raise objection before the Appellate Court at the time of hearing of the appeal. In fact appeal preferred by the defendant and appeal preferred by the plaintiffs were heard on the same day by the same Bench of the Appellate court. The arguments were also advanced in both the appeals together. For the purpose of convenience, the Appellate Court delivered separate judgments.

11. 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 plaintiffs have claimed possession in the suit premises on the grounds under Section 13(1)(g) and 13(1)(k) of

the Act. The Courts below have decreed the Suit under Section 13(1)(k) of the Act and declined to pass decree of eviction under Section 13(1)(g) of the Act. The defendant preferred (A-1) Appeal No.43 of 2014. The plaintiffs could have supported the eviction decree passed by the trial Court under Section 13(1)(k) of the Act and attacked finding of the trial Court under Section 13(1)(g) of the Act without filing cross-objections. The plaintiffs could have filed cross-objections challenging the finding recorded by the trial Court on the ground of reasonable and *bonafide* requirement under Section 13(1)(g) of the Act. Instead of filing cross-objections, they filed substantive appeal against the trial Court's order.

12. It is no doubt true that under Sections 96 and 100 of C.P.C., appeal lies against the decree passed by the Court of original jurisdiction and the decree passed by the Appellate Court in Appeal respectively. Order XLI, Rule 22 as amended by 1976 amendment reads thus,

“
XLI
APPEALS FROM ORIGINAL DECREES

22. Upon haring, respondent may object to decree as if he had preferred separate appeal.-(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation.- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

2) **Form of objection and provisions applicable thereto**--Such cross objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.”

13. A perusal of sub-rule (2), extracted hereinabove shows that such cross-objection shall be in the form of a memorandum and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto. Order XLI, Rule 1 deals with form of appeal and lays down that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment. Sub-rule (2) thereof lays down that the memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any arguments or narrative; and such grounds shall be numbered consecutively. Thus, even the cross-objections are required to be filed in terms of Order XLI, Rule 22(2) read with Order XLI, Rule 1 of C.P.C. In the case of ***State of Punjab and Haryana Vs. Shamlal Murari***, AIR 1976 SC 1177, the Apex Court has observed in paragraph 8 thus,

“8. We must always remember that procedural law is not to be a tyrant but a servant, not an, obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non- compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After, all Courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in

extended time.”

14. Merely because the plaintiffs did not request the Appellate Court to treat the appeal as cross-objections that will not preclude the Appellate Court from treating the substantive appeal as cross-objections in the appeal filed by the defendant. Even that will not preclude this Court from treating the substantive appeal preferred by the plaintiffs in the Appellate Court as a cross-objection. What is important is the substance of the matter and not the form or label attached to the matter. In substance, the plaintiffs had challenged the finding recorded by the learned trial Judge declining to pass eviction decree under Section 13(1)(g) of the Act. In view thereof, I do not find any merit in the submissions of Mr. Godbole that - (i) the appeal preferred by the plaintiffs in so far as the trial Court refusing to pass eviction decree under Section 13(1)(g) is concerned is not maintainable; and (ii) the C.R.A. instituted by the plaintiffs challenging the decree passed by the Courts below refusing to pass eviction on the ground under Section 13(1)(g) is not maintainable.

15. In so far as merits of the case are concerned, the Courts below proceeded on the premise that the plaintiff Trust is a religious institution and is not a Charitable Trust, and therefore, the Trust will not fall in the latter part under Section 13(1)(g) of the Act. In the case of **Bora Brothers** (*supra*), the learned Single Judge noted that Section 13(1)(g) comprises of two parts. Paragraph 8 thereof reads thus,

“8. Section 13(1)(g) comprises of two parts. The first part provides that notwithstanding anything contained in the Act but subject to the provisions of section 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit, the premises are held. Second part of clause (g) relates to the entitlement of the landlord to seek recovery of possession when the landlord is a trustee of a public charitable trust. Undisputedly the expression 'public charitable trust' has not been defined under the said Act. As defined in the Bombay

Public Trusts Act, it does not include any trust which does not have its object akin to the charitable purpose. In the case in hand, it is not in dispute that the trust is a religious institution for religious and educational purpose. Being so, it can fall within the expression of 'Public Charitable Trust'."

16. Even in the present case, it is not in dispute that the Trust is a religious institution for religious and educational purpose. In fact it has come on record that plaintiffs are running primary school right from 1938 and the same is also recognized by the State Government in the year 1960. In view thereof as also in view of paragraph 8 of the judgment in **Bora Brothers** (*supra*), extracted hereinabove, it has to be concluded that plaintiffs Trust is a public charitable trust. The Trust will therefore, fall in the second part of clause (g) which relates to the entitlement of the landlord to seek recovery of possession when the landlord is a trustee of a public charitable trust.

17. Mr. Godbole submitted that the plaintiff did not produce Trust Deed. The learned trial Judge, while answering issue No.1, held that plaintiffs failed to prove that they are the landlords of the property in dispute. It is however material to note that all the trustees have signed the plaint. The plaintiffs have also produced - (i) Certificate of Registration, (ii) Change Reports, and (iii) Bye-laws of the Trust. Once it is accepted that the plaintiffs are trustees of the said Trust, in view of definition of 'trustees' in Section 2(18) of the Bombay Public Trusts Act, 1950, the property of the Trust vests in the trustees. In my opinion, the trial Court was not justified in holding that the plaintiffs are not the landlords of the property in dispute. In fact, in paragraph 20, the learned trial Judge observed that plaintiffs herein are the trustees of the Trust. Even in paragraph 21, the learned trial Judge observed that during the course of argument when Advocate for the defendant pointed out that the plaintiffs being the trustees of the religious Trust are not entitled to get

benefit of Section 13(1)(g) of old Act or Section 16(1)(g) of new Act. In short, the defendants also accepted that plaintiffs are the trustees of the Trust. In view thereof, merely because they did not produce the Trust Deed to show whether the plaintiffs are the trustees of public religious trust or trustees of public charitable trust, the learned trial Judge could not have declined to pass eviction decree under Section 13(1)(g) of the Act.

18. In so far as the Appellate Court judgment is concerned, the Appellate Court has considered this ground from paragraph 16 onwards. In paragraph 22, the Appellate Court noted that P.W.2 produced list of properties belonging to the Trust at exhibit-86. The witness produced list of in all 11 properties on record. In paragraph 23, the Appellate Court noted that plaintiffs have to plead and prove that it had no alternate accommodation. This essential statutory ingredient that there is no alternate accommodation is missing in the plaint. This statutory ingredient is for the purpose of considering the hardship to the plaintiff or the defendant. It was also revealed during the cross-examination of plaintiffs' witness that the plaintiff trust is having 11 other properties but those were not disclosed in the plaint.

19. The witness examined by the plaintiffs namely, P.W.2 has deposed in paragraph 25 that plaintiffs are not in possession to acquire other premises. In cross-examination of P.W.1 - Yasinbhai Gulamabbas Badami, he has referred to list of properties of the plaintiffs Trust at exhibit-86 and has given details in paragraphs 4 and 5 of the properties in possession of the plaintiffs. P.W.2 - Alireza Abdulhusein Bundeally, in paragraph 6 of the affidavit in examination-in-chief stated that the Trust is owner of the properties mentioned in exhibit-86. All these properties are occupied by the tenants and none of the premises is vacant or in

possession of the plaintiffs. The statement made by P.W.2 remained unchallenged in the cross-examination. Even defendant did not examine any witness to substantiate that apart from the suit premises, plaintiffs are having properties, which are vacant and suitable.

20. Mr. Godbole submitted that as the Courts below have concurrently declined to pass eviction on the ground of reasonable and *bonafide* requirement, this Court in exercise of power under Section 115 of C.P.C., will not interfere with the finding of facts arrived by the Courts below, after appreciating the evidence on record. It is not possible to accept this submission for more than one reason. In the first place, the Courts below proceeded to hold that the trust is a religious trust and therefore, is not a public charitable trust. The trustees, therefore, cannot invoke Section 13(1)(g) of the Act. This is a fundamental error committed by the Courts below. In view of the decision in **Bora Brothers** (*supra*), even the religious trust running educational institution is covered by the expression 'public charitable trust', and therefore, Section 13(1)(g) of the Act is applicable. Secondly, the other fundamental error committed by the Courts below is that when the possession is sought on the ground of reasonable and *bonafide* requirement, the Court has to presume the need pleaded is *bonafide* and it is for the defendant to prove that the need pleaded by the plaintiff is neither reasonable nor *bonafide*. As mentioned earlier, defendant did not lead its evidence. In the present case, the Courts below have doubted the need pleaded by the plaintiffs. This is also fundamental error committed by the Courts below while deciding the requirement under Section 13(1)(g) of the Act. Thirdly, as mentioned earlier, Section 13(1)(g) comprises of two parts. The claim made by the Trust for possession of the suit premises is on the ground that the premises are required for occupation for the purposes of the Trust. It will, therefore, fall in the second

category and not the first category of Section 13(1)(g) of the Act. The Courts below have also not considered the deposition of P.W.2 and particularly paragraphs 4 and 5 of his cross-examination. Thus, the findings recorded by the Courts below are contrary to evidence on record. In short, the findings recorded by the Courts below on the ground under Section 13(1)(g) are perverse. This Court will, therefore, be justified in exercising power under Section 115 of C.P.C. by setting aside perverse findings recorded by the Courts below. Hence, Application succeeds. The Suit instituted by the plaintiffs stands decreed under Section 13(1)(g) of the Act. Rule is made absolute accordingly with no order as to costs.

21. At this stage, Mr. Parad orally applies for stay of this order for a period of 12 weeks from today.

22. As mentioned earlier, right from 1996, defendant is not using the suit premises. In 2011, the plaintiffs were compelled to put the lock and surrender the keys to the representative of the defendant. Even thereafter, the defendant is not using the suit premises. In short, between 1996 till today, the defendant is not using the suit premises. It has come on record that since 1993 till date, no attempt is made by the defendant for shifting the school to the suit premises. No educational activities were carried out in the suit premises. The suit premises is locked. During the pendency of the Suit, lock of the suit premises was found broken, and therefore, trustees put another lock and handed over the keys to the authorized person of the Corporation. The photographs produced by the plaintiffs show that after breaking open the windows, the anti-social elements started misusing the premises for illegal activities. Hence, oral application for stay is rejected. Order accordingly.

(R. G. KETKAR, J.)