

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.812 OF 2011**

K. Anand Shetty	]	Applicant
Vs.		
Capt. Ashok Pribhdas Vazirani	]	Respondent

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Mr. Raj Patel and S.G. Bhandary i/b M/s. Bhandary & Bhandary,
Advocate for the Applicant.
Mr. Sagar Talekar, Advocate for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 26th JULY, 2019.

P.C.

Heard Mr. Patel, learned Counsel for the applicant
and Mr. Talekar, 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 applicant, hereinafter referred to as 'defendant' has challenged the judgment and decree dated 9th November, 2009 passed by the learned trial Judge in R.A.E Suit No.245/482 of 2008 as also the judgment and decree dated 26th September, 2011 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Appeal No.129 of 2010. By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as 'plaintiff' under section 16

(1) (g) of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the defendant to hand over vacant and peaceful possession of premises admeasuring about 1040 square feet on the ground floor with the bungalow constructed on a piece of land bearing Plot No.118B within the Sindhi Immigrants Co-operative Housing Society Ltd, situate at Chembur, more particularly described in paragraph 1 of the plaint (for short 'suit premises'). The facts giving rise to the filing of the present Application, briefly stated, are as under.

3. The plaintiff instituted suit against the defendant under sections 15, 16 (1) (b), 16 (1) (c) and 16 (1) (g) of the Maharashtra Rent Control Act, 1999 (for short 'Act'), inter alia, contending that he is working in Indian Army as an officer and after his retirement since 15th May, 1980, he migrated to United States of America (for short 'U.S.A') along with his family members including his aged mother Nirmala P. Vazirani who is also widow of retired Indian Navy Officer. On 1st March, 1980, the defendant entered into tenancy agreement at Exhibit 45 with the plaintiff and occupied the suit premises as a tenant. Tenancy commences on the first day of the month and ends on the last day of the month. The monthly rent was fixed @ Rs.300/- exclusive of taxes which was to be paid in advance on or before 5th day of every month. After considering entitlement to claim yearly permitted increases in the rent, the rent of the suit premises was fixed @ Rs.400/- per month excluding taxes. The defendant agreed to pay electricity charges as per the bill. The plaintiff alleged that by taking undue advantage of the plaintiff's absence,

the defendant committed various breaches of the tenancy agreement.

4. The plaintiff further contended that he has decided to retire and return to India and settle in his own house. His aged and ailing mother, also desires to spend her last days in the suit premises. However, except the bungalow mentioned in paragraph 1 of the plaint, the plaintiff has no other place for residence in Maharashtra. The plaintiff and his family visited India at least 12 times Since May, 1980. In spite of having their own house, they had to stay with the relatives, friends or in Hotels. The plaintiff, therefore, claimed possession of the suit premises on the ground of reasonable and bona fide requirement.

5. The plaintiff had issued legal notice dated 13th January, 2007 through Advocate terminating tenancy and demanding arrears of rent as also vacant and peaceful possession. As the defendant did not hand over possession, the suit is instituted by the plaintiff under section 23 of the Act for recovery of possession. The plaintiff contended that the defendant has other suitable alternate accommodation within the limits of Municipal Corporation of Greater Mumbai and as such no hardship will be caused to him. The plaint is verified by Tribhuvan Nath Gaur, Constituted Attorney of the plaintiff.

6. The defendant filed written statement dated 27th April, 2008 denying the grounds available under section 23 of the Act. The defendant contended that the plaintiff is residing in

U.S.A for last more than 27 years on permanent residence status of VISA or Citizenship of that nation. The plaintiff is having alternate accommodation at D-1, Seaface Park, Bhulabhai Desai Road, Breach Candy, Mumbai – 400 026. During his service in the Armed Force, the plaintiff was resident of the said Flat at Breach Candy. The plaintiff has suppressed availability of the said flat. The defendant further contended that his family consists of several members. He is an old man and has no sufficient means to buy premises in prevailing rates at Mumbai. The greater hardship will be caused to the defendant, in case the eviction decree is passed.

7. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues on 21st August, 2008. On behalf of the plaintiff, affidavit of evidence was filed by Tribhuvan Nath Gaur on 18th September, 2008. He was cross-examined by the defendant. The defendant filed affidavit of evidence on 20th February, 2009. He was cross-examined on behalf of the plaintiff. After considering the material on record, by order dated 9th November, 2009, the learned trial Judge decreed the suit only under section 16 (1) (g) of the Act. Aggrieved by that decision, the defendant preferred appeal which was dismissed by the Appellate Court. It is against these orders, the defendant has instituted the present C.R.A.

8. In support of this application, Mr. Patel has taken me through the fact that the plaint is verified by Constituted Attorney of the plaintiff. The plaintiff examined his Constituted Attorney.

Mr. Patel has taken me through the affidavit of examination-in-chief of the said witness and cross-examination. In the cross-examination, the witness admitted that when the tenancy agreement was executed, he was not present. He further admitted that he was not aware what were the terms and conditions settled between the landlord and tenant at the time of tenancy agreement at Exhibit 45. He did not recall the date on which the tenancy agreement was executed. He did not recollect the date on which the plaintiff retired from Armed Force. He was shown photo copy of the Identity Card of the plaintiff which was marked as Exhibit 57. He admitted that in the Identity Card, address of the plaintiff is shown as Breach Candy. The witness volunteered that his address is given only for the sake of correspondence. He further admitted that every year plaintiff visited India in last 29 years. He was posed question about plaintiff's intention to return to India. The said question and answer are as under;

“Que. If plaintiff has intention to come back to India, then he would have examined himself, what do you want to say?

A. Plaintiff has threats of his death and for that purpose that report has been lodged in the police station”.

9. Mr. Patel submitted that though the witness answered that the plaintiff had threats of his death and report was lodged in the Police Station, the same fact was not substantiated by producing any material. Mr. Patel submitted that basically the

plaintiff should have entered into the witness box to prove ground of reasonable and bona fide requirement under section 16 (1) (g) of the Act. Evidence adduced by the C.A on behalf of the plaintiff does not establish bona fide requirement of the plaintiff. In support of his submission, he relied on the decision in **Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd, AIR 2005 Supreme Court 439.**

10. On the other hand, Mr. Talekar supported the impugned orders. He submitted that after appreciating the evidence on record, the Courts below concurrently decreed the suit. He submitted that Constituted Attorney of the plaintiff deposed that he knows the plaintiff since last four years. He is very close to his in-laws. He resides sometimes in India and sometimes in Chicago, U.S.A. Thus, the said witness was competent to depose on behalf of the plaintiff. In support of his submission, he relied on the decision in **Man Kaur Vs. Hartar Singh Sangha, (2010) Supreme Court Cases 512** and in particular paragraph 18 (g) to contend that case of the plaintiff falls in exception to the requirement. In the present case, all the affairs of the plaintiff are completely managed, transacted and looked after by the Constituted Attorney and as such, the Courts below accepted his evidence. He, therefore, submitted that the findings recorded by the Courts below are based upon evidence, it cannot be termed as perverse findings. Hence, no case is made out for invocation of powers under section 115 of C.P.C.

11. Mr. Patel further submitted that the plaintiff has instituted the suit under section 23 of the Act. He submitted that the plaintiff has to approach the Competent Authority under the Act by filing proceedings under section 42 thereof. The suit instituted by the plaintiff before the Small Causes Court is not maintainable. He further submitted that the plaintiff has produced power of Attorneys authorizing Tribhuvan Gaur who verified the plaint and deposed on behalf of the plaintiff. The power of attorneys given by the plaintiff are defective and Tribhuvan Gaur was incompetent to verify and depose on behalf of the plaintiff.

12. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. Mr. Patel submitted that suit instituted by the plaintiff under section 23 of the Act before the Small Causes Court is not maintainable and he has to file proceedings under section 42 before the Competent Authority. Mr. Patel relied on decision in the case of **Darshansingh Indarsing Sodhi Vs. Podar Education and Sports Trust through its Managing Trustee Pawan Podar, 2016 (6) Bom. C.R. 259** and in particular paragraph 8 thereof. The plaintiff has instituted the suit in the Small Causes Court under section 23 of the Act on the ground that he was working in Indian Army as an Officer. Section 23 (1) (A) (i) in respect of landlord who is a member of Armed Forces of the Union etc which is relevant for deciding the controversy raised in this Petition reads thus;

23. Members of armed forces of the Union, scientists or their successor-in-interest entitled to recover possession of premises required for their occupation._

- (1) Notwithstanding anything to the contrary contained in this Act or any contract,_
- (A) a landlord, who,_
- (i) is a member of armed forces of the Union, or was such a member and has retired as such (which term shall include premature retirement),

shall be entitled to recover from his tenant the possession of any premises owned by him on the ground that such premises are bona fide required by him for occupation by himself or by any member of his family, by making an application for the purpose of recovery of possession of the premises, to the Competent Authority; and the Competent Authority shall make an order of eviction on the ground if;

- (a) in the case of landlord who is a member of the armed forces of the Union, he produces a certificate signed by the authorised office to the effect that,_
- (i) he is a member of the armed forces of the Union, or that he was such a member and has retired as such, and
- (ii) he does not possess any other premises suitable for residence in the local area where the premises are situated;
- a) he produces a certificate signed by the authorised officer to the effect that._

- (i) he is a member of the armed forces of the Union, or that he was such a member and has retired as such, and
- (ii) he does not possess any other premises suitable for residence in the local area where the premises are situate.

Section 23 (2) lays down that any certificate granted under sub-section (1) shall be conclusive evidence of the facts stated therein. Chapter VIII lays down summary disposal of certain applications. Section 39 lays down that provisions of Chapter VIII or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained elsewhere in the Act or in any other law for the time being in force.

13. Section 41 lays down definition of 'landlord' for the purposes of Chapter VIII. Section 41 (1) (b) lays down that for the purposes of Chapter VIII, a landlord must be a member of the armed forces of the Union or a successor-in-interest, referred to in section 23. Section 42 reads thus;

“42. Special provision for making application to Competent Authority by landlord to evict tenant or licensee._ Notwithstanding anything contained in this Act or any other law for the time being in force or any contract to the contrary or any judgment or decree or order of any court, but subject to the provisions of section 22 or 23 or 24, as the case may be; a landlord **may** submit an application to the Competent Authority, signed and verified in a manner provided in rules 14 and 15 of Order VI of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908), as if it were a plaint, to the Competent Authority having jurisdiction in the area in

which the premises are situated, for the purpose of recovery of possession of the premises from the tenant or licensee, as the case may be”.

(emphasis supplied)

14. A perusal of section 42 extracted hereinabove shows that notwithstanding anything contained in n this Act or any other law for the time being in force or any contract to the contrary or any judgment or decree or order of any court, but subject to the provisions of section 22 or 23 or 24, as the case may be; a **landlord may submit an application to the Competent Authority**, signed and verified in a manner provided in rules 14 and 15 of Order VI of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908), as if it were a plaint, to the Competent Authority having jurisdiction in the area in which the premises are situated, for the purpose of recovery of possession of the premises from the tenant or licensee, as the case may be.

15. Thus, option is given to the landlord falling in section 23 of the Act to submit an application to the Competent Authority for recovery of possession. In other words, it does not preclude the landlord to institute a suit for recovery of possession before the Small Causes Court or any other competent Civil Court. This aspect was considered by this Court in **C.R.A No.176 of 2018 on 26th June, 2018** in the case of **Gurudev Singh (deceased) through L.Rs Vs. Dharampal Murlidhar Dhawan (deceased) through LRs Shruti Dharampal Dhawan and another**. In so far as reliance placed by Mr. Patel on the decision in **Darshansingh Indarsingh Sodhi** (supra) is concerned, in that

case a perusal of paragraph 3 shows that the premises were given to the licensee for running a School. It was not given for residential purpose. Deputy Collector, Aurangabad Competent Authority rejected the application filed by the licensor holding that as the premises was given for running School and not for residential purpose, Deputy Collector Competent Authority had no jurisdiction. The application was rejected by Deputy Collector. In Revision, Commissioner held that the Competent authority had no jurisdiction as the premises was given for running a School. In paragraph 8, it was observed thus;

“8. The aforesaid provision, section 41 (c) of the Act shows that only if the premises is given for residence purpose under licence, the matter will fall under Chapter VIII of the Act. In that case, only Competent Authority will have jurisdiction and the Court of Small Causes or Court of Civil Judge, Junior Division will not have jurisdiction. As in the present matter, admittedly the premises was given to present respondent to run educational institution, it was not given for residence purpose and so, the subject matter does not fall under the provision of Chapter VIII of the Act. **The provisions of section 42 and 43 mention the procedure which is required to be followed for getting relief from the Competent Authority and so, those provisions need not be discussed.** The provision of section 43 (4) of the Act shows the restriction on the rights of the licensee and the necessity for licensee to seek permission, leave of the Competent Authority to defend the proceedings filed before the Competent Authority. The provisions of Chapter VIII of the Act shows that the proceedings is of summary nature. It appears that the present petitioners want to use this procedure due to the nature of procedure mentioned in Chapter VIII of the Act. As the subject matter itself does not fall under Chapter VIII of the Act, this Court holds that the learned Additional Commissioner has not committed

any error in allowing the revision and dismissing the proceeding which was filed before the Competent Authority. There is no room to interfere in the order made by the learned Additional Commissioner”.

16. In my opinion, decision in **Darshansingh Indarsingh Sodhi** (supra) does not advance case of the defendant for more than one reason. In the first place, the Competent Authority, Commissioner and this Court held that the premises was given for running a School. In other words, the premises was not given for a residential purpose. Section 24 enables the landlord to recover possession of premises in possession of a licensee given to him on licence for residence, by making an application to the Competent Authority. Chapter VIII lays down summary disposal of certain applications made under sections 22, 23 or 24 of the Act.

17. Section 24 deals with premises given on licence for residential purpose and in that case, the premises was given for running a School, the Authorities including this Court held that the proceedings instituted by the licensor were not maintainable. This Court made reference to Section 41 (c) of the Act, which, for the purposes of Chapter VIII lays down definition of the 'landlord'. The Court thereafter proceeded to observe that only the Competent authority will have jurisdiction and the Court of Small Causes or Court of Civil Judge, Junior Division will not have jurisdiction. Secondly, a perusal of paragraph 8 extracted hereinabove shows that procedure laid down under sections 42 and 43 was not discussed.

18. In my opinion, the said finding was not necessary in the light of the facts in that case. This Court was not called upon to deal with that question. More so, as mentioned earlier, this Court did not discuss provisions of sections 42 and 43 laying down the procedure which is required to be followed for getting relief from the Competent Authority. The observations made in paragraph 8 that only the Competent authority will have jurisdiction and the Court of Small Causes or Court of Civil Judge, Junior Division will not have jurisdiction are merely obiter. The said findings were not necessary for deciding the question raised in that case before this Court. The said finding, therefore, will not bind this Court. I am fortified in taking this view by the following decisions;

[1] **Mohandas Issardas Vs. A.N. Sattanathan, 1955 ILR 318** where it was observed thus;

“....But the question still remains as to what is an 'obiter dictum' given expression to by the Supreme Court which is binding upon the Courts in India. Now, an 'obiter dictum' is an expression of opinion on a point which is not necessary for the decision of a case. This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the determination of the tribunal.

The very reason why the Courts in India agreed to be bound by the 'obiter dicta' of the Privy Council was that the highest judicial authority in the Empire had applied its mind to a question of law which arose before it for its determination; and however unnecessary it was for it to decide that question, having expressed an opinion on that point it became

an authoritative pronouncement on that question of law, and the Privy Council, by deciding that question of law, set its seal of approval upon that question of law. **It cannot be suggested that the doctrine of 'obiter dicta' was so far extended as to make the Courts bound by any and every, expression of opinion either of the Privy Council or of the Supreme Court, whether the question did or did not arise for the determination of the higher judicial authority.**

....

The emphasis is not only on the opinion, but also on the point. It is not merely an expression of opinion unconnected with the point that arises, but it must be an opinion given on a point which arises for determination...

(emphasis supplied)

[2] **Union of India Vs. Dhanvanti Devi, (1996) 6 SCC 44**

wherein it was observed as under;

“what is of the essence in decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein”.

In view thereof, reliance placed by Mr. Patel on the decision of **Darshansingh Indarsingh Sodhi** (supra) does not advance case of the defendant.

19. In view thereof, I do not find any merit in the submission of Mr. Patel that the plaintiff should have filed proceedings under section 23 of the Act before the Competent Authority and the suit instituted in the Small Causes Court is not maintainable. Order-III, Rules-1 and 2 of C.P.C empowers the holder of power of attorney to 'act' on behalf of the principal. The word 'acts' employed in Order-III, Rules 1 and 2 confines only in respect of 'acts' done by the power of attorney holder in exercise of power granted by the instrument. The term 'acts' would not include deposing in place and in stead of the principal. In other words, if the power of attorney holder has rendered some 'acts' in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined as held in paragraph 13 of **Janki Vashdeo Bhojwani and Man Kaur** (supra).

20. Mr. Talekar relied on paragraph 18 (g) of **and Man Kaur** (supra) which reads thus;

“(g)Where the law requires or contemplated the plaintiff or other party to a proceeding to establish or prove something with reference to his “state of mind” or “conduct”, normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his “bona fide” need and a purchaser seeking specific performance who has to show his “readiness and willingness” fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a

party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or “readiness and willingness”. Examples of such attorney-holder are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad”.

21. A perusal of paragraph 18 (g) extracts hereinabove shows that the Apex Court held that the plaintiff has to prove something with reference to his “state of mind” or “conduct”, normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his “bona fide” need falls under this category. A perusal of evidence on record does not indicate that Constituted Attorney of the plaintiff was managing, transacting and looking after all the affairs of the plaintiff. In fact, a perusal of cross-examination of the plaintiff's witness clearly shows that he is ignorant of the terms and conditions of the tenancy agreement settled between the plaintiff and the defendant. He was not present at the time of execution of the agreement of tenancy. I have already extracted question and answer in paragraph 5 of the cross-examination of the plaintiff's witness. He was specifically asked question if the plaintiff has intention to come back to India, he should have examined himself. The reply given by the witness was because of the threats of death, report has been lodged in the Police Station and, therefore, the plaintiff is unable to depose. It is relevant to note that in paragraph 2 of the cross-examination,

witness admitted that every year the plaintiff visited India in last 29 years. That apart, witness did not substantiate threats of life given to the plaintiff by producing any material on record.

22. Applying the principals laid down in the case of **Janki Vashdeo Bhojwani** and **Man Kaur** (supra), in my opinion, the Courts below were not justified in accepting the evidence of the sole witness examined by the plaintiff. If the evidence of the sole witness examined by the plaintiff is discarded, it has to be concluded that the plaintiff has not established that he requires the suit premises bona fide. The Courts below had decreed the suit when there is no evidence to substantiate the ground of bona fide requirement.

23. Mr. Patel submitted that power of attorneyes executed by the plaintiff in favour of Tribhuvan Nath Gaur were defective and Tribhuvan Gaur was not competent to depose on behalf of the plaintiff. I have already held that Tribhuvan Nath Gaur could not have deposed on behalf of the plaintiff, nothing turns on the Power of Attorneys executed by the plaintiff in favour of Tribhuvan Nath Gaur.

24. In view thereof, it has to be held that the impugned orders are perverse and as such are liable to be set aside in exercise of powers of section 115 of the C.P.C.

25. During the course of hearing, I suggested to Mr. Talekar that if plaintiff consents to set aside the impugned orders,

this Court will remand the matter to the trial Court with liberty to the plaintiff to examine himself in support of his case. The matter was accordingly adjourned till today. Upon taking instructions, Mr. Talekar submitted that the plaintiff is not ready and willing to adopt this course.

26. Mr. Talekar made a grievance that since filing of this Petition, the defendant has not paid or deposited rent. Mr. Patel, on instructions, states that the defendant has deposited rent till December, 2019 in the Court of Small Causes at Mumbai. In view thereof, the plaintiff is at liberty to withdraw the amount deposited by the defendant in the Small Causes Court at Mumbai unconditionally.

27. In view thereof, the impugned orders are set aside. The suit instituted by the plaintiff is dismissed. Rule is made absolute with no order as to costs.

[R.G. KETKAR, J.]