

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.583 OF 2017
WITH
CIVIL APPLICATION NO.377 OF 2017

Anuradha Bansidhar Karanje and others.	]	Applicants
Vs.		
Kaniz Fatima	]	Respondent

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Mr. Murtaza Nazmi i/b Nishant V. Gupta, learned Counsel for the Applicants.
Ms. Savina S. Bangera, learned Counsel for Respondent No.1.

.....
CORAM : R.G. KETKAR, J.

DATE : 15TH FEBRUARY, 2019.

P.C.

Heard Mr. Nazmi, learned Counsel for the applicants and Ms. Bangera, learned Counsel for respondent No.1 at length.

2. On the oral application made by Mr. Nazmi, leave to transpose applicants No.2 and 3 as respondents No.2 and 3 is granted. Amendment shall be carried out forthwith.

3. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), applicant No.1, hereinafter referred to as 'defendant No.1' has challenged the judgment and decree dated 12th June, 2015 passed by the learned Judge, Court Room No.40 of the Court of Small Causes at Mumbai in R.A.E Suit No.208/340 of 2010 as also the judgment and decree dated 29th June, 2017 passed by the Appellate Bench of the Court of Small Causes at Mumbai in (A-1) Appeal No.94 of 2017. By these orders, the

Courts below decreed the suit instituted by respondent No.1, hereinafter referred to as “plaintiff” and directed the defendants to hand over vacant and peaceful possession of Room No.1 on the ground floor of 'Zaidi Building/Chawl, situate at 126/B, Nehru Road, Vakola Masjid, Santacruz (East), Mumbai 400 055 (for short 'suit premises') to the plaintiff within three months from the date of the order. The Courts below have decreed the suit only under section 16 (1) (g) of the Maharashtra Rent Control Act, 1999 (for short 'Act') namely, the plaintiff requires the suit premises reasonably and bona fide for her own occupation.

4. In support of this application, Mr. Nazmi strenuously contended that the plaintiff has obtained eviction decree by practising fraud upon the Court. The plaintiff has claimed that she is in possession of one room namely Room No.4 in Zaidy Chawl. He has invited my attention to the order dated 17th November, 2017 passed by this Court (Coram: G.S. Patel, J.). By that order, this Court directed the Court Receiver to visit the suit premises only to make site inspection and report on the premises occupied by each of the parties, i.e., applicant on the one side and respondent No.1 on the other. If possible, a sketch plan should be prepared showing the two structures if indeed there are two structures, and there should also be accompanying photographs. This order was necessitated as in paragraph 2, it was observed there is a very great deal of uncertainty, never properly resolved by either of the Courts below, as to where precisely the Applicant/Defendant No.1 resides and where the 1st Respondent/ Plaintiff resides. It is unclear from these papers whether there are in fact two structures or one. The applicant says she lives on the first floor of a structure known as “Zaidy Building”, while respondent No.1/plaintiff lives in a row house or chawl-like structure opposite, which has no upper floor but only a ground floor. There is also some material to indicate that the entire plot is on a slope. This might make a difference, because both premises may not be on

the same level. For her part, the plaintiff claims to be residing on the first floor of the same structure as defendant No.1 and says that because of her age and failing health, she cannot navigate the stairs to the first floor premises.

5. Mr. Nazmi has taken me through the report submitted by the Court Receiver and submitted that the plaintiff claimed before the Courts below that the plaintiff is residing on the first floor. The report substantiates case of defendant No.1 that plaintiff is residing on the ground floor. Thus, claim made by the plaintiff that she is residing on the first floor and she has to climb staircase and, therefore, she requires the suit premises is falsified by the Court Receiver's report. As the plaintiff did not approach the Court with clean hands and had suppressed the material facts, the Courts below were not justified in passing the eviction decree.

6. Mr. Nazmi further submitted that though the plaintiff claims to be in possession of only Room No.4, from the Court Receiver's report, it is evident that she is in possession of three rooms each admeasuring 450 square feet. In short, he submitted that premises in possession of the plaintiff are sufficient to meet requirement of her family consisting of 11 members. The Courts below were, therefore, not justified in passing eviction decree. The plaintiff has practised fraud upon the Court by suppressing this fact and the said fact is brought on record only through Court Receiver's report.

7. Mr. Nazmi submitted that additional evidence under Order-XLI, Rule-27 of the C.P.C can be adduced even at the stage of revision. As the additional evidence in the form of Court Receiver's report falsifies claim of the plaintiff, it is required to be taken into consideration. As the judgment and decree is obtained by the plaintiff by practising fraud upon the Court, this is a fit case for admitting the application by issuing rule and granting stay to the

eviction decree. The decrees passed by the Courts below are nullity as they were obtained by practising fraud upon the Courts below.

8. Mr. Nazmi further submitted that respondent No.2/defendant No.2 Hema is daughter of the applicant. She had dispossessed defendant No.1 from the suit premises. Defendant No.1 had instituted declaratory suit against the plaintiff and respondent No.2, her daughter. The suit was decreed on 14th December, 2004. It was declared that defendant No.1 is lawful tenant in respect of the suit premises. Aggrieved by that decision, respondent No.2-Hema preferred appeal before the Appellate Court. The appeal was dismissed on 15th December, 2008. Aggrieved by this decision, respondent No.2 preferred C.R.A in this Court. By order dated 12th March, 2010, this Court dismissed the C.R.A. He submitted that immediately thereafter present suit was instituted by the plaintiff invoking ground of bona fide requirement. During the earlier round of litigation, plaintiff never came with the case of reasonable and bona fide requirement. Thus, need pleaded by the plaintiff is neither reasonable nor bona fide. Lastly, he submitted that even if the Court is inclined to dismiss the Petition, the decree should not be executed during the lifetime of the defendant.

9. On the other hand, Ms. Bangera supported the impugned orders. She submitted that the plaintiff has sought possession under section 16 (1) (g) of the Act on the ground that there are 11 members in her family and she is residing only in one room. Premises in her possession are not sufficient. The Courts below after appreciating the evidence on record as also having regard to the members in the family of the plaintiff have concurrently decreed the suit and, therefore, no case is made out for invocation of powers under section 115 of the C.P.C.

10. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. A perusal of the assertions made in the plaint shows that in paragraph 1, the plaintiff contended that she is landlady of property known as “Zaidy Building/Chawl” consisting of ground plus one floor, situate at 126/B, Nehru Road, Vakola Masjid, Santacruz (East), Mumbai. The applicant/defendant No.1 is tenant in respect of Room No.1 on the ground floor i.e the suit premises. In paragraph 3, the plaintiff contended that she is widow aged 71 years old and is residing along with family members and dependents in Room No.4. In paragraph 4, she asserted that she is suffering from various old aged ailments such as Hypertension, knee and joint arthritis, heart problem as well as old aged asthma. In paragraph 5, she asserted that due to her old age and aforesaid illness, she is advised to avoid exertion. The premises where she is residing is situate in a old make building wherein there is no lift and therefore, the plaintiff has to climb all the way from the ground floor to the first floor.

11. In paragraph 7, the plaintiff asserted that her family consists of herself, three daughters namely Farhat, Rafat, Azmat, two sons-in-law namely S. Saleem Rizvi, Mohamed Akhtar, two grand daughters namely Shabhat A. Rizvi aged 17 years Laaraybh Fatiz Rizi aged 12 years and 3 grandsons namely Raza aged 23 years, Ali Zain aged 13 year and Sajjadali aged 3 years. Entire family of the plaintiff is residing along with her in Room No.4 and who are also dependent upon the plaintiff. Premises in possession of the plaintiff admeasures 430 square feet. In paragraph 8, the plaintiff asserted that there are 11 members presently residing in the premises where she is residing. Premises in possession of the plaintiff consists of only one room, kitchen, and common W.C bathroom. In paragraph 9, she contended that it has become very difficult to accommodate all the family members in one room. In paragraph 10, she contended that neither the plaintiff nor her family members

are in a position to acquire additional accommodation in the same locality where she resides. Because of this fact and compelling circumstances, she is forced to institute the present suit for recovery of possession on the ground of reasonable and bona fide requirement. In paragraph 11, she contended that the suit premises are situate on the ground floor which are more suitable to her because she is suffering from various ailments.

12. The applicant filed written statement at Exhibit 9. In paragraph 3 of the written statement, she contended that contentions raised in paragraph 1 of the plaint are substantially correct. In other words, the defendant did not dispute the description of the suit premises given in paragraph 1 of the plaint. In paragraph 7, she denied assertions made in paragraph 5 of the plaint and contended that the plaintiff is residing in a row house consisting three huge rooms to accommodate minimum 15 people. The said row house is on the ground floor and there is no first floor to the said row house. In paragraph 9, the defendant contended that the plaintiff resides in house with one widowed daughter having one son and one married daughter with her husband and three children. She denied that entire family of the plaintiff resides in her house is dependent on the plaintiff. In paragraph 10, the defendant contended that there are total 8 members including the plaintiff staying in the premises where the plaintiff is residing.

13. 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, as mentioned earlier, the learned trial Judge decreed the suit. In paragraph 11, the learned trial Judge dealt with the R.A.D suit instituted by the defendant and that it was decreed by the trial Court. The appeal preferred by respondent No.2-Hema was dismissed and C.R.A preferred by her in this Court was also dismissed. In paragraph 19, the learned trial

Judge noted that it is the case of the plaintiff that her family consists of 16 members and Room No.4 where she is residing along with her family members consisting of 16 members is too short to accommodate all the members. In paragraph 22, the learned trial Judge observed that case pleaded by the plaintiff of reasonable and bona fide requirement in the plaint and in her affidavit of evidence is not challenged by defendant No.1. It is nowhere case of defendant No.1 that the plaintiff is very rich person as compared to her. After considering the entire oral and documentary evidence on record, the learned trial Judge observed that the plaintiff has substantially established her requirement as pleaded in the plaint.

14. In paragraph 23, the learned trial Judge considered the question of comparative hardship and observed that nothing is brought on record by the defendant to show that she has made any attempt for searching alternate accommodation. In fact, no sooner the suit is filed by the plaintiff, the tenant is required to search for alternate accommodation. In the present case, no iota of evidence to that effect has been brought on record by the defendant to show that she has made any attempt for searching alternate accommodation.

15. In paragraph 25, the learned trial Judge observed that the plaintiff came with the case that she requires the suit premises for use and occupation of herself and her family members. The premises available with the plaintiff is inadequate and insufficient to accommodate all the members. The plaintiff has brought on record her dire need to get the suit premises for the residence of herself and her family members. Consistent with these findings, the learned trial Judge decreed the suit.

16. In so far as decision of the Appellate Court is concerned, in paragraph 12, the Appellate Court noted the case of the plaintiff that there are

11 members in the family of the plaintiff. She is residing in a house of one room kitchen and W.C. Premises in possession of the plaintiff is inadequate to accommodate 11 family members. In paragraph 17, the Appellate Court noted that the evidence of Power of Attorney of the plaintiff that 11 members are residing with the plaintiff in one and the same house seems to be probable and acceptable. The said house consists of one bathroom, kitchen and one bedroom. It has become very difficult to accommodate all of them in one room.

17. Mr. Nazmi heavily relied upon the order dated 17th November, 2017 passed by this Court and the report submitted by the Court Receiver. With the assistance of the learned Counsel for the parties I have perused the report submitted by the Court Receiver. A perusal of paragraph 3 of that report shows that the suit premises consists of one room, kitchen and attached bathroom. Defendant No.1 stated that area of the suit premises is 22'x12' feet approximately. She pointed out that toilet for the suit premises is outside. In paragraph 5, it was noted that the plaintiff is occupying Room No.4 in Zaidy Chawl. Room No.4 consists of one room, one kitchen with attached bathroom. Advocate for the plaintiff pointed out that there is partition between room No.4 and 7. The Court Receiver observed that the said partition was made of wooden plywood and was closed. The toilet for Room No.4 is outside and is situate in Zaidy Building. A perusal of paragraph 6 of the Court Receiver's report shows that they noted that there were two structures namely "Zaidy Building" and "Zaidy Chawl". Suit premises is situate in "Zaidy Chawl". Zaidy Building consists of ground plus one floor. Zaidy Chawl is row house having only ground floor with tin sheets roof.

18. Mr. Nazmi submitted that the plaintiff claimed possession of the suit premises on the ground that she is residing on the first floor i.e Room No.4 and the suit premises is situate on the ground floor. The report of the

Court Receiver falsifies the claim. Thus, the plaintiff has obtained decree by practising fraud upon the Courts below. The plaintiff did not approach the Court with clean hands. In view of the order dated 17th November, 2017 passed by this Court, the Court Receiver submitted the report which falsifies the claim of the plaintiff.

19. Even if, I accept contention of Mr. Nazmi that the plaintiff is in possession of Room No.4 on the ground floor of Zaidy Chawl, still it does not advance case of defendant No.1. The Courts below, after appreciating the evidence on record have concurrently found that there are 11 members in the family of the plaintiff. That apart, even report of the Court Receiver and in particular paragraph 5 thereof shows that Room No.4 consists of one room, kitchen and attached bathroom. The Court Receiver also noted that the Advocate for the plaintiff pointed out that there is partition in between Room No.4 and 7. The Court Receiver noticed that the said partition is made of wooden plywood and it has been closed. Contention of Mr. Nazmi that the plaintiff is in possession of three rooms each admeasuring 450 square feet is not substantiated from the evidence on record as also from the Court Receiver's report.

20. Mr. Nazmi relied on decision of **A.V. Papayya Sastry Vs. Govt., Of A.P, (2007) 4 Supreme Court Cases 221**. In that case, the appellants were owners of the lands bearing Survey Nos.3/1, 3/2 and 4 admeasuring 18 acres 39 cents of Village Kancharapalem, District Vishakhapatnam. It was their case that Vishakhapatnam Port Trust wanted to acquire land for construction of quarters for its employees. The Chairman of the Port Trust, therefore, sent a requisition letter to the District Collector, Vishakhapatnam for acquiring land admeasuring 45 acres 33 cents of Survey Nos. 1,2,3 and 4 of the said village. It was claimed that advance possession of the land of the appellants was taken

over by the Estate Manager of the Port Trust on 29th August, 1972 by private negotiations. According to the appellants, in the statement recorded on 29th August, 1972, Akella Suryanarayana Rao stated that he had handed over possession of the land to the Estate Manager of the Port Trust and that there was dispute regarding land with tenant Koyya Gurumurthy Reddy under Andhra Pradesh Lands Tenancy Act.

21. The appellants came with the case that Notification under section 4(1) of the Land Acquisition Act, 1894 for the first time was issued on 10th April, 1973. The Urban Land (Ceiling and Regulation) Act, 1976 came into force in the State of Andhra Pradesh on 17th February, 1976. It covered the Vishakhapatnam Urban Agglomeration. The appellants filed declarations under that Act taking a stand that possession of the land was already handed over to the Port Trust Authorities even before the Ceiling Act came into force. Provisions of the Ceiling Act would not apply to such land. In view thereof, the Special Officer and Competent Authority, Urban Land Ceiling, Vishakhapatnam by order dated 25th May, 1981 declared that the appellants were “non-surplus land holders”. On 29th August, 1981, the Government issued Notification under section 4(1) of the Land Acquisition Act. Urgency clause 17 (4) was not invoked as the possession of the land was already with the Port Trust Authorities. A declaration under section 6 was issued on 12th October, 1982. However, no Award was made.

22. The appellants further came with the case that the Chief Engineer of the Port Trust in reply to query made by Land Acquisition Officer clarified by his letter dated 19th December, 1985 that actual and physical possession of the land was not taken by the Port Trust as the tenant did not vacate possession of the land. In view of the letter, the Special Officer and Competent Authority, Urban land Ceiling, Vishakhapatnam referred the matter to the

Commissioner, Land Reforms and Urban Land Ceiling, Government of Andhra Pradesh, Hyderabad in February, 1987 for taking the matter under section 34 of the Ceiling Act in suo motu revision. By letter dated 27th June, 1987, the Commissioner requested the Collector, Vishakhapatnam to re-open the case and start inquiry. On 21st August, 1989, Chairman, Vishakhapatnam Port Trust addressed a letter to the Commissioner, Land Reforms and Urban Land Ceiling, Government of Andhra Pradesh categorically stating that land admeasuring 18 acres and 39 cents of Survey No.3/1, 3/2 and 4 of Kancharapalem Village had already been taken over by the Port Trust and there was no cause to re-open the case under section 34 of the Ceiling Act. The Government approved the proposal for acquisition of land and notification under section 4(1) of the Land Acquisition Act was issued on 17th May, 1991.

23. The proceedings under the Ceiling Act under section 34 were initiated for re-opening the case. On 20th July, 1994, notice was issued to the appellants to show cause why revisional powers should not be exercised and the order passed by the Special Officer and Competent Authority under the Ceiling Act should not be set aside. It was also stated in the notice that it was brought to the notice of the government that title to the land was undisputedly with the declarants on the appointed day under the Ceiling Act as the land acquisition proceedings were not concluded by that date. As such the land was required to be computed in the holdings of the declarants even if it was admitted by the Port Trust Authorities that they were in possession of the land in the year 1972. The appellants submitted their reply to the notice.

24. In the meantime, Writ Petition No.11754 of 1994 was filed by the appellants in the High Court for issuing direction to the said Authorities to complete the land acquisition proceeding and make an Award. During the pendency of the Writ Petition, the revision was allowed by the State

Government under section 34 of the Ceiling Act on 20th January, 1995 and order passed by the Special Officer and Competent Authority, Urban land Ceiling, Vishakhapatnam declaring that the appellants had no surplus land was set aside. The appellants, therefore, instituted Writ Petition No.3102 of 1995 challenging that order in the revision. By order dated 4th June, 1996, the learned Single Judge allowed the Petitions. The writ appeals preferred by the State Government were dismissed. SLP's filed by the State Authorities were dismissed on 20th October, 2000. On 13th June, 2001, the State Authorities filed application for recalling the order on the ground that fraud was practised by the land owners by suppressing material facts. Reliance was also placed upon the report submitted by Central Bureau of Investigation. By order dated 6th March, 2002, the High Court recalled its order. Against it, the appellants carried the matter to the Supreme Court.

25. In paragraph 17, the Apex Court observed that possession of the land was never with the landlords and was not given to the Port Trust Authorities. From the record, it was clear that neither the land owners nor the Port Trust Authorities were in actual or physical possession of land, but it was occupied by tenants and disputes were also going on between the tenants and land owners. Therefore, the basis on which the Special Officer and the Competent Authority, Urban Land Ceiling proceeded to declare that the appellants were not surplus land owners was non-existent and non-est. In paragraph 18, the Apex Court noted that no Notification under the Land Acquisition Act was issued in 1972. The Notifications were issued in the year 1973, 1981, 1991 and 1996. In short, before the Apex Court, the appellants/land owners came with the case that possession of their land was already taken over by the Port Trust Authorities under the Land Acquisition Act, and, therefore, on 17th February, 1976, they did not hold surplus land. As against this, the said Authorities established that possession was never handed

over to the Port Trust Authorities and in fact, the land was occupied by the tenants and the disputes were also pending between the tenants and land owners. The Apex Court, therefore, came to the conclusion that fraud was practised by the appellants.

26. In the present case, even after perusing the report of the Court Receiver and the order dated 17th November, 2017 passed by this Court appointing the Court Receiver for carrying out site inspection, I do not find that the plaintiff has practised fraud in obtaining the eviction decree. Even the Court Receiver's report does not substantiate contention of defendant No.1 that the plaintiff is in possession of three rooms each admeasuring 450 square feet. In view thereof, decision in **A.V. Papayya Sastry's** case is not applicable to the facts of the present case.

27. Mr. Nazmii submitted that in any case, the decree may not be executed during the lifetime of the defendant. It is not possible to accede to this request. If the submission made by Mr. Nazmi is accepted, it will amount to dismissing the suit filed by the plaintiff, particularly when the Courts below have concurrently decreed the suit. Not only that, it will also cause inconvenience to the 11 members in the plaintiff's family who will be compelled to reside in one room.

28. In the light of the aforesaid discussion, no case is made out for interfering with the impugned orders. The defendant is 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 material on record, no reasonable or prudent person would have come to the conclusion arrived at by the Courts below. The defendant is 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 exercising powers under section 115 of C.P.C. In the result, the Civil Revision Application fails and the same is dismissed.

29. At this stage, Mr. Nazmi orally applies for stay to the eviction decree for a period of 14 weeks from today. He states that the applicant and all the adult family members residing with her will file usual undertaking in this Court within two weeks from today, 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, the applicant will deposit the entire arrears in this Court, under due intimation in writing to the learned Counsel for respondent No.1.
- [e] in case they are unable to obtain suitable orders from the higher Court within 14 weeks from today, they will hand over vacant and peaceful possession of the suit premises to respondent No.1;

30. In view thereof, notwithstanding dismissal of the Civil Revision Application, subject to the applicant filing the undertaking in the aforesaid terms within two weeks from today, this order shall remain stayed for the period of 14 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 applicant commits breach of any of the conditions of the

undertaking, respondent No.1 will be at liberty to proceed with the matter in accordance with law. Order accordingly.

31. In view of dismissal of the C.R.A, C.A. No.377 of 2017 stands disposed of.

32. Courts Receiver stands discharged without passing account but subject to the cost charges/expenses payable by respondent No.1 within a period of 8 weeks.

[R.G. KETKAR, J.]