

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.13157 of 2018

Suresh Pukhraj Jain & anr. ... Petitioners

v/s.

Satish Govind Jagtap & anr. ... Respondents

Mr. Drupad S. Patil for the petitioner.

Mr. R.A.Thorat, Sr. advocate i/b. Ashok B. Tajane a/w. P.B.Gujar for respondents.

CORAM : DAMA SESHADRI NAIDU, J.

27th September 2019.

ORAL ORDER

The petitioners claim to be the tenants. The respondents-owners accept the 1st petitioner as the tenant but not the 2nd petitioner. The owners filed Suit No.140/2007 seeking the petitioners' eviction. Though both the petitioners are brothers, initially the owners filed the suit against the first petitioner. Later, they brought on record the second petitioner. The eviction was on the grounds of rent default, bona fide requirement and non-user. On 16th September 2016, the trial Court, on merits, decreed the suit. Aggrieved, the petitioners filed RCA No.972/2016. It was dismissed on 11.08.2018. Then the petitioners

filed this writ petition.

2. The dispute between the owners and the tenants has witnessed another round of litigation. Earlier, the petitioners issued notice dated 07.06.2001, alleging that the owners had been trying to disturb their possession and, later, filed Suit No.281/2000 for injunction. It was decreed on 14.02.2008. Aggrieved, the owners filed Appeal No.166/2008. On its dismissal, they filed Writ Petition No.10569/2016. This Court seems to have disposed of that writ petition, leaving the rights of the parties intact.

3. In the above factual background, Shri Drupad S. Patil, the learned counsel for the petitioners, has submitted that in the earlier round of litigation the trial Court categorically held that both the petitioners are tenants. According to him, this finding stood undisturbed even in the judgment rendered by this Court in Writ Petition No. 10569/2016. According to him, that finding binds the parties.

4. Shri Patil has also contended that the tenancy may have begun in about 1977. And from then onwards, both the petitioners have been living on the property. In the first year of tenancy, that is in 1977, the 2nd petitioner paid the rent and secured acknowledgment from the owners. Coupled with the owners' admissions in the cross-examination, the rent receipt amply demonstrates that the tenancy is joint and that the 2nd petition is a co-tenant.

5. On the question of bona fide requirement, Shri Patil contends that in the plaint the owners pleaded only one ground: that the first respondent was transferred to Pune, where he needed accommodation. But in the trial, he admitted that he had still been working at some other place. Then, as an afterthought, the owners pleaded children's education and also medical treatment for the aged members of the family as other grounds of bona fide requirement. According to Shri Patil, both the courts below have misdirected themselves in accepting the owners' contentions.

6. In elaboration, Shri Patil has submitted that pending litigation, the owners' children ought to have grown up and that even the medical requirement may have ceased to exist.

7. About the non-user, Shri Patil has submitted that once the court accepts that the 2nd petitioner too is a co-tenant, his living in the property becomes legitimate. Then, the question of non-user remains *non sequitur*.

8. In response, Shri R.A. Thorat, the learned Senior Counsel for the respondents, has submitted that the trial Court and the appellate Court in Pune have rendered accurate findings on the questions of facts, and they need not be interfered with in a Writ Petition, especially, under Article 227 of the Constitution of India. That said, Shri Thorat has taken me through the record, including the judgment of the Appellate Bench, to contend that it has considered all issues in the

correct perspective.

9. Trying to repel the petitioners' contention about the status of the 2nd petitioner—that is, whether he is a co-tenant—Shri Thorat submits that both the petitioners issued a notice to the respondent on 07.06.2001. That was their earliest assertion about their status. Then, he has taken me through notice, which was marked before the trial court either as Exhibit 36 or Exhibit 80A. In that, the petitioners did agree that only the first petitioner is the tenant.

10. Shri Thorat has also taken me through the cross-examination of the second petitioner, who, according to him, admitted that only his brother is the tenant. The 2nd petitioner's admission, stresses Shri Thorat, needs no further proof on the owners' part to establish that only the 1st petitioner is the tenant.

11. Shri Thorat has then addressed the issue of *res judicata*. According to him, the earlier suit by the petitioners was for a mere injunction. There, only the question of possession mattered. At any rate, without any proper pleading and specific issue about the status of the parties or the contractual relationship, mere collateral observation, if any, will not affect the rights of either party in particular proceedings for determining their status. Shri Thorat insists that even this Court in the Writ Petition filed against the judgment in the injunction suit has nullified the trial Court's observation that the tenancy is joint.

12. About *bona fide* requirement, Shri Thorat has submitted that

pending the case, many developments may take place. It does not mean that the need entirely disappears. According to him, though the children have grown up, they still are in college; they needed the best education, for which Pune is well-suited. At any rate, the findings are concurrent and center on the questions of fact.

13. Eventually, on the non-user, Shri Thorat has submitted that once the 1st petitioner alone was held to be the tenant, with his leaving the place long back, only the 2nd petitioner remained in the leased property. The 2nd petitioner not being a tenant, the property remained unused by the tenant proper. And that amounted to non-user. In the end, the learned Senior Counsel has urged this Court to dismiss the writ petition.

14. Heard Shri Drupad Patil for the petitioners and Shri R.A. Thorat, the learned Senior Counsel, instructed by Shri Ashok Tajane and Shri P.B.Gujar, for respondents.

15. I reckon all the issues are questions of fact, and the Courts have rendered concurrent findings. At any rate, Shri Patil has passionately argued that the courts below have erred, concurrently though. First, I may take note of the earlier round of litigation. The trial Court, may be collaterally, observed that the tenancy is joint. The owners did not question that finding. Even this Court, in the writ petition, has not specifically addressed that issue. Nor has it diluted the observations by the courts below. That said, I must add that the suit

concerned possession and the courts below considered only the possession. Neither was there pleading about the status of the parties, nor was there an issue on that aspect. Therefore, findings in collateral proceedings, where a particular dispute or controversy is neither pleaded nor put to trial, cannot be treated as a conclusive finding. It does not attract the doctrine of res judicata, either.

16. On the other hand, in this suit, both the parties have pleaded, led evidence, and tried to establish on the question of the contractual relationship between the owners and the 2nd petitioner. As Shri Thorat has rightly contended, both the petitioners, the brothers, issued a notice on 7th June 2001. That notice unmistakably declares that the 1st petitioner is the tenant. Then, in the cross-examination, the 2nd petitioner has admitted that he has pleaded about his brother's exclusive tenancy, besides admitting that he has not asserted himself anywhere as the co-tenant—except during the trial. Under these circumstances, I reckon the 2nd petitioner's admission binds and that obviates any need for the owners to prove that factum in the trial.

17. There is no conflict of interest between the two brothers. The first petitioner has never deposed before the Court about any co-tenancy.

18. In terms of Section 15 of the Maharashtra Rent Control Act, the first petitioner could have complied with the mandate and paid the rent either after receipt of the notice or once the owners filed the suit.

He did neither. Then, at a later point, the 2nd petitioner was brought on record. He continued the proceedings along with his brother. Nevertheless, had he been a co-tenant, he would have taken steps to avoid the stigma of rent default. He, too, did not take any steps on that count. Viewed from any perspective, the courts below have concurrently—and correctly—held that the first petitioner alone is the tenant. And that finding cannot be termed perverse.

19. So, it is out of this Court's revisional bounds under Article 227 of the Constitution of India to disturb the findings of fact. Though we need not labour much on the other aspects, I must observe on the *bona fide* requirement. Once again, the courts below have returned concurrent findings on that issue, too.

20. Finally, about the non-user, much depends on my answer to the 1st issue—that is, who is the tenant? Once the courts have declared that only the first petitioner is the tenant and he left the leased property long back, the non-user stands established.

Under these circumstances, despite Shri Patil's best efforts, the petitioners could not succeed. I, accordingly, dismiss the writ petition.

(DAMA SESHADRI NAIDU, J)