

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 614 OF 2018

Sandipan Namdeo Garje ...Applicant
Versus
Surendra Waman Kathavte ...Respondent

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Mr. Ashutosh M. Kulkarni, Advocate a/w. S.B. Khandelwal, Advocate for the Applicant.

Mr. Abhijit Kulkarni, Advocate i/b. D.D. & Abhijit Associates, for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 08th JANUARY, 2019

P.C.

1. Heard Mr.Ashutosh M. Kulkarni, learned counsel for the applicant and Mr. Abhijit Kulkarni, learned counsel for the respondent, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as 'defendant', has challenged the judgment and decree dated 29.1.2014 passed by the learned Civil Judge, Senior Division, Barshi in Regular Civil Suit No.319/2012 (old R.C.S. No.228/1993) as also the judgment and decree dated 24.9.2018 passed by the learned Adhoc District Judge-1, Barshi in Regular Civil Appeal No.393/2014 (old R.C.A. No.90/2014).

3. By order dated 29.1.2014, the learned trial Judge partly decreed the suit under Sections 12 and 13(1)(g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). The trial Court directed the defendant to hand over vacant possession of middle room admeasuring South-North 20 ft & East-West 16 ft., C.T.S. No.4000, situate at Bhavani Peth, Barshi, District – Solapur, more particularly described in paragraph-1 of the plaint (for short, 'suit premises') to the plaintiff within three months from the date of decree and pay Rs.2,000/- as municipal taxes and water taxes till filing of the suit and after filing of the suit he is liable to pay half charges of municipal taxes and water taxes till his eviction. As against this, the learned District Judge decreed the suit only under Section 13(1)(g) of the Act. It is against these orders, the defendant has instituted present Civil Revision Application.

4. In support of this application, Mr. Ashutosh Kulkarni has invited my attention to

- (i) paragraph-4(d) of the plaint where the plaintiff has pleaded the requirement under Section 13(1)(g) of the Act;
- (ii) evidence of the plaintiff's witness and in particular cross-examination of PW-2 Rahul, son of the plaintiff. He submitted that in the cross-examination, PW-2 admitted that his education

as also his father's and brother's education was completed in Pune. His children and his brother's children are taking education in Pune. He has obtained ration card of Pune address. Even his brother obtained ration card of Pune address. Father's ration card is also of Pune address. His wife is carrying on profession at Pune. In short, relying upon the admissions given by PW-2, Mr.Ashutosh Kulkarni contended that the entire family of the plaintiff is settled down in Pune. The need of elder son Anand is satisfied as the plaintiff had obtained possession from another tenant Pandit leaving behind the requirement of son Rahul only. Rahul also admitted that since 1.11.2006, he is working in Tilak Ayurvedic Medical College, Pune; and

- (iii) application dated 29.7.2017 filed by the defendant under Order XLI Rule 27 of C.P.C. before the learned District Judge for placing on record the fact that Dr. Rahul is working as Reader P.G. (Associate Professor) which is a permanent post. Mr.Ashutosh Kulkarni submitted that the learned District Judge committed error in rejecting application for adducing additional evidence. He further submitted that even otherwise entire suit premises is affected by proposed road-widening and is to be acquired by appropriate authority. He, therefore, submitted that

in the first place, the need pleaded by the plaintiff is neither reasonable nor bonafide as entire family of the plaintiff is settled down at Pune. Secondly, entire suit property is under acquisition for the proposed road widening. He, therefore, submitted that the application requires consideration.

5. On the other hand, Mr. Abhijit Kulkarni supported the impugned orders. He submitted that the Courts below, after appreciating the evidence on record, have concurrently held that the need pleaded by the plaintiff is both reasonable as well as bonafide and, therefore, no case is made out for interfering with the impugned order. He relied upon a decision of this Court (Coram: Manish Pitale, J.) dated 22.3.2018 in Civil Revision Application No.27/2017 [**Chandrashekhar S. Gadgil and others Vs. Rameshprasad Madhavprasad Shukla and another**] and in particular paragraphs-17 and 18 thereof. In that case, the learned Single Judge referred to the decisions of Apex Court in **Gulshera Khanam Vs. Aftab Ahmad, (2016) 9 SCC 414** and **Mohanlal s/o. Chandulal Agrawal Vs. Navalkishor s/o. Radheshyam Kulwal, 2016(1) Mh.L.J. 735**. In paragraph-17, the learned Single Judge reproduced paragraph-14 of **Mohanlal Agrawal's** case (supra), where the Apex Court held that the landlord being the best judge of his need, the Appellate Court could not have directed the manner in which he should have

conducted his affairs by directing partial eviction.

6. In paragraph-18, the learned Single Judge observed that the landlord being the best judge of his need, the tenant cannot dictate the terms by insisting upon various permutations and combinations. He, therefore, submitted that no case is made out for interfering with the impugned orders.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the respective parties. The learned counsel have advanced arguments only in respect of the ground of bonafide requirement under Section 13(1)(g) of the Act. I have also perused the material on record. A perusal of paragraph-4(d) of the plaint shows that the plaintiff had set up the requirement of his elder son Anand that he wants to start the business of tape recorder, radio repairs as also the requirement of younger son Rahul who was at the relevant time pursuing medical course. The plaintiff contended that he requires the suit premises so as to enable his sons to carry on their respective vocations in the suit premises. It is common ground between the parties that during pendency of the proceedings, the plaintiff obtained possession from another tenant Pandit where his elder son Anand is carrying on his business.

8. In support of his case, the plaintiff examined himself and he

reiterated the requirement of his younger son Rahul in paragraphs-5 to 7. Mr.Ashutosh Kulkarni submitted that entire family of the plaintiff is settled in Pune. Rahul's wife is also carrying on profession at Pune. Rahul is also permanently employed as Associate Professor in Tilak Ayurvedic Medical College, Pune and, therefore, the requirement of the plaintiff is neither reasonable nor bonafide. The suit premises is situate at Barshi and entire family of the plaintiff is settled down in Pune. Even otherwise, the suit premises is acquired for the proposed road-widening. I do not find any merit in these submissions. The learned trial Judge has considered the requirement of the plaintiff from paragraph-21 onwards.

9. In paragraph-22, the learned trial Judge referred the evidence of the plaintiff who was examined as PW-1. PW-1 deposed that he retired from the service and wants to shift at Barshi. As per PW-1, the premises situate at 255, Kasaba Peth, Pune admeasures 365 sq. ft. The area of lavatory and bath-room is 65 sq. ft., kitchen admeasures 150 sq. ft. and the hall admeasures 98 sq. ft.. PW-1, his wife and two sons and their wives and grand-daughter are residing in the said premises. Said premises is insufficient for his family. All the family members do not have privacy. The plaintiff also examined his younger son Rahul as PW-2. PW-2 deposed that he completed his B.A.M.S. & M.D. (Ayurveda) and he wants to open his dispensary in the suit premises.

10. In paragraph-23, the learned trial Judge referred to the decision of **Parvati Devi Vs. T.V. Krishnan, 1987 DGLS (Soft) 321** where the Apex Court held that the landlord is the best judge of his requirement and has a complete freedom in the matter. It is no concern of the Courts to indicate to the landlord how and in what manner he should live or to prescribe for him a residential standard of their own.

11. In paragraph-24, the learned trial Judge observed that the landlord is the best judge of his requirement and has a complete freedom in the matter. It is no concern of the Court to indicate to the landlord how and in what manner he should live.

12. In paragraph-25, the learned trial Judge has referred to the cross-examination of the plaintiff's witness, where it has come on record that the plaintiff is residing in Pune since 1978. His sons are educated at Pune.

13. In paragraph-26, the learned trial Judge noted that the defendant is having another house at Barshi. Till date, the defendant did not search for the suitable accommodation for doing his mess business. The learned trial Judge also noted that the suit property is affected by road widening, but, till date the road is not widened. The defendant has irrigated landed property and he can get another property at Barshi City on rental basis. The learned trial Judge also held

that greater hardship will be caused to the plaintiff in case of refusal of the decree. The learned trial Judge accordingly decreed the suit under Section 13(1)(g) of the Act.

14. During pendency of the appeal, the defendant filed application under Order XLI Rule 27 of C.P.C.. In paragraph-4, it was asserted thus :

“4. The Tilak Ayurvedic College Pune has their portal on internet. The appellant obtained copy of teaching staff in said college which shows that Dr. Rahul Kathavate is working as Reader P.G. (Associate Professor), which is a permanent post. The appellant produced copy of said teaching list with this application. Thus the appellant received said information subsequent to evidence in lower court. The suit is decreed against the appellant on so called bonafides of the appellant. Therefore subsequent events which are material to decide controversy in matter ought to be brought to notice of this court.”

15. While dismissing the appeal, the learned District Judge has dealt with this application in paragraph-20. It was observed that during the course of cross-examination of PW-2 Dr. Rahul, the defendant was aware of his employment. The defendant could have adduced that evidence in the trial Court itself. The learned District Judge accordingly rejected the application.

16. In the case of *Union of India v. Ibrahim Uddin and another*, (2012) 8 SCC 148, Apex Court has exhaustively dealt with

the provisions of Order XLI Rule 27 of C.P.C. from paragraphs-36 to 51. In paragraph-36, it was observed that the general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 of C.P.C. enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.

17. In paragraph-38 it was observed that Order XLI, Rule 27 does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. In paragraph-39 it was observed that it is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. In the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence

should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. In paragraph-41 it was observed that the words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment. Apex Court held that an application for taking additional evidence has to be considered with circumspection, provided it is covered under either prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. The power so conferred upon the Court by the Code ought to be very sparingly exercised and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case.

18. In view thereof, I do not find that the learned District Judge committed any error in dismissing the application Exhibit-30.

19. In paragraph-14, the learned District Judge has considered the requirement of the plaintiff. The learned District Judge noted that the plaintiff's elder son Anand completed T.V. and radio repair course at Pune. The plaintiff's younger son Rahul has completed B.A.M.S. and M.D.. The suit premises is situate near S.T. stand, Barshi. The suit premises is required as Rahul desires to open dispensary in the suit premises at Barshi. The learned District Judge noted that the defendant has purchased plot No.17 from one Tarabai Nalawade at Barshi. The defendant has constructed two-storied building on said plot. Said building is suitable for running hotel and inn. The hotels owned by Chopra and Deshmukh are situate near that place. The defendant is also having land bearing Gat No.36, 24 and 216/1 at village Savargaon, Taluka-Barshi.

20. In paragraph-15, the learned District Judge observed that during the course of cross-examination, PW-1 admitted that he has received possession of the premises one and half year's back from another tenant Dr. Pandit.

21. In paragraph-16, the learned District Judge observed that the plaintiff's elder son Anand has been running electrical equipments repair

and cushion making shop in the premises received from Dr.Pandit.

22. In paragraph-19, the learned District Judge considered the fact that the defendant has agricultural lands at village Savargaon. His elder daughter has completed M.Sc. in Agriculture. She is married to Atul Bharate who is Computer Engineer. His son Ashish has obtained B.E. degree and is serving at Pune. His another daughter Pooja has completed M.Sc. in Micro Biology. His younger son Mangesh is studying in 11th Science. After considering the evidence on record, the learned District Judge held that the plaintiff has established his requirement.

23. In paragraph-21, the learned District Judge noted that the defendant has constructed two-storied building in Barshi. After considering the material on record, the learned District Judge has upheld the judgment and decree passed by the learned trial Judge on the ground of bonafide requirement. The learned District Judge also held that greater hardship would be caused to the plaintiff if eviction decree is refused.

24. Mr. Ashutosh Kulkarni submitted that having regard to the evidence of plaintiff's witnesses, it is very unlikely that the plaintiff's younger son Rahul would shift from Pune to Barshi. The entire family of the plaintiff is settled down in Pune. The children are taking education in Pune. He, therefore, submitted that the requirement of the plaintiff is

neither reasonable nor bonafide. It is not possible to accept this submission for more than one reason. Firstly, as mentioned earlier, PW-1 deposed that the premises at Kasaba Peth, Pune is insufficient having regard to the members of his family. PW-1 deposed that after retirement he wants to shift to Barshi. Secondly, it has come on record that his elder son Anand is carrying on business at Barshi in the premises which was earlier occupied by other tenant Dr. Pandit. PW-2 Rahul deposed that he wants to start his dispensary in the suit premises at Barshi.

25. Thus the defendant is not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The defendant is also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Civil Revision Application fails and the same is dismissed with no order as to costs.

26. At this stage, Mr. Ashutosh Kulkarni orally applies for stay to the eviction decree for a period of eight weeks from today. Mr. Ashutosh Kulkarni states that the applicant is in possession and nobody else is in

possessions. He has neither created third party interest nor parted with the possession. He will hereafter neither create third party interest nor part with the possession. He further states that the applicant and all adult family members using the suit premises are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

27. Having regard to the fact that applicant desires to challenge this order before the Apex Court, in my opinion, ends of justice would be met by staying eviction decree for a period of eight weeks from today subject to the applicant and all adult members using the suit premises giving usual undertaking to this Court within two weeks from today incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that they will pay the arrears of rent, if any, to the respondent within two weeks from today; and
- (v) that in case the applicant is unable to obtain suitable orders from the higher Court within eight weeks from today, they will deliver vacant and peaceful possession of the suit premises to the respondent.

28. In view thereof, notwithstanding dismissal of Civil Revision Application, eviction decree shall remain stayed for a period of eight weeks from today, subject to the applicant filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. It is made clear that in case the applicant does not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)