

FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 5834/2016

(ASHOK NAMDEORAO NAGPURE **VERSUS** MANDA HANSRAJ TAPASE & OTHERS)

 Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

Ms Deepali Sapkal, Advocate with Shri A.S. Kilor, counsel for petitioner.
 Shri Y. Maheshwari, Advocate with Shri S.V. Bhutada, counsel for R-1 to 5.

CORAM : A.S. CHANDURKAR, J.

DATE : JULY 30, 2019.

The challenge in the present writ petition is to the judgment passed by the Appellate Court in Regular Civil Appeal No.40 of 2010 whereby the said appeal preferred by the original plaintiffs has been allowed and the decree for eviction on the ground of *bona fide* need has been passed.

The respondents are the owners of two rooms that have been let out to the petitioner herein on rent. It was the case of the mother of the respondents that the aforesaid property was let out to the petitioner on rent. As the petitioner was irregular in payment of the rent, notice dated 24.10.2002 under provisions of Section 15(1) of the Maharashtra Rent Control Act, 1999 came to be issued. Since the demand made in that notice was not complied with, suit for eviction came to be filed. In paragraph 3 of the plaint, it was pleaded that the original plaintiff had a son who was educated but unemployed. On that count, the plaintiff pleaded that possession of the two rooms was required for setting her son in business. In the written statement as filed, the averments in paragraph 3 were denied. The plaintiff examined the unemployed son of the original plaintiff below Exhibit

19. In his affidavit at paragraph 3, the aforesaid averments were reproduced on oath. In the cross-examination by the defendant, it was suggested that though eviction of the defendant was sought on the ground that he wanted to do some business, he had not placed any documents in that regard on record. The defendant filed his affidavit on record but did not appear before the trial Court for being cross-examined. Hence there was no evidence on the part of the defendant. The trial Court framed an issue as to whether the defendant was in arrears of rent. It answered the same in the negative. No issue was framed as to *bona fide* need of the plaintiff. The trial Court therefore dismissed the suit as it found that the defendant was not in arrears of rent. The plaintiffs filed an appeal. The Appellate Court noted that the issue of *bona fide* need was not framed by the trial Court. It however framed a point in that regard and after considering the evidence led by the plaintiffs held that the need as pleaded was *bona fide*. Since the defendant did not lead evidence, it was held that the aspect of hardship remained un rebutted. The appeal was thus allowed and decree for eviction on the ground of *bona fide* need came to be passed. Same is challenged in the present writ petition.

Ms D. Sapkal, learned counsel for the petitioner submitted that in absence of the issue as regards *bona fide* need of the plaintiffs being framed by the trial Court it was not open for the Appellate Court to have adjudicated that aspect for the first time in appeal. As no issue was framed with regard to the *bona fide* need, the defendant did not lead any evidence in that regard. The Appellate Court ought to have remanded the proceedings to the trial Court instead of considering that issue for the first time in appeal. It was further submitted that even the need as pleaded by the plaintiff was not

shown to be the genuine or pressing need. It was merely the desire to evict the tenant. Placing reliance on the decisions in *Bismilla Bee Sk.Chand & Another Versus Mohd. Anwar Mohd. Akhtar* [2010(2) **Mh.L.J. 829**], *Vijay Gangadhar Dande (dead) through LRs. Versus Dilip Gyanchand Khemani* [2015(6) **Mh.L.J. 519**], *Chandiram Dariyanumal Ahuja Versus Akola Zilla Shram Wahatuk Sahakari Sanstha* [2012(5) **Mh.L.J. 177**], *Dinesh Jagannath Khandelwal Versus Kundanlal Perumal Chhabriya & Others* [2010(7) **Mh.L.J. 719**], *Raghunath G.Panhale (dead) by LRs Versus M/s Chaganlal Sundarji & Co.* [AIR 1999 SC 3864], *Kempaiah Versus Lingaiah & Others* [(2001) 8 SCC 718] and *Narayan Rajaram Alchetty Versus Balamma Baburao Shrirekam & Another* [2005(4) **Mh.L.J. 538**], it was submitted that in the facts of the case such decree could not have been passed for the first time in appeal. As the tenant was in possession since considerable period, greater hardship was likely to be caused to the tenant. It was thus submitted that the impugned judgment was liable to be set aside.

Shri Y.Maheshwari, learned counsel for the respondent supported the impugned judgment. He referred to the pleadings of the parties and the evidence led by the plaintiffs. According to him, the parties were aware of the respective stands and hence mere failure on the part of the trial Court to frame an issue as regards *bona fide* need did not cause any prejudice to the defendant. Moreover, the defendant did not enter the witness box to prove his defence. Since the plaintiffs' witness was cross-examined even on the aspect of *bona fide* need, it was clear that the defendant was aware that his eviction was sought even on that ground. By referring to the provisions of

Order L and Order XLI Rule 33 of the Code of Civil Procedure, 1908 it was submitted that the Appellate Court had the jurisdiction to consider the evidence already on record and decide the point in respect of *bona fide* need. Hence, no interference was called for.

I have heard the learned counsel for the parties and I have perused the pleadings as well as the evidence led by the plaintiffs. As noted above in paragraph 3 of the plaint, the original plaintiff had pleaded that her son being unemployed, the premises were required for setting up a business for him. These averments have been denied in the written statement. The unemployed son who was examined below Exhibit 19 has been cross-examined on that aspect. Absence of any documents to indicate the intention to start business has been sought to be brought on record. Despite the pleadings in the plaint and denial in the written statement, the trial Court failed to frame an issue with regard to *bona fide* need. The Appellate Court on noticing this aspect considered the evidence that was led by the plaintiffs and decided the aspect of *bona fide* need.

Though the defendant filed his written statement, he failed to lead any evidence to substantiate the stand as taken. The Court was therefore only required to consider the evidence led by the plaintiffs. Since it is found that the averments with regard to *bona fide* need were pleaded in the plaint and were denied by the defendant coupled with the fact that the plaintiffs had examined the unemployed son to depose about the need in question, it cannot be said that the defendant was taken by surprise when the Appellate Court considered this aspect of the matter. In a given case where the defendant has also led evidence and prejudice is shown to have occasioned, it would be a different matter. In the present case, the defendant did not lead any

evidence. Even otherwise, the Appellate Court had jurisdiction under provisions of Order XLI Rule 33 of the Code to pass appropriate orders in the facts of the case after considering the *bona fide* need of the plaintiffs in the light of material on record. Even otherwise, the plaintiffs could not be put to prejudice for the failure of the Court to frame the issue in question. As regards ratio of the decisions relied upon by the learned counsel for the petitioner is concerned, there can be no quarrel about the same. In the present case, the son of the original plaintiff was unemployed and therefore his need has been found to be *bona fide*. There is no evidence of the defendant to indicate possible hardship. It is therefore found that the Appellate Court did not err in decreeing the suit for *bona fide* need.

In that view of the matter, I do not find any reason to interfere in writ jurisdiction. The writ petition is accordingly dismissed. Considering the fact that the petitioner is in possession since long, he is granted time till December-2019 to vacate the premises. This would be subject to filing an undertaking in this Court within a period of four weeks that the occupation charges would be paid regularly till the end of December-2019 and possession would be handed over to the respondents by 31st of December, 2019.

JUDGE

APTE