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

CIVIL REVISION APPLICATION NO.310 OF 2021

Sarala Amritbhai Momaiya & Anr.	...Applicants
Versus	
Vinayak Govind Sandhu & Ors.	...Respondents

Mr. Shailesh Shah, Senior Counsel, i/b. Mr. Jaydeep Deo, for the Applicants.

Mr. Vineet B. Naik, Senior Counsel, i/b. Mr. Ajit J. Kenjale a/w. Mr. Sai Rajendra Kadam, for the Respondents.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 16th FEBRUARY 2023**

P.C. :

1. Heard Mr. Shah, learned Senior Counsel appearing for the Applicants and Mr. Naik, learned Senior Counsel appearing for the Respondents.

2. The Applicants by way of the above Civil Revision Application are challenging the legality and validity of the Judgment and Decree dated 3rd May 2021 passed by the Appellate Court of Small Causes at Bombay in Appeal No.411 of 2007. By the said Judgment and Decree, learned Appellate Court held that the Plaintiffs proved that Defendants had acquired alternate suitable accommodation for their residence in Nilkanth-Nilayam, situated at Sanduwadi, Chembur, Mumbai

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and therefore, the ground under Section 13(1)(1) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the “**Bombay Rent Act**”) is proved. Therefore, learned Appellate Court passed the decree of eviction. The learned Appellate Court has also passed decree of mesne profit under Order XX Rule 12 of Code of Civil Procedure, 1908.

3. Mr. Shah, learned Senior Counsel on behalf of the Applicants submitted that the alleged acquisition in question is by the daughter and/or for the benefit of the daughter and the same is not acquired for the benefit of the Applicants. He further submitted that in any case, the acquisition of the premises in question is in the name of his daughter and wife i.e. Applicant No. 1 and tenant is Applicant No.2 i.e. husband, as husband is paying the rent. He submitted that the Trial Court has refused to pass the decree and without properly appreciating the evidence on record, Appellate Court decreed the suit. He submitted that in the plaint decree of *mesne* profit is not sought and inspite of that, Appellate Court has passed the decree of *mesne* profit.

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4. On the other hand, Mr. Naik, learned Senior Counsel appearing on behalf of the Respondents submitted that the Appellate Court has taken into consideration several aspects including that the acquisition is by the wife who is the tenant. After the acquisition, Applicants have shifted to the said acquired premises. In the suit premises nobody is staying. He further submitted that the documentary evidence on record clearly shows that the Applicant No.1 who is the tenant has acquired the alternate premises. He states that Applicant No.1 has not stepped into the witness box and therefore adverse inference is required to be drawn against the Applicant

5. The evidence on record shows that, by agreement dated 1st February 1988 executed between Goodwill Constructions and daughter of Applicants i.e. Kavita Amritbhai Momaiya and Applicant No.1 Sarala Amritbhai Momaiya acquired/purchased Flat No.I-1 of the carpet area admeasuring 650 sq.ft. on the 1st floor with covered/ open garage in the building known as Nilkanth-Nilayam (hereinafter referred to as **“the acquired premises”**).

6. In or about October-1988, the Respondents i.e. Plaintiffs

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filed R.A.E. Suit No.1420/4320 of 1988 for eviction on various grounds including ground of acquisition of alternate accommodation available under Section 13 (1)(1) of the Bombay Rent Act. The learned Trial Court dismissed the suit. The learned Appellate Court reversed the decree on the ground of acquisition of alternate premises and decreed the suit as well as granted decree of *mesne* profit.

7. As far as last contention raised by Mr. Shah, learned Senior Counsel, appearing for the Applicants that in the plaint there is no relief sought regarding *mesne* profit, and inspite of that the learned Appellate Court has granted decree of *mesne* profit, Mr. Naik, learned Senior Counsel appearing for the Respondents, after taking instructions, submitted that as far as decree regarding *mesne* profit is concerned, he has no objection if the same is set aside.

8. As far as the ground regarding acquisition of alternate premises is concerned, the aforesaid agreement dated 1st February 1988 clearly shows that the said acquired premises were acquired/purchased by the Applicant No.1 and her daughter. The Appellate Court has held that daughter was not

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having any independent source of income. Although, it is the contention of Applicant No.1 that, she is the housewife, on the basis of evidence on record, the Appellate Court has held that the Applicant No.1 is a business-woman and she is Director of a company where the Applicant No.2 is also a Director.

9. It is one of the contention of Mr. Shah, learned Senior Counsel appearing for the Applicants that the rent is being paid by the Applicant No.2 and therefore, although the rent receipts stand in the name of Applicant No.1, it is the Applicant No.2 who is the tenant of the suit premises and therefore, acquisition of said acquired premises is *inter alia* in the name of Applicant No.1 cannot be a ground for eviction. In this behalf. It is required to note Section 5(11) of the Bombay Rent Act. As per Section 5(11) of the Bombay Rent Act, tenant *inter alia* means any person by whom or on whose account rent is payable for any premises. Thus, it is clear that definition of tenant includes person by whom rent is payable or on whose account rent is payable. Thus, it is clear that the rent is payable by the Applicant No.1, as the rent receipts stand in her name and even if it is assumed that the rent is paid by the Applicant No. 2 then

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also the same is paid on her account. Therefore, it is clear that the Applicant No.1 is the tenant of the suit premises.

10. It is further significant to note the affidavit in lieu of examination-in-chief filed by the witness of Applicants i.e. Applicant No.2. The said affidavit in lieu of examination-in-chief clearly states as follows:-

“I am the Defendant No.2 Defendant No.1 is my wife.
**My wife is tenant in respect of suit premises. I am
not the tenant in respect of suit premises.”**

(Emphasis added)

Thus, it is clear that in fact, the Applicants came up with positive case that the Applicant No.1 is the tenant in respect of the suit premises and Applicant No.2 is not the tenant in respect of the suit premises. Therefore, there is no substance in the contention of Mr. Shah, learned Senior Counsel that the Applicant No.2 is the tenant of the suit premises and therefore, acquisition in the name of Applicant No.1 has no relevance.

11. It is further submission of Mr. Shah, learned Senior Counsel appearing for the Applicants that the Plaintiffs have to show that tenant has built, acquired, allotted suitable residence as well as the Plaintiff has to show that the said acquisition is

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for the benefit of the Defendant and not for the benefit of other family members. To substantiate the said contention, Mr. Shah, learned Senior Counsel appearing for the Applicants relied on the decision of this Court in **Mrs. Saharabegam Sikandar Shaikh & Anr. vs. Abdul Ali Mawaji Tejani & Anr.**¹ He relied on paragraph 8 of the said judgment, which reads as under:-

“8. It is not uncommon that a father out of his parental obligation or out of love and affection desires to provide for the well being of the future of his children. He may, therefore, advance some amounts for settling them in life. The said amounts may be used for settling a son either in business or providing for his residence or both. If residential premises are acquired, may be out of funds advanced by the father, can it reasonably be held that the premises have been acquired by the father for his benefit and use? In my view, what is required to be seen is whether the acquisition is by the defendant for his own benefit. The said acquisition has to be for the benefit of the defendant and not for the benefit of his son whom he is seeking to habilitate in life. The learned Judge of the Appeal Court after holding that the plaintiff has failed to establish that the defendant has in fact shifted in

1 AIR 1991 Bom. 181

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the flat belonging to his son held the issue regarding comparative hardship in favour of the defendant. In my view the said finding cannot be faulted and is liable to be upheld.”

12. In this behalf it is significant to note the finding recorded by the Appellate Court in paragraph Nos. 73 to 75 which reads as under:

“73. The defendant No. 2 in the examination-in-chief has deposed that the accommodation as alleged by the plaintiff ‘Nilkanth Nilayam’ society was acquired by his daughter Kavita and son Nilesh. As per his deposition one part of the said bungalow is purchased by the son while another part is purchased by daughter Kavita. When the defendant No. 2 has deposed this fact on oath to show that the defendant No. 1 has no concern with this alternate accommodation he was supposed to place on record the sale documents effected in the name of daughter Kavita and son Nilesh. **The defendant No. 1 despite notice to that effect did not produce on record these two documents.** In such situation, there is need to take the recourse of section 114 cause (g) of the Indian Evidence Act which speaks about the **presumption** which is as

114. Court may presume existence of

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certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withhold it;

74. We have already noted above that the son Nilesh was born in the suit premises. The Defendant No. 2 has stated his birth date as 21.05.1970. **On 21.05.1988 only Nilesh had thus completed 18 years of his age, making him competent to enter into any agreement on his own behalf.** In other words, prior to 21.05.1988 Nilesh was not legally competent to enter into any legal agreement. If the birth date of the Nilesh is considered admittedly in the year 1988 he was pursuing his education as the defendant No. 2 has admitted that Nilesh has completed his B.Com degree which he should have been completed after 1990. The defendant No. 2 has tried to say that son Nilesh was serving in his company of which the defendant No. 1 was one of the directors and so he was being paid salary. But to

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prove this fact no documentary evidence has been placed on record by the defendant No. 2. Further fact is that, **it was not the independent source of income of the Nilesh to purchase the property in his own name at the age of 18 years.**

75. So far as **daughter Kavita** is concerned, her birth date is not placed on record, but if the evidence of defendant No. 2 is seen it can be said that **she is just two to four years older to son Nilesh.** Admittedly, **she also in the year 1988 when the said alternative accommodation had been acquired, had no source of income.** No doubt the defendant No. 2 tried to say in the cross-examination that Kavita was also director of the company wherein the defendant No. 1 was one of the directors and thus she was having source of income. But to prove this fact **no documentary evidence is available on record on the defendant's side."**

(Emphasis added)

13. In this particular case, the Defendant No.1 i.e. Applicant No.1 who is the tenant has failed to enter into the witness box and therefore, adverse inference is required to be drawn against her.

14. The Appellate Court found that as per the year 1989-1999, the electricity consumption of the suit premises was zero

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and that Applicants have shifted one of the landline phone connection from the suit premises to the said bungalow in Nilkanth-Nilayam. Thus, the decision on which Mr. Shah, learned Senior Counsel appearing for the Applicants has relied is of no assistance to the Applicants. It has been adequately proved that the said alternate premise is *inter alia* acquired by the Applicant No.1 i.e. the Tenant and the Applicants have shifted from the suit premises to the said acquired premises. Therefore, it has been proved that suit premises are acquired by the Applicant No. 1 i.e. the Tenant for her own benefit. The decision in the matter of **Mrs. Saharabegam Sikandar Shaikh** (supra) on which Mr. Shah, learned Senior Counsel has relied has no application to the facts of this case. In this particular case, not only the tenant has acquired the alternate premises but shifted to the alternate premises and therefore it is clear that, acquisition is for the benefit of the Tenant. Apart from that, Applicant No. 1 i.e. Tenant has not entered into the witness box and therefore, adverse inference is required to be drawn against the Applicants.

15. Thus there is no substance in the challenge to the eviction

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decree. However, it is clarified that clause No.5 of the Appellate Court's Judgment and Decree regarding *mesne* profit is quashed and set aside.

16. For the above reasons, the Civil Revision Application is partly allowed as aforesaid and disposed of as such.

[MADHAV J. JAMDAR, J.]