



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

**CIVIL REVISION APPLICATION NO.456 OF 2023
WITH
INTERIM APPLICATION NO.14482 OF 2023
IN
CIVIL REVISION APPLICATION NO.456 OF 2023**

1. Hemlata Ashok Inamdar
2. Amol Ashok Inamdar ...Applicants

Versus

1. Bhalchandra Damodar Thakare
2. Babibai Gandhi alias Sudha Anant
Gandhi
3. Leela Vinayak Thakare
4. Rajendra Vinayak Thakare
5. Jeetendra Vinayak Thakare
6. Aruna S. Pradhan
7. Ashwini Vaibhav Kulkarni
8. Nupura Rishab Bhise ...Respondents

...

Mr. Vijay Singh Thorat, Senior counsel with Mr. Sanjay Jain, Mr. Nakul Jain and Mr. Karan Jakhar for the Applicants.

Mr. Prashant Karande with Mr. Sudam S. Patil and Mr. Ajit S. Hodage i/ b. Mr. Praful S. Pawar for the Respondents.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED: 6th SEPTEMBER, 2023.

ORAL JUDGMENT :-

1. Heard finally with consent of both the parties.
2. The Applicants, who were the Defendant Nos.2 and 3 in

RAE Suit No.674/1179 of 2008, have filed this application under Section 115 of the Civil Procedure Code challenging the legality of the following judgment/orders:-

(i) Judgment and Decree dated 11th June 2013 in Suit No.674/1179 of 2008 passed by Court Room No.10, Small Causes Court, Mumbai,

(ii) Judgment dated 21st June 2023 passed in the Appeal No.88 of 2013 confirming the judgment and decree dated 11th June 2013 in Suit No.674/1179 of 2008; and

(iii) Order dated 21st June 2023 passed on Application at Exhibit '36' in the Appeal; and

(iv) Order dated 21st June 2023 passed below Exhibit '74', all passed by the Appellate Bench, Small Causes Court, Mumbai and be pleased to quash and set aside the same;"

3. The brief facts necessary to decide this revision application are as under :-

The Respondent No.1 was the plaintiff and the Applicants herein were the Defendant Nos.2 and 3 in R.A.E. Suit

No.674/1179/2008 and shall be hereinafter referred to as the Plaintiff and Defendants respectively.

4. The parents of the Plaintiff -Damodar Sitaram Thakare and Smt. Sushilabai Damodar Thakare were the owners of the building 'Dwarka Sadan' Shivaji Park, Mumbai. Upon their death the Plaintiff, his brother-Anil and two sisters- Dr. Pushpalata and Rohita Bhise @ Shobha Thakare filed a suit viz. Suit No.44/2001 against their brother-Vinayak inter alia for declaration that they had 1/5th share each in 'Dwarka Sadan'. The parties to the said suit settled the dispute amicably and accordingly the suit was decreed vide consent decree dated 30/04/2003. The Plaintiff states that as per the consent decree, the eastern portion of the said building comprising of flat Nos.1, 4 and 5 was allotted to him, his brother – Anil and his sisters – Dr. Pushpalata and Rohita whereas the western portion of the building was allotted to his brother -Vinayak Thakare.

5. The Plaintiff and his family members are occupying flat no.1. It is the case of the Plaintiff that the flat no.5 is allotted to his sisters – Dr. Pushpalata and Rohita and that the said flat is in their occupation and possession. The dispute is in respect of Flat No.4

situated on the first floor of the building - Dwarka Sadan. The said flat shall be hereinafter referred to as 'the suit premises'. Mr. P.Y. Inamdar was a tenant of the suit premises on payment of rent of Rs.124/-p.m. The Defendants are the legal representatives of the original tenant and are occupying the suit premises.

6. The Plaintiff claimed that he along with his wife, daughter-in-law and grandson are occupying Flat No.1 which comprises of two rooms, hall and a kitchen. It is the case of the Plaintiff that he and his wife are suffering from several ailments and need a separate room for themselves. His daughter-in-law is under great shock and is in a disturbed state of mind because of the murder of her husband. She needs constant company of her mother and siblings and hence, needs a separate room for herself. His grandson, who is a college going boy and who would soon be of marriageable age also requires a separate room for himself. According to the Plaintiff, the Flat No.1 is not sufficient to accommodate him and his family members and that he requires the suit premises for his use and occupation. The plaintiff therefore filed a suit for eviction on the ground of bonafide and reasonable requirement of the suit premises.

7. The Defendant contested the suit mainly on the ground that the consent decree was sham and that it was a collusive and fraudulent decree obtained with an oblique motive to evict them from the suit premises. It is alleged that the Plaintiff has voluntarily given up his right in respect of Flat No.2, which has been subsequently let out for commercial purpose. The Defendants also denied that the Plaintiff requires the suit premises bonafidely for residential purpose. It was averred that the Flat No.1 occupied by the Plaintiff is sufficiently big to accommodate his family members. The defendants have denied that they have any alternate premises and further claimed that a decree of eviction will render them and their family members homeless and will thus cause undue hardship.

8. The Trial Court upon considering the evidence adduced by the respective parties held that as per the consent decree, the Plaintiff has been allotted the eastern portion of the building whereas the western portion was allotted to his brother-Vinayak Thakare. The learned Judge rejected the contention of the Defendants that the consent decree is sham, fraudulent or collusive, obtained with an oblique motive to evict them from the suit premises. Furthermore, the Defendants being the tenants cannot challenge the partition inter se

between the owners/landlords. It is held that though the parties have not executed a separate deed of partition, acting upon the consent terms, they are occupying the portion allotted to them as per the consent decree.

9. The learned Judge held that flat No.2 is part of the western wing and has been allotted to Vinayak. The learned Judge also took note of the fact that acting upon the consent decree, said Vinayak filed eviction suit against a tenant in the western wing, that he and his son had entered into an agreement with Cafe Coffee Day and further that said Vinayak and his family are residing in flat no.2. The learned Judge held that flat no.2 is not available for the Plaintiff.

10. The learned Judge observed in paragraph 32 of the impugned judgment that *'it is an admitted position that the flat no.5 is in possession of Dr. Pushpalata Khurana. Mr. Vyas, the learned counsel for the defendant also fairly admitted that flat no.5 is in possession of defendant no.5 and she is residing therein. Defendants have nowhere case that flat no.5 is available for the Plaintiff. On the contrary, it is evident from the consent decree (Exhibit – 48) that possession of defendant no.5 has been confirmed'*.

11. The Trial Court observed that the Plaintiff is residing in Flat No.1, which is a two bedroom flat, alongwith his daughter-in-law and grandson. The Plaintiff is a senior citizen whereas his grandson is a college going boy and they need separate rooms for themselves. The Trial Court observed that the Plaintiff's son was murdered and his daughter-in-law is undergoing mental trauma and pressure and she too needs a separate room for herself. The learned Judge held that it will be unjust to compel the grandson of the Plaintiff, who was by then 25 years of age, to share the bedroom with his mother or with the Plaintiff.

12. The Trial Court took note of the fact that the Defendants have residential premises viz. Flat no.14 admeasuring 606 sq. meters in Kanti Building, which is hardly at 10 minutes distance from the suit premises. Upon considering the bonafide and reasonable need of the Plaintiff and on weighing the hardship likely to be faced by the respective parties, the Trial Court decreed the suit and ordered eviction of the Defendants from the suit premises.

13. Being aggrieved by this judgment and decree, the

Defendants filed an appeal (Appeal No.88 of 2013) before the Appellate Bench of the Small Causes Court, Mumbai. The records indicate that the defendants had also filed a Review Application no. 19/2013 questioning the observations made by the trial court in paragraph 32 of the impugned judgment. The said Application was dismissed by order dated 14/03/2014. During the pendency of the Appeal, the defendants filed Writ Petition No.4300/2014 before this Court, challenging the dismissal of the review application.

14. The said Writ Petition was disposed of by order dated 27/11/2014. It was observed that the Petitioners had accepted occupation of Dr. Pushpalata in the suit premises but did not admit that Dr. Pushpalata and Rohita were in possession of the suit premises as owners. This Court further observed that from the evidence on record, it is clear that it is a specific case of the defendants herein that flat no.5 is available and hence, the statement recorded in paragraph 32 of the judgment that it is not the case of the defendant that flat no.5 is available for plaintiff, is incorrect and is contrary to the case set up by the defendants. This Court therefore deleted paragraph 32 of the impugned judgment and decree dated 11/06/2013 with further directions to the Appellate Court to decide the appeal independently

on merits without being influenced by the observations made in the order except for the observations made in respect of deletion of the impugned portion of the trial court decree.

15. The defendants filed application dated 23/10/2015 under Order 41 Rule 27 of the Civil Procedure Code (Exhibit 36) seeking leave to place on record photographs in respect of 'eating house' being run from flat no.1 of Dwarka Sadan. The said application was dismissed by the Appellate Court mainly on the ground that the photographs which pertain to flat no.2 are not relevant to decide the appeal.

16. The Appellate Court dismissed the appeal on merits on the ground that the defendants had failed to prove that the consent decree was collusive. The Appellate Court confirmed the findings of the Trial Court that the Plaintiff who is a senior citizen, is suffering from several ailments and he needs a separate room for himself. Similarly, his daughter-in-law and his grandson, who is of marriageable age, need sufficient space for themselves. The Appellate Court recorded a finding that the Plaintiff and his family members require the suit premises for bonafide and reasonable use.

17. The Appellate Court rejected the contention of the Defendants that the flat No.5 is now available for the use of the Plaintiff and his family members, in view of the death of Dr. Pushpalata and Rohita during the pendency of the suit. The Appellate court recorded a finding that the plaintiff has no right to flat no.5 and flat no.2 and as such the said flat was not available for his use. The Appellate Court further held that no hardship will be caused to the defendants in view of availability of alternative premises in Kanti Building situated at H.T. Kararia Marg, Matunga (West), Mumbai. The learned Judge also observed that the financial condition of the defendants is very sound and they can either shift in the alternative premises or acquire additional premises for their residential purpose. The Appellate Court thus confirmed the eviction decree passed by the trial court. These concurrent decisions are challenged by the defendants in Writ under Article 227 of the Constitution of India.

18. Mr. Thorat, learned senior counsel representing the Defendants contends that both the Courts below have grossly erred in holding that the consent decree is not fraudulent and collusive. He submits that the Trial Court as well as the Appellate Court has committed jurisdictional error in holding that Flat No.5 was not

available to the Plaintiff. He submits that the plaint proceeds on the premise that the Plaintiff is the exclusive owner of the eastern portion, which includes flat No.5. He submits that flat no.5 was not allotted to Pushpalata and Rohita, the sisters of the Plaintiff and that they were merely occupying the said flat. Both the sisters have since deceased and the children of Rohita are residing at Mahim. Hence, flat no.5 is now available for the use of the Plaintiff.

19. Per contra Mr. Prashant Karande, learned counsel for the Plaintiff submits that the averments in the plaint as well as the consent decree reveal that the Plaintiff and his brother-Anil Thakare and two sisters were allotted eastern portion of the building-Dwarka Sadan whereas the western portion was allotted to their brother-Vinayak Thakare. He therefore contends that the sisters of the plaintiff have right to flat No.5 and since their death their legal representatives have right to the said flat. As a consequence thereof, the said flat is not available to the Plaintiff as of right. He submits that both the Courts below have recorded concurrent findings that the consent decree is not sham. Even otherwise, it is not open for the Defendants to challenge the decree particularly in absence of any evidence to show that said decree was collusive only to defeat the rights of the tenants. Relying

the decision of the Apex Court in *Sunil Kumar and Another vs. Anil Kumar (2008) 9 SCC 241* he submits that both the courts have recorded concurrent finding of fact regarding the bonafide requirement of the Plaintiff as well as comparative hardship and there is no perversity or infirmity in these findings. Hence, no case is made out to interfere with the concurrent findings recorded by the Courts below.

20. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

21. Section 16 of the Maharashtra Rent Control Act, 1999 enumerates grounds for eviction of the tenants. Section 16(1)(g), which is relevant in the present case, provides for eviction of a tenant on the ground of reasonable and bonafide requirement of the landlord. Sub Section 2 of Section 16 provides that no decree for eviction shall be passed on the ground specified in clause (g) of Sub Section 1 if the court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant greater hardship would be caused by passing the decree than by refusing to pass it.

22. Section 16(1)(g) thus enables the landlord to recover possession of the tenanted premises when the same are required for his reasonable and bonafide use. Whereas Sub Section 2 of Section 16 casts a duty on the Court to consider the question of comparative hardship having regard to the circumstances of the case including the question of availability of other reasonable accommodation being available for the landlord or the tenant. Sub Section 2 serves as a bar against eviction inspite of ground of bonafide and reasonable use, having been made out, if the issue as to comparative hardship is answered against the landlord and in favour of the tenant. Needless to state that the burden of proving that the premises are reasonably and bonafidely required for his own use, as contemplated under Section 16(1)(g) of the Act is on the landlord, whereas the burden of proving greater hardship so as to deprive the landlord of his established right to seek eviction lies on the tenant. Reliance is placed on the decision of the Apex Court in ***Badrinarayan Chunilal Buthada vs. Govindram Ramgopal Mundada (2003) 2 SCC 320***. The findings recorded by the courts below are required to be considered in the light of the aforesaid provisions of law.

23. It is not in dispute that the building-Dwarka Sadan was

owned by Damodar Thakare and Sushilabai Thakare. Upon the death of said Damodar Thakare and Sushilabai Thakare, the Plaintiff-Bhalchandra, his brother Anil and their two sisters Dr. Pushpalata and Rohita Bhise filed a civil Suit No.44 of 2001 against their brother-Vinayak inter alia for declaration that each one of them has 1/5th share in the suit property-Dwarka Sadan. The said suit was decreed by consent decree dated 30/04/2003. The consent decree indicates that the building-Dwarka Sadan was divided in two wings viz. eastern wing and western wing. Flat Nos.2,3 and 6 in the western wing were allotted to Vinayak and the eastern half comprising of Flat Nos.1, 4 and 5 was allotted to the Plaintiffs in the said suit.

24. The claim of the Defendants that the said consent decree is collusive and fraudulent, obtained with an oblique motive of evicting them from the tenanted premises cannot be countenanced as it is not open to the tenant to challenge the factum of partition. The only challenge available is that the partition was not bonafide and was effected only for the purpose of maintaining a suit against him. In the instant case, the suit for declaration was filed in the year 2001 and the same was decreed in the year 2003 whereas the suit for eviction was filed in the year 2008. Apart from the bare statement there is

absolutely no evidence to prove that the previous suit for declaration was filed with an oblique motive to secure eviction of the tenant. Furthermore, the previous suit was not restricted only to Dwarka Sadan wherein the suit premises are situated but include other properties owned by the parents of the plaintiff, in respect of which the Defendants-tenants have no right, title or interest. This fact itself would negate the contention of the Defendants that the consent decree was collusive and fraudulent.

25. The Plaintiff has sought eviction on the ground of reasonable and bonafide use of the suit premises for his residential purpose. It is on record that the Plaintiff, who is an octogenarian is suffering from several ailments. His son has been murdered. The grandson, who was a college going boy as on the date of institution of the suit, had turned 32 years of age by the time the appeal was decided. The need pleaded and proved by the Plaintiff to have separate bedrooms for himself, his daughter-in-law and grandson undoubtedly is a natural and bonafide need, which continues to subsist despite death of his wife. Both the courts below, taking note of the age of the Plaintiff, his grandson and their bonafide and reasonable needs to have separate rooms, have observed that the premises presently

occupied by them is inadequate to satisfy their need or requirement. The challenge to these findings cannot be countenanced for the simple reason that the landlord is the best judge of his residential requirement and it is for him to decide how and in what manner he should live. The tenant cannot dictate terms to the landlord as to how he can and should adjust in the available premises. As it has been held by the Apex Court in *Shiv Sarup Gupta Vs. Mahesh Chand Gupta, (1999) 6 SCC 222* if the landlord wishes to live with comfort in a house of his own the law does not command or compel him to squeeze himself tightly into lesser premises protecting the tenant's occupancy.

26. The Defendants had sought to contend that the Plaintiff has voluntarily given up right in respect of flat No.2, which has been converted from residential to commercial premises. It is also sought to be contended that Pushpalata and Rohita, the sisters of the Plaintiff, who were in occupation of Flat No.5 have since expired and the said flat is available for the use of the Plaintiff. As noted above, flat No.2 has been allotted to Vinayak, the brother of the Plaintiff and as such the same is not available for the use of the Plaintiff and his family members. This being the case, the application at Exhibit-36 for producing additional documents relating to flat No.2 was not relevant

or germane to determine the bonafide need of the Plaintiff. Hence, the order dated 21/06/2023 does not warrant any interference.

27. As regards flat No.5, the Plaintiff had specifically averred in paragraph 14 of the plaint that “*the flat No.5 on the second floor of the suit property is in occupation and possession of Dr. Pushpalata Khurana and Rohita Sudhir Bhise as the said flat has come to their share as per the consent decree passed in S.C. Suit No.44 of 2001*”. In response to the pleadings at paragraph 14, the Defendants have averred that “*With reference to paragraph 14 of the plaint, what is stated therein is true only to the extent that flat No.5 on the second floor is in the occupation of Defendant No.5.*” The Plaintiff had specifically averred that as per the consent decree the said flat has come to the share of his sisters. There is no specific denial of these pleadings. There are also no pleadings to indicate that Dr. Pushpalata and Rohita, the sisters of the Plaintiff have relinquished their share in Flat No.5 in favour of the Plaintiff.

28. Furthermore, as noted above, the Plaintiff-Bhalchandra, his brother-Anil and sisters-Pushpalata and Rohita, who were the Plaintiffs in Suit No.44 of 2001 filed against their brother-Vinayak, had sought a

declaration that they have 1/5th share in the property of their parents. The said suit was decreed as per the consent decree dated 30/04/2003. The said decree stipulates that “*the Plaintiffs shall amongst themselves be entitled to the eastern side portion of Shivaji Park property to the exclusion of Vinayak, who is not and shall not in any way concerned therewith or liable therefor and Vinayak shall be entitled for the western portion of the Shivaji Park property to the exclusion of the Plaintiff and the Plaintiffs are not and shall not in any way concern therewith and liable therefor...*”. The decree further indicates that the Plaintiff and his brother were entitled to unconsumed/additional Floor Space Index (FSI) or Transferrable Development Rights (TDR) on the said flat in equal proportion, with further rider that the Plaintiff would use and utilise his share of 50% with his brother Anil, Dr. Pushpalata and Rohita, the Plaintiffs No.2 to 4 in the said civil Suit. The aforesaid clauses in the consent decree in Suit No.44 of 2001 negate the contention of the Defendant that the sisters of the Plaintiff were only the occupants of Flat No.5 without having any right, title or interest in the same and/or that the Plaintiff has legal right to occupy the same.

29. Be that as it may, Dr. Pushpalata and Rohita Bhise had

expired during the pendency of the appeal. The plea that flat No.5, which was occupied by Pushpalata and Rohita is now available to the Plaintiff was raised in the appeal without incorporating an additional ground in the appeal memo and /or amending the written statement. In such circumstances it is not possible to hold that Respondent Nos.7 and 8 viz. the legal representatives of Rohita have no right to the said flat or that the said flat has devolved upon the Plaintiff. This being the case, there is absolutely no error in the findings recorded by the Appellate Court that the Plaintiff has no legal right to Flat No.5 and consequently he and his family members cannot be compelled to occupy the said flat.

30. The Trial Court as well as the Appellate bench of the Small Causes Court while considering the issue of hardship have taken note of the fact that the Defendant No.2 owns a bungalow at Kothrud, Pune. The Defendants are also in possession of residential premises in Kanti building, which is at about 10 minutes distance from the suit premises. The Courts below have also taken note of the fact that the Defendant-Amol Inamadar has admitted that he has taken another rental premises at Fort/Fountain on payment of rent of Rs.3,00,000/- per annum. Considering the above facts, the financial status of the Defendant as

well as the admission of the Defendant that they had not made any attempt to find alternative accommodation, the learned Judge has answered the issue of comparative hardship in favour of the Plaintiff. Both the courts below have not committed any jurisdictional error in recording these findings.

31. Having gone through the records and proceedings, in my considered view the Trial Court as well as the Appellate Court have not committed any illegality or jurisdictional error in ordering eviction of the Defendants from the suit premises. Hence, no case is made out to interfere with the concurrent findings of both the Courts below in exercise of powers under Section 115 of CPC.

32. In view of the aforesaid reasons, the revision application stands dismissed.

33. Learned senior counsel for the Defendants prays for stay of execution of the impugned judgment. The stay is granted for a period of eight weeks from the date on which the judgment is uploaded, subject to condition that the Defendants and /or their family members file an undertaking before the Court within one week that they shall

not transfer or alienate or create third party right in respect of the suit premises.

34. Interim application stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)