



This order is corrected/modified vide speaking to minutes of the order dated 29-09.2023

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 119 OF 2020

Mr. Mahendra Krishnarao Kalgutkar)
Since deceased through his legal heirs)
and representatives)
1. Mohini Mahendra Kalgutkar & Ors)...**Applicants**

Vs.

1. Sheela Harish Talim (Deleted Since Deceased))
Through her legal heirs and legal representatives)
1A. Rajiv Harish Talim and Others)...**Respondents**

Mr. P.G. Karande with Mr. Sudam S. Patil, Advocate for Applicants.

Mr. P.S. Dani, Senior Advocate i/b Mr. R.M. Haridas, Advocate for Respondent No.1.

CORAM : ABHAY AHUJA J.

DATE : 7th AUGUST 2023

PC. :

1. Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally.

2. This Revision Application has been preferred by Mrs. Mohini Mahendra Kalgutkar, the wife of original tenant viz. Mr. Mahendra Kalgutkar, who died during the pendency of eviction suit viz. R.A.E. Suit No. 970/1434 of 2010 (the "said suit") filed by the Respondent No. 1 landlady on the grounds of bonafide requirement for herself and for her family members and non user of suit premises being tenement House No. 383-A on the ground floor admeasuring 360 sq.ft, in Vitthal Niwas, V. P. Road, Mumbai 400 004 (the "suit premises") challenging the decree and judgment dated 5th November 2019 passed in Appeal (A-1) No. 34 of 2013 preferred against the decree and judgment dated 11th February 2013 passed in the said suit and confirming the order of the Trial Court decreeing the said suit filed by Respondent No. 1 on the ground of bonafide requirement and hardship.

3. Mr. P. G. Karande, learned Counsel for the Revision Applicant would submit that the Revision Application deserves to be allowed on the ground that : (i) the fact that the landlord had alternative premises was suppressed and concealed as the same does not find mention in the pleadings but was brought to light in the cross-examination and further cross-examination and that (ii) the Courts below have suo moto sought to explain the bonafide requirement which cannot be permitted.

4. Learned Counsel refers to the following paragraphs 19 and 20 of the decision of the Appellate Court in support :

“19. Plaintiff was having alternate accommodation in House No.383B it was concealed by the plaintiff. The said premises according to plaintiff is not in habitable and the suit premises is very good maintained. So, the plaintiff require that premises shows the intention of plaintiff to grab the premises, bonafide requirement of plaintiff not proved. So, the plaintiff is not entitled for decree on the ground of bonafide requirement.

20. After notice of requirement of the plaintiff, defendants have searched for alternate accommodation and given public notice, that shows the defendants have tried for alternate accommodation but it beyond the rich of the defendant. Hence, comparative hardship is going to be caused to the defendant and plaintiff is not entitled for decree on this ground also.”

(emphasis supplied)

5. Learned Counsel has also relied upon paragraph 28 of the decision of the Appellate Court. The relevant portion is quoted as under :-

“28.So, having a room at 4th floor cannot be called as suitable alternate premises. So, we reject the contention of the defendant that a room of 160 sq.ft on the 4th floor of the suit building is a suitable premises for the plaintiff for accommodation of her family members. Plaintiff have two sons by name Raju and Nitin. Both are married. One is having son nearly age of 25 years and daughter is of 20 years. The age of 25 years is a age of marriage. So, there is a possibility of further increase in the family of the plaintiff, though it is not case of the plaintiff. But considering the age of member of family of plaintiff it can be considered that it will be further bonafide need of the plaintiff. Grand son and daughter of the plaintiff are

of more than 20 years old, so, they definitely require a separate room for their sleep and study.....”

(emphasis supplied)

6. Then he also refers to the written statement and in particular to paragraph 9(a) thereof which is quoted as under :-

*“9(a) The Defendant submits that the above stated previous tenant by name Mr. Sahastrabudhe was residing in exactly adjacent room which is numbered as 383/A (sic 383/B) is almost of the same area or thereabout as the suit premises. The said Room No.383 A (sic 383/B) is 325.30 sq.ft. carpet. The rent receipt of the said premises was standing in the name of Mr. S.G. Sahastrabudhe and Ms. Bhimabai Pednekar and after the death of the said couple in the year 1984 or thereabout, the said room was let out to one Smt. Pratibha Vinayak Naik. The said Smt. Naik surrendered the premises to the landlady in the year 1987. The said premises is vacant and available to the Plaintiff as the said is not in use. Even the Electricity Meter is also removed by Electricity Board as the overdue electricity charges are not paid by the said Smt. Pratibha Vinayak Naik. Annexing herewith the rent receipt issued by the landlord H.B. Talim dated 5th September, 1984 issued in the name of S.G. Sahastrabudhe and Ms. Bhimabai Pednekar and electricity Duplicate Bill issued by B.E.S.T. in the name of Smt. Pratibha Vinayak Naik on which no meter reading history is available and marked as **Exhibit - “A” & “B”** respectively. This Defendant submits that the said room admeasuring about 325.30 sq.ft. or thereabout was available to the Plaintiff well back in the year 1987 for her daughter’s alleged need and even today it is in Plaintiff’s possession and readily available to her to fulfill her and and her daughters alleged bonafide requirement as stated in the Plaint. Hence the bonafide requirement of the Plaintiff is fabricated and just to evict the Defendant by hook or crook and therefore, the Plaintiff has filed one more suit in C.R. No.23 for eviction on the ground of Non-User of this Hon’ble Court.”*

(emphasis supplied)

7. Learned Counsel would also refer to the Additional Affidavit of examination in chief of the Respondent No.1 (Plaintiff) and in particular paragraph 1 thereof. The relevant portion is quoted as under :-

“1. I say that after I filed my affidavit dated 1.8.2011 of Examination-in-chief the Defendant amended his Written Statement. I am therefore filing additional affidavit of my examination-in-chief. I do not admit that Defendant and his unnamed family continued in the suit premises as alleged or otherwise. I say that the Defendant has made vague statement in paragraph 5B of the additional Written Statement. I say that the payment of rent by the Defendant to me is of no consequences in deciding the issue involved in the suit. I am not aware that in the year 2001 the Defendant and his wife purchased a flat in the said Anandashram as alleged. I deny that I had attended the Vastushanti of the flat referred to in paragraph 5D in the year 2001. I deny that the said flat was purchased by the Defendant and his wife for their growing family. I do not admit that the premises in Anandashram C.H.S. Ltd., became inadequate on the marriage of Defendant son by name Pankaj. I do not admit that the 2nd son of the Defendant Mangesh got married in the year 2004 and is residing in the said Anandashram premises admeasuring 891.50 square feet. I do not admit that defendant and his wife are residing in the suit premises as alleged or otherwise. I do not admit that the area of the room mentioned in paragraph 9A is 325.30 square feet (carpet). I do not admit that the said Smt. Naik referred to in paragraph 9A surrendered the said premises to me in the year 1987. I say that Smt. Naik was never my tenant of the said premises. I say that Smt. Naik clandestinely took electric meter in her name without my consent and knowledge. I do not admit that the said premises is vacant and available to me as the same is not in use. I say that the said premises was let-out in or about the year 1987-88 to A K and K.K. Sarna and they are in possession of the premises till date. I do not admit that the said room No.383-A (sic 383/B) is in my possession. I do not admit that my requirement is fabricated and just to evict the defendant

by hook or crook, I have filed this suit. I do not admit that the statements made in paragraph 14A of the Written Statement about the measurement of the various flats mentioned therein. I say that the commercial premises referred to in the said paragraph is not adequate and suitable for the purpose of residence. In any event the said premises are used by my sons for storing articles, things and goods required for their profession. The premises let out to M/s. Anand Bearing Corporation is a commercial premises without mori and toilet facility absolutely unsuitable for residence. I do not admit that said premises were surrendered in 2006. I deny that the said Salunke was residing the said premises.”

(emphasis supplied)

8. Learned Counsel refers to the cross-examination of the plaintiff on 17th January 2012 and in particular in following paragraph :-

“ The room adjoining to suit premises is having equal area like suit premises. It is true to say that Mr. S.G. Sahastrabudhe and Mrs. Bhimabai Pednekar were tenants in respect of the said room. They both died before 20 to 25 years. It is not true to say that after demise of Mr. Sahastrabudhe and Mrs. Pednekar Mr. Vinayak Naik started to reside in suit premises. (Witness volunteers that Mr. Naik was residing with Mr. Sahastrabudhe and Mrs. Pednekar and after their death, he resided in said premises for some period.) I do not know whether electricity meter in said room was in the name of Mr. Naik. Mr. Naik has died before 15 to 20 years. After death of Mr. Naik his wife stayed in the said room for some period and thereafter she left the same and thereafter said room there is no electric supply. It is not true to say that the said room is lying vacant and locked. One Mrs. Sarana use to come occasionally to reside in said room. She started to come after death of wife of Mr.Naik. I am not able to state since which year Mrs.Sarana started to come to stay in said room. At that time, my husband was managing affairs of suit building. My husband has expired

in 1999. I do not know whether any agreement was executed with Mrs. Sarana. We have issued rent receipt in the name of Mrs. Sarana. I was not aware that production of said rent receipt is necessary, therefore not produced along with my documents. I have not stated about Mrs. Sarana while giving instructions while drafting my affidavit of evidence. I have not given any instructions to my advocate about rent receipts issued in the name of Mrs. Sarana. Due to oversight, I have not given said instructions to my advocate. It is not true to say that I do not have any rent receipt issued to Mrs. Sarana, therefore, not given instructions to my advocate. The said room was given to Mrs. Sarana for residential purpose. I do not know whether there is no electricity in the said room since inception. Mrs. Sarana used to come occasionally, but presently she has not come to reside in said room since last 10 years.”

(emphasis supplied)

9. Learned Counsel also draws the attention of this Court to the plaintiff's further cross-examination dated 14th March 2012 and in particular to the following question and answer :-

“Ques :- No person by name Mrs. Sarana is residing in room No.383-B ?

Ans :- Yes, Mrs. Sarana is not residing in said premises. But, in city like Mumbai nobody is ready to leave the premises. We do not want to initiate legal action in respect of said premises as we are not interested in said premises as we don't want that place.

It is true to say that suit premises is well maintained, therefore, we are claiming its possession.”

(emphasis supplied)

10. He has also relied upon the plaintiffs further cross-examination dated 29th March 2012 in respect of Room No.383-B and in particular paragraph 4 thereof :-

“4. The rent receipt in respect of the suit premises was originally in the name of Madhukar Kalgutkar and now same is transferred in the name of Defendant. We transferred said rent receipt in the name of defendant in year 2011. It is true to say that on the date of suit defendant was not our tenant.”

(emphasis supplied)

11. Learned Counsel also refers to the decision of the Trial Court where the contentions of the defendant are recorded in paragraph 7 and quoted as under :-

“7. It is contended that the premises bearing No.383-B admeasuring equal area like suit premises is adjacent to suit premises. Mr. Sahastrabudhe was tenant of premises No.383-B. The rent receipt of said premises was standing in the name of Mr. Sahastrabudhe and Ms. Bhimabai Pednekar. After death of the said couple in the year 1984 or thereabout, the plaintiff let out said premises to Smt.Pratibha Naik. The said Smt.Pratibha Naik surrendered the premises to the plaintiff in the year 1987. The said premises is vacant and available to the plaintiff. The electricity meter in the said premises is also removed due to non-payment of electricity charges by the earlier tenant Smt. Pratibha Naik. The said premises No.383-B admeasuring 325.30 sq.ft. is available to the plaintiff since the year 1987 to satisfy her daughter's need. Even today, it is in possession of plaintiff and available to her to fulfill alleged bonafide requirement. Therefore, the bonafide requirement set out by the plaintiff

deserves to be rejected. The bonafide requirement pressed into service by the plaintiff is nothing but dishonest desire to evict the defendant.”

(emphasis supplied)

12. Learned Counsel also refers to paragraph 14 which is quoted as under :-

“14. Per contra, Mr. Jagushte, Ld. Advocate for the defendant submitted that the premises adjacent to suit premises bearing No.383-B is available for the plaintiff since 1987. She has not utilized said premises. She has suppressed the availability of said premises by stating false story that one Mrs. Sarana is in possession of said premises. He further submitted that the premises on 4th floor of Vithal Niwas building is also available to her. Therefore, requirement pressed by the plaintiff cannot be accepted as a bonafide and reasonable. Therefore, suit may be dismissed.”

(emphasis supplied)

13. Learned Counsel would submit that the Court cannot supply the reasons for establishing bonafide requirement as that is impermissible in law. Learned Counsel refers to paragraph 22 of the decision of the Trial Court in support which is quoted as under :-

“22. Now, in this backdrop, let us see whether this premises are sufficient for the plaintiff to fulfill her requirement considering the family members. It is not in dispute that the plaintiff is having two sons namely Rajeev and Nitin. Mr. Rajeev is residing with his wife and son. His son is 18 years old. The

second son of plaintiff namely Nitin is residing along with his wife and daughter. Daughter is 15 years old. At the same time, Plaintiff and her daughter Shilpa are residing with both sons and their families. There are total eight members in the family of plaintiff. As per the defendant's contention only two bed rooms are available in flat at second floor and one bed room in flat on 4th floor. So, there are only three bed rooms can be used by the family members of the plaintiff. So, there are two married couples i.e. Rajeev and his wife, Nitin and his wife. The age of son of Rajeev is 18 years old. The age of daughter of Nitin is 15 years old. Admittedly, this age of the grandchildren of plaintiff is not disputed. This age of the grandchildren of Plaintiff clearly shows that they cannot be accommodated in a bed room with their parents. Therefore, naturally one bed room is necessary for Mr. Rajeev and his wife, one bed room is necessary for Nitin and his wife. Therefore, the only premises available to use as a bed room for rest of four members is either flat on 4th floor which admeasuring only 160 sq.ft.. It has come in evidence that son Mr. Rajeev is using the flat on 4th floor as a bed room. So, the only bed room available for rest of four members is one bed room in flat on second floor. Now, let us see whether it is possible to accommodate the plaintiff who is 76 years old lady, her daughter Shilpa who is handicap and requires help to move with the help of wheelchair and two grown up grandchildren in a single bed room. To my mind, it would be unjust and improper to compel the plaintiff to use one bed room for four persons. The age of the grandchildren i.e. 18 and 15 years respectively clearly shows that they also require privacy for their studies. Considering their age they are also in need of at least single study room. Therefore, considering this entire scenario, I find substance in the second requirement pressed into service by the plaintiff. If the suit premises is vacated, then plaintiff and her daughter Shilpa can shift on the ground floor, so they will not require to climb the staircase. Thereafter, both grandchildren of the plaintiff will use at least one bed room for them. To my mind, considering their grown up children to adjust themselves in a single bed room. Looking at the size of the family of the plaintiff, availability of three bed rooms in the premises in which the landlady is living, age of

grandchildren, requirement pressed into service is natural and consistent with the sense of decency-not to talk of comfort and convenience. There is nothing unreasonable. The need as pleaded and proved by the landlady is undoubtedly natural, sincere and honest and hence a bonafide need. Therefore, I find there is ring of truthness in the second requirement pressed by the plaintiff.”

14. He also refers to paragraph 28 to 31 to submit that nowhere the suitability of residential accommodation with respect to the submissions with respect to the alternative premises No.383-B has not been pleaded in the plaint and the same has come only in the evidence, which the Court cannot be permitted to consider.

15. In support of his above contention, learned Counsel has relied upon following decisions.

- 1) ***A.V.G.P Chettiar & Sons and Others Vs. T. Palanisamy Gounder.***¹
- 2) ***Tarachand Hassaram Shamdasani Vs. Durgashankar G. Shroff & Others***²
- 3) ***Narendra Gulabrao Zade Vs. Shiocharan Ghashiram Gupta (since deceased through L.Rs.) & Anr.***³
- 4) ***Vasant Mahadeo Gujar Vs. Baitulla Ismail Shaikh and Anr.***⁴

¹ (2002) 5 Supreme Court Cases 337.

² 2004 (Supp.) Bom.C.R. 333

³ 2011(1) ALL MR 889

⁴ 2016(4) ALL MR 174

16. In short Mr. Karande learned Counsel would submit that the premises adjacent to suit premises bearing No.383-B is available for the plaintiff since 1987 and that she had not utilized said premises and suppressed the availability of said premises by stating false story that one Mrs. Sarana is in possession of said premises. Further that, the premises on 4th floor of Vithal Niwas building is also available to her. Therefore, requirement pressed by the plaintiff cannot be accepted as a bonafide and reasonable. Moreover, mention of the said premises is not in the plaint. Mr. Karande, learned Counsel submits that therefore in view of the fact that the contention of the plaintiff with respect to bonafide requirement is outside the pleadings, the impugned decision requires interference. Learned Counsel would submit that the issue of comparative hardship would only arise only after the hurdle to bonafide requirement is crossed which, he submits, in view of the above discussion is yet to be proved.

17. On the other hand, Mr. P.S. Dani, learned Senior Counsel, strongly opposes the submission made on behalf of the Revision Applicant. He would submit that there have been two concurrent findings against the tenant. On the ground of bonafide requirement learned Counsel submits that the plaintiff is a lady more than 78 years, not able to walk and move;

is having a large family to accommodate : that the plaintiff is having two sons namely Rajeev and Nitin. Rajeev is residing with his wife and son, who is 18 years old. Nitin is residing along with his wife and daughter. Daughter is 15 years old. At the same time, Plaintiff and her daughter Shilpa are residing with both sons and their families. There are total eight members in the family of the plaintiff. Plaintiff is herself facing difficulty of climbing the stairs; her 50 years old daughter Shilpa is also handicapped and is unable to walk without the help of clippers and clutches. It is difficult for both the plaintiff and her daughter to climb up the stairs to the 2nd floor. Their movements are restricted. The suit building is four storied and lift facility is not available in the suit building. The suit premises is on the ground floor and therefore is suitable for the plaintiff's family. The premises being 383-B adjacent to the suit premises is neither in the possession or occupation of the plaintiff. It is with the Suranas, who although are not using it but do not seem to be interested in returning it. Moreover, the condition of the said premises is dilapidated and will require repairs and therefore not suitable besides being not available. No litigation has been filed as yet by the plaintiff to recover the same. With respect to the premises on the 4th floor it is only 160 sq.feet and not suitable in every way as it will not be possible for the plaintiff and

her handicapped daughter to climb up to the 4th floor, as it is climbing up to the second floor itself is painful. Learned Senior Counsel would therefore submit that, having a room on the 4th floor cannot be called as a suitable alternate premises. The contention that the said room of 160 sq.feet on the 4th floor is the suitable premises for the plaintiff for accommodation of her family members has already been rejected by the two Courts. The plaintiff and his family members cannot be compelled to reside in a premises which is inconvenient, that too by a Defendant, who is having alternate premises for his residence just three minutes from the suit premises. With respect to the House No.383-B as mentioned above, since the said premises is not in the possession or occupation of the plaintiff, being with the Suranas, it was not necessary to mention the same in the plaint. The two Courts have clearly dealt with this premises as well, while considering the bonafide requirement of the plaintiff. The fact of which the Court can take judicial notice need not be in the pleading. The plaintiff is not required to amend the plaint with every fact that emerges during the evidence as long as the pleading of reasonable bonafide requirement is in the plaint. That, the requirement of the plaintiff with respect to the suit premises is genuine, bonafide and reasonable.

18. Learned Senior Counsel draws the attention of this Court to paragraph 42 of the impugned decision in support. The learned Senior Counsel also refers to paragraphs 5 and 6 of the plaint in the said suit. Learned Counsel reiterates that the plaintiff is 78 years old, has a large family and a handicapped daughter in a building without lift is sufficient to demonstrate the bonafide requirement. That the defendant i.e. Revision Applicant has an alternate premises which is a 3 Bhk flat in Anand Ashram Co-operative Housing Society situate on the ground floor admeasuring 1500 sq. feet, is sufficient to demonstrate the comparative hardship that the plaintiff is suffering, which, both the Courts have considered while decreeing the suit and upholding the same in favour of the plaintiff.

19. In support, learned Senior Counsel has drawn the attention of this Court to paragraphs 19 to 22 of the Trial Court order in support of his contentions, which are quoted as under :

“19. To my mind, this admission on the part of defendant that plaintiff and her daughter are facing the problem of climbing staircase clearly shows that the basis of the requirement on the ground of old age and handicapness of Shilpa is genuine. To my mind, had this admission been come in cross-examination, Court would have considered with some leniency. But, when defendant himself admitted this fact in examination-in-chief itself that both are having difficulty to climb the staircase, then it cannot be said that the requirement pressed into service by

the plaintiff on this ground is malafide or with oblique motive. At this juncture, it is necessary to take into consideration that plaintiff is 76 years old lady, whereas her daughter Shilpa is qualified commercial artist. She has started career from 1990 onwards. Defendant has nowhere denied that she is not doing any professional work. On the contrary, it has come in cross-examination of plaintiff, where Mr. Jagushte asked to the plaintiff, presently how many times Shilpa requires to climb staircase. To answer this plaintiff has categorically deposed that now she is unable to climb the staircase. Here it is essential to take into consideration that Shilpa is handicap right from her school days. She is using calipers and crutches. Now, she is 48 years old. So, it is natural that in view of age factor, it is difficult for her to climb the staircase with the help of calipers and crutches. Mr. Jagushte has tried to bring on record that during school days Shilpa had not made any complaint of strain/stress while climbing staircase. It has come on record that Shilpa was born in the year 1965. Defendant has admitted now Shilpa is 48 year old. It is needless to say that in passage of time particularly after completion of 40 years even normal man/woman finds it difficult to do the work with same enthusiasm as he/she was doing in his/her thirties. Now, Shilpa is 48 years old. She has carried this muscle strain till today. To my mind, merely she did not complain about strain while climbing staircase in past, it does not mean that to compel her to go on with the stress/strain on the muscles even later part of life. This is what defendant tries to convince to the Court. It is pertinent to note that during college days or even thereafter Shilpa had never given excuse of her handicapness. Now, she is 48 years old and moving with the help of wheelchair in the house and calipers and crutches outside the house. Had there been any malafides, plaintiff would have claimed eviction decree much before. It is pertinent to note that Shilpa is commercial artist and carrying on business activities. Therefore, now considering her limitations due to natural act, suit premises is ideal place for her to reside and carry on her business activities. Considering her physical situation, now it is highly impossible for a lady who requires wheelchair and calipers and crutches to climb the staircase everyday.

20. *At the same time, as I stated earlier, plaintiff is also 76 years old. She is also facing difficulty while climbing staircase. Therefore, she also wants to reside along with her daughter in the suit premises which is on the ground floor. To my mind, this requirement pressed into service is quite natural and developed in the passage of time. All these facts, particularly age of plaintiff and handicapness of Shilpa are not undisputed. At the cost of repetition, defendant has also admitted that both are facing problems to climb the staircase. Therefore, first limb of requirement pressed into service cannot be said malafide or with oblique motive.*

21. *The second limb of requirement is that premises on second floor consist two bed rooms, hall and kitchen. It is insufficient for the entire family of the Plaintiff. According to defendant, this premises on second floor is admeasuring 902 sq.ft. She is also having one terrace flat on 4th Floor admeasuring 160 sq.ft., and Plaintiff is using the same for bed room purpose. Defendant has tried to bring on record that the flat of the plaintiff on second floor was consisting three bed rooms, hall and kitchen, but subsequently same was converted into two bed rooms, hall and kitchen. They have merged one bed room into hall. So, according to defendant also plaintiff is in possession of flat consisting two bed rooms, hall and kitchen i.e. flat on second floor and one flat on 4th floor admeasuring 160 sq.ft. and the same is in use for bed rooms purpose. These facts are categorically pleaded by the defendant in amended written statement.*

22. *Now, in this backdrop, let us see whether this premises are sufficient for the plaintiff to fulfill her requirement considering the family members. It is not in dispute that the plaintiff is having two sons namely Rajeev and Nitin. Mr. Rajeev is residing with his wife and son. His son is 18 years old. The second son of plaintiff namely Nitin is residing along with his wife and daughter. Daughter is 15 years old. At the same time, Plaintiff and her daughter Shilpa are residing with both sons and their families. There are total eight members in the family*

of plaintiff. As per the defendant's contention only two bed rooms are available in flat at second floor and one bed room in flat on 4th floor. So, there are only three bed rooms can be used by the family members of the plaintiff. So, there are two married couples i.e. Rajeev and his wife, Nitin and his wife. The age of son of Rajeev is 18 years old. The age of daughter of Nitin is 15 years old. Admittedly, this age of the grandchildren of plaintiff clearly shows that they cannot be accommodated in a bed room with their parents. Therefore, naturally one bed room is necessary for Mr. Rajeev and his wife, one bed room is necessary for Nitin and his wife. Therefore, the only premises available to use as a bed room for rest of four members is either flat on 4th floor which admeasuring only 160 sq.ft.. It has come in evidence that son Mr. Rajeev is using the flat on 4th floor as a bed room. So, the only bed room available for rest of four members is one bed room in flat on second floor. Now, let us see whether it is possible to accommodate the plaintiff who is 76 years old lady, her daughter Shilpa who is handicap and requires help to move with the help of wheelchair and two grown up children in a single bed room. To my mind, it would be unjust and improper to compel the plaintiff to use one bed room for four persons. The age of the grandchildren i.e. 18 and 15 years respectively clearly shows that they also require privacy for their studies. Considering their age they are also in need at least single study room. Therefore, considering this entire scenario, I find substance in this second requirement pressed into service by the plaintiff. If the suit premises is vacated, then plaintiff and her daughter Shilpa can shift on the ground floor, so they will not require to climb the staircase. Thereafter, both grandchildren of the plaintiff will use at least one bed room for them. To my mind, considering their grown up children to adjust themselves in a single bed room. Looking at the size of the family of the plaintiff, availability of three bed rooms in the premises in which the landlady is living, age of grandchildren, requirement pressed into service is natural and consistent with the sense of decency-not to talk of comfort and convenience. There is nothing unreasonable. The need as pleaded and proved by the landlady is undoubtedly natural, sincere and honest and hence a bonafide need. Therefore, I find

there is ring of truthness in the second requirement pressed by the plaintiff.”

20. Learned Senior Counsel would, therefore, submit that the Revision Application deserves to be dismissed and the execution be allowed to be proceeded with.

21. I have heard Mr. P .G. Karande, learned Counsel for the Revision Applicant and Mr. P.S. Dani, learned Senior Counsel for the Respondent and with their able assistance, I have perused the papers and proceedings and considered the rival contentions.

22. It is not in dispute that the plaintiff is a lady of more than 78 years, not able to walk and move; is having a large family to accommodate: has two sons with wives and children who are teenagers. The plaintiff and her daughter Shilpa, who is 50 years old and who is also handicapped are residing with both sons and their families. There are total eight members in the family of the plaintiff. Plaintiff and her daughter find it difficult to climb the stairs to the present place on the second floor of the building. Shilpa is unable to walk without the help of clippers and crutches. The

mother's and the daughter's movements are restricted. The suit building is four storied and lift facility is not available in the suit building. Therefore, having a room on the 4th floor of 160 sq.feet cannot by any stretch of imagination be called as a suitable alternate premises and that too by a Defendant, who is having alternate premises on the ground floor for his residence just three minutes from the suit premises.

23. Coming to the contention on behalf of the Revision Applicant that the availability or the existence of House No.383-B in the building, being another alternate premises was not disclosed or discussed in the pleadings or rather concealed by the Plaintiff and the same came to light only at the stage of evidence, it is observed that the need for reasonable and bonafide requirement and the prayer seeking eviction of the suit premises clearly finds place in the plaint. Paragraph 5 of the plaint is therefore usefully quoted as under:

“5. The Plaintiff states that her daughter, the said Shilpa is a qualified commercial artist. She has been doing business but on account of her disability her movements are very much restricted and her sources of income affected. She finds it extremely difficult to make use of the stairs. She cannot go to doctor for her medical problems. Whenever she goes out for her professional work she uses calipers on her legs and for support she uses clutches. There is no lift in the suit building. The Plaintiff further states that on account of her old age, she also

finds it extremely difficult to make use of the staircase for climbing up and getting down. On account of the said fact, the Plaintiff states that her movements are restricted and she is unable to go out for visiting the temple, visiting relatives etc. which affects her mentally and physically. The Plaintiff further states that the premises where she is presently residing inadequate, inconvenient, insufficient and she does not get the necessary privacy which she requires in her old age. The Plaintiff therefore respectfully submits that the suit premises are reasonable and bona-fide required for her and her daughter, Shilpa for their residence.”

24. It is clear from the above that the bonafide requirement of the Plaintiff with respect to the suit premises has clearly been mentioned in the plaint. In the written statement the Defendant brought out the reference to the adjacent premises as Room no.383A (sic 383-B) to submit that, that was also the premises which the Plaintiff could use and which was available to the Plaintiff well back in the year 1987. In the affidavit in examination-in-chief of the Plaintiff, the Plaintiff clarified with respect to the said house no.383-A shown in the sketch as adjacent to 383-B and that the same was let out to late Smt. Champabai Kalgutkar. In the additional affidavit of examination-in-chief it has been clarified that Smt.Naik did not surrender the premises to the Plaintiff in the year 1987 and she was never the Plaintiff's tenant in respect of the said premises. That, Smt.Naik clandestinely took electric meter in her name without the Plaintiff's

consent and knowledge. It is also stated therein that the said premises are not vacant and nor available to the Plaintiff. That, the said premises was let out in or about 1987-88 to one Mrs. Surana/Sarana who has not come to reside in the said house since more than a decade and that the said premises is lying vacant since the year 2000 and that they are in possession of the premises till date. That, Room no.381-A (sic 383-B) is not in the possession of the Plaintiff.

25. Moreover, from the evidence it has come to light that the said premises is not suitable for the residence purposes. That, it is in a dilapidated condition and would require repairs. Further, there is neither any electric supply nor any water supply. The electricity meter in the said premises was also removed due to the non-payment of electricity charges by one Smt.Pratibha Naik.

26. Also, it has come out in Plaintiff's further cross-examination dated 14th March 2012 that although Mrs.Sarana is not residing in the said premises and that in a city like Mumbai nobody is ready to leave the premises and that the Plaintiffs do not want to initiate legal action in respect of the said premises. It is therefore clear that the premises or

room No.383-B was also not available to the plaintiff to be used as alternate suitable premises.

27. The premises being 383-B appears to be neither in possession nor occupation of the Plaintiff. The finding of the trial Court, as confirmed by the Appellate Court, that the said premises is not only not suitable presently but since the year 2000 the same was neither habitable nor suitable for residence cannot be faulted with. There was no obligation on the part of the Plaintiff to mention about the same in the plaint.

28. That, the requirement of the plaintiff with respect to the suit premises is genuine, bonafide and reasonable. In the facts and circumstances of the case, I agree with the learned Senior Counsel for the Respondent that a fact of which the Court can take judicial notice need not be in the pleading and that the Plaintiff is not required to amend the plaint with every fact that emerges during evidence as long as the pleading of bonafide requirement is in the plaint. Therefore, this is also not a case where the trial court or the appellate court has suo moto explained bonafide requirement of the plaintiff.

29. Since the bonafide requirement, as mentioned above, has been proved on the basis of the evidence appreciated by the two Courts, its time to consider comparative hardship.

30. Both the Courts have categorically found that the Defendant i.e the Revision Applicant has admitted that the Defendant has purchased flat of 3 bedrooms, hall and kitchen of about 1500 sq.feet in Anand Ashram Co-op. Housing Society which is hardly three minutes walking distance from the suit premises. This has come in the evidence of the Defendant. The said flat admeasures 865 sq.feet carpet and this has not been denied by the Defendant. The family of the Defendant, as observed, consists of the Defendant along with his wife and two married sons. Although the eldest son has no issues but the younger son has two children, who, at the time of the trial Court order, were 7 years and 1½ years old respectively. The two married sons of the Defendant can, therefore, be accommodated in the two bedroom separately. The Defendant and his wife can be accommodated in the third bedroom. Therefore, as rightly observed by the trial Court as well as the Appellate Court that there would be no hardship that would be caused to any member in the family of the

Defendant. Let's now compare the grievance of the Defendant to shift from the suit premises to the flat in Anand Ashram Co-op. Hsg. Society is that he does not want the families of his sons to be disturbed. No doubt, that could have been a hardship, however, considering the comparative hardship of the Plaintiff and her handicapped daughter to have restricted movements due to age and due to the physical condition, is in my view, a greater hardship would be caused to the plaintiff as compared to the hardship to the Defendant. Therefore, the trial Court and the Appellate Court have rightly observed that greater hardship would be caused to the Plaintiff, in the event of refusal to pass eviction decree, as compared to the Defendant, more so, in the light of the fact that the premises in the Anand Ashram Society is also on the ground floor, like the suit premises. The entire findings of the trial Court as well as the Appellate Court are based on the evidence which has been perused by this Court as well. No fault, therefore, can be found with the judgment and order of the Appellate Court dated 5th November 2019 in dismissing the Appeal.

31. True as observed by the Hon'ble Supreme Court in the case of *A.V.G.P. Chettiar & Sons and Others Vs. T. Talanisamy Gounder (supra)*, that it is well settled that a decision of a case cannot be based on grounds

outside pleadings of the parties and it is the case pleaded that has to be found, however, in the facts of the case as observed earlier, clearly there are suitable pleadings in respect of the bonafide and reasonable requirement of the plaintiff. Since Room No.383-B as being alternate premises, as mentioned above, was not available to the Plaintiff, therefore, not mentioning the same would not be something that would be fatal to the case of the plaintiff.

32. In *Tarachand Hassaram Shamdasani Vs. Durgashankar G. Shroff & Others (supra)*, this Court has observed that only when the landlord pleads and proves all the the material facts with respect to the other premises capable of being used for the bonafide requirement, that the Court would be able to adjudicate fully, completely and effectively, as to whether the requirement pressed into service by the landlord in the suit so filed is bonafide and reasonable. As observed earlier, the need for the bonafide requirement has already been mentioned by the Plaintiff in the plaint and the reference to the purported alternate premises or Room No.383-B was brought out by the Defendants in their written statement, which has been firstly held to be not available as being in the possession of the Saranas and also not suitable for the requirement of the Plaintiff

and her family. Therefore, the ratio in the said case would not be of any assistance to the case of the Respondent.

33. Learned Counsel for the Respondent has also relied upon the decision of the Nagpur Bench of this Court in the case of *Narendra Gulabrao Zade Vs. Shiocharan Ghashiram Gupta (since deceased through L.Rs.) & Anr. (supra)*. In paragraph 8 of the said decision it has been observed that the law requires the Petitioner to prove his bonafide need and for that to approach the Court of law with clean hands. The Petitioner, in that case, it was held could have explained inadequacy or other lacunae in the Rajapeth accommodation to justify his preference of ground floor in occupation of the tenant. That, had there been such a case and pleading, the respondent tenant would have then got an opportunity of cross-examination and then bonafides or otherwise of the need of the landlord could have been judicially appreciated. In that case it was observed that unfortunately such a course of action was not possible, as the Respondent tenant had through cross-examination of the Petitioner placed on record only the suppression of availability of other house at Rajapeth with further fact that proceedings for eviction of Mohan Singh Thakur therefrom were actually initiated and later on compromised when Mohan Singh Thakur

agreed to increase the rent. The Court went on to hold that, thus, the material brought on record by the tenant was sufficient to substantiate that there is no bonafide need of the landlords. Subsequent utilization of the premises vacated by Mohansingh Thakur for establishing business again raises several questions and as this fact was not on record, the same could not be considered. I am afraid that in the facts of the present case there is no such suppression or concealment. The premises being Room No.383-B is not only not in the occupation or possession of the plaintiff but is also as observed, not suitable for the use of the plaintiff and her family, and therefore, there was no need to disclose the same as an alternate premises available to the plaintiff or for the plaintiff to mention the same and then later on to explain the inadequacy or lacunae in the said premises. In the facts of the case, in my view, there was no need to disclose the premises being 383-B as the same was not another residential accommodation which was available or suitable and therefore there was no duty on the part of the plaintiff to disclose the same.

34. For the same reason, the ratio in the case of *Vasant Mahadeo Gujar vs. Baitulla Ismail Shaikh and Anr. (supra)* would not be applicable to the facts of this case. That was a case where in the course of evidence it had

come on record that the Respondent landlords besides the suit premises had several other premises which were being used by them for the purpose of commerce as well as residence. Some of the premises had been acquired post the institution of the suit including in particular the premises acquired by one of the sons of the Respondent. It is in those circumstances and facts that the Court observed that there were no disclosures volunteered in the course of examination-in-chief and therefore even if the premises subsequently acquired are left out of consideration, there was a duty upon the Respondent landlords to fully and candidly make disclosure about the premises in their occupation, both for the purposes of residence as well as commerce, and thereafter, to explain, howsoever briefly, the substantive subsistence of the need in respect of the suit premises. It is in those facts that it was held that the Respondent landlords had completely failed in this aspect and that such non-disclosure was a relevant consideration in the context of determining both the reasonability as well as bonafides. As mentioned above, those are not the facts of this case. In the facts of the present case, clearly the Plaintiff has brought out her bonafide and reasonable requirement and only with respect to the issue raised in the written statement, that the Plaintiff went on to explain that the said premises being Room no.383-B

was in the possession of the Saranas, and also that the same was not in a suitable condition, and therefore, not mentioned in the plaint. Also, in respect of the said premises, there was no litigation to recover the same from the Saranas. I am, therefore, in agreement with the submission made on behalf of the Respondent by the learned Senior Counsel that the requirement of Plaintiff with respect of the suit premises is genuine and reasonable and that facts of which the Court can take judicial notice, need not be in the pleading, nor is it necessary for the plaint to be amended, as not every fact that emerges during the evidence leads to a situation where an amendment of the plaint is required. The pleading of reasonable bonafide requirement is already in the plaint. In my view, therefore, in the facts of this case, the submission of Mr.Karande, learned Counsel for the Revision Applicant, that the landlord had suppressed or concealed the existence of alternate premises or that the Courts below cannot be permitted to take judicial notice of the facts explaining bonafide requirement already pleaded, would not hold any water.

35. There has neither been any suppression nor concealment by the Respondents of alternative premises. As can be seen, the two Courts have already considered the submissions on behalf of the landlord and tenant

and have rendered concurrent findings on the aspect of bonafide requirement and comparative hardship. The Respondents have established their case of genuine and reasonable bonafide requirement of the suit premises as well as comparative hardship. This is not an Appellate Court, and therefore, cannot re-appreciate the evidence. This is also not a case where the Courts below have exercised jurisdiction not vested in them by law, or have failed to exercise jurisdiction so vested in them, or have acted in exercise of its jurisdiction, illegally or with any material irregularity. There is, therefore, neither any jurisdictional error nor any illegality or irregularity or perversity to warrant any interference.

36. In the circumstances, the Civil Revision Application deserves to be dismissed and is hereby dismissed. The Applicants to vacate the suit premises within a period of six weeks from the date of uploading of this order.

37. Rule stands discharged. Parties to bear their own costs.

38. Mr. Karande requests the Court to stay the order stating that the Applicants may want to challenge the order. The request is rejected.

(ABHAY AHUJA, J.)