

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.827 of 2011

Benvemitta Lam & Anr.

..... Applicants

VERSUS

Clemant Vincent Saldanha (Since Decd.)

Smt.Lilian Clemant Saldanha (deleted)

Sheryl D'Souza & Ors.

..... Respondents

Mr.Surel Shah a/w. Ms.Meenakshi Dhanuka-Rungta, Mr.Nihar Chitre, Mr.Amol K. i/b. Dhanuka & Partners for the Applicants.

Ms.Evanta A.Gonsalves a/w. Mr.Reyden L. Gonsalves for the Respondents.

CORAM: RAJESH S. PATIL, J.

DATE : 18 MARCH, 2024

P.C. :-

This civil revision application is filed under section 115 of the Code of Civil Procedure, 1908 by the tenant/original defendant challenging the concurrent findings recorded by the Trial Court and the Appellate Court on the ground of '*bona fide* requirement', under the Rent Act.

2. The suit premises is a flat admeasuring 675 sq.ft. situated at 1st Floor, Sal House, Pitamber Lane, Mahim, Mumbai – 400 016 (for short ‘the suit premises’).

3. The respondents are the landlords of the suit premises. For convenience, the parties are hereinafter referred to as per their nomenclature in the Trial Court.

4. The suit was filed on 11 November, 1997 on the grounds of ‘*bona fide* requirement’ and ‘non-user’ as according to the plaintiff, the original tenant one Mr.Ferdinand A.D’Souza died on 7 May, 1997, leaving behind him no legal heirs. The suit originally filed was against unknown legal heirs of the original tenant. At the time of the filing of the suit, the plaintiff as per the cause title is shown as **75 years old**. As far as the ground of *bona fide* requirement is concerned, in paragraph no.8 of the plaint, it has been stated that the requirement of the suit premises is for the plaintiff and his family members. It has been further stated in paragraph no.8 of the plaint that the plaintiff himself is

residing in a rental premises being Flat No.1, Joseph House, Marol Maroshi Road, Marol, Andheri (E), Mumbai – 59 and paying monthly rent of Rs.158/- per month. The said premises is admeasuring 420 sq.ft. It is further stated in the said paragraph that the plaintiff is residing with his wife and they have three grown up children, all of them are married.

5. The eldest son has also two minor children and the youngest (Derrick) has one child. It is further stated in the plaint that Derrick has no accommodation of his own in Bombay and has no financial means to acquire another the suitable accommodation.

6. After the suit was filed in the year 1997, suit summons were issued in the name of unknown legal heirs of the deceased tenant, at the address of the suit premises. The said suit summons was received by the applicant herein and she filed her written statement on 17 November, 1998 as an heir and next of

kin of the original tenant.

7. Thereafter issues were framed, the plaintiff's wife entered the witness box as PW No.1 to lead evidence on behalf of the plaintiff. During the cross examination of the plaintiff, an application was preferred by the applicant herein dated 12 April, 2002 under the provisions of section 5(11)(c) of the Rent Act. The said application of the applicant herein was allowed and the applicant herein was joined in the suit as defendant no.2. Thereafter the second written statement was filed by the applicant herein on 4 March, 2003. Pursuant to which an additional issue was framed before the Trial Court.

8. Thereafter the cross examination of the plaintiff's witness i.e. the wife of the plaintiff who was the power of attorney holder of the plaintiff continued and after her evidence was closed. On behalf of the defendants, defendant no.2 entered the witness box and she was cross examined by the plaintiff's advocate.

9. The Trial Court thereafter heard both the parties and by its judgment and order dated 2 December, 2003, decreed the suit and directed the defendants to deliver the vacant and peaceful possession of the suit premises.

10. Being dissatisfied with the judgment and decree passed by the Trial Court, the defendant no.2 and defendant no.1 both filed an appeal before the Division Bench of the Court of Small Causes. During the pendency of the appeal before the Appellate Bench of the Court of Small Causes, the original plaintiff i.e. the landlord Mr.Clemant Saldanha died at the age of 82 years, hence his legal heirs i.e. his wife and three children were brought on record. Thereafter an appeal was heard by the Appellate Bench of the Court of Small Causes and by its judgment and order dated 22 September, 2011, the appeal of the original defendant was dismissed.

11. Being dissatisfied with the concurrent findings recorded by the Trial Court and the Appellate Bench of the Court of Small Causes, Bombay, the original defendant nos. 1 and 2 have filed the present civil revision application under section 115 of the Code of Civil Procedure, 1908.

12. By an order dated 13 March, 2012, the present civil revision application was admitted and there was a stay to the execution of the impugned judgment and order passed by the Trial Court dated 6 December, 2003 and as confirmed by the Appellate Bench by its judgment and decree dated 22 September, 2011.

13. During the pendency of the present civil revision application in this Court, the wife of the original landlord also died. It is submitted before me by the advocate for the landlord that the wife of the original landlord was residing in an old age home at Raigad, Maharashtra during her last days of her life.

14. Mr.Surel Shah, learned counsel made his submissions on behalf of the original defendant, the present applicant :-

15. Mr.Shah submitted that the suit for eviction itself was not maintainable since the suit was filed against the unknown legal heirs of the deceased tenant.

16. Mr.Shah submits that at a later stage in the suit, the landlord admitted that the niece of the original tenant is the only surviving legal heirs. He submitted that various documents were produced before the Trial Court to show that at the date when the original tenant died in the suit premises, his niece i.e. the present applicant was residing in the suit premises with him.

17. Mr.Shah submitted that apart from various documents to show that at the time of the death of the original tenant, the present applicant who is niece of the original tenant, there was

also a Will dated 15 July, 1985 which bequeathed the entire estate of the original tenant including the present suit premises in favour of the niece i.e. the present applicant.

18. Mr.Shah submitted that even if for the sake of argument, it is presumed that the suit was maintainable, the original plaintiff did not enter the witness box and the evidence was led only by the power of attorney holder.

19. Mr.Shah further submitted that the requirement pressed is that of the second son (Derrick). He submitted that even in the evidence requirement pressed is of the second son Derrick who admittedly after going to Canada has never come back. Therefore, according to Mr.Shah, there is no *bona fide* requirement. Therefore, according to him the present civil revision application should be allowed.

20. Mr.Shah further submitted that both the Courts have held that the defendant no.2 is not able to prove that she is the blood relative of the original tenant. He submitted that there is no such requirement under the Rent Act that the person should be blood relative in order to claim tenancy under section 5(11)(c) of the Rent Act.

21. Ms.Gonsalves, learned counsel appearing for the respondents landlord submits that in paragraph no.8 of the plaint, the requirement is specifically mentioned about the plaintiff himself and his children. She submitted that even in the evidence, the plaintiff has mentioned that the requirement is for the plaintiff and his family. She submitted that by picking of one or two sentences in the evidence, it cannot be said that the requirement pressed is only for the son Derrick.

22. Ms. Gonsalves further submitted that in paragraph no.8 of the plaint, it has been specifically stated that the requirements is

of all family members, so also in the evidence, the requirement is of the entire family. She submitted that the second son of the original plaintiff was residing with the plaintiff in a tenanted premises at Andheri. She submitted that the landlord himself was residing in a tenanted premises and the tenant was enjoying the property when the claim of the defendant no.2 as tenant is in doubt. She submitted that the defendant no.2 claimed to be the legal heir and a person who was staying with the original tenant at the time of his death. She submitted that the latest electricity bill showed that from the month of January 2023, there is no electricity connection in the suit premises.

23. Ms. Gonsalves further submitted that after the suit summons was served on the unknown legal heirs at the address of the suit premises, the present applicant volunteered herself to appear in the suit proceedings and filed her written statement dated 17 November, 1998 (first written statement).

24. Ms. Gonsalves further submitted that thereafter when the plaintiff's witness no.1 was in the witness box, purportedly under the provisions of section 5(11)(c) of the Rent Act, an application was preferred for adding the present applicant as a party defendant. As the application was allowed, the present applicant was added as defendant no.2, who again filed a written statement (second written statement). Therefore, according to Ms. Gonsalves the estate of the deceased tenant was fully represented. She further submits that a Will of the deceased tenant was also produced, which shows that various properties including the suit premises were bequeathed to the defendant no.2 (the present applicant).

25. She submitted that as far as the hardship is concerned, the defendant no.2 by way of a Will got various moveable and immoveable properties of the original tenant, being bequeathed to her. So also, it has come on record that the husband of the defendant no.2 owned a flat in the building Brety Apartment at

Colaba, Mumbai. She submitted that it has also come on record that the defendant no.2 worked in five star hotel 'Taj Mahal' in Mumbai and at the time of marriage of the defendant no.2 she stayed in a flat at Breach Candy locality in Mumbai. She submitted that the two children of the defendant no.2 were born in the Breach Candy Hospital. She submitted that therefore, in a case where the plaintiff resided in his whole life in a tenanted premises because of the defendants not vacating the suit premises, and the wife of the original landlord in last few years of life stayed in an old age home, the eviction decree should be confirmed by this Court.

26. She, therefore, submitted that the concurrent findings recorded by both the Courts should not be interfered with by this Court.

ANALYSIS AND CONCLUSION :

27. The original suit for eviction was filed by the landlord when

he was aged 75 years old. The said suit was filed on the ground of '*bona fide* requirement' and 'non-user'. Paragraph no.8 of the plaint specifically pleads about the requirement of the landlord and his family members. It has also been pleaded that the landlord was residing with his family members at a rented house in Andheri admeasuring about 420 sq.ft.

28. It is also come on record that the suit premises was situated at Mahim, Mumbai admeasuring about 675 sq.ft. being a residential premises in the City of Mumbai. The suit premises was covered by the then Bombay Rent Act, 1947. Hence, as far as the rent of the suit premises is concerned, the same was frozen. Therefore, the rent payable of the present suit premises is Rs.50/- per month.

29. It is also come on record that the defendant no.2 inherited various properties of the original tenant by way of a Will, which was probated. So also, the husband of the defendant no.2 owned

a flat at Mistry Park, Breach Candy and also had purchased a flat at Colaba, Mumbai in the building Brety Apartment. Today, before this Court advocate appearing for the landlord also produced a photo-print of the electricity meter of the suit premises to show that from January 2023, the electricity connection of the suit premises has been disconnected. However, the same has been disputed by the advocate appearing for the applicants/original tenant on the ground that such photo-print cannot be taken up by this Court when there is no evidence to that effect.

30. It is a matter of record that after the original tenant died, the suit was filed against the unknown legal heirs. However, when the suit summons was issued, the same was received by the present applicant, who volunteered herself and appeared in the suit proceedings and filed her written statement dated 17 November, 1998 as heir and next of kin of the original tenant. After the issues were framed and the plaintiff entered the witness

box through the power of attorney holder while the cross examination of the plaintiff's witness was in process, the present applicant filed an application under the provisions of section 5(11)(c) of the Rent Act for adding her as a party defendant no.2. After she was added as a party defendant no.2, she filed another written statement on 4 March, 2003 (second written statement). Therefore, according to me, the estate of the deceased tenant was fully represented.

31. That leaves me to take into consideration the concurrent findings recorded by both the Courts on the ground of '*bona fide* requirement'. It is a matter of record that in paragraph no.8 of the plaint, the plaintiff had specifically stated that the requirement is for himself and his family members. It is also a matter of record that the plaintiff and his family stayed in a rented house at Andheri, Mumbai admeasuring 420 sq.ft. While the suit premises was 675 sq.ft. in Mahim, Mumbai. It is also the case of the landlord that during her last days of life, the wife of

the original landlord stayed in old age home. Though this fact is disputed by Mr.Shah. The applicant claimed that she was a legal heir under the provisions of section 5(11)(c) of the Rent Act. It has come on record that the electricity connection of the suit premises was disconnected, so also it has come on record that as per the Will of the original claimant, she inherited various properties of the original tenant. Apart from that, it has come on record that her husband also owned two flats in the prime area of the City of Mumbai, one at Breach Candy and another at Colaba. Applicant, did not give genealogy before the Trial Court to prove how she is niece of original tenant. She admitted in cross examination that her husband and children were not staying in the suit premises. The address of her children in school records is not of suit premises.

32. Both the Courts have come to the findings that the *bona fide* requirement has been proved by the landlord by examining his power of attorney holder i.e. his wife. Mr.Shah also made

submission that the plaintiff himself should have enter the witness box to prove his case. It has been specifically stated in the evidence of the PW-1 that she is the wife of the original landlord who was around 80 years old when the evidence was led and was not keeping good health. According to me, PW No.1 who is the wife of the original landlord and is residing with the plaintiff in a tenanted house and had full knowledge about the present proceedings, she can lead evidence on behalf of the original landlord.

33. I have found no infirmity in the concurrent findings recorded on the ground of *bona fide* requirement by both the Courts. Hence, no case is made out in the civil revision application.

34. Civil revision application is hence dismissed. No costs.

[RAJESH S. PATIL, J.]