

(2001) 07 BOM CK 0061

In the Bombay High Court

Case No : Writ Petition No. 3489 of 1989

Dulanbi Mirasaheb Belgaonkar

APPELLANT

Vs

Annappa Kurka Devadiga

RESPONDENT

Date of Decision : 20-07-2001

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1),
13(1)(1)
Civil Procedure Code, 1908 (CPC) — Order 20 Rule 3
Constitution of India, 1950 — Article 227

Citation : (2001) 4 BomCR 739 : (2002) 1 MhLj 507

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Prashant Naik, for the Appellant; M.D. Angal, (Absent), for the Respondent

Judgement

1. This petition under Article 227 of the Constitution takes exception to the order passed by the Additional District Judge, Sangli dated 11-7-1989 in Reg. Civ. Appeal No. 288 of 1985.

2. The petitioner is the tenant on monthly basis in respect of three rooms in a house situated at CIS No. 914, Pethbhag, Sangli. The respondent is the landlord. The predecessor of the respondent instituted a suit for eviction and possession of the suit premises against the petitioner on the ground of default, bona fide requirement and the petitioner having acquired alternate accommodation. The trial Court by judgment dated 10-4-1985 was pleased to dismiss the said suit and negatived all the three counts. During the pendency of the suit the respondent purchased the suit premises from the erstwhile owners-landlord. In fact it is the respondent who had entered the witness box as P.W. 1 and pursued the suit. Be that as it may, the respondent took the matter in appeal before the District Court, Sangli being R. C. Appeal No. 288 of 1985. The Appellate Court has affirmed the view taken by the trial Court insofar as the grounds of default and bona fide requirement are concerned, but has reversed the finding insofar as

the ground of petitioner having acquired alternate accommodation within the meaning of Section 13(1)(1) of the Bombay Rent Act. The present petition by the tenant accordingly assails the said conclusion reached by the Appellate Court. According to the learned counsel for the petitioner the respondent has not filed any petition challenging the correctness of the concurrent findings recorded by two Courts below with regard to ground of default and bona fide requirement and as such the same have become final. In the circumstances the present controversy is confined only with regard to the ground of petitioner having acquired alternate suitable residence within the meaning of Section 13(1)(1) of the Act-

3. Insofar as this ground is concerned, the case of the respondent in the plaint as amended was that the petitioner's daughters have constructed "Surya Manzil" and "Swar Samrat" bungalows and she was residing in the said palatial bungalow; and is/has let out the suit premises to others for illegal causes and profiteering and she does not require the suit premises. The aforesaid allegations in the plaint have been denied by the petitioner and she took a specific stand that she has no connection with the said bungalows. The petitioner denied that she was staying in the bungalow as alleged, but asserted that she was staying in the suit premises along with other family members, namely, widow sister and her four children, her brother and his family consisting of wife and sons etc. Both the parties adduced evidence before the trial Court. The trial Court on analyzing the material on record concluded that the ground of petitioner having acquired alternate suitable residence was not established. Whereas, the Appellate Court, although accepted that the entries in 7/12 extract produced by the petitioner do indicate that the plot at Kolhapur road stood in the name of petitioner's daughters, but held that in the eye of law the petitioner was the owner of the plot. The Appellate Court has accordingly allowed the appeal and decreed the suit on this count.

4. As mentioned earlier, the case made out in the plaint with reference to the subject ground is that, the petitioner's daughters have constructed bungalows and the petitioner was staying in the said bungalow. If we were to strictly go by this pleading, in my view, no case for the purposes of securing decree of eviction within the meaning of Section 13(1)(1) of the Bombay Rent Act has been made out. In other words the plaint does not make out any cause of action at all. The requirements of Section 13(1)(1) are no more *res Integra*, for the Apex Court in the matter of *Anandi D. Jadhav (Dead) By Lrs. Vs. Nirmala Ramachandra Kore and Others*, , has observed thus:

"From the scheme of the provision [i.e. Section 13(1)(1)] it is discernible that it is only when the tenant gets a right to reside in a house other than the demised premises on the happening of any one of the three alternatives mentioned therein, namely, either by building or by acquiring vacant possession of or by allotment of a house that the landlord can seek recovery of possession of the demised premises from the tenant."

The quintessence of attracting Section 13(1)(1) is that the landlord has to establish that the tenant has acquired some other suitable residence to reside in his/her own rights. There is absolutely no assertion in the plaint that the petitioner has acquired the said bungalows or that she has a right to reside therein. Understood thus, the issue stood concluded against the respondent on this legal basis. In fact no other enquiry into the matter would be warranted. However, even if we were to take a liberal approach that since issue was struck and parties went to the trial with full knowledge of their respective claims, even then I will have no hesitation in answering the issue against the respondent for the reasons mentioned hereinafter. In evidence, during the cross-examination (in para 4) the respondent has admitted that the plot on which said bungalows have been constructed is in the name of petitioner's daughters, namely, Lata and Nargis. Further, the case put to the petitioner during her cross (para 6) by the respondent is that, the names of her daughters were shown as benamis. This would only establish that the respondent not only in his pleading but also during evidence proceeded on the premise that the plot/bungalows were in the name of the petitioner's daughters and all that he asserted was that the petitioner was staying therein. Such pleading or evidence would be wholly insufficient, nay, irrelevant for the investigation of the ground within the meaning of Section 13(1)(1). As observed earlier, to attract the said provisions what is essential to be pleaded and proved is, that the tenant has acquired some other suitable residence to reside in his own rights. In absence of these ingredients no amount of other pleadings or evidence would be germane to decide the issue. Be that as it may, it is relevant to note that the said plot known as "Swar Samrat" at Kolhapur Road in Sangli was originally purchased on April 7, 1975 for a Consideration of Rs. 4,000/- in the names of two persons, namely, Lata Belgabnkar-petitioner's daughter and Husband Nazir Belgaonkar-wife of petitioners brother. Both had equal share in the said property. It appears that the petitioner's name was mutated in the 7/12 extract at a later stage but much before the institution of the suit the said 7/12 entry was mutated in the name of her daughters Lata and Nargis. The 7/12 extract relied by the petitioner and produced on record pertains to this entry effected around 1980; which is a later entry than the one relied by the respondent. At any rate, the suit came to be filed only in 1982, at which point of time the 7/12 extract admittedly indicated the names of the petitioner's daughters. I shall deal with this aspect while examining the correctness of the finding recorded by the Appellate Court relying on the entry in the 7/12 extract to hold against the petitioner. What is relevant is, admittedly, when the suit was filed in 1982 the 7/12 extract indicated the names of petitioner's daughters. Moreover, the respondent herein purchased the suit property in the year 1984, during the pendency of the suit. In this context, the other issues that would go against the respondent is that if the respondent's claim was based on the entry in the 7/12 extract, then, admittedly, the entry at the relevant time, when the suit was filed in 1982, the same stood in the name of petitioner's daughters. The petitioner would thus contend that there was no cause of action to maintain the suit on this ground and at any rate because the

suit premises have been purchased by the respondent during the pendency of the suit, this ground was not available to the respondent. However, I am not required to go thus far, for, as observed earlier, neither the pleading nor the evidence adduced by the respondent assert that the petitioner has acquired some other accommodation suitable for residence to reside in her own rights. This petition would succeed on this legal basis alone.

5. Now, coming to the circumstances which weighed with the Appellate Court, as discerned from the impugned judgment, the same can be catalogued as follows : that petitioner has admitted that she has not given the bungalow to her daughters by any registered document; there is no evidence of transfer nor the petitioner claims that these bungalows purchased by any of her daughters" the property was recorded in the name of daughters on the basis of application made by the petitioner, therefore, in the eye of law the petitioner continued to be the owner of the plot and bungalow constructed on it; the voters list produced indicates the name of the petitioner as residing in the said bungalow along with her daughters; the ration card relied by the petitioner is obtained on 15-6-1983 after filing of the suit - in fact supports the respondent's case that the petitioner and her daughters are living together, messing together in one house as members of one family as one unit (but the ration card pertains to the suit premises); it is not the petitioner's case that daughters started living separately; The petitioner and her daughters are dancers and singers by profession and even though the daughters are married they are still writing the name of petitioner and not of their father - thus they would continue to live with their mother (petitioner); It is not material to know whether petitioner has actually shifted to the bungalow. On the basis of the above circumstances, mostly drawn on the basis of conjectures and surmises, the Appellate Court held that the petitioner has purchased the said plots and constructed bungalows thereon and also started staying in the said bungalows along with her family members including her daughters. On the other hand the trial Court has considered that; the witness examined on behalf of the respondent (P.W.2) to prove that petitioner does not reside in the suit premises was untrustworthy and an interested witness from the 7/12 extract it cannot be said that the building stands in the name of petitioner, there is no evidence that the building is constructed by the petitioner nor there is any evidence that the bungalow stands in her name; ration card (Ex.61) produced by petitioner raises presumption that petitioner is residing in the suit premises along with other family members; the entry in the voters list (Ex.76) does not indicate that petitioner's name was included because of her own application to the authority for that purpose, therefore, the said entry appears to be incorrect and cannot be relied; witness examined on behalf of the petitioner (D.W.2) deposed that petitioner is residing in the suit premises and has no concern with the bungalow; the case made out in the plaint is that daughters have constructed the bungalows, therefore, it does not mean petitioner constructed house; though daughters have acquired alternate accommodation does not mean petitioner tenant has acquired suitable residence; there is no

basis to assume that daughters were incapable of purchasing plot of Rs. 4,000/- only but circumstances would suggest otherwise. Thus the trial Court negated the subject ground.

5A. In my view, the Appellate Court has clearly misdirected itself in entertaining matters which were wholly impertinent to the matter in issue. Whereas, the trial Court has applied the correct test that, that the case made out in the plaint is that petitioner's daughters have constructed bungalows and the petitioner was staying therein, even if accepted, would be of no avail, for there is no assertion or proof that the petitioner has acquired the said bungalows for her residence in her own rights. Besides the lack of pleading and the admission in the cross examination of the respondent referred to earlier, even in the examination-in-chief (para 1) the only case made out by the respondent is that for last 4/5 years petitioner does not reside in the suit premises, but resides in bungalow on Kolhapur Road. The respondent has merely produced 7/12 extract of that property, which, in my view, was not sufficient to establish the ingredients of the provisions of Section 13(1)(b) that the tenant has acquired some other residence to reside in her own rights, in absence of assertion in that behalf. A fortiori, no amount of any other evidence or circumstance would permit the Court to maintain the decree within the meaning of Section 13(1)(b) of the Act. No doubt the approach of the Appellate Court cannot be labelled as perverse, but surely the conclusion reached in the impugned decision cannot stand the test of judicial scrutiny. The most crucial matter regarding the lack of pleading and proof of the relevant ingredients to constitute ground u/s 13(1)(b) of the Act has been glossed over, which has caused serious miscarriage of justice.

6. The Appellate Court has presumed that the petitioner is the owner of the subject plot/building, which finding is palpably an error apparent on the face of the record. Inasmuch as, neither in the pleading nor in the evidence, the respondent plaintiff has made out such a case, but the only plea taken is that petitioner's daughters have constructed the bungalows where she was residing. Thus all the circumstances, culled out by the Appellate Court to justify its finding that the petitioner was the owner of the plot/building obviously travels beyond the case set up by the respondent himself. Once this finding is discarded then the entire edifice of the judgment of the Appellate Court will fall to the ground. Assuming that the respondent has succeeded in establishing that the petitioner was staying with her daughters at Kolhapur Road that by itself will not be sufficient to return a positive answer on the issue of ground u/s 13(1)(b). The decision of the Apex Court referred to above in Anandibai Jadhav's case (supra) precisely deals with this aspect. Understood thus, the conclusion reached by the Appellate Court cannot be sustained in law.

7. Moreover, in view of the mandate of the provisions of Benami Transactions (Prohibition) Act, 1988, which prohibits benami transaction and makes it an offence, it was not open to the Appellate Court to ignore the presumption arising from the 7/12 extract produced by the petitioner which was of a later point of

time and more particularly in absence of any other positive evidence adduced by the respondent in rebuttal to show to the contrary. Thus, the basic approach adopted by the Appellate Court in decreeing the suit against the petitioner on the ground that the petitioner has acquired suitable residence is wholly inappropriate and cannot be sustained in law.

8. Insofar as the circumstance which has weighed with the Appellate Court that the ration card as well as the voters list would indicate that the petitioner is staying and messing together in the bungalow on Kolhapur road along with her daughters, what is lost sight of is that the ration card could be either accepted or discarded as unreliable, but the same could not have been used against the petitioner. If the same is accepted as admissible and genuine evidence then it would show that the petitioner is residing at the suit premises along with other family members and this fact will have to be presumed to be so because, this document has been issued in ordinary course of business. But if the same is to be discarded then it cannot be used against the petitioner to hold that the petitioner and her daughters were messing together as has been done by the Appellate Court. In any case, the Appellate Court has clearly mixed up the issue and has glossed over the crucial distinction between the ground of tenant having acquired suitable residence 13(1)(1) and the ground that the tenanted premises have not been put to use for continuous period of six months-preceding the date of institution of the suit (13(1)(k)). In the present case, admittedly, the latter ground was not pressed by the landlord before the Courts below. Moreover, on perusal of the judgments of both the Courts below, there is nothing to suggest that even remotely the Courts have recorded a finding or even made a passing observation that the suit premises have not been used by the petitioner continuously for a period of more than six months preceding the date of institution of the suit. In that sense, the ground u/s 13(1)(k) cannot be pressed into service in the present case.

9. Accordingly, the only ground with which we are concerned is whether the petitioner has acquired suitable residence. However, this ground cannot be established on the basis of the ration card and the voters list produced on record which at best would indicate that the petitioner was staying elsewhere. That is not sufficient but something more than that is required to establish that the tenant has acquired other premises to reside in his own rights. Having regard to this legal position it is not possible to sustain the conclusion reached by the Appellate Court that the petitioner has acquired suitable residence u/s 13(1)(1) of the Act.

10. For the aforesaid reasons this petition succeeds and the decree of eviction passed by the Appellate Court on the ground of petitioner having acquired suitable residence deserves to be set aside and the same is therefore set aside and instead the order passed by the trial Court dismissing the suit is restored. Rule made absolute in above terms with no order as to costs.

* * * *

1. This order shall form part of the oral judgment pronounced in open court on July 4, 2001.

2. This writ petition was heard on July 4, 2001 when the learned counsel for the respondent was absent. After considering the arguments for the petitioner's counsel, the court was pleased to dispose of the matter by pronouncing the judgment and order in open court. After the said order was pronounced, but before I had signed the same, the learned counsel for the respondent on the same day mentioned the matter before me in chambers. He pointed out that in addition to the ground u/s 13(1)(1), the respondent-landlord has also asserted the ground of non-user of the suit premises by the petitioner-tenant for the purposes for which it was let out to her for more than six months preceding the date of institution of suit within the meaning of Section 13(1)(k) of the Bombay Rent Act. He, therefore, requested that the matter be reheard in open court. In view of the request made, I thought it appropriate to give one opportunity to the respondent so as to reassure myself that no miscarriage of justice is occasioned. Moreover, such a course is permissible in view of the enunciation of the Apex Court in the matter of Vinod Kumar Singh Vs. Banaras Hindu University and Others, . In para 8 of this decision the Apex Court has observed that after the judgment is pronounced or dictated in open court and before the same is signed by the Judge, if it is brought to his notice by counsel of any of the parties or the court discovers some new facts from the record, the matter may be placed for further consideration. In the circumstances, the learned counsel was given liberty to mention the matter after giving notice to the counsel for the petitioner. The learned counsel, accordingly, mentioned the matter on 16th July, 2001 after giving notice to the counsel for the petitioner. The matter was posted for today by consent of both the sides.

3. The learned counsel for the respondent was heard today when he reiterated the submissions made by him while mentioning the matter in chambers. He submits that the respondent-landlord had specifically asserted in the plaint that the tenant was not using the suit premises for the purpose for which they were let so as to make out a ground u/s 13(1)(k). According to him, in spite of the said pleadings, the trial court did not frame issue in that behalf nor adverted to the said matter in the judgment and therefore, the respondent in the appeal once again made a specific grievance that the ground of Section 13(1)(k) though specifically raised has not been considered. He submits that such a ground has been taken in the appeal memo. He submits that in spite of such a plea taken in the appeal memo before the Appellate Court even the Appellate Court did not address itself to the said matter though in para 15 it has accepted the respondent's case that the tenant-defendant was staying with her daughters at the newly acquired premises. He submits that nevertheless the Appellate Court has not decreed the suit on the ground of non-user within the meaning of Section 13(1)(k) and that the respondent-landlord was entitled to support the order passed in his appeal by the Appellate Court on the ground other than the ground on which the Appellate Court has allowed his appeal.

4. The arguments now advanced by the learned counsel for the respondent clearly overlooks the fact that assertion made in the plaint is far too general and does not spell out the cause of action for maintaining suit on the ground of non-user. The only averment made in para 4 of the plaint in which the plaintiff asserts that the petitioner's daughters have constructed bungalows where the petitioner was staying. There is no assertion that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit, which is the requirement for attracting Section 13(1)(k). Moreover, the respondent obviously did not insist before the trial Court to frame an issue for the purposes of seeking eviction on the ground of Section 13(1)(k) of the Bombay Rent Act. Besides that, even before the Appellate Court, it is obvious that, though the ground was raised in the appeal memo, but no specific argument for decreeing the suit on the ground of Section 13(1)(k) has been advanced. All that was argued before the courts below on behalf of the respondent is that the defendant was residing at some other place along with her daughters and not in the suit premises. It is relevant to note that though the respondent had approached the court with a specific plea that the petitioner is misusing the suit premises by running a brothel therein, however, both the courts below have recorded a clear finding that no evidence has been adduced to substantiate this plea. In the circumstances, the said ground is unavailable to the respondent. Nonetheless, the learned counsel for respondent wants this court to examine the matter in the context of the said ground, which would be wholly impermissible in exercise of writ jurisdiction. Be that as it may, this stand taken by the respondent would mean that his grievance was not of non-user of the premises as such but user other than the purpose for which they were let, but this case has been negated by two courts below. In fact this finding of the two courts below will assume relevance while considering the argument of the respondent that the petitioner is staying in the bungalow constructed by her daughters in the context of ground u/s 13(1)(1).

5. Insofar as the grievance made by the learned counsel for the respondent that, although the Appellate Court recorded the finding in favour of the respondent that the petitioner is staying elsewhere but no decree on the ground of Section 13(1)(k) has been passed, this submission clearly overlooks the elementary requirement of Section 13(1)(k). Merely because the landlord succeeds in establishing that the tenant is staying at some other place that is not sufficient to attract Section 13(1)(k). Section 13(1)(k) would be applicable only when the landlord succeeds in establishing the fact that the tenant is not using the suit premises continuously for a period of more than six months preceding the date of institution of suit. Such a plea is totally lacking in the plaint. Be that as it may, even the Appellate Court has not recorded such a finding. In absence of such a finding, there can be no cause of action for institution of the suit on the ground of Section 13(1)(k). Understood thus, even this grievance made by the learned counsel for the respondent is totally misplaced and ill advised.

6. Although this court could have rejected the plea of the respondent at the outset on the ground, that no ground u/s 13(1)(k) was taken before the Appellate Court, but with a view to do full, complete and effectual adjudication of the matter, I thought it appropriate to address even to this matter. In fact the respondent has not filed any cross-objection of for that matter separate writ petition complaining that the courts below erred in not decreeing the suit additionally on this ground. Moreover, the grievance made by the learned counsel for the respondent also clearly overlooks the enunciation of the Apex Court in State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, . The Apex Court has observed that the facts noted in the judgment of the courts below as to what transpired before that court cannot be contradicted by the affidavits or other evidence and in such a situation, the only remedy available to the litigant is to go back before the same court and make grievance that the statement of fact recorded in the order is inaccurate, but the same cannot be a ground in appeal before the superior court. In substance, the grievance of the counsel for the respondent is that, though he had argued a particular point, but the court has not even adverted to the same, is in the nature of assailing the correctness of the facts mentioned in the order which is the subject matter of appeal. Understood thus, even this grievance of the respondent is wholly misplaced.

7. Accordingly, I find no reason to entertain the grievance made on behalf of the respondent. In the circumstances, the order passed by me on 4th July, 2001 is maintained and the same will operate to mean that the writ petition is allowed and the order impugned therein passed by the Appellate Court is set aside and that passed by the trial Court or dismissing the suit is restored.

8. At this stage, Mr. Angal insisted for recording his request for remand of the matter. Since I have already considered the grievance made by the learned counsel on merits, I see no reason as to why the matter needs to be remanded to the Appellate Court for re-examination as submitted by the learned counsel. I may further add that at one stage the learned counsel also requested for permission to approach the Appellate Court for getting the records corrected. Even the said request is totally misplaced and cannot be entertained at such a belated stage. In view of the fact that, the writ petition has remained pending in this court since the year 1989, more than that the respondent did not think it necessary to file a formal cross writ petition or an affidavit in reply to the present writ petition or an application much less a letter or intimation to the other side to indicate that he would be raising the ground u/s 13(1)(k) of the Bombay Rent Act. It would be wholly inappropriate to permit the respondent to raise any such plea across the Bar during the course of hearing so as to take the other side by surprise. If the respondent was serious enough in raising this plea, it was necessary for the respondent to take out appropriate proceedings in that behalf, which has not done in the present case. In the circumstances, the request now made by the learned counsel for the respondent, after the entire matter has been considered, for remand to the Appellate Court, is obviously an afterthought and unjustified. The same in any case is not sustainable. Order accordingly.

9. Order accordingly.