

(2002) 07 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No's. 447 and 2005 of 1992

Jahangir Abdul Saheb Zari

APPELLANT

Vs

Shri Balwant Ramchandra Bhokare Since deceased through
his L.R.

RESPONDENT

Date of Decision : 05-07-2002

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2002) 07 BOM CK 0053

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

Bench : Single Bench

Advocate : S.S. Kulkarni, for the Appellant; Deshpande, for the Respondent

Judgement

A.M. Khanwilkar, J.—These two writ petitions can be disposed of together by common Judgment. For, Writ Petition No. 2005 of 1992 is filed by the landlord, whereas Writ Petition No. 447 of 1992 is filed by the successor in interest of the original tenant Shri. Balwant Ramchandra Bhokare. The parties will be preferred to as landlord and tenant respectively for the sake of convenience. Both these writ petitions challenge the Judgment and Decree passed by the Second Additional District Judge, Sangli in Regular Civil Appeal No. 213 of 1988 dated September 13, 1991. The premises in question is a shop on the ground floor of house property bearing C.T.S.No. 3798 in Shaniwar Peth locality of Miraj Town. The landlord instituted the suit against the original tenant before the court of Civil Judge, J.D., Miraj being R.C.S.No. 369 of 1981 on the ground of bonafide and reasonable requirement and default. The Trial Court by Judgment and order dated 22nd Feb. 1988 dismissed the suit on both the grounds. The landlord carried the matter in appeal before the District Court, Sangli, bearing Civil Appeal No. 213 of 1988. The ground of default was not pressed before the Appellate Court and the appeal was confined to the ground of bonafide and reasonable requirement. The Appellate Court by the impugned Judgment and order dated 13.9.1991 was pleased to partly allow the appeal. The Appellate Court has held that the landlord has established the bonafide and reasonable requirement in

respect of the suit premises and, that, the landlord will suffer greater hardship. None of less, the Appellate Court passed a conditional decree in favour of the landlord. The Appellate Court ordered that if the road widening to the extent of 50ft. or more was to be implemented by the authorities and the plaintiff's present premises of Survarna Cloth Stores are demolished and set back from front side, in that case, the landlord would execute the decree against the tenant. Such a conditional decree came to be passed by the Appellate Court which is the subject matter of challenge in the present writ petitions. The original tenant filed writ petition No. 447 of 1992 challenging the finding with regard to the issue of bonafide requirement as well as hardship, whereas the landlord has filed Writ Petition No. 2005 of 1992 challenging the conditional decree passed by the Appellate Court on the ground that once the Appellate Court was satisfied about the issue of bonafide requirement and the issue of comparative hardship in favour of the landlord, in that case, it had no option but to grant decree in entirety and not conditional decree as has been granted in the present case. It is relevant to note that during the pendency of the writ petitions, the original tenant has died and his heirs have been brought on record in both the matters.

2. In so far as the issue of bonafide and reasonable requirement is concerned, the Trial Court was of the view that the need set up by the landlord was not bonafide because the possibility of road widening was not imminent as it is founded on the plan issue as Master Plan by the local authority in the year 1955 which was more than 25 to 30 years back and no steps have been taken on that basis so far. The Trial Court has also taken into account the fact that during the pendency of the suit, the landlord entered into transaction with another tenant against whom suit was filed for similar reliefs i.e. Mr. K.B. Sawant. The landlord settled the dispute with the said tenant Shri K.B. Sawant and withdrew the suit filed against him and instead transferred the said property in favour of Mr. K.B. Sawant. According to the Trial Court therefore, the need pressed in the present suit was not bonafide and reasonable. On the other hand, the Appellate Court after analyzing the materials on record took the view that the fact that the property was earmarked for road widening and was to be acquired was established from the documentary as well as oral evidence, including independent evidence of the concerned Municipal Council. The Appellate Court has recorded a finding of fact that final acquisition notice has been given in respect of the said acquisition of the premises presently occupied by the landlord and, that, 1/3rd frontal portion of his premises would be demolished if project of the road widening was to be implemented in practice. In so far as the transaction between the landlord and the another tenant Shri. Sawant is concerned. The Appellate Court has taken the view that the said transaction cannot be the basis to doubt the bonafide need set up by the landlord which was based on genuine apprehension, pursuant to the proceedings for acquisition in respect of the premises presently in possession of the landlord. The Appellate Court has observed that the said transaction with Mr. Sawant was entered by the landlord under peculiar circumstances. Taking this view of the matter, the Appellate Court

held that the need pressed by the landlord cannot be said to be malafide but was obviously bonafide one and, that, the same was reasonable. The Appellate Court has even adverted to the fact that the tenant was in occupation of other premises besides the suit premises and for which reason no hardship would be caused to the tenant, if the decree was to be passed. Nevertheless, the Appellate Court has passed a conditional decree as referred to above.

3. During the pendency of these petitions, an affidavit has been filed on record to point out that acquisition was already completed and the landlord has received compensation amount in respect of the said acquisition. The affidavit also indicates that portion which is affected by the said acquisition has already been earmarked by the authorities. The tenant has also filed affidavit on record to contend that, so far, no acquisition has taken place nor the landlord has received any compensation in that behalf and the plea taken in the affidavit filed before this court is false. More than one affidavit has been filed by the respective parties. However, for the purpose of deciding this matter, I shall advert only to the plea taken and the evidence adduced before the courts below. I am persuaded to take this view because, there is no formal application for amendment of pleadings, filed by any of the parties before this Court. Whereas, the questions posed in the affidavits filed by the parties are obviously questions of facts; and if they intended to bring those facts on record, it was essential for them to amend the pleadings. The Apex Court in *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, has observed that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found; without amendment of the pleadings the court would not be entitled to modify or alter the relief. The Privy Council in the case of *Sri. Mahant Govind Rao v. Sita Ram Kesho and Ors.* reported in 1898 (25) Indian App 195 has observed that, as a rule, relief not founded on the pleadings should not be granted. The above decisions have been relied upon by the Apex Court in a recent decision in the case of *Om Prakash Gupta Vs. Ranbir B. Goyal*, . Applying the said principles, merely because more than one affidavit has been placed on record by the respective parties that per se would not compel this court to enter into the controversy on facts raised therein, since the original pleadings have remained unamended. The attempt of both the sides is obviously to march over the other side by taking some plea on affidavit, which has the inevitable effect of raising disputed questions of facts. That cannot be permitted at the stage of proceeding under Article 227 of the Constitution of India, that too for the first time and only when the matter becomes ripe for hearing. Be that as it may, as observed earlier, I would prefer to confine the decision of this matter on the basis of pleadings and the evidence that has already come on record before the courts below.

4. The grievance made by the tenant before this court is mainly that the Appellate Court is completely amiss in recording the finding, which reads thus:

"It is common knowledge that, practically, much more areas of the shop could be

affected because leaving a little front portion for access to the shop i.e. Veranda, the plaintiff's shop would be nearly cut to half of its size."

The other finding criticized by the learned counsel appearing for the tenant is that:

"It is probable that he was not much hopeful of getting success in the litigation and sold away the shop to proceed with the suit filed against the said Shri K.B. Sawant."

According to the learned counsel, both these findings are based on surmises and conjectures, as there is no legal evidence on record to support the same. The next argument of the learned counsel is that the Appellate Court has given more emphasis to the need of the tenant, while considering the bonafide need of the landlord; and that approach cannot be sustained. The next contention is that the finding recorded by the Appellate Court that the premises presently occupied by the landlord were to be acquired for road widening is based on conjecture. In any case, mere notice issued for that purpose would not establish the bonafide need of the landlord but the landlord ought to have adduced further evidence to establish his bonafide need. The next argument of the learned counsel is that, during the pendency of the suit, the landlord entered into transaction with another tenant and that was sufficient reason to eclipse the bonafide need set up by him in the present suit. The learned counsel also argued that the landlord was already in possession of several other shop premises, as is evident from the record and, therefore, it is incomprehensible as to how on reducing portion of the premises presently in his occupation would amount to bonafide need. The learned counsel also criticized the finding of comparative hardship recorded by the Appellate Court.

5. On the other hand Mr. Kulkarni for the Petitioner has adopted the reasons given by the Appellate Court and would contend that there is no infirmity either in the approach or the reasoning of the Appellate Court. He further points out that each of the fact found by the Appellate Court is supported by evidence on record and, therefore, no fault can be found with the conclusion reached by the Appellate Court for the finding cannot be said to be perverse and that some error here or there by itself cannot be a ground for interference under Article 227 of the Constitution of India. In so far as the observations noted by the Appellate Court, which are reproduced above, the learned counsel contends that, the observations made in Para 18 even if ignored, the fact remains that the portion of the shop which is presently in occupation of the landlord was to be acquired for road widening and if that fact is established then bonafide need of the landlord cannot be questioned. In so far as the second observation of the Appellate Court referred to above in respect of transaction with Sawant is concerned, the learned counsel would place reliance on the evidence of P.W.No. 1 and P.W.No. 3 and portion of the cross examination of defendant No. 1, to contend that, that transaction was required to be done in peculiar situation. Moreover, the said transaction has not been questioned by the tenant as being

malafide or with a view to defeat the rights of the tenant. To buttress this position, reliance has been placed on the ruling reported in Yudhishter Vs. Ashok Kumar, wherein the Supreme Court has observed that the onus is on the tenant to establish the fact that such transaction was entered with intention or with purpose to defeat his claim. In substance, the learned counsel contends that no fault can be found with the ultimate conclusion reached by the Appellate Court. Besides that, the learned counsel has invited my attention to the statement made by the tenant before the Trial Court on oath which reads thus:

"It is true that the premises let out to Jadhav are fit to be occupied for my business purpose due to my vast capacity in my business. It is true that I am sincerely intending the occupation of the premises to let out to Jadhav. I made bonafide and reasonable demand of the premises let out to Jadhav. It is true that I am still stick up to my previous prayer in Appellate Court also in respect of this premises. It is true that I have filed that suit against Mr. M.R. Jadhav as I am aware about the eviction from the suit premises. It is true that I am ready to vacate the suit premises when I will be put into premises let out to Jadhav. It is true that the first floor of the suit premises is occupied by Pawaskar".

The learned counsel contends that, having regard to this statement on oath before the court below, the petition presented before this court on behalf of the tenant cannot be proceeded, for the tenant has acquired possession of the premises from his tenant Jadhav.

6. The successors of tenant who are presently contesting the matter have not disputed the fact that the possession in respect of the premises which was with Mr. Jadhav was received recently. But what is contended is that those premises have come to the share of Mr. Ravindra Bhokare one of the son of the original tenant. Those premises are exclusively in use and occupation of said Ravindra, whereas suit premises are being used by another son Laxman Bhokare. According to the tenant, even if the statement was made by their father before the Trial Court, that would make no difference because the premises will be still required for Laxman Bhokare as he has no other shop premises and who has been accepted as tenant by the present landlord. Besides, it is contended on behalf of the tenant that the landlord had instituted three suits at the same time out of which one suit against Sawant was settled and the other suit against another tenant Pawaskar has also been settled, while the same is pending in this court, Pursuant to which possession of the premises on the first floor have been received by the landlord. However, according to the landlord the said suit was filed with specific plea that the premises on the first floor which were then occupied by Pawaskar were required for residential purpose and therefore, the possession obtained from Pawaskar would be of no avail for the purpose of requirement set up in the present suit. There is force in this submission and moreover that position is not countered.

7. After having considered the rival contentions, I have no hesitation in observing that since the tenant has also acquired possession of the premises from his

tenant Shri. Jadhav, the successors in interest of the tenant would be bound by the statement made by him on oath before the court below that on receiving the said premises the suit premises would be vacated forthwith. The subsequent requirement pressed by the tenant for Laxman Bhokare would be of no avail. I would have refused to exercise extra ordinary jurisdiction and preferred to dismiss the writ petition filed by the tenant only on that ground. But I thought it appropriate to examine the rival controversy with regard to the merits also. On examining the materials on record and the reasons recorded by the appellate Court, I have no hesitation in taking the view that the finding of facts recorded by the Appellate Court are supported by the evidence on record. Both the counsel have taken me through the relevant evidence and the finding of facts as recorded by the Appellate Court. It is seen that the total area of the premises presently in occupation of the landlord, bearing CTS No. 3570 was 68.9sq.mtrs. and the area to be acquired out of the said premises was 20.6 sq.mtrs. There is oral as well as documentary evidence to support this position. In this view of the matter, the finding recorded by the Appellate Court that 1/3rd frontal portion of the landlord's present premises would be demolished if project of road widening was to be given effect to in practice, cannot be doubted. Once we accept this position, it necessarily follows that the need set up by the landlord in the present suit will have to be held as bonafide need. The Court cannot examine the plea set up by the landlord with magnifying glasses and with the needle of suspicion. But, it is well settled and as I have had an occasion to advert to the case law on this subject in my recent Judgment in the case of L.V. Venkateswaren Writ Petition No. 3816/89 decided on 3.5.2002, the court has to broadly examine the need set up by the landlord. If at all that need is to be challenged, onus is on the tenant to prove that the need as set up is not bonafide and is malafide. In fact, the tenant is required to adduce positive evidence to establish that position. In the present case, nothing has been brought to my notice which would even remotely suggest that the tenant has been able to create doubt about the need set up by the landlord. On the other hand, the landlord has not only adduced oral evidence but has also examined the independent witness, being employee of Municipal Council, who has deposed about the fact of proposed acquisition. Merely because the plan has not been implemented and the acquisition and demolition has not taken place, that would not denude the landlord of pressing the requirement for his bonafide need. On the other hand, the apprehension and possibility of acquisition looming large over his head would be sufficient enough for the landlord to maintain the suit on the ground of bonafide and reasonable requirement. He need not wait till the demolition or acquisition is completed. Accordingly, the criticism advanced by the counsel for the tenant with regard to the observations made in Paragraph 18 that it is based on surmises and conjecture, to my mind, is devoid of merits. No doubt, there is no clear evidence to the effect that additional area of the shop could be affected because of setting apart of some place for front portion for access to the shop and verandah, reducing the shop to half of its size. May be, it will be an over statement to say that half of the area of the present shop in possession of the landlord will be lost.

However, if that reasoning is understood in the context of the finding recorded earlier that 1/3rd frontal portion of the shop would be demolished, if the project of road widening was to be implemented in practice, is sufficient to uphold the conclusion of the Appellate Court.

8. The next contention with regard to the finding recorded by the Appellate Court in Paragraph 20 regarding the transaction with another tenant of the landlord Shri. Sawant is concerned, even that finding cannot be the basis for reversing the conclusion reached by the Appellate Court regarding the bonafide and reasonable need, the landlord has entered into transaction with another tenant Sawant during the pendency of present proceedings notwithstanding. The circumstances impelling the landlord to enter into that transaction can be culled out from the evidence adduced on behalf of the landlord. The landlord examined himself as P.W.1 and in Paragraph 14 of his evidence disclosed that he has filed a suit against another tenant Mr. Sawant on the ground of bonafide requirement. What is relevant to note is that that tenant's son Sharad Sawant was examined by the landlord as P.W.3,. In his evidence, in Paragraph 3, he has stated that even that tenant has received notice for acquisition of road widening as per the master plan. The premises in possession of Mr. Sawant was admeasuring 35x12ft. and the notice for acquisition is in respect of his premises to the extent of 5 to 6 ft. What is contended on behalf of the landlord, therefore, is that, the premises in possession of Sawant were not convenient, as even the said premises were to be acquired. Besides, the suit against Mr. Sawant was only at the stage of trial and having regard to the uncertainty of the litigation, landlord thought it appropriate to enter into transaction with that tenant. This is a plausible explanation. Moreover, the defendant was examined and in the cross examination it was put to this witness that the premises in possession of Mr. Sawant could not be made over to plaintiff even after the court decision. It is therefore, contended that it is in this context the Appellate Court has made that observation. To my mind, the Appellate Court has not committed any error in opining that merely because of the said transaction the bonafide and reasonable requirement of the suit premises of the landlord cannot be doubted. As observed earlier, no positive evidence has been brought on record by the defendant tenant that the need set up was not bonafide or that was not subsisting. The learned counsel for the landlord has rightly placed reliance on the decision of Apex Court in Yudhishter Vs. Ashok Kumar, that onus would be on the tenant to establish that such transaction was with an intention or with purpose to defeat the claim of the tenant. As observed earlier, it is nobody's case that the landlord has received vacant possession of the premises from his other tenant and thereafter allotted the same to other person to occupy the same. But, as is seen, the landlord decided to settle the matter with Sawant in peculiar circumstances, which by itself cannot be the basis to doubt the bonafide need of the landlord. In this view of the matter, I find no reason to interfere with the finding of facts recorded by the Appellate Court in this behalf on the issue of bonafide and reasonable requirement.

9. No doubt it is contended that the landlord is in possession of other shop premises and therefore, even if the premises presently in his occupation were to be acquired and demolished that cannot cause him any inconvenience. However, to my mind, that will not be the correct approach to be adopted when the landlord says that he needs the premises and especially when he has given sufficient cause for that purpose. Then it is not open for the court to dictate its terms to the landlord as to the manner of using the premises that he intend to use. If there was no basis for the need set up by the landlord that would have been a different matter. However, in the present case the landlord has established that his present premises were being acquired for the road widening and for which reason he needs the suit premises. Be that as it may, the tenant has candidly accepted before the Trial Court on oath that in the event he gets possession of premises in occupation of his tenant Shri. Jadhav, he would forthwith vacate the suit premises. This evidence clearly indicates that even the tenant has acknowledged the fact that the premises presently occupied by the landlord were under acquisition and his need was genuine. In the circumstances, I have no hesitation in affirming the conclusion of the Appellate Court that the landlord has established that his need is bonafide and reasonable.

10. The next question is, the comparative hardships. The Appellate Court has no doubt mixed up question of hardship and bonafide and reasonable requirement together. But from the reasons recorded by the Appellate Court, it is possible to discern that the Appellate Court has positively observed that if the decree was to be passed, no hardship would be caused to the tenant. When examining the question of comparative hardship as observed by the Apex Court in *Mst. Bega Begum and Others Vs. Abdul Ahad Khan (Dead) by Lrs. and Others*, it is for the defendant tenant to establish on record that it would not be possible for the tenant to secure any alternate accommodation elsewhere in the entire city. That evidence is not forth coming in this case. On the other hand, in the present case, what is seen is that the tenant is also in occupation of other premises and in fact, during the pendency of this petition has also admittedly secured possession of the premises from his tenant Jadhav. The legal position with regard to comparative hardship has also been considered in my decision in *L.V. Venkateswaran (supra)*. Having regard to this position, it is not possible to over turn the conclusion reached by the Appellate Court on the issue of comparative hardship in favour of the landlord.

11. The next question that has been rightly agitated in the petition filed by the landlord is that the Appellate Court having recorded clear findings of facts that the landlord has established the need as reasonable and bonafide as also answered the issue of comparative hardship in favour of the landlord, had no option but to decree the suit in its entirety. The Court in such a situation cannot pass a conditional decree. To my mind, the scheme of the provision of the Bombay Rent Act would not permit the courts to pass a conditional or a prospective decree such as the one passed in this case by the Appellate Court. Whereas, once the Court is satisfied with the issue of bonafide and reasonable

requirement of the landlord and also answers the issue of comparative hardship in favour of the landlord, then the court has no option but to decree the suit. The legal position as stated in Raghunath G. Panhale (Dead) By Lrs. Vs. M/s. Chaganlal Sundarji and Co., is that the landlord can maintain a suit for eviction with respect to his need which is in proximity in the future. Applying this principle, once the court finds that there is imminent apprehension to the landlord of acquisition, then it would be wholly preposterous to pass a conditional decree. In the circumstances, the conditional decree passed by the Appellate Court will have to be set aside and instead decree for possession as prayed for in the suit will have to be granted.

12. Accordingly, the order that I propose to pass is as follows:

ORDER

Writ Petition No. 447 of 1992 is dismissed with costs.

Writ Petition No. 2005 of 1992 is allowed with costs and the suit for recovery of possession of the demised premises filed by the landlord is decreed with costs.

All applications are disposed of in view of the order passed in the writ petitions.

C.C. expedited.< /p> At this stage the learned counsel for the tenant prays that operation of this order be stayed to enable the tenant to take appropriate proceedings if so advised. This prayer is opposed by the counsel for the landlord. It is relevant to note that the matter was argued on the previous date when the counsel appearing for the landlord made an offer that his client was willing to settle the matter with the tenant by making some offer. The matter was adjourned. But, however, today when the matter was called out, the counsel for the tenant stated on instructions that the tenant was not wanting any settlement but a decision on merits. In view of this attitude, I find no reason to grant any stay of operation of my order as prayed for. Hence, prayer is rejected.