

(2004) 06 BOM CK 0066

In the Bombay High Court

Case No : Writ Petition No. 4169 of 1989

Lelavati Vallabhadas and Others

APPELLANT

Vs

Vijaykumar Narottam Kapadia and Others

RESPONDENT

Date of Decision : 16-06-2004

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 14, Order 6 Rule 15

Citation : (2004) 4 ALLMR 315 : (2005) 2 BomCR 466 : (2004) 4 MhLj 211

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Prataprao Shinde, for the Appellant; Gauri Godse, for the Respondent

Final Decision : Dismissed

Judgement

D.G. Karnik, J.—By this petition, the petitioners challenge the judgment and decree passed by the appellate Bench of the Small Causes Court, Bombay on 12th July, 1989 in Appeal No. 674 of 1985 allowing the appeal of the respondent-landlords and thereby decreeing their suit for possession.

2. The suit property belongs to Thacker Jethabhai Govindji Nivas, a public charitable Trust (hereinafter referred to as the "trust"). The erstwhile trustees of the Trust filed a suit against Mathuradas Vallabhdas (husband of the petitioner No. 1 and father of petitioner Nos. 2 to 5) for possession on the ground that he had acquired suitable residential premises at Milan Co-operative Housing Society Ltd. (for short Milan Society) after coming into force the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (for short the Bombay Rent Act) and had gone to reside in the said premises. The Trust also claimed possession on other grounds but, they are not pressed before me. The trial Court held that the tenant had acquired residential premises in Milan Society, but held that the Trust had not proved that the premises were suitable for residence of the tenant and therefore, declined to pass a decree for possession. The appellate Bench while confirming the finding that the tenant had acquired residential premises at Milan

also held that the said premises were suitable, and passed a decree for possession. That judgment is impugned in this writ petition.

2-A. Learned counsel for the petitioners does not dispute the finding of fact recorded by the courts below that the tenant through whom the present petitioners claim had purchased and/or acquired a residential flat in Milan Society. He however submits that the landlords had not proved that the flat acquired by the tenant was suitable for him. He further submits that the burden of proving that the flat at Milan Society acquired was suitable for residential premises was on the respondent-landlords and as they had failed to discharge the burden the trial Court had rightly dismissed the suit.

3. Learned counsel for the respondents on the other hand submits that the initial burden of proving that the tenant had acquired residential premises elsewhere lay on the landlords but once the said burden was discharged and the acquisition of other residential premises was proved, the burden of proving that the premises were not suitable was on the tenant. The tenant had acquired self contained flat admeasuring 600 sq.ft in Milan Society. Assuming that the burden of proving suitability was on the landlords, the burden was discharged by proving that the flat at Milan Society was of 600 sq.ft as compared with the suit premises which consist of only one residential room admeasuring about 8" x 16".

4. The landlords in order to be entitled to evict the tenant must establish one of the grounds of eviction provided u/s 12 or 13 of the Bombay Rent Act. One of the grounds of eviction provided u/s 13(1)(1) is that the tenant, after coming into operation of the Bombay Rent Act has built or acquired vacant possession or has been allotted a suitable residence. The initial burden of proving that the tenant has acquired other residential premises is undoubtedly on the landlord. After the landlord has proved that the tenant has built or acquired vacant possession or has been allotted residential premises, the tenant must come forward and state whether the other premises acquired by him are suitable or not. The question of suitability of other premises would depend on the circumstances which are within the special knowledge of the tenant and consequently the tenant must prove and establish those facts i.e. he must establish that the premises acquired are not suitable to him. How would the landlord by his ipse dixit prove that the alternate premises acquired by the tenant are suitable for him? The tenant who best knows his needs must state how the premises acquired by him are not suitable to him. I am fortified in this view by the decision of the Supreme Court in Ganpat Ram Sharma and Others Vs. Gayatri Devi, , wherein the Supreme Court observed :

"The position of law is that the landlord in order to be entitled to evict the tenant must establish one of the alternative facts positively either that the tenant has built, or acquired vacant possession of or has been allotted a residence. It is essential that the ingredients must be pleaded by the landlord who seeks eviction but after the landlord has proved or stated that the tenant has built, acquired vacant possession or has been allotted a residence, whether it is suitable or not

and whether the same can be really an alternate accommodation for the tenant or not are within the special knowledge of the tenant and he must prove and establish those facts."

5. In the present case, the defence of the tenant in the written statement had been of a denial. He had denied in toto the acquisition of the premises in Milan Society. The secretary of Milan Society was examined to prove the acquisition of the premises by the tenant. The tenant had not raised any plea in the written statement, even in the alternative, that the premises acquired at Milan Society were not suitable for him. The tenant had neither pleaded nor adduced any evidence about unsuitability of the premises. The trial Court wrongly placed the burden of proving that the premises were suitable was on the landlord and dismissed the suit. The appellate court corrected the error and held that the burden of proving that the other premises were not suitable was on the tenant and that the tenant had not discharged the same. The view taken by the appellate Court is correct in law and has to be upheld.

6. Learned counsel for the petitioner submits that the premises at Milan Society were disposed of by the tenant in the year 1977. The tenant had incurred losses in his business and in order to repay the debts of his business, he sold the premises at Milan Society in the year 1977 itself and therefore on the date when the suit was heard and decided by the trial Court in the year 1985, the tenant was not in possession of the alternate premises and therefore, the decree cannot be sustained. He further contends that the suit was not properly instituted in as much as the original trustees of the landlord-Trust had not signed the plaint which was signed only by the Advocate. Subsequently, an application was made for amendment of the plaint for substituting the names of the new trustees. The new trustees were brought on record in the year 1980, who sought permission for signing and verifying the plaint. The plaint was signed and verified by the new trustees only in the year 1985. Learned counsel submits that the plaint which was originally instituted was non-est as it was not signed by proper persons. In the alternative, he submits that as the defect of non signing the plaint was cured only in the year 1985 the plaint should be deemed to be instituted in the year 1985. If the suit is deemed to be instituted in the year 1985, then on the date of the institution of the suit the tenant was not in possession of the suitable alternate residence, he having disposed of the premises in the year 1977. Reliance is placed on the decision of this Court in *The Prince Line Ltd. Vs. The Trustees of the Port of Bombay*, . In the said case, it was held that unless and until a plaint was presented to the Court complying with the provisions of Order 6, Rule 14, it could not be said that a proper plaint was submitted to the Court and unless such proper plaint was presented to the Court, it could not be said that the suit had been instituted in court by a party. If the plaint was not presented properly and was not properly signed and verified in accordance with the provisions of Order 6, Rules 14 and 15 the Court had a discretion to allow the plaintiff to remedy the defect at a later stage even though the limitation had expired but that was at the discretion of the Court which it exercised after due

consideration of the facts and circumstances of the case before it. The Court further held that while giving an opportunity to the plaintiff to cure the defect, the court reserved unto the defendant the right to plead the bar of limitation, the defendant would not be deprived of his right to plead the bar of limitation and the plaintiff would have to meet that point when properly raised by the defendant at any subsequent stage.

7. In the present case, we are not concerned with the point of limitation. Therefore, it is not necessary to decide whether for the purpose of limitation, the plaint would be deemed to have instituted on the date when the defect was cured. In *All India Reporter Ltd. and Another Vs. Ramchandra Dhondo Datar*, , a Division Bench of this court had an occasion to consider the effect of a defective presentation, signing and verification of the plaint and its subsequent cure. After detailed review of the decisions of various Courts cited before it, the Division Bench observed in para 27 as under :

"If defects in regard to the signature, verification or presentation of the plaint are cured on a day subsequent to the date of filing of the suit, the date of institution of the plaint is not changed to the subsequent date..... *Shib Deo Misra and Others Vs. Ram Prasad and Others*, ."

8. In para 30 of the judgment the court held that the date of the institution of the suit would not depend upon the discretion of the Court, allowing the amendment or curing of the defect. While the Court would have the discretion to allowed or not to allow the amendment of the pleadings or verification of the plaint, once the discretion was exercised the amendment of the plaint or the fresh signature or verification of the plaint relates back to the original date of the suit. In view of this judgment of the Division Bench the view expressed by the learned Single Judge in *The Prince Line Ltd. v. The Trustees of the Port of Bombay* that even if the court allows the plaintiff to carry out the defect, the defendant may be permitted to raise a plea of limitation on the ground that the defect was cured subsequently cannot be held to be a good law. After the defect is cured by properly signing or verifying the plaint, the suit would be deemed to be instituted on the original date of filing for all purposes.

9. In the case at hand, the suit was instituted on 26th November, 1974. As held by both the Courts below the tenant was in possession of the residential premises in Milan Society on that date and even according to the defendant, till the year 1977. Therefore, on the date of institution of the suit, the plaintiff was in possession of the suitable alternate residential premises. In *Govind Ramchandra Deo v. Ramabai Vasudeo Pandit* reported in 1993 M.L.J. 437, this court has held that the court would be entitled to pass a decree for possession on the ground of acquisition u/s 13(1)(1) of the Bombay Rent Act on the ground that the tenant had acquired suitable residential premises, if at the time of the notice and filing of the suit the tenant was in possession of a suitable alternate premises and it would not be necessary that the cause of action must continue to subsist till the date of passing of the decree. Assuming that the tenant had sold

the premises in the year 1977 as contended by his counsel, that would not alter the position on the date of the institution of the suit, the tenant was in possession of suitable alternate premises and it matters not that the premises were sold before the decree was passed. Therefore, the first appellate court was justified in passing a decree for possession on that ground.

10. There is no merit in the petition which is hereby dismissed. Rule discharged. No costs.

11. Leaned counsel for the petitioners seeks time to vacate the premises. Considering the facts and circumstances of the case, the petitioners are granted six months time to vacate the suit premises on their filing an undertaking on the usual terms in the Court within a period of four weeks.