

(2002) 09 BOM CK 0077

In the Bombay High Court

Case No : Writ Petition No. 2168 of 1986

Mande D''Penha and Others

APPELLANT

Vs

Sapal Farmroze Printers since deceased through his L.Rs.
Miss Parvez Printer and Others

RESPONDENT

Date of Decision : 16-09-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)(1)

Citation : (2003) 1 ALLMR 274 : (2003) 1 BomCR 506 : (2003) 2 BOMLR 216 :
(2003) 1 MhLj 24

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

Bench : Single Bench

Advocate : A.K. Abhyankar, for the Appellant; G.P. Bharucha, for respondent No. 1A and 2A, for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This writ petition under Article 227 of the Constitution of India takes exception to the Judgment and Decree passed by the Small Causes Court of Bombay dated 24th December 1985 in Appeal No. 238 of 1975.

2. The premises in question is on the second floor of building known as "Maudestan" and garage situated at 194, D''Monto Park Road, Bandra, Bombay-50. The petitioners are the landlords in respect of the suit premises. The respondents were inducted in the suit premises as monthly tenants pursuant to the lease agreement dated 8th May, 1951 under which they were asked to erect second floor on the existing building and the garage and the compound wall at the costs of Rs. 21,500/-; and the respondents after constructing the said portion on the suit property started residing there as tenants. The petitioners instituted suit against the respondents sometime in November 1965 being R.A.E. Suit No. 714 of 1965 before the Small Causes Court, Bombay for possession of the suit premises on the ground of change of user, unauthorised structural alterations, non payment of water charges, Education cess and nuisance and

annoyance etc. While that suit was pending, sometime in July 1970, the petitioners took out application for amendment of the plaint so as to add one more ground for eviction being tenants having acquired suitable premises for residence. By that application, the petitioners wanted to add following Para 8A in the plaint which reads as follows:

"The plaintiffs state that the defendants have after coming into operation of the Rent Act built, acquired vacant possession of or been allotted a suitable residence being 4 flats on the 2nd floor of Suraj Co-Operative Housing Society Ltd., Pandya Lane, Juhu, Santacruz, Bombay."

That Application was allowed on 7-7-1970 and the plaint stood amended. The respondents filed additional written statement but plainly denied the allegation that they have been allotted any premises, without taking any specific stand with regard to that ground. Both the sides adduced oral as well as documentary evidence on record. The Trial Court decreed the suit in favour of the petitioners on the ground of nuisance and change of user only. The other grounds were negatived by the Trial Court. Insofar as the ground referred to above u/s 13(1) (1) of the Act is concerned, the Trial Court has noted that no doubt, it is admitted position that three flats were allotted and acquired by the respondents some time between July and August 1964 but before the Application for amendment of the plaint was filed, the respondents had already sold those flats on 31st August 1967. In this view of the matter, the Trial Court took the view that when the application for amendment of plaint for pressing the ground u/s 13(1)(1) was moved, on that date the respondents were not in possession of any suitable residence else whereas the three flats allotted to them were already disposed of and not in their possession at the relevant time. The respondents carried the matter in appeal before the Appellate Bench of the Small Causes Court being Appeal No. 238 of 1975 assailing the conclusion reached by the Trial Court with regard to the ground of nuisance and change of user. In that Appeal the petitioners contended before the Appellate Bench that they were entitled to decree also u/s 13(1)(1) of the Act. In view of the submissions made across the bar, the Appellate Court framed as many as 8 points for consideration which included the question as to whether the landlords have duly proved that the tenants acquired possession of suitable residence as contended by them. The Appellate Court reversed the finding and conclusion in so far as the two grounds which had found favour with the Trial Court. Insofar as the ground u/s 13(1)(1) is concerned, the Appellate Court considered the same in Paras 27 to 29 of the impugned Judgment and has affirmed the aforesaid view taken by the Trial Court. The Appellate Court in Para 29 has summed up the position as follows :

"The learned Advocate for the appellants rightly contended that the flats were acquired for resale and those were disposed of accordingly and those were not suitable for residence of the appellants and there was no intention of the appellants to shift to those flats at any time. If the appellants had intention to shift they would have done so in 1964 only and they would not have waited at

all. In spite of the acquisition of those flats in 1964, their continuing throughout in the suit premises established on record that they had no intention to shift to those flats and those were not acquired as suitable residence but were acquired only for resale. We are thus satisfied that there is nothing on record which would help the respondents to press this ground u/s 13(1)(1) of Bombay Rent Act as the ground of eviction. We thus conclude this aspect accordingly and negative the same ground and answer Point No. 6 accordingly in negative".

Accordingly, the Appeal preferred by the respondents was allowed and the Judgment and Decree for possession passed by the Trial Court was reversed. It is against this decision, present writ petition has been filed. In the present writ petition, the grounds relating to nuisance, change of user, non payment of Education cess and water charges have been pressed into service besides the ground u/s 13(1)(1) that the tenants had acquired alternative suitable residence. The learned counsel wanted this Court to examine all the aforesaid grounds. But, having considered the materials on record, insofar as the ground relating to tenants having acquired alternative suitable residence, I think that the decree on that ground will be inevitable; and for that reason, it will not be necessary to burden this Judgment with the other grounds.

3. Although the respondents have been served and they have entered their appearance through Advocate, none appeared when the matter is called out. This petition pertains to year 1986 and the suit for possession of year 1965. In the circumstances, I have no option but to proceed in the matter. I have examined the records and the decisions of the Courts below with the assistance of the counsel for the petitioners.

4. Insofar as the ground of tenants having acquired alternative suitable residence within the meaning of Section 13(1)(1) of the Act is concerned, the Trial Court has dealt with the admitted position on record which would indicate that between July and August, 1964 tenants were allotted three adjoining residential flats on one floor of the building in Suraj Co-op. Housing Society. This fact is established from the evidence of plaintiffs witness P.W. No. 6 who was the Secretary of the said Society at the relevant time. The respondents though in the written statement denied this fact, eventually conceded in evidence when confronted that they had purchased those three flats in the said Suraj Co-op. Housing Society; but then came out with the defence that those flats were later on sold on 31-8-1967 and 21-7-1968. The stand taken on behalf of the respondents was that when the application for adding the ground u/s 13(1)(1) was filed by the plaintiffs/petitioners in July, 1970, at the relevant time, they were not the owners and in possession of those flats and that they had purchased those flats only for resale and not with an intention to personally occupy the same. It was therefore, contended on behalf of the respondents-tenants before the Courts below that in such a situation the ground u/s 13(1)(1) was not available to the landlords. This plea found favour with the two courts below. However, that plea is completely ill founded and will have to be overturned in view of the decision of the Apex Court

in *Dewan Chand Bhalla v. Dr. Ashok Kumar Bhoil* reported in (1994) 5 SCC 444. No doubt, in that case the Apex Court was considering the provisions of Himachal Pradesh Urban Rent Control Act 1987. But, the relevant provision Section 41(3)(a)(iv) of that Act is almost parallel to the provisions contained in the Bombay Rent Act in the shape of Section 13(1)(1) with which we are presently concerned. In that decision, the Apex Court has observed that merely because the tenant has parted with possession of the premises which had become available to him either by way of allotment or any other mode provided by the Act that would not defeat the landlord of his right to recover possession of the demised premises from his tenant; and the provisions can still be pressed into service in spite of the fact that on the date of institution of the proceedings tenant was not in possession of those premises. To my mind, the principle enunciated by the Apex Court in the said decision would apply with all force to the case on hand. Mr. Abhyankar has rightly relied on the another decision of the Apex Court in the case of *Mohini Badhwar Vs. Raghunandan Saran Ashok Saran*, , which takes the same view as observed in *Dewan Chand's* case (supra). In this Judgment, the Apex Court in fact dealt with the contention of the tenant that the tenant was required to part with possession of the premises which he had acquired on account of legal obligation, even then the Apex Court held that that would not extricate the tenant from the rigours of the provisions such as Section 13(1)(1) of the Act. If that be so, then the decree on the ground u/s 13(1)(1) of the Act in the present case would be inevitable especially when the Courts below have found that the tenants had acquired three residential flats admeasuring 550 sq.ft. each which were adjoining to each other on the second floor of Suraj Coop. Housing Society. Obviously, all the three flats together on one floor would admeasure around 1650 sq.ft. or more and that area by no stretch of imagination can be said to be not suitable for residence especially when the area of the suit premises is less than that area. The fact that the tenants acquired those premises and had no intention to occupy the same would be of no avail. The law postulates that after coming into force of the Act if the tenant acquires suitable alternative residence that by itself is a ground for terminating the tenancy and entitling the landlord to secure possession of the demised premises from the tenant. Understood thus, decree u/s 13(1)(1) in the fact situation of the present case is inevitable. No doubt, both the Courts below have adverted to an unreported decision of this Court in the case of *G.R. Golani v. K.V. Bhatia and Ors.* in Special Civil Application No. 2998 of 1967, however, in view of the above noted decision of the Apex Court, the observations in the said unreported decision of this Court which found favour with the two Courts below would be of no avail.

5. Accordingly, this petition succeeds and the impugned Judgment and Decree is set aside; whereas decree for possession passed by the Trial Court is restored, on the ground u/s 13(1)(1) of the Act though.

6. Rule made absolute in the above terms.

7. No order as to costs.

8. C. C. expedited.

All the concerned to act on the copy of this order duly authenticated by the Associate of this Court.