
(2024) 01 BOM CK 0025

In the Bombay High Court

Case No : Civil Revision Application No. 100 Of 2022, Interim Application No. 13195 Of 2023

Maria Fernades

APPELLANT

Vs

Ismail Nasjid Kumte

RESPONDENT

Date of Decision : 09-01-2024

Acts Referred:

Code Of Civil Procedure, 1908 — Section 115, Order 41 Rule 27
Maharashtra Rent Control Act, 1999 — Section 16(1)(g)

Citation : (2024) 01 BOM CK 0025

Hon'ble Judges : Sharmila U. Deshmukh, J

Bench : Single Bench

Advocate : Kashmira S.Bharucha, Ashokkumar K.Lakhia, P.J. Thorat, Aditi S. Naikare

Final Decision : Disposed Of

Judgement

Sharmila U. Deshmukh, J

1. Rule. Rule made returnable forthwith and taken up for final hearing with consent of the parties.
2. The revisional jurisdiction of this Court has been invoked to challenge the concurrent findings of the trial Court and the Appellate Court decreeing the suit for eviction filed by the respondent. By the impugned judgment dated 23rd October, 2021 passed in Appeal No.18 of 2012, the Appellate Bench has confirmed the Judgment and order dated 24th February, 2012 passed by the trial Court in RAE Suit No.840 of 2001. For the sake of convenience, the parties are referred to by their status before the trial Court.
3. RAE Suit No.840 of 2001 was instituted seeking ejectment of the defendant on the ground of bonafide requirement, permanent alteration and additions without consent of the plaintiff and non-user of the premises for continuous period of six months immediately preceding the date of suit. The suit premises as described in

the plaint is a single room tenement bearing Room No.4 admeasuring about 10 x 16 sqr.ft. having height of 12 feet on the front side and on the rear side 16 feet from ground level which was let out to the original defendant on the monthly rent of Rs.55/-. That, the plaintiff is the owner and landlord of Chawl known as "Moin Manzil" which comprised of 16 single room tenements and the suit premises is situated in the said Chawl.

4. As far as bonafide requirement is concerned, it is the case of the plaintiff that the suit premises are required reasonably and bonafide for the use and occupation of the plaintiff and his family consisting of his wife, two sons and two daughters. That, one of the daughters of the plaintiff was recently married, the eldest son is 24 years and the younger son is 12 years and another daughter is 19 years. That, the plaintiff is residing in a hut admeasuring about 16 x 16 sqr.ft. having two rooms on rental basis and the landlord of the said premises has initiated the eviction proceedings against the plaintiff in the City Civil Court which is pending. That on account of inadequate accommodation, the plaintiff is not in a position to arrange for the marriage of his son-Javed and the current residence is insufficient and inadequate.

5. As regards permanent alterations and additions the case of the plaintiff is that original defendant has constructed a permanent loft having an area of half of the suit premises by reason of which heavy load has been levied on premises causing injury to the suit premises. That, in or around the year 2000, the original defendant removed existing roof of the suit premises and increased the height of the wall by about 15 feet in front and 18 feet on the rear side without consent of the plaintiff. It is further pleaded that the original defendant had acquired another suitable residential accommodation in building 'Highland Court' situated adjacent to the suit Chawl and that the suit premises has not been used by the defendant without reasonable cause for the purpose for which they have let out for continuous period of six months immediately preceding the date of the suit.

6. The suit came to be resisted by the original-defendant contending that the plaintiff has much larger and spacious accommodation of 150 sqr.ft. each four rooms of ground + first floor. Apart from the denial to the other contentions, it is contended that except the suit premises the defendant does not have any other premises and that the monthly income of the family is meager and as such, the requirement of the suit premises is greater for the defendant and the plaintiff is admittedly rich and better placed and has other premises. During the pendency of the proceedings, the original defendant expired and the present applicant was brought on record who has also filed her written statement dated 15th October, 2009, raising the same defence as raised by the original-defendant.

7. The parties went to trial and the plaintiff examined himself and the defendant examined herself. The trial Court by the judgment dated 24th February, 2012, answered the issue as regards the bonafide requirement in the affirmative and on the issue of comparative hardship held that the plaintiff will suffer greater hardship, if eviction decree is refused. As regards the issue of permanent

alteration and addition the issue was answered against the plaintiff. The issue of non-user of the premises for continuous period of six months was answered in the affirmative. The suit came to be decreed directing the defendants to handover vacant and peaceful possession of the suit premises. Appeal No.18 of 2012 was preferred by the defendant which came to be dismissed by the Appellate Court vide judgment dated 23rd October, 2021.

8. During the pendency of the proceedings before the Appellate Court, the defendant filed two applications under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short "CPC"), seeking to produce additional documents. The documents which were sought to be produced was the decree for possession of one room in the Chawl in which the suit premises was situated alongwith the Electricity Bill of which production was allowed by the Court. There was another set of documents sought to be produced being light bills of the premises occupied by society and share certificate of the premises of 'Highland Court' which came to be rejected by the Appellate Court. The Appellate Court held that as far as the electricity bills in respect of the premises occupied by the plaintiff are not materially affecting the merits of the case to invoke Order XLI of Rule 27 and that with due diligence the same could have been produced before the same. Applying the same reasoning, the permission to produce the share certificate of the society was rejected on the ground that the production of the document is filling up the lacuna in the case. The Appellate Court confirmed the findings of the trial Court and dismissed the Appeal, giving rise to the present Revision Application.

9. Before this Court Interim Application is preferred under Order XLI Rule 17 of CPC to produce the Will of the mother-in-law of Applicant, letter of Highland Court Co-operative Housing Society Ltd stating that Applicant is not member of society and not residing in Room No.G-02 of the society and the electricity bills for the period May, 2001 to November, 2001 i.e. six months prior to the filing of the suit.

10. Heard Ms. Bharucha, learned counsel for the Applicant and Mr. Thorat, learned counsel for the Respondent.

11. Ms. Bharucha, learned counsel appearing for the Applicant submits that the Appellate Court committed a jurisdictional error in declining the application to produce additional documents viz the electricity bills of Plaintiff's premises and the share certificate of Highland Court premises as the share certificate of the Society would show that the premises at Highland Court stands in the name of the defendant's sister-in-law. She submits that the trial Court has decreed the suit on ground of non user for the reason that the suit summons was served at the said premises and the death certificate shows the address of the deceased original-tenant at the address of the Highland Court. She submits that as far as the interim application filed before this Court for production of additional documents, the Will of her mother in law, who is the owner of premises in Highland Court shows that the premises has been bequeathed to the Applicant's

sister in law and not to the original-defendant and the electricity bills have a material bearing as the same would indicate that there are consumption of electricity in the suit premises. She would further submit that there is another premises of which possession was obtained by the plaintiff during the pendency of the proceedings and as such, the requirement of the Plaintiff, if any, stood satisfied. On the findings of comparative hardship, she submits that the Defendant would suffer greater hardship as the documents indicate that the Defendant is not the owner of Highland Court.

12. She would further point out the admissions in the cross- examination of PW-1 as regards the previous suits filed by the Plaintiffs against all the tenants out of which 9 suits have been dismissed for default as also RAE Suit No.1349 of 1995 filed against all the 16 tenants on the ground of carrying on alteration and additions which was dismissed in the year 1996. She further points out the admission of PW-1 that in RAE Suit No.854 of 2001, the plaintiff had admitted in his evidence given in the year 2008 that his present residential premises is sufficient to accommodate his family. She submits that DW-1 has deposed in a cross-examination that the plaintiff is having residential accommodation at Pune and also one room in the suit premises Chawl.

13. She points out that although the Appellate Court had refused permission to produce the documents while considering the effect the Appellate Court has erred in law in holding that the name of daughter in the share certificate would not make her the absolute owner. In support of her submission, she relies on the decision in the case of Vasant Mahadeo Gujar v. Baitulla Ismail Shaikh [2016 (4) All MR 174], and decision in the case of Sanjay\ Kumar Singh vs. State of Jharkhand [(2022) 7 SCC SC 247].

14. Per contra, Mr.Thorat, learned counsel appearing for the Respondent submits that the plaintiff has established a genuine and bonafide need for the suit premises, as the current residence of the plaintiff is a tenanted premises consisting of two rooms in which the plaintiff is residing alongwith his wife, two sons and two daughters, out of which one of the daughter is married. He submits that as regards the comparative hardship, greater hardship would be caused to the plaintiff inasmuch as, a suit for eviction is pending against the plaintiff and the plaintiff, who is the landlord cannot be expected to live in tenanted premises while having ownership accommodation of his own. He submits that the Will of the defendant's mother is of the year 2008, whereas the suit is of the year 2001 and it is apparent that the same has been prepared only for the purpose of raising a defence in the suit for eviction. He submits that the share certificate has been issued in the name of the sister-in-law in the year 2006 and that apart from the original defendant, there was one brother, who had expired and the three sisters are married. He submits that it is established beyond doubt that there is non-user of the premises as the suit summons was served on the address of Highland Court, as well as the death certificate shows the address of the Highland Court as the address of the original-defendant. He submits that the

documents which are now sought to be produced does not satisfy the requirement of Rule 27 of Order XLI of the CPC.

15. Considered the submissions and perused the record.

16. Firstly, I would deal with the Interim Application filed under Order XLI Rule 27 of the CPC seeking to produce additional documents viz: Will of the deceased mother-in-law, the letter of Highland Court Society stating that the Defendant is not a member and resident of the Society and the electricity bills of the suit premises for the relevant period i.e. 2nd May, 2001 to 2nd November, 2001. Before the Trial Court specific issue was framed as regards the non-user of the premises. The defendant did not produce the documentary evidence despite being called upon to produce during her cross-examination. Before the Appellate Court, the defendant filed two applications under Order XLI Rule 27 of CPC for producing additional documents. Even at that stage, these documents were not sought to be produced. The Appellate Court has specifically held that despite being called upon to produce electricity bills and other documents, the same was withheld by the defendant. In the decision in Sanjay Kumar Singh (supra), on which reliance is placed by learned counsel for Applicant, in the land acquisition matter, the High Court in appeal against the order of Reference Court refusing to enhance the compensation sought to produce certain documents relevant for purpose of fixing fair market value, which came to be refused. In that context, the Apex Court considered that there was no other evidence on record to arrive at fair market value and the additional documents have direct bearing. The Apex Court in that case noted the decision in the case of A. Andisamy Chettiar v. A. Subburaj Chettiar [(2015) 17 SCC 713].

17. In A. Andisamy Chettiar (supra), the Apex Court held in paragraph Nos.12 and 13 as under:

"12. From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved before the trial court seeking scientific examination of the document (Ex.A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him.

13. In K.R. Mohan Reddy v. Net Work Inc. [(2007) 14 SCC 257], the Apex Court held as under:

19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial Court, but it will be different if the Court itself require the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to

pronounce judgment satisfactorily to the mind of the Court. But mere difficulty is not sufficient to issue such direction.

18. It is clear from the enunciation of law in case of A.Andisamy Chettiar (supra) that the provisions of Order XLI Rule 27 of CPC cannot be invoked to fill in the lacunae at the appellate stage. This is precisely what the Defendant seeks to do by way of the interim application. As such I am not inclined to allow the production of additional documents.

19. Now coming to the facts of the present case, the suit has been decreed on the ground of bonafide requirement and non user of premises for continuous period of six months preceding the filing of the suit. As regards the bonafide requirement, the plaintiff has come with the case that he is living in a tenanted premises admeasuring 16x16 sq.ft. having two rooms on rental basis. That, the current residence is insufficient for him and his family members consisting of his wife, two sons and two daughters. Perusal of the pleadings indicates that the requirement is not only for plaintiff but also for his family members.

20. Section 16(1)(g) of the Maharashtra Rent Control Act, 1999, provides that the landlord shall be entitled to recover the possession of the premises, if the Court is satisfied, that the premises are reasonably and bonafide required by the landlord for occupation by himself or by any person, for whose benefit the premises are held. The Plaintiff has examined himself and deposed that his daughter Zabin is married and has two children and she requires a house since her in-laws family is big and living in a small tenanted premises. He has further deposed that his eldest son Javed is married and staying with them and his wife is pregnant and they have no privacy. He has further deposed that his third daughter Firoza is 25 years and youngest son Moin is 19 years and he is finding it difficult to find enough space for his studies. He has further deposed that he is residing in small hut admeasuring about 16x16 sqr.ft. having two rooms on rental basis and is also facing eviction proceedings.

21. In the cross-examination PW-1 has admitted about the previous suits filed against the tenants which have been dismissed. According to the learned counsel for Defendant, the admission indicates that the requirement for personal use is fictitious and not bonafide. In my view, the filing of the previous suits against the tenants on ground of bonafide requirement cannot be termed as malafide only for the reason that it was filed against all the tenants. There is no documentary evidence as regards the pleadings in those suits to indicate the requirement pleaded in those proceedings.

22. PW-1 has admitted that in RAE Suit No.854 of 2001 he has admitted in the cross-examination that the present residential premises is sufficient to accommodate his family. Again there is not documentary evidence to indicate in what context the admission was given. The bonafide requirement in the instant case has to be adjudged on the basis of the evidence adduced herein. A stray admission in other proceedings cannot be taken as fatal to the case of the

Plaintiff, if he has succeeded to establish his case of bonafide requirement in the present case.

23. The Trial Court on the basis of the documentary evidence i.e. the certified copy of the plaint in SC suit No.3592 of 1994 has come to a finding that the plaintiff is residing in a hut admeasuring 12 x 20 sqr.ft. on rental basis. In the cross examination, there is no challenge to the deposition of the Plaintiff as regards the growing need of his family members and the details of his current residence. The evidence adduced by the plaintiff proves that in area admeasuring 240 sqr.ft. about six people are residing including a married couple and grownup children. It is therefore established that for the growing need of the family, the suit premises is required which is a genuine, bonafide and reasonable requirement. It cannot be expected that the landlord despite having his ownership premises be forced to live in a rented premises of 240 sqr.ft. alongwith with his son, pregnant daughter in law and two grown up children especially with the sword of eviction hanging over his head in respect of the rented premises. The need to reside in his ownership premises can only be termed as reasonable and bonafide.

24. The subsequent event of obtaining possession of one room was brought on record during the appellate proceedings which has been explained by the plaintiff stating that the room has been given to his married daughter, who lives there alongwith her two sons. In the affidavit of evidence itself, the requirement of his married daughter was deposed and as such, at the most the possession of the room can be said to have satisfied the need of the married daughter whereas the need for the Plaintiff and the other family members survives. In any event, the landlord is the best judge of his requirement and it is for the landlord to choose the accommodation which will best suit his purpose.

25. In this context it will be beneficial to refer to the decision of the Apex Court in case of Shiv Sarup Gupta vs. Dr Mahesh Chand Gupta, reported in (1999) 6 SCC 222 (supra), where the Apex Court has held in paragraph no.13 thus;

"13. The phrase "required bona fide" is suggestive of legislative intent that a mere desire which is outcome of whim or fancy is not taken note of by the Rent Control Legislation. A requirement in the sense of felt need which is an outcome of sincere, honest desire, in contradistinction with a mere pretense or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejection of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of the landlord and its bona fides would be capable of successfully withstanding the test of objective determination by the Court. The Judge of facts should place himself in the armchair of the landlord and then asked the question to himself – whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bonafide. The failure on the part of the landlord to substantiate the

pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretense or pretext for getting ride of the tenant, would be enough to persuade the court certainly to deny its judicial assistance to the landlord. Once the court is satisfied of the bonafides need of the landlord for premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited for the purpose; the court would not in such a case thrust its own wisdom upon the choice of the landlord by holding that not one but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the concept of bonafide need and genuine requirement needs a practical approach instructed by realities of life. An approach either too liberal or too conservative or pedantic must be guarded against."

26. Now coming to the aspect of comparative hardship, the settled position is that the burden is upon the landord to prove the issue of bonafide and reasonable requirement and the burden is upon the tenant to prove the issue of comparative hardship. In the present case, the burden cast upon the Plaintiff has been discharged. As regards the comparative hardship, DW-1 has deposed she does not have any alternate accommodation and is financially incapable of purchasing another accommodation. In the cross examination, suggestion was given that the tailoring shop of her husband has been sold by her and her mother in law. DW-1 has admitted that the tailoring shop was sold in the year 2009. DW-1 was called upon to produce her bank pass book, which she has failed to do. As such the Appellate Court has rightly drawn adverse inference against the Defendant. DW-1 has admitted that she has not taken any efforts to search other premises after institution of the suit, which is sufficient to tilt the balance of comparative hardship against the tenant.

27. In the cross examination, suggestion was given to PW-1 that he is an affluent person. It is settled that affluence of the landlord cannot be the sole aspect to answer the issue of comparative hardship against him. The landlord has established that he is residing in a rented premises in respect of which eviction proceedings are pending. On the other hand, the Defendant claims to be financially incapable of purchasing another premises. However, she has admitted that she has not made any efforts to search for alternate premises.

28. In the case of *Suhasini Atmaram Parab vs B.H. Khatu & Ors.* reported in 2003 (1) Bom. CR 733, this Court held in paragraph 5 as under:

"5.On the other hand, the tenant has not only to plead but, also prove the fact that it is impossible to get any other alternative accommodation in the city. If the tenant fails to do so, the issue will have to be answered against the tenant..... The Court has to take into account all the attending circumstances

and if the tenant has failed to plead and prove the fact that it is impossible to get alternate accommodation in the same locality or for that matter, in the same city, then the issue will have to be answered against the tenant. Besides, the respondent No. 1 tenant was obliged to establish that during the long drawn pendency of litigation just as this case since 1973, he made sincere attempt to secure alternative accommodation and was unable to get it. In other words, the tenant cannot remain idle, awaiting for the result of the suit. In the case of Narayan Patil (supra) this Court has observed that the landlord cannot be forced to live in an inhuman condition only because the tenant may suffer decree of eviction. In that case, the Court took into account that even after the decree was passed by the trial Court and, five years had lapsed thereafter, by no stretch of imagination can it be said that such time was not sufficient for the tenant to secure alternative accommodation further when hardship was to be caused to both then there can be no reason why the landlord should be deprived of the decree."

29. The case of the Defendant is that greater hardship will be caused to her as she does not have alternate premises. As far as the premises at Highland Court is concerned, according to the Defendant, the premises were owned by her mother in law and has been bequeathed to her sister in law. The trial Court noted that the suit summons was served on the original defendant at Highland Court building, the Death Certificate of original Defendant shows the address of Highland Court as the address of the deceased defendant and that the voters list at Exhibit 34 and Exhibit 35 mentions the name of the original Defendant as well as the present Defendant at Highland Court building. Based on the documentary evidence which has come on record, the trial Court has come to a finding that the defendant is having alternate residential accommodation on Highland Court building. The Trial Court has rightly appreciated the documents and arrived at correct finding as to the alternate residential accommodation.

30. It will be relevant to note that in Mohd. Ayub and Anr. vs. Mukesh Chand, reported in (2012) 2 SCC 155, the Apex Court has observed that whenever the tenant is asked to move out of the premises such hardship is inherent. But the hardship the landlord would suffer by not being able to occupy their own premises despite reasonable and bonafide requirement would be far greater than the hardship likely to be suffered by the tenant for having to move out another place.

31. Having regard to the discussion above, in my view, the Trial Court and the Appellate Court has rightly answered the issue of comparative hardship in favour of the plaintiff.

32. As regards the non-user of the premises, the trial Court has considered the service report of suit summons, the death certificate as well as the voter's list to arrive at a finding that the suit premises is not used for period of six months. As a specific issue was raised as regards the non-user of the premises, it was expected of the defendant to produce on record substantial evidence to indicate

that the suit premises were being used by the defendant during the prescribed period of six months. By producing the documentary evidence in the form of the voters list as well as the death certificate and the plaintiff had discharged his burden and the onus has shifted upon the defendant to show that she was residing in the suit premises. Having failed to do so, the trial Court has rightly answered the issue against the defendant. The Appellate Court considered that the relevant period for non-user is the period between 2nd May, 2001 to 2nd November, 2001 and also considered that the defendant was called upon to produce the electricity bill, election identity card and bank passbook which has not been produced by the defendant and as such, adverse inference is required to be drawn. The Appellate Court considered that the documentary evidence produced by the defendant would not prove that the original defendant was using the premises between the 2nd May, 2001 and 2nd November, 2001. As discussed above, I am not inclined to consider the additional documents sought to be produced before this Court. Considering the evidence on record, there is no infirmity in the findings of the Trial Court and Appellate Court.

33. As regards the decision in the case of Vasant Mahadeo Gujar (supra) is concerned, the decision was relied upon to submit that the landlord is having other premises and there are no need for dispossessing the Defendant. In the instant case, as regards the possession of other room, the suit was decreed in 2010 and possession was acquired in 2013 after decree of trial Court in instant case. As such, it was subsequent event which was brought on record and considered by the Appellate Court. The Appellate Court considered the explanation tendered by the Plaintiff that the other room is given to his married daughter, whose need was already pleaded in the plaint.

34. From the material which has come on record the trial Court and the Appellate Court has rightly held that the plaintiff has established his bonafide requirement and has answered the issue of comparative hardship against the tenant. It needs to be noted that the revisional jurisdiction of this Court under Section 115 of the CPC has been invoked which has a limited scope and the reappraisal of the evidence is only for the purpose of ascertaining that the conclusion arrived at by the fact finding Court does not suffer from any perversity. In exercise of the powers under Section 115 of the CPC, it is not expected of this Court to interfere with the finding of the fact merely because it does not agree with the finding. Having gone through the material on record, in my view, the order of the trial Court and the Appellate Court does not suffers from any illegality or jurisdictional error while decreeing the suit for eviction. As such, no case is made out to interfere with the concurrent findings.

35. Having regard to the discussion above, the Civil Revision Application is dismissed. The Applicant is given three months' time to vacate the premises. In view of the dismissal of the Revision Application, Interim Applications do not survive and stand disposed of.