

(2000) 01 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 1436 of 1997

Miss Lily Gomes and Others

APPELLANT

Vs

Shri Francis Fernandes

RESPONDENT

Date of Decision : 31-01-2000

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13
Constitution of India, 1950 — Article 227

Citation : (2000) 102 BOMLR 27

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

J.A. Patil, J.—By this writ petition under Article 227 of the Constitution of India, the Petitioner have impugned the Order dated 29.8.1996 passed by the lower Appellate Court in Appeal No. 103 of 1996, whereby the respondent's appeal was allowed and decree of possession passed by the trial Court on 2.2.1996 in R.A.E. Suit No. 4526 of 1989 was set aside. Briefly stated, the relevant facts are as under:

2. The dispute between the parties relate to Room No. 4 forming part of a chawl known as Lily Gomes Chawl, situated at Andheri (West), Murnbai. The petitioners are the landlords and the respondent is the tenant in respect of the said premises. The plaintiffs filed a suit for recovery of possession in the Court of Small Causes of Mumbai on two grounds, namely, that the respondent had unauthorisedly and illegally constructed one room on the western side of the suit premises and, secondly, that the suit premises are reasonably and bona fide required by them for the purpose of demolition and erecting a new building. The defendant resisted the suit and denied to have made any construction upon the suit premises. As regards the second ground, the defendant contended that the plaintiffs requirement of the suit premises was neither bona fide nor reasonable and that the certificate obtained from the Tribunal was not legal.

3. The learned trial Judge, upon consideration of the evidence on record, came to the conclusion that the plaintiffs have failed to prove the first ground. However, he held that the plaintiffs have succeeded in proving the second ground. Consistent with this finding, the trial Judge passed a decree of possession in favour of the plaintiffs. In appeal, a Division Bench of the Small Causes Court took a different view and held that the plaintiffs requirement of the suit premises was not bona fide and reasonable. It was pointed out that the plaintiffs had already made over possession of the entire building to the builder during the pendency of the suit itself; demolished part of the building; made a new construction and sold the flats to others on ownership basis. The learned Appellate Court further held that the plaintiffs have failed to comply with the requirements of Sub-section (3A) of Section 13 of the Bombay Rents, Hotel and lodging House Rates Control Act, 1947 (for short, Rent Act). The Appellate Court, therefore, set aside the decree of possession passed in favour of the plaintiffs and dismissed the suit.

4. I have heard Shri K.A. Shah, the learned Counsel for the Petitioners Plaintiffs and Shri M.M. Vashi, the learned Counsel for the Respondent-Defendant. Shri Shah pointed out that the property in question still stands in the name of the Plaintiffs and that there has been no registered document of transfer in favour of the vendor. He further pointed out that the question as to from where the money for the proposed construction comes is not at all relevant. As regards the certificate of the Tribunal, Shri Shah pointed out that it is not necessary to produce the same at the time of the institution of the suit and that there is sufficient compliance of Sub-section (3A) in case such a certificate is produced airing the pendency of the suit. Shri Vashi, on the other hand, contended that there is absolutely no reason to interfere with the finding of fact recorded by the lower Court. He submitted that reasonable and bona fide requirement contemplated by Section 13(1)(hh) of the Rent Act is of the landlord himself and it is in relation to the date of the suit. Shri Vashi further pointed out that in the instant case, the Tribunal's certificate was not in existence on the date of the suit and that it was applied for and obtained much later.

5. The short question involved in this writ petition is whether the lower Appellate Court has committed any apparent error of law in setting aside the decree of possession passed by the trial Court in favour of the plaintiffs. It may be noted that Section 13 of the Rent Act entitles a landlord to recover possession of his premises on any of the grounds stated therein. However, it is necessary for him to satisfy the Court about the existence of such ground. In respect of certain grounds, the landlord is required to do something more than merely proving the existence of a ground on which the relief of possession is founded. The ground on which the trial Court passed a decree of possession in favour of the plaintiffs is one of such grounds. It will, therefore, be necessary to have a look at the said ground which is contemplated by Section 13(1)(hh) of the Rent Act.

It reads thus:

(hh) that the premises consist of not more than two floors and are reasonably and bona fide required by the landlord for the immediate purpose of demolishing them and such demolition is to be made for the purpose of erecting new building on the premises sought to be demolished.

Sub-section (3A) of Section 13 requires certain compliance to be done by the landlord without which no decree for eviction can be passed, Sub-section (3A) of Section 13 reads as under:

(3A) No decree for eviction shall be passed on the ground specified in Clause (hh) of Sub-section (1), unless the landlord produces at the time of the institution of the suit a certificate granted by the Tribunal under Sub-section (3B) and gives an undertaking -

(a) that the new building to be erected by him shall subject to the provisions of any rules, by-laws or regulations made by a local authority, contain not less than two times the number of residential tenements, and not less than two times the floor area, contained in the premises sought to be demolished,

(b) that the work of demolishing the premises shall be commenced by him not later than one month, and shall be completed not later than three months, from the date he recovers possession of the entire premises; and that the work of demolishing the premises shall be commenced by him not later than one month, and shall be completed not later than three months, from the date he recovers possession of the entire premises; and

(c) that the work of erection of the new building shall be completed by him not later than fifteen months from the said date;

Provided that, where the Court is satisfied that the work of demolishing the premises could not be commenced or completed, or the work of erection of the new buildings, could not be completed, within time for reasons beyond the control of the landlord, the Court may by order for reasons to be recorded extend the period by such further periods, not exceeding three months at a time as may, from time to time, be specified by it, so however that the extended period shall in each case not exceed twelve months in the aggregate.

6. There is no dispute of the fact that the chawl in question consists of not more than two floors and that the defendant is in possession of one of the rooms on the ground floor. According to the plaintiffs, they reasonably and bona fide require the suit premises for the immediate purpose of demolishing the same and that the said demolition was for the purpose of erecting a new building on the premises sought to be demolished. For this purpose, it was necessary for the plaintiffs to have produced a certificate granted by the Tribunal under Sub-section (3B) of Section 13 when they filed the suit. The plaintiffs filed the suit in December, 1989. The defendant filed his written-statement on 9.4.1990. The issues came to be framed on 21.7.1992. The certificate of the Tribunal was, however, produced on 9.2.1994 during the course of recording of evidence. In

fact, on a plain reading of Sub-section (3A), it would be seen that production of the Tribunal's certificate has to be produced at the time of the institution of the suit. In the instant case, the Tribunal's certificate was not even applied for when the plaintiffs filed their suit in December, 1989. The question which, therefore, arises is whether subsequent production of the Tribunal's certificate by the plaintiffs could be said to be sufficient compliance of the requirements of Sub-section (3A) of Section 13.

7. In this respect, Shri Shah relied upon the decision of a learned Single Judge in Sharangdhar Purshottam Kanherev. Sitaram Mahadeo Dabholkar 1997 (2) R.C.J. 321 wherein it was held that the provisions contained in Sub-section (3A) is not mandatory but directory. It was further held that if really the legislature had intended that the requirement of the said provision was mandatory, then the language used would have been that "no suit shall be maintainable without the production of the certificate granted by the Tribunal under Sub-section (3B) and the undertaking." It was further observed that what the legislature intended was that no decree shall be passed unless compliance of the provisions of Sub-section (3A) is made. A similar view was taken by another learned Single Judge of this Court in Kondiram Malhari Jadhav v. Bankai Swami Trust 1981 Mh. L.J. 921 wherein It was held that Sub-section (3A) comes into play only after the requirements of Section 13(1)(hh) are satisfied. It then lays down conditions for passing a decree for eviction and says that such a decree shall not be passed unless the landlord produces at the time of the institution of the suit a certificate granted by the Tribunal under Sub-section (3B) and gives an undertaking. It was, therefore, held that the stage at which this is to be done is at the time of filing of the suit, and, therefore, these two conditions must be satisfied and complied with at the time of institution of the suit. It was further held that the provisions of Sub-section (3A) are directory and not mandatory and that the stage at which the certificate of the Tribunal could be produced in any event, before the evidence is commenced. So that the defendant-tenant is well aware as in what case he has to meet with and the plaintiff can satisfy the Court that he proposes to comply with Sub-section (3A) and has also complied with Sub-section (3A).

8. In view of the above two decisions, there is no reason for taking a different view and to hold that the provisions of Sub-section (3A) of Section 13(1) is mandatory. Although, Sub-section (3A) requires production of the Tribunal's certificate at the time of the institution of the suit, still it does not say that no suit for possession on the ground specified in Clause (hh) shall be instituted or maintainable without production of such certificate. Sub-section (3A) does not appear to be happily worded, since it contains an inconsistency. However, the emphasis of the said sub-section is on the fact that the decree for possession shall not be passed unless the landlord produces the certificate granted by the Tribunal, Therefore, I am in agreement with the view taken by the learned Single Judges in the above-mentioned cases that the provisions of Sub-section (3A) of Section 13(1.) are directory and not mandatory.

9. However, it does not mean that a landlord can conveniently ignore or straightway flout the provisions of Sub-section (3A) merely because they are directory. The Court will never allow countenance of the said stand and would always insist on due and proper compliance even though the provision may not be mandatory. In *Sharangdhar Purshottam Kanhere v. Sitaram Mahadao Dabholkar's* case (supra), the facts were that the landlord wanted possession of his premises from several tenants as he wanted to put up a new construction on the same site. Accordingly, before filing the suits against the tenants, he obtained from the Tribunal the necessary certificate. He filed in all nine suits against nine tenants and produced the Tribunal's certificate in only one suit. He did not produce the Tribunal's certificate in only one suit. He did not produce any copy of the said certificate in other eight suits. The trial Court decreed all the suits, but the Appellate Court was pleased to allow the appeals filed by the tenants on the ground that in respect of six appeals there was no compliance of the provisions of Sub-section (3A). The facts of the said case show that there was technical non-compliance of the provisions of Sub-section (3A). Although the Tribunals' certificate was obtained before filing the suits, the same was produced in only one suit. It was in these peculiar facts of the case that the landlord was held to have complied with the requirement of Sub-section (3A).

10. In *Kondiram v. Bankat Swami Trust's* case (supra), the Tribunal's certificate came to be filed after the arguments were heard by the trial Court. Moreover, the said certificate was not proved. Besides, there was no undertaking given by the landlord, as required, It was, therefore, held that there was total failure to comply with the provisions of Sub-section (3A) and, therefore, the decree of possession was set aside. The facts in the instant case clearly show that the plaintiffs disregarded the statutory requirement of Sub-section (3A) and proceeded to file the suit for possession on the ground contemplated by Clause (hh) of Section 13(1) of the Rent Act. As pointed out above, they had not even applied for the Tribunal's certificate on the date of the suit and it came to be obtained four years thereafter. The plaintiffs power of attorney holder admitted in the trial Court that before obtaining the certificate, the Tribunal was not informed about the pendency of the suit against the tenant. He admitted that the building was already demolished and reconstructed before the certificate from the Tribunal was obtained. In this view of the matter, it cannot be said that the plaintiffs have complied with the provisions of Sub-section (3A). Therefore, no fault can be found with the finding recorded by the learned trial Judges that the plaintiffs have failed to comply with the requirement of Sub-section (3A).

11. Coming to the question of plaintiffs' requirement of the suit premises, it must be shown that the said requirement is reasonable and bona fide and it is for the purpose of demolishing the premises and that the demolition is to be made for the purpose of erecting a new building on the same site. The Appeal Court has found upon basis of the evidence that the requirement put forward by the plaintiffs is not their own requirement but it is the requirement of their builder. The conclusion drawn by the Appeal Court is fortified in view of certain material

brought on record. The evidence of the plaintiffs power of attorney holder Khimji Bhanji Kangar as well as the document of the power of attorney on record show that the plaintiffs have entered into an agreement with their builder and agreed to give him on lease the entire property. The Appeal Court has further pointed out that the references in the deeds of power of attorney clearly show that the builder was allowed to develop and reconstruct the entire property and dispose of the same by executing conveyance deeds. The plaintiffs, however, did not produce the said deeds nor any of them stepped into the witness-box to state the true facts in respect of the transaction entered into with the said builder. The lower Appellate Court has pointed out on the basis of evidence that the new construction comprises of two wings- "A" and "B" and in each wing, there are 29 tenements as against 13 in the old building. However, in "A" Wing, only 9 flats could be constructed, while the remaining could not be constructed as the defendant and other tenants refused to vacate their respective premises. On the basis of all these facts, the lower Appellate Court has come to the conclusion that it is not the plaintiffs who are constructing the building but their builder who is constructing the same and that the plaintiffs have already made over the entire building to the said builder. It will thus be seen that the requirement pleaded in the plaint by the plaintiffs is not their own requirement but the requirement of their builder who has been authorised to reconstruct the flats and sell the same for consideration.

11. In this connection, reference may be made to the decision in Ramnikal Pitambardas Mehta Vs. Indradaman Amratlal Sheth, wherein it was held that the provisions of Clause (hh) of Section 13(1) apply to cases" where the landlord does not require them for erecting a new building which is to be let out to tenants. This is clear from the provisions of Sub-section (3A) which provide that a landlord has to give a certificate or an undertaking before a decree for possession can be passed on the ground specified in Clause (hh). The Supreme Court, therefore, held that the provisions of Clause (hh) apply when the landlord desires to demolish the premises for the purpose of erecting a new building on the premises for being let out to the tenants. In the instant case, the premises which are already reconstructed and the premises which have remained to be constructed are not intended to be let out to the same tenants. It was admitted before me by the learned Counsel for the petitioners that the builder had already sold the flats to some of the tenants. It will thus be seen that the Lower Appellate Court was quite right in coming to the conclusion that the plaintiffs have failed to prove their requirement of the suit premises and much less than it is reasonable and bona fide,

12. In this view of the matter, I am of the opinion that the Lower Appellate Court was quite right in dismissing the plaintiffs claim for possession of the suit premises and that there is absolutely no illegality or any error on its part so as to warrant any interference by this Court in the exercise of its writ jurisdiction. There is no merit in this writ petition and the same is, therefore, dismissed with costs. Rule is discharged.