

(1998) 01 BOM CK 0042

In the Bombay High Court

Case No : Writ Petition No. 3189 of 1989

Netram Ganpat Ingale deceased through his L.Rs.

APPELLANT

Vs

Baliram Vyankat Mistri and another

RESPONDENT

Date of Decision : 22-01-1998

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 25, 4

Constitution of India, 1950 — Article 226, 227

Citation : (1998) 3 ALLMR 424 : (1998) 3 BomCR 343 : (1998) 3 MhLj 667

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : S.C. Bora, for the Appellant; R.G. Karmarkar, for the Respondent

Judgement

B.H. Marlapalle, J.—Petitioner Netram Ganpat Ingale was a tenant of house located on Municipal Plot No. 170, City Survey No. 1847-B/1, Bhavanipeth Jalgaon, of which one Mrs. Kantabai Tatyaba Hazare was the original landlady. One Dattraya Hazare sold the said house to the present respondents sometime in the year 1975. The respondents were in business even prior to 1975, of sewing machine repairs in the adjacent lane which was also a rented premises. The suit premises were taken on lease by the defendant from the original landlady without executing any lease agreement and the defendants continued as tenants in the same way even after plaintiff purchased it. The suit premises consist of 1 room of 171/2 ft. X 151/2 ft. with a toilet block on the ground floor and two rooms and a kitchen on the first floor. Defendant was paying a rent of Rs. 27.50 p.m. and the tenancy was as per the English Calendar month.

2. On 7-8-1977 the plaintiffs issued a legal notice to the defendants to vacate and handover the premises, on the ground that the said premises were required by plaintiffs for starting/increasing their business of sewing machine repairs and sale and that the existing premises in their possession were inadequate. The said notice was replied to by the present defendant on 8-9-1977 through their

advocate, denying the contention of the plaintiffs. The defendant had also stated that the notice was not bona fide.

The plaintiffs, therefore, filed Regular Civil Suit No. 550/1977 in the Civil Court at Jalgaon. By an order dt. 28-11-1980 the suit was decreed. The defendant, therefore, filed Civil Appeal Bearing No. 334/1980 before the District Court, Jalgaon and that appeal was also dismissed by an order dt. 14-12-1982 and the defendant was directed to handover the possession of the suit house to the plaintiffs within two weeks from 14-12-1982.

3. Being aggrieved by the orders passed by the courts below, the petitioner filed Writ Petition No. 356/1983 at Mumbai and subsequently, the petition came to be transferred to this Bench and re-numbered as Writ Petition No. 3189/1989. During the pendency of this petition, the defendant Netram died and his L.Rs. have been brought on record as petitioner Nos. 1 to 9. Petitioner No. 4 also died and his L.Rs. have also been brought on record as petitioner Nos. 4(a) to 4(d).

4. During the pendency of this petition, the defendants have filed Civil Application Nos. 2601/1991 and 5375/1997, contending that in view of the subsequent events, the need or requirement of the plaintiffs for the suit premises no more existed and it was now well settled that when an action is brought by landlord for the eviction of tenant on the ground of personal requirement, the landlord's need must not only exist on the date of the suit, but it must also exist till the decree of the High Court which deals with the matter. It is further stated that during the pendency of this petition subsequent events would not suit the landlord and the decree was, therefore, required to be moulded accordingly. In both the civil applications an attempt has been made to show that the present respondents have developed and constructed some buildings, more particularly at Survey No.147/1-B and Plot No. 16, and Gat No. 176 situated at Shankarnagar, Jalgaon. It is further stated that respondents have purchased a house which is registered in the name of one Purshottam, brother of respondent No. 1 and Suman Madhukar, widowed sister-in-law of respondent No. 1 and that the respondent No.1 is presently residing in the same House No. 204 at Bhavanipeth, Jalgaon. In support of this contention, learned Counsel has also annexed photographs and extracts of property rights.

5. The respondents have filed reply opposing both the civil applications. Contentions raised by the petitioners have been denied and receipt dt. 1-10-1993 has been brought on record to show that the respondent No.1 is a tenant in House No. 204, Bhavanipeth, Jalgaon. A copy of agreement dt. 25-2-1994, executed between Vijay Netram Ingale and Ajantha consultants, has been brought on record to show that the petitioner No. 6 has purchased a flat admeasuring about 58 sq. mtrs. consisting of one living room, kitchen, bedroom, bathroom and laterine, etc. In addition, a xerox copy of licence renewed on 11-9-1979 under the Bombay Shops and Establishment Act, 1948, (hereinafter referred to as the Shops Act) bearing Registration No. 2677 has also been brought on record. The said certificate is issued in the name of original

defendant, stating that he was carrying on the business of welding and carpentry on Plot No. 170, Bhavanipeth, Jalgaon, with earlier Registration No. 8801 and the said Registration Certificate indicates that it was valid till 1987.

6. Learned Counsel appearing for petitioners have raised a preliminary point of law, stating that the trial Court ought to have framed preliminary issues regarding the use of suit premises in as much as whether the premises were being used for residential purposes or for residential as well as business purposes and this failure on the part of the trial Court has resulted in a major illegality and miscarriage of justice. The learned Counsel for respondents submit that if this issue was framed and answered in favour of the defendants, the bar of section 25 of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 would have operated against the plaintiff and the suit was liable to be dismissed on that ground alone.

7. The challenge to the impugned order is that both the courts below, while recording findings regarding bona fide requirement and comparative hardship recorded perverse findings and petitioner has made out a case for interference by this Court under its writ jurisdiction. Subsequent developments brought on record by way of civil applications, as referred to hereinabove, indicate that plaintiffs no more required the suit premises and these events go against the plaintiffs claim. The last limb of argument by the learned Counsel for petitioner is that the widow of late Netram, his three sons and widow of Bhaskar Ingale are staying in the suit premises and comparative hardship is in favour of the same petitioners and not in favour of plaintiffs.

8. To decide the preliminary point of law, raised by learned Counsel for the petitioner, it is pertinent to note that the trial Court had framed issues and it does not appear from the order passed by the same Court that at any point of time defendant had prayed for preliminary issue being framed and decided by the trial Court. No doubt, in para 5 of the written statement such contention has been raised but subsequently, it is clear from the records that no efforts have been taken by the defendant to press the point regarding maintainability of the suit. The defendant was free to apply for the appointment of Commissioner and press before the Court the actual usage of the suit properly viz. whether suit premises were being used for residential purposes or for business purpose or for both. When the defendant raises an issue for opposing the suit, it was the responsibility of the defendant to take steps to bring evidence in support of such a contention. In addition, it is pertinent to note that in reply to the legal notice dt. 8-9-1977, the defendant clearly stated that the suit premises were being used mainly for residence and business. Same contention has also been repeated in the written statement. When the defendant was in witness box, he has admitted in his cross examination as under :

"I prepare furniture in the suit house but I do not sell it there. I used to supply furniture on tender to Zilla Parishad and Government. I accept each tender for Rs. 15,000/-. I have no agreement that I obtain the suit house for only residence

and there is no such mention on rent receipts. I used to accept contracts of building construction. I accepted contract for construction of S.T. Depot for Jalgaon for Rs. 2,00,000/-."

9. In addition the registration certificate renewed in 1979 under the Shop Act also eloquently suggests that the defendant was carrying out business of welding and carpentry from suit premises. The oral and documentary evidence brought on record clearly proves that the suit premises were being used both for residential as well as business purposes and therefore, contention of the learned Counsel for the respondents deserves to be accepted in as much as when the premises are being used for dual purposes and not exclusively for residential purposes, the bar of section 25 of the Act will not operate. The trial Court's findings on this issue, therefore, deserve to be confirmed. Petitioners reliance on a judgment of this Court in case of Laxmibai Co-operative Bank Ltd. 1997(74) Bom.L.R. 186 does not support their claim because that case dealt with a point of change of use i.e. from commercial or business to residence and the point of dual use i.e. residential and business was not under consideration in the said case. The trial Court, therefore, rightly held that the suit premises were occupied by the defendants for residential and business purposes and there was no change in the use of the suit premises.

10. On the point of bona fide requirement both the courts below have given concurrent findings that the plaintiffs required the premises for business purposes and the need was bona fide. The learned Counsel for the petitioners, relying upon a recent judgment of the Supreme Court in the case of Achutananda Baidya Vs. Prafulla Kumar Gayen and others, , urged that there are serious errors on this issue of bona fide requirement and this Court should exercise its writ jurisdiction to interfere with the findings. On the other hand learned Counsel for the respondents has relied upon a judgment of the Apex Court in the case of AIR 1975 1297 (SC) , L.R. Bhojwani & another v. P.M. Pardeshi, reported in 1996(1) Mh. L.J. 507 and a recent judgment of the Apex Court in the case of Kanta Udharam Jagasia (Miss) Vs. C.K.S. Rao, and submitted that the scope for interference, under Article 226 and 227 of the Constitution of India, is limited and unless the findings recorded by the courts below are patently illegal or perverse there is no occasion for this Court to interfere with the findings recorded by the lower courts. The learned Counsel for the respondents further submitted that if the lower courts have taken one view which is possible, that itself does not warrant interference by the High Court. There is no dispute that both the courts below have recorded concurrent findings on the issue of bona fide requirement of the suit premises by the plaintiff for their business purposes. The purpose for which the suit premises were required by the plaintiff has not been seriously disputed and the intention of the plaintiff to expand their business in larger premises has also been duly established before the trial Court. The plaintiff have been in the business of repairing sewing machine and they required the suit premises for expanding to said business, including the sale of such machines, which was a related business to their earlier

business. The reasoning given by the trial Court is just and proper and the Appellate Court has rightly confirmed the said finding. No case is made out to interfere with the concurrent findings recorded by both the Courts below as the said findings cannot be dubbed as erroneous leave alone patently erroneous or illegal.

11. On the issue of comparative hardship, the trial Court held that both the plaintiffs as well as defendants suffered equal hardship. Learned Additional District Judge has rightly discussed and analysed the evidence brought on record before the trial Court and come to the conclusion the plaintiffs would suffer greater hardship in case decree for possession was refused. The learned District Judge also considered the fact that defendant had started construction of his own plot where his two sons were residing and that the defendant is a big contractor, he could afford a suitable accommodation. The lower Appellate Court has also gone into details regarding efforts taken by the plaintiffs to look and identify suitable premises on rent being made available to the defendant. Both the courts below have also examined the financial capability of the defendant who was a contractor and a tax payer at the relevant time. A perusal of the Appellate Court's Order dt. 14-12-1982 fully justifies the finding that greater hardship would cause to the plaintiffs if decree of eviction was refused to them and the said finding do not suffer from any errors apparent on the face of record or the said findings cannot be held to be without any evidence.

12. Much has been made out regarding subsequent developments i.e. alleged construction of buildings by the plaintiffs during the pendency of this petition. The learned Counsel for the petitioners vehemently argued before this Court that subsequent events which non suit the plaintiffs or plaintiffs requirement must be considered even by the Writ Court while deciding the writ petition and if such subsequent events make out a case that the requirements of plaintiff's no more exist, the suit will have to be rejected and the decree passed against the petitioner will have to be reversed.

13. In this regard the learned Counsel for petitioner has relied upon the judgments of the Supreme Court in the case of Hasmat Rai and Another Vs. Raghunath Prasad, , in the case of Variety Emporium Vs. V.R.M. Mohd. Ibrahim Naina, , in the case of Govind Vs. Dr Jeetsingh, and in the case of Ansuyaben Kantilal Bhatt v. Rashiklal Manilal Shah and another, reported in 1997(4) Bom.C.R. 354: AIR 1997 S.C.W. 2452. The learned Counsel for the petitioner has also relied upon the judgments of this Court in the case of Abdul Rehman Khan Ismail Khan v. Smt. Indirabai R. Bapat, reported in 1980(2) RCJ 337 and in the case of Smt. Sugarbai Mohamad Siddiq and Others Vs. Ramesh Sundar Hankare deceased by LRs., . It will be appropriate to reproduce the observations of the Supreme Court in the case of Acchutrai (supra).

"When the matter was pending in appeal at the instance of the tenant, the landlord built a house or Bungalow which would fully satisfy his requirement if the subsequent event is taken into consideration, the landlord would have to be

non-suited. Can the Court shut its eyes and evict the tenant? Such is neither the spirit nor intent of Rent Restriction Act, which was enacted to fetter the unfettered right of reentry. Therefore, when an action is brought by the landlord under Rent Restriction Act for eviction on the ground of personal requirement, his need must not only be shown to exist at that date of the suit but must also exist on the date of the appellate decree or the date when a higher Court deals with the matter."

14. This ratio has been subsequently reiterated by the Apex Court in other cases relied upon by the learned Counsel for the petitioners. Similarly, two judgments of this Court cited above also support his contentions. While opposing these submissions, the learned Counsel for the respondents has relied upon a recent judgment of the Supreme Court in the case of Kamleshwar Prasad v. P. Agrawal, reported in A.I.R.1997 S.C.W. 2310 and more particularly, the following observation of the Apex Court:

"Under the Act the order of the appellate authority is final and the said order is a decree of the Civil Court and decree of a competent Court having become final cannot be interfered with by the High Court in exercise of its powers of superintendence under Articles 226 and 227 of the Constitution of India by taking into account subsequent event which have happened. That apart, the fact that the landlord needed the premises in question for starting a business which fact has been found by the Appellate Authority, in the eyes of law, it must be that on the day of application for eviction which is the crucial date, tenant incurred the liability of being vacated from the premises."

15. The learned Counsel for petitioners urged that the above observation made in Kamleshwar case (supra) are limited to the facts in the case alone and these observations cannot be treated as a general law enunciated by the Apex Court.

16. Be that as it may, in the present case, it is the contention of the petitioners that the respondents have subsequently constructed buildings and also acquired a flat. The documents in support of the purchase of the flat as brought on record, clearly indicate that the flat is not purchased in the name of the present respondents. Regarding construction of the plot, the respondents have given a detailed reply and clearly stated that they have nothing to do with these buildings and they do not own any of these buildings or any part thereof or any shop located in these buildings. The land at Survey No. 147/1-B was transferred by way of gift deed dt. 27-8-1996 i.e. when the dispute was pending before this Court and the family members in whose favour the plot was transferred have subsequently borrowed money from the persons whose names have been stated in the affidavit and they have constructed four shops and not eight shops, as stated in the civil application by the petitioners. The reply filed by the respondent to both the civil application shows that the contentions raised by the petitioners have been disputed and an unambiguous declaration has been made that they do not own any flat or shops anywhere in Jalgaon and that they are presently staying as tenants in House No.204 in Bhavanipeth, Jalgaon. When subsequent events

which have been brought on record are disputed, there is no necessity to consider such subsequent events that have taken place during the pendency of the present petition and the authorities relied upon by the learned Counsel for the petitioners are not applicable in the instant case. Therefore, the submissions to reject the claim of the respondents on the basis of the alleged subsequent events are devoid of merits.

17. The learned Counsel for the petitioners urged before this Court to remand the matter for fresh trial on this point of disputed facts regarding subsequent events during the pendency of this petition. The learned Counsel for respondents has opposed this plea and stated that already the respondents have waited for twenty long years and the trial must receive a finality rather than keeping the plaintiffs waiting for a final decree in their favour. Such a course of action of remanding the matter for fresh trial would cause a serious prejudice as well as injustice to the plaintiffs and even otherwise original defendant had also acquired property viz. a flat admeasuring about 58 sq. mtrs. and he had constructed a building. Therefore, equity does not warrant that case is remanded to the trial Court for fresh consideration urged the learned Counsel for respondents. The submissions made by learned Counsel for respondent deserve to be accepted. It will be appropriate to refer to the judgments of the Supreme Court in the case of Vijaykumar Suganchand Jain and Others Vs. V. Pannalal Jaydeo Agarwal and Another, . The relevant observations of the Apex Court read as under:

"We are of the view that the stand taken by the appellants and their predecessor has not been properly appreciated and perhaps if the matter goes on remand, a different view could be taken. The suit itself instituted in 1973 is still pending and if we direct remand it would take many more years to close. Taking the special facts into consideration, the interpretation given by this Court to the provision of Section 4 of the Act and taking a broad view of the matter, instead of directing remand we think it appropriate to dispose of the appeal by holding that for the ends of justice the appellants should have a declaration of tenancy over one acre of land out of the disputed property."

18. There is no merit in the contentions that three members of the petitioner's family are presently occupying suit premises and if they are evicted they will be on the street. There is no case made out to accept this plea at this belated stage and hence, the same is rejected. Both the courts have assessed oral as well as documentary evidence, applied their mind and recorded a concurrent finding on the issue of bona fide requirements and comparative hardships are more to the respondents. The findings do not require any interference under Articles 226 and 227 of the Constitution of India and therefore, the petition must fail.

19. In the result, the petition is dismissed without any order as to the costs and Rule is discharge. The interim order dt. 8-2-1983 stands vacated. The petitioners are directed to vacate and handover peaceful possession of the suit premises to the respondents within a period of two months from today.

20. Petition dismissed.