

(1974) 06 BOM CK 0006
In the Bombay High Court
Case No : Spl. C.A. No. 278 of 1973

P.A. Machiah

APPELLANT

Vs

Champaklal Nagindas and another

RESPONDENT

Date of Decision : 25-06-1974

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (1975) MhLj 238

Hon'ble Judges : V.S. Deshpande, J

Bench : Single Bench

Advocate : V.V. Albal, for the Appellant; M.A. Rane with M.G. Choudhari, instructed by Ramanlal Varjivandas and Company, for the Respondent

Judgement

V.S. Deshpande, J.—Respondent-landlord is the owner of the building at 130, Shivaji Park, Bombay. It is a three storied building consisting in all of six flats. One flat on the top floor is occupied by the landlord himself, while another flat on the first floor is in possession of the tenant. Landlord's suit for possession of the flat in possession of the tenant has been decreed concurrently by both the Courts holding that his need of the flat for his growing family was reasonable and bona fide and greater hardship would be caused by not passing a decree of eviction in his favour. The tenant challenges the legality of this decree for eviction in this petition under Article 227 of the Constitution.

2. Undisputable facts show that accommodation in the flats occupied by the landlord and the tenant is almost identical and consists of a kitchen of 10" x 10", a bed-room of 10" x 12"; and a hall of 10" x 12", in addition to a water closet and the bath-room, each flat covering roughly an area of 375 square feet. The landlord's family consists of himself, his wife, two grown up sons of marriageable ages and a daughter and a permanent servant. The tenant was an officer in the Western Railways and has retired in or about the year 1961. He was residing in the flat with his three sons. The tenant has now constructed a bungalow at his native place at Coorg, where he stays with his wife. His two married sons have

shifted to a flat at Bandra covering an area of 1,000 square feet since May, 1965. The third son is married in the month of November or December, 1966, i. e. a few days before this suit was instituted on January 17, 1967. He is employed as a purser in Air India and is required to be abroad for days together in connection with his duties, when his wife stays with her parents. According to the tenant, the flat is still required by him for his residence, when he returns to Bombay occasionally and also for the residence of his third married son Prakash.

3. During the pendency of the appeal an affidavit was filed by the landlord indicating that one of the two sons of the tenant residing at Bandra flat has now acquired another flat and is staying separately with his wife and the eldest son has vacated the said Bandra flat and has accommodated one Iyer in the same. In the affidavit in reply filed by Prakash these facts are not disputed, though need for the flat for his own residence is reiterated.

4. Mr. Albal, the learned advocate appearing for the tenant, contends that the trial Court failed to comply with statutory obligation to decide if the requirements of the landlord could have been satisfied by a part of the premises only, viz. the hall, and allowing the tenant to retain the kitchen and the bedroom without causing any hardships to either of them. He, secondly, contends that the Appellate Bench, at any rate, ought to have decided this issue or have remanded the case for trial thereof, if material on record was insufficient therefore, particularly when the tenant had offered before it to be content with the retention of kitchen and bed-room alone.

5. Now, it does not appear that any such plea was raised by the tenant either in his pleadings, evidence or even in arguments, at any stage of the trial. The question whether decree for partial premises can satisfy the requirements of the landlord without causing hardship to him or the tenant cannot admit of decision without some foundation in evidence, if not in pleadings. Ordinarily it must be left to the parties to choose what to plead, prove or urge and how to advance their cause. They alone know their difficulties, their needs, the strength or weakness of their pleas and the material at their command. All that is left to the Court is to decide the issues so raised on the material so produced. It is not proper or even advisable for any Court to decide any question of its own, unless it happens to be a statutory preliminary issue such as conceived under the Partnership Act or Tenancy Act, etc. or it feels impelled to do so by the equities of a given case without causing any prejudice to anyone. Failure to try or decide any issue not raised or urged in the case cannot amount to an error on the part of the Court.

6. Mr. Albal, however, relies on section 13 (2) of the Rent Act and contends that, latter part of it makes it so obligatory on the Court also to find if a partition of the premises would satisfy the landlord's need. Section 13 (2) of the Rent Act is as follows:

"(2) No decree for eviction shall be passed on the ground specified in clause (g)

of sub-section (1) if the Court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant greater hardship would be caused by passing the decree than by refusing to pass it.

Where the Court is satisfied that no hardship would be caused either to the tenant or to the landlord by passing the decree in respect of a part of the premises, the Court shall pass the decree in respect of such part only"

This sub-section deals with the question of comparative hardships. Opening words of this section indicate the extent of their mandatory character. The provision consists of two parts. First part prohibits the Court from passing decree, proof of bona fides and reasonableness of the claim notwithstanding, if it is likely to result in greater hardship to the tenant. Second part enables the Court to pass decree only for a portion of the premises, if the same does not result in hardship to either. The Court would not be able to pass a decree for eviction without weighing hardships of the parties, in either of these contingencies. Recording of a finding u/s 13 (2) is thus mandatory in its sense. But whether findings on one or both parts of this section is necessary or not, must necessarily depend on how the case is prosecuted on either side. Each one may seek to acquire or retain possession of the entire premises by establishing greater hardships to himself or seek to acquire or retain only part of the premises by proving no hardship to either. Each one may even try to bring his case under both the parts and seek reliefs alternately, taking no chance. This must, in turn, depend, in no small measure, on the urgency and extent of the needs of the both, availability of alternate accommodation, the extent of the accommodation in dispute, degree of adaptability of the parties and suitability of the portion of the premises and variety of other factors. Suffice it to note that it is not difficult to conceive of cases where mere part of the premises may not suit the requirements of the either under any circumstances, and of his own deliberate choice, each one of them may rather choose to concentrate on first part and try to acquire or retain the entire premises by proving his greater hardships than even think of pressing for any portion of the premises. It would be unrealistic in such a situation to require the Court to record any finding on the second part even when parties themselves have deliberately, due to the sheer disinterestedness, not pressed for it at any stage of the trial. There is nothing in section 13 (2) to require the Court mandatorily to record a finding on both the parts even without any plea, evidence and need. It would indeed be an idle formality. The present case itself appears to me to be illustrative of such an instance. Having regard to the nature and extent of the accommodation and the strata of the society, to which the parties belong, none could have been interested in part only of the premises. Notwithstanding the contention of Mr. Albal to the contrary, it is difficult to see how the tenant could have been content with kitchen and bath-room alone, without the benefit of the hall and how mere hall in the flat without bath-room, water closet could have suited the need of the landlord. Grievance against the Court of not having recorded any finding on the

second part, in the present case appears to me to be more imaginary than real and merely a pretence to protract the litigation with ulterior purpose. It cannot thus be laid down as a rule of law that in every case u/s 13 (1) (g) finding on both parts of section 13 (2), without any plea from the parties, is mandatory. To hold so is to provide an excuse to unscrupulous defeated litigant, whether landlord or tenant, to protract the litigation and abuse the process of law.

7. Mr. Albal relied on an unreported judgment in *Gangadhar Vishwanath Bapat v. Bhagwan Prabhakar Oak* (1959) Civil Revision Application No. 158 of 1959, decided by Tarkunde J., on August 26, 1959 (Unrep.). Both the Courts below were found not to have applied their minds to the question of comparative hardships at all in that case. While remanding the case for doing so, Tarkunde J. framed two issues covering two parts of section 13 (2) and directed trial thereof. The judgment nowhere lays down any rule of law, as contended by Mr. Albal, beyond emphasising the need to consider comparative hardships before eviction decree is passed. Mr. Albal also relied on the judgment of the Calcutta High Court in the case of *Krishna Das Nandy Vs. Bidhan Chandra Roy*, . Certain observations in paras. 77 and 80, if torn out of context, have the appearance of lending support to his contention. The observations, however, are mainly based on the finding that the tenant was misled by the landlord's vague pleadings and also on peculiar wording of section 12 (1) (h) of the West Bengal enactment and the proviso thereof, scheme of which is not identical with section 13 (1) (g) and section 13 (2) of the Bombay Act. Proviso of the West Bengal enactment, on which the ratio is founded, makes it obligatory on the Court to first seek giving effect to it where tenant so consents before considering eviction on the grounds furnished by section 12 (1) (h) itself. This runs counter to the scheme of section 13 (1) (g) and section 13 (2) of the Bombay Rent Act under which no such priority is accorded to the consideration under the latter part of section 13 (2). The case then mainly deals with the power of the Court to consider any question mooted for the first time in appeal. The limits of such discretionary powers involving even leave to amend pleading, and to have additional evidence or remand, are now well-settled and in spite of the sweep of the language, the learned Judge could not have intended to unsettle the same. Howsoever strongly a Judge may feel about a cause of a litigant, his discretionary powers cannot be exercised beyond such limits. I do not think that any of these judgments can assist Mr. Albal.

8. The second contention of Mr. Albal stands on a different footing. The appellate Court in its discretion could have considered the point raised, on the material on record, or it could have even remanded the case for trial of such an issue, had any case for the same been made out before it. The appellate Court has given reasons for refusing to consider it and I do not see any error in its reasoning. The appellate Bench has confirmed the finding of the trial Court that a suitable alternate accommodation was available to the tenant and greater hardship would be caused to the plaintiff by refusing to pass a decree than by passing it. Mr. Albal could not satisfy me how this finding could be interfered with. I also agree

that with this finding, any consideration of the latter part of subsection (2) of section 13 was not called for in the facts and circumstances of this case.

9. There is thus no merit in this Special Civil Application. 10. Rule is accordingly discharged with costs.