

(2002) 07 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 2013 of 1988

Pandi Bandu Wani since deceased through his L.Rs. and
Others

APPELLANT

Vs

Sapadu Krishna Wani since deceased through his L.Rs. and
Others

RESPONDENT

Date of Decision : 16-07-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1),
5(11)
Succession Act, 1925 — Section 63

Citation : (2003) 3 ALLMR 1007 : (2003) 1 BomCR 607

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

Bench : Single Bench

Advocate : U.G. Kerkar, for the Appellant; Suresh Kumbhar, for Respondents No. 1-A to 1-C and 2 to 6, for the Respondent

Final Decision : Dismissed

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 Additional District Judge, Nasik dated 8-2-1988 in Regular Civil Appeal No. 101 of 1984.

2. The premises in question are CTS No. 1730 at Satara, District Nasik. The said property was originally owned by one Gopikabai wife of Vishnu Wani. Out of the said property, the entire western and middle portion was let out to the predecessor of the petitioners herein namely, Bandu Ramji Wani, by the said Gopikabai at monthly rent of Rs. 8/- for the purpose of residence and business of storage of grocery goods. This fact is not in dispute as the parties have contested the matter on that basis and it has been so stated in paragraph 1 of the writ petition before this Court.

3. The respondents on the other hand claim to have become owners in respect of the suit premises by virtue of the Will executed by deceased Gopikabai on

30-7-1971 bequeathing the suit property in favour of their predecessor Shri Hari Krishna Wani. According to the respondents the said Gopikabai expired on 31-7-1971 whereafter the said Hari Wani and now the respondents have become the owners of the suit property. On that premise, the said Hari Krishna Wani determined the tenancy of the tenant in respect of the suit property by giving notice dated 27-3-1974. That notice was replied by the tenant on 12-4-1974. Subsequently the said Hari Krishana Wani predecessor of the respondents herein, who had become owner under the said Will expired and, therefore, the original respondents Sapadu Krishna Wani and legal heirs of Hari Krishana Wani instituted suit for possession of the suit property against the petitioners being Regular Civil Suit No. 78 of 1979 in the Court of Civil Judge, J.D. Satara. In the said suit, the relief of possession was sought on the ground of default, bona fide and reasonable requirement, change of user, and tenant having erected permanent construction unauthorizedly. This suit was resisted by the tenant. Specific plea was taken by the tenant that the plaintiffs were not the owners of the suit property. The tenant questioned the ownership of the plaintiffs on the ground that he had no knowledge about the execution or existence of the Will. Accordingly, the parties proceeded with the trial. The plaintiffs caused to examine the scribe of the Will as well as the attesting witnesses and the beneficiary Dattatraya Jagannath, so as to counter the claim set up by the tenant-petitioners that no such Will was in existence and they had no knowledge about that document. Besides that, the parties adduced evidence on other issues relating to grounds pressed into service for possession. The trial Court by judgment and decree dated 21-1-1984 decreed the suit in favour of the plaintiffs by holding that the plaintiffs proved that they have become the owners of the suit house by virtue of the Will made by Mrs. Gopikabai original landlady. The trial Court has however, negated the ground of default and answered the same against the plaintiffs. The trial Court on analyzing the materials on record has taken the view that the plaintiffs have established the need pressed into service being reasonable and bona fide. Even the issue of comparative hardship has been answered against the defendants and in favour of the plaintiffs. The trial Court has also answered the issue that tenant having erected permanent construction in the suit house illegally but only in regard to the flooring and of erecting a wall. Accordingly, the suit came to be decreed for the aforesaid grounds against the defendants and in favour of the plaintiffs. The petitioners herein therefore carried the matter in appeal before the District Court being Regular Civil Appeal No. 101 of 1984. Even the appeal has been dismissed by the Appellate Court. It is not in dispute that the plaintiffs filed cross-objection before the District Court and both the appeal as well as cross-objections were heard together and the same were dismissed. In other words, the Appellate Court has affirmed the findings of fact recorded by the trial Court on the relevant issues namely that the plaintiffs have proved that they have become owners of the suit house by virtue of the Will made by Gopikabai as well as on the issue of need of the plaintiffs was reasonable and bona fide and that comparative hardship will be caused to the plaintiffs if the decree was to be refused. The Appellate Court has also affirmed

the finding of fact recorded by the trial Court on the issue of unauthorized permanent construction erected by the tenants in the suit house. It is against this concurrent findings of fact, the present writ petition has been filed.

4. At the outset, I may mention that I am not elaborating the issue of permanent construction as in my view the decree as passed by two courts below on the issue of bona fide and reasonable requirement will have to be maintained.

5. The main contention advanced on behalf of the petitioners is that the Will which is the basis on which the plaintiffs claim to have become owners has not been proved in evidence as required u/s 63(c) of the Indian Succession Act and section 3 of the Transfer of Property Act. The argument proceeds on the premise that the testator of the Will was admittedly unwell at the relevant time and for which reason the attesting witnesses as well as the doctor who had attended at the time of execution of the said Will ought to have been examined. It is therefore, contended that the Will has not been established to be genuine though it has come on record. According to the petitioners the attestation of the Will has not been done in accordance with law and if that aspect is answered against the plaintiffs, it would necessarily follow that the subject Will is inadmissible in evidence. As a consequence, it will have to be held that the plaintiffs claim that they have become owners of the premises by virtue of the Will would fail. In which case, no suit could be maintained by the plaintiffs against the defendants-petitioners herein. The learned Counsel also made an attempt to assail the correctness of the findings recorded by the Court below on the issue of bona fide and reasonable requirement as well as issue of comparative hardship. On the other hand, the learned Counsel for the respondents-plaintiffs contends that the only basis on which the matter proceeded before the Court below is that the defendants had no knowledge about the execution of the Will. It is contended that the title of the plaintiffs was not questioned on the basis of improper attestation of the Will or on the ground as is contended before this Court, but only for want of knowledge of the existence of the Will. The matter has been therefore, examined by the two courts below only in that perspective. If that be so, no fault can be found with the courts below. Moreover, it is contended on behalf of the respondents that, the plaintiffs caused to examine not only the scribe but also the attesting witnesses as well as the beneficiary of the Will and non-examination of the doctor who was present during the execution of the Will would not be fatal in any manner. It is submitted that in any case, it is not open for the tenant to question the genuineness of the Will, being a stranger to that Will. To buttress this submission, reliance is placed on the decision of this Court reported in 1946 The Indian Law Reporter Page 510 in the case of Kalu Beg and others v. Gulzar Beg and others. According to the learned Counsel, findings of fact recorded by two courts below on the issue of bona fide and reasonable requirement or on the issue of comparative hardship cannot be questioned in the present writ petition under Article 227 of the Constitution of India as it is not possible to even remotely suggest that the findings are perverse or manifestly wrong. It is therefore, contended that no interference is warranted under Article

227 of the Constitution of India in relation to the ground of bona fide and reasonable requirement and comparative hardship which has been answered in favour of the respondents-plaintiffs.

6. Having considered the rival contentions, I have no hesitation in straight way accepting the stand taken by the respondents. The materials on record clearly establish that the only plea taken by the petitioners-defendants before the trial Court is that they had no knowledge about the existence of the Will. It is in that context that the plaintiffs caused to adduce evidence not only of the scribe as well as of the attesting witness and the beneficiary of the Will. Since the factum of execution and existence of the Will has been established by that evidence, the plea taken by the defendants to question the ownership of the plaintiffs would become unavailable. It is however, contended that the Will was not attested as required by section 63(c) of the Indian Succession Act. To my mind, the two courts below have concurrently found that the requirement of section 63(c) have been fulfilled as is evident from the evidence which was before the trial Court. In exercise of writ jurisdiction, it will not be possible to reappreciate the evidence so as to overturn that finding of fact returned by the courts below. Once this finding cannot be challenged then it necessarily follows that the plaintiffs have proved the execution and existence of the will. Moreover, as rightly, contended by the respondents-plaintiffs, the scope of enquiry before the Rent Court would be very limited and, it is not for the Rent Court to decide on the questions of genuineness and validity of the Will as such. No doubt, the Rent Court can examine the factum of execution or existence of the Will but cannot go into the issue of genuineness and validity of the Will. The factum of execution and existence of Will would be incidental to decide the issue as to whether the person is the landlord in respect of the suit premises by virtue of such Will as claimed by him. But, the issue of genuineness and validity cannot be examined by the Rent Court which is invested with limited jurisdiction u/s 28 of the Act. Moreover, it is not possible to countenance the plea that the tenant can question the genuineness and validity of the Will that too in the proceeding under the Rent Act, though he is a total stranger to that Will. Reliance is rightly placed on the decision in *Kalu Beg's* case which takes the view that a stranger cannot be permitted to challenge the gift deed. Applying the principle underlying the said decision, I have no hesitation in accepting the plea that the tenant who is a stranger to the Will cannot question the genuineness and validity of the Will, in any case in Rent Act proceeding. Understood thus, no fault can be found with the findings of the courts below on the issue that the respondents-plaintiffs have become owners of the suit property by virtue of the Will executed by Gopikabai. Once this finding is reached then it necessarily follows that the respondents are landlords and the petitioners are tenants in respect of the suit property and therefore, the action instituted by the respondents for possession by invoking provisions of section 13(1)(g) of the Act would be appropriate action against the petitioners.

7. The next question that needs to be examined is whether the issue of bona fide and reasonable requirement answered by two courts below needs any

interference. It is well settled that writ jurisdiction should be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This Court cannot assume that it is sitting as another Court of Appeal. It is also well settled that some error here or there in the reasoning of the subordinate courts cannot be the basis for interference under Article 227 of the Constitution of India. Whereas, it is when this Court finds that the findings recorded by the Subordinate Court are perverse and which would cause manifest injustice that exercise of jurisdiction under Article 227 of the Constitution of India may be warranted.

8. In the present case, no grievance has been made of any irregularity in the decision making process. Besides, the petitioners have not demonstrated as to how the findings of fact recorded by the two courts below on the issue of bona fide and reasonable requirement can be assailed as being perverse. On the other hand, the finding recorded by both the courts below are well supported by the evidence on record as can be discerned from the discussion in the decision of the trial Court with reference to issue Nos. 4 and 9 and of the Appeal Court in paras 22 and 23. It is not the contention of the petitioners that the findings are based on conjectures or surmises. In other words, there is no basis for interfering with the concurrent finding of facts recorded by the two courts below on the issue of bona fide and reasonable requirement and, therefore, even this Court will have to answer the same against the defendants-tenants.

9. The next aspect that requires to be examined is the question of comparative hardship. Even on that issue two courts below have answered the same in favour of the plaintiffs and against the defendants. The Appellate Court in paragraph 24 of its decision has adverted to the admissions of defendant No. 1 that he has started his own business at Village Chaundhane by starting a new grocery shop. It is therefore, not a case that no alternative accommodation can be secured by the tenant in the event the decree was to be passed. The plaintiffs on the other hand have established and as has been concurrently found by two courts below that, they have no other place to satisfy the need pressed into service for possession of the suit premises. To my mind, since there is nothing on record, to show that it is not possible for the defendants to secure another accommodation in the same locality or for that matter in the city, applying the dictum of the Apex Court in *Mst. Bega Begum and Others Vs. Abdul Ahad Khan (Dead) by Lrs. and Others*, , this Court will have no option but to answer even the issue of comparative hardship against the petitioners. The Apex Court has observed that it is imperative for the tenant as the onus lies on the tenant not only to plead that it is not possible to get any other accommodation in the same locality or for that matter in the city in the event the decree for possession was to be ordered, but also to prove that fact. In the present case evidence on this aspect is completely lacking; whereas, the defendants have admitted that they have started business in some other place. This by itself would be sufficient to answer the issue against the petitioners-tenants. To my mind, no interference is

warranted in respect of the finding of fact recorded by the courts below even on the issue of comparative hardship.

10. In the circumstances, this petition fails. Hence, the same is dismissed with costs all throughout.

At this stage, Mr. Kerkar for the petitioners prays for some reasonable time to vacate the premises. Mr. Kumbhar for the respondents submits that he has no objection if 9-months time is granted provided the petitioners and all other major occupants in the suit premises who are occupying the suit premises would file usual undertaking in this Court. In the circumstances, time to vacate is granted upto 30th April, 2003 subject to filing of usual undertaking by all the petitioners as well as other major persons occupying the suit premises within 4 weeks from today. It is made clear that if the affidavit of undertaking is not filed within time as aforesaid, it will be open to the respondents to get the decree for possession executed in accordance with law.