

(2011) 01 BOM CK 0136

In the Bombay High Court

Case No : Writ Petition No. 1483 of 1998

Ramchandra Vasudeo Patankar, Prabhakar Vasudeo Patankar, APPELLANT
deceased through his legal heirs (Mr. Dhananjay Prabhakar
Patankar, Mrs. Jayashri Shripad Mahajani, Mrs. Manjushri
Hemant Soman and Mrs. Maya Prakash Abhyankar) and
Narayan Moreshwar Patankar

Vs

Mukund Dattatraya Desai RESPONDENT

Date of Decision : 05-01-2011

Acts Referred:

Constitution of India, 1950 — Article 227
Houses Rates Control Act, 1947 — Section 13(1)

Citation : (2011) 01 BOM CK 0136

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Vijaykumar G. Peshave, for the Appellant; V.D. Borwankar, for the Respondent

Judgement

D.G. Karnik, J.—Heard the learned Counsel for the parties.

2. This petition is directed against the judgment and order dated 24th September, 1997 passed by the District Court, Pune allowing the Civil Appeal No. 443/1996 filed by the Respondent (tenant) and thereby dismissing the suit for possession filed by the Appellants (landlords).

3. The Petitioners are the owners of the property bearing City Survey No. 998, House No. 249 situated at Mangalwar Peth, Bhore, Dist. Pune. The Respondent is a tenant of a shop admeasuring 4 Khanas i.e. 15" x 20" situated on the eastern side of the ground floor of the Petitioners' aforementioned property (hereinafter referred to as the "suit premises")

4. The Petitioners filed a suit, bearing Regular Civil Suit No. 01/1993, against the Respondent for eviction, inter alia on the ground of nonuser and reasonable and bonafide requirement. The trial court after considering the oral and documentary

evidence on record and also the report of the Court Commissioner, came to the conclusion that the Respondent had not used the suit premises for a period of six years immediately preceding the filing of the suit "without any reasonable cause" and therefore, the Petitioners were entitled to a decree of possession u/s 13(1) (k) of the Bombay Rent and Lodging Houses Rates Control Act, 1947 (for short "the Bombay Rent Act"). The trial court also held that the Petitioners required the suit premises reasonably and bonafide for the purpose of business of enamel wears and utensils and that no hardship would be caused to the Respondent in the event a decree for possession was passed. The trial court accordingly passed a decree for possession in favour of the Petitioners and against the Respondent under Sections 13(1)(g) and 13(1)(k) of the Bombay Rent Act.

5. Aggrieved by the decision of the trial court, the Respondent filed Civil Appeal No. 443/1996 in the District Court at Pune. By its judgment and order dated 24th September, 1997, the 5th Additional District Judge, Pune, to whom the Appeal was assigned, allowed the appeal and dismissed the suit of the Petitioners. The appellate court held that though the Respondent had admitted that no business was carried in the suit premises for 10 years, the pleadings in regard to the nonuser were defective. The appellate court noted that though the Petitioners had pleaded nonuser for a continuous period of more than six months immediately preceding the filing of the suit they had not specifically pleaded that the nonuser by the Respondent tenant was "without any sufficient cause" . Relying upon two decisions of this Court in the case of C.R. Shaikh v. Lilabai D. Rohidas and Anr. 1981 Mh. L.J. 437 and Tulshiram Ramchandra Mantri v. Ramvilas Kamat 1993 BCJ 629 the appellate court held that it was necessary for the Petitioners landlords not only to plead that the premises were not used for a continuous period of six months immediately preceding the suit but it was necessary for them also to plead that the premises were not used by the tenant "without reasonable cause". Since the Petitioners had not pleaded that there was no reasonable cause for nonuser by the Respondent, the pleadings in that regard were defective. The appellate court, therefore, held that the Petitioners were not entitled to a decree of possession u/s 13(1)(k) of the Bombay Rent Act.

6. As regards the bonafide requirement, the appellate court held that the trial court was influenced by the fact that the suit premises were not used by the tenant for a period of nearly 10 years prior to the institution of the suit. Though this fact may be relevant for the purpose of considering hardship, according to the appellate court this fact was irrelevant for considering the reasonable and bonafide requirement of the landlords and the trial court had committed an error by taking into consideration the irrelevant fact. It also held that the burden of proving that any other alternative premises were not available to the landlords was on them. They had not discharged this burden. The appellate court, therefore, set aside the finding of reasonable and bonafide requirement recorded by the trial court in favour of the Petitioners. Consequently, the appellate court allowed the appeal and dismissed the suit of the Petitioners.

7. Aggrieved by the decision of the appellate court, the Petitioners have approached this Court.

8. Learned Counsel for the Respondent raised a preliminary objection about maintainability of the writ petition in view of the decision of the Supreme Court in the case of *Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil*, . Learned Counsel in particular invited my attention to paragraph 32 of the said decision which reads as follows:

32. No writ petition can be moved under Article 227 of the Constitution nor can a writ be issued under Article 227 of the Constitution. Therefore, a petition filed under Article 227 of the Constitution cannot be called a writ petition. This is clearly the Constitutional position. No rule of any High Court can amend or alter this clear Constitutional scheme. In fact the rules of Bombay High Court have not done that and proceedings under Articles 226 and 227 have been separately dealt with under the said rules.

Relying upon the aforesaid passage, the learned Counsel for the Respondent submitted that this writ petition, purportedly filed under Article 227 of the Constitution of India, challenging a decree and order passed under the Bombay Rent Act cannot be entertained.

9. It is true that in *Shalini Shetty's* case the Supreme Court has held that a petition under Article 227 of the Constitution of India cannot be called as a writ petition. In fact previously this Court had followed the practice of numbering petitions under Article 227 of the Constitution of India as Special Civil Applications. Some time in 1980 or thereabout this practice was discontinued and petitions under Article 227 of the Constitution of India were numbered as writ petitions. The reasons for this change is not pointed out. However, a mere error in nomenclature ,as observed by the Hon"ble Supreme Court of erroneously calling a petition under Article 227 of the Constitution of India as the writ petition cannot take away the power of superintendence conferred on the High Courts under Article 227 of the Constitution of India. In paragraph 62 of its decision of *Shalini Shetty's* case itself the Hon"ble Supreme Court has clearly recognized and affirmed the existence of the power of superintendence vested in the High Courts under Article 227 of the Constitution of India. After cautioning the High Courts against interfering in the orders of the tribunals or courts on the drop of a hat, the Hon"ble Supreme Court held that the High Courts can interfere in the judgments and or orders of tribunals or courts inferior to it in exercise of its power of superintendence when there has been a patent perversity in their orders or where there has been a gross and manifest failure of justice or where the basic principles of natural justice have been flouted. It was held that the High Court cannot interfere to correct mere errors of law or fact. The Supreme Court, however, held that the High Courts" power of superintendence under Article 227 cannot be curtailed by any statute. This power is the basic structure of the Constitution as held by the Constitution Bench in the case of *L. Chandra Kumar Vs. Union of India and others*, . While exercising wide and unfettered power

under Article 227, the High Court must keep in mind the main object of the Article 227 and it should keep strict administrative and judicial control on the administration of justice within its territory. The object of the superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute.

10. Keeping in mind the limitation of the power of superintendence under Article 227, as culled out from the various decisions of the Supreme Court and reaffirmed by it in its decision in *Shalini Shyam Shetty (Supra)*, it would be necessary to consider whether any interference is necessary in the facts and circumstances of each case. The broad contention of the Respondent that the High Court cannot interfere in exercise of writ jurisdiction under Article 227 of the Constitution of India in respect of any matter arising under the Bombay Rent Act, cannot be accepted.

11. I would, therefore, proceed to consider whether the judgment of the District Court impugned in the present case requires interference in exercise of writ jurisdiction of this Court under Article 227 of the Constitution of India in the light of the principles laid down by the Hon"ble Supreme Court in the case of *Shalini Shyam Shetty (supra)*.

12 The trial court as well as the appellate court have recorded a concurrent finding of fact that the suit premises were not used for the purpose of business for which they were let for a continuous period of more than six months immediately preceding the suit. While coming to this conclusion, the trial court, inter alia, has relied upon the report of the commissioner which clearly discloses that the premises were in disuse for a substantial period of time. The trial court has also noted that the Defendant tenant had admitted that the suit premises were not used for six years but had contended they were not so used because of disrepair and neglect on the part of the landlords to carry out tenable repairs. The Respondent - tenant had only contended that he could not carry on his business in the suit premises as the suit premises were in dilapidated conditions for 6 to 7 years. In his deposition, the Respondent tenant admitted "the condition of my shop is bad as for the last ten years no customer has purchased cloth in my shop". Perusal of the evidence and the testimony of the Respondent shows that a concurrent finding recorded by the courts below that the suit premises were not used for a continuous period of six months immediately preceding the filing of the suit is not only a possible finding but eminently probable finding of fact. Before me also the learned Counsel for the Respondent did not seek to impeach this finding but only contended that the suit premises could not be used for the purpose of business on account of their dilapidated condition. He submitted that the dilapidated condition of the premises was the reasonable cause for nonuser of the suit premises. He further submitted that the Petitioners landlords were required to plead and prove that the nonuser of the premises by the tenant was "without a reasonable cause". Relying on the decisions of this

Court in the case of C.R. Shaikh v. Lilabai D. Rohida (supra) and a recent decision of this Court in Ashok Vithal Chavan and Ors Vs. Baburao Sakharam Bhagat, , he submitted that since the Petitioner landlord had not specifically pleaded that the premises were not used "without reasonable cause", the appellate court did not commit any error in rejecting the case of the Petitioner u/s 13(1)(k) of the Bombay Rent Act.

13. In C.R. Shaikh v. Lilabai R. Rohida" s case (supra), the landlord had filed the suit for possession inter alia on the ground of nonuser. In the plaint he had pleaded that the tenant had kept the premises closed for last three years. He, however, had not specifically pleaded that the tenant kept the premises closed or not used the premises "without reasonable cause". This Court held that Section 13(1)(k) requires the landlord to prove that the premises have not been used "without reasonable cause" for the purpose for which they were let for continuous period of six months immediately preceding the date of the suit and since the landlord had not pleaded that the premises were not used "without reasonable cause", the pleadings were defective.

14. In Tulsiram Ratanchand Mantri v. Ramvilas Kashinath Kasat 1993 B.C.J. 629, this Court followed its earlier decision in the case of C.R. Shaikh v. Lilabai D. Rohida (supra). More recently in Ashok Vithal Chavan and Ors Vs. Baburao Sakharam Bhagat, following the decision of this Court in the case of C.R. Shaikh v. Lilabai D. Rohida (Supra), this Court held that no cause of action would arise for a landlord to claim possession unless the premises were not used for six months or more by the tenant "without reasonable cause". The court observed that though onus on the landlord with regard to the factum of the nonuser of the suit premises "without reasonable cause" is very light, but nonetheless the landlord has to allege that fact and only then the provisions of Section 13(1)(k) can be said to be attracted.

15. With respect, I am unable to subscribe the view taken in the above mentioned cases for the reasons indicated below.

16. Undoubtedly the burden of proving that the premises were kept closed and / or are not used for the purpose for which they were let out continuously for a period of six months or more immediately preceding the filing of the suit is on the landlord. The fact that the premises were kept closed can be and is required to be proved by the landlord by adducing evidence. However, once that is proved, in my view, the burden of proving "reasonable cause" for nonuser of the premises would be on the tenant. Whether there is any cause for nonuser of the premises, whether reasonable or otherwise, that would always be within the special knowledge of the tenant. It is for the tenant, therefore, to plead what was the cause for which the premises were not used by him and to prove the cause. It would be then possible for the court to assess whether the cause shown by the tenant is reasonable or otherwise. Section 106 of the Indian Evidence Act provides when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The rationale of Section 106 of the

Evidence Act is clear. If a person is having special knowledge of any fact and the opposite party has no such knowledge, then naturally the person who has knowledge must plead and prove the fact which is within his special knowledge. For example, in a given case, the residential premises may not be used by a tenant for a period of six months or more because while the tenant was in service, he may have been sent on deputation to another town for a few months only to return to the suit premises thereafter. The fact that the tenant had been sent on deputation is the fact within the special knowledge of the tenant only and the landlord is not expected and would not even know the reasons why the tenant had moved out of the premises. When the relations between the landlord and the tenant are strained the parties are secretive and do not disclose anything to each other. In such circumstances, it may be impossible for the landlord to know what is the cause on account of which the tenant is not using the rented premises. Unfortunately, the provisions of Section 106 of the Indian Evidence Act were not brought to the notice of the Court while deciding the above mentioned cases.

17. Section 106 of the Evidence Act is a statutory provision regarding burden of proof. When there is a statutory provision regarding the burden of proof, any pleading regarding that burden may not be strictly relevant. Once it is proved that the premises are not used by the tenant continuously for a period of six months or more immediately preceding the suit, in my view, the burden of proving the reasonable cause lies on the tenant irrespective of the pleadings of the parties by reason of the provisions of the statute. Since the provisions of Section 106 were not brought to the notice of the court, in my view, the decisions require reconsideration. For this reason, I am of the view that the matter be referred to a larger bench for considering the following point.

i. Whether it would be a fatal error in the pleading of a landlord where he only pleads that the tenant has not used the suit premises continuously for a period of six months or more immediately preceding the suit but fails to further plead that there was "no reasonable cause" for nonuser of the premises?.

The papers may be placed before the Hon"ble the Chief Justice for appropriate orders.