

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELATE JURISDICTION
WRIT PETITION NO.2254 OF 1993

1 Faruk Ilahi Tamboli
2 Rafiq Ilahi Tamboli ...Petitioners

vs.

Balasaheb Shankarrao Kokate
(since deceased by his L.Rs.)
1 Smt.parwatibai Balasaheb Kokate
(since deceased through L.Rs.)
2 Shankar Balasaheb Kokate
3 Satish Balasaheb Kokate
4 Sou. Alka Mohanrao More ...Respondents

Mr.A.M.Kulkarni for the petitioners
Mr.Nitin Jamdar for the respondents

CORAM :A.S.OKA,J.
DATE : FEBRUARY 26, 2010

JUDGMENT :

1 By this Writ Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and Decree dated 21st April 1993 passed by the learned District Judge, Solapur by which decree passed by the trial Court for eviction against the respondent in a suit filed by the petitioners has been set aside.

2 The petitioners filed a suit for eviction relating to the suit premises more particularly described in the plaint. Accordingly to the petitioners, they purchased a larger property forming part of the suit premises from one Vaman Dattatraya Sulakhe by a sale deed dated 11th August 1980. According to the petitioners, their predecessor had informed the respondent about the purchase of the property by the petitioners and the respondent was called upon to pay rent to the

petitioners. As the respondent was in arrears of rent from 11th August 1980, by notice dated 1st May 1982 tenancy of the respondent was terminated by the petitioners. It was alleged that the respondent was a defaulter. It was alleged that the suit premises was let out for running a grocery shop and the respondent had changed the user by starting a Pan shop in the suit premises. It was contended by the petitioners that the respondent had agreed with the predecessor of the petitioners to construct wall in between the suit premises and adjacent premises. It is alleged that the respondent failed to comply with the said assurance. Even on that ground, a decree for possession was sought. The last ground on which decree was sought is of bona fide requirement.

3 The respondent defended the suit by filing a written statement. He contended that he had filed an application for fixation of standard rent being application no.8 of 1979. In the said application, the respondent had applied for impleading the petitioners as a party. According to the case of the respondent, month of tenancy of the respondent starts from Shudhha Pratipada of Hindu calendar month and ends with Vadya Amavatsya of the said month. It is alleged that on 21st January 1981, the respondent paid a sum of Rs.180/- to the uncle of the petitioners towards rent, but the rent receipt has not been issued by the petitioners. The other grounds were denied by the respondent. The respondent contended that the petitioners were owners of two other shops in which they are carrying on business.

4 The trial Court framed various issues. The trial Court held that the respondent was willful defaulter and standard rent in respect of the suit premises was Rs.36/-

per month. The trial Court passed a decree on the ground of default. The trial Court also passed a decree on the ground of bona fide requirement. The Appellate Court reversed the said decree.

5 It must be stated here that one of the legal representatives of the respondent has filed an affidavit in this petition for placing on record the alleged subsequent events. It is alleged in the said affidavit that the father of the petitioners purchased the property bearing CTS No.3568/B which is at the distance of less than 100 meters from the suit premises. It is stated that the brothers of the petitioners purchased the adjoining property bearing CTS 2640-A. It is alleged that after the writ petition was admitted, the petitioners have purchased the property bearing CTS No. 3569-A which admeasures one 114.2 sq. meter in which the petitioners are running a flour mill. It is stated that after admission of the petition, another property bearing CTS 3568/A admeasuring 105-7 sq. meter has been purchased by the petitioners which is situated at the distance of 100 meters from the suit premises where the petitioners have started the wholesale business of various goods including beetle leaves, cigarettes and fire work items etc. There is a rejoinder filed by the petitioners contending that though the standard rent was fixed at Rs.36/- per month by the trial Court by order dated 16th October 1984 passed in the standard rent application, the respondent has not challenged the same. In the affidavit it is contended that the properties bearing CTS Nos.3568/B and 3569/A referred to in the affidavit of the legal representatives of the respondent are residential properties which are occupied by the petitioners and their brothers. It is contended that the property bearing CTS no.3569/A is also a residential

property. As far as license for sale of fire works etc. is concerned, it was contended that temporary license was obtained by the petitioners during the festivals like Diwali. It was alleged that the legal representatives of the respondent have started business of sale of motorcycles/scooter of renowned of two wheeler company. It is stated that the business in computer is also started by the legal representatives of the respondent. It is contended that the rent has not been deposited regularly even during the pendency of the petition.

6 The learned counsel for the petitioners submitted that as far as ground of arrears of rent is concerned, after receipt of notice of demand, the respondent did not tender the arrears and no application for fixation of standard rent was filed. He pointed out that though the application for fixation of standard rent was decided on 16th October 1984, no amount was deposited by the respondent till 1st October 1987 towards rent. He submitted that the respondent was a clear defaulter. He submitted that the evidence adduced by the respondent to prove payment of Rs.180/- to the uncle of the petitioners is totally unsatisfactory and was rightly rejected by the trial Court. As far as bona fide requirement is concerned, he submitted that even assuming that the father of the petitioners was the owners of some property, the petitioners being the mohamedans , they did not acquire any right in respect of their father s property and therefore, consideration of father s property by the Courts below is totally irrelevant. He submitted that the petitioners being the plaintiffs are the best judges of their own requirement and in absence of any evidence on record to show that other premises are available to the petitioners, the Appellate Court ought not to have interfered with the finding on the

ground of bona fide requirement. On the question of comparative hardship, he pointed out that the respondent was an affluent person. He pointed out that the respondent was running a liquor shop which fact was brought on record of the Appellate Court. He stated that the original respondent started automobile shop in the name of his daughter in law. He submitted that even the finding on the issue of comparative hardship could not have been disturbed by the Appellate Court.

7 The learned counsel for the respondent relied upon the decision of the Apex Court in case of Chimanlal vs. Mishrilal [1985 (1) SCC page 14]. He also placed reliance on the decision of the Apex Court in case R. Appavoo (dead) by Lrs. Vs. Sree Dharna Vinayakan Dharmaraja Devasthanam [1991 Supp (2) SCC 337]. He submitted that no interference is called for in the finding of fact recorded by the Appellate Court.

8 I have considered the submissions. It must be noted here that the suit premises was purchased by the petitioners on 11th August 1980 and the suit was filed in the year 1982 on the ground of bona fide requirement. The Appellate Court noted that though there was no pleading that the petitioners have separated from their father, the second petitioner stepped into witness box and stated that the petitioners have separated from their father. On the basis of the evidence of the 2nd petitioner recorded on 22nd September 1988, the learned District Judge came to the conclusion that the ration card of the petitioners was separated from their father in the year 1985-86 i.e during the pendency of the suit. The Appellate Court also noted that the petitioners and their father were residing in the same house bearing no. 3568. The Appellate Court referred to the evidence of the

3rd witness examined by the respondent. He stated that the shops of the father and the uncle of the petitioners were in properties bearing CTS no.2640/A and 2640/B. The said witness deposed that the petitioners father and uncle were not looking after the business for a period of 3-4 years as both of them were suffering from Paralysis. The Appellate Court noted that this aspect has not been challenged in the cross examination of the said witness by the petitioners and only a suggestion was given to the witness that the father and uncle were doing the business through their servants. The correctness of the said suggestion was denied by the witness.

9 A case was made out by the petitioners that they were carrying on the business by sitting by the side of the road near Dane Galli and Kirana Road . The learned Judge noted that there is no pleading on this aspect. The learned Judge found that there was no documentary evidence to corroborate the testimony of the second petitioner about the petitioners carrying on such business. The learned Judge also noted that it is not the case of the petitioners that the relationship with their father and uncle has been strained. The Appellate Court also dealt with the contention that the petitioners have no right in respect of the property of their father and uncle. The Appellate Court has referred to pursis filed in Appeal that the practitioners uncle has died and he has no son.

10 The important aspect noted by the Appellate court from the evidence of the 2nd petitioner is that the ration cards of the petitioners were separated from the father during the pendency of the suit. Even going by the finding recorded by the trial Court, there are two shops bearing CTS 2640/B and 2640/A adjacent to the suit

premises which are owned by the petitioners father and uncle. The evidence brought on record to show that the father and uncle have stopped carrying on business. The trial Court observed that the evidence on record shows that the petitioners are sitting on account of their business in the premises of their father and uncle. The trial Court held that it cannot be presumed that in future they will continue to be on good terms with their father and uncle. The trial court relied upon the ration card to show that the petitioners have separated from their father. As pointed out earlier the ration card was separated during the pendency of the suit. Thus, the finding of the trial Court that the premises of the father and uncle are not available to the petitioners is based on the pure surmise that in future it is not necessary that the petitioners will continue to be on good terms with their father and uncle. The trial Court has recorded a finding that there is evidence on record to show that the petitioners are sitting in the premises of their father and uncle. Moreover, the evidence of the 2nd witness examined by the respondent establishes that due to paralysis, both the father and uncle have stopped business. The only suggestion given to the witness was that the father and uncle were carrying on business through their servants. Therefore, the Appellate Court was right in holding that two business premises adjacent to the suit premises were available to the petitioners for carrying on their business. Hence, it is difficult to find fault with the finding of fact recorded by the Appellate Court on the ground of bona fide requirement. Subsequent events have been pleaded by both the parties. Suffice it to say that on the basis of the material on record, the Appellate Court has rightly found that the bona fide need was not established. If there are subsequent events after the decision of the Appeal,

including the events which are set out by the petitioners in their rejoinder, it will be open for the petitioners to file a fresh suit on the ground of bona fide requirement.

11 Now turning to the ground of arrears of rent, reliance was placed on the notice of demand dated 1st May 1982. In the notice dated 1st May 1982 the arrears claimed were for a period from 11th August 1980 to 30th April 1982. In the reply to the said notice it was contended by the defendant that a sum of Rs.180/- was paid by him to one Gafoor who was the uncle of the petitioners. In the written statement it is specifically stated that the amount was paid to the said Gafoor on 21st January 1981. In the deposition, the defendant initially came out with a case that a sum of Rs.180/- was paid on 16th April 1980. The copies of the cash book and ledger book were produced at Exhibits-81 and 82 showing the entry of the said amounts on 27th January 1981. In the deposition, the defendant corrected himself by saying that the payment was made on 27th January 1981 and the date given by him earlier as 16th October 1981 was wrong. It is true that the Appellate Court has not accepted the evidence in the form of cash book and ledger as there was no evidence on record to show that the same was regularly maintained.

12 The 2nd plaintiff in the cross examination denied the suggestion that his uncle has received a sum of Rs. 180/- on his behalf. He pleaded ignorance about the fact whether there is an entry of the receipt of the amount in the accounts of his uncle. The 2nd plaintiff did not come out with a case that he made an enquiry with his uncle. This observation is made by the Appellate Court in the context of the fact that in the reply to the suit

notice and in the written statement, a contention regarding payment of amount to the Gafoor was specifically raised. The 2nd plaintiff admitted in the evidence that Gafoor and his father were joint. It is not the case of the plaintiffs that their relationship with the said Gafoor was strained. Therefore, the Appellate court observed that the plaintiffs ought to have examined their uncle as a witness. The Court observed that he could have examined on commission. That is why a case made out by the Respondent regarding payment of a sum of Rs.180/- to the said Gafoor has been accepted by the Appellate Court. It must be noted here that the Appellate Court also dealt with the case that in the written statement, the defendant came out with a case that on 21st January 1981, payment of Rs.180/- was made and in the reply to the notice, the said date is mentioned as 27th January 1981. The Appellate Court noted that the age of the defendant was 65 years at the time of recording of evidence and therefore, it is possible that he may not remember the exact date. After accepting the case of the defendant regarding payment of Rs.180/- in January 1981 towards rent, the Appellate Court found that in the notice dated 1st May 1982 at Exhibit-68 issued by the plaintiffs, a demand was made for arrears from 11th August 1980 without considering and taking into account the said payment of Rs.180/-. It must be noted here that the suit is based on the said notice. In the said notice, a demand was incorporated without taking into consideration payment of a sum of Rs. 180/- by the defendant which was accepted by the plaintiffs uncle on their behalf. Thus, the finding of the Appellate Court is that deliberately a demand was made of excessive amount. That is why a finding has been recorded that the demand notice was invalid. There is no reason to disturb the said finding. The case regarding

the payment of Rs.180/- made to said Gafoor was not an afterthought. The plaintiffs have chosen not to examine the said Gafoor.

13 Once the notice is held to be invalid, there was no cause of action for filing a suit on the ground of arrears of rent. If there was no cause of action for filing a suit on the ground of arrears of rent on the date on which the suit was instituted, there was no occasion to consider the case for passing a decree under section 12(3) (b) of the said Act. The trial Court passed a decree only on the ground of arrears of rent. Which is the ground under section 12(3) (a) of the said Act. In the circumstances, the Appellate Court was justified in disturbing the decree passed on the ground of arrears of rent.

14 Writ petition is rejected. Rule is discharged with no order as to costs.

JUDGE