

(1980) 04 BOM CK 0005

Bombay High Court

Case No: Writ Petition No. 242 of 1979

Haji Walimohamed
Haji Salemohamed
Temla alias Kacchi

APPELLANT

Vs

Fidahussain
Meghajibhai Surati
and Another

RESPONDENT

Date of Decision: April 1, 1980

Acts Referred:

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 13(1)
- Constitution of India, 1950 - Article 227

Hon'ble Judges: R.A. Jahagirdar, J

Bench: Single Bench

Advocate: K.J. Abhyankar, for the Appellant; V.T. Walawalkar and Narendra Walawalkar, for the Respondent

Judgement

R.A. Jahagirdar, J.

The petitioner who had originally succeeded in the trial Court in his suit for possession of the suit premises tenanted by the first respondent, hereinafter referred to as "the respondent", and failed in Appeal Court has approached this Court under Article 227 of the Constitution of India. The respondent is the tenant of a shop measuring 11'-6" x 32" situated in a building bearing C.S. No. 801 at Sangli. The shop will be hereinafter referred to as "the suit premises". Originally, the building was owned by one Mohamed Usman Atar from whom the petitioner purchased the building for a sum of Rs. 23,000/- on 15th April, 1974. Before the petitioner purchased the building Mr. Mohamed Usman Atar had failed in an attempt to evict the tenant on the ground of bona fide and reasonable requirement of the suit premises. I am making a mention of this fact because some arguments were advanced in the Court below and unfortunately accepted by the Court below

on the basis of this fact.

2. The petitioner terminated the tenancy of the respondent by his notice dated 22nd May, 1974 and filed the suit, out of which the present proceedings arise, on 4th of June, 1974.

3. The respondent resisted the suit by raising defences which are normally appropriate in a suit of this type. He particularly denied the reasonable and bona fide character of the requirement by the petitioner of the suit premises. It was also contended on his behalf that greater hardship would be caused to him than to the petitioner if a decree for possession is passed.

4. The learned trial Judge by his judgment and order dated 11th of March, 1979 decreed the suit for possession. At this stage it would be appropriate to mention some of the facts on which considerable discussion has taken place both in the Appeal Court below and before me. The petitioner was originally a tenant of a shop situated in a building bearing City Survey No. 699 which was owned by one Bhide. The ownership of the building passed on to Mane Brothers at some stage and Mane Brother filed a suit in the year 1959 against the petitioner for the possession of the shop occupied by the petitioner as a tenant. Ultimately, the suit was decreed and the decree became final in the year 1964. The petitioner was required to hand over the possession of that premises to Mane Brothers. Thereafter, the petitioner took possession of a shop in a building bearing City Survey No. 678 and owned by one Shikalgar. The possession of this shop is said to have been obtained by the petitioner under what has been characterised as a "mortgage". There is some debate as to whether it was really a mortgage or sale with a condition to re-purchase. In any case, Shikalgar has failed a suit, being Regular Civil Suit No. 142 of 1975, for redemption of the mortgage and consequently for possession of the shop in the building bearing City Survey No. 678. The suit filed by Shikalgar has been decreed on 29th of June, 1979 and I have been informed that an appeal preferred by the petitioner, being Civil Appeal No. 234 of 1979 is pending in the District Court. It may be also be stated at this stage that in the suit filed by Shikalgar the petitioner at some stage took the contention that he was a licensee of the shop and not a mortgagee. That contention has obviously been rejected by the Court in which Shikalgar's suit was filed.

5. The learned trial Judge was satisfied that the requirement of the suit premises by the petitioner was bona fide and reasonable. While so holding, he has considered the facts which I have mentioned in the preceding paragraph. On the question of comparative hardship the learned trial Judge held against the respondent by noticing the fact that the respondent owns a bungalow in the railway colony at Sangli and the nature of his business is such that he could conduct the same in his bungalow. On the other hand, the petitioner was being driven from shop to shop though he has by this time invested a sum of Rs. 23,000/- in the present building.

6. The learned appellate Judge, however, held by reversing the finding of the Court below that the petitioner has failed to prove his reasonable and bona fide requirement. While so holding the learned appellate Judge took into account the fact that the petitioner has dared to purchase the property from which the original owner has failed to evict the present respondent. In my opinion, this is entirely an irrelevant consideration while deciding the reasonable or bona fide character of the requirement, of the petitioner. Merely because the original owner failed to obtain possession of the suit premises from the respondent it cannot be said that a subsequent owner of the same building will not require the suit premises reasonably and bona fide. The facts which are mentioned at some length while summarising the case of the parties and the finding of the trial Court show that the petitioner is being kept out of one shop or the other from time to time. The learned trial Judge has also noticed that the building is in a dilapidated condition and it may be required to be pulled down so that it would become safe and habitable. The reason given by learned appellate Judge that the very act of purchasing the property from the owner who had failed in his attempt to evict the respondents makes of mala fide is erroneous.

7. The fact that the petitioner is in possession of a shop which is owned by Shikalgar does not detract from the urgency of the need felt by the petitioner for the suit premises. Whether he is the licensee of that shop or whether he is the mortgagee, his possession has already been challenged in the suit filed by Shikalgar and as has been held by the Supreme Court in [Phiroze Bamanji Desai Vs. Chandrakant N. Patel and Others](#), if a landlord is in occupation of the other premises on leave and licence, they are obviously not available to the landlord for occupation and cannot be taken into account for negating the need by the landlord of the premises in question. As things stand today, there is also a decree against the petitioner in respect of the premises in the building owned by Shikalgar. The threat is not merely the imminent, but it has in fact materialised. This fact must be borne in mind while determining the requirement by the petitioner of the suit premises as well as while deciding the question of comparative hardship.

8. The learned trial Judge after considering the nature of the business conducted by the respondent and noticing the accommodation available to him came to the conclusion that lesser hardship would be caused to him if a decree for possession is passed. The learned appellate Judge has not done justice either to the reasoning given by the trial Court or to the evidence on record while considering the question of comparative hardship in paragraph 12 of the judgment. The summary manner in which he has dealt with this question could only be appreciated by noticing the said paragraph.

"The plaintiff had not adduced any evidence in the trial Court to show that the alternative accommodation were available. At the same time, the plaintiff had taken the risk by purchasing the suit property from After who had failed in the Court of

law to get the possession of the premises from the same tenant. In my opinion, there would have been more hardship to the tenant if he was directed to vacate the premises."

9. Apart from the errors of English contained in these excerpts from the judgment of the learned appellate Judge, there is also a patent error of law. How is the Act of purchasing a property for getting some accommodation for the shop from a landlord who had failed in his attempt to evict the tenant relevant factor while considering the comparative hardship? In my opinion, it is totally irrelevant. The learned Appellate Judge has repeatedly hasted upon this fact and as a result made his approach is clouded by his extraneous consideration. It may be true that the plaintiff did not adduce evidence in the courts below to show that alternative accommodation was available to him, but all the same there is evidence to show that there is accommodation available to the respondent and that accommodation will meet the requirements of the type of the business which the respondent is conducting.

10. Mr. Walawalkar, the learned Advocate appearing for the respondent has sought to support the finding of the Appeal Court by underlining the limited jurisdiction of this Court under Article 227 of the Constitution. He has invited my attention to some judgments which describe the well known limits of the jurisdiction of this Court under Article 227. It is not necessary for me to refer to the same. I have shown above how the judgment of the Appeal Court is vitiated by factors which were totally irrelevant to the determination of the question before it. Such a judgment, in my opinion, is amenable to correction by this Court in exercise of its jurisdiction under Article 227 of the Constitution.

11. Some attempt was made by Mr. Walawalkar to persuade me not to interfere in this case because what he called the interests of justice do not require such interference. I do not see how any concept of interest of justice is involved in decreeing a suit in accordance with law. There is no question of justice as far as this case is concerned de hors of the provisions of the Rent Act. The provisions of the Rent Act do warrant a decree for possession on the facts and circumstances of this case.

12. In the result, this petition must succeed. The decree passed by the learned appellate Judge of Sangli in Civil Appeal No. 104 of 1977 is set aside and the decree passed by the joint Civil Judge, Junior Division, Sangli in Civil Suit No. 202 of 1974 is restored. There is, however, no order as to costs in this petition.