

(2001) 03 BOM CK 0136

Bombay High Court

Case No: Writ Petition No. 2565 of 1990

Kondeo Savalaram Panse

APPELLANT

Vs

Digambar Ramrao Pai and
Others

RESPONDENT

Date of Decision: March 1, 2001

Acts Referred:

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 13(1), 3
- Constitution of India, 1950 - Article 227
- Limitation Act, 1963 - Article 66, 3, 3(1)

Citation: (2001) 4 BomCR 267 : (2001) 3 BOMLR 691

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

Bench: Single Bench

Advocate: Mr. S.M. Gorwadkar and Mr. V.G. Rege, for the Appellant;

Judgement

A.M. Khanwilkar, J.

This writ petition under Article 227 of the Constitution of India takes exception to the order passed by the IIIrd Addl. Dist. Judge, Thane dated 11.12.1989 in Civ. Appeal No. 962 of 1987.

2. Briefly stated the petitioner, landlord in respect of premises on the ground floor of CTS No. 257/3, Rasta Peth, Pune consisting of two rooms admeasuring 10" x 14" and 10" x 12" and bathroom 7" x 5", filed a Suit against the respondents in the Court of Small Causes, Pune being C. Suit No. 611 of 1982. The possession was sought on the grounds, of bona fide requirement; the tenant having acquired alternative suitable accommodation; nuisance, and default. Prior to the institution of the suit the tenant had filed an application for fixation of standard rent. The Trial Court decreed the suit on the ground of bona fide requirement and tenant having acquired alternative suitable accommodation. The said decree was carried in appeal by the respondents before the District Judge, Pune. The Appellate Court has

reversed the decree passed by the Trial Court on both the counts.

3. The petitioner's case is that the respondent No. 1 was the original-tenant in respect of the suit premises. He was inducted sometime in the year 1952 as tenant. At the relevant time respondent No. 1 was bachelor and was staying alone in the suit premises. The petitioner's case is that subsequently the family members of respondent No. 1 started staying along with respondent No. 1 in the suit premises. The petitioner however stated that the respondent No. 1 shifted to Bombay sometime in the year 1960-61 and since then settled down in Bombay. In the circumstances the petitioner asserted that the respondent No. 1, who was the original tenant, had acquired alternative suitable accommodation. In so far as the plea for bona fide requirement is concerned the averments contained in plaint are articulated in para (d) thereof. The petitioner has stated that the suit premises are required bona fide and reasonably for the accommodation of his family members as he desires to celebrate the marriage of his two sons. It is further stated that marriage of one son has already taken place and the marriage of second son may be celebrated within couple of months. The petitioner has further asserted in the plaint that after the said marriage the petitioner's son will require the suit premises bona fide and reasonably and the petitioner will also require the premises for his own use and occupation. The plaint further asserts that the petitioner was working as Head Master of the High School, Rasta Peth Education Society, Pune which had 70 school teachers and 2500 students who intermittently visited the petitioner at his residence. Besides this the petitioner was working as the President of Science Association and Chief Editor of "Vidnyan Varta; a magazine circulated all over Maharashtra. According to the petitioner, he required the suit premises in view of the large number of visitors at his residence. In response to the said claim the respondents filed written statement and denied the material allegations. Both the parties went to the trial. However, during the course of the trial at the time of evidence details of some premises which became available to the petitioner were brought on record. From the evidence it would appear that though the suit was filed in 1982 prior to that sometime In 1975 the petitioner had received possession of tenement on the first floor which was occupied by Mrs. Puram. It is also alleged that another premises on the first floor which were occupied by another tenant Hardikar became available to the petitioner sometime in the year 1984. An attempt has also been made to bring on record that one more premises which were occupied by another tenant Kande on the ground floor of the rear side of the building also became available. The respondents, therefore, resisted the ground of bona fide requirement. According to the respondents since the premises occupied by Mrs. Puram became available to the petitioner prior to the institution of the suit and no reference was made about the availability of the said accommodation for occupation of the petitioner, the petitioner had not approached the Court with clean hands and in any case the ground of bona fide requirement stood belied on such evidence being brought on record. The respondents also contended before the

Court below that since premises which were originally occupied by other two tenants viz. Hardikar and Kande were available to the petitioner the ground of bona fide requirement could not be pressed into service. The Trial Court, however, after considering the relevant pleadings and evidence on record negated the said contention and instead held that in so far as the premises which were originally occupied by Mrs. Puram were concerned it consisted of one big hall without any attached sanitary block. According to the Trial Court the said premises could be used only as drawing hall by the petitioner. On the other hand the suit premises consisted of two rooms, kitchen and living room and therefore the said premises were bona fide required by the petitioner. In so far as the premises occupied by another tenant Hardikar is concerned the Trial Court examined the evidence and has concluded that the evidence which has come on record was not convincing to hold that Hardikar had vacated the premises and handed over the possession thereof to the petitioner. The evidence that was sought to be brought on record was in the nature of entry from the Register maintained in the Rationing Department which was cancelled. The Trial Court observed that the basis for cancellation of the said entry would be reflected in the application pursuant to which the said entry was cancelled and since the same was not brought on record it was not possible to accept the plea that Hardikar's premises became available to the petitioner. In so far as the accommodation of another tenant Kande was concerned the Trial Court has observed that the said premises consisted of one room admeasuring 6" x 10" and the bathroom 6" x 4". The Trial Court has accepted the evidence adduced on behalf of the petitioner that Kande's premises were not suitable for the use and occupation of the petitioner and his family members for residence since it was on the rear side of the building and consisted of small room. Taking the totality of the circumstances, the Trial Court took the view that the petitioner had established the ground of bona fide personal requirement for himself and his family members. While answering the issue of comparative hardship the Trial Court analyzed the evidence and concluded that the respondent No. 1 was the original tenant and since he had shifted permanently to Bombay the suit premises were not put in use by the tenant and therefore the question of causing any hardship to the tenant would not arise. The Trial Court also recorded a finding that the respondent No. 1 tenant had acquired alternative suitable accommodation at Bombay and that there was no evidence on record to show that there was any probability of respondent No. 1 coming back to Pune. The Trial Court has recorded that no animus reverend had been shown by the original tenant. In the circumstances the Trial Court decreed the suit also on the ground of alternative suitable accommodation.

4. On the other hand the Appellate Court has reversed the conclusion reached by the Trial Court on both the aforesaid grounds. According to the Appellate Court, the petitioner had failed to make out a case of bona fide requirement since other premises became available to the petitioner. The Appellate Court has accepted the version of the respondent that the premises which were originally occupied by Mrs.

Puram had become available and were being used by the petitioner and his family members. The Appellate Court also proceeded to record a finding that the premises occupied by another tenant Hardikar were vacated and possession thereof has been made available to the petitioner. The Appellate Court has also held that the premises of Kande were also available to the petitioner and for his family members. The Appellate Court accordingly reversed the finding of bona fide requirement. In so far as the issue of comparative hardship is concerned the Appellate Court has discussed the same along with the Issue of tenant having acquired alternative suitable accommodation. According to the Appellate Court the son of respondent No. 1 was still using the suit premises and therefore the ground of alternative accommodation could not be pressed into service and consequently greater hardship would be caused to the family members of the tenant.

5. The present petition takes exception to the aforesaid view taken by the Appellate Court. The counsel for the petitioner mainly contends that the findings of the Appellate Court in reversing the conclusion on facts recorded by the Trial Court are palpably unreasonable and error apparent on the face of the record and has caused serious miscarriage of Justice. According to the petitioner in so far as the premises of Mrs. Puram are concerned the same were not suitable and this aspect of the matter has been clearly overlooked by the Appellate Court. In so far as the premises of Hardikar are concerned, the grievance made is that the conclusion of the Appellate Court that the same were available is on the basis of conjectures and surmises and without any cogent reason. In so far as the finding with regard to premises of another tenant Kande is concerned, the argument is that the said premises were not suitable being very small area and on the rear side of the building, which has been overlooked by the Appellate Court. Besides that it is now contended that the said premises are no more available as said structure has collapsed due to dilapidated condition. It is stated that since the said structure has collapsed, the same, in any case is not available to the petitioner. In so far as the ground of alternative accommodation is concerned the argument advanced on behalf of the petitioner is that the Court having accepted the evidence that the respondent No. 1 was the original tenant and had permanently shifted to Bombay there was no option but to decree the suit on the said ground. Merely because other family members continued to occupy the premises would not deprive the petitioner from pressing the said ground for seeking decree of possession.

6. On the other hand, the learned counsel for the respondents supported the findings recorded by the Appellate Court and adopted the reasons indicated by the Appellate Court as his argument. It is further contended that in so far as the ground of alternative accommodation is concerned the same cannot be pressed into service, since, admittedly, the suit has been filed almost after 20 years from the date when the respondent No. 1 the original tenant, had shifted from the suit premises and started living in Bombay. Reliance is placed on the decision of the Apex Court in the case of Smt. Shakuntala S. Tiwari v. Hem Chand M. Singhania," to buttress this

contention. According to the respondents in view of the provision contained in section 3 of the Limitation Act it is the duty of the Court to dismiss the suit even if issue of limitation is raised at the stage of writ Jurisdiction. In so far as the grounds of bona fide requirement and comparative hardship are concerned the respondents would support the reasons mentioned by the Appellate Court for concluding that the petitioner had failed to make out ground of bona fide and reasonable requirement for himself and his family members. According to the respondents in any case issue of comparative hardship should be answered in favour of the petitioner. One of the objection raised on behalf of the respondents is that so far as the ground of bona fide requirement is concerned the pleadings which are filed before the Trial Court were not sufficient and in fact the petitioner suppressed material fact that the petitioner had already acquired premises of Mrs. Puram much prior to the institution of the suit. This objection is however countered by the petitioner by relying on the decision of this Court in the case of Ramesh Woman Pingale v. Sitaram Nathu Shimpi. According to the petitioner, although the said fact was not stated in the plaint, but since the same has come in evidence; and all other material facts have been brought on record during the course of examination of the witnesses; and the parties permitted the said evidence to be let in, it is not open to the respondents to now complain that the said material cannot be looked into since it was not specifically pleaded in the plaint.

7. Having considered the rival submissions I would first deal with the ground of the tenant having acquired alternative suitable accommodation. The relevant facts for adjudicating this issue are that: the respondent No. 1, the original tenant, shifted from Pune as back as in the year 1960 and since then he has been staying in Bombay; and after his departure suit premises were used by his family members. There is no dispute that the relationship of landlord and tenant existed between the petitioner and respondent No. 1 and that the petitioner has not accepted the family members of respondent No. 1 as tenant in respect of the suit premises. Thus the ground u/s 13(1)(1) became available to the petitioner as back as in or around 1960 and, therefore, it was Incumbent upon the petitioner landlord to initiate action on the basis of the said ground before the Rent Court within limitation. There can be no doubt that limitation for Initiating action would commence from the date of knowledge that the ground has become available; and the suit on the said ground ought to have been filed within 12 years from the date of such knowledge. Reference to the provisions of section 3 read with Article 66 of the Limitation Act would be apposite. Article 66 provides that when the forfeiture is incurred or the condition is broken the suit should be filed within 12 years from the date of such occurrence. Admittedly, in the present case, the forfeiture was incurred by respondent No. 1 and condition broken by him sometime in the year 1960 or thereabout; but the suit has been filed on 16.3.1982, which is obviously after expiry of 12 years; and was, therefore, beyond limitation. The argument advanced on behalf of the petitioner that the cause of action is continuing one and therefore the

suit instituted by the petitioner was within time is totally misconceived. This aspect of the matter stands answered by the Apex Court in the decision of Smt. Shakuntala S. Tiwari (supra). The Apex Court has held that provisions of Limitation Act are applicable to suit for recovery of possession instituted by the landlord against the tenant. Sub-section (1) of section 3 of the Limitation Act, 1963 clearly postulates that although limitation has not been set up as a defence nevertheless the suit If instituted should be dismissed if barred by limitation, for the Court has no Jurisdiction to entertain such a suit. I have, therefore, no hesitation in concluding that the ground that respondent No-1 original tenant having acquired alternative suitable accommodation cannot be pressed into service, being barred by law of limitation. In the circumstances, the conclusion reached by the Appellate Court on the said ground, though wrong, does not require any Interference.

8. Coming to the next ground of personal bona fide requirement of the suit premises the same needs to be examined in the light of principle enunciated by the Apex Court in Raghunath G. Panhale v. Chaganlal Sundarji and Co. What appears to my mind is that the Appellate Court has interfered with the finding of fact recorded by the Trial Court without any cogent reason. The basis on which Interference has been made whether the same is warranted and just or not is the subject matter of challenge in the present writ petition. I shall now first refer to the premises which were originally in occupation of Mrs. Puram, and now which are stated to be in possession of the petitioner. In so far as this premises are concerned the Trial Court has considered the evidence and found that the same could hardly be said to be sufficient to meet the family needs of the petitioner because the same consist of only a hall with no attached sanitary block. The Trial Court has observed that the said hall could at best be used as a drawing hall by the petitioner and his family members. Whereas, the suit premises consist of two rooms viz. one kitchen and the other as living room, which accommodation was the requirement of the petitioner and his family members. The Trial Court while answering this Issue kept in mind that the family of the petitioner consisted of his three sons, one unmarried daughter and wife when the suit was decided by the Trial Court. Undisputedly, the family of the petitioner consisted of seven adult members viz. three couples and a marriageable son, whereas the premises which were in occupation of the petitioner at the relevant time consisted of three rooms. However, the Appellate Court has not touched upon any of the aforesaid reasons which weighed with the Trial Court in respect of this premises. Such approach cannot be countenanced especially when the Appellate Court has reversed the finding on this ground and while doing so recorded that premises of Mrs. Puram were available to the petitioner. In my view, this is palpably unreasonable approach which has caused serious miscarriage of justice.

9. In so far as the premises which were occupied by another tenant Hardikar, now stated to be in occupation of the petitioner is concerned, the Trial Court on analyzing the evidence found that the evidence which was brought on record was

not convincing to conclude that the premises were in actual possession of the petitioner. The Trial Court has noticed that the petitioner had denied to have received possession of this premises from Hardikar. Further the basis on which the respondents proceeded was by relying upon some entry from the Register maintained in the Rationing Department to indicate that the same was cancelled and therefore presume that Mr. Hardikar and his family had vacated the premises. The Trial Court observed that the application on the basis of which the said entry was cancelled, which alone could have shown the reason for cancellation, itself was not produced on record nor the witness from the Rationing Department was in a position to depose convincingly that in fact Hardikar had vacated the premises. In the circumstances the Trial Court held that there was no reason to disbelieve the petitioner when he asserts that Hardikar was still continuing possession of his premises. The Appellate Court, however, has erroneously assumed that Hardikar's premises became available to the petitioner on the basis of surmises and conjunction. The Appellate Court has not touched upon any of the factors referred to above while recording a contrary view, except saying that it appears from the another witness examined on behalf of the respondents that Hardikar got cancelled his ration card on 9.4.1987. This approach is palpably unreasonable and has obviously caused serious miscarriage of justice. I have no hesitation in rejecting the approach of the Appellate Court in answering that Hardikar vacated the premises on the basis of some entry in the Register of the Ration Card Department, which at any rate did not mention that reason for cancellation. Thus there is absolutely no legal evidence on record to support the finding of the Appellate Court.

10. Similarly with regard to the accommodation which was with Mr. Kande, another tenant, the Trial Court has observed that the same consisted of one room admeasuring 6" x 10" and other being bathroom of 6" x 4" and besides it was on the rear side of the building, therefore, not suitable. The Trial Court has noticed that the petitioner had deposed that the said premises were not suitable, though in his occupation; and this has not been contradicted by the Respondents either by giving suggestion or any positive evidence to the contrary. The Trial Court had held that this room is not suitable- The Appellate Court although noticed that the petitioner had expressed willingness to offer this premises to the respondents has totally misdirected itself in answering that it was suitable. Merely because the said premises became available does not mean that it were suitable. Nevertheless it is not in dispute that this premises have collapsed as it were in dilapidated condition, therefore, will be of no avail for effectually deciding the matter on hand.

11. Even accepting the reasoning of the Appellate Court what appears is that the premises that became available from Mrs. Puram are on the first floor; from Hardikar on the first floor; whereas Kande's premises are on the ground floor. On the other hand the petitioner Is stated to be occupying three rooms on the second floor. On close scrutiny of the conclusion reached by the Appellate Court what appears to me is that the Appellate Court has committed palpable error which has

caused serious miscarriage of Justice. The reasoning which weighed with by the Appellate Court is recorded in para 16 of the Judgment. On examining the said reasoning, to my mind, the Appellate Court has proceeded on conjectures and surmises. In the first place the Appellate Court has not dealt with the reasons recorded by the Trial Court for rejecting the case made out by the respondents. Without dealing with the said reasoning it was not open to the Appellate Court to reverse the finding of the Trial Court on any count. The fact remains that the requirement of the petitioner's family which consists of three couples and one son of marriageable age at the relevant time coupled with the status of the petitioner, has been overlooked by the Appellate Court, which has caused serious miscarriage of Justice. In my view, the finding recorded by the Appellate Court that the ground of bona fide and personal requirement has not been made out is perverse and palpably wrong and unsustainable.

12. What I find on the close scrutiny of the record is that Mrs. Puram's premises though available are not suitable whereas premises of Hardikar and now even of Kande are not in possession of the petitioner. Naturally, therefore, the petitioner has succeeded in establishing the ground of bona fide and personal requirement for himself and his family.

13. The grievance made on behalf of the respondent that since the plaint did not specify the accommodation which was already available with the petitioner when the suit was instituted an adverse inference should be drawn against the petitioner and the ground of bona fide requirement deserves to be rejected, is totally misconceived. This aspect of the matter has been answered by our High Court in Ramesh Waman Pingale's case (supra). This Court has held that if the averments in the plaint were vague but the parties went to trial and permitted evidence to be let in it cannot preclude the landlord from making out a case on the basis of evidence which has come on record. This Judgment has considered the ratio of decision reported in Abdul Samad Makhadum Baksh Shaikh's case (supra) which has been relied upon by the Appellate Court. I would prefer to place reliance on this decision reported in 1990 B. R. C. 326 as it would squarely apply to the facts of the present case.

14. The approach of the Appellate Court, in my view, is therefore, erroneous and palpably wrong. In fact it has caused serious miscarriage of justice by overlooking certain crucial matters on which the Appellate Court should have had applied its mind.

15. Now reverting to the ground of comparative hardship, admittedly, respondent No. 1 who is the original tenant has permanently shifted to Bombay. The comparative hardship is to be considered only in the context of the hardship caused to the tenant and not to other occupants in the suit premises who were merely occupying the same as family members. In any case, what has been observed by the Appellate Court in para 19 is that the son of the respondent No. 1 Rajendra is stated

to be residing in the suit premises. It is stated across the Bar that even Rajendra is not staying in the suit premises and in fact the premises are lying unused for quite long. It is not necessary to go into this controversy. Since the respondent No. 1 was original tenant the comparative hardship will have to be tested between the petitioner and the original tenant. By passing decree of eviction if any hardship is going to be caused to the son of the respondent No. 1 that need not deter the Court from passing the decree, for it is not a hardship to the tenant as such, but the family member of the tenant. If this distinction is kept in mind, I find no hesitation in concluding that by refusing decree of possession greater hardship would be caused to the petitioner-landlord. It is not in dispute that the petitioner and his family now consists of himself, his wife, his three married sons, and their dependents. No doubt it is stated across the Bar that out of three married sons one son is staying separately.

But even then the petitioner who is the landlord is surely entitled to claim possession as and when the additional premises are required for the need of his family. Moreover, if the suit premises became available it is possible that the son may occupy the same. The petitioner's family, in any case, even today, undisputedly consists of three couples and their dependents and therefore it would be preposterous to assume that the premises already in possession of the petitioner are sufficient to take care of such a big family and at any rate a growing family. To deny decree of possession in such a case would be causing violence to the letter and spirit of law. In the circumstances, I find that the conclusion reached by the Appellate Court deserves to be reversed and instead decree of possession passed by the Trial Court against the respondent should be restored but on the ground of bona fide and personal requirement alone.

16. For the aforesaid reasons this petition succeeds. The Impugned order dated 11.12.1989 is set aside and instead the order and decree passed by the trial Court is restored. No order as to costs.

17. At this stage Mr. Gorwadkar prays for time to approach the Apex Court. Mr. Naik has no objection for grant of time provided the respondents and any other adult person staying in the suit premises shall file undertaking before this Court that they shall vacate the suit premises on expiry of eight weeks from today. They shall also file declaration as to who is in possession of the suit premises and further undertake that they shall not part with possession or create any third party rights in the said premises. Respondents also undertake to pay all the arrears within two weeks. Parties to maintain status quo for a period of eight weeks subject to the aforesaid condition. C. C. expedited.