



WP 1816/09



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Judgment Dt/- 18/06/2009

**IN THE HIGH COURT OF JUDICATURE AT
BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 1816/2009

Mr. Norman F.X. Alva,
Aged adult,
Occupation retired,
r/o Ground Floor, `Dina-Del',
HouseNo. 665/0+1, Residency Road,
Sadar Nagpur,
through his power of attorney holder
Mrs. Lorha w/o Norman Alva. ...

PETITIONER

.....VERSUS.....

Vice Admiral Rustom Faramroze Contractor,
aged about 60 years, C/o Naushir Bhagwagar,
Ajanta Cooperative Housing Society Ltd.,
Opp. Poonam Chambers, Chindwara Road,
Nagpur. ...

RESPONDENT

Mr. D.V. Chauhan, Advocate, for the petitioner.
Mr. M. Shareef, Advocate, for the respondent.

CORAM: SMT. VASANTI A. NAIK, J.
DATE : 18th JUNE, 2009.

ORAL JUDGMENT

1. Rule. Rule made returnable forthwith.

The petition is heard finally at the stage of admission with the consent of the learned counsel for the parties.

2. Few facts giving rise to the petition are stated thus-

The petitioner is the original defendant. A suit was filed by the respondent-Landlord against the petitioner in the Small Causes Court, Nagpur, for ejection and possession. The respondent was the owner of the suit property and the petitioner was occupying the same as a tenant for more than 40 years, on payment of monthly rent. The respondent pleaded that he was serving in the Indian Navy and was posted at New Delhi on deputation to the Indian Coast Guard as the Director General, at the time of filing of the suit and was due to retire from service in November, 2008. The respondent pleaded that he was desirous to settle in Nagpur, after his retirement. It was also pleaded that after his retirement, he intended to commence a security consultancy of his own as he had vast experience in that field. It was pleaded that he did not possess suitable accommodation for the purpose of establishment of the said consultancy. The respondent pleaded that the tenanted premises in occupation of the petitioner were most suitable and convenient for the respondent to start his security consultancy. The

respondent pleaded that the suit property was required for the purpose of bona fide need of the respondent as well as his son. It was lastly pleaded that no prejudice would be caused to the petitioner if the petitioner vacated the suit premises as he had sufficient alternate premises.

3. The petitioner filed the written statement and denied the claim of the respondent. It was, however, admitted that the respondent was the owner of the suit property and that he was occupying the suit property as a tenant since 1968. The pleadings in regard to the posting of the respondent at the relevant time as also the date of the retirement of the respondent from service, were, however, denied for want of knowledge. It was vehemently denied by the petitioner that the tenanted premises in possession of the petitioner were most suitable and convenient for commencement of the security consultancy. It was pleaded that the respondent had another accommodation in Byramji Town. Lastly, it was denied by the petitioner that no prejudice would be caused to the petitioner if he vacated the suit premises as he was having sufficient accommodation and the hardship caused to the

respondent would be greater than the petitioner if at the fag end of his life, he was compelled to vacate the tenanted premises, specially looking to his medical unfitness.

4. The parties tendered their evidence and on an appreciation of the same, the Small Causes Court, by the impugned judgment dated 7th of November, 2008, decreed the suit of the respondent. It was held by the Small Causes Court that the landlord had succeeded in proving his bona fide need and the hardship caused to the respondent would be greater. The judgment passed by the trial Court on 7th of November, 2008, was challenged by the petitioner in an appeal. The Ad hoc District Judge-1, Nagpur, however, by the impugned judgment dated 3rd of March, 2009, dismissed the appeal filed by the petitioner.

5. Shri D.V. Chauhan, the learned counsel for the petitioner, submitted that the Courts were not justified in holding that the comparative hardship caused to the respondent would be greater by considering certain documents and oral evidence which was inadmissible. The learned counsel for the petitioner submitted that certain

documents were introduced by the respondent during the cross-examination of the petitioner though those documents were not produced by the respondent before the Court as required under the provisions of Order VII Rule 14 of the Code of Civil Procedure. According to the learned counsel for the petitioner, the respondent wanted to rely upon the document of *Jamabandi* for proving that the petitioner had alternate accommodation and hence it was necessary for the respondent to produce the *Jamabandi* before the Court when the plaint was presented by the respondent in the Court of Small Causes. The learned counsel for the petitioner then submitted that the provisions of Order VII Rule 14 (4) of the Code of Civil Procedure could not have been made applicable to the facts of the case. According to the learned counsel the document of *Jamabandi* could not have been introduced during the cross-examination of the petitioner as it was neither produced for the cross-examination of the petitioner nor handed over to the petitioner to refresh his memory. The learned counsel for the petitioner relied on the decision reported in **1984 Mh. L.J. 938** to substantiate his submissions. According to the learned counsel for the

petitioner, the petitioner could not have been taken by surprise by introduction of the document during the cross-examination of the witness, nor could the respondent have improved his case on the basis of the document of *Jamabandi* which was not produced before the Court in accordance with the provisions of Order VII Rule 14 of the Code of Civil Procedure. The learned counsel for the petitioner submitted that the provisions of Order XIII Rule 1 of the Code of Civil Procedure are also similar to that of Order VII Rule 14 of the Code of Civil Procedure and, therefore, the respondent could not have taken resort to the provisions of Order XIII Rule 1 of the Code of Civil Procedure for introducing the document of *Jamabandi* during the cross-examination of the petitioner. The learned counsel for the petitioner fairly conceded that the petitioner could not have effectively challenged the finding recorded by both the Courts on the bona fide need of the respondent, though the finding as regards comparative hardship was liable to be set aside and it was necessary to remand the matter to the appellate court to decide the issue of comparative hardship afresh on merits as the same was decided by the courts on the basis of inadmissible

evidence.

6. Shri Shareef, the learned counsel for the respondent, supported both the judgments and submitted that the Courts committed no error whatsoever in permitting the respondent to introduce the document of *Jamabandi* during the cross-examination of the petitioner, as it was the case of the petitioner that he did not have any other alternate accommodation. The learned counsel for the respondent submitted that the burden to prove the issue of comparative hardship always lies on the tenant and, therefore, the respondent could have introduced the document of *Jamabandi* during the cross-examination of the petitioner to prove that the petitioner had alternate accommodation and no hardship would be caused to the petitioner. The learned counsel for the respondent relied on the decisions reported in **1996 (1) Mh. L.J. 961** and **AIR 2003 Supreme Court 2713**, to substantiate his submission that the document of *Jamabandi* could have been filed without the leave of the Court and also could be introduced during the cross-examination of the petitioner. The learned counsel for the respondent submitted that it

was clearly pleaded by the petitioner in the written statement that he had no alternate premises for his accommodation and that greater hardship would be caused to the petitioner if he was required to vacate the premises at the fag end of his life. In the backdrop of these pleadings, according to the learned counsel for the respondent, the document of *Jamabandi* could have been introduced during the cross-examination of the petitioner. The learned counsel for the respondent relied on the provisions of Order VII Rule 14 of the Code of Civil Procedure, as also the provisions of Order XIII Rule 1 of the Code of Civil Procedure, to substantiate his submission that document of *Jamabandi* could have been introduced during the cross-examination of the petitioner.

7. I have considered the submissions made on behalf of the parties and perused the impugned judgments as also the relevant provisions of the Code of Civil Procedure and the evidence tendered by the parties on record. It is necessary to note that it was pleaded by the respondent-landlord that no prejudice would be caused to the petitioner if he vacates the suit premises as he had sufficient

alternate premises. This plea was raised by the respondent in the plaint and in response to this plea, the petitioner had pleaded in the written statement that he did not have any alternate premises for his accommodation and the hardship caused to the petitioner would be greater than that of the respondent, if at the fag end of the life, he was required to vacate the suit premises. Since the respondent had based his case on the plea that the petitioner had alternate premises, it was necessary for the petitioner to produce the document of *Jamabandi* at the time of presentation of the plaint and deliver a copy of the document to the petitioner. It is also necessary to note that though the respondent had pleaded in the plaint that the petitioner had sufficient alternate premises, the details of the alternate premises available to the petitioner were not pleaded by the respondent. In this background, the petitioner had merely denied the fact of possessing alternate premises.

8. It is apparent that the petitioner was taken by surprise when the document of *Jamabandi* was introduced by the respondent during the cross-examination of the petitioner. It is necessary to note that the object of the

provisions of Order VII Rule 14 of the Code of Civil Procedure is to provide full opportunity to the defendant to enable him to take an effective defence. It is, therefore, necessary for the plaintiff to produce all the relevant documents on which he bases his claim, at the time of institution of the suit. The intent of the provisions of Order VII Rule 14 of the Civil Procedure Code is to grant an opportunity to the defendant to examine the documents produced by the plaintiff, before filing the written statement and taking a defence. Since it was the case of the respondent that the petitioner had alternate accommodation, it was necessary for the respondent to produce the document of *Jamabandi* on which he relied to prove the same, at the time of presentation of the plaint. The petitioner could not have been taken by surprise by introduction of the document during his cross-examination.

9. The submission made on behalf of the respondent that the provisions of Order VII Rule 14(4) of the Code of Civil Procedure would be applicable to the facts of this case as the respondent was entitled to produce the document for the cross-examination of the petitioner, is also not well-

founded as from a reading of the evidence tendered by the petitioner in the examination-in-chief, it is clear that the petitioner did not utter that he did not have any alternate premises. In the absence of any assertion or a statement in that regard in the examination-in-chief, there was no question of cross-examining the petitioner on the said fact by introducing the document of *Jamabandi*. Hence, it cannot be said that the document of *Jamabandi* was introduced by the respondent during the cross-examination of the petitioner, for the purpose of cross-examination of the petitioner on the evidence tendered by him during the examination-in-chief. For similar reasons, the provisions of Order XIII Rule 1 of the Code of Civil Procedure would also not come to the rescue of the respondent for holding that the document could have been introduced during the cross-examination of the petitioner. Since the document of *Jamabandi* cannot be said to have been introduced to contradict a statement made by the petitioner in his examination-in-chief, the same could not have been introduced during the cross-examination. For the aforesaid reasons, the first appellate Court was not justified in holding that the non-filing of the document of *Jamabandi* pertaining

to the flat on the fifth floor at Mangalwari, Nagpur, by the respondent prior to the cross-examination of the petitioner, could not be said to be illegal.

10. On a reading of the judgment, it is clear that both the Courts had answered the issue of comparative hardship in favour of the respondent, mainly on the ground that the respondent had succeeded in proving that the petitioner had alternate accommodation, on the basis of the document of *Jamabandi* introduced by the respondent during the cross-examination of the petitioner. The Courts referred to the evidence of the petitioner from the cross-examination, which was extracted on the basis of the introduction of the document of *Jamabandi*, to draw an inference that the petitioner's wife has alternate premises though the fact was denied in the cross-examination. Since the finding recorded by both the Courts on the issue of comparative hardship is based on the finding that the petitioner's wife owned a flat in Mangalwari and the same in turn is based on an inference drawn on the basis of the evidence which was extracted from the petitioner by the introduction of the document of *Jamabandi*, the said finding

cannot be sustained.

11. Since the finding on the issue of comparative hardship was liable to be set aside, this Court asked the counsel for the petitioner as to whether the petitioner desires to produce the necessary documents before the trial court with the leave of court and then lead evidence on the basis of those documents as the respondent has no objection if that course is followed, the counsel for the petitioner, on instructions from the petitioner answered in the negative and sought a remand of the matter to the first appellate court, rather than the trial court. Hence, it would be just and proper in the facts and circumstances of the case to remand the matter to the first appellate court which is a final fact finding court for recording a finding on comparative hardship.

12. In the result, the writ petition is partly allowed. The impugned orders passed by both the Courts are hereby modified. The finding recorded by both the Courts on the issue of comparative hardship is hereby set aside. The rest of the findings recorded by both the Courts specially the

finding on the issue of bona fide need are hereby maintained. Since the issue of comparative hardship, which is liable to be decided by the first appellate Court is a short one, the first appellate Court is expected to decide the appeal as early as possible and positively within a period of three months from today. Both the parties undertake to appear before the appellate Court on 2nd of July, 2009, so that issuance of individual notices could be dispensed with. Rule is made absolute in the aforesaid terms with no order as to costs.

(Vasanti A. Naik)
JUDGE

RMP