

PETITIONER:
MRS. MEENAL EKNATH KSHIRSAGAR

Vs.

RESPONDENT:
M/S TRADERS & AGENCIES & ANR.

DATE OF JUDGMENT: 11/07/1996

BENCH:
NANAVATI G.T. (J)
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NANAVATI G.T. (J)
AGRAWAL, S.C. (J)

CITATION:
JT 1996 (6) 468 1996 SCALE (5)302

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

NANAVATI. J.

Leave granted.

This appeal arises out of the judgment and order of the High Court of Bombay in Writ Petition No. 3600 of 1990. The appellant had filed that writ petition against the judgment and order passed by the Appellate Bench of the Small Causes Court whereby the judgment of the Small Causes Court, Bombay, was reversed and the appellant's suit was dismissed. The appellant is an owner of a flat and a garage in the building known as 'Tarangini' in Bombay. This suit premises belonged to her father and were gifted to her in 1972. By an agreement dated 29.3.1972 the said premises were given by the appellant to Respondent No.1 firm on leave and licence basis for the purpose of its use and occupation by Respondent No.2 who is a partner of that firm. She filed Suit No. R.A.E. 372/1276/83 in of the Court of Small Causes at Bombay seeking eviction of he respondents on the ground that she requires the suit premises reasonably and bona fide for her person occupation. In the plaint she stated that she and her husband do not have any other residential premises of their own in Bombay. Her husband is a paid Assistant in M/s. A.F. Ferguson & Co. a firm of Chartered Accountants. That firm has taken on lease one flat in a building named 'Park View'. It had then given the same to one of its partners Mr. Kalra for his occupation. As Mr. Kalra was transferred from Bombay to Delhi, the flat had become available temporarily and therefore it was allowed to be used by the appellant's husband purely on a temporary caretaker basis. As the said partner is likely to return to Bombay her husband will be required to vacate that flat and, therefore, they will be without any accommodation whatever in Bombay. She further stated that she had called upon the respondents to vacate the suit premises in 1974 and in response to one of her letters the respondents had in 1976 and again in 1978 assured the appellant that they would

vacate the suit premises as soon as the flat booked by Respondent No.2 in a building called 'Rambha' would become ready for occupation. Even though the said flat has become available to Respondent No.2 he is not vacating the suit premises. She also stated that it is not possible for her to acquire any other premises in Bombay and, therefore, if a decree for possession is not passed she will suffer greater hardship. The suit was opposed on the ground that possession of the premises then in occupation of her husband was not insecure or temporary and that the suit premises are really not required by the appellant reasonably and bona fide for her occupation. Later on in 1987, during the pendency of the suit, the appellant, took out a notice of motion for early hearing of the suit. Therein she stated that she is serving as a lecturer in the Education Department of the Bombay University. As the respondents did not vacate the suit premises in spite of her request and the assurances given by the respondents and as there was a problem of accommodation in Bombay her husband had to get himself transferred to Madras in 1984. She also obtained study leave and went to Madras to stay with him. As her application for further leave was rejected she had to return to Bombay and report for duty in July 1987. Since then she has been residing with her parents as she does not have any accommodation in Bombay.

In support of her case the appellant examined herself and led evidence of P.W.3 Mr. Eknath Kshirsagar her husband, P.W.5 Mr. Maluste her father, P.W.2, Dr. Momin Mohinuddin, Head of the Department of Foreign Languages in the University of Bombay, P.W.4 Mr. Shohrab Burjoriji Vakil, Secretary of the Royal Bombay Yacht Club. On behalf of the respondents, Respondent No.2 was examined as a witness. During her cross-examination the appellant stated that her husband was a tenant of a bed room flat in 'Olympus Apartments' and that after her marriage with Eknath on 24.10.1971 she stayed with her husband in that flat till October 1972. Appellant's husband Eknath in his evidence stated that neither he nor his younger brother had any accommodation in Bombay, after his father left for Zambia in early 1968. After returning from England in November 1968 he took on lease a flat in 'Olympus Apartments' and started living therein along with his brother from December 1968. As his brother had disclosed his intention to marry in May 1972 and as his wife was expecting a baby he decided to have another accommodation. His employer, M/s. A.F. Ferguson & Co. had taken on lease from Mrs. Kalra one flat in a building named 'Park View' and it was given by the firm to Mr. Kalra for his occupation as he was a partner of that firm. As Mr. Kalra was then transferred to Delhi the said flat had become vacant and so his employer permitted him to use that flat temporarily on caretaker basis. He, therefore, shifted to that flat in October 1972 whereas Sridhar continued to stay in the 'Olympus' flat.

As the fact that the appellant's husband was a tenant of the 'Olympus' flat was neither disclosed in her plaint nor in her examination-in-chief a contention was raised before the trial court that omission to state that fact amounted to suppression of a material fact and on that ground her claim that she requires the suit premises bona fide for her personal occupation should be rejected. This contention was rejected by the trial court by observing that the appellant herself did not have any personal interest in the 'Olympus' flat and it was not necessary for her to mention that fact in the plaint as they had already shifted from that flat in October 1972 and since then the said flat

was occupied by Sridhar. The trial court also observed that the omission to state the said fact did not disclose any mala fide intention on her part.

On merits, the trial court held that though Eknath alone is the tenant of the 'Olympus' flat, right from the date it was taken on lease, the same was occupied both by Eknath and Sridhar and that since October 1972 Sridhar and his family consisting of his wife and two sons are residing therein. It further held that in view of the partial decree passed in favour of the landlady in respect of that flat which consists of two bed rooms only, it would be impossible for the two families of Eknath and Sridhar to stay therein. The trial court also held that Eknath was required by his employer, M/s. A.F. Ferguson & Co. to vacate the 'Park View' flat in 1984 and it was not available to him for occupation thereafter. The trial court also held that the appellant's husband had to get himself transferred to Madras because of lack of accommodation in Bombay and the appellant also had to stay at Madras till July 1987 by remaining on leave. The trial court believed that after their return from Madras the appellant with her sons has been staying with her father and her husband has to stay alone in one room in the premises belonging to Royal Bombay Yatch Club of which he is a member, on short-term basis. It, therefore, held that the 'Olympus' flat is not really available for occupation by the appellant and her husband because Sridhar is staying in that flat and the accommodation in 'Park View' flat is insecure, even if it is believed that the same is still available to the appellant's husband, and thus the appellant has proved that she requires the suit premises reasonably and bona fide for occupation by herself and her family. The trial court also held that Respondent No.1 being a firm does not require the suit premises for any other purpose and as it is financially well off no hardship will be caused to it if a decree for eviction is passed. The trial court also held that Respondent No.2 has no independent interest in the suit premises and, therefore, the question as to whether greater hardship would be caused to him or not does not arise for consideration. In the alternative, it held that as he has already acquired a flat in 'Rambha' having a larger area no hardship will be caused to him also if a decree for eviction is passed. The trial court, therefore, passed a decree against the respondents for eviction.

The respondents preferred an appeal to the Appellate Bench of the Small Causes Court. The Appellate Bench held that the appellant ought to have disclosed the fact that her husband is a tenant of the 'Olympus' flat at the first available opportunity and the said omission amounted to suppression of a material fact. After considering the stand taken by Eknath and the findings recorded in the proceedings for eviction filed by the landlady of the 'Olympus' flat it held that Eknath alone is the tenant of the said flat and occupation of that flat by Sridhar is totally at the mercy of Eknath and, therefore, it cannot be said that the said flat is not available to the husband of the appellant. It further held that in spite of the decree for partial eviction it is still possible for Eknath and Sridhar to occupy the said flat. Moreover, in view of the death of the landlady during the pendency of the appeal and the contention raised by Eknath that the landlady has not left behind any legal heir or representative there is a possibility of the said flat, in its entirety, becoming available to Eknath. As regards the 'Park View' flat it held that there was no evidence on record to show that Eknath was required by M/s. A.F. Ferguson & Co. to vacate the said flat

and that the correspondence which was produced in that behalf by the appellant could not be relied upon as it was "the internal correspondence of the company". It further held that it was necessary for the appellant to prove by examining Mrs. Kalra or some other person from the firm that Eknath was really called upon to vacate the said flat and that Eknath had vacated it for that reason. In absence of such evidence the Appellate Bench held that Eknath had left that flat voluntarily in order support the appellant's case for bona fide requirement and in fact there was no real or imminent threat to vacate the said flat. It also held that the act of vacating the 'Park View' flat was an artificially created circumstance to support the case of the appellant. Thus, according to the Appellate Bench both the flats being available to the appellant's husband, the appellant cannot be said to have proved her case of bona fide requirement. On the question of comparative hardship the Appellate Bench held that there would really be no hardship to the appellant if a decree for eviction is not passed in her favour. So also it held that "no hardship whatever will be caused to the appellant-tenant if a decree for eviction were passed against them." It further held that "the hardship of appellant No.2 cannot be considered as he has been allotted the suit premises by the appellant No.1 partnership firm and he has no independent right to that premises." It, therefore, allowed the appeal and dismissed the appellant's suit.

The appellant, therefore, preferred a writ petition in the High Court of Bombay challenging the judgment and order passed by the Appellate Bench. The High Court held that suppression of the material fact that the appellant's husband is a tenant of the 'Olympus' flat is sufficient to disentitle her from getting a decree of eviction. The High Court also agreed with the findings and reasons given by the Appellate Bench and dismissed the writ petition.

It was contended by Mr. Atul Setelwad, learned senior counsel appearing for the appellant that while testing reasonable requirement of the landlord what is required to be considered is the reality of the situation and not the possibility of the landlord being able to continue to reside in rented premises. He submitted that as a wrong test has been applied by the Appellate Bench and the High Court in this case, that has led to miscarriage of Justice.

Mr. Shanti Bhushan, learned senior counsel appearing for the respondents on the other hand supported the judgments of the Appellate Bench and the High Court on the ground that the findings recorded by both the courts are quite reasonable, and the view taken cannot be said to be so erroneous as to call for interference by this Court.

In *Prativa Devi vs T.V. Krishnan* JT 1987 (1) SC 764, to which our attention has been drawn by the learned counsel for the appellant, this Court has pointed out the correct test which has to be applied in finding out whether the requirement of the landlord is bona fide or not. It has held that:

"The landlord is the best judge of his residential requirement. He has a complete freedom in the matter. It is no concern of the Courts to dictate to the landlord how, and in what manner, he should live or to prescribe for him a residential standard of their own.... There is no law which deprives the landlord of the beneficial enjoyment of his

property."

It is further held therein that what is to be considered is not merely the availability of alternative accommodation but also whether the landlord has a legal right to such accommodation.

The following decisions of the Bombay and Calcutta High Courts relied upon by the learned counsel for the appellant are also helpful in deciding the question of bona fide requirement of the landlord. In *Dinshaw Billimoria vs. Rustomji Master* 23 Bombay Law Reporter 850, the Bombay High Court has held that:

"Ordinarily speaking, an owner of premises, if he says he wishes to use them for his own purposes, is entitled to do so. What the Rent Act endeavors to provide for is the case of a landlord who evicts the existing tenants in order that he may let them to another tenant at a higher rent, or exact a higher rent from the tenant on a threat of eviction. It seems to me that the question in that case whether the plaintiff was reasonably dissatisfied with the premises which he rented in Girgaum is irrelevant, because in any event the plaintiff was entitled to live in his own premises. He was not bound to continue to rented premises with all the uncertainties of that tenure."

The Calcutta High Court in *Basant Lal Saha vs. P.C. Chakravarty* 54 C.W.N 20 has observed as under:

"Where a landlord seeks to eject a tenant on the ground of bona fide requirement within the meaning of Proviso (f) of Sec. 11(1) of the Rent Control Act, 1948, he has to satisfy three tests:

- (i) That he "requires" the premises:
- (ii) That such requirement is for his "own occupation":
- and (iii) That his requirement is "bona fide-".

The word "require" means more than mere wish or convenience or fancy of the landlord. The landlord must show some need or necessity.

But it does not mean an absolute need or an absolute requirement in the sense that the landlord will not have any accommodation of any description and that he must actually be in street before he can demand his own house for his own occupation."

The High Court has also observed therein that while considering the question of bona fide requirement the nature and character of the landlord's temporary accommodation at the time when he is asking for a decree for possession, the insecurity or otherwise of the tenure that he might be holding at the time, the fact that he himself is under a notice to quit, the scope, size and character of his

requirement are all relevant factors that the Court has to consider.

In Ramendra Mohan Guha Sarkar vs. Smt. Bedana Paul, 1987(2) All India Rent Control Journal 154, the Calcutta High Court has observed that if a person is in occupation of 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 claim of the landlord for the premises in question. After referring to the decision of this Court in Phiroze Bamanji Desai vs. Chandrakant M. Patel, AIR 1974 SC 1059 it further observed that possession of a licensee is precarious and cannot be considered suitable alternative accommodation.

In view of the rival submissions, what we have to consider is whether the Appellate Bench and the High Court applied the correct test while determining the question whether the appellant requires the suit premises bona fide and reasonably for her occupation. The fact that the appellant is the owner of the suit premises and that she does not own any other premises in the City of Bombay is not in dispute. She does not pose, even as a tenant, any premises in Bombay. No doubt, she would be entitled to stay in the premises of which her husband is a tenant but if for any reason her husband had parted with possession of such premises and the same were occupied by her husband's brother, it cannot be said that the said premises were available to her and by not referring to those facts she had come to the court with unclean hands and that by itself was sufficient to disentitle her from getting a decree of eviction. If the appellant believed that the 'Olympus' flat of which her husband was a tenant was not available for occupation as the same was vacated by her husband many years back and was occupied by Sridhar and his family and that it was not possible or convenient for her and her family to go and stay there, it was not absolutely necessary for her to refer to those facts in her plaint. It would have been better if she had referred to those facts but mere omission to state them in the plaint cannot be regarded as sufficient for disentitling her from claiming a decree for eviction, if otherwise she is able to prove that she requires reasonably the suit premises for her occupation. We are, therefore, of the opinion that the Appellate Bench and the High Court clearly went wrong in holding that the said omission was sufficient to disentitle her from getting a decree of eviction and it also disclosed that her claim was mala fide and not bona fide as required by law.

The finding recorded by both the courts that the 'Park View' flat was available to her and her husband for occupation is the result of not applying the correct test to the facts of the case. Eknath was undisputedly not a tenant of the said flat. The tenant of the said flat is M/s. A.F. Ferguson & Co. of which Eknath is only a Director. Mrs. Kalra is the owner of that flat and after it was taken on lease by the firm it was given to Mr. Kalra, another Director of the firm for his occupation and use. The firm allowed Eknath to use the said flat temporarily on leave and licence basis in October 1972 as Mr. Kalra was then temporarily transferred to Delhi. The evidence produced by the appellant did disclose that the firm had required Eknath to vacate the same and it was not right for the Appellate Bench and the High Court to brush aside that evidence on the ground that it was "internal correspondence of the company". Eknath could not have occupied the said flat as a matter of right and in view of the arrangement between the firm and Mr. Kalra as used by the evidence on record it cannot be

said, in the context of judging the bona fide requirement of the appellant, that the said flat was available to her and her husband for occupation even after 1984, Even if it is believed that Eknath had not really vacated the said flat in 1984 and continued to be in possession, it cannot be said that the possession of the said flat was such as would disentitle the appellant to get a decree of eviction. Being a licensee Eknath's possession of that flat was precarious and therefore, could not have been considered as suitable alternative accommodation.

As regards the 'Olympus' flat the evidence discloses, and it is not in dispute, that Eknath left that flat in October 1972 and since then only Sridhar and his family members have been staying in that flat. It is a two bed room flat having an area of 1100 sq. ft. Sridhar has a wife and two children and the family of appellant also consists of four persons. In the suit for eviction filed by the landlady of that flat a partial decree has been passed and Eknath has been ordered to hand over half the portion of that flat. Both Eknath and landlady have challenged the said partial decree and their respective appeals are pending before the Appellate Court. In this context the courts had to consider whether it can be said that the appellant and Eknath are having suitable alternative accommodation and, therefore, the appellant's claim that she requires the suit premises for her occupation is not reasonable and bona fide. The Appellate Bench and the High Court considered the possibility of Eknath going back to that flat and occupying it along with Sridhar and also the possibility that in case the landlady's appeal is dismissed and Eknath's appeal is allowed the flat in its entirety, will become available to Eknath and on that basis held that the appellant's claim that she requires the suit premises reasonably and bona fide is not true. As pointed out by this Court it is for the landlord to decide how and in what manner he should live and that he is the best judge of his residential requirement. If the landlord desires to beneficially enjoy his own property when the other property occupied by him as a tenant or on any other basis is either insecure or inconvenient it is not for the courts to dictate him to continue to occupy such premises. Though Eknath continues to be the tenant of the 'Olympus' flat, as a matter of fact, it is being occupied exclusively by Sridhar and his family since October 1972. For this reason and also for the reason that because of the partial decree passed against him Eknath is now entitled to occupy the area of 550 sq. ft. only, it is difficult to appreciate how the Appellate Bench and the High Court could record a finding that the 'Olympus' flat is readily available to the appellant's husband and that the said accommodation will be quite sufficient and suitable for the appellant and her family.

In view of the facts and circumstances of the case we are of the view that the appellant has proved her case of bona fide requirement and, therefore, the Small Causes Court was right in passing the decree in her favour. The Appellate Bench committed a grave error in reversing the same and the High Court also committed an error in confirming the judgment and order passed by the Appellate Bench. We, therefore, allow this appeal, set aside the judgment and order passed by the High Court and also by the Appellate Bench and restore the judgment and decree passed by the Small Causes Court. The respondents shall pay the cost of this appeal to the appellant.

JUDIS