

Presented on : 17.01.2013
Registered on : 31.01.2013
Decided on : 01.04.2019
Duration : Ys. Ms. Ds.
06 02 15

**IN THE COURT OF 3rd JOINT CIVIL JUDGE, JUNIOR DIVISION,
AHMEDNAGAR, DIST. AHMEDNAGAR**

(Presided over by Smt.K.S.Navandar)

Regular Civil Suit No.55/2013
Exh.89

(CNR No.MHAH02-000166-2013)

Shaikh Sirajoddin Nijamoddin
(Deceased) Through Legal Heirs :

- 1A. Shaikh Naushad Allauddin**
Age: 50 years, Occ: Household,
- 1B. Shaikh Shamshad Samir**
Age: 46 years, Occ: Household,
- 1C. Shaikh Dilshad Muktar**
(Deceased) Through Legal Heir :
- 1C1. Shaikh Imran Muktar**
Age: 33 years, Education,
- 1D. Shaikh Shaboddin Sirajoddin**
Age: 53 years, Occ: Business
1A, 1C1 & 1D R/o: Near Rodga
Masjid, Panchpir Chavdi,
Ahmednagar.

... Plaintiffs

Versus

Hamidkhan Ahmadkhan Pathan
Age: 64 years, Occ: Business,
Proprietor-Hamid Furnitures &
Famous Furniture,
R/o: Near Panchpir Chavdi Masjid,
Ahmednagar.

... Defendant

Shri. S.M. Sayyad : Learned Advocate for the plaintiffs.
Shri. F.B. Shaikh : Learned Advocate for the Defendant.

J U D G M E N T

(Delivered on 1st day of April, 2019)

This is suit for recovery of rent and possession of tenanted premises.

2. Suit Property:

- (A) : City survey No.3862 out of which 6 x 6 ft. shop on ground floor (Hamid Furniture).
(B) : City survey No.3862, same building, 8 x 9 ft. shop on the first floor (Famous Furniture).

Both the shops in the same building are situated at Panchpir Chavadi, Ahmednagar within municipal limits (hereinafter referred to as 'the suit property').

Certain admitted facts :

3. The plaintiffs are owners of suit properties, while the defendant is tenant. In the previous adjudication between them, the Court fixed monthly rent of Rs.100/- and 200/- for suit properties 'A' and 'B' respectively.

Brief facts of the plaintiffs' case :

4. Deceased father of the plaintiffs let out suit property 'A' to

the defendant in year 1992 on monthly rent of Rs.500/- as per English calendar. The defendant illegally occupied suit property 'B' which is adjacent to the property 'A'. He also failed to pay the rent. The defendant filed suit for injunction against the plaintiffs bearing R.C.S. No.527/1997 claiming himself tenant of both the suit properties. The plaintiffs preferred counter-claim and sought possession of property 'B' claiming the defendant to be a trespasser. They filed a separate suit bearing No. R.C.S. No.469/1997. During adjudication rent of both properties have been fixed to Rs.100/- and 200/- per month for properties 'A' and 'B' respectively. The defendant held to be tenant of both properties. The decree passed by learned trial Court was confirmed in appeal.

5. After the decision in above proceeding and it's appeal, the defendant did not pay rent regularly. Rent of about 5 years is due. As such, the defendant is a willful defaulter.

6. The defendant has kept the property 'B' under lock since more than 5 years. He is not using the same thereby he has lost right to continue the possession.

7. Plaintiff 1D Shahabuddin is running a shop 'Royal Vastu Bhandar' in a small shop which is adjacent to property 'B'. Due to shortage of space he has to keep goods elsewhere and under the staircase. Instances of theft of articles are thereby increasing and he has to suffer heavy loss. As such, he is in *bonafide* need of suit property 'B'.

8. The defendant is having alternate accommodation and hence if decree of eviction is passed, he will not be put greater hardship than the plaintiffs.

9. The plaintiffs issued notice on 11.10.2011 and thereby terminated tenancy of the defendant as per Section 106 of the Transfer of Property Act. Despite of due service of notice, the defendant did not pay the due rent nor vacated the premises, instead he sent a false reply. Hence, the plaintiffs have brought this suit.

Defence :

10. The defendant has filed his written statement at Exh.13 and thereby resisted the suit. It is denied that only suit property 'A' was taken on rent by him and thereafter he encroached upon property 'B'. It is also denied that he is in arrears of rent. According to him, he was regularly paying rent to the plaintiffs. However, the plaintiffs have not issued receipts. It is contended that from time to time he sent money orders and thereby paid the rent. It is also contended that he paid rent by money orders, but the plaintiffs purposely refused to accept the same. Therefore, according to him, he cannot be said to be a willful defaulter and plaintiffs are not entitled to get possession of the suit property on this ground.

11. The defendant has specifically denied that the plaintiffs are in *bonafide* need of the suit property. According to him, the plaintiffs are having many other shops, they have let out other shops recently and hence on this ground also they cannot claim possession. The

defendant has denied that he has alternate accommodation and contended that if decree of eviction is passed, he will suffer greater hardship than the plaintiffs.

12. It is also denied that he is not using the suit property 'B' and it is closed since more than 5 years. As such, according to the defendant, the plaintiffs are not entitled to get possession of the suit property on the ground of closure or abandonment.

13. On the basis of rival pleading of the parties, my learned Predecessor has framed issues at Exh.17. They are reproduced below and I have recorded my findings on them along with reasons as under :

ISSUES

FINDINGS

- | | |
|--|-----------------------|
| 1. Does plaintiff prove that the defendant is a willful defaulter ? | ..In the affirmative. |
| 2. Does plaintiff prove that he requires suit premises reasonably and <i>bonafide</i> for his own use and occupation ? | |
| 3. To whom greater hardship would be caused by passing the decree than by refusing to pass it ? | ..To the defendant. |
| 4. Whether plaintiff is entitled for recovery of possession of suit premises and arrears of rent with <i>mesne</i> profits as prayed ? | |

- 4A Does the plaintiff prove that the suit property is not used by the defendant for more than five years before filing of the suit without reasonable cause ? ..In the negative.

5. What order and decree ?

REASONS

14. To prove the claim, plaintiff-Shahabuddin (P.W.1) has examined himself at Exh.23 and also examined witness Radhakisan Ananda Wagh (P.W.2) at Exh.51. The plaintiffs have produced on record certified copies of property extract (Exh.32), judgments in R.C.S. No.469/1997 & R.C.S. No.527/1999 (Exh.34 & 35), application for electric supply (Exh.47), inspection report of electric company (Exh.48), office copy of notice (Exh.61), postal acknowledgment (Exh.62), light bill (Exh.63), etc.

15. In rebuttal, defendant-Hamidkhan (D.W.1) has examined himself at Exh.72. The defendant has produced on record various receipts of rent at Exh.75 to 82.

AS TO ISSUE NO.1 : (Willful defaulter)

16. According to plaintiffs, the defendant has not paid rent of more than 5 years, that notice was issued by the plaintiffs thereby terminating his tenancy on 11.10.2011 (Exh.61) and even after service of notice, the amount was not tendered. The defendant denied this claim in his examination-in-chief. According to him, he tendered rent by money order, it was not accepted by the plaintiffs.

The cross-examination of the defendant is important to decide this issue.

17. During cross-examination of the defendant it is brought on record that as per the decree of R.C.S. No.669/1997 dated 19.04.2003, the Court directed to payment of rent for the period of August, 1997 to 2003 and the payment was to be made within 3 months of the decree. However, he made payment in R.C.A. No.176/2003 by cheque and till decision of the appeal, i.e. till 16.07.2004, he was depositing rent in the Court. From the above details what can be gathered is that the defendant was not regular in paying rent and he was compelled by the Court.

18. According to defendant, after decision of R.C.A. No.176/2003 he was sending money order to the plaintiffs. He has filed receipts of money order at Exh.75 to 82. The datewise money orders with their status is as follows :

Date	Rs.	Status
08.12.2008	1200/-	Accepted
21.03.2009	1200/-	Accepted
09.02.2010	1200/-	Accepted
12.10.2011	1500/-	Refused

19. The R.C.A. No.176/2003 came to be decided on 16.03.2004. According to defendant, he was making payment by money orders. However, there is no document to support his statement. The receipts are postal acknowledgments of the money

order are not filed. From the receipts of the money orders filed on record as noted above, what can be gathered is that the defendant was not regular in paying rent. Issuance of notice by plaintiffs dated 11.10.2011 is specifically admitted by the defendant (Exh.61). He replied the notice. According to him, simultaneously he sent money order of Rs.3000/-, however there is no postal receipt or acknowledgment of the said money order. Even the date of such money order is not mentioned. In the absence of necessary details and documents, oral evidence of the defendant cannot be accepted. It is, therefore, to be held that the defendant was in arrears of huge rent.

20. R.C.A. No.176/2003 was decided on 16.07.2004. The notice was issued on 11.10.2011. The rent of this period, i.e. 7 years and 2 months comes to Rs.25,800/-. However, he tendered only an amount of Rs.1800/- by sending different money orders as referred above, that means rent of Rs.24,000/- of 80 months was due. It can be said that the rent of more than 6 years was due when the notice was sent. No doubt, the claim of the plaintiffs that rent of more than 5 years was due at the time of filing of suit is correct.

21. The defendant has relied upon judgment of Hon'ble Bombay High Court in the case of *Vasant Mahadeo Gujar Vs. Baitulla Ismail Shaikh & Anr. [Hon'ble High Court, Bombay, Civil Revision Application No.770/2013]*. According to him, if the defendant is sending rent to the plaintiff by money order and the plaintiff refuses to accept the money order, it is to be presumed that

the defendant is ready and willing to pay rent of the suit property. There cannot be any other view regarding the observations and ratio laid down in the above cited judgment. However, as observed above, in the case at hand it is found that the defendant has failed to produce any document to show that the plaintiffs have refused to accept the money orders which were sent by him towards due rent. In fact, it is found that he is in arrears of rent amount of more than five years.

22. As per Section 15(2) of the Maharashtra Rent Control Act, 1999, due rent should have been paid by the defendant within 90 days of the receipt of notice of termination of tenancy. However, there is no evidence of such payment in this case. Even after filing of the suit, the defendant could have saved his tenancy rights by depositing due rent along with the interest within 90 days from the service of summons. He received summons on 07.03.2013 as per the report at Exh.8. He appeared in the proceeding on 22.03.2013 vide Exh.9. He filed written statement on 04.05.2013. However, no due rent was paid or deposited till 06.02.2014. He deposited rent on 06.02.2014 as per Exh.15. As such, the defendant had not paid due rent even within grace period provided by the statute. Therefore, he is a defaulter.

23. In taking this view I am supported by judgments of Hon'ble High Court and Supreme Court in the cases cited by the plaintiff as follows :

- (i) *Tarun Kumar Krishna Chandra Bhattacharya Vs. Ganga Prabhudas Madnani [2009(5) Mh.L.J. 544].*
- (ii) *Tarun Kumar Krishna Chandra Bhattacharya Vs. Ganga Prabhudas Madnani [2009(6) Mh.L.J. 404].*
- (iii) *Girish Gangadhar Agrawal Vs. Jiteshkumar Hasmukha Vakhariya [2009(6) Mh.L.J. 875].*
- (iv) *Sriniwas Babulal Vs. Ramakant Shivnarayan Jaiswal [2011(2) Mh.L.J. 156].*
- (v) *Chandiram Dariyanumal Ahuja Vs. Akola Zilla Shram Wahatuk Sahakari Sastha [2012(5) Mh.L.J. 177].*
- (vi) *Fehameeda Begum Mahamood Khan Pathan Vs. Abdul Hafiz Sheikh Anwar [2013(2) Mh.L.J. 524].*
- (vii) *Zainab Bee Mohd. Ismail Vs. Prabhakar Rajaram Kharwade [2017(2) Mh.L.J. 374].*
- (viii) *Babulal Fakirchand Agrawal Vs. Suresh Kedarnath Malpani [2017(4) Mh.L.J. 406].*

24. The defendant is doing business in the suit property 'B'. He was knowing well about his liability to pay. Even his tenancy was terminated by notice dated 11.10.2011 (Exh.61). Despite service of notice, he did not pay the due rent. It is, therefore, he is willful defaulter within the meaning of Section 15 of the Maharashtra Rent Control Act. Hence, I answer issue No.1 in the affirmative.

AS TO ISSUE NO.2 : (Bonafide need)

25. According to plaintiffs, they are in *bonafide* need of the suit property. Plaintiff-Shahabuddin has no sufficient space in running his business. He has to keep the goods below the staircase, there are

chances of theft. As such, he is in *bonafide* need of the suit property 'B', which is adjacent to his shop.

26. During cross-examination of the plaintiff it is brought on record that the plaintiffs have let out 3 shops and 6 houses in the building, just after filing of the suit in year 2013-14. They also let out 2 shops to two different tenants in 2015. They have let out residential premises to one Babubhai Maniyar in the same building. As such, the plaintiffs have inducted different tenants in the same building in the near past. The plaintiffs should have utilized any of the said premises for storage of goods of the shop of the plaintiff Shahabuddin. Therefore, it cannot be said that the plaintiffs are in *bonafide* need of the suit premises.

27. The plaintiff has cited following judgments in order to support his argument on the point of his *bonafide* need :

- (i) *Joginder Pal Vs. Naval Kishore Behal* [2002(7) S.R.J. 124].
- (ii) *Sharadabai Anandrao Durgule Vs. Ramchandra Manku Pol* [2009(2) Mh.L.J. 225].
- (iii) *Ranjana Jayant Aundhe Vs. Ashok Namdeo Inamdar & Anr.* [2009(2) Mh.L.J. 800].
- (iv) *Nana Kisanrao Thokade through L.R.s Vs. Prabhakar Ambadas Gosavi* [2014(6) Mh.L.J. 563].
- (v) *Mohanlal Chandulal Agrawal Vs. Navalkishor Radheshyam Kulwal* [2016(1) Mh.L.J. 735].

However, as discussed above, it is found that he has let out

some of his premises to other tenants, he has other place to keep his goods, therefore, above cited case laws are not helpful for him.

28. According to defendant, *bonafide* need of the plaintiff must be his own need. To support his contentions, the defendant has relied upon judgment of Bombay High Court in the case of *Hariprasad Babulal Mehadia (dead) through L.R.s Vs. M/s. Mehadiya & Sons (Sitabuldi) and others [Hon'ble High Court, Bench at Nagpur, Writ Petition No.2735/2015]*.

29. According to him, the suit was filed by Shaikh Sirajjoddin Nijamoddin, i.e. father of present plaintiffs and therefore issue of *bonafide* need cannot be decided on the basis of need of deceased father of present plaintiffs. It is correct that the suit was filed by deceased father of present plaintiffs, however since filing of the suit it is specifically contended that the suit property was required for purpose of business of sons of deceased father. Hence, the observation in the above citation is not applicable to the present case. However, as discussed above, it is found that need of present plaintiffs also is not *bonafide*. As such, ground of *bonafide* need for eviction is not available to the plaintiffs.

AS TO ISSUE NO.3 :

30. According to plaintiffs, the defendant is having alternate accommodation and therefore if decree of eviction is passed, he will suffer no greater hardship. It is stated by the plaintiff in his examination-in-chief that the defendant is residing at a short

distance from the suit properties, he is manufacturing furniture at his residence and he is not in need of suit property 'B' for that purpose. However, in his cross-examination he has admitted that the house of the defendant is situated in a lane and there is no evidence that at the said place he can carry out manufacturing of furniture. There is no evidence of availability of accommodation at any other place for the defendant. Therefore, the issue of hardship has to be answered in favour of the defendant.

AS TO ISSUE NO.4A :

31. According to plaintiffs, the suit property 'B' is not in use for more than many years. In his examination-in-chief he has stated likewise. However, the defendant has filed on record light bill (Exh.63), application for electric supply (Exh.47) and inspection report of electric company (Exh.48), which show that the defendant is using the suit premises continuously for business purpose since before filing of the suit. The plaintiffs have relied upon following judgments to claim eviction on the point of non-user :

- (i) *Gopaldas Khushaldas Parmar Vs. Sanmukhlal P. Shah [2012(4) Mh.L.J. 599].*
- (ii) *Shankarlal Ramsay Sharma (Marwadi) & others Vs. Sushilabai Govindlal Wani [2015(6) Mh.L.J. 204].*
- (iii) *Shridhar Dattatraya Karadkar Vs. Narayan Laxman Soparkar [2017(4) Mh.L.J. 712].*

32. In the case of Shridhar Karadkar (cited supra) it is observed that if the electric meter shows consumption of electricity as zero units, it must be inferred that the premises is not in use. However, in

the case at hand, on the basis of documents the defendant has successfully proved that he is running his business in the suit property 'B' since before filing of the suit. Therefore, the claim of non-user of suit premises cannot be accepted. Accordingly, I answer issue No.4A in the negative.

As to Issue No.4 : (Entitlement)

33. From the appreciation of evidence as above, it is proved that the defendant is willful defaulter. The notice for termination at Exh.61 is found to be legal. Even after service of the notice and even after filing of the suit, the defendant did not pay the due rent within prescribed period and therefore the plaintiffs are entitled to get possession of the suit property.

34. The claim of the plaintiffs is only respect of suit property 'B' and therefore it has to be granted. So far as claim of arrears of rent is concerned, during pendency of the suit, the defendant has paid amount of Rs.19,697/- it can be said that he has cleared the dues till August, 2014, as mentioned in the application at Exh.16. As the tenancy of the defendants was terminated by the plaintiffs, the plaintiffs will not be entitled to get rent amount from August, 2014. Necessarily, the plaintiffs are not entitled for decree of recovery of rent, nevertheless they will be entitled to get *mesne* profit for further period and for that purpose inquiry needs to be initiated. In the result, I pass following order :

ORDER

1. The suit is hereby decreed with costs.
2. The defendant do deliver possession of the suit property within 1 month from the date of this order.
3. Enquiry under Order-XX, Rule-12 is directed accordingly.

(Decree be drawn up accordingly.)

Date : 01.04.2019
Place : Ahmednagar

(Smt. K. S. Navandar)
3rd Jt. Civil Judge, Junior Division,
Ahmednagar.