

Bombay High Court

Malkhansingh Nazarsingh Chauhan vs Godrick Maenual Dias on 6 November, 2017

Bench: G.S. Patel

Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4523 OF 1996

Goodrick CD Dias,
Age 55, Occupation: Nil, residing at 529, Centre
Street, Pune 411 001

...Petitioner

~ versus ~

Malkhansingh Nazarsingh
Chouhan,
Age 57 Adult, Occupation: Business, Address: 529,
Centre Street, Pune 411 001

...Respondent

AND WRIT PETITION NO. 5379 OF 2005 WITH CIVIL APPLICATION NO. 804 OF 2007 AND CIVIL APPLICATION NO. 805 OF 2007 Malkhansingh Nazarsingh Chauhan, Age about 67 Adult, Occupation: Business, Address: 529, Centre Street, Vallabhbai Patel Street, Pune 411 001 ...Petitioner ~ versus ~ Godrick Manueal Dias, 6th November 2017 Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan 219-aswp4523-96+.doc Age about 64 Adult, Occupation: Nil, residing at 529, Centre Street, Vallabhbai Patel Street, Pune - 411 001 ...Respondent A PPEARANCES FOR THE PETITIONER IN WP Mr Prabhakar Jadhav, i/b VP Sawant. 4523 OF 1996 FOR THE RESPONDENT IN Mr SC Naidu, i/b Pankaj J Das. WP 4523 OF 1996 AND THE PETITIONER IN WP 5379 OF FOR THE RESPONDENT IN Mr AK Pawar, i/b Vilas Tapkir.

WP 5379 OF 2005

CORAM: G.S. PATEL, J
DATED: 3rd/6th November 2017

ORAL JUDGMENT: -

1. Writ Petition No. 5379 of 2005 is filed by the original Defendant ("Chauhan") in an eviction suit filed by the Respondent ("Dias") in that Writ Petition ("the tenant's Petition"; "Chauhan's Petition"). Chauhan challenges concurrent findings against him. Dias is the landlord. He is also the Petitioner in an earlier Writ Petition No. 4523 of 1996 ("the landlord's Petition"; "Dias's Petition"). That writ petition is against the concurrent finding of the courts below in Chauhan's favour dismissing Dias's first eviction suit. The consequence is that if the tenant's later writ 6th November 2017 Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan 219-aswp4523-96+.doc petition, Chauhan's Petition of 2005 fails, i.e., Chauhan does not succeed in having the decree against him set aside, then the landlord's earlier writ petition of 1996 is infructuous. I propose, therefore, to begin with Chauhan's Writ Petition No. 5379 of 2005. I believe that will sufficiently cover the entire conspectus of both matters. For convenience, I will refer to parties by their names.

2. First, as to the property in question. This is situated at 529, Centre Street, Camp, Pune 411 001. Dias owns this property. The portion rented out to Chauhan consists of two rooms, each 10 ft x 19 ft, one at the front and one at the rear of the Centre Street property. The property is described in Schedules "A" and "B" to Dias's plaint. Dias created the tenancy in favour of Chauhan by an agreement dated 7th March 1977.¹ The agreement allowed Chauhan to make repairs and renovations necessary for the purposes of carrying on a clothing and tailoring business. Clause 8 of the agreement said that the tenancy was created only for this business and for no other purpose. As a part of the litigation history, it is necessary only to note that Dias earlier filed Civil Suit No. 415 of 1985 against Chauhan seeking his eviction inter alia on the ground that he required the property for his personal, reasonable and bona fide use. In that suit, he also alleged Chauhan to have made unauthorized additions and alterations to the tenanted premises.

3. That suit was dismissed after evidence. Dias filed Civil Appeal No. 553 of 1991. The appeal was dismissed on 12th January 1996. Dias filed Writ Petition No. 4523 of 1996 against that appellate 1 Typed copy, Petition, pp. 22-26 6th November 2017 Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan 219-aswp4523-96+.doc order. While that writ petition was pending, Dias filed a fresh Suit No. 647 of 1997. This suit was decreed on 18th July 2004 by the Trial Court.² Chauhan carried the matter in Civil Appeal No. 456 of 2004. It is the order of the Appellate Court of 15th July 2005 in this Civil Appeal that Chauhan challenges in his Writ Petition No. 5379 of 2005.

4. The grounds for eviction are out in paragraph 3 of the amended plaint.³ There are several distinct grounds. One of these is that on 20th September 1997, Chauhan demolished a partition wall with a door between the shop and the rear room, and did so without any prior written or oral permission and without obtaining the necessary permission from the Pune Cantonment Board ("Board"). Dias said this demolition was not necessary for any repairs and that no express permission had been obtained. This ground is pleaded in paragraph 3. The traverse is to be found in paragraph 4 of the written statement.⁴ The denials here are general.

5. I note this because Exhibit 115 in evidence was a copy of a notice No. CE/1228 of 1997 dated 7th August 1997 from the Board addressed to Dias with a copy to Chauhan requiring the demolition of the north west side walls and some wooden members of the ceiling of the ground floor. The notice says that if the landlord fails to do this within thirty days the tenant must do it.

- 2 Petition, p. 184.
- 3 Petition, p. 27.
- 4 Petition, p. 45.

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6. Dias's first suit was filed on 4th March 1985. The written statement followed much later on 22nd August 1985. Dias's second suit was filed on 23rd September 1997.⁵ It contained the same allegations in regard to the unauthorised changes as the first suit. The written statement in the second suit was filed on 14th March 1998.⁶

7. The allegations of unauthorized alterations were made in both suits. The allegation in the previous Suit No. 415 of 1985 could not possibly relate to the notice from the Board because that notice came only in 1997. I find also that in the written statement in the second Suit No. 647 of 1997 there is no specific mention in paragraph 5 of that written statement of the Board notice. The first reference that we find is in paragraph 24 of the written statement in the second suit, where in support of his case that he was permitted to make necessary repairs, alterations and renovations, Chauha makes a reference to the notice from the Board. I will return to this later to assess whether this has been properly or satisfactorily dealt with by the Courts below.

8. The plaintiff filed an affidavit of evidence before the Trial Court in which he deposed inter alia not only about the structural changes but also about his bona fide requirement. The affidavit of evidence broadly follows the plaint. The allegation was also that Chauhan had reduced the thickness of the walls, removed three wooden cupboards, a wooden loft, and all this work caused structural damage to the building. The Board notice refers to the 5th Petition, p. 58.

- 6 Petition, p. 160.

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Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan 219-aswp4523-96+.doc north west side walls, not to a partition wall or a wooden loft; and the north west wall issue is separately addressed in the plaint and in the affidavit of evidence filed by the plaintiff (for convenience, we may refer to Item 6 at page 132). At the broadest level, it seems to me inappropriate to suggest that the only complaint that Dias had was about the north west wall and some wooden members. On any fair

reading, his complaint was far wider than that.

9. The second aspect of the plaint was of the question of bona fide requirement. In paragraph 5 of the affidavit of evidence (again closely following the plaint), this is what the plaintiff said:

"5. The plaintiff's elder son named Spinol Dias is of 22 years of age and has got a degree in Bachelor of Commerce (B.Com.) in the year 1995 and presently doing the second year in Management in Business Administration (M.B.A.) which he will be completing it in the month of April, 1998. Now he has passed M.B.A. Examinations. He has to carry out the business in the suit premises of telecommunication and computers etc. along with his father who wants to carry out the business of workshop of grocery and hence, the suit premises are required by the plaintiff for his bona fide and reasonable use. In the previous suit i.e. Civil Suit No. 415/1985, the possession of the suit premises is claimed for the bona fide and personal use of the plaintiff only. Due to change in the circumstances, now his elder son has become major and he also requires the suit premises for his personal and bona fide use for conducting his business. The necessary technical qualification for telecommunication and computer is known to the plaintiff's son named Spinol Dias. The plaintiff's said son is educated unemployed person and he is entitled for various schemes and facilities in this 6th November 2017 Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan 219-aswp4523-96+.doc respect of the Government and other financial institutions etc. Moreover, his trying to obtain the agency to do that business or commission for which there will be no necessity of any investment and finance."

10. I note this because it is Mr Naidu's submission on behalf of Chauhan that this need of bona fide requirement seems to have been, as it were, a work in progress, constantly evolving and changing over time, taking new forms. There is, for instance, a statement that the Dia's son, Spinol, having acquired some qualifications and academic degrees, wanted to start a business of telecommunication and computers, while Dias wanted to start a grocery business. This is what paragraph 5 says. A little later in the cross-examination, Dias said he wanted the premises for a workshop and a grocery business. Again, I do not think that it is correct to say that this was completely a deviation from the evidence because in the affidavit of evidence too Dias mentioned the need for a workshop, and this is also mentioned in paragraph 4 of the plaint.

11. Mr Naidu attempts to draw some capital out of the fact that Dias and his family were all quite musically inclined, adepts at various musical instruments. They occasionally performed at different venues. I do not think it is at all reasonable to suggest that they do not or did not need these premises for that reason, or should have spent the rest of their days performing at different venues. Dias was also cross-examined on whether he was running a wine shop. He denied this, saying that it was his brother who did, but even if he was, that should make no difference to this aspect of the matter.

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12. Spinol, Dias's son, gave evidence as PW2. He reiterated even in cross-examination that he wanted to start a business in telecommunications but he had no capital. He wanted to do business on his own. Incidentally, he too denied that he was "musical by profession" though he sometimes performed at hotels in Pune.

13. What Mr Naidu suggests is this: a bona fide requirement may be specific or general. It need not be exact, but it must at the very least be consistent, and a plaintiff claiming a bona fide requirement must stick to the need stated. This may not be entirely accurate over the life span or a trajectory of a trial, especially given how notoriously delayed trials are in our system. A need at the beginning of the suit may well have evolved or changed by the time of the trial or even of the decision. At the most general level, we need to consider this: is the evidence that Dias and his son wanted the premises for their own business -- a workshop, a grocery business and the computer or internet business for Spinol -- one that can be said to have been varied or changed or mutated over time?

14. On any fair reading of the plaint or the evidence, I do not think this can be so. In any case, this is not a proceeding in which I could possibly re-examine this. A Writ Court is charged with the duty to examine whether the findings of the Courts below, and especially where there are concurrent findings, are so utterly perverse that they have no link to or nexus with the evidentiary material and are, therefore, not conclusions that could not reasonably have been reached. This is perversity in law as we understand it, and, if demonstrated, is certainly a ground for interference.

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15. I will at this stage separate the question of bona fide requirement from comparative hardship though both are indeed inter-linked simply because, as Mr Naidu rightly points out, the question of comparative hardship only arises if the bona fide requirement is established in the first place.

16. What is it that the Trial Court concluded on the question of bona fide requirement? The Trial Court framed 12 distinct issues. The question of bona fide requirement was issue No. 6 and that of comparative hardship was issue No. 7. The Trial Court found for Dias. Again, it seems to have been argued before the Trial Court that Spinol's musical talents should have been sufficient but, as the Trial Court said, there was no evidence that this was his livelihood. The Trial Court correctly followed the well-settled law that the landlord is the best judge of his residential requirements. Neither the tenant nor a Court can dictate to him in those matters. I also do not find that there is any material discrepancy between the conclusion, the pleadings and the testimony that were before the Court.

17. This should take us immediately to the question of comparative hardship and here the balance tilts more than somewhat, because it emerged in the course of trial that Chauhan himself had a property on the same street. This is in fact noted by the Appellate Court in paragraph 18. Chauhan purchased Survey No. 377/378, Centre Street, Pune. His wife ran a tailoring business in the suit property but she stopped it. At the time when Chauhan purchased his Centre Street property, it three tenants. He sought to evict them. He settled with one Bhagwantibai by selling the 6th

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tenanted premises to her. He then obtained an eviction decree against another tenant Oza and thereafter transferred the suit property to his sons. One of his sons filed an eviction proceeding against one Ashok Restaurant and successfully obtained possession. This is the evidence that was available before both Courts on the question of comparative hardship. The plaintiff had no other property, but the defendant did.

18. PW5 was one Balkrishna Bhagwat Pethkar of the Board. His evidence is telling. He accepts that the Board gave notice to remove one wall and a copy was given to Chauhan. However, he says that there was no permission granted to Chauhan to re-erect that wall. He accepts that Dias had complained to the Board about Chauhan's removal of the partition wall without permission but says no Board permission was required for this. What this tells us is that Chauhan did take steps to remove the partition wall ostensibly only on the ground that the agreement allowed him to make necessary changes. It is equally true that he had no permission to re-erect a wall, and, Pethkar says, no permission to repair and replace five girders.

19. It is not, as I said, for a writ Court to re-assess the sufficiency of this evidence. It is for me to see whether on this material it can fairly be said that either of the Courts below misdirected themselves or arrived at a conclusion of such perversity that a Writ Court must intervene. On the first aspect of the matter, i.e., the question of repairs it is not possible to arrive at such a conclusion.

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20. On the question of bona fide requirement, the argument may be somewhat more subtle in the sense that it is difficult in any such situation to accurately address a "requirement". As Mr Naidu says, and I do not think this can be disputed, a bona fide requirement is not a mere fanciful wish. It is something more than that and the words "bona fide requirement" cast on a Court the duty to see whether that requirement as pleaded and proved is reasonable, i.e., not fanciful, and is one that is otherwise tenable. The reason for this stringent a standard is self-evident. A landlord is seeking to evict a tenant from a residence or a business and this necessarily entails a loss and prejudice. These are matters, therefore, not to be taken lightly. Bona fide requirement is not to be assumed. At the same time it is not something that can be said with complete precision or exactitude. When, for example, in the context of commercial premises, a landlord says that he need premises to do business he is necessarily dealing with a level of uncertainty. He does not know whether his proposed business will flourish. He does not know what hurdles he will face. He does know that given certain conditions -- some amount of capital, the training that he has been able to give to his son -- he reasonably expects to be able to embark on this new venture. The single most expensive component of any new business is real estate. When a landlord has premises of his own and wants to use them to start a new business, to expect him to pay additionally for real estate is unreasonable. One thing however needs to be clarified and eliminated. It is no business of the tenant to suggest that the landlord need not do the business that he wishes to do but should, instead, content himself with playing a saxophone at some hotel in Pune or blowing a trumpet somewhere else. The landlord or his son may certainly do that in their spare time and might even earn 6th November 2017

Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan 219-aswp4523-96+.doc a modest fee but it is not a tenant to say that that is what they should do as an avocation and, therefore, they have no need of return of their own premises. This is no test in law.

21. Mr Naidu reserves his greatest ire for a manner in which the Appeal Court dealt with the question of bona fide requirement. This is what the Appeal Court said in paragraph 17:

"17. It is submitted on behalf of the appellant that the landlord has a habit to institute the proceedings only with an intention to trouble the tenant and his need is not bona fide and genuine. However, if the pleadings in the previous suit is taken into consideration from the plaint itself, it discloses that in the previous suit the landlord did not ask possession of the suit premises for the bona fide need of his son and hence the present ground can be treated as a subsequent ground, which is made available to the landlord after the decision in the previous proceeding. The evidence which is produced on record is sufficient to establish the bona fide need of the landlord for the business of his son. The trial court has rightly answered the same issue and no interference is warranted at the hands of this court to the finding recorded by the trial court. Hence, I answer point No. 1 in the affirmative."

22. Mr Naidu says that this is wholly inadequate. There is no discussion of the evidence at all. All that the Appeal Court has said is that in the earlier suit the plaintiff did not seek possession for his son, but that was because the son was then a minor.

23. What the argument overlooks is that in paragraph 16 and in the previous narrative the Appeal Court did summarize the 6th November 2017 Goodrick CD Dias v Malkhansingh Nazarsingh Chouhan 219-aswp4523-96+.doc evidence that was before the Court. It is true that on the bona fide requirement it has not gone through the evidence line by line but then that is because the evidence is largely oral and consists of the testimony of Dias and his son Spinol. I have referred earlier to both of these and we have seen that they are largely consistent. They speak of a workshop, a grocery business and a new computer venture for Spinol. Dias is consistent that he once had a workshop, where he used to have, apart from his musical instruments, a wooden lathe and other items. In his plaint and evidence, Dias spoke of all three requirements, i.e., the workshop, a grocery business and the proposed computer / internet business for his son, Spinol. It is not as if he has embellished or added to these in his evidence. Spinol, for his part, has spoken first about his own need and then mentioned his father's need in passing.

24. What is of particular interest, however, is the cross-examination of the plaintiff on the question of bona fide requirement. First of all there is the suggestion about other talents. Then there is a suggestion, which is refuted, about a wine shop at Gultekadi, and then there is a suggestion at page 145 about another workshop. What is important is that in the cross-examination in paragraph 21, Dias clearly said that he claimed possession for use in business for himself as well as his son; that he wanted to start a workshop as well as a grocery shop. Spinol in cross-examination said his father was a partner in another workshop business elsewhere, but those premises were repossessed by the landlord; the land at Gultekadi was occupied by slums and, again in his evidence in chief, said that

his father had sold a tenanted property to the tenant. Both father and son accepted that at present the plaintiff was doing no business.

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25. There is also some faint suggestion of some other land being available but it was shown that this was encroached with slums, and on this not much will turn. The only other evidence was that of one Karl Monteiro, the Director of a trading company to the effect that it intended to appoint Dias as a distributor for their products provided he had a centrally located area. In his cross-examination, he said that Dias's son was his cousin and had been engaged as a distributor. I do not believe this will materially affect matters in any way. This was the totality of the evidence of the cross-examination and the testimony before the Courts below.

26. The question, therefore, is whether Mr Naidu is successful in showing that the bona fide requirement stated and deposed to has been disproved or dislodged, and that the Courts below could not have arrived at a conclusions that they did.

27. On any fair reading of the material, I do not believe this is correct. I do not actually see what more the Appellate Court could have said or done beyond what it did and the approach of the Trial Court is to my mind faultless.

28. On the question of repairs, as I have noted, it is perhaps an over simplification to limit this to the subject matter of the Board Notice. In any case, this will not matter greatly because the eviction decree is not based only on one of these grounds. Even if the ground of unauthorized alterations fails, the other ground is sufficient.

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29. In my view, the impugned order in Writ Petition No. 5379 of 2005 calls for no interference. Rule is discharged. The Writ Petition is dismissed. There will be no order as to costs.

30. The consequence is that Dias's Writ Petition No. 4523 of 1996 is infructuous and is disposed of accordingly. There will be no order as to costs.

31. The civil applications do not survive and are disposed of as infructuous.

32. There was a previous injunction order in terms of prayer clause (b). Time to deliver possession is extended by sixteen weeks from today. This will be necessarily subject to the usual undertaking that the defendant will not create any third party rights, alienate or part with possession of the suit premises.

(G. S. PATEL, J) 6th November 2017