IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5976 OF 2024

Natwarlal Shamji Gada } ...Petitioner

Versus.

1. Vinay Raghunath Deshmukh }..Respondent/
Orig. Appellant.
2. Virchand Shamji Gada
3. Mrs. Jaswati Shyam Shah
4. Mrs. Ramila Jevat Gala }...Respondents.
Orig.Resp.Nos.2 to 4

Mr. Pradeep Thorat with Mr. Nishant Vyas, Mr. Parth Choudhary and Mr. Yagnesh Vyas, for the Petitioner.

Mr. Nitin Gangal with Ms. Prapti Karkera, for Respondent No.1.

CORAM : SANDEEP V. MARNE, J.

Judgment Reserved on: 29 July 2024.

Judgment Pronounced on: 7 August 2024.

JUDGMENT:

1) Petitioner challenges order dated 5 April 2024 passed by the Appellate Bench of the Small Causes Court allowing application at Exhibit-38 filed by Plaintiff and permitting him to carry out

amendment in the plaint. The Appellate Bench has referred the case to the Trial Court for inviting its finding on the issue of *bonafide* requirement and hardship after amendment of the Plaint. Petitioner-Defendant No.1 is thus aggrieved by the Appellate Court's order permitting amendment of Plaint at appellate stage and remanding the suit for inviting findings of the Trial Court on the issue of *bonafide* requirement and hardship.

2) Respondent No.1-original Plaintiff had instituted R.A.E.& R. Suit No.102/152 of 2006 in the Small Causes Court at Mumbai seeking recovery of possession of the suit premises comprising of Shop No.2, admeasuring 188 sq.ft, ground floor, Laxman Zulla, 50 Ranade Road, Dadar (West), Mumbai-400028 (**Suit Premises**). Eviction of Defendants was sought on the grounds of default in payment of rent, erection of permanent structure and reasonable and *bonafide* requirement of the Plaintiff. It appears that additional issue relating to subletting was also framed by the Trial Court. The Trial Court proceeded to dismiss the Suit vide decree dated 29 November 2016 by rejecting the grounds of eviction raised by Plaintiff. Plaintiff filed Appeal No. 299 of 2017 before the Appellate Bench of the Small Causes Court. It appears that during pendency of the Appeal, the Original Plaintiff passed away and his son, Vinay Raghunath Deshmukh continued prosecuting the Appeal. During pendency of the Appeal, he filed application at Exhibit-38 seeking amendment of the plaint and remand of the suit for leading evidence on the

additional events in support of ground of his *bonafide* requirement. He sought to add averments relating to *bonafide* requirements for operating his own consultancy office, his wife's office as practicing advocate and his son's consultancy and medical practice in the suit premises. Plaintiff also sought to add averments relating to parting with possession of the suit premises in favour of Ms. Sathawalekar. The application was opposed by the Petitioner-Defendant by filing reply. The Appellate Bench has however proceeded to allow the application by order dated 5 April 2024 and has permitted Appellant to carry out amendment in the Plaint. The Appellate Bench has referred the amended Plaint to the Trial Court for findings on the issue of *bonafide* requirement and hardship. Liberty is granted to Defendants to file Written Statement as well as opportunity to parties to lead evidence. The Trial Court has been directed to give findings on the issue and send back the matter to the Appellate Bench and/or before 20 December 2024. The order dated 5 April 2024 passed by the Appellate Bench is subject matter of challenge in the present petition.

3) Mr. Thorat, the learned counsel appearing for the Petitioner would submit that the Appellate Bench has erroneously exercised jurisdiction under Order 41 Rule 25 of the Code of Civil Procedure, 1908 **(the Code)** by permitting Plaintiff to amend the plaint and by remitting the matter for inviting fresh findings on the issue of *bonafide* requirement. He would submit that power of

remand can be exercised by the Appellate Court under Order 41 Rule 25 of the Code only when the Trial Court has omitted to frame or try any issue or to determine any question of fact. That in the present case, the Trial Court had framed the issue of *bonafide* requirement, permitted parties to lead evidence and has thereafter decided the said issue against the Plaintiff. That therefore the power of remand under Order 41 Rule 25 could not have been exercised in the present case.

4) Mr. Thorat would further submit that the impugned order amounts to substitution of cause of action. That the original cause of action for filing suit for recovery of possession on the ground of *bonafide* requirement was Original Plaintiff's alleged need for doing business of general store after his retirement. Now an altogether different need of Original Plaintiff and his family members is sought to be added by way of amendment where his son wants to start consultancy office, daughter-in-law wants to open her office as Advocate and grandson want to commence medical practice in the suit premises. That once pleaded *bonafide* requirement is tried and decided, at appellate stage Plaintiff cannot be be permitted to add an altogether new requirement by seeking remand of the suit by amending the plaint. Taking me through the evidence recorded by the Trial Court on the case pleaded by the Original Plaintiff, Mr. Thorat would submit that the Original Plaintiff had specifically stated in the cross-examination that '*my*

son is not concerned with this matter'. That he further admitted that '*my son never demanded any premises to me for his office. So also my daughter-in-law never demanded any premises to me for her office*'. That therefore the amendment now sought to be added in the plaint is infact contradictory to the earlier case of the Original Plaintiff and that the amendment would thus result in inconsistent pleas and ought to have been avoided. Lastly, Mr. Thorat, would submit that in case if any new requirement of Original Plaintiff's son has arisen, he can always file a fresh suit rather than creating complications in the existing proceedings. In support of his contentions, Mr. Thorat would rely upon three judgments:

(i) ***Keshav Bhaurao Yeole (D) by Lrs. Versus. Muralidhar (D) and Ors.***[1]
(ii) ***Shakuntala Bai and Ors. V/s. Narayan Das and Ors.***[2]
(iii) ***Bachahan Devi and Another Versus. Nagar Nigam, Gorakhpur and Another***[3]
(iv) ***Sheshambal (Dead) Through Lrs. V/s. Chelur Corporation Chelur Building and Others.***[4]
(v) ***Gajraj V/s. Sudha and Others.***[5]
(vi) ***Yashodabai w/o. Gopalrao Khedkar (since deceased) through L.R. Rajendra Govindrao Hatwalne V/s. Godavaribai Balkrishna @ Chatusheth Sinnarkar and Others.***[6]

[1]2023 SCC OnLine SC 1362
[2](2004) 5 SCC 772
[3](2008) 12 SCC 372
[4](2010) 3 SCC 470
[5](1999) 3 SCC 109
[6]Writ Petition No.5672 of 1998 decided on 1 February 2019.

5) The petition is opposed by Mr. Gangal, the learned counsel appearing for Respondent No.1-Plaintiff submitting that the issue of *bonafide* requirement was already framed by the Trial Court and that this is not a case where the new issue is directed to be framed by the Appellate Bench. He would submit that Appeal is nothing but continuation of suit and since Plaintiff can prove his *bonafide* requirement throughout pendency of proceedings, he is entitled to bring on record any change in situation that has arisen during pendency of Appeal. That if Plaintiff can institute a fresh suit in respect of *bonafide* requirement that has now arisen for him, there is nothing in law that would prevent him from amending the pleadings in the pending appeal as well. That law always favours decision of disputes in one proceedings rather than driving parties for multiple proceedings. In support of his contentions, Mr. Gangal would rely upon the following judgments:

(i) Pasupuleti Venkateswarlu V/s. The Motor & General Traders.[7]
(ii) Hasmat Rai and another V/s. Raghunath Prasad.[8]
(iii) Om Prakash Gupta V/s. Ranbir B. Goyal.[9]
(iv) Kedar Nath Agarwal (Dead) and another V/s. Dhanraj Devi (Dead) by LRs and another[10]
(v) Ramkumar Barnwal V/s. Ram Lakhan (Dead)[11]
(vi) Govindlal Motilal Jhawar (Deceased Through his L.Rs.) V/s. Kanakmal Maganmal Gandhi[12]

[7](1975) 1 SCC 770
[8](1981) 3 SCC 103
[9](2002) 2 SCC 256
[10](2004) 8 SCC 76
[11](2007) 5 SCC 660
[12]2015 SCC OnLine Bom 6147

6) Rival contentions of the parties now fall for my consideration.

7) The issue that arises for consideration is whether a new need or requirement of Plaintiff, different than the one originally pleaded in the plaint, can be permitted to be raised at the appellate stage which requires the Appellate Court to invite Trial Court's finding on such new need. In the Plaint as filed by the Original Plaintiff, he pleaded that the suit premises were required by him for commencement of business of general stores after his retirement on account of his weak financial condition and inability to purchase a new shop. After dismissal of the suit and during pendency of the Appeal, Original Plaintiff has passed away. His son, Vinod Raghunath Deshmukh is brought on record and is prosecuting the Appeal. In the pending Appeal, Original Plaintiff's son sought following amendments in the plaint:

> 4(a)-Plaintiff state that the Plaintiff who is presently employed in FF Services and is also providing the consultancy services to other clients. In pursuit of his consultancy services, the suit premises which is in the same building in which the Plaintiff resides in suitable and required to meet the need and requirement of the Plaintiff.
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> 4(b) Plaintiff states that the Plaintiff's family consist of himself, his wife, Advocate Mrs. Shilpa and his son, Dr. Vibhav. Plaintiff states that his wife Shilpa is a practising Advocate who operates her office from a small of 100 100 sq.ft situated on the back side of the building Laxman Zulla nad hence attracts less

local clients, her practice will flourish if she commence her practice from the suit premises as the suit premises are situate facing the main road. Plaintiff states that his son Vibhav has completed his education in M.B.B.S. he would like to start his consultation and medical practice from the suit premises. Plaintiff states that in the above mentioned reasons the plaintiff bonafide require the suit premises for himself and his family members.

9. Plaintiff states that the Respondent No.1 had already parted with possession of the suit premises in favour of one Miss. Sathawalkar and is earning huge profit from the suit premises. Plaintiff states that in the circumstances no hardship of any nature will be caused to Respondent No.1 if decree in eviction is passed against the Respondent. Plaintiff further states that Respondent No.2, 3 and 4 are non contesting Respondents.

8) Thus, three new needs are now sought to be raised by Original Plaintiff's son during pendency of the Appeal viz. (i) that suit premises are needed for his own consultancy services (ii) for his wife-Shilpa to operate her office as practicing advocate and (iii) for his son-Vibhav who has completed his education in MBBS and who wants to start consultation and medical practice in the suit premises.

9) It is Petitioner's contention that the requirement of the Original Plaintiff to open general store in the suit premises has come to an end with his death. It is further contended that during the course of cross-examination, Original Plaintiff specifically gave admissions that his son or daughter-in-law did not require the suit

premises for operating their offices. That now an altogether different need of Original Plaintiff's son, daughter-in-law and grandson is sought to be incorporated in the plaint which is directly contradictory to the stand taken by the Original Plaintiff in his evidence. The issue that arises for consideration is whether with death of the Original Plaintiff, the *bonafide* requirement pleaded by him comes to an end or whether the *bonafide* requirement of his heirs can also be pleaded and considered in the same suit.

10) Mr. Thorat does not seriously dispute the position that if Original Plaintiff passes away during the pendency of the appeal and, his heirs can still pursue the appeal. However according to him the Appeal must be pursued on the grounds originally pleaded by Plaintiff. The issue therefore is if the death of the Original Plaintiff occurs after decision of the suit and during pendency of Appeal and his originally pleaded need comes to an end, whether his heirs can set up their own need by seeking to amend the plaint at appellate stage. It is well settled law that Appeal is continuation of suit. In that view of the matter, ordinarily what can be done during pendency of the suit, should also be permitted to be done at appellate stage. The only difference in the present case is that the stark distinction in the needs of Original Plaintiff and his heirs are sought to be adjudicated in same proceedings. Mr. Thorat also does not seriously dispute the position that Original Plaintiff's son-Vinay Deshmukh can institute a fresh suit for his alleged bonafide

requirement of operating his own office, office for his wife and consultancy for his Doctor son. Mr. Gangal contends that if a fresh suit can be instituted, why not have the said requirement of Vinay Deshmukh, adjudicated in the same proceedings. Original Plaintiff's son-Vinay Deshmukh is prosecuting Appeal No. 299/2017 instituted by his father which includes challenge to the findings of the Trial Court on the ground of bonafide requirement. Thus, entitlement of the landlord to recover possession of the suit premises on the ground of bonafide requirement is an issue to be decided by the Appellate Court in pending Appeal No. 299/2017. If that is the case whether, Vinay Deshmukh can now be permitted to update the latest requirement of the family at appellate stage is the issue.

11) The Appellate Court has exercised power under Order 6 Rule 17 of the Code for allowing the amendment application and has further remanded the matter to Trial Court for inviting its finding on the issue of updated bonafide requirement in the amended plaint by exercising power under Order 41 Rule 25 of the Code. Mr. Thorat has raised objection about exercise of power of remand by the Appellate Court under Order 41 Rule 25 on the ground that the said power of remand can be exercised only when there is an omission to frame issue or failure to try any issue or failure to determine any question of fact. Order 41 Rule 25 of the Code reads thus:

> **25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from.**
> Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required;
> And such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons thereof within such time as may be fixed by the Appellate Court or extended by it from time to time.

12) Mr. Thorat has relied upon judgment of the Apex Court in ***Bachahan Devi*** (supra) in which the Apex Court has dealt with scope of Court's power under Order XLI Rule 25 of the Code and has held in paras-10 and 11 as under:

> 10. Under Order XLI Rule 25, if it appears to the Appellate Court that any fact essential for the decision in the suit was to be determined, it could frame an issue on the point and refer the same for trial, to the Court from whose decree the appeal is preferred and in such case, shall direct such court to take additional evidence required. The order of remand should not be passed as a matter of routine. The First Appellate Court which has the power to analyse the factual position can decide the issue and the additional issues. In the instant case the First Appellate Court, inter alia, observed as follows:
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> > "As such, it would not be proper for the first Appellate Court in such matter to itself record the evidence and to give its findings in regard to newly created issues. The Hon'ble High Court has also held that in the present matter under the provision of Order 41 Rule 25 of Civil Procedure Code, becomes mandatory (shall) though in this provision, the word 'may' has been used. No doubt in the present matter also the Appellate Court has framed 6 additional issues which are legal in nature and also factual, with the result if the Appellate Court gives its findings relating to said legal and factual issues after itself

> recording (receiving) evidence then the aggrieved party would be prevented from his right of filing first appeal. Accordingly, the aforesaid ratio laid down by the Hon'ble High Court is fully applicable in the present matter."
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> 11. A bare reading of the provision makes it clear that the same comes into operation when the Court, from whose decree the appeal is preferred, has omitted to frame or try and issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order XLI Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate Court to do so. This is clear from the use of the expression 'may'. But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor.

13) In the present case, admittedly there is neither omission by the Trial Court to frame or decide any particular issue nor has it failed to decide any question of fact. Therefore in strict sense, reference to the Trial Court was not really necessary.

14) However, the remand to the Trial Court for inviting finding on the issue of bonafide requirement is necessitated in the present case on account of Appellate Court permitting amendment in the plaint. Thus, the order of remand for inviting the finding of the Trial Court by leading additional evidence is not on a standalone basis, but is essentially triggered on account of Appellate Court permitting the Plaintiff to amend the plaint. It is well settled law, and which Mr. Thorat rightly does not dispute, that Plaint can be amended even at the stage of Appeal. Therefore, what is required to be determined is whether amendment of the plaint was warranted in the present case and at appellate stage. Therefore, what needs to be determined is whether case was made out by the Plaintiff for amendment of the plaint.

15) The main opposition is to amendment of the plaint at this stage is the contradictory stands that Original Plaintiff's son now wants to plead through amendment. In his cross-examination, the Original Plaintiff specifically admitted that his son and daughter-in-law did not demand the suit premises for operating their respective offices. It is Petitioner's contention that in view of those admissions given by the Original Plaintiff, his son cannot now be permitted to raise a pleading that he and his wife require the suit premises for operating their offices.

16) Mr. Thorat has relied upon judgment of the Apex Court in ***Keshav Bhaurao Yeole*** (supra), in which the landlord had passed away during pendency of eviction proceedings. Relying on its judgment in ***Gaya Prasad V/s. Pradeep Srivastava***[13] the Apex Court held that any eviction petition filed by the landlord against his tenant, crucial date for deciding the bonafides of the requirement of the landlord is the date of his application for eviction and that events occurring subsequent to these dates have no bearing on the issue as to whether the eviction was a bonafide requirement. The Apex Court held in para-32 as under:

> 32. **We do not think that the High Court was correct in remanding the case, in its entirety to the original authority on the ground that the landlord having died pending eviction proceedings, his heirs had to demonstrate afresh, the bonafide requirement of leased lands for personal cultivation.** In *Gaya Prasad v. Pradeep Srivastava*, this Court, while considering an eviction petition filed by the landlord against his tenant, laid down the principle that the crucial date for deciding the bona fides of the requirement of the landlord is the date of his application for eviction. Events occurring subsequent to this date have no bearing on the issue as to whether the eviction was a bona fide requirement. It was reasoned therein that if every subsequent development was to be accounted for in the post-petition period, there would perhaps be no end so long as the unfortunate situation in the litigative slow-process system subsists. Therefore, the High Court fell into grave error in ordering remand of the case by considering, events which occurred subsequent to the date of filing of the petition.

17) Mr. Gangal has sought to distinguish the judgment in ***Keshav Bhaurao Yeole*** on the ground that the same arises out of proceedings initiated under the Maharashtra Tenancy and

[13] (2001) 2 SCC 604.

Agricultural Lands Act, 1948 and according to him, the decision would not strictly apply to Rent Act proceedings. However, though the dispute under Maharashtra Tenancy and Agricultural Lands Act, 1948 is dealt with by the Apex Court, it has relied upon its judgment in ***Gaya Prasad V/s. Pradeep Srivastava*** arising out of Rent Act in which it is held as under:

> 10. **We have no doubt that the crucial date for deciding as to the bona fides of the requirement of the landlord is the date of his application for eviction.** The antecedent days may perhaps have utility for him to reach the said crucial date of consideration. **If every subsequent development during the post-petition period is to be taken into account for judging the bona fides of the requirement pleaded by the landlord there would perhaps be no end so long as the unfortunate situation in our litigative slow-process system subsists.** During 23 years, after the landlord moved for eviction on the ground that his son needed the building, neither the landlord nor his son is expected to remain idle without doing any work, lest, joining any new assignment or starting any new work would be at the peril of forfeiting his requirement to occupy the building. It is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. If a young entrepreneur decides to launch a new enterprise and on that ground he or his father seeks eviction of a tenant from the building, the proposed enterprise would not get faded out by subsequent developments during the traditional lengthy longevity of the litigation. His need may get dusted, patina might stick on its surface, nonetheless the need would remain intact. All that is needed is to erase the patina and see the gloss. It is pernicious, and we may say, unjust to shut the door before an applicant just on the eve of his reaching the finale, after passing through all the previous levels of the litigation, merely on the ground that certain developments occurred pendente lite, because the opposite party succeeded in prolonging the matter for such unduly long period.
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> *(emphasis added)*

18) Mr. Thorat has also relied upon judgment of the Apex Court in ***Shakuntala Bai*** (supra) in which the Apex Court has

encountered a reverse situation where the landlord succeeded in the suit for eviction and passed away during pendency of the Appeal. The Defendant raised an issue that since Plaintiff had passed away during pendency of the Appeal, the right to sue did not survive and the bonafide need of Plaintiff came to an end. The Apex Court held in paras-10, 10.1 and 11 as under:

> 10. The effect of death of a landlord during the pendency of the proceedings has been considered in several decisions of this Court. In *Phool Rani v. Naubat Rai Ahluwalia*, the landlord filed an ejectment application under Section 14(1)(e) of the Delhi Rent Control Act and eviction of the tenant was sought on the ground that the premises were required by the plaintiff "for occupation as a residence for himself and members of his family". The Additional Rent Controller dismissed the application on a preliminary ground that the notices to quit were not valid, without examining the case on merits. The plaintiff died during the pendency of the appeal preferred by him and his heirs were substituted. The case was remanded and the Rent Controller passed an order of eviction. In appeal a contention was raised that the right to sue did not survive to the heirs of the plaintiff, which was rejected by the Rent Control Tribunal but was accepted in appeal by the High Court. This court held that different result may follow according to the stage at which the death occurs. One of the situations considered in para 13 of the reports is as under : [SCC p.694,para 13(i)]
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> > "13.(i) cases in which the death of the plaintiff occurred after a decree for possession was passed in his favour; say, during the pendency of an appeal filed by the unsuccessful tenant."
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> 10.1. With regard to this category of cases it was held that the estate is entitled to the benefit which, under a decree, has accrued in favour of the plaintiff and, therefore, the legal representatives are entitled to defend further proceedings, like an appeal, which constitute a challenge to that benefit. Even otherwise this appears to be quite logical. In normal circumstances after passing of the decree by the trial Court, the original landlord would have got possession of the premises. But if he does not and the tenant continues to remain in occupation of the premises it can only be on account of the stay order passed by the appellate Court. In such a

situation, the well known maxim 'actus curiae neminem gravabit' that 'an act of the Court shall prejudice no man' shall come into operation. Therefore, the heirs of the landlord will be fully entitled to defend the appeal preferred by the tenant and claim possession of the premises on the cause of action which had been originally pleaded and on the basis whereof the lower Court had decided the matter and had passed the decree for eviction. However in regard to the case before the court it was held that the requirement pleaded in the ejectment application on which the plaintiff founded his right to relief was his personal requirement and such a personal cause of action must perish with the plaintiff. On this ground it was held that the plaintiff's right to sue will not survive to his heirs and they cannot take the benefit of the original right to sue.

11. In *Shantilal Thakordas v. Chimanlal Maganlal Telwala*, a larger Bench overruled the decision rendered in *Phool Rani v. Naubat Rai Ahluwalia* in so far it held that the requirement of the occupation of the members of the family of the original landlord was his personal requirement and ceased to be the requirement of the members of his family on his death. The court took the view that after the death of the original landlord the senior member of his family takes his place and is well competent to continue the suit for eviction for his occupation and occupation of the other members of the family. Thus, this decision held that the substituted heirs of the deceased landlord were entitled to maintain the suit for eviction of the tenant. The ratio of this decision by larger Bench does not in any manner affect the view expressed in *Phool Rani* that where the death of the landlord occurs after a decree for possession has been passed in his favour, his legal representatives are entitled to defend further proceedings like an appeal and the benefit accrued to them under the decree. In fact, the ratio of *Shantilal Thakordas* would reinforce the aforesaid view. There are several decisions of this Court on the same line. In *Kamleshwar Prasad v. Pradumanju Agarwal* it was held that the need of the landlord for premises in question must exist on the date of application for eviction, which is the crucial date and it is on the said date the tenant incurred the liability of being evicted therefrom. Even if the landlord died during the pendency of the writ petition in the High Court, the bona fide need cannot be said to have lapsed as the business in question can be carried on by his widow or any other son. In Gaya Prasad v. Pradeep Srivastava 2001 (2) SCC 604 it was held that the crucial date for deciding as to the bonafides of requirement of landlord is the date of his application for eviction. Here the landlord had instituted eviction

> proceedings for the bona fide requirement of his son who wanted to start a clinic. The litigation continued for a long period and during this period the son joined Provincial Medical Service and was posted at different places. The subsequent event i.e. the joining of the service by the son was not taken into consideration on the ground that the crucial date was the date of filing of the eviction petition. Similar view has been taken in *G.C. Kapoor v. Nand Kumar Bhasin*. Therefore, the legal position is well settled that the bona fide need of the landlord has to be examined as on the date of institution of proceedings and if a decree for eviction is passed, the death of the landlord during the pendency of the appeal preferred by the tenant will make no difference as his heirs are fully entitled to defend the estate.

19) In ***Gajraj*** (supra) relied upon by Mr. Thorat, it is held that legal heirs take the place and are bound by the pleadings of their predecessor and that they cannot pursue their own individual rights and interests. The relevant findings in para-5 of the judgment reads thus:

> 5. After perusing the orders of the trial Court and of the High Court, we are of the view that on the facts of this case, the High Court was not right in observing that the proposed legal representatives can take up all other defences arising from their individual rights. The reason is that the respondents on more than one occasion moved applications under Order 1, Rule 10, C.P.C. raising contention to agitate their individual rights and those applications were dismissed. The trial Court observed thus:
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> > The scope of an enquiry under Section 22, Rule 5 of the C.P.C. is very limited. Moreover, this is a suit between landlord and tenant. **The plea taken by the proposed LRs is inconsistent with the plea taken by the deceased Vasantrao**. They must proceed with the litigation from the stage where the death of Defendant 1 had taken place. They are bound by the pleadings of their predecessor in whose place they are to be substituted. **A legal representative substituted cannot set up a new or individual right. He cannot take up a new and inconsistent plea contrary to the one taken up by the deceased**. The proposed LRs stand in

> the shoes of the deceased defendant and must accept their position adopted by their predecessor. Besides this, the plea of right in the property by birth in the ancestral property and the male representative are the coparceners was taken by the proposed LRs by moving applications Exhs. 114, 119 and 174 under Order 1, Rule 10, C.P.C. The applications Exhs. 114 and 119 were rejected by my learned predecessor by passing a common order dated 13.2.1992 and Exh. 174 was rejected on 8.3.1994 by my learned predecessor. The said orders were unsuccessfully challenged by the proposed LRs before the Hon'ble High Court in civil revision and thereafter review petition. Thus, the said issue has now become final and cannot be reagitated by the present LRs.

The Apex Court approved the above findings recorded by the Trial Court in ***Gajraj***.

20) Mr. Thorat has also relied upon judgment of the Apex Court in ***Sheshambal*** (supra) which travels a bit close to the issue at hand. In that case, landlord and his wife filed a suit for eviction of tenant on the ground of bonafide requirement, which was dismissed and the appellate authority upheld the order of Rent Controller. During pendency of Revision Petition before the High Court, the landlord passed away and during pendency of Appeal before the Supreme Court, his wife also passed away. The three daughters of the couple were brought on record as legal representatives, one of whom was settled in America, one is Coimbatore and one in Bihar. The Apex Court has formulated the issue in Para 8 of the judgment as under:

> 8. The short question that was, in the above backdrop, argued by learned counsel for the parties at considerable length was whether the proceedings instituted by the deceased-owners of the

demised property could be continued by the legal heirs left behind by them.

21) While deciding the issue, the Apex Court observed in paras 12, 13 and 14 as under :

> 12. It is not in dispute that in the eviction petition the owners had pleaded their own requirement for the premises to be occupied by them for residential as well as commercial purposes. **The eviction petition was totally silent about the requirements of any member of the family of the petitioner owners leave alone any member of their family who was dependent upon them.** That being so the parties went to trial before the Rent Controller on the basis of the case pleaded in the petition and limited to the requirement of the owners for their personal occupation.
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> 13. Neither before the Rent Controller nor before the Appellate Authority was it argued that the requirement in question was not only the requirement of the petitioner owners of the premises but also the requirement of any other member of their family whether dependent upon them or otherwise. **Not only that, even in the petition filed before this Court the requirement pleaded was that for the deceased widowed owner of the demised premises and not of any member of her family.**
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> 14. Superadded to all this is the fact that the legal representatives who now claim to be the family members of the deceased are all married daughters of the deceased couple each one settled in their respective matrimonial homes in different cities and at different places. That none of them was dependent upon the deceased petitioner is also a fact undisputed before us. Even otherwise in the social milieu to which we are accustomed, daughters happily married have their own families and commitments, financial and otherwise. **Such being the position we find it difficult to see how the legal representatives of the deceased appellant can be allowed to set up a case which was never set up before the courts below so as to bring forth a requirement that was never pleaded at any stage of the proceedings.** **Allowing the legal heirs to do so would amount to permitting them to introduce a case which is totally different from the one set up before the Rent Controller, the Appellate Authority or even the High Court.**
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> *(emphasis and underlining supplied)*

22) In the light of the observations made above, the Apex Court answered the issues in ***Sheshanbal*** as under:

> 28. As noticed earlier, the requirement pleaded in the eviction petition by the original petitioners was their own personal requirement and not the requirement of the members of their family whether dependent or otherwise. **Indeed, if the deceased landlords had any dependent member of the family we may have even in the absence of a pleading assumed that the requirement pleaded extended also to the dependent member of their family.** That unfortunately, for the appellants is neither the case set up nor the position on facts. The deceased couple did not have any dependant member of the family for whose benefit they could have sought eviction on the ground that she required the premises for personal occupation.
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> 29. In the light of what we have stated above, we have no hesitation in holding that **on the death of the petitioners in the original eviction petition their right to seek eviction on the ground of personal requirement for the demised premises became extinct** and no order could on the basis of any such requirement be passed at this point of time.
>
> *(emphasis added)*

23) Thus in ***Sheshambal***, the Apex Court has held that permitting the legal representatives to set up a new bonafide requirement would amount to introduction of new case totally different than the one set up before the Rent Controller. The Apex Court has further held that the position may have been different if in the original petition, owners had pleaded their own requirement and the requirement of any member of the family depending on them. This exactly is the situation in the present case where the original Plaintiff did not plead that his son, daughter-in-law or grandson

needed the premises for their use. Far from contending so, he actually admitted in the cross examination that his son and daughter-in law did not require the premises.

24) The Judgment in ***Sheshambal*** has been followed by this Court in ***Yashodabai Gopalrao Khedkar*** (supra). In that case, the landlady Yashodabai filed suit for recovery of possession of suit shop, which was decreed. During pendency of appeal, tenant passed away but the appeal was allowed. In Revision filed by Yashodabai before this Court, she filed application for introduction of new ground of availability of additional premises for tenant and non-user. Yashodabai also passed away during pendency of the Revision. It was contended by the heirs of tenant that with death of Yashodabai, her requirement did not subsist. However, the heir of Yashodabai-Rajendra contended that his wife required the suit shop for the business of imitation jewellery and cutlery. Thus, similar to the present case, in ***Yashodabai Gopalrao Khedkar*** also, the original landlady passed away during pendency of Revision before this Court. In the light of above factual position, this Court relied upon the Apex Court judgment in ***Sheshambal*** and held as under:

> 45. In my opinion, said decision applies on all fours to the facts of the present case. **I have already dealt with the requirement pleaded by Yashodabai in paragraphs3 and 4 of the plaint. As mentioned earlier, during pendency of the petition unfortunately Yashodabai died on 3.8.2009. In view of this subsequent development, namely, the death of Yashodabai on 3.8.2009 overshadows the genuineness of the need and also is of such a dimension that the need propounded by Yashodabai is**

completely eclipsed on account of her death. Rashmi, wife of Rajendra was not even remotely dependent upon Yashodabai.

46. That apart, in the year 1996 Yashodabai also secured the possession of 25 rooms situate on the 1st and 2nd floor and a office premises admeasuring 150 sq. ft. which is situate on the ground floor. Though the possession of 25 rooms was obtained in the year 1996, Yashodabai did not disclose said fact during pendency of the appeal. Even thereafter during her lifetime she did not disclose said fact in the present proceedings. That apart, even Rajendra in his affidavit filed in the Civil Application as also in the affidavit-inrejoinder did not disclose said fact. **As mentioned earlier, in the affidavitinrejoinder, for the first time, Rajendra has claimed that his wife Rashmi requires the suit premises for carrying on business of imitation jewelery and cutlery. In my opinion, this was not the requirement pleaded by Yashodabai. If at all Rajendra wants the possession of the suit premises, he will have to file a suit invoking the grounds that are available under the Rent Control Legislation. He cannot be allowed to superimpose the requirement of his wife pleaded for the first time in this petition**.

47. **In view thereof, I cannot accept the request made by Mr. Kulkarni to set aside the impugned order and <u>permit the plaintiff to amend the plaint and adduce evidence. This will amount to almost a denovo fresh trial</u>.** After considering the assertions made in paragraphs3 and 4 of the plaint and applying the principles laid down by the Apex Court in Seshambal's case (supra), it has to be held that the need pleaded by Yashodabai is totally eclipsed and is not in existence as of date**. It will be open to Rajendra to file a suit, if so advised, for recovery of possession of the suit premises**. If such a suit is filed, the concerned Court will decide the same on its own merits and in accordance with law uninfluenced by the observations made in this order. All contentions of the parties in that regard are expressly kept open. Subject to above, petition fails and the same is dismissed with no order as to costs. Rule is discharged. In view of dismissal of the petition, Civil Application No.1173/2008 does not survive and the same is also disposed of. Order accordingly.

(emphasis and underlining added)

25) In my view, the judgment in ***Yashodabai Gopalrao Khedkar*** delivered by this Court after considering the Apex Court

judgment in ***Sheshambal*** completely answers the issue involved in the present Petition. In the present case also, original Plaintiff did not plead the requirement of his son, daughter-in-law or grandson, which are sought to be introduced for the first time before appellate court after death of original Plaintiff. This would amount to introducing an altogether new case, inconsistent with what was pleaded by the original Plaintiff.

26) What remains now is to deal with the judgments relied upon by Mr. Gangal.

(i) In ***Hasmat Rai*** (supra), written statement was sought to be amended in Second Appeal by filing application under Order 6 Rule 17 of the Code for adding a plea that Plaintiff had secured vacant possession of adjoining portion of the building. His Lordship *R. S. Pathak J.* delivering concurring judgment held that the High Court was bound to take the said fact into consideration as the personal requirement of the landlord must continue to exist on the date when the proceeding is finally disposed of either in Appeal or in Revision. The Apex Court held in para-29 as under:

> 29. The subordinate courts were influenced by the consideration that although the respondent had obtained a decree for ejectment against Goraldas Parmanand, the case continued to be the subject of litigation and therefore it could not be said that the respondent was in possession of alternative accommodation. However, while the second appeal was pending in the High Court the appellants applied for amendment of their written statement to include the plea that the respondent had meanwhile obtained possession from

> Goraldas Parmanand. The High Court declined to permit the amendment. In doing so, it seems to me that the High Court erred. It was an essential part of the appellants' defence from the outset that the portion let out to Goraldas Permanand constituted suitable alternative accommodation, and therefore they should not be ejected. It is immaterial that the amendment was sought more than three years after possession of the portion had passed to the respondent. The High Court was bound to take the fact into consideration because, **as is well settled now, in a proceeding for the ejectment of a tenant on the ground of personal requirement under a statute controlling the eviction of tenants, unless the statute prescribes to the contrary the requirement must continue to exist on the date when the proceeding is finally disposed of either in appeal or revision, by the relevant authority.** That position, to my mind, is indisputable. The High Court should have allowed the amendment. The High Court, alternatively observed that the respondent wanted to accommodate his shop in the front portion of the building and therefore, of necessity, he would require the portion occupied by the appellants. That conclusion is based on the findings rendered by the courts below, which findings the High Court respected as findings of fact. But the High Court failed to note that both the courts below had proceeded on the assumption that the adjoining portion occupied by Goraldas Parmanand was not immediately available on account of litigation. It is for that reason that permitting the amendment sought by the appellants became relevant and, indeed, imperative. If the respondent has obtained possession of that portion, and that does not seem to be disputed, it becomes a serious question for decision whether the respondent needs the front portion of the building for his medicine shop and, if so, according to dimensions proposed by him. In the consideration of that question the element of the respondent's need for the rear portion of the building for his personal residence must be ignored. That need was never pleaded in the plaint and, as will be seen from s. 12(1)(e) of the Act, several considerations need to be satisfied before the need can be held proved. This aspect of the matter was apparently not brought to the notice of the High Court and therefore it fell into the error of taking this element into account.

The judgment in ***Hasmat Rai,*** though of larger Bench than ***Sheshambal,*** is on the issue of permissibility for Defendant to amend the written statement during pendency of appeal

to bring on record securing of vacant possession of adjoining portion of building. The Defendant must be permitted to bring the development of landlord acquiring additional premises to satisfy his bonafide need as Defendant cannot file fresh suit once his eviction on the original pleaded case becomes final. As against this, original Plaintiff's legal heirs can always bring a fresh suit to seek tenant's eviction based on their individual need contrary to the one pleaded by original Plaintiff in previous suit. Therefore the judgment in ***Hasmat Rai*** would not apply to the facts of the present case.

(ii) The judgment of this Court in ***Govindlal Motilal Jhawar*** (supra) is relied upon by Mr. Gangal wherein this Court has held that all the developments appearing during pendency of the Appeal are also required to be taken into consideration. This Court held in para 35 as under:

> 35. The learned counsel for landlord placed reliance on some observations made by the Apex Court in the case reported as AIR 2001 (SC) 803 [*Gaya Prasad v. Pradeep Srivastava].* The Apex Court has considered the helplessness of the landlord due to continuation of such litigation over years together. It is observed that due to such delay, landlord takes steps to satisfy his own needs and Court cannot expect him to sit idle. **It is held that in such cases, unless subsequent events totally eclipse the bonafide need of the landlord, the landlord will not lose his right to get possession on this ground.** In the case reported as AIR 1997 (SC) 2399 [*Kamleshwar Prasad v. Pradumanju Agrawal),* the Apex Court has laid down that if the requirements of the landlord had continued till the decision of the appellate Court, the High Court is not expected to interfere in the matter in a proceeding filed under

> Articles 226 and 227 of Constitution of India if some event took place after the decision of the appellate Court. There cannot be any dispute over this proposition also. In any case, this Court has considered the subsequent developments as against the landlord. The developments as against tenants could have also be considered. Necessary observations are made in this regard. In view of the aforesaid discussion, this Court holds that there is no possibility of interference in the decision given in favour of the landlord on the ground of bonafide requirement for personal use.
>
> *(emphasis added)*

The judgment of this Court in ***Govindlal Motilal Jhawar***, far from assisting the case of Respondents, actually militates against them as the need of the original landlord/Plaintiff has been completely eclipsed.

(iii) In ***Pasupuleti Venkateswarlu*** (supra), it is held that in revision stage, the High Court can take cognizance of subsequent event of acquisition of premises by the Plaintiff. The ratio appears to be similar to the judgment in ***Hasmat Rai***. In fact, ***Hasmat Rai*** is rendered after considering the ratio in ***Pasupuleti Venkateswarlu.*** Therefore for the same reasons as recorded for non-application of ratio in **Hasmat Rai**, the judgment in ***Pasupuleti Venkateswarlu*** would also not have any application to the present case.

(iv) In ***Om Prakash Gupta*** (supra), the Apex Court has reiterated the position that in a suit for eviction, subsequent events taking place at appellate stage can be

taken into consideration by following the judgment in ***Pasupuleti Venkateswarlu.*** In any case the Apex Court has refused to take into consideration the subsequent even in that case. The judgment therefore has no application to the present case.

(v) In ***Kedar Nath Agrawal*** (supra), the Apex Court took stock of several judgments on the issue held in para-31 as under :

> 31. In view of the settled legal position as also the decisions in ***Pasupuleti Venkateswarlu*** [1975 (1) SCC 770] and ***Hasmat Rai*** [1981 (3) SCC 103], in our opinion, the High Court was in error in not considering the subsequent event of death of both the applicants. In our view, it was power as well as the duty of the High Court to consider the fact of death of the applicants during the pendency of the writ petition. Since it was the case of the tenant that all the three daughters got married and were staying with their in- laws, obviously, the said fact was relevant and material. The ratio laid down by this Court in *Rameshwar,* would not apply to the facts of this case as it related to agrarian reforms. Likewise, *Gaya Prasad*, does not carry the matter further. There during the pendency of proceedings the son for whom requirement was sought had joined Government Service. In the instant case, the requirement was for the applicants, who died during the pendency of writ petition. *Gaya Prasad* is thus clearly distinguishable.

Thus ***Kedar Nath Agrawal*** again follows the ratio in ***Pasupuleti Venkateswarlu*** and ***Hasmat Rai***, and both the judgements are held to be inapplicable to the facts of the present case.

(vi) In ***Ram Kumar Barnwal*** (supra), the Apex Court has followed the judgments in ***Pasupuleti Venkateswarlu, Omprakash Gupta*** which are already dealt with above.

27) After considering the judgments relied upon by the learned counsel appearing for the rival parties, the position of law appears to be well settled that in eviction proceedings, subsequent events taking place at appellate stage can be taken into consideration. However, most of the judgments relied upon by Mr. Gangal relate to the subsequent events questioning subsistence of bonafide need of the Plaintiff. In none of the judgments relied upon by Mr. Gangal, the Courts have dealt with a case where a new and distinct need of legal heirs has arisen requiring amendment of plaint at the appellate stage. On the other hand, in ***Gajraj***, the Apex Court has held that legal heirs take place of their predecessor and are bound by the pleadings raised by the predecessor. Furthermore, in ***Sheshambal***, it is held that if the Original Plaintiff pleads his own bonafide requirement and chooses not to plead bonafide requirement of any of his family members, such family members, who are subsequently brought on record as legal heirs, cannot be permitted to raise pleadings to introduce their own need for the suit premises. As observed above, the judgment of this court in ***Yashodabai Gopalrao Khedkar*** completely answers the issue involved in the present case.

28) In the present case, the Original Plaintiff came up with a case that he needed the suit premises for commencing the business of general stores. His need is now eclipsed upon his death. In the cross-examination, he specifically admitted that his son or

daughter-in-law did not need the suit premises for their offices. What is now sought to be done by the legal heirs of Original Plaintiff is to raise contradictory need of opening offices for himself and his wife in the suit premises. Thus, the need that is sought to be raised in the amended plaint is directly contradictory to the evidence led by the Original Plaintiff. Therefore, allowing Plaintiffs to amend the plaint at this stage would result in raising of inconsistent pleas. In my view, therefore the Appellate Bench could not have permitted the legal heirs of the Original Plaintiff to amend the plaint for introducing an altogether new, and more importantly inconsistent, requirement than the one originally pleaded by the Original Plaintiff. Mr. Thorat has fairly conceded that the current landlord, Vinay Raghunath Deshmukh can always bring a fresh suit seeking recovery of suit premises for the current need of his family members. Therefore, no prejudice would be caused to the current Plaintiff if he is not allowed to amend the plaint during pendency of the Appeal.

29) In my view, therefore the Appellate Bench has erred in allowing the application for amendment filed by the Appellant-Plaintiff as granting such amendment has resulted in remand of the proceedings before the Trial Court for inviting findings on the fresh bonafide requirement sought to be incorporated by the Plaintiff. The correct course of action for the Appellate Bench was to direct the Plaintiff to file fresh suit on the ground of his bonafide

requirement for operating offices by himself, his wife and medical consultation by his son.

30) The Writ Petition accordingly succeeds. The order dated 5 April 2024 passed by the Appellate Bench of the Small Causes Court is set aside and the application filed by Appellant-Plaintiff at Exhibit-38 is dismissed. The Plaintiff shall however be at liberty to file a fresh suit with regard to the cause of action sought to be incorporated by way of amendment. Nothing observed in the present judgment would come in the way of Plaintiff pursuing his suit on the grounds of his and his family's bonafide requirements or on any other ground.

31) With the above directions, the Writ Petition is **allowed.** There shall be no order as to costs.

NEETA SHAILESH SAWANT

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Date: 2024.08.07 16:42:00 +0530

[SANDEEP V. MARNE, J.]