

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 361 OF 2015

Bonfilio Pereira & Anr.	..	Petitioners
VS.		
Lawrence Vaz	..	Respondent

Mr. M. A. Khan for Petitioners.
Mr. Amol Shinde for Respondent.

CORAM : M. S. SONAK, J.
DATE : 24 AUGUST 2015

P.C. :-

1] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

2] This petition is directed against the order dated 25 November 2014, by which the Small Causes Court has dismissed the petitioners application at Exhibit '67' for framing an additional issue, in the matter of eviction on the grounds of non user of the suit premises.

3] Mr. Khan, the learned counsel for the petitioners invited my attention to the averments in paragraph 4 of the plaint and paragraph 8 of the written statement to submit that issue of eviction on account of non user of the suit premises clearly arose and

therefore, such issue ought to have been framed by the Trial Court. Mr. Khan pointed out that in fact the petitioners had instituted four suits against four different tenants in the same building in which grounds of bonafide requirement and non user had been raised. In three suits, both the issues have been duly framed. However, in the present suit, the issue of non user remained to be framed. Mr. Khan pointed out that though the plaintiffs have already led evidence in this matter, there will be no necessity of leading any further evidence as the Plaintiffs have already deposed to the issue of non user, under the presumption that such an issue has been framed in the present case. Mr. Khan submitted that even the respondent has cross-examined the petitioners on the aspect of non user. For all these reasons, Mr. Khan submitted that the impugned order is vitiated by jurisdictional error and requires to be interfered with.

4] On the other hand Mr. Amol Shinde, the learned counsel for the respondent submitted that issues had been cast almost six years ago therefore, there is no justification at this stage to insist upon framing of the additional issue. Mr. Shinde pointed out that the petitioners, by letter dated 29 October 2007 had requested the Registrar of the Trial Court to assign the matter to Court room no. 32, which was the Court dealing in matters where eviction is

applied for on the ground of bonafide requirement under Section 16(1)(g) of the Maharashtra Rent Control Act, 1999 ("Rent Act"). Mr. Shinde submitted that from this it is clear that no issue of eviction on the ground of non user, at all arose and in any case, the same was given up by the petitioners, by their aforesaid conduct. Mr. Shinde submitted that the petitioners have already concluded their evidence and the evidence of the respondent is in progress. At this belated stage, if an additional issue is framed, the same, apart from being illegal, would occasion very severe prejudice to the respondent. For all these reasons, Mr. Shinde submitted that there is no case made out to interfere with the impugned order.

5] Having heard the learned counsel for the parties and perused the record, in my judgment, the issue with regard to the eviction on the ground of non user will have to be framed in the facts and circumstances of the present case. No doubt, the petitioners have not been very diligent in the matter and such non diligence is likely to occasion prejudice to the respondent. However, the prejudice is not of such nature as cannot be compensated by way of substantial costs.

6] In paragraph 4 of the plaint, the petitioners have stated as follows:

“4. The Defendant has been residing permanently at the address given in the title of suit. The Plaintiffs further state that from last 10 years, the Defendant has not been using and occupying the suit premises from last 10 years and the suit premises is lying vacant.”

7] In paragraph 8 of the written statement, the respondent has, in response to the statements in paragraph 4 of the plaint, pleaded as under:

“8. With reference to Para 4 of the plaint, it is denied that defendant has been residing permanently at the address given in the title of suit or that defendant has not been using and occupying the suit premises from last ten years and suit premises is lying vacant. The flat at Borivali is the flat of the son of this defendant, who is also married and has two children and this defendant usually goes to reside in the flat of his son.”

8] From the aforesaid, it is quite clear that the petitioners, in their plaint, have pleaded that the respondent has not been using and occupying the suit premises since last ten years and the suit premises are lying vacant. No doubt, this averment has been duly denied by the respondent. In such circumstances, the issue with regard to eviction on the ground of non user certainly arises and the same was required to be framed.

9] On the aspect of delay and prejudice, it must be noted that the petitioners in the present case are the landlords. Accordingly, by delaying the proceedings, it is the petitioners, who suffer, possibly more than the respondent – tenant. That however, is no excuse for lack of diligence. The learned counsel for the petitioners has made a statement that the plaintiffs will not lead any further evidence on the aspect of non user, but will rely upon the evidence already led in that regard. The learned counsel for the petitioners further submitted that the respondent has also cross-examined the plaintiffs on the aspect of non user. However, in case the respondent desires to further cross-examine the plaintiffs, the petitioners will have no objection to their recall for the limited purpose.

10] In so far as the letter dated 29 October 2007 is concerned, the same may have been tendered for some administrative purposes. That by itself, cannot be taken as any waiver of the ground of eviction on the basis of non user. Similarly, assignment of matters to Court room no. 32, is also within the realm of administrative procedures. Accordingly, if an issue arises, then the framing of the same cannot be avoided on the ground of allotment of the matter to Court room no. 32. The said Court, is equally competent to take up and decide the issue of non user along with the issue of bonafide requirement.

11] Therefore, upon cumulative consideration of the aforesaid circumstances, this petition is disposed of with the following order:

(A) The impugned order dated 25 November 2014 is set aside;

(B) Accordingly, the Trial Court is directed to frame an issue on the aspect of eviction on the ground of non user as contemplated by Section 16(1)(n) of the Rent Act;

(C) The aforesaid shall be subject to the petitioners depositing before the Trial Court costs of Rs.10,000/- (Rupees Ten Thousand) within a period of two weeks from today. In case, the costs are not deposited, then this petition shall be deemed to have been dismissed;

(D) Upon the deposit of costs of Rs.10,000/- the respondent shall be entitled to withdraw the same unconditionally;

(E) The Trial Court shall afford opportunity to the respondent to cross-examine the petitioners, once again, on the aspect of non user of the suit premises if the respondent so desires and applies;

(F) The Trial Court will also permit the respondent to continue with his evidence or lead evidence in the manner of non user.

(G) All concerned to act on basis of authenticated copy of this order.

(H) Rule is made absolute to the aforesaid extent.

Chandka

(M. S. SONAK, J.)