

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

CIVIL REVN. APPLICATION NO. 893 OF 2013

Shri Bhimraj Sardarmalji Parmar (deceased)

1(a) Smt.Jatnabai Parmar & ors.

... Applicants

v/s

Mrs.Bridget Nazareth & ors.

... Respondents

Mr.P.S. Dani, senior advocate i/by Pratap Mandlik for the applicant.

Mr.Pradip Kadam for the respondent No.1.

CORAM: N. M. JAMDAR, J.

DATED : 13TH APRIL, 2015

ORAL ORDER:

This revision application is preferred by the applicant- tenant of the premises challenging the judgment and orders passed by the Small Causes Court, Mumbai, dated 10 June 2003 and the Appellate Bench of the Small Causes Court, Mumbai, dated 15 November 2013 directing the eviction of the applicants from the suit premises.

2. The suit premises is a shop No.4 situated Bhavani Shankar Road, Dadar. The respondents-landlords filed a Suit No.1384 of 1984 against the applicants for eviction from the suit premises. The suit was filed seeking possession from the applicants on the

ground that the applicants had kept the suit premises locked and unused for a period of one year preceding the date of filing the suit. The respondents also contended that the suit premises were required for their bonafide personal use. The applicants appeared in the suit and filed their written statement. It was contended that there was no non-user of the premises as alleged and no case was even pleaded regarding non-user. The applicants contended that there were thefts in their jewellery shop because of which they had reduced their business activity for some time. The learned Small Causes Court Judge, after considering the evidence on record and the arguments of both sides, came to the conclusion that the premises were not used by the applicants without reasonable cause for continuous period of six months. Accordingly, the learned Small Causes Court Judge by the judgment and decree dated 10 June 2013 directed the applicants to hand over possession of the premises. Thereafter, the applicants filed an appeal bearing No.590 of 2003 before the Appellate Bench of the Small Causes Court. The Appellate Bench concurred with the findings of the learned Trial Judge that the applicants had not used the premises without any reasonable cause. The Appellate Bench, by judgment and order dated 15 November 2013 dismissed the appeal. Hence the present civil revision application.

3. Mr.Dani, learned senior advocate for the applicants contended that there are no adequate pleadings as regard the non-user in the plaint. He submitted that the landlord must plead that

the tenant has not only not used the premises for the requisite period but he must state that the non-user was without any reasonable cause. He submitted that, unless the words 'without reasonable cause' are stated in the plaint the Small Causes Court will not have jurisdiction. He relied upon the decision of the learned Single Judges of this Court in the case of ***C.R.Shaikh v/s Lilabai D. Rohid & anr.***,¹ and ***Ashok Vithal Chavan & ors. v/s Baburao Sakharam Bhagat***².

4. What the landlord is required to prove is that the tenant has not used the premises for the specified period. Once this position is established, it will be a defence of the tenant that either to state that either premises were used or if they are not so used, it was with reasonable cause. Once the landlord pleads non-user of the premises, it would generally inhere in the pleading that he considers such non-user without a reasonable cause. The issue of burden of proof came up for consideration before the Apex court in the case of ***Dunlop India Ltd. v/s A.A. Rahna & anr.***³ The Apex Court has observed as under :

“21. The word “occupy” used in Section 11(4)(v) is not synonymous with legal possession in technical sense. It means actual possession of the tenanted building or use thereof for the purpose for which it is let out. If the building is let out for residential purpose and the tenant is shown to be continuously absent

1. 1981 Mh.L.J. 437

2. 2002 (6) Bom.C.R. 736

3. (2011) 5 SCC 778

from the building for six months, the Court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case, legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was a reasonable cause for his having ceased to occupy the building.”

“22. The initial burden to show that the tenant has ceased to occupy the building continuously for 6 months is always on the landlord. He has to adduce tangible evidence to prove the fact that as on the date of filing the petition, the tenant was not occupying the building continuously for 6 months. Once such evidence is adduced, the burden shifts on the tenant to prove that there was reasonable cause for his having ceased to occupy the tenanted premises for a continuous period of 6 months.”

The decisions relied upon by Mr.Dani in the case of **C.R. Shaikh** (supra) and **Ashok V. Chavan** (supra) do not lay down an absolute proposition which is advanced by him. Furthermore the decisions in the cases of *C.R. Shaikh* and *Ashok V. Chavan*, were rendered prior to the decision of the Apex Court in *Dunlop India Limited*. But it is not necessary to finally conclude on this question of law in view of the factual position in the present case which is indicated below.

5. The respondents have pleaded that the premises were not

used for a period of six months immediately preceding the date of the institution of the suit. The applicants filed their written statement and gave an explanation regarding the said period. Evidence was led by both the parties as regard the factual position in respect of the requisite period. It is upon this evidence, both the Courts came to the conclusion that there was an absence of the applicants from the suit property for the requisite period and it was without reasonable cause. Therefore, after fulfilled trial and when parties produced the evidence on record, it will not be possible to set aside the finding only on the ground that the respondents did not include the words, 'without reasonable cause' in the plaint, which would be merely quoting the relevant section.

6. An identical argument was made before learned single judge of this court in the case of **Gopaldas Khushaldas Parmar v/s Sanmukhlal P. Shah**⁴. The plaintiff therein had not averred that the premises were not being used 'with sufficient cause'. The learned Single Judge noted that, even though there were no such words, the written statement dealt with the aspect and gave reason for non-use. The learned Single Judge observed as under :

“18. A perusal of the plaint in the present case shows that the plaintiff has not pleaded that the non-user was without reasonable cause. I would have normally followed the ratio in the case of C.R. Shaikh (supra) and as has been done by the Appellate Court and the plaintiff would have been non-suited on the ground of failure to plead non-user without reasonable cause. However, in

4. 2012(4) Bom.C.R. 541

the facts and circumstances of the case, the defendant has elaborately pleaded the reasons for non-user. In this case though the plaintiff did not plead lack of reasonable cause, the defendant has elaborately pleaded the reasonable cause which according to the defendant prevented the defendant from using the suit premises. In view of this it is clear that no prejudice was caused to the defendant on account of failure of the plaintiff to plead lack of reasonable cause for non-user. It is in this context that I am not in agreement with the reasoning of the appellate Court in paragraph 22 of its judgment that failure to plead lack of reasonable cause was fatal to the case of the plaintiff.

In this decision, the learned Single Judge took note of the decision in the case of *C.R. Shaikh* and followed the decision of the Apex Court in *Dunlop India Ltd.* There is no reason to take different view.

7. Since the written statement gave elaborate explanation and evidence was led on non-use and the sufficiency of reason for non use, the Courts below were not in error in taking a view that the applicants were not prejudiced by lack of the phrase, “without reasonable cause” be pleaded in the plaint. The approach is in consonance with the decision of this Court in the case of *Gopaldas* (supra) and hence cannot be termed as perverse.

8. Mr.Dani made a faint attempt to contend that the premises were being used intermittently and the applicants had a reasonable cause. He submitted that when the applicants were doing the business of jewellery, there were thefts in the shop and because of which the applicants were unsure of carrying on their business and

started using the premises intermittently. The question whether the tenant has ceased to occupy the premises for the requisite period is primarily a question of fact. No straight jacket formula can be applied for it is a matter of proof and it must depend on facts of each case. In the revisional jurisdiction the only area open is to ascertain whether the assessment of evidence and finding of fact can be termed as perverse.

9. The suit was filed on 24 March 1984. Therefore, the period in question will be the six months prior to it i.e. September 1983 to March 1984. The Courts below have considered the evidence of a supervisor of the electricity supply company that the electricity supply was disconnected from 19 May 1983 and it was restored on 6 February 1985. Though it is contended that merely because the electricity supply was cut, non-user cannot be directly inferred, it has to be kept in mind that generally a shop business in city of Mumbai will not be carried out without electricity. The Courts below have taken note of the fact that another premises at Bhavani Shankar Road itself were being used by the applicants. According to Mr. Dani, these premises belong to the father of the applicants and the learned Appellate Bench was in error in taking these premises into consideration. However, the fact still remains that the father of the applicants has a shop on the same road dealing with the business of jewellery. Therefore, taking availability of the shop next door, as one of the factors to draw presumption, cannot be considered as a perverse approach. The only evidence that is

produced on record by the applicants to show business being run from the premises is of income tax returns of the sons of the applicant which have been rightly rejected as not relevant. The fact that the applicants reduced the use of the premises is not disputed as they have come out with a case that thefts took place in the premises. However, the thefts took place in the year 1981 and the suit was instituted in the year 1984. It is not possible to believe that the applicants will not take any security measures at all to ensure that incidents not occur.

10. The non-user of the premises has to be gathered from surrounding circumstances, taking all the factors cumulatively. If all these facts are taken together i.e. disconnection of electricity supply, no documents showing actual business being run from the premises, father's shop being on the same road, indicate that the finding regarding non-user is a possible view of the matter. The finding is not perverse or shocking nor the Courts below have committed any error of jurisdiction. The only ground regarding error of jurisdiction that was urged was requirement in the pleadings which are already been dealt with in the earlier paragraph.

11. In the circumstances, no case is made out for interference. The civil revision application is rejected. No costs.

12. Mr.Dani, learned senior counsel for the applicants seeks continuation of the ad-interim order for a period of eight weeks. I

am inclined to grant period of six weeks. However, procedural aspects regarding copy of the order will take some time, it is directed that the ad-interim order dated 21 December 2013 will continue for a period of eight weeks on the same terms and conditions stated therein.

(N. M. JAMDAR, J.)