

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

WRIT PETITION NO. 4376 OF 2016

Kanaya Detaram Athwani

..Petitioner.

Vs

Mahavir Mohan Desarda

.. Respondent

Mr. G.S.Godbole, Senior Advocate, i/b L.J.Law, Advocates for
Petitioner.

Mr. R.S.Datar, Advocate for Respondent.

CORAM : R.G.KETKAR,J.

DATE : 17/06/2016

PC:

1. Heard Mr. G.S.Godbole, learned senior counsel for the petitioner and Mr. R.S.Datar, learned counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and decree dated 6.7.2011 passed by the learned 5th Addl. Judge, Small Causes Court, Pune in Civil Suit No. 569 of 2006 as also the Judgment and decree dated 4.11.2015 passed by the learned Adhoc District Judge-3, Pune in Civil Appeal No. 516 of 2011. By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as 'plaintiff', under section 16(1)(g) - bona fide and reasonable requirement and 16(1)(n)-non user.

3. The plaintiff has instituted the suit for recovery of

possession of shop admeasuring 256 sq.ft, consisting of mezzanine floor and one room of 50 sq.ft., W.C. and bathroom, situate at Final Plot no.630, Deccan Gymkhana, CTS no.1273, Shivaji Nagar, Pune (for short, 'suit premises).

4. In support of this petition, Mr. Godbole submitted that the building where the suit premises is situate, was purchased by father of the plaintiff in the year 1993. At the relevant time, the plaintiff was minor. In paragraph 8, the plaintiff asserted that he is a student of M.I.T. College and is about to graduate within a few months in Bachelor of Computer Applications. The plaintiff wants to start his own business in Computers and for which he does not have any available premises anywhere. The entire building is in occupation of tenants already inducted by erstwhile owner. Paragraph 8 was amended slightly to the effect that father of the plaintiff is a practicing surgeon who has his consulting room in the suit building who has assured the plaintiff to provide for the required capital for his intended business but the father of the plaintiff cannot acquire other premises and make them available to the plaintiff for his business due to his personal reasons. The suit premises are located in Deccan Gymkhana near Sambhaji Bridge, opposite Deccan Gymkhana Post Office, which is exclusively commercial area and as the suit premises are on the ground floor and on main road, the suit

premises is the most ideal location for the intended business of the plaintiff. The plaintiff, therefore, asserted that he reasonably and bona fide requires the suit premises for his own use and occupation.

5. The plaintiff further came with the case that the defendant has stopped the user of the suit premises somewhere from June 2005 till date without any reasonable cause. The defendant has removed almost entire furniture from the suit premises and the suit premises is totally closed and unused for the purpose for which they were let for a continuous period of six months without any reasonable cause. The petitioner, hereinafter referred to as 'defendant', filed written statement resisting the claim. In paragraph 6, the defendant denied the assertions in paragraph 5 of the plaint. In paragraph 9, the defendant denied the assertions in paragraph 8 of the plaint.

6. In support of the plaintiff's case, his father Dr. Mohan Phulchand Desarda was examined. Mr. Godbole submitted that the plaintiff himself did not enter into witness box. In paragraph 7, PW 1 stated that at the time of filing of the suit, the plaintiff was about to complete his degree in Bachelor of Computer Applications. Now his son has completed degree course. He has filed true copy of degree certificate of his son at sr. no.9 of the list which may be exhibited and read in evidence. He further

deposed that his son wants to start his own business in Computers and for which he does not have any available premises anywhere. Though he has purchased the southern half portion of the suit building, the entire building is already in occupation of tenants inducted by erstwhile owner. He is the father of the plaintiff and is a practicing surgeon. He is having his consulting room in the suit building. He has assured the plaintiff to provide for the required capital for his intended business but he cannot acquire other premises and make them available to the plaintiff for his business due to his personal difficulties and reasons. The suit premises are located in Deccan Gymkhana near Sambhaji Bridge, Opposite Deccan Gymkhana Post Office which is exclusively commercial and as the suit premises are on the ground floor and on main road, the suit premises is the most ideal location for the intended business of the plaintiff. The plaintiff, therefore, reasonably and bonafide requires the suit premises for his own use and occupation and on the other hand, the defendant has already sublet the suit premises to various persons and due to the quarrels between the defendant and his subtenants, the defendant has kept the suit premises totally closed and unused since May-June 2005 and, therefore, will not suffer any hardship if decree for possession is passed. On the other hand, it will be the plaintiff who will suffer grave and

irreparable loss and his entire future will be uncertain if the decree is refused. The plaintiff will, therefore, suffer grave hardship rather than the defendant who will not suffer any hardship at all.

7. Mr. Godbole invited my attention to cross examination of PW 1 and in particular paragraph 8. He submitted that in paragraph 8 of the cross examination, PW 1 admitted that he was in possession of the first and second floor of the property owned by Genu Thorat wherein he was running his hospital. However, as the patients started shifting to Poona Hospital, he discontinued his hospital in that property and he established separate cabins and separate persons to use those cabins on services presently nobody is using the said services of those cabins. He, therefore, submitted that the entire first and second floor of the property owned by Genu Thorat is available and that will meet the requirement allegedly set up by the plaintiff. He further submitted that apart from these premises, even from the evidence of D.W.2-Pandurang Jagannath Inamdar, it would be evident that shop no. A/2/17, Gajalaxmi Society is available to meet the requirement of the plaintiff. He submitted that the Appellate Court, however, did not consider availability of shop no. A/2/17 in the impugned order. Mr. Godbole submitted that during the course of evidence, the plaintiff did not give details about the

nature of business proposed to be carried out in the suit premises and how much capital is required.

8. As far as ground under section 16(1)(n), namely, non user is concerned, the suit is instituted on 14.12.2006. The relevant period would be from 15.6.2006 to 14.12.2006. He submitted that on 6.1.2005, the defendant had issued notice calling upon the landlord to carry out repairs. The landlord did not carry out the repairs and, therefore, this is a reasonable cause for non-user of the suit premises for a continuous period of six months preceding the institution of the suit. He further submitted that in fact the plaintiff did not discharge the burden in proving that the suit premises were not in continuous use for a period of six months preceding the date of institution of the suit. He, therefore, submitted that Petition requires consideration.

9. On the other hand, Mr. Datar supported the impugned orders. He submitted that the Courts below after appreciating the evidence on record, have concurrently held that the plaintiff has established grounds under section 16(1)(g) and 16(1) (n) of the Act. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused

the material on record. I have already indicated the requirement pleaded by the plaintiff in paragraph 8 of Plaint. It is not disputed and cannot be disputed that the plaintiff has obtained degree in Bachelor of Computer Applications. True copy of the degree certificate is produced on record at sr.no.9 of the list filed on 31.3.2009. Mr.Godbole submitted that the entire first and second floor of the property owned by Genu Thorat is available and the said premises can meet the requirement of the plaintiff. I do not find any merit in this submission for more than one reason. In the first place, the defendant has not positively established that the said premises are factually available. From perusal of paragraph 8 of the cross examination, PW 1 denied the suggestion that he is not running the profession in the suit property, namely, the first and second floor of the building where the suit premises is situate. Witness volunteered that he is running Charitable Trust Office, Day care center, business center. He also gave the name of Trust. Dr. M.P. Desarda Charitable Trust and Research Institute and Indian Hernia Institute activities are being run in this property. It is, in that context, obligatory on the part of the defendant to lead positive evidence to establish availability of the premises on the first and second floor of the building where the suit premises is situate. Secondly, perusal of further cross examination in paragraph 8 shows that PW 1 stated

that the plaintiff wants to start the business of Sales and Service of Electronic goods and the plaintiff is doing M.B.A. from M.I.T. Institute. Having regard to the nature of business proposed to be carried out in the suit premise, viz. business of Sales and Service of Electronic Goods and further having due regard to the fact that the suit premises is situate on the ground floor, it cannot be said that the need pleaded by the plaintiff is either unreasonable or mala fide. The Courts below have concurrently held that the plaintiff has established his need. In particular, the learned District Judge has considered this aspect from paragraph 59 onwards. The learned District Judge considered the availability of shop no.17 in building A-2 at Gajalaxmi Society, Sahakarnagar, Parvati, which is lying vacant. After considering the admissions given by D.W. 2-Pandurang, during the course of cross examination, the learned District Judge observed that the shop premises at Gajalaxmi Society are not used since long due to dispute between husband and wife, viz. parents of the plaintiff. The learned District Judge has considered this aspect from paragraph 65 onwards and agreed that the findings recorded by the learned trial Judge that the need of the plaintiff is both reasonable as well as bona fide. As far as the comparative hardship is concerned, in paragraph 69 the learned District Judge observed that there is absolute no evidence on record that after

the service of the suit summons, the defendant made search of alternate suitable premises and, despite that, he did not find the same. The learned District Judge, therefore, held that no hardship will be caused to the defendant in the event of passing of eviction decree. I do not find that the Courts below committed any error in decreeing the suit under section 16(1)(g) of the Act.

11. After appreciating the evidence on record, the Courts below have held that the plaintiff has established non user for the relevant period and the defendant did not establish reasonable cause that prevented him from using the suit premises. In paragraph 5 of the Written Statement, the defendant contended that after receipt of notice dated 20.11.2006, the plaintiff failed and neglected to carry out repairs and because of not carrying out the repairs, the defendant could not run business for some days. In paragraph 28, the Appellate Court, therefore, held that the defendant practically admitted that the premises are not used for certain period but did not specify the period for which the premises are not used. The learned District Judge considered notice dated 6.1.2005 at Exh.23 calling upon the plaintiff to carry out minor repairs.

12. In paragraph 36, the learned district Judge observed that in the notice the defendant contended that only minor repairs are required to be carried out and as the plaintiff did not carry out

repairs, he himself carried out repairs in January 2007. There was absolutely no evidence or explanation to indicate as to what prevented the defendant from carrying out repairs. It is only after service of the notice and after acquiring knowledge about filing of the suit, the defendant carried out the repairs. As the defendant did not carry out the repairs from 2005 to 2007, it showed that during the said period the shop was closed and was not in use. As far as the ground of non user is concerned, the defendant did not produce any evidence on record to substantiate his contention that he was using the suit premises continuously for six months immediately preceding the date of filing of the suit.

13. In the case of *Dunlop India Limited Vs. A.A. Rahna*, (2011) 5 Supreme Court Cases 778, the Apex Court has observed in paragraph 22 and 27 thus:

“22. The initial burden to show that the tenant has ceased to occupy the building continuously for six 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 six 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 six months.”

14. In paragraph 27, the Apex Court referred to the decision in *Brown V Brash*, (1948) 1 ALL ER 922 (CA). The Court of Appeal reversed the order of the County Court Judge and held thus:

“27. “We are of opinion that a "non-occupying" tenant prima

facie forfeits his status as a statutory tenant. But what is meant by "non-occupying"? The term clearly cannot cover every tenant who for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend 24 hours in all weathers under his own roof for 365 days in the year. Clearly, for instance, the tenant of a London house, who spends his week-ends in the country, or his long vacation in Scotland, does not necessarily cease to be in occupation. **Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, prima facie, of a cesser of possession or occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect. The legal result seems to us to be as follows:** (1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it he must, at all events, establish a de facto intention on his part to return after his absence. (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for 5 or 10 years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts as affirmed in *Keeves v. Dean* (1924) 1 KB 685: 1923 ALL ER Rep 12 (CA) and *Skinner v. Geary* (1931) 2 KB 546: 1931 ALL ER Rep 302(CA), (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it, i.e., installs in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming. There will then, at all events, be someone to profit by the housing accommodation involved which will not stand empty. It may be that the same result can be secured by leaving on the premises, as deliberate symbols of continued occupation, furniture, though we are not clear that this was necessary to the decision in *Brown v. Draper* (1944) 2 KB 309: (1944) 1 ALL ER 246 (CA). Apart from authority, in principle possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an "animus possidendi" but a "corpus

possessionis," viz., some visible state of affairs in which the animus possidendi finds expression. (5) If the caretaker (to use that term for short) leaves or the furniture is removed from the premises, otherwise than quite temporarily, we are of opinion that the protection, artificially prolonged by their presence, ceases, whether the tenant wills or desires such removal or not. A man's possession of a wild bird, which he keeps in a cage, ceases if it escapes notwithstanding that his desire to retain possession of it continues and that its escape is contrary thereto. We do not think in this connection that it is open to the tenant to rely on the fact of his imprisonment as preventing him from taking steps to assert possession by visible action. **The plaintiff, it is true, had not intended to go to prison. He committed intentionally the felonious act which in the events which have happened landed him there, and thereby put it out of his power to assert possession by visible acts after 9.3.1946. He cannot, in these circumstances, we feel, be in a better position than if his absence and inaction had been voluntary."**

(emphasis supplied)

The Apex Court held that initial burden to show that the tenant has ceased to occupy the building continuously for six months is always on the landlord. He has to adduce tangible evidence to prove the fact that as on the date of filing of the suit, the tenant was not occupying the building continuously for six months. Thus, in principle, possession in fact (for it is with possession in fact and not with possession in law) requires not merely an "animus possidendi" but a "corpus possessionis," viz., some visible state of affairs in which the animus possidendi finds expression.

15. Thus, the Courts below after considering the evidence on record, have concurrently held that the plaintiffs have

established grounds under sections 16(1)(g) and 16(1)(n) of the Act. The defendant was not in a position to demonstrate that the findings recorded by the Courts below are either perverse, being based on no evidence, or that on the basis of material on record, no reasonable or prudent person would have come to the conclusion which is arrived at by the Courts below. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

16. At this stage, Mr. Godbole orally applies for stay of this order for a period of eight weeks from today. He states that the petitioner is in possession of the suit premises. The petitioner has neither created third party interest nor parted with possession. The petitioner will hereafter neither create third party interest nor part with possession.

17. Mr. Godbole assures that within two weeks from today, the petitioner and all adult family members using the suit premises, will file usual undertaking in this Court, after giving advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest so far nor parted with possession;
- (iii) that they will hereafter neither create third party interest nor part with possession;

(iv) that they will pay arrears of rent within two weeks from today to the respondent and that they will not apply for further extension of time for payment of arrears of rent;

(v) that in case they are unable to obtain suitable orders from higher Court within 8 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondent.

18. Hence, subject to the petitioner and all adult family members giving undertaking in this Court in the aforesaid terms and serving copy in advance to other side, notwithstanding dismissal of Petition, this order shall remain stayed for a period of eight weeks from today. It is made clear that if within two weeks from today, the undertaking in the aforesaid terms is not filed and arrears are not paid, the interim order shall stand vacated without further reference to the Court.

19. List the Petition for compliance after three weeks.

(R.G.Ketkar, J.)