IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 262 OF 2015

Mr. Pravinchandra Ratilal Shah ..Applicant

Vs

Ravindra Sakharam Sawant and Ors .. Respondents

WITH

CIVIL REVISION APPLICATION NO. 759 OF 2015

Ravindra Sakharam Sawant and Ors ..Applicants

Vs

Mr.Pravinchandra Ratilal Shah .. Respondent

Mr. N.G.Samant a/w Mr. Sandeep V. Mahadik, Advocate for Applicant in C.R.A.No.262 of 2015 and Respondent in CRA/759/15.

Mr. Suresh C. More, Advocate for Applicants in C.R.A.No.759 of 2016 and Respondents in CRA No. 262 of 2015.

CORAM : R.G.KETKAR,J.
DATE : 08/08/2016

PC:

1. Heard Mr. N.G. Samant, learned counsel for the applicant in C.R.A. No. 262 of2015 and for respondent in C.R.A. No.759 of 2015 and Mr. Suresh More, learned counsel for the respondents in C.R.A. No.262 of 2015 and for applicants in C.R.A. No. 759 of 2015 at length. Respondents in C.R.A. No.262 of 2015 and applicants in C.R.A. No.759 of 2015 shall, hereinafter, be referred to as 'plaintiffs'. Applicant in C.R.A. No. 262 OF 2015 and

respondent in C.R.A.No.759 of 2015 shall, hereinafter, be referred to as 'defendant'.

2. Plaintiffs have instituted suit against the defendant for recovery of possession of Room no.3, situate at ground floor of building known as 'Shant-Sakha, situate at 5, Nehru Road, Final Plot No. 176, Vile Parle (E), Mumbai – 400 057, hereinafter referred to as 'suit premises and suit building' respectively. Plaintiffs have claimed possession of the suit premises mainly on two grounds: (i) bonafide requirement as contemplated by Section 16(1)(g) and (ii) non user without any reasonable cause for a continuous period of six months immediately preceding the date of the suit as contemplated by section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). By Judgment and decree dated 5.5.2011, the learned trial Judge decreed the suit under section 16(1)(g) of the Act. The learned trial Judge declined to pass decree on the ground of non user as contemplated by Section 16(1)(n) of the Act.

3. Aggrieved by this decision, defendant preferred Appeal. The Plaintiffs preferred Cross Objection No.15 of 2011. By Judgment and decree dated 12.3.2015, the Appellate Court decreed the suit under section 16(1)(n) of the Act and declined to pass decree under section 16(1)(g) of the Act in view of Section 30 of the Act. The defendant has filed Civil Revision Application

No.262 of 2015 challenging both the orders. Plaintiffs have instituted Civil Revision Application No. 759 of 2015 as the Appellate Court declined to pass decree on the ground of reasonable and bonafide requirement under section 16(1)(g) of the Act.

4. In support of Civil Revision Application No. 262 of 2015, Mr. Samant strenuously contended that the Appellate Court was not justified in passing the decree under section 16(1)(n) of the Act. He submitted that the learned trial Judge declined to pass the decree on that ground. He has taken me through the discussion from paragraphs 20 to 46. He submitted that the suit was instituted on 1.9.2007. The relevant period for considering the ground of non-user is six months from 1.3.2007 to 31.8.2007. The learned trial Judge considered the electricity bills produced at Exhibit-13 for months of March 2007, April 2007, May 2007, June 2007 as also July, 2007. Plaintiffs produced photocopy of the bill of October, 2007 which shows consumption of units for the month of March 2007 onwards. As the plaintiffs produced photocopy of the electricity bill of October 2007, the learned trial Judge did not admit that bill in evidence, which was marked as Article “X”. He has taken me through the order dated 3.9.2010 regarding admissibility of documents below Exh.10. The learned trial Judge exhibited only original bills as Exhibit P-13 (1 to 6) and

marked photocopies as Article “X”.

5. Mr. Samant also took me through the written arguments filed by the plaintiffs before the Appellate Court and in particular paragraphs 13 to 16. In these paragraphs, the plaintiffs contended that the original electricity bill for the month of October, 2007 was handed over to their earlier Advocate for producing it in the trial Court. However, earlier Advocate did not produce original electricity bill and on account of negligence of their previous Advocate, they should not suffer .

6. Mr.Samant submitted that considering the written arguments, it is evident that though the plaintiffs have original bill of October 2007, their Advocate did not produce in the trial Court. Even along with the written argument, the plaintiffs did not produce original bill for October, 2007. Even in this Court, they did not produce original bill during the course of hearing. He, therefore, submitted that the plaintiffs have not established non user for a period of six months immediately preceding the date of filing of the suit. The learned trial Judge was fully justified in not accepting the said ground.

7. As against this, the Appellate Court relied upon the bill for October,2007 and held that the plaintiffs have proved ground under section 16(1)(n) of the Act. He, therefore, submitted that Civil Revision Application No.262 of 2015 requires consideration.

8. As against this, Mr. More supported the eviction order under section 16(1)(n) of the Act. He submitted that the Appellate Court held the plaintiffs have established ground of non user by leading tangible evidence. The burden shifted on the defendants to establish user by leading tangible evidence or to establish non user because of reasonable cause. The defendant did not establish user of the suit premises. The defendant also did not establish non user without reasonable cause. As far as the trial Court judgment is concerned, he submitted that the learned trial Judge failed to consider that the defendant came with the case that he was not continuously using the suit premises. In other words, the defendant came with the case that he was intermittently using the suit premises. However, the defendant did not adduce any tangible evidence in that regard. Electricity bills produced by the plaintiffs clearly show non user of the suit premises and the burden shifted on the defendant to establish non user for reasonable cause. As far as reasonable cause set up by the defendant is concerned, even the trial Court has disbelieved the said case. He, therefore, submitted that the trial Court was not justified in declining to pass the decree on the ground of non user under section 16(1)(n) of the Act. As against this, the Appellate Court was fully justified in passing the decree on that ground.

9. As far as the ground under Section 16(1)(g) of the Act is concerned, Mr. More, in support of Civil Revision Appreciation No 759 of 2015, has taken me through paragraphs 4 and 5 of plaint as also oral evidence of the plaintiffs to contend that the plaintiffs do not require the suit premises for commercial purpose. The plaintiffs require the suit premises as a rest room and for entertaining the customers which cannot be considered as commercial use. The Appellate Court was, therefore, not justified in turning down the ground under section 16(1)(g) in view of Section 30 of the Act.

10. On the other hand, Mr.Samant submitted that the Appellate Court was justified in declining to pass the decree under section 16(1)(g) of the Act. He has also taken me through the pleadings and evidence of the plaintiffs. In particular, during the course of cross examination, the plaintiffs admitted that they do not require the suit premises for their residence. They require the suit premises for printing business. He, therefore, submitted that the Appellate Court rightly declined to pass the decree under section 16(1)(g) of the Act.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Appellate Court passed decree under section 16(1)(n) of the Act. As far as the

trial Court is concerned, the trial Court did not pass the decree on that ground. As far as discussion of the trial Court on this ground is concerned, it is to be found from paragraphs 20 to 26. In paragraph 21, the learned trial Judge observed that the burden to prove non user of the suit premises for the purpose for which it was let out without reasonable cause for a continuous period of six months immediately preceding the date of the suit, lies upon the plaintiffs. If the plaintiffs succeed in proving the ground of non user and in that case, the burden shifts upon the tenant to prove whether there is any sufficient reason for continuous nonuser of the suit premises.

12. In paragraph 22, the learned trial Judge referred to electricity bills produced by the plaintiffs at Exh.13. The plaintiffs had produced six electricity bills. The electricity bills for the month of March, 2007 showed consumption of zero unit. For the month of April 2007, consumption was one unit, for the month of May, 2007, consumption was zero unit. For the month of June 2007, it was zero unit. For the month of July 2007 unit consumed was zero unit. Thus, for a period of 5 months continuously consumption of electricity unit was either zero and only for the month of April, 2007 consumption was one unit.

13. In paragraph 23, the learned trail Judge referred to electricity bill for the month of Oct., 2007. Plaintiffs had

produced photocopy of the electricity bill for Oct. 2007 which was marked as Article 'X'. The learned trial Judge did not consider this bill on the ground that it was not admissible in evidence. It is, however, material to note that though in paragraph 21 the learned trial Judge observed that initial burden of proving the ground of non user is on the plaintiffs and if they succeed in proving the ground of non user in that case, the burden shifts on the tenant to prove whether there is any sufficient reason for continuous nonuser of the suit premises. Bills produced by the plaintiffs for the months of March to July, 2007 clearly establish nonuser of the suit premises by the defendant. In other words, the plaintiffs have discharged their burden for establishing nonuser by the defendant. It is in that context material to note the discussion of the trial Court as to whether the defendant has produced any positive evidence to establish non user. Perusal of the trial Court Judgment does not indicate that any attempt was made by the trial Court for considering this aspect. The trial Court hereafter considered whether the defendant has established reasonable cause for not using the suit premises in paragraph 27 and ultimately held that the defendant has failed to prove his allegations. In other words, the trial Court did not accept that the defendant established reasonable cause for non user of the suit premises.

14. As far as the Appellate Court is concerned, the ground of non user is considered from paragraphs 10 to 16. The Appellate Court considered electricity bill of October 2007 which shows electricity consumption from October 2006 to September, 2007 was zero except for the month of April 2007 which shows consumption of 1 unit. The Appellate Court hereafter considered electricity bills from January 2008 to November 2008. All these electricity bills showed consumption of zero unit. In paragraph 11, the Appellate Court observed that if at all the defendant is really residing in the suit premises, it is inconceivable that he will not use the electricity in a place like Mumbai.

15. In paragraph 13, the Appellate Court also considered the fact that all family members of the defendant are residing at Kandivali premises. The defendant was asked about electricity bill pertaining to the suit premises. He deposed that "I am not aware whether these electricity bills are in respect of the suit premises". "The defendant also admitted that his wife is not residing in the suit premises and he volunteered that she occasionally comes to the suit premises whenever she stays there. After considering the evidence on record the Appellate Court held that wife of the defendant has permanently shifted to Kandivali premises. Admittedly, Kandivali premises is purchased and owned by the defendant. All other family members of the

defendant are residing at Kandivali premises. All these circumstances clearly indicate that the defendant is not using the suit premises for the purpose it was let out.

16. 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 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.”

17. 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.

18. Mr. Samant submitted that the Appellate Court was not justified in relying upon the electricity bill for October, 2007. As noted earlier, the findings recorded on the question of non user by the Appellate Court are not solely based on electricity bill of October, 2007. The Appellate Court has considered entire evidence on record as also other circumstances and came to the conclusion that the plaintiffs have established ground of non user. Applying the tests laid down by the Apex Court in the case of Dunlop India Limited (supra), I do not find that the Appellate

Court has committed any error in passing the decree under section 16(1)(n) of the Act. Defendant was not in a position to demonstrate that the findings recorded by the Appellate Court are perverse being based on no evidence or that they are contrary to evidence on record. Defendant was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusions arrived at by the Appellate Court. Civil Revision Application No.262 of 2015 fails and the same is dismissed.

19. As far as Civil Revision Application No.759 of 2015 filed by the plaintiffs is concerned, the Appellate Court declined to pass decree under section 16(1)(g) in view of Section 30 of the Act. Perusal of the paragraph 4 of the plaint shows that the plaintiffs asserted that they want the suit premises for running printing press. In paragraph 4, the plaintiffs specifically pleaded that they require the suit premises for the purpose of printing press which they are running on the ground floor of the suit building. In paragraph 5, the plaintiffs contended that they require the suit premises for residential purpose and that they require the suit premises to take rest and to entertain customers and relatives of the plaintiffs at the suit premises which will be very much convenient for the plaintiffs and other family members. The plaintiffs can watch his business from the suit premises very

closely and did not go for food and other facilities very often. During the course of cross examination, PW 1 admitted that ' it is true to say that we do not require the suit premises for our residence. We require the suit premises for our printing business". PW 1 further deposed that "all the three plaintiffs are residing in the suit building. I require the suit premises to take rest and to use it for sitting as office purpose". Having regard to the pleadings in paras 4 and 5 as also pointed admissions of PW 1 that they do not require the suit premises for residential purpose and require the suit premises for their printing business, I do not find that the Appellate Court committed any error in not passing decree under section 16(1)(g) of the Act. It is not in dispute that the suit premises is let out for residential use. Section 30 of the Act reads thus:

> "30. Conversion of residential into commercial premises prohibited.
>
> (1) A landlord shall not use or permit, to be used for a commercial purpose any premises which, on the date of the commencement of this Act, were used for a residential purpose.
>
> (2) Any landlord who contravenes the provisions of sub-section (1) shall, on conviction, be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both."

20. In view of mandate of Section 30, in my opinion, the

Appellate Court was fully justified in not passing the decree under section 16(1)(g) of the Act. Plaintiffs were not in a position to demonstrate that the findings recorded by the Appellate Court are perverse being based on no evidence or that they are contrary to evidence on record. Plaintiffs were also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusions arrived at by the Appellate Court. Civil Revision Application No.759 of 2015 fails and the same is dismissed. The decree passed under section 16(1)(n) of the Act is upheld.

21. At this stage, Mr. Samant orally applies for stay of this order for a period of eight weeks from today. He states that the defendant is in possession and nobody else is in possession. Defendant has neither created third party interest nor parted with possession. Defendant will hereafter neither create third party interest nor part with possession. Defendant and all adult family members residing with him will file usual undertaking in this Court within two weeks from today with 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 nor parted with possession;

(iii) that they will hereafter neither create third party interests nor part with possession;

(iv) that they will pay arrears of rent, if any, within 2 weeks from today;

(v) that they will not apply for further extension of time;

(vi) 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 the plaintiffs.

22. Hence, notwithstanding dismissal of C.R.A No.262 of 2015, subject to the defendant and all adult family members using the suit premises filing undertaking in this Court in the aforesaid terms within two weeks from today and serving copy in advance to other side, eviction decree shall not be executed 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 as also arrears, if any, are not paid to the plaintiffs, the interim order shall stand vacated without further reference to the Court. Order accordingly.

23. List the Petition for reporting compliance after three weeks.

(R.G.Ketkar,J.)