

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.333 OF 2016

Santosh Kumar Chatterjee and another ... Applicants
Vs.
Vilma Joseph Soares ... Respondent

Mr. Pradip Thorat a/w. Mr. C. P. Mishra i/b. Mr. Dilip Jairaj Bhatia for Applicants.
Mr. P. S. Dani, Senior Advocate a/w. Mr. N. S. Rodrigues i/b. R. M. Partners for Respondent.

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 06, 2016

P.C. :

Heard Mr. Thorat, learned Counsel for applicants and Mr. Dani, learned Senior Counsel for respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 20.05.2013 passed by the learned Judge, presiding over Court Room No.20 of the Court of Small Causes at Mumbai in R.A.E. Suit No.1519/2359 of 2010 as also the judgment and decree dated 13.04.2016 passed by the Appellate Bench of the Court of Small Causes at Bombay in Appeal No.84 of 2013. By these orders, the Courts below decreed the Suit instituted by the respondent, hereinafter referred to as plaintiff, under Sections 16(1)(e), 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. Plaintiff has instituted Suit against the defendants *inter alia* contending that defendant No.1 is a tenant in respect of flat No.4 admeasuring 750 sq.ft. (consisting of one living room, two bedrooms,

one kitchen, one bathroom, one toilet, one corridor and one balcony) first floor, Shanti Nivas C.T.S. No.1587, St. Anthony's Homes Co-operative Society, D. S. Marg, Chembur, Mumbai 400 071 (for short 'suit premises'). Plaintiff alleged that since September 2002, defendant No.1 and his wife were not seen occupying the suit premises and it remained locked for long periods. On making further inquiries, plaintiff came to know that defendant No.1 had permanently migrated to Pondicherry and that defendant No.1 had inducted defendant No.2 in the suit premises. Defendant No.1 had parted possession of the suit premises and allowed defendant No.2 to occupy exclusively the suit premises. Defendant No.1 has left the suit premises in or about September 2002 and since then he is residing in Pondicherry. Defendant No.1 has stopped using the suit premises for his residence. Thus, plaintiff has set up grounds of eviction as contemplated by Sections 16(1)(e) and 16(1)(n) of the Act. Plaintiff further averred in paragraph 6, their requirement as contemplated by Section 16(1)(g) of the Act.

4. Defendant No.2 for himself and as Constituted Attorney of defendant No.1 has filed written statement resisting the Suit. Defendants inter alia contended that they are themselves occupying the suit premises and since defendant No.1 is suffering from Arthritis, for getting the proper treatment, defendant No.1 went to Pondicherry for some days. Defendant No.1 will be returning back to Mumbai. Defendant No.2 is a nephew of defendant No.1 and is residing in the suit premises along with the defendant No.1 jointly since many years to take care of the elderly couple consisting of uncle and aunt. Defendants denied that defendant No.2 has unauthorizedly and illegally occupying the suit premises. Defendant No.2 is not an unauthorized person. Defendant No.2 is a nephew of defendant No.1 and is also a Constituted Attorney of defendant No.1. Defendant No.1 went to Pondicherry for medical

treatment and will return back to Mumbai in future after taking medical treatment of Arthritis disease.

5. On the basis of pleadings of the parties, initially on 04.10.2011, the learned trial Judge framed the issues. Parties led oral and documentary evidence. At the time of delivering judgment, the learned trial Judge framed additional issue, namely, to whom greater hardship would be caused by passing the decree than by refusing to pass it. After considering the evidence on record, the learned trial Judge decreed the Suit under Sections 16(1)(e), 16(1)(g) and 16(1)(n) of the Act. Aggrieved by that decision, defendants preferred appeal. The appellate Court dismissed the appeal and upheld the trial Court's order on all the grounds. It is against these decisions, defendants have instituted present C.R.A.

6. In support of this Application, Mr. Thorat submitted that the Courts below were not justified in passing the decree under Section 16(1)(n) of the Act. He invited my attention to paragraphs 3 and 4 to contend that the requisite ingredients for passing decree under Section 16(1)(n) are not pleaded by the plaintiff. He submitted that Section 16(1)(n) of the Act requires plaintiff-landlord to plead that the premises have not been used **without reasonable cause** for the purpose for which they were let out for a continuous period of six months immediately preceding the date of the Suit. In the absence of pleading requisite ingredients under Section 16(1)(n) of the Act, the Courts below were not justified in passing the decree on that ground. In support of this submission, he relied upon decision of this Court in the case of **C. R. Shaikh Vs. Lilabai**, 1981 Mh.L.J. 437 as also **Saharabegam Sikandar Shaikh Vs. Abdul Ali Mawaji Tejani**, AIR 1991 Bom. 181. Relying upon these two decisions, Mr. Thorat submitted that as the plaintiff did

not make out a case under Section 16(1)(n) of the Act, the tenant is not expected to meet such a case.

7. As far as the requirement under Section 16(1)(g) of the Act is concerned, he submitted that building where suit premises is situate is ground plus two floors. Suit premises is situate on the first floor. Two flats in the buildings, where the suit premises is situate, are lying vacant, one on the ground floor and the other on the second floor. As two flats are lying vacant, it cannot be said that the requirement set up by the plaintiff is, both, reasonable as also bonafide. He further submitted that the learned trial Judge did not frame issue of comparative hardship. The parties did not lead evidence on that issue. While delivering the judgment the learned trial Judge framed that issue which has caused prejudice to the defendants.

8. As far as the ground of unlawful subletting under Section 16(1)(e) of the Act is concerned, he submitted that defendant No.2 is a nephew as also Constituted Attorney of defendant No.1. There is no evidence about payment of consideration so as to warrant passing of decree under Section 16(1)(n) of the Act. He further submitted that defendant No.1 has never parted with possession of the suit premises and therefore, it cannot tantamount to defendant No.1 losing control of the suit premises so as to warrant passing of decree under Section 16(1)(e) of the Act. He submitted that application requires consideration.

9. On the other hand, Mr. Dani supported the impugned orders. He has taken me through the pleadings, oral evidence as also findings recorded by the Courts below. As far as framing of additional issues at the time of passing of judgment is concerned, he submitted that parties were fully aware of their respective case and accordingly led the

evidence. He, therefore, submitted that framing of the issue at the time of delivering the judgment has not caused any prejudice to the defendants.

10. As far as the availability of two flats, one on the ground floor and another on the second floor is concerned, he submitted that partition was effected among three brothers as is evident from letter at exhibit-55. Two flats on the ground floor fell to the share of Ernest Soares. Two flats on the second floor went to the share of Mourice Soares. Two flats on the first floor were taken by Joseph Soares, husband of the plaintiff - Vilma. Flat No.3 is in possession of the plaintiff and flat No.4 is the suit premises. He, therefore, submitted that as the one flat on the ground floor went to the share of Ernest Soares and flat on the second floor went to the share of Mourice Soares, it cannot be said that they are available to the plaintiff. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

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 far as the decree under Section 16(1)(n) of the Act is concerned, perusal of the plaint shows that in paragraphs 3 and 4, plaintiff specifically asserted that defendant No.1-tenant and his wife were not occupying the suit premises. Defendant No.1 had permanently migrated to Pondicherry. Defendant No.1 had parted with possession of the suit premises and allowed defendant No.2 to occupy exclusively the suit premises without obtaining their consent. Defendant No.1 has stopped using the suit premises for his residence.

12. Defendants dealt with these contentions *inter alia* contending that defendant No.1 is suffering from Arthritis and for getting the proper

treatment, he went to Pondicherry for some days and would be returning back to Mumbai shortly. It was reiterated in paragraph 7 that defendant No.1 went to Pondicherry for medical treatment and will return back in future after taking medical treatment of his Arthritis disease.

13. P.W.1 Vilma Joseph filed affidavit of examination-in-chief. In paragraphs 4 and 5, she reiterated that defendant No.1 has permanently left the suit premises and migrated to Pondicherry since last several years. As far as evidence of defendants is concerned, D.W.1 Arun Kumar Saha deposed in paragraph 2 that defendant No.1 is taking treatment at Pondicherry since many years in respect of Arthritis and heart ailment. He relied upon certificates dated 09.04.2011 and 05.10.2012, which were marked as exhibits 64 and 65 in support of his case.

14. The learned trial Judge has considered this aspect in paragraphs 24 to 28. The learned trial Judge has considered several circumstances, such as inclusion of name of defendant No.1 in the voters list of Pondicherry. Availability of telephone in the flat of defendant No.1 at Pondicherry as also receipts of electricity bills and telephone bills. As far as the ground of unlawful subletting under Section 16(1)(e) is concerned, the learned trial Judge has dealt with this aspect from paragraphs 12 to 23. After considering the evidence on record, in paragraph 23, the learned trial Judge recorded a finding that plaintiff categorically came with the case that defendant No.1 has unlawfully sublet the suit premises to the defendant No.2. For rebutting it, no cogent evidence is adduced on record. As far as the grounds of unlawful subletting and non-user under Sections 16(1)(e) and 16(1)(n) of the Act are concerned, the appellate Court has considered these grounds in paragraphs 31 to 57. After considering the circumstances as also

evidence on record, the appellate Court upheld the findings of the trial Court on both the grounds namely, 16(1)(e) and 16(1)(n) of the Act.

15. As far as the ground under Section 16(1)(g) of the Act is concerned, the learned trial Judge has considered this ground in paragraphs 29 to 32 and the appellate Court has considered this ground in paragraphs 58 to 68. As far as the question of comparative hardship is concerned, the learned trial Judge has considered this aspect in paragraph 33 and the appellate Court has considered this aspect in paragraphs 61 to 78.

16. Mr. Thorat relied upon the decision of this Court in **C. R. Shaikh** (*supra*) and in particular paragraph 12 thereof. In paragraph 12, it was observed thus,

“12. If we analyse the plaint in the light of the requirement of the section, it will be seen that the words “without reasonable cause” are wholly absent in the plaint. If that is so, I do not think that it could be said that the plaintiff had made out a case under section 13(1)(k) so that, the tenant could be required to meet such a case. It is also not shown and not alleged that the non use of the premises had been for a continuous period of 6 months immediately preceding the date of the suit. The section emphasises the situation, and a continuation of a situation and its existence at the date of the suit. If such a situation and its existence for a continuous period of 6 months does not exist at the time when the suit is launched, then the cause of action does not accrue. Even if the tenant has not used the premises for a period of 6 months some time before the filing of the suit, or for more period, that would not give a landlord a cause of action. That state of affairs must continue till the date of the filing of the Suit. If therefore, a tenant who had not used the premises for a long period, but had started using them before the date of the suit, the cause of action is gone. It is therefore necessary to emphasise the words “continuous” and “immediately” preceding the date of the suit” occurring in clause (k) of sub-section (1) of section 13 which only bring out clearly that the cause of action claimed is on that account. As I pointed out, this must be further supported by an allegation that the non use was without reasonable cause. As pointed out, neither of these two aspects are clearly present in the plaint.”

17. Relying heavily on this paragraph, Mr. Thorat submitted that this Court has held that in the absence of the words “without reasonable cause”, it cannot be said that plaintiff made out a case of non-user as contemplated by Section 16(1)(n) of the Act. The said decision was also specifically followed by this Court in **Saharabegam Sikandar Shaikh** (*supra*), and in particular paragraph 10 thereof.

18. In the case of **C. R. Shaikh** (*supra*), plaintiff had instituted Suit under Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, which is identical to Section 16(1)(n) of the Act. The learned trial Judge dismissed the Suit on the ground that plaintiff failed to prove that defendant was not using the suit premises since three years before the Suit. In paragraph 5 of that report, the observations made by the learned Assistant Judge were referred. Paragraph 5 reads thus,

“5. The learned Assistant Judge observed that in the reply to the notice to the plaintiff-landlord, the defendant had made a statement and that statement “read between the lines” would show, the learned Judge felt, “even according to the defendant, he was residing at Baramati and he used to visit Daund only for the purposes of paying rent or for some other work.” Now, the marathi statement appearing in the reply Ex.41 is, that the petitioner comes to Daund often for payment of rent and “for other purposes and resides”. Apparently, the learned Judge in reading between the lines has omitted to read that portion where he says that he used to come to Daund for other purposes and also used to stay there.”

19. On facts, this Court found that it was not shown and also not alleged that the suit premises were not used for a continuous period of 6 months immediately preceding the date of the Suit. In paragraph 14, on facts, this Court found that defendant used to come of and on and reside in the suit premises. If he was doing so, it could not be said that the premises were not continuously used for a period of 6 months before the Suit without a reasonable cause. In paragraph 15, the Court observed

that the question one has to ask oneself is, not whether the evidence about non-user is produced or not and why this evidence is not produced, but whether, in the circumstances, that evidence is required to be produced. If the plaint allegations are missing then it could not be said that the defendant is required to meet those allegations which were never made and sought to be established for the first time inferentially and during evidence. Better evidence of the occupation by the defendant-petitioner could have been produced.

20. If the ratio in the decision of **C. R. Shaikh** (*supra*) is applied to the facts of the present case, perusal of the written statement as also evidence on record clearly shows that defendants tried to make out a case namely, that defendant No.1 was required to go to Pondicherry for taking medical treatment for Arthritis disease. It, therefore, cannot be said that defendants were taken by surprise. In fact, defendants specifically pleaded reasonable cause that prevented defendant no.1 from using the suit premises. In my opinion, in the facts and circumstances of the present case, the said decision is not applicable.

21. In the case of ***Dunlop India Limited Vs. A.A. Rahna***, (2011) 5 SCC 778, the Apex Court was considering the provisions of Section 11(4) of the Kerala Buildings (Lease and Rent Control) Act, 1965. Section 11(4)(v) is *para materia* with Section 16(1)(n) of the Act. In paragraphs 22 and 27, it was observed 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.”

22. In paragraph 27, the Apex Court referred to the decision in ***Brown Vs. 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)

23. Applying the tests laid down in the aforesaid decision to the facts of the present case, defendants have to establish "corpus possessionis," viz., some visible state of affairs in which the animus possidendi finds expression. In the present case, after appreciating the evidence on record, the Courts below have concurrently held that defendant No.1 has permanently migrated to Pondicherry. In view thereof, reliance placed by Mr. Thorat on the decisions in the case of **C. R. Shaikh** (*supra*) and **Saharabegam Sikandar Shaikh** (*supra*) does not advance case of the defendants. The Courts below, after appreciating the evidence on record, have concurrently held that defendant No.2 is in occupation of the suit premises exclusively. The Courts below have concurrently held that plaintiff has established the ground of unlawful subletting.

24. As far as the ground of bonafide requirement under Section 16(1) (g) of the Act is concerned, as noted earlier, it has come on record that the building was partitioned among three brothers. Ground floor flats went to the share of Ernest Soares. First floor flats went to the share of Joseph Soares, husband of the plaintiff and the second floor flats went to the share of Mourice Soares. The said statement about division effected

by father-in-law of the plaintiff on the basis of letter of partition at exhibit-55 was not rebutted by the defendants. In view thereof, it cannot be said that two flats, one on the ground floor and another on the second floor, are available which will satisfy the requirements of the plaintiff. In view thereof, I do not find that the Courts below committed any error in passing decree under Sections 16(1)(e), 16(1)(g) and 16(1)(n) of the Act. Defendants were not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of evidence on record, no reasonable person could have come to that conclusion. Merely because, another view is possible on the basis of evidence, this Court will not exercise its jurisdiction under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

25. At this stage, Mr. Thorat orally prays for stay of this order for the period of 12 weeks from today. He states that the defendants are in possession of the suit premises and nobody else is in possession. Defendants have neither created third party interest nor parted with possession and the defendants will hereafter neither create third party interest nor part with possession. He assures that within 2 weeks from today, defendants and all adult family members residing in the suit premises, will give usual undertaking with advance copy to the other side, incorporating therein that,

- i) they are in possession and nobody else is in possession of the suit premises;
- ii) they have neither created third party interest nor parted with possession of the suit premises;
- iii) they will hereafter neither create third party interest nor part with possession of the suit premises;
- iv) they will pay up-to-date arrears of rent, if any, to the

respondent within two weeks from today;

v) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will vacate and handover vacant and peaceful possession of the suit premises to the respondent;

26. In view thereof, notwithstanding dismissal of C.R.A, subject to the defendants and all adult family members residing in the suit premises filing undertaking in the aforesaid terms within two weeks from today after giving advance copy to the other side, decree shall not be executed for a period of twelve weeks from today. It is made clear that in case they do not file undertaking and / or do not pay arrears of rent, if any, to the plaintiff within two weeks from today, the interim order shall stand vacated without further reference to the Court.

27. List the Application for 'reporting compliance' after three weeks.

(R. G. KETKAR, J.)

Minal Parab