

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

CIVIL REVISION APPLICATION NO. 764 OF 2014

1. Mr. Kamal S. Narang and Ors. ..Applicants

Vs

M/s. New Hindustan Silk Mills .. Respondents

Mr. P.J.Thorat i/b Bipin Joshi, Advocate for Applicants.

Mr. Sachin Dhakephalkar , Advocate for Respondents.

CORAM : R.G.KETKAR,J.

DATE : 14/06/2016

PC:

1. Heard Mr. P.J.Thorat, learned counsel for the applicants and Mr. Sachine Dhakephalkar, learned counsel for the respondents at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants have challenged the Judgment and decree dated 28.4.2004 passed by the learned Judge, presiding over Court Room No.10, of the Small Causes Court at Bombay in R.A.E. Suit No.844/1538 of 1998 as also the Judgment and decree dated 2.5.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai in (A1) Appeal No.128 of 2005. By these orders, the Courts below dismissed the suit instituted by the applicants, hereinafter

referred to as 'plaintiffs', under Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

3. The plaintiffs came with the case that defendants were carrying on its business activities in the field of cloths and for that purpose they had installed looms at the suit premises. In or about November, 1996, the defendants removed the looms and since then kept the suit premises locked and unused. The ground level of the suit premises is 3 to 4 feet below from the road level. The plaintiffs further contended that the defendants acquired suitable accommodation for carrying on their business on new premises at Choudhary Compound, Narpoli, Bhivandi, District Thane and Samita Complex behind Crown processors Sakinaka Mumbai-72 and practically the business activities are shifted to new premises. The defendants filed written statement resisting the suit. Defendants contended that as the suit premises is below the road level, in every monsoon it gets flooded with water and during that period the machineries, accessories, electrical installation, stock, stock-in- trade are under water.

4. Mr. Thorat submitted that the defendants have admitted non-user but came with reasonable cause, namely, that the suit premises is in low lying area and because of water logging during monsoon, they cannot carry out their manufacturing activities. He invited my attention to letter dated 30.12.1998 addressed by

the defendants to the Senior Inspector of Licenses, Municipal Corporation of Greater Mumbai (for short, 'Corporation') setting out therein that their trade licences were valid upto 31.12.1998. Due to market position and recession in trade market, they are surrendering the licences for production activities. He also invited my attention to electrical consumption from August 1994 to October, 1998. The suit was instituted on 13/10/1998. He submitted that between April 1998 and October, 1998, following is the consumption of electricity:

<u>Months</u>	<u>Units consumed.</u>
April,1998	244
May, 1998	200
June, 1998	142
July ,1998	210
August, 1998	0
September, 1998	228
October, 1998	88

He submitted that as against consumption of 2641 units in August, 1994, the units consumed during April 1998 to October 1998 are considerably on lower side which substantiates the claim of the plaintiffs that the suit premises are not used by the defendants.

5. Mr. Thorat has taken me through the evidence of DW 1 Arvindkumar Mody. In particular, DW 1 admitted that no work of production is carried out when the suit premises is flooded with water. Manufacturing activities are closed in 1998. The witness

was confronted with letter dated 30.12.1998 addressed to the Corporation and he deposed that the contents of the said letter are false.

6. Mr. Thorat has also taken me through the impugned orders and submitted that the Courts below, though held that the plaintiffs established nonuser, accepted the defence raised by the defendants that because of reasonable cause the defendants were prevented from using the suit premises. He, therefore, submitted that the application requires consideration.

7. On the other hand, Mr. Dhakephalkar supported the impugned orders. He submitted that the Courts below after appreciating the evidence on record have held that the defendants are carrying out trading activities in the suit premises and that they have made out sufficient cause for non-user of the suit premises.

8. 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, suit is instituted only under section 13(1)(k) of the Act. As far as ground of nonuser is concerned, the learned trial Judge has considered this aspect from paragraphs 13 to 18. After appreciating the evidence on record, the learned trial Judge has held that though the defendants admitted that manufacturing activities are not carried

out in the suit premises, they are using the suit premises for trading of their business. The electricity bills produced by the defendants at Exhibit-7 Collectively. and telephone bills at Exh. 6 Collectively clearly support the case of the defendants. The learned trial Judge also considered letters at Exhibit 8 Collectively and Exhibit-10 Collectively wherein they have sought permission of the plaintiffs for allowing them to increase the flooring level of the suit premises. The defendants have addressed letters to the Corporation right from 1977 onwards. The learned trial Judge considered the letter dated 30.12.1998 and observed that the suit is instituted on 13.10.1998 and, therefore, one has to consider whether ground of nonuser preceding six months of institution of the suit is made out. In that context, the learned trial Judge observed that the letter dated 30.12.1998 after institution of the suit, does not help the plaintiffs to prove the case of non-user. From paragraph 18 onwards, the learned trial Judge has considered whether the defendants have made out a reasonable cause. After appropriating the evidence on record, the learned trial Judge accepted the defence raised by the defendants.

9. As far as the Appellate Court is concerned, the ground of non-user is considered from paragraphs 21 to 40 of the order. In paragraph 37, the Appellate Court considered the Telephone Bills

at Exh.6 Collectively as also Electricity Bills at Exh.7 Collectively and observed that the suit premises are used for some kind of activities. Thus, the Courts below after appreciating the evidence on record have concurrently held that the suit premises were used, namely, not for manufacturing activities but for other activities. That apart, the Appellate Court also considered whether the defendants have made out reasonable cause and accepted the defence raised by the defendants.

10. 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.”

11. 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. In the present case, after appreciating the evidence on record, the Courts below have concurrently found that the defendants are using the suit premises. Even assuming in favour of the plaintiffs that the defendants are not using the suit premises for any purpose whatsoever, the question is whether

tenant has established a reasonable cause. The Apex Court has held that once the landlord has established that tenant was not occupying the building continuously for six months, the burden shifts on the tenant to prove that there was reasonable cause of having ceased to occupy the tenanted premises continuously for six months.

12. In the present case, the Courts below have concurrently held that the defendants have established their defence. The plaintiffs 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 would have come to the conclusions arrived at by the courts below. In the light of the aforesaid discussion, I do not find that the applicants have made out any case for invocation of powers under section 115 of C.P.C. In the result, Application fails and the same is dismissed.

13. At this stage, Mr. Thorat prays for continuation of ad-interim arrangement recorded in the order dated 16.7.2014. In that order, the statement on behalf of the respondents that till next date, they will not take any steps to carry out any repairs in respect of the suit premises, without following due process of law was recorded. Mr. Dhakephalkar has no objection. Hence, notwithstanding dismissal of Civil Revision Application, interim

arrangement recorded in the order dated 16.7.2014 shall remain in force for a period of eight weeks from today. Order accordingly.

(R.G.KETKAR, J.)