IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.383 OF 2016

Biharilal Ghanshyamdas Chhabria … Applicant
Vs.
Sheila E. U. Botawala and another … Respondents

Mr. Jitendrakumar G. Damani for Applicant.
Mr. Sagheer Khan a/w. Mr. Mohd. Shoeb i/b. Judicare Law Associates for Respondents.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 22, 2016

P.C. :

Heard Mr. Damani, learned Counsel for applicant and Mr. Khan, learned Counsel for respondents at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant', has challenged the judgment and decree dated 17.03.2010 passed by the learned Judge, presiding over Court Room No.6 of the Court of Small Causes at Bombay in R.A.E.Suit No.948/1928 of 1996 as also the judgment and decree dated 04.05.2016 passed by the Appellate Bench of the Court of Small Causes in Appeal No.218 of 2010. By these orders, the Courts below decreed the Suit instituted by respondents, hereinafter referred to as 'plaintiffs', under Sections 13(1)(g) and 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

3. In support of this Application, Mr. Damani strenuously contended that the Suit is bad for non-joinder of necessary parties. He has invited my attention to paragraph 1 of the plaint and paragraph 1 of the written statement. In paragraph 1 of the written statement, defendant

specifically contended that the suit property belongs to the Trust and all the trustees are not joined as parties to the Suit. Plaintiffs have also not obtained permission from the Charity Commissioner for instituting the Suit. The Suit is, therefore, liable to be dismissed. He submitted that during the pendency of the Appeal, defendant filed application under Order 41, Rule 27 of the C.P.C. for adducing additional evidence. In paragraph 4 of that application, defendant specifically asserted that by Deed dated 30.03.1964, Wakf was made irrevocable. By Indenture dated 30.03.1965, Ibrahim Yusuf Botawala retired as a trustee, appointing following 3 trustees:

a. Mrs. Sheila Ebrahim Botawala;
b. Ms Shameem Ebrahim Botawala; and
c. Ahmed Mohammad Omerji.

4. In paragraph 5, it was further contended that after the appointment of these new trustees, there is no further change of trustees. All the 3 trustees are there since 1965 without any change report. Out of the 3 trustees, only 2 trustees instituted the Suit and Ahmed Mohammad Omerji is not joined in the Suit. The appellate Court, however, rejected the application. He invited my attention to the finding recorded by the appellate Court against point No.1 as also paragraph 21 and submitted that the Suit is liable to be dismissed on the ground of non-joinder of necessary parties.

5. He also invited my attention to the cross-examination of P.W.1 Ms Shameen Ibrahim Botawala wherein she admitted that E. U. Botawala Trust is a registered Trust. She stated that she will produce the Register Certificate and the other documents to show that the Trust is registered. She further deposed that her father Ibrahim Usuf Botawala was founder of the said Trust. He died in the year 1992. The Trust was

founded somewhere in the year 1964. P.W.1 and her mother are the trustees of the Trust. Relying upon this portion of the deposition, Mr. Damani submitted that though P.W.1 assured that she will produce the documents, she did not produce any document to substantiate her case that P.W.1 and her mother were the only trustees of the Trust. Thus, as all the trustees are not impleaded as plaintiffs, the Suit is bad for non-joinder of necessary parties.

6. As far as the ground of non-user is concerned, he submitted that it has come on record that defendant is consuming electricity and thus, is using the suit premises. Merely because the electricity consumption shows consumption of 4 units that by itself does not amount to non-user of suit premises. He submitted that defendant was attending the office in the morning session.

7. As far as the ground of bonafide requirement under Section 13(1)(g) of the Act is concerned, he submitted that plaintiffs have several premises in their possession. As there are several premises available to the plaintiffs, it cannot be said that their requirement is both, reasonable and bonafide.

8. On the other hand, Mr. Khan supported the impugned orders. He submitted that after appreciating the evidence on record, the Courts below have concurrently decreed the Suit under Sections 13(1)(k) and 13(1)(g) of the Act. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

9. 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 contention that Suit is bad for non-joinder of

necessary parties is concerned, the said contention was raised in paragraph 1 of the written statement, which reads thus,

> "1. At the outset, the Defendant submits that suit as filed is not tenable in law in as much as the suit property is belonging to Trust but all Trustees have not joined as party to the suit nor there was any permission obtained from Charity Commissioner to prosecute the suit hence the suit is liable to be dismissed for non joinder and misjoinder of necessary parties."

10. Perusal of this paragraph shows that defendant merely contended that all the trustees are not joined as party to the Suit. The appellate Court has commented upon this aspect in paragraph 18 and it was observed that the mere vague statement without there being any basis was just like aimless shot in the air. Apart from this, Order 31, Rule 1 of C.P.C. reads thus,

> "ORDER XXXI
>
> SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS
>
> 1. Representation of beneficiaries in suits concerning property vested in trustees, etc.- In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties."

11. In view thereof, I do not find that the Suit is bad for non-joinder of necessary parties. The appellate Court considered that defendant did not make out a case falling under sub-rule 1(aa) of Order 41, Rule 27 of C.P.C. The appellate Court has rightly rejected the application made by the defendant under Order 41, Rule 27 of C.P.C.

12. As far as the ground of non-user is concerned, the learned trial Judge has considered this ground in paragraphs 13 to 20. The appellate Court has considered this ground in paragraphs 25 and 27. The Courts

below have observed that the Suit is instituted on 03.09.1996 and the relevant period cannot be 6 months preceding that date. After considering the documentary evidence on record, namely electricity bills at exhibits-45, 46 and 47, the Courts below have recorded that the average consumption of electricity is 4 units per month. In the case of ***Dunlop India Limited Vs. A.A. Rahna***, **(2011) 5 SCC 778**, the Apex Court was dealing with the provisions of the Kerala Act and it was 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."

13. 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)”

14. Applying the tests laid down by the Apex Court as also the concurrent finding recorded by the Courts below about the consumption of electricity in the suit premises, I do not find that the Courts below committed any error in decreeing the Suit under Section 13(1)(k) of the

Act.

15. As far as the ground of bonafide requirement under Section 13(1) (g) of the Act is concerned, the learned trial Judge has considered this aspect from paragraphs 21 to 48 and the question of comparative hardship in paragraphs 49 to 56. The said ground was considered by the appellate Court from paragraphs 28 to 37. Mr. Damani submitted that plaintiffs are having other premises and the said need, therefore, cannot be said to be reasonable as well as bonafide. In paragraph 30, the appellate Court has considered this aspect and recorded a finding that defendant failed to develop the case as regards the availability of the alternate accommodation with plaintiffs.

16. Thus, the Courts below have recorded findings after appreciating the evidence on record. Defendant was not in a position to demonstrate that the findings recorded by the Courts below are based on no evidence or that they are contrary to the evidence on record. Defendant was also not in a position to demonstrate that on the basis of evidence on record, no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. Merely because on the basis of evidence on record, another view is possible that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed.

17. At this stage, Mr. Damani orally applies for stay of this order for a period of twelve weeks from today. He states that the applicant is in possession of the suit premises and nobody else is in possession. The applicant has neither created third party interest nor parted with possession and the applicant will hereafter neither create third party

interest nor part with possession. He assures that the applicant and all adult family members using/residing in the suit premises will give 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 interest nor part with possession;

(iv) that they will pay arrears of rent within 2 weeks from today to the respondents-plaintiffs;

(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 12 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondents.

18. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of twelve weeks from today subject to the applicant and all adult family members using/residing in the suit premises filing undertakings in the aforesaid terms within two weeks from today and serving copy in advance to other side. It is made clear that in case arrears upto and inclusive of 12 weeks from today are not paid as also the undertaking in the aforesaid terms is not filed within two weeks from today, the interim order shall stand vacated without further reference to the Court.

19. List the Application for reporting compliance after three weeks.

(R. G. KETKAR, J.)