

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 1158 OF 2014

Mrs. Shakuntala W/o. Nandakishore
Purohit (deceased And Deleted)
And Ors

...Applicants

Versus

Mrs. Saroj Bhanwarlal Tholiya
(deceased And Deleted) And Ors

...Respondents

....

Mr. P.K. Dhakephalkar, Senior Advocate i/b. Jaydeep Deo,
Advocate for the Applicants.

Mr. Amol Doijode, Advocate for Respondent No.2.

....

CORAM : R. G. KETKAR, J.

DATE : 16th June, 2016

P.C.

1. Heard Mr. P.K. Dhakephalkar, learned Senior Counsel for the applicants and Mr. Amol Doijode, learned Counsel for respondent No.2, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants, hereinafter referred to as 'defendants No.1,3 and 4', have challenged the judgment and decree dated 14.9.2009 passed by the learned Judge, presiding over Court Room No.35 of the Court of Small

Causes at Mumbai (Bandra Branch) in R.A.E. Suit No.864 of 2004 as also the judgment and decree dated 5.11.2014 passed by the Appellate Bench of the Court of Small Causes at Mumbai (Bandra) in Appeal No.208/2009. By these orders, the Courts below decreed the suit instituted by original plaintiffs under Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act').

3. Mr. Dhakephalkar submitted that the plaintiffs instituted suit on 9.12.2004 invoking ground under Section 16(1)(n) of the Act. In view thereof, the relevant period would be 8.6.2004 to 9.12.2004 being six months preceding the date of institution of the suit. He submitted that Nandkishor was the original tenant. He died leaving behind applicant No.1 Ms. Shakuntala. She has two sons, by name, Bharat and Madhukar. Bharat has permanently shifted to U.S.A.. He submitted that Ms.Shakuntala being aged, was often required to go to Rajasthan. For the period between November and December, 2004 she was taking treatment in Breach Candy Hospital, Mumbai. He invited my attention to evidence of PW-1 Alok. During the course of cross-examination, PW-1 Alok admitted that at present two daughters of defendant No.4

Madhukar are residing in the suit premises. He further admitted that in November-December, 2004, major operation of defendant No.1 Shakuntala was performed. He denied that his father and mother had gone to see her in the suit premises. PW-1 volunteered that at that time defendant No.1 Ms.Shakuntala had been residing at Warden Road and she was admitted in Breach Candy Hospital, therefore, his father and mother had visited her in Breach Candy Hospital. Due to major operation, Ms.Shakuntala was unable to climb staircase. Therefore she was not residing on the first floor of the suit premises. He further admitted that in the year 2004, he had applied to the office of Electoral Roll Registrar to delete the name of defendant NO.4 from the electoral roll.

4. Mr. Dhakephalkar submitted that as the relevant period is between 8.6.2004 and 9.12.2004 and as PW-1 himself admitted that due to major operation defendant No.1 Shakuntala was unable to climb staircase, she was not residing on the 1st floor in the suit premises, it constitutes reasonable cause for not using the suit premises. As PW-1 admitted this fact, it was not necessary for the defendants to plead and prove the reasonable cause for non-user. He

submitted that in view of these admissions given by PW-1 during the course of cross-examination, it cannot be said that the defendants were not using the suit premises six months preceding the institution of the suit. He, therefore, submitted that the application requires consideration.

5. On the other hand, Mr. Doijode supported the impugned orders. He has invited my attention to the written statement filed on behalf of the defendants wherein the only reasonable cause pleaded is that defendant No.1 was suffering from various ailments and that she was admitted in Breach Candy Hospital on 18.11.2004 and was discharged on 27.11.2004. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C..

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

7. As noted earlier, the suit is instituted under Section 16(1)(n) of the Act. Section 16(1)(n) of the Act reads thus :

“16. When landlord may recover possession:- (1) Notwithstanding anything

contained in this Act but subject to the provisions of section 25, a landlord shall be entitled to recover possession of any premises if the court is satisfied--

.....

.....

(n) that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit.”

8. In the case of *Dunlop India Limited Vs. A.A. Rahna and another, (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.”

9. 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)

10. 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.

11. Perusal of paragraphs-22 and 27 shows that the initially it is for the landlord to establish 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. Once on the basis of the evidence, the landlord establishes non-use of the premises for more than six months immediately preceding the date of the suit, the burden is shifted on the tenant to establish reasonable cause.

12. In the present case, the Courts below after appreciating the evidence on record have held that the plaintiffs have established non-user of the suit premises by the defendants. In particular, in paragraph-11, the appellate Court

has considered the evidence of the defendant's witness. It was observed that the passport was issued in the name of the defendants from Jaipur address. The witness had obtained passport in the year 1989. After 10 years, same was renewed from Jaipur address i.e. 5, Mahavir Marg, Ashok Nagar, Jaipur. This is the bungalow standing in the name of father and brothers of the defendant. In Jaipur bungalow near about 11 persons are residing. The ration card in the name of those 11 persons bears the address of Jaipur bungalow. Defendant No.3 Deepak holds passport at the address of Jaipur. It is not in dispute that Bharat is not resident of India and is settled at USA. Defendant No.1 holds a passport at Jaipur address. The names of adult family members who qualifies the requirement of electoral roll, are found appearing in the electoral roll at Jaipur. He has also stated that some time he has cast vote from Jaipur. He did not state that he has cast vote at Mumbai at any time. He also admitted that at present his name is not shown in the electoral roll of Mumbai constituency. It was got deleted by the landlord. He admitted that he has obtained LIC policy at the address of Jaipur. After minutely considering his deposition, Appellate Court recorded a finding that the plaintiffs have

proved that the defendants are not using the suit premises for six months immediately preceding filing of the suit.

13. In paragraph-12, the Appellate Court considered the reasonable cause set up by the defendants, namely, that defendant No.1 was not feeling well, she was suffering from so many old age ailments, therefore, for the purpose of proper environment she shifted to Jaipur premises, and that she is residing at Jaipur. The defendants also stated that defendant No.1 was admitted in hospital on 18.11.2004 and was discharged on 27.11.2004. The Appellate Court observed that it cannot be said that during the period from 18.11.2004 to 27.11.2004 the defendants were residing in the suit premises. The entire documentary and oral evidence clearly shows that the defendants were not using the suit premises.

14. In paragraph-13, the appellate Court further observed that the documentary evidence like income tax papers etc.. clearly shows that the defendant has permanently shifted and there is no intention of any defendants to come back and reside in the suit premises. Mere casual visit to the suit premises is not sufficient to hold that they are using the suit premises for

more than six months immediately before filing of the suit without any reasonable and probable cause.

15. Mr. Dhakephalkar relied upon the testimony of PW-1 to the effect that due to major operation defendant No.1 was not in a position to climb. Therefore, she is not residing on the first floor of the suit premises. It is not possible to accept this submission for more than one reason. In the first place, no such case is made out in the written statement. Secondly, no such case is made out in the evidence adduced by the defendants. On the basis of the testimony of PW-1, it cannot be said that the defendants have made out a reasonable cause in view of paragraph-27 in the case of ***Dunlop India Limited (supra)*** extracted hereinabove. I do not find that the Courts below committed any error in not accepting the reasonable cause made out by the defendants.

16. The 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 they are contrary to evidence on record. The defendants were not in a position to demonstrate that no reasonable person would have arrived at the

conclusions other than arrived by the Appellate Court. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

17. At this stage, Mr.Dhakephalkar orally applies for stay of this order for a period of eight weeks from today. He further states that the applicants and all adult family members residing in the suit premises are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondents opposes said prayer.

18. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be served by staying operation of this order for a period of eight weeks from today subject to the applicants and all adult members residing with them in the suit premises giving usual undertaking to this Court within two weeks from today incorporating therein: (i) that they are in actual possession of the suit premises and nobody else is in possession; (ii) that they have so far neither created third party interest nor parted

with the possession of the suit premises; (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises; (iv) that they will pay the arrears of rent, if any, to the plaintiffs within two weeks from today; and (v) that in case the applicants are unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondents.

19. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of eight weeks from today, subject to the applicants filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case the applicants do not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the application for compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)