

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 912 OF 2014**

Smt Malini Yahwant Samant, since ..Applicant
deceased through her legal heir:
Smt. Prabha Govind Samat

Vs

Shri Chandrashekhar Mahadev
Khedekar .. Respondent

Mr. Neeta Karnik i/b Ms. Preeti R. Bondre, Advocate for
Applicant.

Mr. Sandesh D. Patil a/w Ms. Anusha Amin, Advocate for
Respondent.

CORAM : R.G.KETKAR,J.
DATE : 22/06/2016

PC:

1. Heard Ms. Neeta Karnik, learned counsel for the applicant and Mr. Sandesh Patil, learned counsel for the respondent at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as 'defendant no.4', has challenged the Judgment and decree dated 21.3.2006 passed by the learned Jt. Civil Judge, Jr. Dn., Thane in Regular Civil Suit No.629 of 2002 as also the Judgment and decree dated 5.10.2013 passed by the learned District Judge-4, Thane in Civil Appeal No.83 of 2006. The learned trial Judge decreed the suit instituted by the respondent,

hereinafter referred to as 'plaintiff', on the ground (i) that the plaintiff has proved that Room no. 1 admeasuring 200 sq.ft in house no.10 named as "Smruti" located at Thane (for short, 'suit premises') is not used by the defendant-tenant for the purpose for which it was let out as contemplated by Section 16(1)(n) as also on the ground that the plaintiff proved that the suit premises is required reasonably and bonafide by him as contemplated by Section 16(1)(g) of the Maharashtra Rent Act, 1999 (for short, 'Act'). The learned trial Judge held that greater hardship will be caused to the plaintiff in the event of refusal of passing of eviction decree.

3. Aggrieved by that decision, defendant no.4 preferred Appeal. The learned District Judge decreed the suit only under section 16(1)(n) of the Act and did not accept the plaintiff's case that he requires the suit premises reasonably and bona fide as contemplated by Section 16(1)(g) of the Act. It is against these decisions, defendant no.4 has instituted the present Revision Application under Section 115 of C.P.C.

4. In support of this Application, Ms. Karnik submitted that original tenant was Yashwant Samant. He died some time in the year 1997. The plaintiff alleged the ground of non user. She submitted that in paragraph 4, the plaintiff alleged that the defendant acquired alternate and suitable premises in Thane City

more particularly as given 2nd address in the cause title much prior to the death of the deceased husband of the defendant, i.e. 1997. In the year 1997, the defendant's husband along with defendants shifted with bag and baggages to the newly acquired premises in the month of April 1997 and since then the suit premises is locked. All the daughters of the defendants are married and living with their husbands at their matrimonial homes. The plaintiff alleged that the defendants are not using the suit premises for more than six months for the purpose for which it was let out. The defendant- Yeshwant Samant has shifted to the newly acquired premises.

5. She submitted that no particulars about non user of the suit premises as contemplated under section 16(1)(n) of the Act, have been set out. She submitted that after the death of original tenant-Yeshwant Samant, his legal representatives requested the plaintiff to transfer the tenancy in the name of defendant no.4. The plaintiff neither transferred the tenancy in favour of defendant no.4 nor accepted the rent. She submitted that the Written Statement was amended and in paragraph 6(a), it is specifically asserted that the building where the suit premises is situate, has become dangerous and is in danger of collapsing. The plaintiff has deliberately avoided to carry out the repairs of the suit premises so as to illegally evict the defendant. She has

invited my attention to photographs as also letter dated 20.10.1994 addressed by all the tenants calling upon the plaintiff to carry out the repairs and the notice dated 28.8.2013 issued by the Thane Municipal Corporation under section 264 of the Bombay Provincial Municipal Corporations Act, 1949.

6. Ms Karnik submitted that from the evidence adduced produced by the defendants, it is evident that the suit premises is used by the defendants. In other words, it cannot be said that there is non user of the suit premises. In paragraph 4 of the Written Statement, the defendants denied that from April 1997 the suit premises are locked and that they have stopped using the suit premises for more than six months for the purpose for which it was let out. She invited my attention to the cross examination of P.W.1 and in particular paragraphs 16 to 19 thereof. She submitted that P.W.1 admitted that the defendant no.4's husband Govind Samant is residing in the suit premises. The plaintiff has admitted that as the defendant no.4's husband is residing in the suit premises, the Courts below were not justified in passing the decree under Section 16(1)(n) of the Act. She also invited my attention to Electricity Bills, receipts issued by Gas Dealer evidencing supply of cylinders at the suit premises to contend that the suit premises are in use of defendant no.4.

7. Alternatively, she submitted that assuming that defendant

no.4 was not using the suit premises, nonetheless, disconnection of the electricity supply as also dilapidated condition of the building constitute reasonable cause for non user of the suit premises. She, therefore, submitted that the application requires consideration.

8. On the other hand, Mr. Patil supported the impugned orders. He invited my attention to paragraph 23 of the District Court's order and submitted that the learned District Judge has considered documentary evidence on record as also Electricity Bills produced at Exhibit 106 collectively and Exhibit 107. The Courts below after appreciating the evidence on record have concurrently held that the plaintiff has established ground under section 16(1)(n) of the Act and that the defendant has not established that reasonable cause prevented them from using of the suit premises. He submitted that the Courts below were justified in passing decree under section 16(1)(n) of the Act. Mr. Patil, however, did not advance any argument as far as the ground under section 16(1)(g) of the Act.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. The short question is whether the Courts below were justified in passing the decree under Section 16(1)(n) of the Act? After considering the evidence on record, the Courts

below found that the husband of defendant no.4 retired from Sales Tax Department and after his retirement, he is staying at Kudal where he owns a bungalow. In particular in paragraph 22, the learned District Judge observed that defendant no.4 admitted that her son is staying at Pragat Society. She was working as a teacher and resigned the job in the year 1979. She was residing with her husband at Kudal and her son was residing at Pragat Society. In paragraph 23, the learned District Judge considered the Electricity Bills produced at Exhibits 106 and 107 and noted that as the suit is instituted on 8.10.2002, the relevant period is between 7.4.2002 and 7.10.2002. Electricity Bill at Sr.No.8 of list at Exhibit 106 was during the period of six months relevant for consideration of ground under section 16(1)(n). That bill indicated consumption of only 10 units. The bill was for the period of two months of April and May 2002. The learned District Judge also considered the admissions given by defendant no.4 in cross examination at the time of leading additional evidence. She admitted that there is no electric connection in the suit premises. The disconnection of electricity supply was for quite long period.

10. With the assistance of the learned counsel for the parties, I have also perused the evidence of the plaintiff's witness as also the defendant's witness. After going through the evidence of

these witnesses, I do not find that the Courts below committed any error in decreeing the suit under Section 16(1)(n) of the Act. The Courts below have held that the plaintiff has proved non user of the suit premises by leading positive evidence. The evidence led by the defendants did not indicate user of the suit premises for the relevant period.

11. As far as the reasonable cause set up by the defendant is concerned, equally, I do not find that the Courts below committed any error in not accepting the defence set up by the defendant. I paragraph 6(a) of the Written Statement, what is contended is that the building is in dilapidated condition. The plaintiff deliberately did not carry out repairs so as to illegally evict the defendant. Thus, on one hand in paragraph 6(a), the defendant has raised plea of reasonable cause. On the other, in paragraph 4, the defendants denied that the defendants have shifted to alternate premises in the month of April 1997 and kept the suit premises locked. In other words, they are using the suit premises.

12. In the case of Dunlop India Limited Vs. A.A. Rahna (2011) 5 Supreme Court Cases 778, the Apex Court considered the provisions of Section 11(4)(v) of Kerala Rent Act, 1965 which is somewhat similar 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.”

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)

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.

14. Applying the tests laid down in the above decision, I do not find that the Courts below committed any error in decreeing the suit under section 16(1)(n) of the Act. Hence, Application fails and the same is dismissed.

15. At this stage, Ms.Karnik orally applies for stay of this order for a period of eight weeks from today. She states that the applicant is in possession of the suit premises. The applicant has neither created third party interest nor parted with possession. The applicant will hereafter neither create third party interest nor part with possession.

16. Mr. Karnik assures that within two weeks from today, the applicant and all adult family members residing the suit premises, will file usual undertaking in this Court, after giving 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 so far 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, if any, within two weeks from today to the respondent;
- (v) 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 respondent.

17. In view thereof, notwithstanding dismissal of this Application, subject to the applicant and all adult family members giving undertaking in this Court in the aforesaid terms within two weeks from today and serving copy in advance to other side, this order shall remain stayed 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 and arrears are not paid, the interim order shall stand vacated without further reference to the Court.

18. List the Application for compliance after three weeks.

(R.G.KETKAR, J.)