

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1595 OF 1997

Mr. Lalchand Raghunath Lunavat(deceased))
Through Hiis Legal Heirs & representatives)
(a) Smt. Vasantibai Lalchand Lunavat)
(b) Mr.Ashok Lalchand Lunawat)
(c) Mr.Ajit Lalchand Lunawat)
(d) Pradeep Lalchand Lunawat)
(e) Sanjiva Lalchand Lunawat)
all carrying on their business at)
16, Kasaba Peth, Ganesh Road,)
Pune 411011.)...Petitioners

Versus

Dnyanoba Sadba Kadre)
Age 64 years, Occupation Agriculturist,)
Address 52/3, Mundhwa-Pune 411038)...Respondent

Mr.S.G.Surana, for the Petitioners.

None for the Respondent.

CORAM : G.S.Kulkarni, J.

Reserved on : 24th July,2017

Pronounced on : 2nd November,2017

JUDGMENT:

1. The petitioners are before the Court in this petition under Article 227 of the Constitution of India, being aggrieved by the

judgment and order dated 7 December 1996 of the learned 10th Additional District Judge, Pune, whereby the appeal of the respondent-landlord came to be partly allowed thereby decreeing the respondent's suit for possession on the ground of non-user of the suit premises. The petitioner Lalchand Raghunath Lunavat was the tenant of the suit premises, who expired during the pendency of the suit. Petitioner Nos.1(a) to 1(e) are his legal heirs and representatives, who are pursuing this proceeding.

2. In nutshell the facts are :-

The suit premises is a shop admeasuring 10 ft. X 17 ft. situated at 16, Kasba Peth, Pune. It is not in dispute that the petitioner was a tenant of the suit premises paying rent of Rs.50/- per month.

3. The respondent instituted the suit in question (Regular Civil Suit No.1250 of 1989) against the petitioners for a decree of possession *inter alia* on the ground of non-user, change of user and for a money decree of Rs.3034/- towards arrears of rent for the period December 1985 till filing of the suit on 22 December 1989 and for mesne profit.

4. The case of the respondent/plaintiff as set out in the plaint is that the respondent had become the owner and landlord of House No.16, Kasba Peth, Pune, as described in the schedule to the plaint, by virtue of a decree dated 20 December 1985 passed by the learned Civil Judge, Senior Division, Pune in Special Civil Suit No.81 of 1980 against his elder brother. By virtue of the said decree, larger premises which included the suit premises had come to the respondent's share and the respondent was accordingly entitled to exclusively receive rent and other charges for the same.

5. The petitioner was a monthly tenant of a portion of the respondent's property consisting of ground floor shop premises which was let out to the respondent for the purpose of business of selling tea powder, under the name and style "M/s.Ajit Tea Depot". The tenancy commenced on the first day of each month. The monthly rent was Rs.50/- besides the education and employment cess at Rs.15 and fire and tree cess at Rs.1 per annum. Despite the rent being nominal, the petitioner/defendant was irregular in paying the rent and was in arrears of rent from December,1985 till the date of filing of the suit (22 December 1989), amounting to Rs.2400/-. As also the education and employment cess, tree and fire cess and other charges

were not paid by the petitioner. The respondent asserted that the suit premises were rented out for the purpose of a shop, however, the defendant had kept the premises closed without any just and reasonable cause, continuously for a period of more than six months prior to the filing of the suit. The petitioner however was holding on, to the suit premises even though he was not in need of the suit premises, only with a view to extract an unfair advantage, since the rent was very nominal. Further the petitioner had converted the suit premises into a godown without the permission of the respondent, by storing un-serviceable articles and this change of user was causing loss and damage to the suit premises. Such change of user was also contrary to law. The respondent therefore by his advocate's notice dated 9 October 1989 terminated the tenancy and called upon the petitioner to deliver quiet and vacant possession of the suit premises as also to pay arrears of rent and other charges due and payable to the respondent. This notice was sent by 'registered post acknowledgment due' and under 'certificate of posting', as also the same was served by affixing the same on the suit premises. However, despite receipt of the same, notice was neither replied nor complied. It is in these circumstances, the respondent instituted the suit in question inter alia seeking a decree of possession.

6. The petitioner appeared before the trial court and resisting the suit filed a written statement. The petitioner disputed the description of the suit property. The petitioner contended that for last about 35 to 40 years the petitioner was a tenant of the suit premises. In paragraph 4 of the written statement, the petitioner contended that the suit premises were not let out to the petitioner only for conducting business of selling tea powder but were let out for undertaking any business. The petitioner contended that for many years the petitioner was conducting business of selling tea under the name and style of M/s.Ajit Tea Depot and even on the date of filing of the written statement, the premises stood in the name of M/s.Ajit Tea Depot. The petitioner averred that however, due to competition in the tea market, the petitioner alongwith selling tea was also dealing with sale of peppermint, biscuits, confectioneries, bakery products, as also purchasing waste paper and selling the same. This was being done for last about 10 to 15 years. There were no arrears of rent as upto December, 1985, the rent was deposited with the brother of the respondent. The petitioner denied the case of the respondent that six months prior to the filing of the suit, the suit premises were closed and asserted that he was routinely undertaking business in the suit premises. The petitioner also denied the case of the respondent that he was holding on to the suit

premises, as the rent was very low. The petitioner stated that he had four children and they were helping him in business being conducted in the suit premises. The petitioner also denied that the suit premises were used for storage as a godown and that there was a change of user of the suit premises. As regards the return of the respondent's legal notice sent by registered post A.D./under certificate of posting, the case of the petitioner was that it was possible, that shop was closed when the registered post was sought to be delivered. The petitioner also denied the respondent's case on arrears of rent. The petitioner asserted that earlier in the year 1976 a suit was instituted by the respondent's brother against the petitioner which was decided in the year 1979 against the respondent's brother and it is for this reason the present suit was filed by the respondent. The intention of the respondent was to in some manner evict the petitioner and rent out the premises at a larger amount or sell the premises.

7. On the above rival pleas, the parties went on a trial. The parties also led oral evidence of their respective witnesses. The learned trial Judge framed eleven issues the relevant being Issue nos.1,4 and 5 namely whether the petitioner was in arrears of rent; whether the respondent proved that the defendant had not used the suit premises for the purpose for which the premises was let out for

more than six months prior to the institution of the suit without any just and reasonable cause; and whether the plaintiff proved that the defendant had illegally converted the shop premises into a godown and changed the user of the suit premises.

8. The learned trial Judge dismissed the respondent's suit accepting the petitioner's case that the petitioner was using the suit premises and/or they were not kept closed/locked for six months prior to the institution of the suit. The findings in that regard can be seen in paragraph 8 of the judgment. The learned trial Judge observed that the documents at Exhibits 37 and 37 and 55 to 59, would show that the suit premises/shop was in use and not closed as alleged by the respondent. These exhibits are the licence issued by Pune Municipal Corporation under the Bombay Shop and Establishment Act, under the Prevention of Food Adulteration Act, initially issued on 17 January 1968 and extended from time to time till the year 1980-81, and the electricity bills. More particularly considering the licence issued under the Shop and Establishment Act, the learned trial judge was of the opinion that the shop was not closed six months prior to filing of the suit. It was also observed that the petitioner had paid renewal fees from time to time from 1988 to 1990. The licence issued by the Weights and Measures department

would also show that the suit premises were not closed for six months prior to the institution of the suit. This licence was valid upto 18 July 1985. It was observed that the electricity bill at Exhibit 58 also indicated that the suit premises were in use as the electricity bill reflected a minimum consumption of about 10-20 units. As regards the accounts it was observed that the petitioner had not maintained any accounts. As regards absence of telephone in the suit premises, it was observed that it depends upon the capacity of the shopkeeper. The learned trial Judge also relied on the deposition of D.W.2-Narayan Manolikar who stated that the shop of the petitioner was not closed at any time and that he used to purchase articles from the shop of the petitioner since over twenty five years and that the shop was not continuously closed. As regards the issue of arrears of rent, the learned trial Judge observed that the petitioner had deposited rent in the court on 21 March 1990 to the tune of Rs.3712/- and the subsequent deposit upto 1993, seeking benefit under Section 12(3) of the Bombay Rent Act (for short the 'Bombay Rent Act'). Thus, there was a compliance of the first condition of Section 12(3) of the Bombay Rent Act. Accordingly, the learned trial Judge held that the respondent failed to prove that the petitioner was in arrears of rent, as the respondent failed to prove that the suit premises were not being used for six months prior to the institution of the suit and/or

that there was a change of user. The learned trial Judge accordingly, dismissed the suit by the judgment and order dated 27 July 1993.

9. The respondent being aggrieved by the dismissal of his suit approached the Court of the learned Additional District Judge by filing Regular Civil Appeal No.667 of 1993.

10. The appellate Court carefully examining and appreciating the evidence on record held that the petitioner though was in arrears of rent from 1st December 1985 till December 1989 and though the respondent had proved that the petitioner neglected to pay the due rent and permanent increases within one month from the date of demand notice, it was held that the respondent could not prove that the petitioner was a defaulter and on this ground, the respondent would not be entitled to a decree of eviction. As regards the issue of non-user of the suit premises for more than 6 months, for the purpose of which it was let out, the appellate Court held that the respondent had proved such non-user and on this ground, the respondent was entitled to a decree of eviction. In this regard, the appellate Court considered the documentary and the oral evidence and more particularly the bi-monthly electricity bills, the report of the postal authorities, the fact that the petitioner had failed to examine

any shop inspector, who would inspect the suit shop for the purpose of necessary permission and that from 25th July 1985 till 15th February 1990 there being no inspection of the suit premises by the shop inspector. The Ganesh Festival donation receipts, as relied by the petitioner were also not accepted as these receipts were not proved in evidence. As regards the electricity bills, it was observed that there was meager consumption of electricity by the petitioner of about 10 to 20 units for two months which also reflected the non-user of the suit shop. It was further observed that DW-2 Narayan, who was examined on behalf of the petitioner, was unable to say anything about nature of the goods he had purchased from the petitioner. It was further observed that eye sight of the witness was too weak and that shop of the petitioner was not visible from his house and in such circumstances, it was not possible to believe what DW-2 Narayan saw that the petitioner was conducting business in the suit shop. The appellate Court thus observed that the respondent's contention of non-user was also required to be accepted by taking into consideration the evidence of the respondent (PW-1). It was observed that non-user of the suit premises was also very well proved from the evidence of the petitioner DW-1 Lalchand Lunawat, and that the documentary evidence to that effect was placed on record by the petitioner himself. It was observed that the defendant was not

maintaining any account of his business. There was not a single document on record to show any articles or items purchased or sold by the petitioner. The petitioner had also failed to examine neighbouring shopkeepers who were also tenants of the respondent. It was observed that thus there was nothing on record to show that the petitioner was using the suit premises. The appellate Court also did not accept the contention of the petitioner that the petitioner was dealing in waste paper and book binding, as there was no evidence to show that he was doing the said business and was supplying such articles to the customers. In regard to the hardship, it was observed that the petitioner had raised inconsistent pleas by saying that he is the only earning member of his family, however, he admitted in cross-examination that all his sons are earning and his youngest son is having a shop in Pune city. It was further observed that greater hardship was caused to the respondent. It was observed that after receipt of the suit notice, the petitioner had also made no efforts to search another premises. On these observations, the appellate Court set aside the findings of the learned trial Judge on non-user of the suit premises and held that the respondent was entitled to claim possession on non-user of the suit premises. However, in regard to the findings of the trial Court in respect of arrears of rent and default in payment of rent, the appellate Court confirmed the findings of the

learned trial Judge. In these circumstances the petitioner is before this Court in the present petition.

11. The learned Counsel for the petitioner, in assailing the judgment and order passed by the appellate Court, submits that the respondent had not proved that the petitioner was not using the suit premises for a period of 6 months prior to filing of the suit, so as to entitle himself for a decree under the provisions of Section 13(1) (k) of the Bombay Rents Hotel And Lodging House Rates Control Act, 1947 (for short, “the Bombay Rent Act”). This submission is supported by referring to paragraph 3 of the plaint which reads thus:-

“Not only this, the defendant has converted the suit premises into a Godown for storing un-serviceable articles and this change of user is causing loss and damage to the premises. The defendant has thus changed the user of the premises from business to storage contrary to Law and without permission of the plaintiff.”

12. The learned Counsel for the petitioner submits that the respondent who has made the above averments, cannot say that the petitioner was not using the premises. It is next submitted that the petitioner had in fact, proved that he was using the suit premises, which is clear from the licence issued under Bombay Shop and Establishment Act which was renewed from time to time upto 1992;

the permission of Pune Municipal Corporation (Exh.37), the licence issued by the Weights and Measures department (Exh.27) which was valid upto 18th July 1985; inspection visit book of shop inspector (Exh.38), electricity bills (Exh.58) and donation receipts of Ganpati festival (Exh.59). It is thus submitted that the petition deserves to be allowed.

13. I have heard the learned Counsel for the petitioner. With his assistance, I have also perused both the judgment of the learned trial Judge as also the learned appellate Judge. I have also gone through the pleadings and the evidence from the record and proceedings as called for.

14. The only issue which arises for consideration is as to whether the respondent/landlord was entitled to a decree of eviction and possession for non-user/change of user of the premises. In this regard, it would be appropriate to note the relevant provisions of the Bombay Rent Act which reads thus:-

“13. When landlord may recover possession -

(1) Notwithstanding anything contained in this Act, but subject to the provisions of Section 15 and 15(A), a landlord shall be entitled to recover possession of any

premises if the Court is satisfied

- (a) that the tenant has committed any act contrary to the provisions of clause (a) of Section 108 of the Transfer Property Act 1982;

.....

- (k) that the premises have not been used without reasonable purpose for the purpose for which they were let for a continuous period of 6 months immediately preceding the date of the suit; or
.....”

15. On a perusal of the above provision, it can be clearly seen that the object of the provisions is that the tenant should use the premises for the purpose for which the premises were let out and that the premises cannot be kept locked or not used for a continuous period of 6 months immediately before the date of the suit. If these ingredients are satisfied, then the landlord would be entitled to a decree of possession against the tenant.

16. The tenancy of the suit premises is not in dispute. Perusal of the averments as made in the plaint would clearly indicate that the respondent had approached the trial Court *inter alia* seeking a decree of possession of the suit premises, as let out to the petitioner on the ground of non-user for a continuous period of 6 months prior

to the filing of the suit. These averments can be seen in paragraphs 2 and 3 of the plaint which read thus:-

“2. The defendant has rented the suit premises for the purposes of selling Tea and Coffee powder. However, the defendant has kept the premises closed without any just and reasonable cause continuously for a period of more than six months before the date of filing of the suit. In fact, the defendant is holding on to the suit premises even though he does not really need the premises only with a view to extract unfair advantage since the rent is very nominal.

3. Not only this, the defendant has converted the suit premises into a Godown for storing un-serviceable articles and this change of user is causing loss and damage to the premises. The defendant has thus changed the user of the premises from business to storage contrary to Law and without permission of the plaintiff.”

17. The case of the respondent in paragraphs 2 and 3 of the plaint as dealt and answered by the petitioner, is contained in paragraphs 4 and 6 of the written statement. The denial is vague. The petitioner says that though earlier he conducted the business of selling tea, however, he says that later on, the nature of business had changed, as there was lot of competition in the business of selling tea and therefore, the petitioner had started selling peppermint, biscuits confectionery bakery products and also dealing with old newspapers etc. for last about 10 to 15 years. In paragraph 7 of the written statement, the petitioner denied the respondent's case as averred in paragraph 3 of the plaint that the petitioner was not using the suit

shop as a godown and to store scrap material. However, though such specific pleas were taken in the written statement, the petitioner in the cross-examination stated something new, namely that the petitioner was in fact undertaking the business of “book-binding” in the suit premises/shop. The petitioner stated that there was no servant in the shop. The petitioner also deposed that he cannot do the work of binding and that there were no machines required for book binding in the shop. He also deposed that he had not produced any purchase receipts memos regarding any articles in the shop. He also deposed that he had not maintained cash memos or credit memos regarding the goods sold and that he had not maintained any record of the binding material and articles. He further deposed that he had not maintained record about dealing in waste paper or dealing in old and new books. He did not have any profession tax registration as also he did not have any permission from food and drug administration required for selling edible items. He further deposed that he had no registration under the Sales-tax and was also not paying any income tax. He also deposed that he did not obtain any licence for sale of old papers. He deposed that there were two tube lights in his shop, each of 40 watts. He also admitted the electricity bills.

18. Considering the evidence on record, it is quite clear that mere reliance of the petitioner on the electricity bills would not assist the petitioner to contend that the petitioner was in use of the premises for a continuous period of 6 months prior to filing of the suit. The electricity bills are not in dispute. The electricity consumption was very meager about 10 to 20 units for two months. As rightly observed by the appellate Court it was thus not possible to conclude from the electricity bills that the shop premises were in actual use and occupation as the law would contemplate. Further the other evidence namely the renewal of the licences under the Bombay Shop and Establishment Act would also not assist the petitioner. This for the reason that the petitioner did not examine any officer/employee of the concerned department to show that any actual inspection was taken and thereafter such renewal of licences was granted only on being satisfied that the business was being conducted. Even a careful perusal of the renewal of the licences under the Bombay Shop & Establishment Act (Exhibit 38) does not show that the premises were in occupation and in use for six months prior to the filing of the suit on 22 December 1989. Significantly the petitioner also did not examine the neighbouring shopkeepers. Thus, there was no material on record to reach a conclusion that the petitioner was actually using the suit premises. The evidence of DW-

2 Narayan also could not be accepted as he admitted in the cross-examination that the shop was not visible from his premises and his vision was affected as he was suffering from cataract since 8 to 10 years. This evidence also could not inspire any confidence to come to a reasonable conclusion that the petitioner was using the suit premises as observed by the learned appellate Judge. The receipts issued for the Ganpati festival as relied by the petitioner also could not have any relevance to support the case of petitioner that he was using the suit premises. In any case, the plaintiff has not examined the persons who have issued the Ganpati Festival Ganpati donation receipts, and that they had actually visited the suit premises when the amount came to be collected. Thus, the entire evidence was speaking to point out that the petitioner was not using the suit premises to conduct any business, and in fact that the premises had remained closed, as asserted by the respondent. In my opinion, the learned appellate Judge has appropriately evaluated the evidence which had come on record in setting aside the findings of the learned trial Judge which were contrary to the evidence on record and in fact which were perverse.

19. It may also be pointed out that the petitioner to protect the possession of the premises, has taken inconsistent pleas as noted

above, even these pleas as noted above, could not be proved, that the petitioner was using the suit premises for a continuous period of 6 months prior to institution of the suit. Even assuming that the petitioner had changed the nature of the business, the evidence on record clearly indicates that the petitioner was not using the premises for a continuous period of 6 months prior to institution of the suit and therefore, Section 13(1)(k) was clearly applicable to entitle the respondent for a decree of possession against the petitioner. The object of the said provision is that the tenant should use the premises for the purpose for which the premises were let out and the tenant cannot keep the premises unused for the period stipulated by the said provision, unless there was some reasonable cause. In the present case, the respondent has succeeded to prove that the petitioner was not using the premises continuous for the period of 6 months prior to institution of the suit. Further the petitioner has also not come with a case to furnish some reasonable cause preventing him from such non-user. I am, therefore, not inclined to accept the limited submissions as made on behalf of the petitioner, as the findings recorded by the appellate Judge are based on evidence and on application of the proper principles of law, in partly allowing the appeal and in decreeing the suit against the petitioner, on the ground of non-user of the suit premises.

20. In the above circumstances, I am certain that there is no perversity in the findings as recorded by the learned appellate Judge. The petition is devoid of merits and is accordingly dismissed.

21. The petitioner shall hand over the suit premises to the respondent within a period of eight weeks from today.

22. No order as to costs.

[G.S. KULKARNI, J.]