

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.241 OF 2018
WITH
CIVIL APPLICATION NO.333 OF 2018
WITH
CIVIL APPLICATION NO.410 OF 2018
IN
CIVIL REVISION APPLICATION NO.241 OF 2018

Sunil Naraindas Devnani ... Applicant
Vs.
Vikram Gopichand Chandiramani and others ... Respondents

Mr. A. M. Saraogi a/w. Mr. Sushil Upadhyay for Applicant.
Mr. P. K. Dhakephalkar, Senior Advocate a/w. Mr. Jaydeep Deo for
Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JULY 13, 2018

P.C. :

Heard Mr. Saraogi, learned Counsel for the applicant and
Mr. Dhakephalkar, learned Senior Counsel for the respondent No.1 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 03.04.2013
passed by the learned Judge, Court Room No.6 of the Small Causes
Court at Mumbai in R.A.E.Suit No.600/697/2005 as also the judgment
and decree dated 20.01.2018 passed by the Appellate Bench of the Small
Causes Court in (2a) Appeal No.14 of 2013. By these orders, the Courts
below decreed the Suit instituted by the respondent, hereinafter referred
to as 'plaintiff', under Section 16(1)(n) of the Maharashtra Rent Control
Act, 1999 and directed the defendant to handover possession of Unit
No.110 in Owner's Industrial Estate Co-operative Society Limited, 505,
Pitamber Lane, L. T. Road, Mumbai 400 016 (for short 'suit premises').

3. In support of this Application, Mr. Saraogi submitted that the parties entered into tenancy agreement on 01.11.1965. The suit premises was let out to the defendant for industrial or commercial purpose. He submitted that basically the suit premises was let out to the partnership firm namely, M/s. Ajanta Technical Institute and the Suit is instituted against individual person. As the partnership firm is a tenant in respect of the suit premises, the Suit instituted against individual person is not maintainable. He submitted that on 21.10.2004, plaintiff issued notice to - (1) M/s. Ajanta Technical Institute and (2) M/s. Ajanta Commercial Institute. He submitted that the premises at Ganesh Bhuvan are no way concerned with the controversy raised between the parties. He submitted that the Courts below have committed serious error in holding that plaintiff has established the ground of non-user. He has taken me through the - (i) Registration Certificate of Establishment issued under the Bombay Shops and Establishment Act, 1948, (ii) 8 electricity bills produced at annexure XXVI - the first bill covering the period from 22.08.2003 to 07.11.2003 showing consumption of 891 units, the second bill covering the period from 21.10.2003 to 19.12.2003 showing the consumption of 102 units, demand of Rs.9870/- raised by BEST, Disconnection memo dated 16.06.2004 claiming dues of Rs.8095/-, Reconnection charges memo dated 14.10.2004, debit note dated 30.11.2004, electricity bill covering the period from 19.10.2004 to 21.12.2004 showing consumption of 24 units, electricity bill covering the period from 18.02.2005 to 20.04.2005 showing consumption of 45 units, electricity bill covering the period from 18.08.2005 to 20.10.2005 showing consumption of 3 units. He has also taken me through evidence of Sunil Naraindas Devnani-D.W.1.

4. Mr. Saraogi submitted that the Courts below however proceeded on the footing that defendant did not produce the documents referred in

paragraph 8 of the written statement. As the defendant has produced the electricity bills showing consumption of units, it cannot be said that there was non-user of the suit premises as contemplated by Section 16(1)(n) of the Act. He submitted that initially till the year 2004, defendant's father and defendant were running Ajanta Technical Institute. From 2004, they discontinued Ajanta Technical Institute and destroyed the documents pertaining to that Institute. Defendant started using the suit premises for storing baggage and PVC Rolls. As the defendant had changed the business, he took some time for running the business smoothly. The Courts below, however, proceeded on the footing that after closure of Ajanta Technical Institute, defendant had totally stopped the user of the suit premises. He submitted that the approach of the Courts below was perverse and the findings recorded by the Courts below are contrary to evidence on record. He, therefore, submitted that application requires consideration.

5. On the other hand, Mr. Dhakephalkar supported the impugned orders. He submitted that Suit was instituted on 26.04.2005. In view of Section 16(1)(n) of the Act, the relevant period for consideration is from 26.10.2004 to 26.04.2005. He invited my attention to the findings recorded by the learned trial Judge on the issue of non-user in paragraph 5 and of the Appellate Court in paragraphs 11 to 22. He submitted that the Courts below have considered the electricity bills produced by the defendant and observed that till December 2003, the units consumed were 900 units. As against this, the units constantly reduced to 102 units, 24 units and 3 units till the month of October 2005. He submitted that after appreciating the evidence on record, the Courts below have held that defendant have stopped user of the suit premises for the relevant period and accordingly, decreed the Suit. 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 the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph 5, the learned trial Judge has considered the case made out by the defendant in paragraph 8 of the written statement. In paragraph 8, defendant contended that in support of the contention about the user of the suit premises, he will rely upon electricity bills, telephone bills, visiting cards, correspondence and bills. He however did not produce the telephone bills and other correspondence save and except 8 electricity bills. The learned trial Judge also considered the case of the defendant that in the year 2004, they have stopped running Ajanta Technical Institute and started business of tourist bags and PVC Rolls. Though, the defendant relied upon several documents in paragraph 8 of the written statement, he did not produce any evidence to substantiate his claim. The learned trial Judge has considered electricity bills showing consumption of 24 units in December 2004, 45 units in April 2005 and 3 units in October 2005 and observed that till December 2003, their consumption of units were in 3 digits and the same is reduced to 2 digits and no satisfactory is given by the defendant in this aspect. Defendant has only ensured that there is some electricity consumption in the suit premises.

7. In so far as the Appellate Court is concerned, in paragraph 17, the Appellate court has referred to the electricity bills covering the period from October 2005 to April 2006. In paragraph 18, the Appellate court observed that the question is whether the defendant has proved his use for any intermittent period during those six months preceding the date of the Suit. Defendant did not lead any evidence as regards change of business of bags and PVC rolls. In paragraph 21, the Appellate court

referred to the consumption of 900 units in December 2003 and thereafter reduction of units to 102 units, 24 units and 3 units. Thus, after appreciating the evidence on record, the Courts below held that plaintiff has proved non-user of the suit premises.

8. In the case of ***Dunlop India Limited Vs. A.A. Rahna, (2011) 5 SCC 778***, the Apex Court was considering the provisions of Section 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act, 1965. In paragraph 21, the Apex Court observed that the word 'occupy' used under Section 11(4)(v), in technical sense, means actual possession of the tenanted building or use thereof for the purpose for which it is let out. In paragraph 22, 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.”

9. In paragraph 25, the Apex Court highlighted distinction between terms 'possession' and 'occupy' in the context of rent control legislation (*Ram Dass Vs. Davinder, (2004) 3 SCC 684*).

10. In paragraph 27, the Apex court referred to the decision in *Brown Vs. 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.”

11. In paragraph 28, the Apex Court referred to the decision of this Court in *Achut Pandurang Kulkarni Vs. Sadashiv Ganesh Phulambrikar*, AIR 1973 Bom 210 and observed thus,

“28. In Achut Pandurang Kulkarni (supra), the learned Single Judge of the Bombay High Court interpreted Section 13(1)(k) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 the language of which is somewhat similar to Section 11(4)(v) of the 1965 Act. The learned Single Judge referred to order passed by Chagla, C.J. in Civil Revision Application No.1527/1953 decided on July 30, 1954 and observed:

'16. As observed by Chagla, C. J., in the above case, physical possession by a tenant himself was not necessary. Physical possession by other members of the family also is not necessary if there was reasonable cause for their remaining absent from the premises. The question is one of fact and degree. If there is evidence on record to show that the tenant had something more than a vague wish to return and that he had a real hope coupled with the practicable possibility of its fulfilment within a reasonable time, it cannot be said that he had no reasonable cause for not using the premises. In every case it is the duty of the Court to satisfy itself that the tenant had no reasonable cause. Absence may be sufficiently prolonged or unintermittent to compel the inference prima facie of a cesser of occupation. The onus is on the tenant in such a case to repel the presumption and to establish that his possession had not ceased or that he had ceased to occupy on account of reasonable cause. In my judgment, this can be established if the tenant proves notwithstanding the intention on his part to return after his absence, his helplessness in remaining absent from the premises.

17. It is true that the tenant should have made proper attempts to discharge the onus in the present case by producing the orders, if not before the trial Court, at least before the Appellate Court. That, however, as stated above, does not permit the Courts to brush aside the requirements of Section 13(1)(k). It is a matter for not awarding the costs. The Court cannot ignore the nature of the tenant's services and his liability to be transferred when deciding the question under Section 13(1)(k). I do not propose to lay down that in every case where a Government servant is transferred and he goes on paying rent in respect of the premises, he had reasonable cause for not using the premises for the purpose for which they were let. The question will depend on the facts and circumstances of each case. The tenant must couple and clothe his inward intention to return, with some formal, outward and visible sign of it, as for instance by installing 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. It may also be that the same result can be secured by leaving on the premises, as a deliberate symbol of continued occupation, furniture. As stated by Asquith L. J., in *Brown v. Brash and Ambrose*, (1948) 2 KB 247, the tenant must prove not only *animus possidendi* but a *corpus possessionis*."

12. 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.

13. After considering the evidence on record as also findings

recorded by the Courts below and applying the principles laid down by the Apex Court in the case of **Dunlop India Limited** (*supra*), I do not find that the Courts below committed any error in decreeing the Suit. Defendant was not in a position to demonstrate that the findings recorded by the Courts below are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendant was also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

14. At this stage, Mr. Upadhyay prays for four weeks time for removal of the articles lying in the suit premises. On instructions from the applicant - Sunil Naraindas Devnani, who is present in the Court, he states that applicant will not hold respondent No.1 responsible for loss or damages of any articles lying in the suit premises.

15. Mr. Deo submits that from February 2018 till 08.06.2018, applicant has not paid compensation fixed by the Appellate Court @ Rs.15,000/- per month. Mr. Upadhyay assures that during the period of 4 weeks from today, applicant will pay compensation @ Rs.15,000/- from February 2018 till respondent No.1 taking over possession on 08.06.2018.

16. Having regard to the fact that Bailiff's report dated 08.06.2018 records that he had executed a warrant of possession and has handed over possession to the respondent No.1-plaintiff along with articles, 4 weeks time is given to the applicant to remove articles with express understanding that applicant will not hold first respondent responsible

for any damage or loss of the articles.

17. In view of the dismissal of C.R.A., Civil Application No.333 of 2018 and Civil Application No.410 of 2018 do not survive and the same are disposed of accordingly.

(R. G. KETKAR, J.)

**Minal Sandip
Parab**

Digitally signed by Minal
Sandip Parab
Date: 2018.07.16 08:18:00 -
0400

Minal Parab