

Flavia Thomas	...	Applicant
Vs.		
Dr. Kanayalal Alimchand Purswami	...	Respondent

Mr. Samji Joseph a/w. Mr. Jins P. Thomas i/b. Uni Lex for Applicant.
Mr. Durgesh Kulkarni i/b. Mr. S. W. Kulkarni for Respondent.

CORAM : R. G. KETKAR, J.
DATE : APRIL 5, 2018

P.C. :

Heard Mr. Joseph, learned Counsel for the applicant and Mr. Kulkarni, 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.'), applicant, hereinafter referred to as 'defendant', has challenged the judgment and decree dated 28.08.2012 passed by the learned Judge, Court Room No.13 of the Court of Small Causes at Bombay in R.A.E. Suit No.692/1121 of 2007 as also the judgment and decree dated 06.01.2015 passed by the Appellate Bench of the Small Causes Court in 2(a) Appeal No.51 of 2012. 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 (for short 'Act')

3. In support of this Application, Mr. Joseph strenuously contended that the Courts below committed serious error in decreeing the Suit under Section 16(1)(n) of the Act. He submitted that the Courts below proceeded on the footing that defendant is not residing in room No.1, ground floor of Alim Bhuvan situate at 543/A, Jagannath Shankar Seth

Road, Mumbai - 400 002 (for short 'suit premises') without any 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. The Courts below proceeded on the footing that the defendant is residing at B-61-63, 3rd floor, Bandukwala Building, L. N. Jadhav Marg, Mumbai 400 009. He submitted that the Appellate court referred to the electricity consumption in respect of the suit premises in paragraph 13. A perusal of paragraph 13 shows that in the months of - (i) November-December 2006, units consumed were 9, (ii) January-February 2007, units consumed were 8, (iii) March-April 2007, units consumed were 0, (iv) May 2007, units consumed were 1, (v) June 2007, units consumed were 8, and (vi) July 2007, units consumed were 6. In short, it is not found that there is '0' consumption during the relevant period between November-December 2006 to December 2007 as the Suit is instituted on 27.11.2007. If there is a consumption of even 1 unit, it cannot be said that the defendant was not using the suit premises, as contemplated by Section 16(1)(e) of the Act.

4. He has invited my attention to the notice dated 22.06.2006 issued by the plaintiff, and in particular paragraphs 2, 3 and 4 thereof. In paragraph 2, plaintiff alleged that defendant is not using the suit premises since last more than four years as she was residing at Bandukwala Building. In paragraph 3, it is alleged that defendant has unlawfully and illegally sublet the premises to the third party and various customers have been brought to the ground floor of the building. In paragraph 4, plaintiff claimed that he requires the premises reasonably and bona fide for his personal use and occupation. He also invited my attention to the cross-examination of the plaintiff in respect of letter at exhibit-11, acknowledgment at exhibit-12 and notice at exhibit-13 dated 22.06.2006. He has also invited my attention to the

affidavit of examination in chief of the defendant, and in particular paragraph 3 where she denied that she is residing at the address mentioned in the title of the plaint i.e. Bandukwala building.

5. Mr. Joseph invited my attention to the decision of the learned Single Judge of this Court in ***Achut Vs. Sadashiv***, AIR 1973 Bombay 210 and the decision of the Apex Court in ***Dunlop India Limited Vs. A. A. Rahna***, (2011) 5 SCC 778, and in particular paragraphs 21, 25 and 27 thereof. He submitted that plaintiff has not established that defendant is continuously not occupying the suit premises for a period of 6 months immediately preceding the date of the Suit. The Courts below were, therefore, not justified in decreeing the Suit under Section 16(1)(n) of the Act.

6. On the other hand, Mr. Kulkarni supported the impugned orders. He submitted that the Courts below, after appreciating the evidence on record, have concurrently found that defendant is not using the suit premises as contemplated by Section 16(1)(n) of the Act. That apart, in the cross-examination, defendant admitted that she is residing at the address given in the title and her evidence. In her affidavit of examination in chief, she gave address of Bandukwala building. In other words, defendant admitted that she is not residing in the suit premises but is residing at the address of Bandukwala Building.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Courts below have decreed the Suit under Section 16(1)(n) of the Act. The learned trial Judge has considered this ground from paragraphs 17 to 24. In paragraph 17, the learned trial Judge has referred to marriage invitation card at exhibit-15 where the

address of the defendant is shown as B/61-63, third floor, Bandukwala Building, L. N. Jadhav Marg, Mumbai – 09. D.W.1 admitted above fact in her cross-examination and further admitted that the said marriage invitation card is of her daughter and she has invited the plaintiff for marriage. The learned trial Judge further observed that generally in the marriage card, the parents of bride mention their own residential address. Even the suit summons is served personally upon the defendant on the address of Bandukwala building, which is other than the suit premises and the said fact is substantiated by the Bailiff's report at exhibit-5 dated 02.08.2007. These circumstances show that in September 2002 and in August 2007, the defendant was residing at Bandukwala Building.

8. In paragraph 20, the learned trial Judge referred to the statement of electricity consumption at exhibit-22 and dealt with the consumption of units from December 2006 till August 2007. It was observed that the consumption of electricity for this period was admitted by D.W.1 in her cross-examination. In paragraph 23, the learned trial Judge recorded a finding that defendant has not shown any reasonable cause for not living in the suit premises during the relevant period.

9. As far as the Appellate Court is concerned, the Appellate Court has considered this ground in paragraphs 11 to 16. In paragraph 13, the Appellate Court referred to the register extract at exhibit-22 showing the electricity consumption for the period of 8 months. After extracting the consumption of units from November 2006 till July 2007, the Appellate court noted that the electricity consumption has not reached even the double digit. In paragraph 14, the Appellate Court observed that there is absolutely no evidence to establish the claim of the defendant that she is using the suit premises on the date of the Suit or six months prior to that.

In paragraph 15, the Appellate Court dealt with summons report at exhibit-13 dated 22.06.2006 and observed that defendant is residing at Bandukwala Building, which is other than the suit premises.

10. In the case of **Dunlop India Limited** (*supra*), 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. Mr. Joseph submitted that the said paragraph supports the contention of the defendant namely, “plaintiff has to establish that defendant is continuously absent from the building for 6 months”. In the present case, the said criterion is not satisfied. I do not find any merit in this submission.

11. In paragraph 22, it was observed thus,
- “22. The initial burden to show that the tenant has ceased to occupy the building continuously for 6 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 6 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 6 months. ...”
12. 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].
13. 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 (1) and Skinner v. Geary (3), (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 (4). 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) or the furniture be 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. 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.

15. Applying the tests laid down to the facts of the present case as also having regard to the fact that the Courts below have concurrently found that plaintiff has established the ground under Section 16(1)(n) of the Act.

16. Mr. Joseph also relied upon the decision of **Achut** (*supra*). In that case, the tenant shifted temporarily to the place of his transfer. It is

in that context, the learned Single Judge observed that it cannot be said that the non-user of the premises because of the transfer can be said to be without reasonable case. The said decision also refers to *Brown Vs. Draper (supra)*, which is considered by the Apex Court in **Dunlop India Limited** (*supra*).

17. In the result, Application fails and the same is dismissed.

(R. G. KETKAR, J.)

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