

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION [ST]NO.9790 OF 2018
WITH
CIVIL REVISION APPLICATION [ST]NO.9794 OF 2018

Mr. John Anthony D'Mello & Ors.] Applicants

Vs.

Khatijabai Ali Mohammed Memon & Ors.] Respondents

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Ms. Gauri Godse a/w Mr. Rohit Joshi, for Applicants.

Mr. Sandesh Patil i/b Chintan Y. Shah, for Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 16TH APRIL, 2018.

P.C.

Heard Ms. Godse, learned Counsel for the applicants and Mr. Patil, learned Counsel for the respondents in both the matters at length.

2. C.R.A (ST) No.9790 of 2018 takes exception to the judgment and decree dated 21st July, 2012 passed by the learned 5th Joint Civil Judge, Thane in Regular Civil Suit No.442 of 2005 as also the judgment and decree dated 2nd February, 2018 passed by the Principal District Judge, Thane in Regular Civil Appeal No.236 of 2012. The learned trial Judge decreed the suit only u/s 16 (1) (k) and declined to pass decree u/s 16 (1) (i) and 16 (1) (n) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. As against this, the learned District Judge decreed the suit u/s 16 (1) (k) and 16 (1) (n) of the Act and directed the applicants, hereinafter

referred to as “defendants” to hand over possession of residential tenement having area about 200 square feet on the ground floor of Mohammad Ali Road, Wholesale Market, Mahagiri, Thane (W), (for short 'suit premises') more particularly described in paragraph 2 of the plaint to the respondents, hereinafter referred to as “plaintiffs”.

4. C.R.A (ST) No.9794 of 2018 takes exception to the judgment and decree dated 2nd February, 2018 passed by the learned Principal District Court, Thane in Cross Objection filed in Regular Civil Appeal No.236 of 2012 arising out of the judgment and decree dated 21st July, 2012 passed by the learned 5th Joint Civil Judge, Senior Division, Thane in Regular Civil Suit No.442 of 2005.. By impugned judgment and decree, cross objection filed by the respondents in Regular Civil Appeal filed by the petitioners was allowed and decree of possession was passed u/s 16 (1) (n) of the Act. Since the common question of law and facts arise in these Petitions, the said can conveniently be disposed of by this common order. In order to appreciate controversy raised between the parties, facts from CRA (ST) No.9790 are taken into consideration.

5. Respondents, hereinafter referred to as “plaintiffs” have instituted the suit on 10th August, 2005 for recovery of possession of the suit premises *inter alia* invoking grounds u/s 16 (1) (i), 16 (1) (k) and 16 (1) (n) of the Act. The defendants resisted the suit by filing written statement at Exhibit 20. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. The learned trial Judge decreed the suit only under section 16 (1) (k) of the Act and declined to pass decree u/s 16 (1) (i) and 16 (1) (n) of the Act. Aggrieved by this decision, the defendants preferred appeal and plaintiffs preferred Cross Objection as learned trial Judge declined to pass decree u/s 16 (1) (i) and 16 (1) (n). By order dated 2nd February, 2018, the learned District Judge dismissed the appeal and allowed the cross objections

and decreed the suit u/s 16 (1) (k) and 16 (1) (n) of the Act. It is against these orders, defendants have instituted the present proceedings.

6. In support of this application, Ms. Godse submitted that the Courts below committed serious error in decreeing the suit under sections 16 (1) (k) and 16 (1) (n) of the Act. She submitted that the learned trial Judge declined to pass decree under section 16(1) (n) of the Act. As against this, the learned District Judge decreed the suit also under sections 16 (1) (k) and 16 (1) (n). She invited my attention to the findings recorded by the District Judge in paragraphs 25 to 35. In paragraph 25, the learned District Judge considered the case made out by the plaintiffs that the defendants have acquired a suitable alternate premises namely residential flat on the first floor of Siddhesh Apartment at Kolbad Road, Thane (West) and shifted in the year 1996 to that premises. In paragraph 27, the learned District Judge referred to voluminous documentary evidence adduced by the parties. The learned District Judge after considering the evidence on record observed that the plaintiffs have established the ground under sections 16 (1) (k) and 16 (1) (n) of the Act. She submitted that in paragraph 27, the learned District Judge referred to electricity bill Exhibit 54 issued on 15th June, 2005 for the period from 20th March, 2005 to 24th May, 2005. The electricity bill showed meter reading as 2618 recorded on 20th March, 2005 in the column “current reading” dated 24th May, 2005, the remark was mentioned as “inaccess”. That remark was also since January, 2005. Ms. Godse submitted that merely on the basis of remark was “inaccess” will not *ipso facto* lead to the conclusion that the plaintiffs have established ground under sections 16 (1) (k) and 16 (1) (n) of the Act. She submitted that basically real reason for instituting the suit for eviction was ground under sections 16 (1) (i) of the Act. She submitted that all along, various notices issued by the Corporation were served on the tenants which suggests that the tenant including the defendants were continuously occupying

the suit premises. She has taken me through the documents referred to by the learned District Judge and submitted that the learned District Judge was not justified in decreeing the suit under sections 16 (1) (k) and 16 (1) (n) of the Act.

7. On the other hand, Mr. Patil supported the impugned orders. He has taken me through the findings recorded by the learned District Judge and in particular paragraphs 27 to 31. In paragraph 27, the learned District Judge observed that the defendants did not come with the case that they have reasonable ground for non user and that bills produced by the defendant did not pertain to the relevant period of 6 months i.e February, 2005 and August, 2005.

8. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. As noted earlier, the learned District Judge has decreed the suit u/s 16 (1) (k) as also 16 (1) (n) of the Act. The ground u/s 16 (1) (n) is considered in paragraphs 25 to 35. In paragraph 27, the learned District Judge noted that right from January, 2005 onwards the remark in the electricity bill is “inaccess”. This is to be appreciated on the backdrop of the fact that the plaintiffs have asserted that the defendants have shifted to Siddhesh Apartment in the year 1996. In that paragraph, the learned District Judge referred to electricity bill at Exhibit 54 dated 15th June, 2005 covering period from 20th March, 2005 to 24^h May, 2005. In paragraph 28, the learned District Judge referred to meter reading taken on 8th July, 2015 showing reading “2618”. Thus, the bill issued on 20th March, 2005 and bill issued on 8th July, 2005 show that no change in the meter reading which indicates that there was no electricity consumption from 20th March, 2005 till 8th July, 2005. The learned District Judge referred to bill Exhibit 81 showing the meter reading recorded on 12th September, 2005

showing meter reading 2686. The learned District Judge observed that the suit summons was pasted with defendants' premises on 18th August, 2005. As per the Bailiff's report Exhibit 7, Vakalatmana Exhibit 12 was filed on 24th August, 2005. This shows that in the midst of August, 2005, the defendant was made aware about pendency of the suit on the ground of non-user. In these circumstances, the meter reading recorded one month after defendant's knowledge, leave possibility of consumption to save from non-user clause.

9. In paragraph 29, the learned District Judge referred to various bills produced by the defendants which are either of the period April, 2003, August, 2004 and post August, 2005. In other words, the defendants did not produce a single bill showing electricity consumption for the relevant period of 6 months between February, 2005 and August, 2005. In paragraph 31, the learned District Judge referred to electricity bills at Exhibit 71 to 74 and Exhibit 76 to 80. Remark on Exhibit 74 was again "inaccess" and on bills at Exhibit 74 and Exhibit 78, there is remark "no/met". The learned District Judge also referred to identity cards issued by Election Commission of India Exhibit 85 to 87 showing address of the suit premises which were issued in the year 1994, voters list at Exhibit 88 of the year 1995 also was not relevant as the plaintiffs have invoked ground u/s 16 (1) (n) of the Act by filing suit on 10th August, 2005. In paragraph 33, the learned District Judge referred to receipts showing consumption of LPG i.e cooking gas. Except single receipt dated 15th September, 2005, all receipts were post the said period. The learned District Judge also referred to LIC receipts at Exhibit 90 and ration card at Exhibit 117. In paragraph 35, the learned District Judge noted that the suit summons was tried to be served on defendant No.1 at Siddhesh apartment. He refused to accept the suit summons.

10. 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. Ms. Godse 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. ...”

2. 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].

12. 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)"

13. 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 that case to the facts of the present case and for the reasons recorded by the learned District Judge in paragraphs, 27 to 29 and 31 to 35, I do not find that the learned District Judge committed any error in decreeing the suit u/s 16 (1) (n) of the Act. In so far as the decree u/s 16 (1) (k) of the Act is concerned, the Courts below concurrently decreed the suit on that ground.

15. The defendants are not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of material on record, no reasonable or prudent person

would have come to the conclusion arrived by the Courts below. Merely because on the basis of the material on record, another view is possible that, by itself, is no ground for exercising the powers under section 115 of C.P.C. In the result, the Civil Revision Applications fail and the same are dismissed.

16. At this stage, Ms. Godse orally prays for stay of eviction decree for a period of twelve weeks from today. She states that the defendant and all the adult family members residing with him/using the suit premises will file usual undertaking in this Court within two weeks from today, after giving advance copy to the other side incorporating therein that:

- [a] they are in possession and nobody else is in possession of the suit premises;
- [b] they have neither created third party interests nor parted with possession of the suit premises;
- [c] they will hereafter neither create third party interests nor part with possession of the suit premises;
- [d] within two weeks from today, applicants/defendants will deposit the arrears of rent, if any, in this Court, under intimation in writing to the learned Counsel for the respondents/plaintiffs.
- [e] in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

17. In view thereof, notwithstanding dismissal of the Civil Revision Application, subject to the defendants filing undertaking in the aforesaid terms within two weeks from today, this order shall remain stayed for the period of 12 weeks from today. It is expressly made clear that in case the undertaking is

not filed in the aforesaid terms within two weeks from today and/or in case applicants commit breach of any of the conditions of the undertaking, the plaintiff will be at liberty to execute decree. Order accordingly.

[R.G. KETKAR, J.]