

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.338 OF 2018

Arun Chhotelal Ghiya @ Marwadi and another ... Applicants
Vs.
Raghuraja Kacheshwar Tulshibaugwale ... Respondent

Ms Gauri Jadhav for Applicants.
Mr. S. N. Chandrachud for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 9, 2018

P.C. :

Heard Ms Jadhav, learned Counsel for the applicants and Mr. Chandrachud, 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.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 27.04.2017 passed by the learned 6th Additional Judge, Small Causes Court, Pune in Civil Suit No.247 of 2015 as also the judgment and decree dated 15.02.2018 passed by the learned District Judge-12, Pune in Civil Appeal No.397 of 2017. 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') and directed the defendants to handover vacant and peaceful possession of two rooms admeasuring 7 khan situate on first floor in the property bearing House No.1141, Budhwar Peth, Pune (for short 'suit premises'), within 3 months from the date of the order.

3. In support of this Application, Ms Jadhav submitted that plaintiff had earlier instituted Civil Suit No.56 of 1998 against the defendants inter alia invoking the grounds of - (i) default in payment of rent, (ii)

non-user, (iii) permanent alterations and additions and (iv) bonafide requirement. The learned trial Judge decreed the Suit only on the ground of default on 26.06.2006. Civil Appeal No.637 of 2006 preferred by the defendants was dismissed. Defendants have preferred C.R.A.No.114 of 2010 and the same is pending in this Court. She submitted that in the earlier round of litigation, the Courts did not decree the Suit on the ground of non-user. Plaintiff has instituted the present Suit on 16.07.2015 once again alleging ground of non-user. She submitted that in the present Suit, plaintiff alleged that since 01.09.2009, defendants are not using the suit premises and that they have not opened the suit premises without reasonable cause for the purpose for which they were let out since 01.01.2015. As in the earlier round of litigation, the ground of non-user is turned down, the Courts below were not justified in decreeing the Suit on that ground.

4. Ms Jadhav further submitted that plaintiff did not establish the ground of non-user. In support of his case, plaintiff examined P.W.1 Chandrashekhar Vishweshwar Tulshibagwale at exhibit-22. He was given Power of Attorney by the plaintiff. She relied upon the decision in the case of ***Janki Vashdeo Bhojwani Vs. IndusInd Bank Limited*, AIR 2005 SC 439** to contend that the evidence of Power of Attorney did not establish the ground of non-user. For the same proposition, she also relied upon the decision in ***Ram Prasad Vs. Hari Narain*, AIR 1998 Rajasthan 185**.

5. Ms Jadhav has taken me through the judgments of the Courts below that discussed the ground of non-user. She relied upon the decision of this Court in ***Laxmibai Ramji Vs. Khimji Palan*, 2001 (Supp.) 2 Bom.C.R. 321**. As the plaintiff had not discharged initial burden to prove non-user and that the defendants have proved the

reasonable cause for non-user, the Courts below were not justified in decreeing the Suit.

6. On the other hand, Mr. Chandrachud supported the impugned orders. He submitted that after appreciating the evidence on record, the Courts below have concurrently held that defendants have admitted non-user of the suit premises and that they have not proved the reasonable cause that prevented them from using the suit premises.

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, plaintiff had earlier instituted Suit being Civil Suit No.56 of 1998 on 03.02.1998. In view of Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Bombay Rent Act'), the relevant period for considering the ground of non-user without reasonable cause is a continuous period of six months immediately preceding the date of the Suit. It is no doubt true that in the earlier round of litigation between the parties, the Suit was decreed only on the ground of default and not on the ground of non-user. In the present case, plaintiff has instituted Suit on 16.07.2015 inter alia invoking the ground under Section 16(1)(n) on the ground that defendants have stopped the user of the suit premises from 01.09.2009, and that from 01.01.2015, defendants have not opened the suit premises. In view thereof, I do not find that the reliance placed by defendants on the earlier round of litigation is of assistance. Basically, plaintiff has to establish non-user six months immediately prior to 16.07.2015. The evidence led in the present Suit has to be considered in that context.

8. A perusal of the written statement as also the discussion of the Courts below clearly shows that defendants admitted non-user. Defendants came with the case that because of the reasonable cause,

they could not use the suit premises. The reliance placed by Ms Jadhav on the decisions to contend that Power of Attorney does not have personal knowledge and therefore, he was not competent to depose loses significance once the defendant admits non-user. The burden is on the defendants to prove the reasonable cause that prevented them from using the suit premises. In that context, if we peruse the trial Court's judgment and in particular from paragraph 25, the learned trial Judge has considered the evidence threadbare and also the decision of this Court in *Achut Pandurang Kulkarni Vs. Sadashiv Ganesh Phulambrikar*, **AIR 1973 Bombay 210**. In paragraph 26, the learned trial Judge dealt with the contention of the defendants that plaintiff had installed gate towards entrance of the suit premises and kept lock on the gate. The plaintiff also kept dubber and other scrap material in the passage of the suit premises and therefore, defendant could not use the suit premises. Defendants contended that this constituted reasonable cause for not using the suit premises.

9. In paragraph 27, the learned trial Judge discussed the evidence adduced by the defendant No.1-Arun Marwadi. In cross-examination, he admitted that he had not lodged report regarding the obstruction made by the plaintiff. He had also not made a written complaint against the landlord plaintiff for fixing the gate. It also came in evidence that there is no electric connection in the suit premises. Defendant No.1 did not mention the date of disconnecting electricity because it occurred repeatedly. He also admitted that he had not made complaint against the landlord or before any Court in that regard for not connecting the electricity in spite of his repeated requests. There was separate electricity meter in the premises which was removed by MSEB. He however did not know about removal of electricity meter before one year. Even thereafter also, he did not make complaint to MSEB. In paragraph 28, the learned trial Judge referred to defendant No.1's cross-

examination that he is running real estate developers and agent business in his personal name but he had not taken Shop Act Licence for that business. He is also running Tool Fabricon Industrial Consultancy and Usha Developer Associates in the suit premises. However, there is no account of these businesses and he used to deposit income from these businesses in his personal account. Though he used to maintain account of business, he has not produced that account on record. Though he is having Shop Act Licence of business, he did not produce those licences on record. He also did not assign any reason for not producing it. Though he claimed to be income tax payee and the income of all the above three businesses is reflected in Income Tax Returns, he did not produce those returns on record. Though he claimed that he had several clients, he did not produce any document showing transaction with his clients.

10. In paragraph 33, the learned trial Judge referred to photographs produced at exhibits-89/1 to 89/18 and also referred to Section 65-B of the Indian Evidence Act, 1872 (for short 'Evidence Act'). It was further observed that if the photographs are taken by digital camera then certificate to that effect is necessary as per Section 65-B of the Evidence Act. If the photographs are taken by common camera then negatives of the photographs have to be filed. Defendants have not done either of these things. The photographs did not indicate that the defendants are carrying on business in the suit premises. After considering the evidence on record, the learned trial Judge held that defendants have not established the reasonable cause that prevented them from using the suit premises. For the reasons recorded in paragraphs 25 to 46, I do not find that the learned trial Judge committed any error in decreeing the Suit on the ground of non-user.

11. In so far as the District Court's judgment is concerned, in

paragraph 28, the learned District Judge noted that the case of non-user of the suit premises preceding six months prior to institution of the Suit is an admitted fact. According to the defendants, there is a reasonable cause for such non-user. The learned District Judge also considered the earlier non-user of the suit premises and observed that it has no concern. The period of six months prior to institution of the Suit is to be taken into consideration. In paragraphs 28 and 31, the learned District Judge referred to evidence of Achal - D.W.2 and photographs produced by the defendants as also Section 65-B of the Evidence Act. In paragraph 32, the learned District Judge referred to decision in **Anwar Vs. Basheer, (2014) 10 SCC 473**. The learned District Judge concurred with the findings of the learned trial Judge that the photographs are not proved by the defendants.

12. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit under Section 16(1)(n) of the Act. The defendants have admitted non-user. They have however failed to establish reasonable cause that prevented them from using the suit premises. In the case of **Dunlop India Limited Vs. A.A. Rahna, (2011) 5 SCC 778**, the Apex Court has observed in paragraph 22 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 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."

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. In the present case, defendants have admitted non-user. They have not exhibited the reasonable cause that prevented them from using the suit premises.

15. Ms Jadhav relied upon the decision of this Court in **Laxmibai Ramji** (*supra*). In that case, the Courts below, after appreciating the evidence on record, have concurrently held that plaintiff failed to establish the ground of non-user of the suit premises. As against this, the defendant had produced voluminous documentary evidence. It is against these concurrent findings, the matter was carried to this Court. In

paragraph 12, the learned Single Judge observed that if the evidence of the parties is weighed, it cannot be said that the plaintiff by merely stating on oath that defendant was not doing any business would entitle them to evict the defendant from the suit premises. The evidence of the defendant as well as the documents placed before the Court would show that the premises were not kept idle and in all probability it was used for business. In my opinion, the said decision is not applicable to the facts of the present case. Hence, no case, is made out for interfering with the impugned orders. Defendants were 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. Defendants were also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, Application fails and the same is dismissed.

(R. G. KETKAR, J.)

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