

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 376 OF 2018

Shri. Nandkumar Vasudev Phalke

And another

...Applicants

Versus

Mr. Gangaram Shivram Kanade

...Respondent

....

Mr. Rajesh S. Jadhav, Advocate for the Applicants.

Mr. Kishor K. Malpathak, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 1st OCTOBER, 2018

P.C.

1. Heard Mr. Rajesh Jadhav, learned counsel for the applicants and Mr. Kishor Malpathak, learned counsel for the respondent, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants, hereinafter referred to as 'defendants No.1 & 2', have challenged the judgment and decree dated 20.3.2018 passed by the learned Principal District Judge, Thane in Regular Civil Appeal No.202/2013. By that order, the learned District Judge allowed the appeal preferred by the respondent, hereinafter referred to as the 'plaintiff', and set aside the judgment and decree dated 6.11.2012 passed by the learned 8th Jt. Civil Judge, Senior

Division at Thane in R.C.S. No.507/2010. The learned District Judge decreed the suit and directed the defendants to hand over vacant and peaceful possession of room No.6, admeasuring 10' x 15', subsequently enhanced by 10' x 18' by enclosing varanda out of the Municipal House No.207 in Kanade Chawl, standing on land bearing C.T.S. No.207, situate at Near Sawant Chawl, Lokmanya Nagar, Pada No.4, Thane (W) – 400606 (for short, 'suit premises').

3. The plaintiff had instituted suit against the defendants invoking the grounds under Sections 15, 16(1)(b), 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act'). By order dated 6.11.2012, the learned trial Judge dismissed the suit. By the impugned order, the learned District Judge decreed the suit only under Sections 16(1)(n) of the Act. Thus, the defendants have challenged the judgment and decree passed by the District Court only on the ground of non-user [Section 16(1)(n)].

4. In support of this application, Mr. Jadhav has invited my attention to the findings recorded by the learned trial Judge in paragraphs-13 and 14. After considering the evidence on record, the learned trial Judge negated the ground of non-user. Insofar as the judgment of the District Court is concerned, the ground of non-user is

considered in paragraphs-21 and 22. Mr. Jadhav submitted that having regard to the fact that the suit premises is in dilapidated condition, the defendants had reasonable cause in not occupying the suit premises. He relied upon the decision of this Court in **Achut Pandurang Kulkarni v. Sadashiv Ganesh Phulambrikar**, AIR 1973 BOMBAY 210 and in particular paragraphs-15 and 16 thereof. He submitted that in that case the tenant contended that on account of his services, he was transferred and he did not produce the transfer orders before the Courts below. The learned Single Judge of this Court observed that though the tenant did not produce the orders of transfer before the trial Court and the Appellate Court, that does not justify the Courts to ignore the requirements of Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 Act. In paragraph-16, the learned Single Judge referred to the decision of Chagla, C.J. in C.R.A. No.1527/1953 decided on 30.7.1954. In paragraph-17, the learned Single Judge referred to the decision in *Brown v. Brash and Ambrose*, (1948) 2 KB 247.

5. Mr. Jadhav submitted that as the suit premises was in a dilapidated condition, it constituted reasonable cause for not-using the suit premises. The learned District Judge was, therefore, not justified in decreeing the suit.

6. On the other hand, Mr. Malpathak supported the impugned order. He submitted that in the first place, the defendants did not plead reasonable cause. Secondly, no material was produced in support of the plea of reasonable cause. Thirdly, in paragraph-9, the plaintiff specifically deposed about the ground of non-user. The defendants, however, did not cross-examine the plaintiff's witness on the ground of non-user. That apart, the suit summons Exhibit-5 was served on the defendants on different address of Airoli as per the bailiff report. The defendants have also not produced the electricity bills etc. to substantiate that they are residing in the suit premises. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the defendants did not make out a case of reasonable cause. A perusal of the written statement and in particular paragraph-10 shows that the defendants have denied the ground of non-user. In other words, the defendants maintained that they are using the suit premises. A perusal of paragraph-21 of the District Court judgment shows that besides denial in the written statement, there is nothing on record to discard the plaintiff's evidence

on the point of non-user. The plaintiff's evidence on the point of non-user was not at all challenged during entire cross-examination. That apart, the defendants also did not enter into witness box for leading positive evidence. In paragraph-22, the learned District Judge also noted that no documents like electricity bill etc. are produced by the defendants. In other words, no positive evidence was adduced by the defendants to establish user of the suit premises. The learned District Judge also noted that the suit summons Exhibit-5 was served on the defendant on different address of Airoli.

8. Mr. Jadhav relied upon the decision of this Court in **Achut Pandurang Kulkarni** (supra). A perusal of paragraph-3 of that decision shows that in the written statement, the defendants specifically contended that he was temporarily transferred to Solapur. In that case, the defendant/tenant had specifically pleaded the reasonable cause that precluded him from using the suit premises. It is in that context, the learned Single Judge has observed that though the tenant did not produce the transfer orders before the Courts below, that cannot justify the Courts to ignore the requirements of Section 13(1)(k). It was further observed that the question as to whether the tenant had ceased to use the premises without reasonable cause, will depend on the facts and the circumstances of each case. In paragraph-16, the learned Single

Judge has referred to the judgment of Chagla, C.J. in C.R.A. No.1527/1953 decided on 30.7.1954. In paragraph-17, the decision of *Brown v. Brash and Ambrose*, (1948) 2 KB 247 was considered.

9. In the case of **Dunlop India Limited Vs. A.A. Rahna (2011) 5 SCC 778**, the Apex Court has considered the ground of non-user under Section 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act, 1965. In paragraph 22, the Apex Court 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.”

10. In paragraph 27, the Apex Court referred to the decision in *Brown V 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 observed thus :

28. In Achut Pandurang Kulkarni v. Sadashiv Ganesh Phulambrikarm, AIR 1973 Bom. 210, 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 30-7-1954 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 fulfillment 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. Applying the tests laid down in the case of **Dunlop India Limited's** case (supra) to the facts of the present case as also in the light of the material on record, I do not find that the learned District Judge has committed any error in passing the impugned order. For the reasons recorded in paragraphs-21 and 22 of the impugned order, no case is made out for invocation of powers under Section 115 of C.P.C. Defendants No.1 & 2 are not in a position to demonstrate that the findings recorded by the Appellate Court are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants No.1 & 2 are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Court. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence Civil Revision Application fails and the same is dismissed with no order as to costs.

(R. G. KETKAR, J.)

Deshmane (PS)