

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10221 OF 2016

Joyce Regina Amor through her P.O.A. Holder
Francis Noel De Souza ... Petitioner
Vs.
Urmila Vinod Motee and others ... Respondents

Mr. S. C. Wakankar for Petitioner.
Mr. Madhav Jamdar for Respondents No.1 to 5.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 12, 2018

P.C. :

Heard Mr. Wakankar, learned Counsel for the petitioner and Mr. Jamdar, learned Counsel for the respondents No.1 to 5 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.1', has challenged the judgment and decree dated 18.02.2014 passed by the learned Judge, Small Causes Court, Pune in Civil Suit No.106 of 2009 as also the judgment and decree dated 05.11.2015 passed by the learned Ad-hoc District Judge-3, Pune in Civil Appeal No.239 of 2014. By these orders, the Courts below decreed the Suit instituted by the respondents No.1 to 5, hereinafter referred to as 'plaintiffs', invoking grounds under Sections 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the defendant to handover possession of shop admeasuring 1800 sq.ft. situate on the ground floor of 2, North Petty Staff Lines, East Street, Pune 411 001 (for short 'suit property'). Though the plaintiffs invoked ground of default as contemplated by Section 15 of the Act, the Courts below declined to pass decree on that ground. Thus, the Courts below have decreed the Suit only on the grounds of reasonable and bonafide requirement [Section 16(1)(g)] and non-user

without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit [Section 16(1)(n) of the Act].

3. In support of this Petition, Mr. Wakankar has raised the following contentions:

a. Plaintiffs have set up requirement of plaintiff No.4 - Ms Namrata Ravindra Bapat. Plaintiff No.4 did not verify and sign the plaint. The plaint was signed by the plaintiff No.3 - Urvashi Vinod Motee. Plaintiff No.4 entered into witness box. As plaintiff No.4, who deposed in the Suit, has not verified and signed the plaint, the Courts below were not justified in decreeing the Suit;

b. Plaintiffs are in possession of 7000 sq.ft. area plus 500 sq.ft. area of godown. The requirement pleaded by the plaintiffs is, therefore, neither reasonable nor bonafide;

c. Plaintiff No.4, during the course of her evidence, denied that defendant No.1 is using the premises continuously for her business. She admitted that she does not have any evidence to show that the business is closed by the defendants since 1986. She denied that she illegally tampered the electricity meters of the defendants, and therefore, defendants made complaint to M.S.E.B. Defendant No.1 entered into witness box and deposed that for three times in the last 5 years, she had gone abroad. The Courts below failed to appreciate that the defendant No.1 has produced positive evidence in the form of Income Tax Returns as also Shop Act Licence. The Courts below were, therefore, not justified in decreeing the Suit on the ground of non-user. He, therefore, submitted that Petition requires consideration.

4. On the other hand, Mr. Jamdar supported the impugned orders. He submitted that plaintiffs had issued notice terminating tenancy on 19.11.2008. The Suit is instituted on 03.03.2009 invoking grounds under

Sections 15, 16(1)(g) and 16(1)(n) of the Act. In so far as the ground of reasonable and bonafide requirement is concerned, he invited my attention to paragraphs 4 and 5 of the plaint where plaintiffs have come with the case that they require premises admeasuring 12,000 sq.ft. for show-room from where plaintiff No.4 can carry on her business of furniture. The plaintiffs have disclosed availability of the premises including availability of godown admeasuring 500 sq.ft. After appreciating the evidence on record, the Courts below have concurrently held that the requirement pleaded by the plaintiff No.4 is reasonable as also bonafide. In so far as the ground of non-user is concerned, defendant No.1 did not adduce any positive evidence in order to substantiate her user in the suit premises. He, therefore, submitted that no case is made out for interfering with the impugned orders.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. One of the issues raised in this Petition was applicability of the Act qua the premises, which are situate in Pune Cantonment area. By order dated 21.09.2018, I have held that Act is applicable in respect of the premises situate in Cantonment area.

6. In so far as the ground of non-user is concerned, the learned trial Judge has considered this ground from paragraphs 16 to 22. In paragraph 16, the learned trial Judge noted that defendants did not adduce any evidence to the effect that they are carrying on business in the suit premises since the year 1986. In paragraph 17, the learned trial Judge noted that the electricity connection of the suit premises was disconnected from time to time for non-payment of electricity bills. In paragraph 20, the learned trial Judge noted that defendant No.1 produced income tax returns at exhibit-96 for the assessment year 2007-08, 2008-09, 2009-10 and 2010-11. The learned trial Judge observed

that defendant No.1 obtained the acknowledgment about the submission of those returns with the Income Tax Department on 30.03.2010. This clearly shows that after institution of the Suit, she had submitted the returns of the aforesaid years and the said fact was admitted by the defendant No.1 during her cross-examination. In paragraph 21, the learned trial Judge referred to Shop Act Licence, exhibit-95, which shows that the licence was not renewed year to year but it was renewed for the year 2006-2008 at one and the same time. The licence was not renewed for the year 2011-12.

7. In so far as the ground of reasonable and bonafide requirement under Section 16(1)(g) of the Act is concerned, the learned trial Judge has considered this ground from paragraphs 23 to 29. In paragraph 23, the learned trial Judge noted premises in possession of the plaintiffs as also surrendering of premises by tenants Khatri and Mazda. The learned trial Judge noted that plaintiffs are in possession of 7000 sq.ft. As against this, the requirement of the plaintiffs is 12000 sq.ft. for carrying on business of furniture from the show-room. After considering the decisions relied by the parties in paragraphs 26 to 28, the learned trial Judge recorded a finding in paragraph 29 that plaintiff No.4 is carrying on business of furniture since last many years and the said fact is proved by her by producing documentary evidence. She also proved that she requires 12000 sq.ft. premises and the premises presently in her possession are not sufficient to satisfy her need. Her need is neither a mere desire nor fancy. In so far as the question of comparative hardship is concerned, the learned trial Judge has considered this ground from paragraphs 30 to 34. In paragraph 32, the learned trial Judge observed that defendant No.1 is not actually carrying on business and she has kept the suit premises locked without any reasonable and probable cause. After considering the evidence on record, in paragraph 34, the learned trial Judge observed that greater hardship will be caused to the plaintiffs

if the eviction decree is not passed.

8. In so far as the District Court is concerned, the ground of non-user is considered from paragraphs 16 to 29. After considering the evidence on record and in particular, the admissions given by the defendant No.1 and her witnesses, the learned District Judge recorded a finding in paragraph 28 that the defendant No.1 was not in use of the suit premises continuously for six months, immediately preceding the date of filing the Suit. Though defendant No.1 claimed that she was using the suit premises and was carrying on her business, she failed to explain as to without electricity, how she conducted the business. In paragraph 29, the learned District Judge observed that plaintiffs have discharged their burden to prove the ground of non-user. In so far as the grounds of reasonable requirement and comparative hardship is concerned, the learned District Judge has considered this from paragraphs 32 to 39. After re-appreciating the evidence on record, in paragraph 36, the learned District Judge observed that plaintiffs came with the specific case that they want to expand their furniture business, and therefore, they are in need of the suit premises, which is on the ground floor. The learned District Judge observed that there is no reason to doubt the requirement of the plaintiffs in view of the evidence adduced by the plaintiff No.4. In paragraph 37, the learned District Judge observed that defendant No.1 stopped doing business in the suit premises and has kept the suit premises unused, and therefore, defendant No.1 will not suffer hardship in case the eviction decree is passed. In paragraph 38, the learned District Judge noted that defendant admitted in her cross-examination that plaintiffs are running furniture business in their premises and the suit premises is adjacent to their premises. In paragraph 46, the learned District Judge noted that in cross-examination, defendant No.1 admitted that after receipt of the notice from the plaintiffs, she had not taken search of the alternate premises.

9. In the case of ***Phiroze Bamanji Desai Vs. Chandrakant N. Patel***, (1974) 1 SCC 661, the Apex Court observed that the word “requires” in Section 13(1)(g) means that there must be an element of need before a landlord can be said to “require” premises for his own use and occupation. It is not enough that the landlord should merely desire to use and occupy the premises. What is necessary is that he should need them for his own use and occupation. The finding that the landlord reasonably and bona fide required the suit premises for his own use and occupation is clearly one of fact. In paragraph 12, the Division Bench of this Court in ***Nathulal Gangabaks Khandelwal Vs. Nandubai***, AIR 1984 Bombay 340 observed that the question whether the landlord so requires or needs the premises and whether such need or requirement is bona fide or not would be a question of fact which of course the landlord would have to establish for success in the case.

10. In so far as the ground of non-user is concerned. 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.”

11. 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* (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."

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. Thus, applying the tests laid down by the Apex Court to facts of the present case, I do not find that the Courts below committed any error in decreeing the Suit. Defendant No.1 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 No.1 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 Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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