

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 118 OF 2019

Rajendra Muralidhar Kadam
and others

...Applicants

Versus

Prakash Vitthal Rao

...Respondent

....

Mr. Chaitanya Nikte a/w. Sneha Bhange & Tejas Kamble, Advocate for the Applicants.

Mr.Akshay R. Pai a/w. Mr.Ranjit D. Shinde a/w., Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 18th JUNE, 2019

P.C.

1. Heard Mr.Chaitanya Nikte, learned counsel for the applicants and Mr.Akshay Pai, 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.'), the applicants, hereinafter referred to as the 'defendants', have challenged the judgment and decree dated 28.2.2013 passed by the learned 5th Additional Judge, Small Causes Court at Pune in Civil Suit No.161/2011 as also the judgment and decree dated 23.10.2018 passed by the learned District Judge-18, Pune in Regular Civil Appeal No.33/2015. The learned trial Judge decreed

the suit under Sections 15, 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short, 'Act') and directed the defendants to hand over possession of two rooms admeasuring 225 sq. ft. along with passage located towards front portion i.e. Western side of ground floor of CTS No.149, as more particularly described in paragraph-1 of the plaint. Aggrieved by this decision, the defendants preferred appeal. By order dated 23.10.2018, the District Court decreed the suit under Sections 15 and 16(1)(g) of the Act and declined to pass decree under Section 16(1)(n) of the Act. It is against these orders, the defendants have instituted present C.R.A. It appears that during pendency of the appeal, defendant No.2 Dilip Kadam expired and his L.Rs. were brought on record.

3. During the course of hearing, Mr. Nikte has tendered draft amendment seeking addition of grounds. As the C.R.A. is pending for admission leave to amend is granted. Amendment shall be carried out forthwith. The learned Counsel were also asked to address this Court as to whether the respondent can support eviction decree and attack the findings rendered by the District Court under Section 16(1)(n) without filing C.R.A./cross objection in the light of the decision of Apex Court in **Banarsi Vs. Ram Phal, (2003) 9 SCC 606.**

4. In support of this application, Mr. Nikte submitted that the Courts below were not justified in passing the decree under Section 15

of the Act. He invited my attention to paragraph-6 of the plaint. In paragraph-6, the plaintiff asserted that the defendants have not paid the arrears of rent from 1.4.2007 to 31.3.2011. In paragraph-7, the plaintiff asserted that despite demanding rent and permitted increases, the defendants failed and neglected to pay the same and, therefore, are defaulters. The plaintiff has, however, not given details as to when the demand notice was sent to the defendants and as to whether the demand notice was duly served on the defendants.

5. Mr. Nikte invited my attention to paragraph-5 of the written statement, where the defendants dealt with the contentions raised in paragraph-6 of the plaint. In paragraph-5 of the written statement, the defendants asserted that immediately after receipt of the notice, as per the demand raised in the notice, the defendants have remitted Rs.1296/- by money order in May, 2011. The plaintiff has, however, refused to accept said money order. Thus it amounts to valid tender and in view of Section 15(2) of the Act the plaintiff could not have instituted suit invoking the ground of default under Section 15 of the Act. He submitted that without considering this aspect, the Courts below have proceeded to decree the suit by resorting to Sections 15(1) & 15(3) of the Act. He relied upon the Full Bench decision of this Court in **Babulal Fakirchand Agrawal Vs. Suresh Kedarnath Malpani and others,**

2017(4) Mh.L.J. 406 and in particular paragraphs-16 & 25 thereof.

6. Insofar as the decree under Section 16(1)(g) of the Act is concerned, Mr. Nikte invited my attention to paragraphs-9 and 10 of the plaint. In paragraph-9, the plaintiff contended that the suit premises is a mansion (Wada) situate in CTS No.149. In this mansion there are eight rooms. Two rooms on the ground floor are in possession of the defendants. Two rooms on the first floor are in possession of Geeta Diliprao Kadam, sister-in-law of the plaintiff. In these two rooms, the family consisting of five persons is residing. The children are taking education in college and they require independent and separate rooms for study. Two rooms on the first floor are in possession of Jeejabai Malharrao Yadav (since deceased) and remaining two rooms on the first floor are in possession of Satish Vishnu Rao. Satish Vishnu Rao is cousin of the plaintiff. In paragraph-10, the plaintiff contended that he is residing in premises situate in CTS No.809, Budhwar Peth. Said premises is consisting of three rooms admeasuring 510 sq. ft. The plaintiff is residing along with his wife, married son Harshal, his wife Gauri and grand-son Aditya. In all five persons are residing in Budhwar Peth premises. Aditya is taking education and he requires separate and independent room for the purpose of studies.

7. Mr.Nikte also invited my attention to the plaintiff's evidence

and in particular to his cross-examination. In cross-examination, the plaintiff admitted that there are eight rooms in CTS No.149, Shivaji Nagar, Pune. Out of these eight rooms, two rooms are in his possession. Two rooms are in possession of his sister-in-law Geeta. He submitted that while filing the suit the plaintiff suppressed availability of two rooms in CTS No.149. The requirement pleaded by the plaintiff is, therefore, neither reasonable nor bonafide, but, in fact is malafide. In order to get over this admission, the plaintiff cross-examined defendant's witness DW-2 Suresh and DW-3 Tanaji and elicited admission to the effect that not a single room in CTS No.149 is in possession of the plaintiff. The purpose of examining Suresh and Tanaji was to substantiate the case of the defendants that for a temporary period he was occupying the premises situate in CTS No.250-A, Shivaji Nagar, Pune. He submitted that the so called admissions given by the witnesses Suresh and Tanaji will not come to the rescue of the plaintiff in view of his categoric admission in the cross-examination to the effect that two rooms are in his possession. He submitted that the Courts below, however, absolutely did not deal with the admissions given by the plaintiff during the course of cross-examination. He, therefore, submitted that the Courts below were not justified in passing the decree under Section 16(1)(g) of the Act.

8. Mr. Nikte relied upon the decision in **Narendra Gulabrao Zade Vs. Shivcharan Ghashiram Gupta, since deceased, through L.Rs. Smt. Radhabai Shivcharan Gupta and another, 2011(1) Mh.L.J. 839** and in particular paragraph-10 thereof to contend that though the landlord is a best judge of his need, he must fairly disclose all options available to him. In the present case, as the plaintiff has suppressed the availability of two rooms in CTS No.149, his need cannot be termed as reasonable and bonafide.

9. Insofar as the ground of eviction under Section 16(1)(n) of the Act is concerned, he submitted that the Appellate Court declined to pass the decree on that ground. He invited my attention to the findings recorded by the learned District Judge in paragraphs-12 and 13 of the order. He has also submitted that during pendency of the appeal the defendants filed application dated 21.3.2016 seeking permission to file documents. List dated 30.11.2015 was annexed with this application. In the application it was contended that the defendants want to file some important documents which can help the Appellate Court to decide present matter. He has also invited my attention to the electricity bills placed on record of the Appellate Court to contend that the defendants have adduced positive evidence showing user of the suit premises and, therefore, the Appellate Court rightly declined to pass decree under

Section 16(1)(n) of the Act. He submitted that for all these reasons the application requires consideration.

10. On the other hand, Mr.Pai supported the impugned order. He submitted that in the plaint the plaintiff specifically gave details about eight rooms in CTS No.149 and the persons in possession of these rooms. Satish Vishnu Rao is cousin of the plaintiff and he is in possession of two rooms. It is in that context the so called admission given in the cross-examination of the plaintiff has to be appreciated. As there is no partition between the plaintiff's father and Satish's father, the plaintiff is co-owner and as such said admission is to be viewed. It cannot be said that the requirement pleaded by the plaintiff is neither reasonable nor bonafide as he suppressed the availability of two rooms in CTS No.149. Having regard to the need pleaded in paragraphs-9 and 10 of the plaint, the Courts below were justified in passing eviction decree. He, therefore, submitted that no case is made out for interfering with the impugned order.

11. In so far as the learned District Judge declining to pass the decree under Section 16(1)(n) of the Act is concerned, he relied upon **Banarsi's** case (supra) to contend that even in the absence of cross-objection, the plaintiff can support the decree to the extent to which it is already in his favour by laying challenge to a finding

recorded in the impugned judgment against him. He submitted that the plaintiff has discharged the burden by adducing tangible evidence that the defendants have shifted to alternate premises. Once the plaintiff has discharged the burden, it was for the defendants to lead positive evidence showing user of the suit premises. He has taken me through the evidence of the defendants where he has not deposed about the user of the suit premises. He further submitted that the plaintiff had examined PW-2 Surekha Chagan Divte, employee in the Nayab Tahsildar's office who produced voter's list of 2012 showing the names of the defendants as against house No.250-A.

12. The plaintiff also examined PW-3 Vilas Bapu Landge, working in the Food Distribution Office, who produced ration card showing the residence of the defendant as '250-A'. PWs-2 & 3 were not cross-examined by the defendants.

13. Mr. Pai also invited my attention to the cross-examination of DW-2 Suresh and DW-3 Tanaji who admitted in cross-examination that no a single room in C.T.S. No.149 is in possession of the plaintiff. He submitted that the learned District Judge should have passed the decree even under Section 16(1)(n) of the Act.

14. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the

material on record. As mentioned earlier, the Courts below have decreed the suit under Sections 15 and 16(1)(g) of the Act. Though the trial Court passed the decree under Section 16(1)(n) of the Act, the learned District Judge declined to pass decree under Section 16(1)(n) of the Act.

15. Insofar as the eviction decree under Section 15 of the Act is concerned, in **Babulal's** case (supra), the question that fell for consideration before the Full Bench was to the following effect :

“If the tenant complies the notice issued by the landlord demanding arrears of rent and pays the entire amount as demanded within the time stipulated under section 15(2) of the Maharashtra Rent Control Act, then whether the landlord can still file a suit for eviction on the ground of arrears of rent and whether the eviction can be ordered by invoking provisions of section 15(3) of the Maharashtra Rent Control Act ?”

16. The Full Bench considered the decision in **Chandiram Dariyanumal Ahuja Vs. Akola Zilla Shram Wahtuk Sahakari Sanstha, Akola, 2013(1) Mh.L.J. 28** in paragraphs-2, 5, 6, 8, 9 and 17. In paragraph-24, the Full Bench held that the view expressed in **Chandiram Ahuja's** case (supra) lays down correct proposition.. In paragraph-25, it was observed thus :

“25. To infer that once the tenant pays the amount recorded in the notice or tenders the same, the landlord has no right to institute a suit for

recovery of possession for non-payment of those arrears or continue with such proceeding for eviction and no decree for possession can be asked for, is not within contemplation of provisions of section 15 of the Act. The provision does not interfere with the right of the landlord to initiate proceeding for eviction, however, sub-section (2) of section 15 prescribes precondition for presentation of suit, that is to say that no suit can be initiated without issuing a notice within contemplation of said sub-section (2) of section 15 and tenant's entitlement to claim relief against forfeiture shall be subject to fulfillment of conditions stipulated under sub-section (1) and (3) of section 15 of the Rent Act. ”

17. A perusal of paragraph-25, extracted hereinabove, shows that landlord has no right to institute a suit for recovery of possession for non-payment of arrears or continue with such proceeding for eviction once the tenant pays the amount recorded in the notice or tenders the same.

18. In the present case it has come on record that immediately after receipt of the demand notice, the defendants remitted an amount of Rs.1296/- by money order in the month of May, 2011. However, said money order was refused by the plaintiff. In view thereof, the Courts below were not justified in resorting to Section 15(3) of the Act without considering the effect of Section 15(2) of the Act. The decree passed under Section 15(2) of the Act, therefore, cannot be maintained.

19. Insofar as the decree under Section 16(1)(g) of the Act is

concerned, in paragraphs-9 and 10 the plaintiffs have set up twin requirement that is to say the requirement of his sister-in-law Geeta Kadam whose family consists of five members. Her children are college going and require independent and separate rooms for study. In paragraph-10, the plaintiff has set up the requirement of grand-son Aditya who is a school going child requiring independent and separate room for study. Thus, the need pleaded by the plaintiff cannot be termed as unreasonable or malafide.

20. Mr. Nikte submitted that the Courts below did not refer to the admission given by the plaintiff during his cross-examination. In cross-examination the plaintiff admitted that he is in possession of two rooms in CTS No.149. I do not find any merit in this submission for more than one reason. In the first place, as mentioned earlier, in paragraph-9 of the plaint the plaintiff specifically asserted that there are eight rooms in the mansion (wada) situate in CTS No.149. Two rooms on the ground floor are in possession of the defendants. Two rooms on the first floor are in possession of his sister-in-law Geeta Kadam. Two rooms are in possession of other tenant Jijabai Yadav and remaining two rooms are in possession of Satish Vishnu Rao, the cousin of the plaintiff. It is in this context the admission given by the plaintiff in cross-examination has to be appreciated. The partition is not effected between the plaintiffs

father and Satish's father. The plaintiff is co-owner and as such said admission is to be viewed. The assertions in paragraph-9 are required to be considered while appreciating the submission of Mr. Nikte about the admission of the plaintiff. Understood thus, I do not find that the plaintiff's admission is fatal for passing eviction decree under Section 16(1)(g) of the Act.

21. Secondly, even assuming for the sake of argument that Satish Vishnu Rao is not in possession of two rooms and these two rooms are in possession of the plaintiff, even in that case in the light of the twin requirement pleaded by the plaintiff in paragraphs-9 and 10, it cannot be said that these two rooms will meet the requirement pleaded by the plaintiff. Thus the need pleaded by the plaintiff is both reasonable as well as bonafide.

22. Thirdly, the witnesses examined by the defendants, namely, DW-2 Satish and DW-3 Tanaji admitted in cross examination that not a single room from CTS No.149 is in possession of the plaintiff.

23. Insofar as the question of comparative hardship is concerned, the Courts below have concurrently found that greater hardship will be caused to the plaintiff in case the eviction decree is not passed. After service of the suit summons the defendant did not make any attempt for searching alternate accommodation. In view thereof, I

do not find that the Courts below committed any error in passing the eviction decree under Section 16(1)(g) of the Act.

24. Insofar as the eviction decree under Section 16(1)(n) of the Act is concerned, the learned trial Judge decreed the suit. As against this, the learned District Judge declined to pass eviction decree on that ground. In paragraph-13, the learned District Judge has observed that defendant No.1 was residing temporarily in CTS No.250-A till the year 2000. The learned District Judge thereafter observed that he may not be staying there in the year, 2011 when the suit was filed. In the absence of convincing evidence that the defendants were not using the suit premises continuously for the period of six months and more immediately preceding filing of the suit, it is difficult to believe the allegations of non user. In my opinion, the approach of the learned District Judge was totally perverse. In the case of **Dunlop India Limited Vs. A.A. Rahna (2011) 5 Supreme Court Cases 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-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.”

25. In the present case, the plaintiff has adduced tangible evidence and the said fact was also accepted by the learned District Judge by observing in paragraph-13 that defendant No.1 was residing from 1995 till 2000 in a rented premises bearing CTS No.250-A. Once the plaintiff has adduced the evidence, it was for the defendant to establish user of the suit premises. A perusal of the evidence of the defendant shows that he did not even depose about the user of the suit premises. No evidence was adduced in the trial Court. Before the Appellate Court an application was made on the ground that the defendants want to file important documents which will help the Court to decide the case. Application dated 26.3.2016 can hardly be said to be one under Order XLI Rule 27 of C.P.C. Assuming that it falls under Order XLI Rule 27(b), no case is made out for production of additional evidence.

26. In the case of **Union of India v. Ibrahim Uddin and another, (2012) 8 SCC 148**, the Apex Court has exhaustively dealt with the provisions of Order XLI Rule 27 of C.P.C.. Thus, one has to conclude that the defendants did not adduce any positive evidence showing user of the suit premises immediately preceding six months from filing of the

suit.

27. In paragraph-27 of **Dunlop's** case (supra), 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.”

(emphasis supplied)

28. 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.

29. Applying the principles laid down by the Apex Court in **Dunlop's** case (supra) to the facts of the present, it has to be concluded that the learned District Judge was not justified in declining passing decree under Section 16(1)(n) of the Act.

30. In the case of **Banarsi** (supra) the Apex Court considered the amendment to C.P.C. of the year 1996 and observed in paragraphs- 10 and 11 thus :

“10. The CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 Sub-rule (1) a party in whose

favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of Sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly stated. A respondent may defined himself without filing any cross objection to the extent to which decree is in his favour, however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
 - (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;
 - (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.
11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying

challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of Sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by Sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent. ”

31. It was observed that in the following cases it will be necessary to file appeal or cross-objections :

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
- (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;
- (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

32. In cases covered by clauses (ii) and (iii), it is not necessary to file cross-objections. The respondent can support the decree even

without filing the cross-objections.

33. In view thereof, in my opinion, the plaintiff need not file cross petition / objections attacking the findings recorded by the learned District Judge under Section 16(1)(n) of the Act and can support the decree of eviction. In view thereof, the suit of the plaintiff deserves to be decreed under Sections 16(1)(g) and 16(1)(n) of the Act.

34. The defendants are 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. The defendants are 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 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. No case is made out 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. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)