

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No.7087 of 2019
[Converted from Civil Revision Application NO. 287 OF 2017]

Padmakar Bhagwant Kulkarni (since deceased)
through LRs.

...Petitioners

Versus

Smt Suhasini Mukund Bhuskute
And another

...Respondents

....

Mr. Sanjay Kshirsagar, Advocate for the Petitioners (Applicants).
Mr. Shailendra S. Kanetkar a/w. Raghvendra B. Kulkarni, Advocate for
the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 17th JUNE, 2019

P.C.

1. Heard Mr. Sanjay Kshirsagar, learned counsel for the applicants and Mr. Shailendra Kanetkar, learned counsel for the respondents, at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the applicants, who are the L.Rs. of original defendant, since deceased, have challenged the judgment and decree dated 16.12.2016 passed by the learned District Judge-18, Pune in Civil Appeal No.643 of 2009. By that order, the learned District Judge set aside the order dated 30.9.2009 passed by the learned trial Judge dismissing the suit and decreed the suit. The learned District Judge

directed the defendants to deliver possession of premises admeasuring 100 sq.ft. situate at C.T.S.No.1283, lane No.7, Subhash Nagar, Shukrawar Peth, Pune (for short 'suit premises').

3. In view of Section 7 of C.P.C., the provisions of Section 115 are not applicable to the proceedings arising from the Small Causes Court constituted under the Provincial Small Cause Courts Act, 1887. Hence, leave to convert C.R.A. into Writ Petition is granted. Amendment shall be carried out within one week from today. In pursuance thereof, the office has converted the C.R.A. into Writ Petition.

4. In support of this Petition, Mr. Kshirsagar strenuously contended that the learned District Judge decreed the suit on two grounds, namely, that the defendant - tenant had shifted to bungalow situate in 786, Sadashiv Peth, Pune and that he is not residing in the suit premises for a continuous period of six months immediately preceding the date of filing of the suit. The learned District Judge failed to appreciate that the suit was instituted on 10.12.2007 under Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). It is an admitted position that on 14.09.2007, defendant, since deceased, had undergone heart surgery and this constituted sufficient cause for not residing in the suit premises. The other ground is on the basis of the complaint made by the plaintiffs to police station on 03.07.2008 to the effect that relatives of the deceased defendant broke open the lock of

the suit premises after filing of the Suit.

5. Mr. Kshirsagar has invited my attention to paragraph-8 of examination-in-chief of deceased defendant where he deposed that the plaintiffs mischievously ensured that he does not get electricity bills. As the defendant, since deceased, did not get the electricity bills raised by the MSEB from time to time, he could not pay the electricity charges. Because of the activities of the plaintiff, the MSEB removed the meter and disconnected the electricity supply. The defendant, since deceased, was constrained to take electricity connection from the neighbouring tenant Shri Mhaisurkar.

6. Mr. Kshirsagar submitted that the learned trial Judge after considering the evidence on record dismissed the suit. As against this, the learned District Judge did not accept the case made out by the defendant, since deceased, and held that the plaintiffs have established the ground of non-user as contemplated by Section 16(1)(n) of the Act. He has taken me through the pleadings as also oral evidence adduced by the parties and the impugned order.

7. On the other hand, Mr. Kanetkar supported the impugned order. He invited my attention to the cross-examination of the defendant Padmakar Bhagwant Kulkarni, since deceased. During the course of cross-examination, the witness admitted that his son Bipin married on 3.6.1991. His other son Sachin also married and to that

effect invitation card was produced at Exhibit-24. The witness admitted the contents of the invitation cards of marriages of Bipin and Sachin. He submitted that the address of the defendant, since deceased, is '786, Sadashiv Peth' as against the suit premises is situate in Shukrawar Peth. The witness further admitted that he does not have ration card of the suit premises. He was also having telephone bearing No. 4434004. Presently the telephone is not there in the suit premises. The defendant further admitted that he did not make any complaint to the electricity board for not getting the bills. He did not pay the electricity bills from 27.3.2004 and as the outstanding bill was Rs.5940.20, the Board disconnected the electricity supply. He submitted that after appreciating the evidence on record, the Appellate Court concluded that for more than 10 years the defendant/tenant is not residing in the suit premises. He submitted that in the written statement the defendant did not plead specific case that prevented him from occupying the suit premises. He, therefore, submitted that no case is made out for interfering with the impugned order.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. From the material on record, it is evident that the suit is instituted on 10.12.2007. Mr. Kshirsagar submitted that on 14.9.2007, the defendant, since deceased, had undergone heart surgery.

A perusal of the written statement filed by the defendant is totally silent as regards this aspect. The other sufficient reasonable cause made out by the defendant was that there is no wash-room and toilet facility attached to the suit premises. The learned District Judge has considered these aspects in paragraphs-20 and 21 of the impugned order. In paragraph-20, the learned District Judge observed that there is only one wash-room and toilet, which is towards the backside of the suit premises. In paragraph-23, the learned District Judge noted that the written statement filed by the deceased defendant is silent on this aspect. In paragraph-2 of the written statement, the defendant contended that the description of the suit premises is not correct and the plaintiffs deliberately did not mention in the description that one wash-room and toilet is situate towards the eastern side and the plaintiffs had closed the wash-room and toilet. In paragraph-4, the defendant pleaded that he is 74 years old and he had been to his son's house for medical treatment and the plaintiffs took undue advantage of this fact. The learned District Judge observed that there are no pleadings about a heart surgery in September, 2007 and because of that the deceased defendant shifted his residence to his son's house. For the reasons recorded in paragraphs-20 and 21 of the impugned order, I do not find that the learned District Judge has committed any error in recording these findings.

9. It has also come on record that the defendant had not paid the electricity charges after 27.3.2004. Eventually the electricity connection was disconnected. After considering the admissions given by the defendant's witness during the course of cross-examination, I do not find that the learned District Judge committed any error in decreeing the suit under Section 16(1)(n) of the Act. It is also material to note that the summons of the suit was served on the address of 'Sadashiv Peth, Pune' and not at the address of the suit premises.

10. In the case of **Dunlop India Limited Vs. A.A. Rahna (2011) 5 Supreme Court Cases 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.”

11. 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."**

(emphasis supplied)

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 principles laid down by the Apex Court in **Dunlop's** case (supra) to the facts of the present, I do not find that the learned District Judge has committed any error in decreeing the suit. The defendants are not in a position to demonstrate that the findings recorded by the District Court 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 District Court. No case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Writ Petition fails and the same is dismissed with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)