

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.368 OF 2018

Ramesh Ravindra Khatu and another ... Applicants
Vs.
Manoj Shankar Kolwankar ... Respondent

Mr. Mahendra M. Agavekar for Applicants.
Mr. Shreepad Murthy a/w. Mr. Abhishek Patil and Ms Rima Oke for
Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 7, 2019

P.C. :

Heard Mr. Agavekar, learned Counsel for the applicants and
Mr. Murthy, 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 29.12.2009 passed by the learned 2nd Joint Civil Judge, Junior Division, Chiplun in Regular Civil Suit No.122 of 2000 as also the judgment and decree dated 08.02.2018 passed by the learned District Judge-2, Khed, Taluka Khed, District Ratnagiri in Civil Appeal No.7 of 2010. By these orders, the Courts below decreed the Suit instituted by the respondent, hereinafter referred to as 'plaintiff', and directed the defendants to handover vacant and peaceful possession of premises admeasuring 43.9 sq.mtrs. in Municipal House No.1869 situate at City Survey No.3957 in Pan Galli, Chiplun Market, Chiplun, District Ratnagiri (for short 'suit premises'). The Courts below decreed the Suit instituted by the respondent under Section 16(1)(g) and 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. In support of this Application, Mr. Agavekar strenuously

contended that the plaintiff claimed possession of the suit premises inter alia on the ground that he is working in a fruit stall and his income is not sufficient to maintain his family. However, during the course of evidence, he produced documents to substantiate requirement of his wife. The Courts below were, therefore, not justified, in accepting the ground of bonafide requirement.

4. In so far as the ground of non-user under Section 16(1)(n) of the Act is concerned, he submitted that plaintiff did not discharge his burden so as to require defendants to lead / adduce positive evidence showing user of the suit premises. In any case, he submitted that the suit premises consists of ground plus first floor and partial decree of eviction will meet the requirement of the plaintiff. He, therefore, submitted that application requires consideration.

5. On the other hand Mr. Murthy supported the impugned orders. He submitted that in the plaint, plaintiff has specifically pleaded requirement of his wife. The plaintiff has adduced evidence substantiating requirement of his wife apart from the fact that plaintiff is working in a fruit stall and the income augmented therefrom is not sufficient to maintain his family. He submitted that the Courts below, after appreciating the evidence on record, have concurrently held that the plaintiff has established that the requirement is both, reasonable as also bonafide.

6. In so far as the ground of non-user is concerned, he submitted that the Courts below held that the defendants did not adduce any positive evidence establishing user of the suit premises. He, therefore, submitted that no case is made out for interfering with the impugned orders.

7. I have considered the rival submissions advanced by the learned

Counsel appearing for the parties. I have also perused the material on record. A perusal of the plaint, and in particular paragraph 6 thereof, shows that plaintiff pleaded that his wife is educated unemployed. She has completed typing and beauty parlour course. She requires the suit premises for running Typing institute and carrying on beauty parlour business. Plaintiff's wife was earlier carrying on the business of selling sports articles, sweets and farsan in the rented premises. Because of the harassment caused by the landlord of that premises, she had to surrender the rented premises. Plaintiff also contended that along with his father, he is working in a fruit stall near S.T. Stand, Chiplun. Income augmented therefrom is insufficient to meet requirement of his family, which consists of 7 members. Thus, the plaintiff has also claimed possession of the suit premises on the ground of his requirement as also his wife's requirement.

8. The learned trial Judge has considered this ground in paragraph 10. After considering the evidence on record, the learned trial Judge held that plaintiff has produced evidence in the form of certificates of his wife showing that she has completed typing course in the year 1987 and shorthand course in November 1990. Plaintiff's wife also obtained training under the Pantapradhan Rojgar Yojana in the year 1995. She also completed course of drawing in the year 1979. Plaintiff also examined his wife as P.W.2. She also supported the plaintiff's case.

9. As far as the ground under Section 16(1)(g) of the Act is concerned, the learned District Judge has considered the ground of bonafide requirement in paragraphs 18 to 27. After considering the evidence on record, the learned District Judge concurred with the findings recorded by the learned trial Judge. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit under Section 16(1) (g) of the Act.

10. In so far as the ground of non-user is concerned, the learned trial Judge has considered this ground in paragraph 11. The learned trial Judge observed that defendant No.1 is auto rickshaw driver and defendant No.2 is employed. The children of the defendants are not dependent and are earning separately. Defendants did not produce any positive evidence to show that they are carrying on business.

11. In so far as the District Court is concerned, the aspect of non-user is dealt with in paragraphs 28 and 29. In paragraph 29, the learned District Judge observed that defendants did not produce any material to show that he had paid profession tax / sales tax. In short, the learned District Judge observed that defendants did not produce any positive evidence showing user of the suit premises.

12. In the case of 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.

15. Mr. Agavekar submitted that the suit premises consists of ground plus first floor and even if partial decree is passed, no prejudice will be caused to the plaintiff. It is not possible to accept this submission. The said contention was not raised in the Courts below. In the case of ***Chetan Anand Shetty Vs. Indrajeet Chandrasen Shirole, 2013 (3) Mh.L.J. 310***, the learned Single Judge has observed thus,

“13. For such plea being raised in revisional jurisdiction and which jurisdiction is limited, there has to be some material before the Courts below. If the materials before the Courts below rest only on the availability of other accommodation and premises to the landlord for his requirement, either of residential or non residential nature, then, the parties like the Applicants cannot claim as of right that they be permitted to raise a plea of the present nature and for the first time in the

revisional jurisdiction.

Concededly, there is nothing in the judgments of the Courts below or in the oral and documentary evidence, which would enable me to hold that the Applicants did request the Trial Court or the lower Appellate Court to consider passing of a partial Decree or in relation to a part of the premises. Therefore, this is a plea raised for the first time and it being a mixed question, to my mind, it would not be proper to entertain it. Assuming that Mr. Jahagirdar is right in contending that there is a mandate on the Court flowing from the legal provision, yet that mandate is required to be fulfilled by the Courts below provided the parties place before it necessary materials. The Supreme Court judgment in *Badrinarayan* (supra) does not dispense with such requirement, but rather reaffirms the position that the parties cannot, in the absence of all such materials, urge such a plea for the first time in a higher court. Even if there is a mandate which is required to be fulfilled as urged by Mr. Jahagirdar and that mandate is to record satisfaction that no hardship would be caused either to the tenant or to the landlord, but if the Court is satisfied that having regard to all the circumstances of the case including the question as to whether other reasonable accommodation is available for the landlord or the tenant, the greater hardship would be caused by passing the Decree than refusing it, and in relation to that mandate the Applicants have miserably failed to prove their case, then, they cannot be heard in the facts and circumstances of this case to urge that the statutory mandate is not discharged. That statutory mandate requires two things, the Court must be satisfied that no hardship would be caused to either of the parties. That hardship would not be caused by passing a Decree in respect of a part of the premises. If on the earlier point the Court is satisfied that the need of the landlord is proved and in relation to the entire premises and that need could not be satisfied because other accommodation available at his disposal is not reasonable, then, the parties like the Applicants cannot be heard to say that there is non fulfillment of the later statutory mandate, particularly when they fail to place any material in the first instance or the first available opportunity. If such pleas are raised in the highest court for the first time, they cannot be entertained without any material. That means there is no finality to proceedings. This is really the ratio of the above decisions. To my mind, the argument which has been raised before me is as a last resort to avoid consequences of the Decree. That hotel business has been settled by the Applicants in 1976 as claimed by them and has been continuing for decades from the suit premises, is no

ground to hold that non fulfillment of the statutory mandate as urged by Mr.Jahagirdar vitiates the decree in this case. Once concurrent findings on the point of both reasonable and bonafide requirement and comparative hardship have been rightly rendered in favour of the Respondents, then, it is futile to urge that a partial decree should be passed. That would mean that this Court finds fault with the satisfaction that has been reached with regard to requirement of the premises by the Respondents. Once that satisfaction in this case has not been found to be vitiated by any error of jurisdiction and particularly the Courts below have not acted illegally nor they committed material irregularity, then, all the more the concurrent decrees cannot be set aside in revisional jurisdiction.”

16. Aggrieved by this decision, the matter was carried to the Apex Court and the S.L.P. was summarily dismissed. In view thereof, the contention raised by Mr. Agavekar in this Court for the first time for passing partial eviction decree cannot be acceded to. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit on the grounds under Sections 16(1)(g) and 16(1)(n) of the Act.

17. The 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. The 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. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Section 115 of the C.P.C. Hence, Application fails and the same is dismissed.

(R. G. KETKAR, J.)