

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.309 OF 2019

Nishad Anil Telang	]	Applicant
Vs.		
Ajita Jayram Patki and another.	]	Respondent

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Mr. Saket Mone a/w Ms. Nidhi Singh i/b Vidhii Partners, Advocate for the Applicant.

Ms. Vasudha Narvekar, Advocate for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 15th JULY, 2019.

P.C.

Heard Mr. Mone, learned Counsel for the applicant and Ms. Narvekar, 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 applicant, hereinafter referred to as 'defendant' has challenged the judgment and decree dated 14th August, 2015 passed by the learned trial Judge in R.A.E Suit No.1410 of 2013 as also judgment and decree dated 18th February, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai in 2a Appeal No.398 of 2015. By these orders, the Courts below decreed the suit instituted by the respondents, hereinafter referred to as "plaintiffs" and directed the defendant to hand over vacant and peaceful possession of Block No.1 admeasuring 420 square feet, Ground Floor of Prasana Building, Plot No.340, Sitaladevi Temple Road, Mahim, Mumbai 400 016 (for short 'suit premises'). The Courts below decreed

the suit on the ground of non user as contemplated by section 16 (1) (n) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. The plaintiffs instituted suit on 30th August, 2013, *inter alia*, contending that the defendant has left the suit premises and not using the same from December, 2011. The defendant is not using the suit premises for the purpose for which it was let out to him. The defendant has kept the suit premises under the lock and keys without reasonable cause for a period of six months immediately preceding the date of institution of the suit.

4. The defendant filed written statement dated 6th May, 2014. In paragraph 3, the defendant denied that he had left the suit premises and is not using the same from December, 2011. He denied that he is not using the suit premises for the purpose for which it was let out to him as alleged or otherwise. He denied that he had deliberately kept light on in the suit premises. He denied that on account of non user and misuse of electricity, there is waste to the suit premises as alleged or otherwise. In paragraph 4, the defendant contended he is Doctor by profession and was employed with Reliance Industries Limited as a Medical Officer since February, 2012. During the course of employment with Reliance Industries Ltd, the defendant was posted at Reliance Corporate Park at Ghansoli. As a Medical Officer, the defendant was required to attend the Clinic at Reliance Corporate Park in shifts. On certain occasions, the defendant was required to be at the Clinic till midnight and was also required to visit the Clinic at odd hours to attend the emergencies. Considering the odd hours of working of the defendant at Reliance Industries Ltd, the defendant was compelled to temporarily reside at Thane as commuting from Mahim to Ghansoli. The premises at Thane where the defendant was temporarily residing are owned by his father. The defendant requested his father to allow him to temporarily occupy the said

premises at Thane and his father agreed to the same. Defendant's stay at Thane was a temporary arrangement made by the defendant out of compulsion.

5. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence. After considering the evidence on record, the Courts below decreed the suit. It is against this order, the defendant has instituted the present C.R.A.

6. In support of this Application, Mr. Mone has invited my attention to;

- [1] paragraph 6 of the plaint,
- [2] paragraphs 3 and 4 of the written statement;
- [3] paragraph 4 of the Affidavit of examination-in-chief of the plaintiff dated 28th April, 2014.
- [4] communication dated 2nd December, 2013 addressed to Public Information Officer Customer Care , G/North Department of BSES.

Mr. Mone submitted that Respondent No.1 had made application under Right to Information Act, 2005 to BEST. The Public Information Officer enclosed the computerized system information along with letter. He also invited my attention to communication dated 25th February, 2015 enclosing therewith certified copies of the reports.

7. Mr. Mone submitted that basically the plaintiffs have not proved computerized generated information at Page 65 and 69 by following procedure laid down in section 65-B of the Indian Evidence Act, 1872 (for short 'Evidence Act'). He relied on the decision in **Anvar P.V Vs. P.K. Basheer, (2014) 10 Supreme Court Cases 473** and in particular paragraphs 14 and 15. He submitted that under section 65-B(4) of the Evidence Act, evidence in the form

of electronic record is permissible subject to fulfillment of conditions stipulated in clauses (a) to (e). The electronic evidence can be produced only in terms of section 65-B of the Evidence Act. The plaintiffs have relied only upon computerized generated information and they have not complied the conditions stipulated in Section 65-B. As the plaintiffs have not complied the conditions stipulated in section 65-B of the Evidence Act, the Courts below were not justified in passing the eviction decree. They have not adduced any tangible evidence to prove non user of the suit premises.

8. Mr. Mone also relied upon the decision of **Achut Pandurang Kulkarni Vs. Sadashiv Ganesh Phulambrikar, AIR 1973 Bombay 210** and in particular paragraphs 16 and 17. The said decision is quoted with approval by the Apex Court in **Dunlop India Limited Vs. A.A. Rahna, (2011) 5 SCC 778**. In paragraph 28 of **Dunlop India Limited** (supra), the Apex Court reproduced paragraphs 16 and 17 of **Achut Pandurang Kulkarni's** case. In paragraph 16, the learned Single Judge (Coram: G.N. Vaidya, J.) considered the decision dated 30th July, 1954 in C.R.A No.1527 of 1953 of Chagla, Chief Justice.

9. Mr. Mone submitted that in any case, the defendant has proved a reasonable cause which prevented him from occupying the suit premises. He invited my attention to appointment letter dated 28th January, 2012 issued by Reliance Industries Ltd as also paragraph 1 of the affidavit of evidence of the defendant. He submitted that C.R.A requires consideration.

10. On the other hand, Ms. Narvekar supported the impugned orders. She submitted that appointment letter dated 28th January, 2012 was issued to the defendant at the address of Thane. She has further invited my attention to the cross-examination of D.W.1 and submitted that even after defendant resigning from Reliance Industries Limited on 5th February, 2013, he did not

shift to the suit premises. She submitted that no case is made out for interfering with the impugned order.

11. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The suit is instituted on 30th August, 2013 invoking ground of non user. The plaintiff has examined P.W.2 Shridhar Manohar Deshmukh working in the office of BEST Customer Care, G-North. He deposed that one of the works of his office is to take reading of electricity meter of customers. He has also produced the documents/statement at Exhibit 28 Colly. That apart, the plaintiffs had produced computerized generated information. A perusal of that information shows that meter reading in respect of meter No. ZRO816134 on 1st January, 2011 is 43781. On 2nd August, 2013, it was 43781. Mr. Mone submitted that the plaintiffs did not comply conditions stipulated in section 65-B of the Evidence Act. It is material to note that the plaintiffs produced the communication dated 25th February, 2015 enclosing therewith separate copies of the reports. In other words, the plaintiffs had produced certified copy of the report showing consumption for the period from 4th January, 2013 to 2nd August, 2013. A perusal of this report shows that meter reading through out this period was 43781. In other words, there was no electricity consumption.

12. Mr. Mone submitted that in paragraph 6 of the plaint, the plaintiffs asserted that the defendant deliberately kept light on in the suit premises and misused the electricity causing waste to the suit premises. Thus, the plaintiffs came with a specific case that the defendant was keeping lights on in the suit premises and, therefore, reliance on these reports does not advance their case.

13. In the case of **Dunlop India Limited** (supra), in paragraph 22, the Apex Court has 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.”

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)

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. In the case of **Dunlop India Limited** (supra), the Apex Court held that the plaintiffs have to adduce tangible evidence to prove the fact that as on the date of filing of the suit, the tenant was not occupying the suit premises continuously for a period of six months immediately preceding the date of filing of the suit. Once such evidence is adduced, the burden shifts on the tenant to prove that there is reasonable cause for not using the suit premises for a continuous period of six months immediately preceding the date of filing of the suit.

15. In the present case, the plaintiffs have adduced tangible evidence. The defendant has not adduced any positive evidence showing user of the suit premises. Even otherwise, from perusal of his cross-examination, it is evident that the defendant was working in shifts sometimes from 9.00 a.m to 4.00 p.m and sometimes from 1.00 p.m to 9.00 p.m. He further admitted that in morning shift after his duty hours, his successor used to take charge of the duties, the said thing was not applicable to his other shifts. In that Clinic, apart from him, there are five Doctors. In view thereof, contention raised by the defendant in the written statement that as a Medical Officer he was required to be at Clinic till midnight and also required to visit the Clinic at odd hours to attend emergency is not substantiated. The defendant also did not examine anybody from Reliance Industries Ltd to substantiate his working hours. The statements made by the defendant are self serving statements. The Courts below after appreciating the evidence on record, concurrently held that the plaintiffs have established ground of non user. Applying the tests laid down in **Dunlop India Limited** (supra), it cannot be said that the Courts below committed any error in passing decree of eviction.

16. In view thereof, it cannot be said that the findings recorded by the Courts below while decreeing the suit under Section 16 (1) (n) of the Act are

contrary to the material on record. The defendant is not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that on the basis of the material on record, no reasonable or prudent person would have come to the conclusion arrived at by the Courts below. The defendant is not in a position to show that the findings are contrary to the evidence on record. Merely because on the basis of the material on record, another view is possible that, by itself, is no ground for exercising the powers under section 115 of the C.P.C. In the result, the Application fails and the same is dismissed.

17. At this stage, Mr. Mone states that the defendant was regularly depositing the compensation in the Small Causes Court. He has handed over demand draft of Rs.16,000/- for the month of June and July, 2019. He has also complied the order dated 22nd April, 2019 by depositing compensation @ Rs.8,000/- for the months of March, April, and May, 2019. Ms. Narvekar states that without prejudice to the rights and contentions of the plaintiffs, seeks permission to withdraw the amount deposited by the defendant as also has accepted the demand draft in the sum of Rs.16,000/- covering compensation for the months of June and July, 2019. The plaintiffs are permitted to withdraw the amount deposited by the defendant in the Small Causes Court unconditionally.

18. Mr. Mone orally prays for continuation of interim order dated 22nd April, 2019 for a period of six weeks from today. He assures that the applicant and all the adult family members residing with him will file usual undertaking in this Court within two weeks from today, after giving advance copy to the other side incorporating therein that:

- [a] they are in possession and nobody else is in possession of the suit premises;
- [b] they have neither created third party interest nor parted with possession of the suit premises;
- [c] they will hereafter neither create third party interest nor part with possession of the suit premises;
- [d] the defendant will go on paying compensation @ Rs.8,000/- per month from August, 2019 onwards.
- [e] in case they are unable to obtain suitable orders from the higher Court within six weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

19. In view thereof, notwithstanding dismissal of the Civil Revision Application, subject to the applicant filing the undertaking in the aforesaid terms within two weeks from today, this order shall remain stayed for the period of six weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case applicant commits breach of any of the conditions of the undertaking, the respondents will be at liberty to proceed with the matter in accordance with law. Order accordingly.

20. **List the C.R.A on 5th August, 2019 for reporting compliance.**

[R.G. KETKAR, J.]