

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.2977 OF 2001

M.M. Shetty	]	Petitioner
Vs.		
Narayan Madhav Dhake and another.	]	Respondent

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Ms. Vasanti S. Dighe, Advocate for the Petitioner.
Mr. Sandesh S. Patil a/w Prithviraj S. Gole and Ms. Anusha P. Amin, Advocates
for Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 12th JULY, 2019.

JUDGMENT:

Heard Ms. Dighe, learned Counsel for the petitioner and Mr. Patil, learned Counsel for the respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant' has challenged the judgment and decree dated 21st April, 2001 passed by the learned II Additional District Judge, Kalyan in Civil Appeal No.28 of 1997. By that order, the learned District Judge allowed the appeal preferred by the respondents, hereinafter referred to as 'plaintiffs' and has directed the defendant to hand over vacant and peaceful possession of Room No.1 on the ground floor of the building known as "Sarthak" situate at Pandurang Wadi, Lane No.3, Dombivli (East), Taluka Kalyan (for short 'suit premises'). The relevant and material facts giving rise to filing of the present Petition, briefly stated, are as under.

3. The plaintiffs instituted suit on or about 17th January, 1996 against the defendant, *inter alia*, contending that the defendant has acquired suitable alternate accommodation at 16, Laxmi Dham at Pandurang Wadi near the suit premises. The defendant since last 7 to 8 years has shifted there with his baggage, luggage and utensils and continues to reside there. The plaintiffs further contended that the defendant since then had locked the suit premises and is not using the suit premises. The plaintiffs further asserted that since last 7 to 8 years, the defendant is not using the suit premises for residence continuously without any sufficient cause. The plaintiffs further contended that plaintiff No.1 is a medical practitioner. He wants to commence the Medical Dispensary and expansion thereof. He, therefore, needs the suit premises. The plaintiffs are having sons and other family members. The premises in occupation of the plaintiffs are not suitable and are inconvenient. The plaintiffs, therefore, require the suit premises reasonably and bona fide for their use and occupation. In substance, the plaintiffs claimed possession of the suit premises invoking grounds under section 13 (1) (g), 13 (1) (k) and 13 (1) (l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act').

4. The defendant filed written statement dated 29th March, 1996 at Exhibit 9 resisting the suit. In paragraph 9, the defendant denied that he acquired suitable alternate accommodation situate at 16 Laxmi Dham, Pandurang Wadi near the suit premises. The defendant contended that said premises is the residence of his mother-in-law. He has nothing to do with the said premises. He has no right, title and interest whatsoever in that premises. He further denied that he has shifted with his baggage, luggage and utensils to 16, Laxmi Dham Bungalow as alleged or otherwise. In paragraph 10, the defendant denied that since last 7 to 8 years, the defendant is not using the suit premises continuously for his residence without any sufficient cause. In

paragraph 12, the defendant denied the ground of bona fide and reasonable requirement set up by the plaintiffs.

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 material on record, by order dated 16th January, 1997, the learned trial Judge dismissed the suit. Aggrieved by this decision, the plaintiffs preferred appeal before the District Court. By the impugned order, the learned District Judge has allowed the appeal. The learned District Judge held that the plaintiffs have proved that the defendant has acquired suitable alternate residence at 16, Laxmi Dham Bungalow. The learned District Judge also held that the plaintiffs proved that the defendant kept the suit premises closed for more than six months preceding the date of the suit and not using the suit premises for the purpose for which it was let out. The learned District Judge negatived the ground of reasonable and bona fide requirement. In short, the learned District Judge decreed the suit under section 13 (1) (k) and 13 (1) (l) of the Act. It is against this order, the defendant has instituted the present Petition.

6. In support of this Petition, Ms. Dighe strenuously contended that the learned District Judge committed serious error in decreeing the suit on the ground of acquisition of alternate suitable residence. She submitted that Laxmi Dham Bungalow is owned by the defendant's mother-in-law Girijabai. The defendant has no right, title and interest in the suit property. She submitted that on account of ill health of defendant's mother-in-law, occasionally he was visiting Laxmi Dham Bungalow as a temporary measure. The defendant did not shift along with his baggage, luggage and utensils in Laxmi Dham Bungalow. The learned District Judge was not justified in passing the decree under section 13 (1) (l) of the Act.

7. In so far as decree under section 13 (1) (k) is concerned, she submitted that mother-in-law of the defendant was not keeping good health. In order to look after her, the defendant along with his wife temporarily shifted to Laxmi Dham Bungalow. This will not amount to non user of the suit premises. She further submitted that the suit premises are in a dilapidated condition. It is not in a habitable condition and, therefore, the defendant was temporarily occupying the premises at Laxmi Dham bungalow. This will constitute sufficient cause for not occupying the suit premises. She submitted that merely because the defendant had applied for telephone connection giving address of Laxmi Dham Bungalow as also R.C. Book shows his address at Laxmi Dham bungalow, it will not amount to plaintiffs establishing the ground of non user. She, therefore, submitted that the impugned order deserves to be set aside, thereby, dismissing the suit filed by the plaintiffs.

8. On the other hand, Mr. Patil supported the impugned order. He submitted that the plaintiffs have produced voluminous documents on record to substantiate that the defendant along with his wife shifted to Laxmi Dham bungalow and that he is not using the suit premises continuously for a period of more than six months immediately preceding the date of the suit without any reasonable cause. He submitted that mother-in-law of the defendant gave tacit consent and, therefore, the defendant was occupying Laxmi Dham. This fact is substantiated from Voters list, application made for telephone connection and R.C book. In support of his submission, he relied upon decision of this Court in **Candrashekhhar Ganesh Joshi Vs. Pradeep Ramchandra Mankikar**, MANU/MH/0933 OF 2019. He submitted that the defendant as a matter of legal right is entitled to reside in Laxmi Dham bungalow. The learned District Judge, therefore, justified in passing eviction decree on the ground of acquisition of alternate suitable residence.

9. In so far as the ground of non user is concerned, he submitted that for the reasons recorded in paragraphs 11 to 18 by the learned District Judge, no case is made out for interfering with the impugned order.

10. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. In so far as ground of acquisition of alternate suitable residence is concerned in case of **B.R. Mehta Vs. Atma Devi, (1987) 4 Supreme Court Cases 183**, the Apex Court quoted, with approval, the decision of Delhi High Court in **Revti Devi Vs. Kishan Lal [1970] All R.C J 418**, where Deshpande J., as the learned Chief Justice of Delhi High Court then was, held that the mere occupation of a new residence by the tenant without any legal right to do so would not be covered by proviso (h) to section 14 (1) of the Delhi Rent Control Act. Decision of **B.R. Mehta** (supra) was considered in **Anandi D. Jadhav (dead) by L.Rs Vs. Nirmala Ramchandra Kore, (2000) 3 Supreme Court Cases 703**.

11. In the present case, admitted position is that Laxmi Dham Bungalow belonged to father-in-law of the defendant and after his death, it is standing in the name of defendant's mother-in-law. The plaintiffs have not brought on record any material to substantiate that the defendant as a matter of right is entitled to occupy Laxmi Dham Bungalow. Applying the tests laid down in **Revti Devi's** case (supra), I find that the learned District Judge was not justified in passing eviction decree on the ground of acquisition of alternate suitable residence.

12. In so far as the ground of non user of the suit premises as contemplated under section 13 (1) (k) is concerned, the learned District Judge has considered this ground from paragraphs 11 onwards. The learned District

Judge has considered certified copy of telephone bill produced at Exhibit 34 and certified copy of the application made by the defendant with telephone office at Exhibit 33. In the documents at Exhibit 33 and 34, the defendant has shown address of Laxmi Dham bungalow. The plaintiffs have produced on record certified copy of voters list of the year 1995 at Exhibit 26. It revealed that at Sr. No.8757 and 8758 name of the defendant and his wife are recorded on the address of Laxmi Dham bungalow. The learned District Judge also considered certified copy of voters list at Exhibit 27 which shows that names of the defendant, his wife and mother-in-law were deleted from voters list of Kalyan Municipal Corporation. The learned District Judge considered submission advanced on behalf of the defendant that voters list Exhibit 26 does not support the plaintiff's case that the defendant acquired accommodation at Laxmi Dham bungalow. The learned District Judge observed that because of bifurcation of wards in Municipal Corporation, Kalyan names of defendant, his wife and mother-in-law were deleted from the address of Laxmi Dham bungalow. The plaintiffs produced telephone Directory at Exhibit 29 showing the address of the defendant of Laxmi Dham bungalow.

13. In paragraph 12, the learned District Judge considered registration certificate at Exhibit 60 in respect of Fiat Car bearing Registration No. MMG-890. The address of the defendant in R.C. Book is that of Laxmi Dham bungalow.

14. In paragraph 13, (wrongly mentioned as paragraph 12) the learned District Judge referred to electricity bills at Exhibit 52 to 54 produced by the defendant and noted that no electricity consumption is reflected in Exhibit 52 for the month of October to December, 1985. In paragraph 15, the learned District Judge considered the submission of the defendant that the suit premises requires tenantable repairs and as the plaintiffs did not carry out

repairs, this will constitute sufficient cause for not using the same. The learned District Judge considered photographs of the suit premises at Exhibit 71 and held that the defendant has not shown that the suit premises require tenantable repairs and the plaintiffs did not carry out the said repairs. That apart, a perusal of paragraph 10 of the written statement shows that the defendant denied that condition of the suit premises became worst due to continued non-user for long time and that suit premises are damaged considerably or otherwise. The defendant asserted that the statements made by the plaintiffs that the condition of the suit premises is damaged is a figment of the imagination of the plaintiffs. The said contention has no rational or scientific basis not being backed by material particulars or date. In short, the defendant denied non user of the suit premises and did not plead any sufficient cause for not using the suit premises.

15. 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.”

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)

16. 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.

17. In the present case, the plaintiffs have adduced tangible evidence to prove that the defendant was not occupying the suit premises continuously for a period of six months immediately preceding the date of filing of the suit. As against this, the defendant has not adduced any positive evidence showing user of the suit premises. Applying the tests laid down by the Apex Court in the above decision, I do not find that the learned District Judge committed any error in passing the decree of eviction on the ground of non user.

18. With the assistance of learned Counsel for the parties, I have also perused the original record. After perusing the original record, I am satisfied that the findings recorded by the learned District Judge on the ground of non user are supported by evidence on record.

19. In view thereof, the learned District Judge was perfectly justified in passing decree of eviction under section 13 (1) (k) of the Act. The defendant is not in a position to demonstrate that the findings recorded by the District Court 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 District Court. 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 Article 227 of the Constitution of India. In the result, the Petition fails and the same is dismissed. Rule is discharged with no order as to costs.

[R.G. KETKAR, J.]