

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.1172 OF 2000

Shantabai Tukaram Choudhary	]	Petitioner
Vs.		
M/s. A.K. Builders registered	]	
partnership firm through its	]	
partner Mr. Zuber Asgarbhai	]	
Poonawala	]	Respondent

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Mr. S.R. Page, learned Counsel for the Petitioner.

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CORAM : R.G. KETKAR, J.

DATE : 5TH APRIL, 2019.

JUDGMENT:

Heard Mr. Page, learned Counsel for the petitioner 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 3rd December, 1999 passed by the learned 14th Additional District Judge, Pune in Civil Appeal No.599 of 1996. By that order, the learned District Judge allowed the appeal preferred by the respondent, hereinafter referred to as 'plaintiff' and set aside the judgment and decree dated 6th March, 1996 passed by the learned 2nd Additional Small Causes Judge, Pune in R.C.S. No.2 of 1995. The learned District Judge decreed the suit filed by the plaintiff under sections 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'). The relevant and material facts, giving rise to filing of the present Petition, briefly stated, are as under.

3. The plaintiff instituted suit for recovery of possession of premises, more particularly, described in paragraphs 1 and 2 of the plaint. In paragraph 1 of the plaint, the plaintiff contended that land admeasuring 20.18 square meters out of total land admeasuring 3251.12 square meters of C.T.S No.915, Ravivar Peth, Pune was let out to the defendant in the year 1958. The previous owner had permitted the defendant to erect rooms on the rented area at her own costs and use and occupy the same for residential purposes. Again, additional area of 20.18 square meter was let out to the defendant in the year 1970 by the erstwhile landlord.

4. The plaintiff alleged that the defendant along with her family members were and are permanent residents of Village Dhanori, Tal. Haveli, Dist. Pune. The defendant is owner of large agricultural land at Village Dhanori, Tal. Haveli, Dist. Pune. She has constructed a spacious bungalow at Village Dhanori, Tal. Haveli, Dist. Pune and she is residing permanently along with her family members there. The defendant is owner of various house properties in the vicinity of Village Dhanori, Tal. Haveli, Dist. Pune and has let out the same to the various tenants. The defendant was working as 'Sarpanch' of Village Dhanori Gram Panchayat. The plaintiff, therefore, claimed possession on the ground that the defendant has acquired alternate suitable accommodation as contemplated by section 13 (1) (l) of the Act.

5. The plaintiff further contended that the defendant is not using the suit premises and has kept closed for more than six months prior to institution of the suit. The defendant is not using the suit premises without any reasonable and sufficient cause. The plaintiff, therefore, claimed possession of the suit premises under section 13 (1) (k) of the Act.

6. The plaintiff further contended that it is engaged and carrying on business of promotion, development and construction of immovable properties. The plaintiff has purchased the suit property during the course of their business for the purpose to promote and develop the same. The plaintiff, however, could not undertake the proposed venture of development of the suit property due to existence of the suit premises occupied by the defendant. The plaintiff, therefore, claimed possession on the ground of reasonable and bona fide requirement under section 13 (1) (g) of the Act.

7. The plaintiff further contended that greater hardship will be caused to her in case eviction decree is not passed. No hardship will be caused to the defendant as she has acquired suitable alternate accommodation at Village Dhanori and has been permanently residing in the alternative accommodation by keeping the suit premises locked. The plaintiff also alleged that the defendant is in arrears of rent from 1st January, 1986 till date of filing of the suit i.e till 2nd January, 1995.

8. The defendant filed written statement dated 20th April, 1995 denying assertions made in the plaint. The defendant denied that land admeasuring 20.18 square meter was let out to her in the year 1958 at the monthly rent of Rs.25/- for construction of rooms. She further denied that in the year 1970, adjacent land admeasuring 20.18 square meters was let out by the erstwhile landlord to her on the monthly rent of Rs.15/-. She admitted that she is having agricultural land at Dhanori, Tal. Haveli which are ancestral properties. For protecting and using agricultural land, she has constructed Farm House. The defendant denied that she along with her family is residing at Dhanori. She further denied that several properties are owned by her. The defendant denied ground of non user and contended that she is agriculturist and agricultural land is situate in Dhanori. She has to go there on and of. The

defendant further denied that the plaintiff is carrying on business of purchasing land and constructing the flats and selling them.

9. 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 learned trial Judge dismissed the suit on 6th March, 1996. Aggrieved by that order, the plaintiff preferred the appeal before the District Court. By the impugned order, the learned District Judge decreed the suit on all the grounds. It is against this order, the defendant has instituted the present Petition.

10. In support of this Petition, Mr. Page strenuously contended that after considering the entire material on record, the learned trial Judge dismissed the suit. The learned District Judge was not justified in decreeing the suit under section 13 (1) (g) of the Act as what was let out to the defendant was open land. The Courts below were not justified in framing issue as regards greater hardship. Issue of greater hardship arises only when the suit is instituted invoking ground of reasonable and bona fide requirement. As the suit is essentially under section 13 (1) (i) of the Act, the plaintiff has to establish that ground by producing sanctioned plan and financial capacity. In the present case, no documents are produced to substantiate ground under section 13 (1) (i) of the Act. He has invited my attention to cross-examination of the plaintiff where he admitted that he did not file sanctioned plan about new construction. He has not obtained certificate from the Tribunal. He has also not produced any document to show that he has sufficient funds for carrying out new construction. He, therefore, submitted that as the suit is essentially under section 13 (1) (i) of the Act, the learned District Judge was not justified in decreeing the suit under section 13 (1) (g) of the Act.

11. In so far as ground of acquisition of alternate suitable residential premises as contemplated by section 13 (1) (l) and ground of non user as contemplated by section 13 (1) (k) of the Act is concerned, he submitted that the plaintiff did not substantiate the case of acquisition of alternate suitable residential accommodation by the defendant. The plaintiff has also not established by leading cogent evidence the ground of non user. Merely because, the defendant was visiting Dhanori Village on and of, that will not constitute non user of the suit premises. He has taken me through the evidence of the plaintiff as also evidence of the defendant and in particular, cross-examination of the defendant's witness. He, therefore, submitted that the impugned order deserves to be set aside by restoring the judgment of the trial Court of dismissing the suit.

12. I have considered submissions advanced by Mr. Page. I have also perused the material on record. As mentioned earlier, the plaintiff has instituted the suit invoking grounds under sections 13 (1) (g), 13 (1) (k) and 13 (1) (l) of the Act. Mr. Page submitted that the suit is essentially under section 13 (1) (i) of the Act. The plaintiff did not substantiate the said ground by producing sanctioned plan as also bringing on record financial capacity of the plaintiff. In order to appreciate this contention, it is necessary to consider whether suit is instituted under section 13 (1) (i) or 13 (1) (g) of the Act. A perusal of paragraphs 1 and 2 of the plaint as also paragraph 3 of the written statement clearly shows that initially land admeasuring 20.18 square meters was let out to the defendant in the year 1958. She was permitted to construct rooms. Again, in the year 1970, adjacent land admeasuring 20.18 square meters was let out to the defendant. The plaintiff's witness Zuber Poonawala in his examination-in-chief deposed that previous owner had let out open land to the defendant. She built two rooms on the open land with the consent of the previous owner at her own cost. In the year 1970, the previous owner again

rented out adjacent open land admeasuring 20.18 square meters for residential purpose. Again, she had built up two additional rooms at her own cost. The witness further deposed that say of the defendant that open land was not let out to her is false.

13. Mr. Page invited my attention to paragraph 16 of the impugned order where it was noted that it was the case of the plaintiff that open land was let out to the defendant and the defendant had constructed structure over that land at her own cost. Therefore, provisions of section 13 (1) (i) of the Act are attracted was considered. The learned District Judge observed that after going through the record, it is seen that there is no satisfactory evidence before the Court to believe that originally the open plot was let out to the defendant, and, therefore, the plaintiff's case under section 13 (1) (i) of the Act cannot be accepted. I agree with the reasoning as also conclusion arrived at by the learned District Judge. The learned District Judge has considered ground of reasonable and bona fide requirement. In paragraph 6, the learned District Judge noted that in the written statement, the defendant admitted that the plaintiff is engaged in the business of purchasing properties for development. It was further pleaded that the business of the plaintiff is to sell the ownership flats. P.W.1 deposed that he wanted to build flats and shops after demolishing the entire suit property. The learned District Judge, therefore, held that for the purpose of business of development of the property, the plaintiff has purchased the suit property.

14. In so far as question of comparative hardship is concerned, the learned District Judge has considered this aspect in paragraph 15 and noted that the defendant is occupying alternate accommodation at Village Dhanori and if she is asked to vacate the suit premises, no hardship will be caused to her. I do not find that the learned District Judge has committed any error in

arriving at that conclusion, more so, when the decree is also passed on the ground of acquisition of alternate suitable accommodation and also non user.

15. In so far as the ground of acquisition of alternate suitable residence and non user as contemplated by section 13 (1) (l) and 13 (1) (k) are concerned, the learned District Judge has considered this aspect from paragraphs 7 to paragraph 14. In paragraph 7, the learned District Judge referred to the documentary evidence. The plaintiff had issued notice dated 28th April, 1992 at Exhibit 3 to the defendant through R.P.A.D on the address of Village Dhanori. Acknowledgment receipt produced on record at Exhibit 24 shows signature of the defendant. The said postal acknowledgment receipt bears address of the defendant at Village Dhanori. It shows that the defendant is living at “Raigad Bungalow” Village Dhanori. She received the notice at Dhanori. The notice was replied by the defendant to the Advocate of the plaintiff. On the said postal acknowledgment, address of the defendant is written as Village Dhanori, Taluka Haveli, District Pune. The learned District Judge referred to marriage invitation card of the son of the defendant dated 23rd May, 1989 which was given to witness No.2 of the plaintiff. The learned District Judge observed that the marriage invitation card is coming before the Court from the proper custody. It is not the case of the defendant that the marriage invitation card is a fabricated document. In the marriage invitation card, address of the defendant is mentioned as “Sarpanch of Gram Panchayat, Dhanori and Chairman of “Jay Bajrang Housing Society”.

16. In paragraph 8, the learned District Judge referred to the voters list of the residents of Municipal House No.915, Raviwar Peth, Pune which are produced on record from Exhibit 35 to 39. In the voters list, name of the defendant is not recorded. The learned District Judge also referred to the notice published in Marathi Newspaper “Prabhat” dated 23rd January, 1996 at

Exhibit 40 which shows that that the defendant is resident of Village Dhanori. In paragraph 9, the learned District Judge referred to the death certificate of husband of the defendant produced at Exhibit 12 which shows permanent address of the residence of defendant's husband at Village Dhanori. Photo copies of the relevant pages of Telephone Directory of telephone connection in the name of the defendant and her husband were produced in the appeal. They were marked as Articles "B" and "C". Both these documents show that one telephone connection is in the name of the defendant and one telephone connection is in the name of husband of the defendant. Both are at the address of Village Dhannori.

17. In paragraph 10, the learned District Judge referred to the fact that M.S.E.B removed electricity meter in the suit property. The learned District Judge observed that electricity is one of the essential services in the day to day life. Nobody can pull on the day to day life without supply of light in the night time and for other electrical implements such as Television, Fan, Heater etc. The defendant did not produce bill furnished by M.S.E.B which was issued for the excess amount. The defendant could have shown as to from which month, the electricity supply was disconnected by M.S.E.B. The learned District Judge, therefore, observed that only inference, therefore, can be drawn that the defendant is not living in the suit property. If at all, the defendant was residing in the suit property, she would not have kept quiet in case of issuing excess bill by M.S.E.B. She would have immediately made arrangement for solving the problem of excess bill issued by M.S.E.B. She would have taken such steps that M.S.E.B would not have disconnected the electricity connection. The learned District Judge did not believe the story put up by the defendant that because of excess billing, M.S.E.B disconnected electricity supply.

18. In paragraph 11, the learned District Judge referred to the telephone connection at Village Dhanori which is in the name of the defendant and her husband. In paragraph 12, the learned District Judge expected the defendant to produce documentary evidence such as gas card for the domestic gas connection at Pune. She could have produced documentary evidence showing her user of the suit premises. She could have examined neighbours to show that she is continuously living in the suit premises. The voters list of House No.915, Raviwar Peth, Pune does not bear name of the defendant. The defendant did not satisfactorily explain about notice published in daily "Prabhat" as per Exhibit 40. She did not explain about wedding card of her son at Exhibit 36. All these circumstances indicate that the defendant is living at Dhanori. In paragraph 13, the learned District Judge referred to the evidence of P.W.3 Balbhim Gaikwad at Exhibit 61. The said witness deposed about various properties standing in the name of the defendant.

19. In paragraph 14, the learned District Judge noted that P.W.2 had actually visited the Bungalow of the defendant at Village Dhanori. He deposed that bungalow of the defendant at Dhanori consists of ground floor plus two floors. He also noticed one chawl belonging to the defendant adjacent to that bungalow where 20 to 25 tenants are residing. Thus, after considering the evidence on record, the learned District Judge held that the plaintiff has established the ground of acquisition of suitable alternate residential accommodation by the defendant as contemplated by section 13 (1) (l) of the Act as also ground of non user as contemplated by section 13 (1) (k) of the Act.

20. In the case of **Dunlop India Limited Vs. A. A. Rahna, (2011) 5 SCC 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 21, the

Apex Court observed that the word 'occupy' used under Section 11(4)(v), in technical sense, means actual possession of the tenanted building or use thereof for the purpose for which it is let out.

21. In paragraph 22, it was observed thus,

“22. The initial burden to show that the tenant has ceased to occupy the building continuously for 6 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 6 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 6 months. ...”

In paragraph 25, the Apex Court highlighted distinction between terms “possession” and “occupy” in the context of rent control legislation [Ram Dass Vs. Davinder, (2004) 3 SCC 684].

22. 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* (1) and *Skinner v. Geary* (3), (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* (4). 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) or the furniture be 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)"

23. 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.

24. The learned District Judge after re-appreciating the evidence on record had decreed the suit under section 13 (1) (g), 13 (1) (k) and 13 (1) (l) of the Act. The findings recorded by the learned District Judge are supported by the evidence on record. It cannot be said that the findings recorded by the learned District Judge are perverse and contrary to the evidence on record or that they are based on no evidence. The defendant is not in a position to demonstrate that the findings recorded by the learned District Judge are perverse. Merely because on the basis of the evidence on record, another view is possible that by itself is no ground for invocation of powers under Article 227 of the Constitution of India. Hence, the Petition fails and the same is dismissed. Rule is discharged with no order as to costs.

[R.G. KETKAR, J.]