

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2371 OF 2019

Bhaskar Narayan Joshi and others ... Petitioners
Vs.
Kalpana Bharatkumar Jain and another ... Respondents

Mr. S. C. Wakankar for Petitioners.
Mr. S. R. Nargolkar with Mr. Ketan Joshi for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : APRIL 23, 2019

P.C. :

Heard Mr. Wakankar, learned Counsel for the petitioners and Mr.Nargolkar, learned Counsel for the respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 06.07.2018 passed by the learned District Judge-20, Pune in Regular Civil Appeal No.153 of 2015. By that order, the learned District Judge partly allowed the appeal preferred by the first respondent, hereinafter referred to as 'plaintiff', and set aside the judgment and decree dated 31.01.2015 passed by the learned 4th Additional Judge, Small Causes Court, Pune in R.C.S.No.426 of 2011. The learned District Judge decreed the Suit only under Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the defendants to handover vacant possession of premises comprising of three rooms admeasuring 300 sq.ft. in C.T.S.No.1145, Budhwar Peth, Pune, more particularly described in paragraph 1 of the plaint (for short 'suit premises').

3. The plaintiff instituted Suit for recovery of possession of the suit premises invoking grounds under Sections 16(1)(g) and 16(1)(n) of the Act. In paragraph 7, the plaintiff asserted ground of non-user under Section 16(1)(n) of the Act. Defendants No.2 and 3 filed written statement dated 09.01.2012 at exhibit-17 resisting the Suit. In paragraphs 9 and 15, they denied the assertions made by the plaintiff in paragraph 7 invoking ground of non-user. Defendants No.1 and 5 filed *purshis* dated 31.07.2012 adopting written statement filed by the defendants No.2 and 3. Defendant No.1 filed *purshis* dated 09.11.2012 adopting written statement filed by defendants No.2 and 3. Amended written statement was filed by the defendants No.2 and 3 on 24.09.2013 at exhibit-64.

4. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. The plaintiff examined herself as also Shaju K., P.W.2 in support of her case. Defendants did not enter into witness box. By order dated 31.01.2015, the learned trial Judge dismissed the Suit. In so far as the ground of non-user under Section 16(1)(n) of the Act is concerned, the learned trial Judge has considered this issue from paragraphs 15 to 29. In paragraph 22, the learned trial Judge referred to the decisions relied by the defendants. In paragraph 23, the learned trial Judge observed that to attract the provisions of Section 16(1)(n), what is essential to be pleaded and proved is that the tenant is not using the suit premises continuously for a period more than six months preceding the date of institution of the Suit. In paragraph 24, the learned trial Judge referred to the decision of ***C.R.Shaikh Vs. Lilabai D. Rohida*, AIR 1981 Mh.L.J. 437** and observed that even if the tenant has not used the premises for a period of six months some time before filing of the Suit or for more period, that would not give the landlord a cause of action. In paragraph 25, the learned trial Judge referred to the pleading and evidence of the plaintiff in support of ground of non-user and observed

that the words “continuously preceding date of the Suit” are missing in the pleading as well as in the evidence of the plaintiff. Thus, the cause of action for filing the present Suit on the ground of non-user by the plaintiff is missing. In paragraph 26, the learned trial Judge observed that landlord is expected to adduce oral as well as documentary evidence to prove non-user of the suit premises. In the instant case, the only evidence adduced before the Court is that of the plaintiff. When the suit premises is residential premises, there must be having electricity connection and if there is non-user of the suit premises, the electric consumption must be zero. The plaintiff by calling the official of Maharashtra State Electricity Distribution Company (for short 'Company') as a witness ought to have proved that there was no consumption of electricity to infer non-user of the suit premises. No efforts were taken to adduce documentary evidence from the Company. The plaintiff also did not examine any neighbour to prove that defendants are not using the suit premises for the purpose for which it was let out. It was easy for the plaintiff to apply for appointment of Court Commissioner for local inspection to show non-user of the suit premises.

5. In paragraph 27, the learned trial Judge noted that plaintiff came with the case that defendants are having several properties at various places. She has, however, not produced documentary evidence. It was easy for her to adduce on record the assessment extract of the properties in the name of defendants. In paragraph 28, the learned trial Judge observed that in the cross-examination, plaintiff admitted that she has not produced on record any evidence to show that defendants are not using the suit premises. She further admitted that her husband informed her that defendants have luxurious flat. This hearsay evidence of the plaintiff shows that she has no personal knowledge about the non-user of the suit premises by the defendants. If her husband had knowledge as

regards non-user, she should have examined her husband as a witness. However, she did not examine her husband. Ultimately, in paragraph 29, the learned trial Judge concluded that the evidence and pleading of the plaintiff lack the essential ingredients of Section 16(1)(n) of the Act. Aggrieved by this decision, plaintiff preferred appeal. By the impugned order, the learned District Judge has allowed the appeal, as indicated earlier. In so far as the ground of non-user is concerned, the learned District Judge has considered this ground from paragraphs 9 to 31. After re-appreciating the entire evidence on record, the learned District Judge held that plaintiff has proved the ground of non-user.

6. In support of this Petition, Mr. Wakankar reiterated the submissions that were advanced before the Courts below. He submitted that the pleadings and evidence of the plaintiff do not satisfy the ingredients of Section 16(1)(n) of the Act. The plaintiff has not pleaded “non-user continuously for six months immediately preceding the date of the Suit”. The learned trial Judge has rightly held that plaintiff failed to establish the ground of non-user. He invited my attention to the admissions given by the plaintiff during her cross-examination. P.W.1 admitted that she has no documentary evidence to substantiate non-user by the defendants. He further submitted that in the present case, plaintiff has not discharged burden by producing tangible evidence. With the result, the burden did not shift on the defendants to adduce positive evidence showing user of the suit premises.

7. Lastly, he invited my attention to the application filed by the defendants under Order VI, Rule 17 read with Order XLI, Rule 27 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') at exhibit-36 before this Court on 02.02.2017. By order dated 02.02.2018, the learned District Judge rejected the application. He submitted that by that application, defendants proposed to incorporate paragraphs No.16(c)

and 16(d) after paragraph 16(b) in the written statement. In paragraph 16(c), defendants contended that time and again, they requested the landlady to carry out repairs. It is further contended that because of the condition of the building, it is dangerous to reside in the suit premises. He submitted that the learned District Judge committed error in rejecting the application exhibit-36. In support of his submissions, Mr. Wakankar relied upon the following decisions:

- a. ***Babhutmal Raichand Oswal Vs. Laxmibai Raghunath Tarte*, 1972 Mh.L.J. 382**, and in particular paragraphs 7 and 11;
- b. **C. R. Shaikh** (*supra*), and in particular paragraphs 11 and 12;
- c. ***Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar*, (1981) 4 SCC 569**, and in particular paragraphs 11 to 13;
- d. ***Laxmibai Ramji (since deceased) Vs. Khimji Palan (since deceased)*, AIR 2001 Bombay 3**, and in particular paragraphs 10 and 12;
- e. ***Gopaldas Khushaldas Parmar Vs. Sanmukhlal P. Shah*, 2012 (6) ALL MR 71**, and in particular paragraph 19;
- f. ***Dunlop India Limited Vs. A. A. Rahna*, (2011) 5 SCC 778**, and in particular paragraph 22.

8. For all these reasons, he submitted that Petition requires consideration.

9. On the other hand, Mr. Nargolkar supported the impugned order. He submitted that defendants did not enter into witness box. He submitted that in paragraph 22 of **Dunlop India Limited** (*supra*), the Apex Court has held that the initial burden to show that the tenant has ceased to occupy the building continuously for 6 months is on the

landlord. In the present case, plaintiff has adduced tangible evidence to prove the said fact. As the plaintiff had adduced evidence, the burden shifted 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. That apart, tenant has to adduce positive evidence showing user of the suit premises. In the present case, defendants did not enter into the witness box and adduce positive evidence showing user of the suit premises. The learned trial Judge committed serious error in placing burden on the plaintiff. He, therefore, submitted that no case is made out for interfering with the impugned order.

10. 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 paragraph 7 of the plaint shows that plaintiff asserted that for last several years, defendants are not using the suit premises. Defendants are having several premises and their family members are residing in different places. Without reasonable cause, defendants have locked the suit premises. A perusal of written statement, and in particular, paragraphs 9 and 15 shows that defendants denied ground of non-user and in fact contended that defendants are using the suit premises. Thus, it is not the case of the defendants that because of reasonable cause, they are prevented from using the suit premises. As defendants claim that they are using the suit premises, they ought to have adduced positive evidence.

11. As mentioned earlier, plaintiff entered into witness box as also examined one more witness. Defendants, however, did not enter the witness box. Mr. Wakankar submitted that during the course of cross-examination, P.W.1 admitted that she has no evidence to prove non-user of the suit premises. In paragraph 28, the learned trial Judge has considered this aspect. The learned trial Judge observed that the

evidence of the plaintiff is hearsay. She has no personal knowledge about the non-user of the suit premises by the defendants. In my opinion, the approach of the learned trial Judge was wholly perverse. The learned trial Judge failed to appreciate that burden on the plaintiff is to adduce tangible evidence about non-user and the burden shifts on the tenant to adduce positive evidence to establish user of the suit premises. The approach of the learned trial Judge was to place entire burden on the plaintiff to establish the ground of non-user. The learned trial Judge failed to appreciate that defendants did not enter into witness box and also did not adduce any evidence to show user of the suit premises.

12. As against this, the learned District Judge referred to the decision of ***Ram Sarup Gupta (dead) by LRs Vs. Bishun Narain Inter College and others***, AIR 1987 SC 1242 where it was observed thus,

“In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead; the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.”

13. The learned District Judge referred to the decision of **C.R. Shaikh** (*supra*) as also decision in ***Smt. D. Malini M. Gopal Vs. Samirmal Amolakchand Kucheria***, 222 Bom.R.C.1987. In paragraph

14, the learned District Judge noted that even if there is deficiency in pleading, if the parties knew the case then it will not be fatal. In view of the decision of **Ram Sarup Gupta** (*supra*), the plaint as a whole has to be read. In paragraph 15, the learned District Judge referred to the case made out by the plaintiff in paragraph 7 and observed that the words “so many years” would certainly cover a period more than six months. The words that “the defendants have not been using the suit property for so many years” would indicate that they have not been using the same till filing of the Suit. The plaintiff has further contended that defendants have kept the suit property locked. These words are sufficient to mean that the defendants have not been using the suit property for so many years and the suit property has been locked till the plaintiff filed the Suit. This sufficiently complies the requirement of Section 16(1)(n) of the Act.

14. In paragraph 16, the learned District Judge referred to the written statement of the defendants and observed that defendants clearly understood that plaintiff has put up the case of non-user under Section 16(1)(n) of the Act. Even the learned trial Judge had framed the issues, including the issue of non-user under Section 16(1)(n) of the Act. Thus, the parties to the Suit had clear idea and notice of Section 16(1)(n) of the Act. The learned trial Judge should not have adopted rigid and technical view. In paragraph 22, the learned District Judge referred to the approach of the learned trial Judge expecting plaintiff to produce on record electricity consumption by summoning official from the Company. It was further observed that plaintiff did not file any document proving non-user. To prove non-user means to prove a negative fact. In fact, if it is the case of the defendants that there is no non-user (user of the suit premises) and they have been using the suit property continuously then the trial Court ought to have invoked Section 106 of the Indian Evidence Act, 1872, which lays down that when any

fact is especially within knowledge of any person, the burden of proving such fact is upon him.

15. In paragraph 30, the learned District Judge referred to the contentions advanced by the defendants that P.W.1 is not residing in the suit property, and therefore, she has no personal knowledge as to who is residing in the suit property. The learned District Judge observed that there is nothing in the cross-examination of P.W.1 to shatter her case about non-user of the suit property by the defendants. In paragraph 31, the learned District Judge noted that suit summons at exhibit-30 was sent to the defendant No.1 on the address of the suit property. It was returned with the endorsement that the property is locked. The suit summons was sent to the defendant No.1 as per exhibit-31 on the address of 57, Shaniwar Peth, Pune and the suit summons was served there. Summons of defendant No.2 vide exhibit-7 was served on the address of Hingne Budruk, Sinhagad Road, Pune. The summons of defendant No.3 vide exhibit-8 was served on the address of 57, Shaniwar Peth, Pune. The summons of defendants No.4 and 5 vide exhibit-9 was returned when it was sent on the address of the suit property. All these factors can be considered to be additional factors to indicate that defendants are not using the suit property for residence for many years as deposed by the plaintiff. The learned District Judge accordingly concluded that the plaintiff has established ground of non-user under Section 16(1)(n) of the Act.

16. In the case of **Dunlop India Limited** (*supra*), 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.”

17. 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."

18. 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. After considering the material on record, I do not find that the learned District Judge committed any error in arriving at that conclusion.

19. Mr. Wakankar relied upon the decision of **Babhutmal Raichand Oswal** (*supra*). The said decision was reversed by the Apex Court in **Bathutmal Raichand Oswal Vs. Laxmibai R. Tarta**, (1975) 1 SCC 858. In view thereof, the reliance placed in paragraphs 7 and 11 of that report does not advance case of the defendant. In the case of **C. R. Shaikh** (*supra*), the learned Single Judge held that the words “without a reasonable cause” was not pleaded and it was fatal to the case of the plaintiff. The said decision was considered by the learned Single Judge in **Gopaldas Khushaldas Parmar** (*supra*). That apart, in view of the portion extracted hereinabove in **Ram Sarup Gupta** (*supra*), I do not find that the reliance placed by Mr. Wakankar on **C.R.Shaikh** (*supra*) advances the case of the defendants. Mr. Wakankar also relied upon the decision of **Pandurang Jivaji Apte** (*supra*) to contend that the adverse inference should be drawn against the plaintiff. The Apex Court held that adverse inference against a party for his failure to appear in Court can be drawn only in the absence of any evidence on record. In the present case, plaintiff herself entered into witness box. As against this, defendants did not enter into witness box. In fact this is a fit case to draw adverse inference against the defendants as they failed to enter into the witness box and adduce positive evidence about the user of the suit premises. Mr. Wakankar relied upon the decision of **Laxmibai Ramji** (*supra*). In that case, the tenant had rebutted the case made out by the landlord and established that after closing ration shop, he used premises first as grocery shop and later for operating medicine shop. The facts obtaining in the present case are materially different from the facts in the case of **Laxmibai Ramji** (*supra*).

20. In the light of the aforesaid discussion and applying the principles laid down by the Apex Court in the case of **Dunlop India Limited** (*supra*), I do not find that the defendants have made out any case for

interfering with the order passed by the learned District Judge. 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. 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. Merely because on the evidence on record, another view is possible, that itself is no ground for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

21. At this stage, Mr. Wakankar orally applies for stay of the eviction decree for a period of 12 weeks. He assures that within 4 weeks from today, defendants and all adult family members residing in the suit premises will furnish undertaking 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 interests nor parted with possession of the suit premises;
- (c) they will hereafter neither create third party interests nor part with possession of the suit premises;
- (d) they will clear arrears of rent, if any, within 4 weeks from today;
- (e) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

22. Mr. Nargolkar opposes the application.

23. As the defendants intend to challenge this order before the Apex

Court, I find that the request made by Mr. Wakankar is reasonable. Hence, notwithstanding dismissal of the Petition, subject to the defendants filing the undertaking in the aforesaid terms within 4 weeks from today, eviction decree shall not be executed for the period of 12 weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within 4 weeks from today and/or in case defendants commit breach of any of the conditions of the undertaking, this interim order shall stand vacated without further reference to the Court and respondent No.1 will be at liberty to proceed with the matter in accordance with law. Order accordingly.

24. List the Petition for reporting compliance on 07.06.2019.

(R. G. KETKAR, J.)

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