

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

CIVIL REVISION APPLICATION NO.603 OF 2018

Saifuddin Ahmedali Ahmedali Nulwala	]	
(since deceased)	]	
Fatema wd/of Saifuddin Nulwala and others.	]	Applicants.
Vs.		
Hussainee Alihusain Lilamwala and another.	]	Respondents

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Mr. R.A. Thorat Senior Advocate i/b Kalpana Kanhere, for Applicants.

Mr. Mohil Punjabi a/w Ajinkya Patil i/b Naik Patil, Salvi & Associates, for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 4TH FEBRUARY, 2019.

P.C:

Heard Mr. Thorat, learned Senior Counsel for the applicants and Mr. Punjabi, learned Counsel for respondent No.1 at length. Time to file Vakalatnama by Mr. Punjabi is extended by one week from today.

2. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicants, hereinafter referred to as "defendants" have challenged the judgment and decree dated 15th December, 2011 passed by the learned trial Judge, Court Room No.22 of the Court of Small Causes at Mumbai in R.A.E. Suit No.1064/1619 of 2006 as also the judgment and decree dated 25th September, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in A-1 Appeal No.11 of 2012. By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as 'plaintiff' under sections 16 (1) (g) and 16 (1) (n) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). The

plaintiff had instituted suit for recovery of possession of Room No.13 on the first floor of Hussainee Manzil situate at 51-1st Umer Khadi Road, Balu Changu Marg, Mumbai 400 009 on C.T.S No.1938 (P) Mandvi Div, more particularly described in paragraph 1 of the plaint (for short 'suit premises') invoking grounds under section 16 (1) (e) (unlawful subletting by defendant No.1 in favour of defendant No.2), 16 (1) (g) (reasonable and bona fide requirement), section 16 (1) (n) (non user). The trial Court decreed the suit under sections 16 (1) (g) and 16 (1) (n) of the Act. Aggrieved by that decision, defendant No.1 preferred appeal. During the course of hearing of the appeal, in paragraph 11, the Appellate Court noted that “admittedly there is no challenge by plaintiff against these findings of the learned trial Court by filing any cross objection. We are, therefore, of the considered view that we need not and are bound to deal with the correctness or otherwise of those findings returned by the learned trial Court on Issue Nos.1 and & 3”.

3. The Petition was heard on 15th January, 2019. In view of the decision of the Apex Court in **Banarsi Vs. Ram Phal (2003) 9 SCC, 606**, the learned Counsel for the parties were directed to address the Court on the issue as to whether the respondent-landlord without filing cross-objections can support the eviction decree and attack the findings recorded by the Courts below in respect of ground under section 16 (1) (e) of the Act. The matter was adjourned till today.

4. Mr. Punjabi, on instructions, states that the plaintiff is not pressing ground of unlawful subletting covered by section 16 (1) (e) of the Act. Thus, correctness of the impugned orders is required to be considered only under sections 16 (1) (g) and 16 (1) (n) of the Act.

5. In support of this application, Mr. Thorat submitted that the plaintiff had issued notice dated 6th November, 2005 seeking recovery of possession, *inter alia*, on the grounds of;

- (a) acquisition of alternate residence;
- (b) unlawful subletting of the suit premises and thereby profiteering.

In other words, the plaintiff did not invoke ground of reasonable and bona fide requirement. He submitted that the plaintiff is in possession of two bed rooms, hall, kitchen flat and the suit premises admeasures about 200 square feet situate in a chawl which has common toilet facility. He submitted that in paragraph 8 of the plaint, the plaintiff asserted that he requires the suit premises reasonably and bona fide for use of his married son and his family.

6. Mr. Thorat has invited my attention to affidavit of examination-in-chief of P.W.1-Husainee Alihusain Lillamwala and in particular paragraphs 16 to 18 thereof. In paragraph 16, P.W.1 deposed that he has two sons and one daughter. His elder son by name Aliasgar is at present on job in Dubai. He is already married and has one child. In paragraph 17, P.W.1 deposed that his younger son Abbas is yet to get married. The present premises in his occupation are not sufficient to accommodate the entire family. In paragraph 18, he deposed that daughter Sabina aged 25 years is residing with him at the present premises at Clare Road, Mumbai. He invited my attention to his cross-examination. In cross-examination, P.W.1 admitted that residential flat consists of two bed rooms, hall and kitchen. The flat admeasures about 700 to 750 square feet. He is using one bed room. He has two sons. Elder son is in abroad for job and he is married. His family is with him. Younger son Abbas is also in abroad. He is also married. He has gone abroad for study. His wife is staying at Bangluru. Whenever his daughter-in-law comes to Mumbai, she used to reside with him. At present, P.W.1, his wife and daughter are residing in his residential premises. Daughter Sabina is unmarried. At present, for three of

them, his residential flat is sufficient to reside. He, therefore, submitted that as P.W.1 admitted that the premises in his possession are sufficient for accommodating three persons, his both sons are abroad, the Courts below were not justified in passing eviction decree under section 16 (1) (g) of the Act.

7. Mr. Thorat submitted that having regard to the status and life style of the plaintiff's family, their requirement of the suit premises admeasuring about 200 square feet in a chawl with common toilet facility cannot be said to be genuine requirement. It is mere father's (plaintiff's) wish to recover possession of the suit premises. He further submitted that there is nothing on record to indicate about return of sons of the plaintiff to India. The plaintiff, did not even examine one of the sons to establish their requirement. He also invited my attention to paragraph 8 of the plaint and the evidence adduced by the plaintiff to contend that evidence adduced by the plaintiff travelled beyond the pleadings. He, therefore, submitted that the Courts below were not justified in passing eviction decree under section 16 (1) (g) of the Act.

8. In so far as ground of non user is concerned, he submitted that in paragraph 9 of the plaint, the plaintiff merely asserted that the defendant has not used the suit premises without reasonable cause for the purpose for which they were let out for a continuous period of 6 months immediately preceding the date of the suit. In other words, the plaintiff has bodily lifted the wordings employed in section 16 (1) (n) of the Act. That apart, the plaintiff has not adduced any evidence to substantiate the ground of non user. The burden is essentially on the plaintiff to establish the ground of non user and the plaintiff has not succeeded in establishing that ground. The Courts below were not justified in passing the decree on the ground of non user under section 16 (1) (n) of the Act. He has taken me through the impugned orders. He, submitted

that Petition requires consideration.

9. On the other hand, Mr. Punjabi has supported the decree under sections 16 (1) (g) and 16 (1) (n) of the Act. He has taken me through the impugned orders and submitted that no case is made out for invocation of powers under section 115 of the C.P.C.

10. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. In so far as the ground under section 16 (1) (g) of the Act is concerned, the learned trial Judge considered this from paragraph 21 onwards. The learned trial Judge noted that sons of the plaintiff are in abroad and are doing job there. In so far as younger son Abbas is concerned, he also got married. His wife is residing at Bangluru. Whenever she comes to Mumbai, she resides in the house of the plaintiff. In paragraph 25, the learned trial Judge observed that daughter Sabina who is 25 years old certainly needs one bedroom for her privacy. Three persons cannot be adjusted in one room as whenever sons come to India with their family. P.W.1 deposed that the premises in his possession are insufficient when his both sons come to India with their family, though he may not have deposed exact return of his sons and daughter-in-law. Wife of younger son Abbas is residing in Bangluru.

11. In paragraph 26, the leaned trial Judge concluded that present residential accommodation of the plaintiff is insufficient for 8 members, having three couples and 25 years old girl. The learned trial Judge concluded that requirement of the plaintiff is both reasonable and bona fide. The learned trial Judge also noted the fact that defendant No.1 has acquired Flat No.404 in Ezzy Apartment, Mazgaon which is of equal area to that of the plaintiff. Defendant No.1 had shifted there four years back. In other words, no

greater hardship will be caused to defendant No.1 if the eviction decree is passed. Notice at Exhibit 30 i.e dated 6th November, 2005 was also served on defendant No.1 on the address of Flat No.404, Ezzy Apartment. In the cross-examination, defendant No.1 also admitted that he had shifted gas connection from the suit premises to Flat No.404, Ezzy Apartment. The learned trial Judge noted that defendant No.1 is residing with his wife. In other words, there are only two persons in the family of defendant No.1 and they cannot stay at two places. At the same time, documents at Exhibit 35 produced by defendant No.1 also do not support user of the suit premises by the defendant as they are prior to 2003.

12. In so far as the ground of non user is concerned, the trial Court has considered this ground in paragraphs 17, 18 and 20. In paragraph 17, the learned trial Judge observed that it is admitted fact that defendant No.1 has acquired Flat No.404, Ezzy Apartment, Mazgaon. Defendant No.1 has shifted to the said premises. Notice dated 6th November, 2005 (Exhibit 30) issued by the plaintiff was served on the defendant on the address Ezzy apartment. Defendant No.1 also admitted in the cross-examination that he has shifted gas connection from the suit premises to premises at Ezzy Apartment about four years back. Thus, after appreciating the evidence on record, the trial Court held that the plaintiff has established ground of non user.

13. In so far as the Appellate Court is concerned, the Appellate Court has considered the ground of bona fide requirement from paragraph 12 onwards. After re-appreciating the entire evidence on record, the Appellate Court affirmed the findings recorded by the learned trial Judge and held that the plaintiff has led evidence to prove that his need is bona fide and also the

plaintiff will suffer greater hardship in the event of refusal of decree of eviction.

14. In so far as the ground of non user is concerned, in paragraph 27, the Appellate Court also referred to the documents produced by defendant No.1. The Appellate Court also noted that the suit is filed in the year 2006 and defendant No.1 is not using the suit premises for more than six months as they had already shifted to Flat No.404, Ezzy Apartment. The learned Appellate Court noted that the documents produced by defendant No.1 are of the year 2008 onwards. The suit is instituted on 8th August, 2006 and the relevant period is six months preceding 8th August, 2006. After considering the material on record, the Appellate Court also decreed the suit under section 16 (1) (n) of the Act.

15. Mr. Thorat submitted that burden is on the plaintiff to establish ground of non user. However, the plaintiff has not produced any evidence to substantiate the said ground. I do not find any merit in this submission. 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.

16. 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. ...”

2. 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**].

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* (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)"

18. In paragraph 28, the Apex Court referred to the decision of this Court in *Achut Pandurang Kulkarni Vs. Sadashiv Ganesh Phulambrikar*, AIR 1973 Bom 210 and observed thus,

"28. In *Achut Pandurang Kulkarni* (supra), the learned Single Judge of the Bombay High Court interpreted Section 13(1)(k) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 the language of which is somewhat similar to Section 11(4)

(v) of the 1965 Act. The learned Single Judge referred to order passed by Chagla, C.J. in Civil Revision Application No.1527/1953 decided on July 30, 1954 and observed:

'16. As observed by Chagla, C. J., in the above case, physical possession by a tenant himself was not necessary. Physical possession by other members of the family also is not necessary if there was reasonable cause for their remaining absent from the premises. The question is one of fact and degree. If there is evidence on record to show that the tenant had something more than a vague wish to return and that he had a real hope coupled with the practicable possibility of its fulfilment within a reasonable time, it cannot be said that he had no reasonable cause for not using the premises. In every case it is the duty of the Court to satisfy itself that the tenant had no reasonable cause. Absence may be sufficiently prolonged or unintermittent to compel the inference prima facie of a cesser of occupation. The onus is on the tenant in such a case to repel the presumption and to establish that his possession had not ceased or that he had ceased to occupy on account of reasonable cause. In my judgment, this can be established if the tenant proves notwithstanding the intention on his part to return after his absence, his helplessness in remaining absent from the premises.

17. It is true that the tenant should have made proper attempts to discharge the onus in the present case by producing the orders, if not before the trial Court, at least before the Appellate Court. That, however, as stated above, does not permit the Courts to brush aside the requirements of Section 13(1)(k). It is a matter for not awarding the costs. The Court cannot ignore the nature of the tenant's services and his liability to be transferred when deciding the question under Section 13(1)(k). I do not propose to lay down that in every case where a Government servant is transferred and he goes on paying rent in respect of the premises, he had reasonable cause for not using the premises for the purpose for which they were let. The question will depend on the facts and circumstances of each case. The tenant must couple and clothe his inward intention to return, with some formal, outward and visible sign of it, as for instance by installing 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. It may also be that the same result can be secured by leaving on the premises, as a deliberate symbol of continued occupation, furniture. As stated by Asquith L. J., in *Brown v. Brash and Ambrose*, (1948) 2 KB 247, the tenant must prove not only *animus possidendi* but a *corpus possessionis*."

19. 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.

20. Applying the tests laid down by the Apex Court to the facts of the present case, I do not find that the Courts below committed any error in passing the decree of eviction under section 16 (1) (n) of the Act. In the present case, defendant No.1 has not adduced evidence as regards non user for the relevant period.

21. In so far as the ground under section 16 (1) (g) of the Act is concerned, after appreciating the evidence on record, the Courts below have concurrently decreed the suit under section 16 (1) (g) of the Act. Defendant No.1 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 material on record, no reasonable or prudent person would have come to the conclusion arrived at by the Courts below. 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 C.P.C. In the result, the Civil Revision Application fails and the same is dismissed.

22. At this stage, Mr. Thorat orally applies for continuation of ad-interim order dated 27th November, 2018 for a period of 10 weeks from today. He submitted that in pursuance of the order dated 27th November, 2018, Power of attorney of petitioner No.1 Feroz Ahmedali Nulwal has filed undertaking dated 14th January, 2019 and the same is continued.

23. As the applicants desire to challenge this order in the Supreme Court, I find that the request made by Mr. Thorat is reasonable. Hence, notwithstanding dismissal of C.R.A, eviction decree shall not be executed for a period of 10 weeks from today. Undertaking dated 14th January, 2019 shall continue to remain in force. Mr. Thorat also assures that within 2 weeks from today, petitioner No.1(a) will file additional undertaking to the effect that in case, the applicants do not get suitable order from the higher Court within 10 weeks from today, they will hand over vacant and peaceful possession of the suit premises to the plaintiff. Let that undertaking be filed within 2 weeks from today.

24. List the Application for reporting compliance on **25th February, 2019.**

[R.G. KETKAR, J.]