IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.620 OF 2018
WITH
CIVIL APPLICATION NO.675 OF 2018
IN
CIVIL REVISION APPLICATION NO.620 OF 2018

Ravendra Bahadur Khare … Applicant
Vs.
Jagdishchandra Ramjilal Jain … Respondent

Dr. Abhinav Chandrachud i/b. Mr. Shailendra J. Singh for Applicant.
Mr. P. S. Dani, Senior Advocate i/b. Mr. Mandar Soman for Respondent.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 4, 2019

P.C. :

Heard Dr. Chadrachud, learned Counsel for the applicant and Mr.Dani, learned Senior Counsel for the respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant', has challenged the judgment and decree dated 09.05.2015 passed by the learned Judge, Court Room No.40 of the Court of Small Causes at Mumbai (Bandra Branch) in R.A.E.Suit No.519 of 2012 as also the judgment and decree dated 11.10.2018 passed by the Appellate Bench of the Small Causes Court at Bandra in (A-1) Appeal No.26 of 2015. By these orders, the Courts below decreed the Suit instituted by the respondent, hereinafter referred to as 'plaintiff', and directed the defendant to handover vacant and peaceful possession of one room kitchen situate on the first floor of 'Navlakhi Bungalow' situate at Ganjawala Lane, Mandpeshwar Road, Borivali (West), Mumbai 400 092 corresponding to C.T.S. No.555, 555/1 to 10 and duly assessed before R/Central Ward and Account No.R-5242(2)233, House GR.W.No. 5242

(1), Borivali, Mumbai (hereinafter referred to as the 'suit premises') on the ground of non-user as contemplated by Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act').

3. In support of this Application, Dr. Chandrachud submitted that the Suit was instituted by the plaintiff on 29.06.2012. The relevant period would therefore, be 6 months preceding 29.06.2012 being the date of institution of the Suit. He has invited my attention to the findings recorded by the learned trial Judge in paragraphs 21, 23 and 26 as also the findings recorded by the Appellate Court in paragraphs 22 and 23. He submitted that the initial burden is on the plaintiff to prove the ground of non-user. Though plaintiff admitted in his cross-examination that he is in possession of the electricity bills pertaining to the suit premises, he did not produce the same. The Courts below should have drawn inference against the plaintiff for non-production of the electricity bills. He submitted that the Courts below also recorded erroneous finding to the effect that ration card ration card of the defendant was cancelled 20 years back. He has invited my attention to the letter dated 05.02.2013 issued by the Information Officer / Rationing Officer to Ashish Jain.

4. Dr. Chandrachud has invited my attention to the entries made in the bank statement as also the entries made on the passport of the defendant. In so far as the entries in the Account of the defendant maintained with the HDFC Bank, Borivali (West) Branch is concerned, entry of 10.01.2012 shows that amount of Rs.30/- was transmitted through Electronic Clearing System (E.C.S.) to Reliance Infrastructure (for short 'Reliance'). On 10.02.2012, an amount of Rs.40/- was transmitted through E.C.S. to Reliance. On 13.03.2012, an amount of Rs.110/- was transmitted through E.C.S. to Reliance. On 13.04.2012, an amount of Rs.200/- was transmitted through E.C.S. to Reliance. Again

on 11.05.2012, an amount of Rs.530/- was transmitted through E.C.S. to Reliance. Thus, the consistent entries right from 10.02.2012 to 11.05.2012 indicate user and consumption of electricity by the defendant during the relevant period.

5. Dr. Chandrachud submitted that entry in the oval stamp on the passport shows arrival date of defendant to India on 09.02.2012 and the entry in the rectangle stamp on the passport shows departure date as 30.04.2012. Thus, during this period, defendant was actually occupying the suit premises. He has also taken me through the cross-examination of P.W.1 - son of the plaintiff where he denied that defendant alone is residing in the suit premises. He does not know that defendant is financially dependent on his children. He made statement in the affidavit that due to non-user of the suit premises for residence, the electricity of the suit premises is not used / unconsumed on the basis that defendant is not residing in the suit premises and the electricity bills are for negligible amount or nil. The electricity bills in respect of the suit premises are in his possession. He has some of the bills pertaining to the of last 4-5 years. He admitted that those bills were not produced by him in Court. He denied that he did not produce the bills deliberately in the Court.

6. Dr. Chandrachud submitted that in view of the admissions given by P.W.1 in the cross-examination, the Courts below ought to have drawn adverse inference. He further submitted that the defendant has not acquired U.S.A. citizenship and continues to be citizen of India. Merely because Social Security Card is issued in favour of the defendant, that by itself, does not amount to acquiring citizenship of U.S.A. Though defendant is Green Card holder, he is not citizen of U.S.A. For all these reasons, he submitted that Application requires consideration.

7. On the other hand, Mr. Dani supported the impugned orders. He submitted that after appreciating the evidence on record, the Courts below have concurrently held that plaintiff has established the ground of non-user. He submitted that defendant did not adduce any positive evidence about user of the suit premises.

8. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. As mentioned earlier, the Suit is instituted by the plaintiff on 29.06.2012 invoking the ground of non-user as contemplated by Section 16(1)(n) of the Act. Section 16(1)(n) reads thus,

> 16. When landlord may recover possession.-
>
> (1) Notwithstanding anything contained in this Act but subject to the provisions of section 25, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-
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> > (n) that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit.

9. In so far as the judgment of the trial Court is concerned, the learned trial Judge has considered this issue from paragraph 7 onwards. In paragraph 13, the learned trial Judge observed that initially, the burden is cast upon the plaintiff to show that the defendant was not using the suit premises for more than six months preceding the date of filing of the suit. If the plaintiff proves it then the burden is shifted on the defendant to prove further that he was using the suit premises. In paragraph 19, the learned trial Judge noted the case made out by the plaintiff. It is the case of the plaintiff that defendant has permanently settled at Wood Bridge, 07095, New Jersy, U.S.A.

10. In paragraph 20, the learned trial Judge observed that it has come

on record that defendant's family members are permanent residents of U.S.A. and Canada and all are settled there prior to more than 10 years. The defendant admitted that his VISA in the form of Green Card is the permanent resident of U.S.A. The wife of the defendant expired at U.S.A. and their residence is shown as New Jersy, U.S.A. Undisputedly, since 2004, the defendant is on visiting terms to India from USA for 6-8 months as per the requirement. As per his VISA condition, he is not allowed to stay in India or out of U.S.A. for more than six months to one year. The learned trial Judge noted that no electricity bill was produced by the defendant to show his residence at the suit premises during the period of six months prior to filing of the Suit. No gas consumption bill was produced on record to substantiate his contention. No document to justify that he has tendered the rent to the plaintiff and water consumption charges of the suit premises was produced. He did not produce VISA and Green Card and even photocopies of the same. The learned trial Judge, therefore, observed that the adverse inference for not producing the documents is required to be drawn against the defendant. The learned trial Judge also dealt with the bank statement vide exhibit-45 for the period from 01.01.2012 to 31.12.2012 and noted that the bank account was operated by E.C.S., which could be operated from any place. The entries in the passport vide exhibit-46 are not conclusive proof of his residence. On the contrary, the entries go against the defendant to show that he was only on visiting terms to India and justify that he is a non-user of the suit premises.

11. In paragraph 21, the learned trial Judge observed that the ration card was not renewed by the defendant since last 20 years. The document of gas consumption was obtained during the hearing of the Suit. All these facts indicate that defendant was not using the suit premises for a period of more than six months preceding the date of

filing of the Suit. In paragraph 23, the learned trial Judge concluded that from evidence on record, it is evident that defendant has migrated to U.S.A. and residing there with his children. He also failed to prove to the satisfaction of the Court that there was reasonable cause for non-user by leading evidence to that effect. In paragraph 26, the learned trial Judge observed that mere casual stay for a short period in the premises cannot be called residence so as to infer that the premises were used by the tenant during the relevant period. The entries in the passbook and ration card are insufficient to prove user of the suit premises by the defendant because the presence of the defendant is not essential for the transactions disclosed in the said entries. Defendant has also not examined independent witness from either rationing authority, gas company or electricity department to justify his case of user of the suit premises.

12. In so far as the judgment of the Appellate Court is concerned, in paragraphs 22 and 23, the Appellate Court has re-appreciated the evidence on record. Dr. Chandrachud submitted that the Appellate Court committed serious error in holding that entries in the Passport are required to be proved by producing certificate as contemplated by Section 65-B of the Indian Evidence Act, 1872. I find that the observations made by the Appellate Court on this aspect are not correct. However, it does not advance the case of the defendant. The Appellate Court thereafter observed that defendant did not produce documents such as electricity bill to prove user of the suit premises. It was his duty to submit the electricity bill on record. He could have examined witness to prove consumption of the electricity. Even that was not done by the defendant. In paragraph 23, the Appellate Court observed that defendant retired from services in the year 2000 and since 2004, along with other family members, he is residing in U.S.A. His daughter is residing in Canada. Defendant's wife has got Social Security Card. Even the

defendant has got Social Security Card. Thus, the Appellate Court, after appreciating the entire evidence on record, held that defendant did not adduce any positive evidence establishing his user for the relevant period.

13. 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. In paragraph 22, it was observed thus:

> "22. The initial burden to show that the tenant has ceased to occupy the building continuously for six months is always on the landlord. He has to adduce tangible evidence to prove the fact that as on the date of filing the petition, the tenant was not occupying the building continuously for six months. Once such evidence is adduced, the burden shifts on the tenant to prove that there was reasonable cause for his having ceased to occupy the tenanted premises for a continuous period of six months."

14. 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**).

15. 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."

16. 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:
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>> '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."

17. 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.

18. 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

decreeing the Suit.

19. In the case of ***M. L. Sethi Vs. R. P. Kapur*, (1972) 2 SCC 427,** the Apex Court has considered the scope of revision under Section 115 of C.P.C. In paragraph-12 of that decision, the Apex Court observed that the jurisdiction of the High Court under Section 115 of C.P.C. is a limited one. The Apex Court considered following decisions :

(i) **Rajah Amir Hassan Khan vs. Shoo Baksh Singh, (1884) LR 11 IA 237;**

(ii) **Balakrishna Udayar vs. Vasudeva Aiyar, (1917) LR 44 IA 261, 267;**

(iii) **N.S. Venkatagiri Ayyangar vs. Hindu Religious Endowments Board, Madras, (1948-49) LR 76 IA 73;**

(iv) **Manindra Land and Building Corporation Ltd., vs. Bhutnath Banerjee and others, AIR 1964 SC 1336;**

(v) **Vora Abbasbhai Alimahomed vs. Haji Gulamnabi Haji Safibhai, AIR 1964 SC 1841;** &

(vi) **Pandurang Dhuni Chowgule vs. Maruti Hari Jadhav, AIR 1966 SC 153.**

The Apex Court quoted the observations of Privy Council in **Rajah Amir Hasan Khan** (supra) which is to the following effect :

> "The question then is, did the judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

The Apex Court further quoted its observations in the case of **Pandurang Chowgule** (supra) as under :

> "The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is

> not competent to the High Court to correct errors of fact however gross they may be, or even errors "of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Section 115."

20. The above decision reiterates that under Section 115 of C.P.C., the High Court has to satisfy itself on three matters, namely,

(a) that the order of the subordinate Court is within its jurisdiction;

(b) that the case is one in which the Court ought to exercise jurisdiction, and

(c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provisions of law, or with material irregularity,

that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on these three matters, it has no power to interfere because it differs from conclusion of the subordinate

Court on question of facts or of law.

21. Applying the tests laid down in **M. L. Sethi** (*supra*) to the facts of the present case, I find that the defendant has not established that the findings recorded by the Courts below are perverse being based upon no evidence or that they are contrary to the evidence on record. The defendant is also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Merely because on the basis of the evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. Hence, Civil Revision Application fails and the same is dismissed. In view of the dismissal of the C.R.A., Civil Application No.675 of 2018 does not survive and the same is disposed of accordingly.

22. At this stage, Mr. Singh orally applies for stay of the eviction decree for a period of 10 weeks from today. He states that applicant / defendant alone is in possession and no one else is in possession. He assures that within 2 weeks from today, applicant will file undertaking incorporating therein that,

(a) he is in possession and nobody else is in possession of the suit premises;

(b) he has neither created third party interests nor parted with possession of the suit premises;

(c) he will hereafter neither create third party interests nor part with possession of the suit premises;

(d) he will go on depositing the compensation at the rate of Rs.10,000/- p.m. as directed by the Appellate Court and noted in the order dated 14.12.2018 passed by this Court;

(e) in case he is unable to obtain suitable orders from the higher Court within ten weeks from today, he will hand over vacant and peaceful possession of the suit premises to the respondent;

23. In view thereof, notwithstanding dismissal of the Civil Revision Application, subject to the defendant filing the undertaking in the aforesaid terms within two weeks from today with advance copy to the other side, eviction decree shall not be executed for the period of ten weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendant commits breach of any of the conditions of the undertaking, the interim order shall stand vacated without further reference to to the Court.

24. List the Application for 'reporting compliance' on 25.02.2019.

(R. G. KETKAR, J.)

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