

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.27 OF 2019
WITH
CIVIL APPLICATION NO.9 OF 2019
IN
CIVIL REVISION APPLICATION NO.27 OF 2019

Madan Ramkisan Bajaj and others ... Applicants
Vs.
Shripad Haribhau Ratnaparkhe and another ... Respondents

Ms Kalyani Tulankar a/w. Mr. A. A. Pimpalwalkar for Applicants.

CORAM : R. G. KETKAR, J.
DATE : MARCH 14, 2019

P.C. :

Not on Board. At the request of Ms Tulankar, learned Counsel for the applicants, taken up for admission.

2. In view of Section 7 of C.P.C., Ms Tulankar seeks leave to convert this Civil Revision Application into Writ Petition under Article 227 of the Constitution of India. Leave as prayed for is granted. Amendment shall be carried out within one week from today.

3. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants', have challenged the judgment and decree dated 07.10.2016 passed by the learned 3rd Additional Judge, Small Causes Court at Pune in Civil Suit No.198 of 2013 as also the judgment and decree dated 06.10.2018 passed by the learned District Judge-18, Pune in Regular Civil Appeal No.1073 of 2016. By these orders, the Courts below decreed the Suit instituted by the respondents, hereinafter referred to as 'plaintiffs', under Section 16(1)(n) of the Maharashtra Rent Control Act, 1999 (for short 'Act') and

directed the defendants to handover vacant and peaceful possession of the shop premises situate on the ground floor of C.T.S.No.768, Kasba Peth, Pune admeasuring 221 sq.ft., more particularly described in paragraph 1 of the plaint (for short 'suit premises') to the plaintiffs within thirty days from the date of the order.

4. Plaintiffs instituted Suit for recovery of possession of the suit premises inter alia contending that the suit premises was let out to one Ramkisan Ramdayal Bajaj. He died in March 2006 leaving behind defendants No.1 to 4 being his heirs and legal representatives. He did not carry on any business in the suit premises and in fact, the suit premises was kept locked. Plaintiffs further contended that defendants No.1 to 4 also did not use the suit premises without reasonable cause for the purpose for which they were let out for a continuous period of six months immediately preceding the date of the Suit. Alternatively, plaintiffs contended that after the death of Ramkisan Dayal Bajaj, defendants No.1 to 4 did not carry on business of grocery and general merchant and they have used the suit premises for the purpose of godown for storing musical instruments. Thus, defendants No.1 to 4 have changed the user of the suit premises. The plaintiffs also contended that for more than 23 years, defendants No.1 to 4 have not paid the electricity bills. In fact the Maharashtra State Electricity Board had disconnected the electricity connection. Defendants No.1 to 4 never made any attempt for restoration of electricity connection. The very fact that for last 23 years, electricity supply is not restored to the suit premises, establishes their case that the suit premises is not used continuously for more than 6 months preceding filing of the Suit.

5. Defendants filed written statement traversing the allegations made in the plaint. It is their case that the suit premises was let out for

non-residential purpose without specifying as to whether the suit premises is to be used as a shop or godown. Defendants further contended that after the death of Ramkisan Bajaj, they started business of ration shop i.e. grocery item supply by the Government. In the year 1997, due to ill-health of Ramkisan, the licence was surrendered to Food Distribution Officer. It is mutually agreed between the legal representatives of deceased Ramkisan that defendant No.4 will take care of the suit property. Defendant No.4 is a singer and owns musical orchestra. For the said orchestra, some valuable instruments such as lights, speakers, etc. are needed for performing the programme. Defendant No.4 started using the suit premises as godown. Even today, all the valuable musical instruments are lying in the suit premises. Whenever needed, defendant No.4 takes instruments from the godown and after the programme is over, he keeps the instruments back in the godown. It was denied that it amounts to change of user of the suit premises as contemplated by the Act.

6. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence in support of their respective case. After appreciating the evidence on record, the learned trial Judge decreed the Suit. Appeal preferred by the defendants was dismissed. It is against these orders, defendants have instituted the present Petition.

7. In support of this Petition, Ms Tulankar strenuously contended that the Courts below were not justified in passing the eviction decree on the ground of non-user as contemplated by Section 16(1)(n) of the Act. She has invited my attention to paragraph 4 of the plaint. In paragraph 4, the plaintiffs alleged non-user. However, in paragraph 4-A, they contended that instead of using the suit premises for grocery business

and general merchant, defendants are using it as a godown for storing the musical instruments. Thus, it cannot be said that there is a non-user of the suit premises. She also relied upon the rent receipts which describe the purpose for which the suit premises was let out, namely, for non-residential purpose. She submitted that as the suit premises was let out for non-residential purpose, this will also include user of the suit premises as godown. The Courts below were, therefore, not justified in decreeing the Suit under Section 16(1)(n) of the Act.

8. Ms Tulankar further submitted that in any case the Suit is barred by limitation. She submitted that in the written statement, it was specifically contended that the Suit is barred by limitation. The plaintiffs came with the case that the suit premises is not used from 1995 and the Suit is instituted in the year 2013. In view of Article 67 of the Limitation Act, 1963, as the Suit is not instituted within a period of 12 years from accrual of cause of action, the Courts below ought to have dismissed the Suit on the ground of limitation. Lastly, she submitted that in any case, there is waiver on the part of the plaintiffs. According to the plaintiffs, the suit premises is not used since 1995 and that, till filing of the Suit, no action was taken against the defendants by filing Suit or even otherwise, and thus, the plaintiffs have waived the ground of non-user as contemplated by Section 16(1)(n) of the Act. In support of this submission, she relied upon the decision in ***Panchal Manilal Vs. Mistry Mulshankar***, AIR 1988 Gujarat 177 and submitted that Petition requires consideration.

9. I have considered the submissions advanced by Ms Tulankar. I have also perused the material on record. As mentioned earlier, the Courts below have decreed the Suit on the ground of non-user. The learned trial Judge has considered this ground from paragraph 16

onwards. In paragraph 31, the learned trial Judge observed that the landlord has to plead and establish that the premises are not being used for the purpose for which it was let out. Once that burden is discharged by the landlord, it is for the tenant to plead and establish reasonable cause which prevented him from using the premises for the purpose for which it was let out. In paragraph 37, the learned trial Judge referred to the evidence of Firoja Karimbhai Wadhwani at exhibit-41, Malhar Balkrishna Paithankar at exhibit-63 and Amol Arun Gadekar at exhibit-67 and observed that for a considerable, for last 15 to 20 years, there is no electric connection in the suit premises. In paragraph 38, the learned trial Judge noted that in the cross-examination, D.W.1 Manik Bajaj admitted that for running musical instrument, electric supply is required. In paragraph 39, the learned trial Judge observed that during the course of cross-examination, D.W.1 admitted that since the year 1995, there is no electric supply. He admitted that his father Ramkisan during his life time never applied to M.S.E.B. for restoration of electric supply. Even after the death of Ramkisan, defendants did not apply for restoration of electric supply.

10. In paragraph 41, the learned trial Judge observed that from the admissions given by the D.W.1 in cross-examination, it is evident that the address of his business is shown as 9, Mangalwar Peth, Pune Orchestra Musical Paradise and this premises is owned by his brother-in-law and is in his possession since 1998. Thus, the defendant No.4 is using the premises at 9, Mangalwar Peth, Pune for his business purpose and not the suit premises. The learned trial Judge also dealt with the ground of limitation. In paragraph 48, the learned trial Judge observed that though the defendants raised the ground of limitation in their written statement, the said ground is not pressed either in the evidence or in arguments. The learned trial Judge referred to Article 67 of the

Limitation Act and observed that limitation of 12 years will start from the date when the tenancy is terminated. In the present case, the notice was issued on 05.03.2013 and therefore, the Suit instituted on 21.06.2013 is within limitation.

11. In support of the contention based on the ground of waiver is concerned, the learned trial Judge has dealt with this contention in paragraph 27. The learned trial Judge observed that no such contention was raised in the written statement. Even no evidence was adduced. During the course of evidence of plaintiffs, suggestion was given regarding implied consent of the plaintiffs for change of user, which was denied by the plaintiffs. The learned trial Judge negated the contention of waiver. Thus, the learned trial Judge, after appreciating the evidence on record, held that plaintiffs have established the ground of non-user.

12. In so far as the decision of the District Court is concerned, after re-appreciating the entire evidence on record, the learned District Judge observed in paragraph 15 thus,

“15. From the evidence adduced by the plaintiff which has been discussed above, it is clear that the suit property is not being used for grocery business after the demise of father of defendants. The photographs show that, it is locked. The documentary evidence and the oral evidence discussed above shows that, there is no electricity connection in the suit property since after the year 2000. It also has come on record that the license to conduct the business has not been renewed after the year 1995. Thus, it is clear that on the date of filing of suit, no business of grocery shop and general merchant was being run in the suit property. The suit property has not been used for running such business since the year 1995. Thus, it is clear that since more than six continuous months prior to filing of the suit, the defendants have not been using the suit property for running the business of grocery shop and general merchant. No reason is assigned for not doing such business by the defendants.”

13. In paragraph 16, the learned District Judge referred to the

contention that the suit premises is used as a godown. It was observed that to substantiate this contention, no documentary evidence was adduced. No licence was produced by the defendants showing that they are using the suit property for any business much less for the use as a godown. The learned District Judge thereafter considered the admission of Manik (D.W.1). In paragraph 17, the learned District Judge dealt with the evidence of Rahul Karat (D.W.2). In paragraph 18, the learned District Judge referred to the decision of **Panchal Manilal** (*supra*) and observed that no such case was made out in the present case.

14. In the case of ***Dunlop India Limited Vs. A.A. Rahna***, (2011) 5 SCC 778, the Apex Court has observed in paragraph 22 thus:

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

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. 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. In the present case, defendants have admitted non-user. They have not exhibited the reasonable cause that prevented them from using the suit premises.

17. Applying the tests laid down by the Apex Court in **Dunlop India Limited** (*supra*) to the facts of the present case, I do not find that the Courts below committed any error in decreeing the Suit under Section 16(1)(n) of the Act. Defendants are not in a position to demonstrate 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. Defendants are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed.

18. In view of the dismissal of C.R.A., Civil Application No.9 of 2019 for stay of the impugned orders does not survive and the same is dismissed.

19. At this stage, Ms Tulankar orally applies for stay of the eviction

decree for a period of 8 weeks from today. She assures that within 2 weeks from today, defendants and all adult family members using the suit premises will file usual undertaking, with advance copy to the other side, 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 two weeks from today; and
- (e) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will hand over vacant and peaceful possession of the suit premises to the plaintiffs;

20. In view thereof, notwithstanding dismissal of the Application, subject to the defendants and all adult family members using the suit premises filing the undertaking in the aforesaid terms as also clearing arrears of rent, if any, within two weeks from today, the eviction decree shall not be executed for the period of eight 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 defendants commit breach of any of the conditions of the undertaking, this interim order shall stand vacated without further reference to the Court.

21. List the Petition for reporting compliance on 11.04.2019.

(R. G. KETKAR, J.)