

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.46 OF 2019

The Municipal Corporation of Greater Bombay ... Applicant
Vs.
Umedalibhai Merchant (deleted) and others ... Respondents

Mr. G. S. Godbole, Senior Advocate a/w. Ms Shital Mane a/w.
Mr.Santosh Parad i/b. J. J. Xavier for Applicant.
Mr. Sajjad H. Patel for Respondents No.2, 10 to 13, 15, 16 and 20.

CORAM : R. G. KETKAR, J.
DATE : JULY 15, 2019

P.C. :

Heard Mr. Godbole, learned Senior Counsel for the applicant and Mr. Patel, learned Counsel for the respondents No.2, 10 to 13, 15, 16 and 20 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the applicant - Municipal Corporation of Greater Mumbai (hereinafter referred to as 'defendant') has challenged the judgment and decree dated 30.11.2013 passed by the learned trial Judge in R.A.E. Suit No.241/498 of 1995 as also the judgment and decree dated 13.11.2018 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.43 of 2014. By these orders, the Courts below decreed the Suit instituted by the respondents, hereinafter referred to as 'plaintiffs', under Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') and directed the defendant to handover vacant and peaceful possession of rooms No.8 to 14 situate on the first floor of the building at 165/67, Nisanpada Road, Dongri, Mumbai - 400 009 (for short 'suit premises') to the plaintiffs.

3. The Application was heard on 25.02.2019. Mr. Godbole relied upon order dated 05.02.2019 passed by this Court in C.R.A.(St.) No.33222 of 2018 whereby the issue as to whether it would be a fatal error in the pleading of a landlord where he only pleads that the tenant has not used the suit premises continuously for a period of six months or more immediately preceding the suit but fails to further plead that there was "no reasonable cause" for non-user of the premises was referred to the larger Bench. In view thereof, the parties were asked to address this Court on the question as to whether order dated 05.02.2019 passed by this Court in C.R.A.(St.) No.33222 of 2018 needs to be recalled or not.

4. Accordingly, the parties were heard at length and by order dated 04.06.2019, order dated 05.02.2019 referring the matter to the larger Bench was recalled. The application was adjourned beyond Summer Vacation to 11.06.2019. It was made clear that the observations made in the order dated 04.06.2019 are prima facie and tentative with a view to ascertaining whether to recall order dated 05.02.2019 or not. All contentions of the parties on merits were expressly kept open.

5. In support of this C.R.A., Mr. Godbole submitted that Suit is decreed under Section 13(1)(k) of the Act. He invited my attention to paragraph 5 of the plaint where plaintiffs have alleged the ground of non-user. He submitted that in paragraph 5 of the plaint, plaintiffs alleged that the suit premises are not being used by the defendant for the purpose for which the same has been let out i.e. for running school since last more than one year prior to filing of the Suit. The defendant has kept the premises locked and unused since a very long time. The plaintiffs have however not contended that "without any reasonable cause", defendant is not using the suit premises. He submitted that this is the fatal lacuna in the pleading of the plaintiffs. He relied upon the

following decisions:

- a. ***C. R. Shaik Vs. Lilabai D. Rohida*, 1981 Mh.L.J. 437;**
- b. ***Cyrus Behram Irani Vs. Pavis Burjorji Engineer*, 1991 Mah. R.C.J. 158;**
- c. ***Ashok Vithal Chavan Vs. Baburao Sakharam Bhagat*, 2002 (6) Bom.C.R.736;**
- d. ***M/s. Brimco Plastic Machinery Vs. Bhaladuta B. Pande*, Writ Petition No.8230 of 2008 decided on 09.02.2009;**
- e. ***Hasmat Rai Vs. Raghunath Prasad*, (1981) 3 SCC 103** to contend that in the eviction suit, the plaintiff-landlord has to make specific pleadings and to establish that the essential statutory requirements are satisfied.

6. As against this, Mr. Patel relied upon the decision of ***Gopaldas Khushaldas Parmar Vs. Sanmukhlal P. Shah*, 2012 (4) Mh.L.J. 599**. In this case, the learned Single Judge referred to the decision in ***C. R. Shaikh* (supra), *R. A. Datar Vs. Waman Dattatray Purohit*, 2004 Bom. R.C.463** and ***Dunlop India Limited Vs. A. A. Rahna*, (2011) 5 SCC 778**. The learned Single Judge noted that the defendant had elaborately pleaded the reasons for non-user. Though the plaintiff did not plead lack of reasonable cause, the defendant had elaborately pleaded the reasonable cause which prevented the defendant from using the suit premises. It was held that it was clear that no prejudice was caused to the defendant on account of failure of the plaintiff to plead lack of reasonable cause for non-user. Thus, what is necessary to find out in each case is whether the plaintiff has pleaded the ingredients of Section 13(1)(k) of the Bombay Rent Act / Section 16(1)(n) of the Maharashtra Rent Act. Reliance is also placed upon the decision of ***Ram Sarup Gupta Vs. Bishun Narain Inter College*, (1987) 2 SCC 555**. In that case, the Apex Court observed in paragraph 6 thus,

“ 6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. 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. In ***Bhagwati Prasad v. Shri Chandramaul***, AIR 1966 SC 735, a Constitution Bench of this Court considering this question observed:

'If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was

involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to reply upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.'

7. In paragraph 8, the Apex Court noted the contention of the appellant that mere execution of work of a permanent character and incurring expenses by the licensee is not sufficient to make the licence irrevocable; instead licensee must plead and prove by positive evidence that the licensee **“acting upon the licence”**, executed work of a permanent character and incurred expenses in its execution. The Apex Court observed thus,

“... It is well settled that the pleadings need not reproduce the exact words or expressions as contained in the statute, nor the question of law is required to be pleaded.”

8. In paragraph 10, it was observed thus,

“... It is true that the pleadings raised in the written statement of defendants did not expressly use the expression that the school had executed work of permanent character "acting upon the license". But reading the entire written statement one cannot escape the conclusion that the defendants had raised the plea that Raja Ram Kumar Bhargava the grantor of the license had granted license for running the school in the building and for using the open land for the purpose of school and in pursuance of the license, so granted, the school had executed work of permanent character and incurred expenses in making the same. The defendants further pleaded that no objection had been raised by the grantor of the license or by anyone else against the school in making the constructions. Repeated assertions have been made in their written statement that Raja Ram Kumar Bhargava, had granted a permanent license which was irrevocable. Substance of the pleading was clear that defendants had raised a specific plea that the school had in

pursuance of the license executed work of permanent character and incurred expenses in execution and that no objection was raised by the licensor therefore the license was irrevocable. ...”

9. In the order dated 13.04.2015 passed by this Court (Coram : N. M. Jamdar, J.) in C.R.A.No.893 of 2013 (Bhimraj Sardarmalji Parmar Vs. Bridget Nazareth and others), the learned Single Judge has followed the decision of Gopaldas Khushaldas Parmar (*supra*). In view of the decisions in **Gopaldas Khushaldas Parmar** (*supra*), **Bhimraj Sardarmalji Parmar** (*supra*) and **Ram Sarup Gupta** (*supra*), it is necessary to find out whether the defendant was taken by surprise. A perusal of the written statement filed by the defendant and in particular paragraph 5 thereof shows that defendant came with the case that Corporation had been running Khoja Mohalla Municipal Urdu School (for short 'said school') from 1st Standard to 4th Standard till the year 1993. Due to the dilapidated condition of the suit premises, defendant was compelled to temporarily shift their Urdu School to J. A. Urdu School. It was further submitted that the suit premises are in a dilapidated condition and for the safety of the children assembling in the said school, the defendant had to shift the said school temporarily to J.A. Urdu School. Thus, the defendant in fact pleaded reasonable cause for not using the suit premises. The defendant was aware of the plaintiffs' case which it has to meet.

10. In so far as the additional affidavit of examination-in-chief of plaintiff No.1 - Yasinbhai Gulamabbas Badami dated 24.02.2008 is concerned, in paragraph 2, the said witness deposed that defendant is not using the suit premises without any reasonable cause for which the same was let out to them for a continuous period of one year prior to filing of the Suit and even thereafter. He further stated that even today, the defendant is not using the suit premises and the same has been kept

locked. In view thereof, I do not find any merit in the contention raised by Mr. Godbole that as the plaintiffs did not aver any reasonable cause, the same is fatal for passing eviction decree on the ground of non-user.

11. Mr. Godbole submitted that it has come on record that the building is 75 years old. Plaintiffs' witness admitted that he cannot tell as to how many times, the building was repaired. He also could not tell the year in which the building was repaired by the plaintiffs' Trust. The very fact that the building is 75 years old and no repairs were carried out substantiates the contention of the defendant that the building is in dilapidated condition and therefore, the defendant was justified in not occupying the suit premises.

12. Mr. Godbole submitted that the Courts below committed serious error in passing the eviction decree on the ground of non-user. The Courts below failed to appreciate that the non-user was on account of the fact that the suit premises is in a dilapidated condition. Having regard to the safety of children assembling in the school, defendant was constrained to shift the said school to J. A. Urdu School. He has taken me through the evidence adduced by the parties as also findings recorded by the Courts below.

13. On the other hand, Mr. Patel supported the impugned orders and submitted that after appreciating the evidence on record, the Courts below have concurrently decreed the Suit under Section 13(1)(k) of the Act. He has also invited my attention to the deposition and the findings recorded by the Courts below. In so far as the ground of non-user is concerned, in additional affidavit of examination-in-chief of plaintiff No.1- Yasinbhai Gulamabbas Badami, in paragraph 3, it is deposed that the building where the suit premises is situate consists of ground plus three upper floors. The upper floors are occupied by the tenants and the

suit premises is on the first floor. The defendant has not brought on record any material to substantiate that the tenants who were occupying the upper floors have vacated the suit premises on the ground that building is in a dilapidated condition. On the contrary, in the written statement, defendant specifically pleaded that Mumbai Building Repairs and Reconstruction Board (for short 'Board') has carried out the repairs and they intend to shift the said School to the suit premises in the near future.

14. 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 the order passed by the learned trial Judge shows that he has considered ground of non-user from paragraphs 31 to 38. The learned trial Judge noted that defendant contended that as the suit premises was in a dilapidated condition, it was compelled to shift out of the premises to other premises and after premises were being repaired by Board, it was intending to shift back. The learned trial Judge observed that many years have been passed since the Board had repaired the suit building but the defendant is yet to shift back to the suit premises to continue to run the school. No reasons have been stated by the defendant as to what restrained it from shifting back to the suit premises even after the repairs. In paragraph 12, the learned trial Judge observed that though sufficient opportunity was granted to the defendant, it failed to lead its evidence. After considering the material on record, the learned trial Judge held that plaintiff has established the ground of non-user.

15. As far as the Appellate Court is concerned, the Appellate Court has considered this aspect from paragraphs 16 to 31. In paragraph 17, the Appellate Court noted that it is an admitted fact that since 1993, defendant stopped using the suit premises for school and the Suit is instituted in the year 1995. It is admitted fact that the school was shifted

in the year 1993 to J. B. Urdu School No.2, Kharanshala Road, Mumbai. The defendant has not exchanged any correspondence with the Trust calling upon it to carry out repairs as the suit premises was in a dilapidated condition. No evidence is adduced by the defendant to establish that it was compelled to shift the school temporarily from suit premises to J. B. Urdu School No.2.

16. In paragraph 18, the Appellate Court referred to the contention of the defendant that building has been repaired by Board and defendant are intending to shift in the near future. In paragraph 20, the Appellate Court noted that the Suit was decreed on 30.11.2013. Since 1993 till 2013, no attempt was made by the defendant for shifting the school to the suit premises. No educational activities were carried out in the suit premises. The suit premises is locked. It has also come on record that during the pendency of the Suit, lock of the suit premises was found broken, and therefore, trustees put another lock and handed over the keys to the authorized person of the Corporation. The photographs produced by the plaintiff show that after breaking open the windows, the anti-social elements started misusing the premises for illegal activities. In paragraph 21, the Appellate Court dealt with the contention of the defendant that plaintiffs have not averred that the suit premises is kept unused “without being reasonable cause”, which is a statutory ingredient to raise ground of eviction. The Appellate Court referred to the decisions in **C. R. Shaikh** (*supra*), **Hasmat Rai** (*supra*), **Gopaldas Khushaldas Parmar** (*supra*) and **Dunlop India Limited** (*supra*). In paragraph 26, the Apex Court observed that though the words 'without reasonable cause' are not pleaded in the plaint, in the written statement, defendant has elaborately pleaded the reasonable cause for non-user. Thus, both the parties are well aware of case of each other. In paragraph 31, the Appellate Court noted that plaintiffs have duly proved that defendants are not using the suit premises for the purpose for which it was let out

for more than six months prior to filing of Suit without any reasonable cause.

17. Thus, the Courts below, after appreciating the evidence on record, have concurrently decreed the Suit on the ground of non-user. The Courts below have also considered the decision in **Dunlop India** (*supra*). In that case, 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.”

18. 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).

19. 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.”

20. 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*."

21. 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.

22. After considering the evidence on record as also findings recorded by the Courts below and applying the principles laid down by the Apex Court in the case of **Dunlop India Limited** (*supra*), I do not find that the Courts below committed any error in decreeing the Suit. A perusal of the evidence on record shows that plaintiffs had adduced tangible evidence showing non-user of the suit premises. The defendant did not adduce any evidence much less positive evidence showing user of the suit premises. The defendant also did not establish the reasonable cause for not using the suit premises. In view thereof, I do not find that any case is made out for interfering with the impugned orders whereby the Suit is decreed on the ground of non-user under Section 13(1)(k) of the Act. The defendant was 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. The defendant was 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, Application fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab