

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.175 OF 2019

Firojoddin Sheroddin Sheikh	]	
(since deceased through his Lrs.)	]	
Shahabuddin B/o Firojoddin Shaikh	]	
and others.	]	Applicants
Vs.		
Zubedabegam w/o Nisar Moulavi	]	
through Constituted Attorney	]	
Ejaj Ahmed Badruddin Majid.	]	Respondent

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Mr. Rajesh S. Jadhav i/b Kasim Y. Sheikh, Advocate for the Applicant.

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CORAM : R.G. KETKAR, J.

DATE : 27th JUNE, 2019.

P.C:

Heard Mr. Jadhav, learned Counsel fro the applicant, at length.

2. By this application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C'), the applicants, who are legal heirs of the original defendant, hereinafter referred to as 'defendants' have challenged the judgment and decree dated 16th August, 2007 passed by Joint Civil Judge (Junior division) Kalyan in Regular Civil Suit No.471 of 1999 as also the judgment and decree dated 6th July, 2018 passed by Ad-hoc District Judge-1, Kalyan in Civil Appeal No.107 of 2007. By these orders, the Courts below have decreed the suit filed by the respondent, hereinafter referred to as 'plaintiff' under section 13 (1) (k) and 13 (1) (l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') and directed the

defendant to hand over vacant and peaceful possession of Room No.5, House No.17 in Municipal Lane No.45, Annasaheb Vartak Road within the jurisdiction of Kalyan Dombivali Municipal Corporation (hereinafter referred to as 'suit premises').

3. In support of this application, Mr. Jadhav strenuously contended that the Courts below were not justified in passing the eviction decree on the ground of non user as contemplated by section 13 (1) (k) of the Act. The plaintiff did not adduce evidence to substantiate the said ground. He invited my attention to paragraph 18 of the trial Court's judgment to contend that in this paragraph the learned trial Judge observed that the suit summons Exhibit 5 was served on the defendant's new address of R.K. Plaza. The summons was accepted by the defendant on 16th October, 1999 on the address of R.K. Plaza. The learned trial Judge, therefore, concluded that the plaintiff has established that the defendant was residing in the premises at R.K. Plaza. Mr. Jadhav submitted that the said finding is contrary to the material on record.

4. Mr. Jadhav further submitted that the Courts below committed serious error in decreeing the suit under section 13 (1) (l) of the Act. The Courts below failed to appreciate that consideration for purchasing premises in R.K. Plaza was given by the son of the defendant who is gainfully employed in Saudi Arabia. Thus, the plaintiff has not established acquisition of alternate suitable residence by the original defendant.

5. I have considered the submissions advanced by Mr. Jadhav. I have also perused the material on record. In so far as contention that the plaintiff did not adduce evidence establishing ground of non user is concerned, in paragraph 18, the learned trial Judge observed that the suit summons at Exhibit 5 was served on the defendant on the new address of R.K. Plaza i.e

premises other than the suit premises. The defendant accepted the suit summons on 16th October, 1999 and this fact establishes that the defendant is residing in premises other than the suit premises. The learned trial Judge also noted that the defendant did not enter into the witness box. Mr. Jadhav submitted that at the relevant time, the defendant was not well. I do not find any merit in this submission. The defendant could have applied for his examination through Commissioner. That apart, Mr. Jadhav could not substantiate his submission that finding recorded in paragraph 18 is contrary to record.

6. In so far as the District Court is concerned, the learned District Judge has considered ground of non user and acquisition of alternate suitable residence from paragraphs 10 to 12. After considering the material on record, the learned District Judge observed that though the defendant came with plea that consideration for purchasing premises in R.K. Plaza was received from son, he did not substantiate the said contention by producing documentary evidence. He also admitted that he is running a transport business. Mr. Jadhav fairly stated that agreements in respect of flat No.17 and 18 of the year 1994 are in the name of the defendant. Thus, the learned District Judge after re-appreciating the entire evidence on record has affirmed the findings recorded by the learned trial Judge under section 13 (1) (k) and 13 (1) (l).

7. In the case of **Dunlop India Limited Vs. A.A. Rahna (2011) 5 Supreme Court Cases 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. 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.”

8. In paragraph 27, the Apex Court referred to the decision in **Brown V 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."**

(emphasis supplied)

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.

9. In this case, the Apex Court has laid down that the plaintiff/landlord has to adduce tangible evidence. Once landlord adduces tangible evidence, it is for the defendant to adduce positive evidence showing user of the premises. In the present case, the defendant has not adduced positive evidence. Hence, I do not find that the Courts below committed any error in passing the impugned orders.

10. In view thereof, it cannot be said that the findings recorded by the Courts below while decreeing the suit under Section 13 (1) (k) and 13 (1) (l) of the Act are contrary to the material on record. The defendants are 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 the material on record, no reasonable or prudent person would have come to the conclusion arrived at by the Courts below. Defendants are not in a position to show that the findings are contrary to the evidence on record. 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.

[R.G. KETKAR, J.]