

Sneha
N.
Chavan

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 72 OF 2020

Mr. Sabaji Vitthal Desai (since deceased)
Through Lrs. Rajesh Sabaji Desai & Anr. ..Applicants
V/s.

Sou. Chhaya Mohan Patkar ..Respondent

Mr. Sagar Joshi for the Applicants.

Mr. Rajesh Datar for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 24th FEBRUARY, 2021

P.C.

1. The challenge in this revision application is to the judgment and order dated 15.02.2017 passed by the learned District Judge at Thane in Civil Appeal No. 34 of 2012. By the impugned judgment, the learned District Judge, while dismissing the appeal filed by the applicant, has confirmed the judgment and decree dated 31.10.2011 passed by the learned 6th Joint Civil Judge Junior Division, at Thane in Regular Civil Suit No. 648 of 2016.

The net result is that there is a decree of eviction passed against the applicants *inter alia* on the ground that the applicants have not used the premises for a period of more than 6 months.

2 The subject matter of dispute happens to be a room admeasuring 12 ft X 13 ft along with open space (varanda) admeasuring about 3 x12 ft situated at Chhaya Mohan Patkar Chawl, Shastri Nagar, Thane(West), which is more specifically described in the plaint. The applicants happen to be the tenants in respect of the said premises of the respondent.

3. According to the respondent, the monthly rent is Rs.35/- inclusive of taxes and cess, which are at present Rs.18.30 per month. The respondent claims that the applicants were irregular in the matter of payment of rent and permitted increases and were in arrears of rent from 01.01.1992, in spite of repeated request and demands. The respondent issued a notice dated 04.03.2006 thereby terminating the tenancy, on expiry of the period of 90 days from the receipt of the notice and sought possession along with arrears of rent etc. The said notice was returned after the postal authority served an intimation on the applicants. The respondent also sent a copy of notice under postal certificate. It is contended that the applicants failed to deliver possession as well as clear the arrears, which led the respondent to file aforesaid suit for possession and arrears of rent etc.

4. The suit was resisted on behalf of the applicants. It was contended that the applicants were residing in the suit premises since more than 30 years and were paying Rs.25 per month as rent inclusive of taxes. The applicants were also paying the light bill and water taxes separately. All other adverse allegations were denied. It was denied that the applicant No.1 along with his wife and nephew have shifted in another premises and the allegations about non user were denied.

5 On the basis of the rival contentions, the learned Trial Court framed as many as fifteen issues.

6. At the trial, the respondent examined her husband Mohan Patkar (PW-1), who also happens to be her Power of Attorney holder. The respondent also examined Shreekant Mane (PW-2), Shreenath Dubey (PW-3), Pramod Kalekar (PW-4) and Prashanti Mane (PW-5) and produced certain documents. The original defendant examined himself as (DW-1) and one Anant Ghogale (DW-2)

7. The learned Trial Court answered the material issue nos. 2, 3 and 7 in the affirmative and decreed the suit. The applicant

unsuccessfully challenged the same before the first Appellate Court. Hence, this revision.

8. I have heard Mr. Joshi, the learned counsel for the applicants and Mr. Datar, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have gone through the record.

9. Mr. Joshi, the learned counsel for the applicants has submitted that Issue No.2 as framed by the Trial Court namely whether the applicant (defendant) has secured alternate accommodation, could not have been framed. It is submitted that Section 16 of the Maharashtra Rent Control Act, 1999 ('the Act' for short) does not provide a ground for eviction namely that of the tenant having secured an alternate accommodation. It is next submitted that the power of attorney, which was executed by the respondent in favour of PW-1 on 26.06.2002 did not authorise PW-1 to depose on behalf of the respondent, in the aforesaid suit. It is, thus, submitted that the evidence of PW-1 was inconsequential and ought to have been discarded. He, therefore, submitted that the impugned Judgment and Decree be set aside. Except these, there are no other contentions raised.

10. Mr. Datar, the learned counsel for the respondent has supported the impugned judgment. It is submitted that the ground about the tenant having secured an alternate accommodation has been given up by the respondent before the first Appellate Court. It is submitted that the power of attorney was executed in the year 2002 i.e. prior to the institution of the suit in the year 2006 and therefore, cannot possibly have a reference to the said suit. It is submitted that the power of attorney holder i.e. PW-1 is the husband of respondent and it has come on record that he was also issuing rent receipts and therefore, was in know of the facts of the case. He, therefore, submitted that absence of the specific reference to the civil suit in the power of attorney is inconsequential. It is submitted that it has sufficiently been proved on the record that there was non user of suit premises for a period of 6 months prior to the filing of the suit and therefore, the eviction decree does not call for any interference.

11. I have considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. It is true that Section 16 of the Act, in terns does not set out a ground for eviction namely that the tenant has secured an alternate accommodation. It is also true that the Trial Court had framed issue

No.2 to that effect. However, a perusal of the para 13 of the judgment of the first Appellate Court would indicate that it was conceded on behalf of the respondent that issue no.2 was wrongly framed. The appellate court is right in refusing to remand the matter as mere framing of a wrong issue was not sufficient for remand of the matter. Thus, the consideration has primarily to be confined to the ground of non user.

12. The contention that the power of attorney does not specifically mention the number of the suit has rightly not been accepted. It is necessary to note that the power of attorney was executed in the year 2002 while the suit itself was filed in the year 2006 and therefore, the power of attorney possibly cannot contain the specific number of the suit. That apart, it has come on record that PW-1 who is the husband of the respondent, was dealing with the applicant in respect of the suit property and had infact issued the rent receipts. It can thus, be seen that the PW-1 was in know of the facts of the case and therefore, his evidence could be read and relied upon. PW-2 Mr. Mane was the Manager of Mane and Vartak Gas Agency. He stated that the wife of the defendant Sou. A.S. Desai, was their customer since 18.08.1992 having consumer No. 608335. She had applied for a second gas cylinder on 24.06.1994

and cash memo was produced at Exhibit 28 along with letter head Exhibit 29 and copy of the voucher Exhibit 30. This witness stated that the address of the wife of the applicant was shown as Flat No.2, Upvan Society, Shivai Nagar, Thane. PW-3 is an employee working with MSEB since 1977, in whose evidence it has come on record that there was no consumption as such in the suit premises for the period from 1997 to June 2010.

13. PW-4 is one Mr. Kalekar, who was working as a Secretary of Shivai Nagar Upavan Co-op. Housing Society since 2002, of which the applicant was also a member since 1989 having purchased Block No.2. Lastly, PW-5 is the Nayab Tahsildar, who had produced a voters list Exhibit 65, in which the name of the defendant, his wife and son were appearing at serial Nos. 96 to 98 with the address at Shivai Nagar, Upavan Co. Op. Housing Society. The said list was published on 30.10.2010. Thus, there is sufficient evidence on record that the tenant was not residing in the suit premises since more than 6 months prior to the filing of the suit. PW-1 had admitted that he is unable to file electricity bill of the suit premises for the period from 2002 to 2006. Considering the over all evidence, the first Appellate Court had held the ground under Section 16 (1)(n) of the said Act to be proved. The said finding

does not suffer from any infirmity so as to require interference in the revisional jurisdiction.

14. The revision application is without any merit and is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.