
(2015) 09 BOM CK 0037

In the Bombay High Court

Case No : Writ Petition No. 5274 of 1997

Abdul Rehman Khan Fakir Mohamed

APPELLANT

Vs

Afzal Khan and Others

RESPONDENT

Date of Decision : 01-09-2015

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15, 15(1)
Contract Act, 1872 — Section 10, 23, 65

Citation : (2015) 09 BOM CK 0037

Hon'ble Judges : M.S. Sonak, J

Bench : Single Bench

Advocate : Pravin N. Shah, for the Appellant; D.B. Sawant and Vinayak Salokhe, Advocates for the Respondent

Judgement

M.S. Sonak, J—The petitioner, Abdul Rehman Fakir Mohamed (Abdul), who is himself a tenant in respect of suit premises, instituted L.E.& C. suit No. 230/270 of 1988 against Mohd. Ismail Mohamed Ibrahim (Mohd. Ibrahim) on the ground that the said Mohd. Ibrahim was a licensee and had unduly refused to vacate the suit premises, despite the expiry of termination of licence. The suit was not contested by Mohd. Ibrahim and by ex-parte decree dated 9 November 1994, Mohd. Ibrahim was ordered to be evicted from the suit premises.

2. The execution of the decree dated 9 November 1994 was, however, obstructed by Afjal Khan and others, thereby requiring the petitioner-Abdul to take out obstructionists Notice No. 230/270 of 1988. The Trial Court, by its judgment and order dated 21 August 1996, held that the obstructionists have not been able to establish any independent right in themselves, but went on to hold that the petitioner, himself being a tenant, was not entitled to create a leave and licence in favour of Mohd. Ibrahim and therefore, the decree dated 9 November 1994 was invalid and obtained by fraud. Upon such reasoning, the obstructionists Notice No. 3 of 1995 was discharged. The petitioner's appeal to the Division Bench of the Small Causes Court (Appeal Court) was dismissed on 13 August

1997, endorsing the very same reasoning. Hence, the present petition.

3. In this case, both the Trial Court as well as the Appeal Court have categorically recorded that the obstructionists have been unable to establish any independent right in themselves and that the obstructionists are nothing but the claimants under Mohd. Ibrahim, the original licensee. The obstructionists had raised various pleas in their affidavit-in-reply to oppose the obstructionists notice. However, the plea which has found favour with the two Courts, is that the very grant of licence to Mohd. Ibrahim was unlawful in terms of the provisions contained in Section 15 of the Bombay Rents, Hotel and Lodging Houses Rates Control, 1947 Act (Rent Act), and the petitioner-Abdul, having unlawfully licensed the suit premises to Mohd. Ibrahim, was not entitled to take recourse to any legal proceedings for the recovery of possession of suit premises. The Appeal Court has held that very grant of licence in favour of Mohd. Ibrahim was a contract hit by public policy and there fore, such contract would never be enforced through a Court of law. There are, in my judgment, several fallacies in the reasoning of the two Courts.

4. There was no plea taken by Mohd. Ibrahim that the very grant of licence was an unlawful contract or a contract hit by doctrine of public policy. There is again difference between an illegal or unlawful decree and decree which is a nullity. The obstructionists, which the two Courts have held, claimed through and not independent of Mohd. Ibrahim, could not have resisted the execution of the decree, unless, they were to establish that decree is a nullity. Therefore, the belated plea of obstructionists, who were not setting up any independent right in themselves, was clearly misconceived.

5. Section 15(1) of the Rent Act does prohibit a tenant from giving on licence, in whole or in part, the suit premises. This is, however, subject to the contract to the contrary. In this case, there is no material on record to establish the nature of contract between the petitioner and the landlord. In any case, there is no provision under the Rent Act, which renders such contract as void, as opposed to unlawful. Such distinction is relevant, because the Apex Court in case of Nutan Kumar and Others Vs. IInd Additional District Judge and Others, AIR 2002 SC 3456 : (2002) 7 JT 481 : (2002) 7 SCALE 81 : (2002) 8 SCC 31 : (2002) 2 SCR 686 Supp , has held that a contract in violation of statute is not void, unless the statute specifically provides so and the contract would remain binding between the parties and can always be enforced between the parties themselves.

6. In case of Nutan Kumar vs. IInd Additional District Judge (supra), the Apex Court placing reliance upon its earlier decision in case of Nanakram Vs. Kundalrai, AIR 1986 SC 1194 : (1986) 1 SCALE 916 : (1986) 3 SCC 83 : (1986) 2 SCR 839 : (1986) 2 UJ 535 , at paragraphs 7, 11 and 13, observed thus :

7. In the case of Nanakram Vs. Kundalrai, AIR 1986 SC 1194 : (1986) 1 SCALE 916 : (1986) 3 SCC 83 : (1986) 2 SCR 839 : (1986) 2 UJ 535 the question was whether a lease in violation of statutory provisions was void. It was held that in the absence of any mandatory provision obliging eviction in case of contravention

of the provisions of the Act the lease would not be void and the parties would be bound, as between themselves, to observe the conditions of lease. It was held that neither of them could assail the lease in a proceeding between themselves. This authority was in respect of the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949, wherever also the landlord was obliged to intimate a vacancy to the Deputy Commissioner of the District and the Deputy Commissioner could allot or direct the landlord to let the house to any person. The provisions were more or less identical to the provisions of the said Act. This authority has directly dealt with the questions under consideration and answered them. The majority judgment takes note of this authority and holds as follows:

"With utmost humility and reverence it is stated that above observations are not compatible with provisions of Sections 10 and 23 of the Contract Act. Otherwise also, it is most respectfully pointed that the statement of law contained in the said observation is, perhaps, in conflict with the law declared in the decisions of the Hon'ble Supreme Court in Waman Shrinivas Kini v. Rati Lal Bhagwan Das & Co., Shrikrishna Khanna V. Additional District Magistrate, Kanpur and others, and Manna Lal Khetan V. Kedar Nath Khetan."

Thus it is to be seen that the majority judgment, with a pretence of humility and reverence refuse to follow a binding authority of this Court. It was not open for the Full Bench to comment that the authority was not compatible with provisions of Section 10 and 23 of the Contract Act. The Full Bench also realised that there are no conflicting authorities. They therefore say that this authority is "perhaps in conflict with" the decisions in Waman Shrinivas Kini, Shrikrishna Khanna and Manna Lal Khetan. One must therefore see whether there is any conflict of decisions. If there is no conflict then judicial discipline and propriety required that the majority of the Full Bench followed the binding authority of this Court.

8. ...

9. ...

10. ...

11. It is thus to be seen that the principles laid down in Nanakram's case still hold the field. There is no contrary or conflicting decision or authority. The Full Bench was bound by the authority in Nanakram's case and could not have taken a contrary view.

12....

13. In this view of the matter the decision of the Full Bench dated 20th May, 1993 cannot be sustained and is set aside. It is held that the law, as laid down in Nanakram's case, still holds the field. Thus unless the statute specifically provides that a contract contrary to the provisions of the statute would be void the contract would remain binding between the parties and could be enforced between the parties themselves. Consequently the judgment dated 20th September, 1993 dismissing the Writ Petition is set aside. The matter is sent

back to the High Court for deciding the Writ Petition in accordance with law.

The appeals stand disposed of accordingly. There will be no order as to costs."

(emphasis supplied)

7. Mr. Sawant, learned counsel for the respondents, has placed reliance upon the decision of the Full Bench of the Allahabad High Court in case of Nutan Kumar and others Vs. IInd Additional District Judge, Banda and others, AIR 1994 All 298 : (1993) AWC 1090 , which was incidentally the same decision, upon which reliance was placed by the Appeal Court whilst making the impugned judgment and decree dated 13 August 1997. Such reliance, with respect, is clearly misplaced. This is because, the Apex Court, in case of Nutan Kumar vs. IInd Additional District Judge (supra), has specifically set aside this decision of the Full Bench dated 20 May 1993.

8. Further, the Division Bench of this Court, in case of Kakubhai and Co. Vs. Nathmal Kisanlal, AIR 1980 Bom 25 : (1979) MhLj 450 , in the context of the provisions contained in Clauses 22, 23 and 24 of the C.P. & Berar Letting of Houses and Rent Control Order 1949, has held that even though the lease may be in contravention of the legal provisions, nevertheless, the suit by landlord for restoration of possession is legal and proper. In such a suit, the party to a void contract, cannot take advantage and continue to enjoy the benefit of contract, which he himself alleges as being void.

9. The matter can be viewed from yet another perspective. Even, if we are to proceed on the basis of that the very contract of licence as between the petitioner - Abdul and Mohd. Ibrahim, through whom the obstructionists claim, was void under Section 23 of the Indian Contract Act, 1872 (Contract Act), even then, the provisions of Section 65 of the Contract Act provides that when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. Accordingly, there is no question of Mohd. Ibrahim continuing in possession on the basis of so called void contract. If, Mohd. Ibrahim was disabled from so continuing, then surely, the obstructionists who claim under said Mohd. Ibrahim, can have no better claim or case.

10. Upon cumulative consideration of the aforesaid facts and circumstances, as also the legal position, the impugned judgments and orders dated 21 August 1996 and 13 August 1997 are required to be set aside and are hereby set aside. The obstructionists Notice No. 3 of 1995 is made absolute. Rule is also made absolute to the said extent.

11. In the facts and circumstances of the present case, there shall be no order as to costs.