

(1996) 09 BOM CK 0007
In the Bombay High Court
Case No : First Appeal No. 726 of 1990

Abdulhussein Noorooddin Kagajwalla and Another	APPELLANT
Vs	
Messrs Maharashtra Industries and Another	RESPONDENT

Date of Decision : 27-09-1996

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 14, 15A, 28, 5(8), 8A

Citation : (1997) 2 BomCR 246

Hon'ble Judges : V.H. Bhairavia, J

Bench : Single Bench

Advocate : S.U. Kamdar and V.S. Khemka, for the Appellant; A.K. Abhyankar, for the Respondent

Final Decision : Allowed

Judgement

V.H. Bhairavia, J.—This appeal is directed against the judgment and order dated 29-8-1990 passed by the City Civil Court, Bombay in Chamber Summons No. 1207 of 1989 in S.C. Suit No. 6948 of 1973, whereby the Chamber Summons was made absolute.

2. The execution proceedings taken out by the decree holder i.e. the respondents herein against the appellants who have obstructed the execution of the ex-parte decree. A Suit being S.C. Suit No. 6948 of 1973 was filed in the City Civil Court, Bombay against M/s. Gipar Packaging Industries for recovery of the suit premises situated at 1st floor, Kalina Castle, 175, C.ST. Road, Kalina, Bombay - 29 and for recovery of arrears of compensation and mesne profit etc. The said suit came to be decided ex-parte on 7-1-1988. Under the decree, the defendants-Judgment debtor M/s. Gipar Packaging Industries were directed to hand over the possession of the suit premises to the plaintiffs by 29th February, 1988. Further, the defendants judgment debtor were directed to pay mesne profit to the plaintiffs at the rate of Rs. 1,050/- p.m. It reveals that in pursuance to the said decree, the decree holder-plaintiff moved for issuance of the writ of possession

and the Registrar of the City Civil Court issued a writ of possession on 22nd August, 1989 and a warrant of attachment of the moveable property in possession of the judgment-debtor respondent No. 2 herein. The Bailiff of the Sheriff had gone to the suit premises on 7-9-1989 and on 14-9-1989 respectively for execution of the said writ of possession and on both the occasions, the premises was found to be locked. Again, on 19-9-1989, the Bailiff of the Sheriff had gone to the suit premises for execution and at the same time, the premises was found open and there was a board in the name of M/s. Gipar Industries- the appellant, instead of Gipar Packaging Industries-Judgment debtor. It reveals that again, on 26-9-89, the decree-holder respondent No. 1 alongwith the Bailiff went to the suit premises for execution of the writ of possession. At that time, he was obstructed by the present appellants. Therefore, the decree-holder respondent No. 1 took out a Chamber Summons for removing the obstruction caused by the appellants. The appellants filed their reply to the Chamber Summons contending that the appellants claim the occupation of the suit premises within their own rights as a protected tenant under the Bombay Rent Act, 1947. According to the appellants, there was a Leave and Licence Agreement executed between the original defendant-respondent No. 2 and the appellants in respect of the suit premises on 17th November, 1972. Further, it is contended that the said licence was for a period of 10 years i.e. upto 31st October, 1982. The said Leave and Licence Agreement was reduced into writing. The appellants claim that they are in possession of the suit premises since 1st November, 1972 and commenced their business therein in the name and style of Gipar Industries. The Partnership Deed was also executed on 15th November, 1972. It reveals that the business of warehousing was carried out in the beginning and thereafter, it was changed from warehousing to that of manufacturing playing cards and other paper items in 1978 in the suit premises. The factory permit was issued by the Municipal Corporation in 1979. Thereafter, the appellant No. 2 firm made purchases of diverse machineries from 1979 onwards for the purposes of establishing the project and the machineries worth about Rs. 2 lakhs were installed and the same were lying in the factory premises i.e. the suit premises. The appellants further alleged that the electricity connection and the machineries are standing in the name of appellant No. 2 firm. The appellant No. 2 firm was granted further permanent registration certificate on 17th March, 1977 in the name of appellant No. 2 firm from the Government of Maharashtra, Directorate of Industries. It has been submitted that the appellants thus, in occupation of the suit premises since 1972 and claimed to be deemed tenants of the suit premises by virtue of the amended provisions contained in the Bombay Rent Act. It is stated on behalf of the appellants that the appellants are entitled for legal protection against the eviction ex-parte decree as it is not binding to the appellants.

3. After framing the issues and recording the evidence, the learned Judge was pleased to reject the plea of the appellants and the Chamber Summons was made absolute by his order dated 29-8-90 directing the appellants to vacate the

suit premises. Hence, this appeal.

4. The question raised in the appeal is two fold :---

(A) (i) Whether the ex-parte decree passed by City Civil Court in Civil Suit No. 6948 of 1973 dated 29-8-1980 is binding to the appellant as it was barred by jurisdiction.

(ii) And, whether the appellants being licensee of the judgment-debtor respondent No. 2 since 1972, claimed to be deemed tenant are entitled to the protection u/s 15A of the Bombay Rent Act.

(B) (i) Is it open to raise the issue regarding jurisdiction in executing proceeding ?

(ii) Is it correct to hold that original defendant-respondent No. 2 as "dat qui not habet" (he gives nothing who has nothing).

5. Heard the learned Counsel Mr. Kamdar with Mr. Khemka for the appellants and the learned Counsel Mr. Abhyankar for respondent No. 1. It has been contended by Mr. Kamdar on behalf of the appellants that it is an admitted fact that the judgment-debtor respondent No. 2 herein was a licensee of the landlord respondent No. 1 herein as per the Leave and Licence Agreement (Exhibit "A") dated 15th July, 1968. This agreement purported to be initially for 11 months and was to be expired on 14th June, 1969. There was a clause for extension of period of leave and licence for further 9 consecutive period. Though the licence was not renewed in written terms, it is admitted fact that the defendant-respondent No. 2 was continued in possession without any interruption till the suit for eviction was filed in 1973. It is submitted that the judgment-debtor respondent No. 2 continued to be a lawful licensee/tenant of the suit premises. It is submitted that before the leave and licence agreement revoked by notice dated 30th July, 1973, Maharashtra Act No. XVII of 1973 came into force on 1st February, 1973 and all the licensees of the landlord were declared to be the deemed tenants of the said premises. The judgment-debtor respondent No. 2 was a licensee of the landlord respondent No. 1 under the agreement of leave and licence Exhibit "A" dated 15th July, 1968. Apparently, the judgment-debtor respondent No. 2 was the beneficiary of the amended section 15A of the Bombay Rent Act. The said section 15A reads as under :---

15A. Certain licensees in occupation on 1st February 1973 to become tenants.-

(1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day of February, 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purpose of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid.

And in view of this amendment, without going into the question of interpreting the relationship between the tenant and the landlord, the licensees have become the deemed tenants of the suit premises on 1st February, 1973. This is the undoubted statutory status of the judgment-debtor respondent No. 2 before the suit for eviction is filed and it has been categorically pleaded and stated by the judgment-debtor respondent No. 2 in his written statement filed by him in S.C. Suit No. 6948/1973. It is pertinent to reproduce here the said pleadings as under :--

In para 1 of the written statement, it is stated that-

"The defendants submit that this Hon"ble Court has no jurisdiction to entertain and try this suit and the suit can be tried only by the Court of exclusive jurisdiction specified in section 28 of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947, in as much as there is a relationship of landlord and tenant between the plaintiffs and the defendants in respect of the suit premises and the suit relates to recovery of possession of the suit premises to which the provisions of the Bombay Rent Act are applicable. The defendants submit that this Hon"ble Court has no jurisdiction to determine the claims and questions arising under the provisions of the Bombay Rent Act."

In Para 3 of the written statement, it has been stated that-

"The defendants are the monthly tenants of the plaintiffs in respect of the suit premises. The defendants are protected by the provisions of the Bombay Rent Act. By an agreement in writing arrived at between the defendants and M/s. Gipar Packaging on 6th July, 1970 the defendants granted a licence in favour of M/s. Gipar Packaging to have exclusive use and possession of the suit premises and also use the plant and machinery of the defendants on terms and conditions set out therein. M/s. Gipar Packaging are paying the monthly compensation/rent of Rs. 1050/- in respect of the factory shed to the defendants. Rs. 15/- as water charges and Rs. 1185/ towards rent of plant and machinery. The said licence was duly subsisting on 1st February, 1973 and M/s.Gipar Packaging were in possession of the suit premises in their capacity as licensees of the defendants for the consideration as aforesaid. Accordingly, the Maharashtra Act No. XVII of 1973 coming into force M/s. Gipar Packaging became "deemed tenant" of the defendants in respect of the suit premises. M/s. Gipar Packaging have allowed M/s. Gipar Industries to conduct their business in the said premises. The defendants say that the plaintiffs are fully aware about the fact that the defendants are not in possession of the suit premises since about September, 1970. The plaintiffs have still not joined the said M/s. Gipar Packaging as party defendants to the suit."

6. The learned Counsel Mr. Kamdar for the appellants vehemently submitted that the appellants had also filed application requesting the Court to join them as defendants in the suit. However, the learned Judge has decided the suit ex-parte against the defendants. Obviously, the defendants were not interested in

defending the suit because they were not in possession of the suit premises. The learned Counsel Mr. Kamdar has vehemently submitted that the City Civil Court had no jurisdiction to entertain this suit, as it was barred by section 28 of the Bombay Rent Act and the City Civil Court has no jurisdiction to decide the issue regarding the relationship of the tenants and the landlord and the right of the tenants under the Bombay Rent Act. The learned Counsel has also stated that it is open for the appellants to challenge the ex-parte decree as it is not binding to the appellants and no writ of possession could be executed against the appellants. The Civil Court who has no jurisdiction to hear the suit ought not to have passed a decree for possession against the deemed tenant. Bombay Rent Act reads as under :---

28. Jurisdiction of Courts.--(1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction,

(a) in Greater Bombay, the Court of Small Causes, Bombay,

(aa) in any area for which, a Court of Small Causes is established under the Provincial Small Causes Courts Act, 1887, such Court and]

(b) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge the Court of the Civil Judge (Senior Division) having ordinary jurisdiction,

shall have jurisdiction to entertain and try suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this party apply [or between a licensor and a licensee relating to the recovery of the licence fee or charge] and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and [subject to the provisions of sub-section (2)] no other Court shall have jurisdiction to entertain any such suit, proceedings, or application or to deal with such claim or question.

(2) (a) Notwithstanding anything contained in clause (aa) of sub-section (1), the District Court may at any stage withdraw any such suit, proceeding or application pending in a Court of Small Causes established for any area under the Provincial Small Causes Courts Act, 1887, and transfer the same for trial or disposal of the Court of the Civil Judge (Senior Division) having Ordinary Jurisdiction in such area.]

(b) Where any suit, proceeding or application has been withdrawn under clause (a), the Court of the Civil Judge (Senior Division) which thereafter tries such suit, proceedings or application, as the case may be, may either retry it or proceed from the stage at which it was withdrawn.

(c) The Court of the Civil Judge trying any suit, proceeding or application withdrawn under clause (a) from the Court of Small Causes, shall, for purposes

of such suit, proceeding or application, as the case may be, deemed to be the Court of Small Causes.

7. In the plaint, the plaintiff has admitted that the defendant No. 2 (judgment-debtor) was a partnership firm, running a business in the name Gipar Packaging Industries and the suit premises was given on leave and licence basis and written agreement (Exhibit "A") dated 28th September, 1968 was executed. He has admitted that even after expiry of 11 months period of leave and licence agreement, the defendant continued to carry on his business in the suit premises and has continued to pay the rent to the plaintiff-landlord. It was not the case of the plaintiff that he was a trespasser of the suit premises but it is pleaded that the leave and licence agreement is revoked by notice dated 30th July, 1973 and he was in arrears of compensation/rent upto 1973. By virtue of statutory amendment, the licensee acquired the status of the deemed tenant of the said premises. He becomes the tenant of the landlord and the relation of tenant and landlord governs as per the Bombay Rent Act and therefore, the City Civil Court has no jurisdiction to hear the suit filed by the landlord against the tenant. In support of his argument, Mr. Kamdar relied on the case of Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, it has been observed thus-

(B) Bombay Rents, Hotel and Lodging Houses Rates Control Act (57 of 1947), sections 15A, 14-Licensee-Meaning of-Licensees created whether by landlords or tenants before 1-2-1973 and in occupation of at least single room-Are entitled to be tenants-Specific term for creating licence whether exists or not in original agreement is immaterial- Ratanlal Chandiprasad Jalan and Others Vs. Raniram Darkhan and Others, , Overruled. Decision of Bombay High Court dated 20-12-1985, Reversed.

"All licensees created by landlords or by the tenant before 1st February, 1973 and who were in actual occupation of a premises which was not less than a room as licensees on 1st February, 1973 be the licensees of the landlord or tenant and whether there be any term in the original agreement for tenancy permitting creation of such tenancy or licences or not they would become tenant and enjoy the rights granted under the Act specially those mentioned in section 14(2) of the Act. Ratanlal Chandiprasad Jalan and Others Vs. Raniram Darkhan and Others, , Overruled. Decision of Bombay High Court dated 20-12-1985, Reversed.

Until a decree of eviction is passed against the tenant, the tenant can create a licence and where the licence was created before 1st February, 1973, the licensee must, by the express terms of section 15A of the Act, continue to be a tenant of the landlord in respect of the premises in question. A tenant protected by a statute is entitled to create a licence. The licence is not an interest in property. It is purely a personal right. The various amendments in the Act introduced simultaneously with section 15A and the Aims and Objects indicate that the entire scheme of those amendments was to protect licensees. It cannot, therefore, be said that the scheme of the Act is intended to protect only the licensees of the tenant. On the contrary all licensees who were there on 1st

February, 1973 were to be protected and subsequent licences were made illegal as was done in the case of sub-tenancy from 1959. It was an attempt to protect very large number of legitimate persons in occupation and also to eliminate future mischief."

8. In view of this legal position, it is submitted that the City Civil Court has no jurisdiction to entertain the suit and to grant ex-parte decree for eviction. Obviously, this decree which is passed without jurisdiction, would be a nullity. The inherent jurisdiction of the Court is not vested in it and the decree passed is nothing but a nullity. Unfortunately, the defendant-respondent No. 2 has not challenged the ex-parte decree. Obviously, he was not at all interested in the proceedings because he was not a loser and had lost every interest in the suit premises. Therefore, the question is, can it be challenged at the time of execution of the decree ? In the case of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, , it has been observed thus :---

"When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record : where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In AIR 1933 61 (Privy Council) the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction".

9. In the instant case, it appears that though the defendant has taken objection regarding jurisdiction in his written statement and has categorically pointed out the legal position and the status acquired by the defendant by virtue of the amended provision of section 15A, the City Civil Court jurisdiction is expressly barred by section 28 of the Rent Act. The learned Judge has failed to appreciate this legal position and the ex-parte decree passed by him which deprives the legal right extended to the licensees by the Maharashtra Act No. XVII of 1973 and it is open for the appellants to challenge even at the executing stage. (Relied on Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others,). I do find much force in the argument of Mr. Kamdar. It is well settled law that a Civil Court cannot pass a decree for possession against a tenant, from the premises to

which provision of the Rent Control Act apply. (Relied on Smt. Govindamma Vs. Murugesh Mudaliar and others,).

10. The learned Counsel Mr. Abhyankar for the respondent No. 1 submitted that the suit premises used for manufacturing articles does not fall within the purview of "Premises" as defined u/s 5(8) of the Bombay Rent Act and the Licensee is not entitled for the benefit of the amended provision of section 15A of the Act and therefore, the question of jurisdiction of Civil Court does not arise in this case.

11. In view of the settled legal position, it is not possible to agree with the argument of Mr. Abhyankar, appearing for the respondents. It has been held by the Apex Court in Natraj Studios (P) Ltd. Vs. Navrang Studios and another, , as under :---

"If the definitions of "premises let or given on licence for business", "premises" and "licensee" are read together it will be clear that even a building so constructed or designed as to be capable of being used for running a certain business only is "premises" within the meaning of section 5(8) and section 5(8A) and does not cease to be premises merely because the building is capable of being used for the particular business only or merely because machinery or equipment must necessarily go alongwith the building if it is to be used for the business. If "premises" did not, by definition, include a building given on licence but meant only a building which was let, it could perhaps be argued that the expression "premises" would not take within its stride a business let as a business, but the situation is changed by the inclusion of any building given on licence in the definition of "premises" and by the deeming of a licensee as a tenant u/s 15A of the Act. A licensee is not really a tenant but is a person deemed to be a tenant because of section 15A of the Act".

"Exclusive jurisdiction to entertain and try certain suits, to decide certain applications or to deal with certain claims or questions given to the Court of Small Causes does not necessarily mean exclusive jurisdiction to decide jurisdictional facts also. Jurisdictional facts have necessarily to be decided by the Court where the jurisdictional question falls to be decided and the question may fall for decision before the Court of exclusive jurisdiction or before the Court of ordinary jurisdiction. A suit by the landlord against the tenant for recovery of possession of his premises on grounds specified in the Rent Act will have to be brought in the Court of Small Causes which has been made the Court of exclusive jurisdiction.

In the instant case the relationship between the parties being that of licensor-landlord and licensee-tenant and the dispute between them relating to the possession of the licensed-demised premises the Court of Small Causes alone has the jurisdiction and the Arbitrator has none to adjudicate upon the dispute between the parties."

12. The learned Judge has held the defendant respondent No. 2 as "dat qui not habet" (he gives nothing who has nothing).

13. It is an absurd view taken by the learned Judge because of some misconnect of legal position. As observed above, the defendant-respondent No. 2 was not a trespasser but a licensee/tenant of the suit premises. The plaintiff-respondent No. 1 has admitted that defendant-respondent No. 2 was in possession of the suit premises as a licensee and has paid compensation/rent upto March, 1973. Thus, licensee has become deemed tenant on 1st February, 1973. (Relied on Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram,). Therefore, it could not be said that licensee-defendant respondent No. 2 (judgment-debtor) was "dat qui not habet" (he gives noting who has nothing). Therefore, the finding of the learned Judge is not well founded and deserves to be set aside.

14. It reveals from the record that respondent No. 2 (judgment-debtor) has given the decretal premises alongwith the machineries therein to one Shri P.C. Moona in 1970 and Shri P.C. Moona was paying Rs. 1,200/- per month to the respondent No. 2 (judgment-debtor) towards the use of his machinery and decretal premises and Shri P.C. Moona was in exclusive possession of the decretal premises. Further, it is stated by him (judgment-debtor) that P.C. Moona has allowed the appellant-firm to use machineries and decretal premises to the appellant-firm and an agreement marked "Y" was executed in the year 1972 and he has signed over that agreement marked "Y" as licensor. However, it reveals that respondent No. 2 has signed on the documents of the agreement dated 17th November, 1972 purported to be executed between M/s. Gipar Packaging Industries, the licensor (judgment-debtor) and M/s. Gipar Industries as the licensee (appellant-firm). This document was signed in the presence of Shri P.C. Moona. Shri Girish Shah, one of the partners of M/s Gipar Packaging Industries (respondent No. 2) has been examined in this case on behalf of the appellant and he has admitted his signature. However, the learned Judge has not believed this document as it was not registered document and hold that the appellant was not in possession of the suit premises in 1973 but he has been in possession since 1980 only. This finding of the learned Judge seems to be perverse. It reveals from the record that the learned Judge has heavily attacked on the witnesses by putting questions to them in the style of cross-examination and tried to find out the role played by one learned advocate Shri Maheshwari. I failed to understand why the learned Judge should involve himself in the issue which has not been raised, or alleged by the plaintiff-respondent. The learned Counsel Mr. Kamdar appearing on behalf of the appellants has submitted that as the document i.e. agreement of licence between the licensor and licensee, does not create any right in the property, it does not require registration under the Registration Act. However, the learned Judge has treated it as a lease document which require registration. Apparently, on the face of it, the document marked "Y" is an agreement of licence which does not require registration. I do not see any just reason for disbelieving the licence agreement marked "Y". Shri Girish Shah, Partner of defendant-Respondent No. 2 firm has admitted in his oral evidence his signature thereon as a licensor. Not only that but it is his consistent statement even in his written statement filed in the main suit. Further, the

circumstantial evidence led me to believe that the appellant was in possession of the suit premises since November, 1972. It reveals from the record that the appellants had filed R.A.N. Application No. 756 of 1974 in the Small Causes Court at Bombay against the plaintiff-respondent No. 1 and the defendant-respondent No. 2 for fixation of the standard rent and the plaintiff-respondent No. 1 had also filed affidavit-in reply in the said application. The said application was dismissed by the Court for non-prosecution. Further, it reveals that the appellant No. 2 had also filed R.A. Declaratory Suit bearing No. 502 of 1976 in the Small Causes Court at Bombay against the plaintiff-respondent No. 1 and defendant respondent No. 2 for declaration that they are lawful and/or protected tenants in the suit premises. It reveals that the plaintiff-respondent No. 1 had also filed Written Statement in the said suit and denied the rights and claim of the appellant M/s. Gipar Industries and pleaded in the written statement that M/s. Gipar Industries and defendant-respondent No. 2 are the same firm. That suit was dismissed for default on 9-11-81. Further, there is a categorical documentary evidence that the appellant-firm was having the necessary licence obtained from the competent authorities right from 1974 to 1979. These are the circumstances corroborate the case of the appellant that the appellant-firm was running business in the suit premises since 1972 and that too, within the knowledge of plaintiff-respondent No. 1. Thus, it is undoubtedly held that the appellant was in possession of the suit premises prior to 1st February, 1973 and in view of the Supreme Court observation in Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, , the appellant is deemed to be a tenant of the suit premises and he is entitled for the protection of amended section 15A of the Maharashtra Act No. XVII of 1973. The appellant has acquired statutory status of tenant and he cannot be evicted by executing the ex-parte decree which is not binding on him.

In the result, the appeal is allowed. The judgment and order dated 29-8-1990 passed in Chamber Summons No. 1207 of 1989 in S.C. Suit No. 6948 of 1973, is set aside. No order as to costs.