
(2002) 06 BOM CK 0086
In the Bombay High Court
Case No : Writ Petition No. 4574 of 1986

Ayashabi and Others

APPELLANT

Vs

Mrs. M.H. Niyazi and Others

RESPONDENT

Date of Decision : 17-06-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A

Citation : (2002) 4 ALLMR 26 : (2002) 6 BomCR 57 : (2002) 4 MhLj 15

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : M.A. Rane, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

A.M Khanwilkar, J.—This petition under Article 227 of the Constitution of India takes exception to the order passed by the Court of Small Causes, Bombay in Appeal No. 690 of 1980 in R. A. Declaratory Suit No. 2670 of 1973 dated September 3, 1986. This Writ petition was called out for hearing on June 13, 2002 when the learned Counsel was informed that the question agitated in this Writ Petition was no more res integra. The learned counsel prayed for time to examine that position. Today when the matter is called out, none appears in the matter.

2. Briefly stated, the petitioners claim to be in possession of the premises being block No. 22 on the first floor of Gajare building, 243, Maulana Azad Road, formerly known as Ripon Road, Mumbai. The predecessor-in-title of the petitioners was inducted in the suit premises by the respondents-landlord as a licensee. The Respondent No. 1 instituted an Ejectment Application No. 226/E of 1962 in the Court of Small Causes at Bombay against the original occupant Mohamed Nazir Taj Mohamed who is the predecessor-in-title of the petitioners herein. The said application was allowed by the Small Causes Court vide order dated 23 March, 1968. In the said proceeding, the predecessor of the petitioners took the stand that insofar as his plea of benamidar is concerned, the same be

left open to be decided in the suit filed by him being Suit No. 1950/1988 before the City Civil Court at Mumbai. What is relevant for the purpose of this matter is that the predecessor of the petitioners showed willingness to vacate the suit premises. No doubt a statement was made on behalf of the respondent/landlord that he has no objection to give four months time to enable the opposite side to obtain injunction from the City Civil Court. Be that as it may, the Small Causes Court passed the following order on 23rd March, 1968 viz.

"Respondent do hand over vacant and peaceful possession of the suit premises to the applicant. Four months" time is granted to the Respondent to vacate the premises. The Respondent to pay Rs. 30/- to the applicant as professional costs and also Court costs."

(Note Respondent referred to above is the predecessors-in-title of the petitioners herein and the applicant is the respondent No. 1 landlord).

3. It is not in dispute that the petitioners predecessor remained in possession of the suit premises pursuant to the above arrangement and even till the suit filed by him came to be finally disposed by the City Civil Court, Bombay on 21st July, 1969. In the suit filed by the predecessor of the petitioners, claiming title in respect of the suit premises in his own rights, consent terms came to be filed on the basis of which the Court proceeded to pass the order. The same reads thus :

"1. Suit dismissed save and except as follows :--

2. The Plaintiff agrees and undertakes to hand over to the 1st Defendant Vacant Possession of the suit premises on or before the 30th June, 1973, The Plaintiff further agrees that in the event of the Plaintiff failing to hand over possession of the suit premises as aforesaid Warrant of Possession and execution in suit No. 226/E of the Court of Small Causes to issue forthwith. The said Undertaking shall be binding on the heirs, executors and administrators of the plaintiff.

3. The plaintiff undertakes to pay to the 1st Defendant a sum of Rs. 210/-per month by the 10th of every English calendar month as compensation for the use of the said premises till that time. In the event of plaintiff committing two consecutive defaults in payment of the month compensation warrant of possession and execution to issue forthwith. The 1st Defendant shall pay the rent to the landlord regularly.

4. Execution of the Decree of the Small Causes Court suit No. 226/E stayed till 30th June, 1973 and the Defendants undertake not to execute that said Decree save and except as above.

5. No order as to costs",

(Note : Plaintiff referred to above is the Predecessor of the petitioners and Defendant is the Respondent-landlord).

In view of the above order passed by the City Civil Court, the predecessor of the petitioners was allowed to remain in occupation of the suit premises till June 30,

1973. Taking advantage of this arrangement and particularly the amendment to the provisions of the Bombay Rent Act, whereby section 15-A of Bombay Rent Act came to be inserted, which created right in favour of the licensee in possession of the premises as on 1st of February 1973 to have become protected licensee, the predecessor of the petitioners filed declaratory suit No. 2670/1973 before the Small Causes Court claiming that since he was in possession of the suit premises on 1st of February, 1973 under the arrangement arrived at between the parties before the Court, which was in the nature of licence and as that licence was subsisting on the relevant date, he had become a protected licensee, The said suit was dismissed by the trial Judge by a well reasoned order dated 30th August, 1980. The Trial Court rejected the claim set up by the predecessor of the petitioners. The matter was taken in appeal, before the Appellate Bench of the Small Causes Court, Bombay being No. 190/86. The appellate Bench has also formed the same view taken by the Small Causes Court and dismissed the appeal. The petitioners have preferred this Writ Petition against the concurrent findings/view taken by the Courts below, under Article 227 of Constitution of India.

4. The main argument of the petitioners as was pressed on the previous date by the Counsel appearing for the petitioners was that the petitioners were the protected licensee within the meaning of Section 15-A of the Act inasmuch as, they were in occupation of the suit premises pursuant to the subsisting licence as on 1st of February 1973 and in particular order passed by the City Civil Court dated 21st July, 1969. To my mind, this submission is totally devoid of merits. It clearly overlooks that the petitioner's possession in respect of the suit premises was not as a licensee as such. The term "licensee" has been defined in Section 5(4A) of the Bombay Rent Act. In the present case, it is incomprehensible to even suggest that the petitioners were in possession of the suit premises on 1st of February, 1973 in the wake of subsisting agreement of licensee. The petitioner's predecessor suffered the decree of eviction and that decree and order has become final. Even in the suit for title instituted by the petitioner's predecessor has been rejected. The possession was continued only pursuant to the order of the Court. Accordingly, the decree passed against the petitioners by a Court of competent jurisdiction for eviction could not be executed till 30th June, 1973. There is perceptible difference between a contract and an act done because of the order of the Court. In a contract, two parties agree on a particular point, whereas under the order of the Court if the possession is retained, it is not permissible to ascribe to the other party who agreed to abide by the order, of not to evict a person in possession can be said to have entered into any contract with the person in occupation. This position is no more *res Integra*. The Division Bench of this Court in matter of Narendra vs. Jethalal, (1978) 80 BLR 186 has adverted to this aspect. What is relevant to note is that even in that case the Appellants before this Court were in possession of the premises on 1-2-1973 by virtue of a consent decree passed by the Court. However, in that case the Appellants filed application before the trial Court to relieve them of the

undertaking given by them to the Court under the consent decree. That application was rejected. Before this Court it was contended on behalf of the Appellants therein that, the lower Court was in error in not relieving them of the undertaking given by them under the consent decree especially in the wake of right accrued in their favour by virtue of amended provision Section 15-A of the Act. This plea has been rejected and the Court has held that the scheme of the Act would not permit the view that person in possession of the premises on 1-2-1973 pursuant to the consent decree and the undertaking given to the Court would be protected by Section 15-A of the Act. This decision considers the relevant provisions of the Act and the gamut of case law cited across the bar. This decision is clearly binding on me. In the present case in fact no attempt has been made either by the Petitioner's predecessor or the Petitioners to get themselves relieved from the undertaking recorded in the order dated 21-7-1969. Be that as it may, the abovesaid decision has been followed in the subsequent decision of this Court in 1992 (1) M.L.J. 393 = 1991 (4) BCR 296 Smt. Bhagirathibai v. Om Prakash. There is yet another unreported decision of this Court on W. P. 1465 of 1985 decided on July 28, 1997 in the case of Dattatraya B. Khadilkar v. Akhil Maharashtra Vidya Mandir Samiti where in a similar situation, the Court observed that the provisions of Section 15-A of the Act does not exclude the operation of the judgment and decree of the Court. In this decision the Court has compared the language of Section 15-A relating to licence and Section 15 relating to sub-lessee which were brought into force simultaneously in 1973 and held that it is clear that in relation to sub-tenancy, the protection is extended to the subtenant notwithstanding anything contained in any contract or in the judgment, decree or order of a Court; whereas so far as licensees are concerned, no exception is made in relation to the judgment and decrees of the Court but only in respect of the other provisions of the Act or any other law in force or in any contract to the contrary. In this decision reference has been made to a decision of the Division Bench in Appeal (OO L. J. Appeal) No. 72 of 1974 delivered on 21/24 February, 1979 in the case of Baldev Pathak v. Jacob David Sopher. The settled position, in such a situation, is that, once a decree for possession has been passed in favour of the landlords, they acquire a vested right to recover possession under it and the intention to interfere with such vested right cannot be inferred except if the words of Section 15-A of the Act were to show an intention to override the provisions of decree or order of the Court. To my mind, therefore, the order passed on 23rd March, 1968 completely destroys the right of the occupant and instead crystallizes the right in favour of the landlords to recover possession of the suit premises. However, it is only because of the order of the Court that delivery of possession was postponed. In any case, the right to recover possession continued and ultimately, once again recognised on 21st July, 1969 in favour of the respondent/landlord when the City Civil Court dismissed the suit filed by the petitioners' predecessor. From the order as passed by the City Civil Court, it is seen that in fact the predecessor of the petitioners agreed and undertook before the Court to hand over vacant and peaceful possession of the suit premises to the 1st respondent on or before 30th

June, 1973 and further declared that the said undertaking was binding on his heirs and successors. This makes the matter still worst since an undertaking is given to the Court. The subsequent amendment to the provisions of the Bombay Rent Act would not extricate the petitioners of the undertaking so given to the Court. Accordingly, since there was no subsisting licence in favour of the Petitioners' predecessor on 1st of February, 1973, merely because the petitioners remained in possession of the premises on 1st February 1973 cannot and would not create any right in their favour. Their possession on that day was obviously pursuant to the order passed by the City Civil Court dated 21-7-1969 not to execute the decree till 30th June, 1973. It was no more and no less. In other words, the respondent No. 1 landlord allowed the occupant to remain in possession only because of that order passed by the City Civil Court; and by no stretch of imagination can be said to have agreed or contracted with the petitioners so as to create a fresh licence. That was obviously not his intention and it is not possible to infer so. In this view of the matter, the argument as advanced that, the order passed by the City Civil Court on 21st of July 1969 created a new licence in favour of the petitioners or for that matter in favour of their predecessor is untenable and ill advised. As a matter of fact the petitioners are in contempt of the Court, because of the unequivocal undertaking given to the Court to hand over the possession of the suit premises to the respondent No. 1 on or before 30th June, 1973 and for not complying with the same. This act of commission or omission however, is taken shelter under the guise of mistaken belief that they were protected by the amended provisions of the Bombay Rent Act, vide Section 15-A. The said position has been explained by this Court in Narendra's case (supra). It would be also useful to advert to the observations made by the Apex Court in D.H. Maniar and Others Vs. Waman Laxman Kudav, , though the facts of that case are distinct as it deals with the purpose of Section 15-A of the Act and the effect of person who remains in occupation of the premises on 1-2-1973 in spite of order of Court.

5. Taking over all view of the matter I see no merits in this petition.

6. Therefore, the same is dismissed with exemplary costs.

7. At this stage, Mr. Rane appeared and requested the Court to examine the matter further on its merits. Even at this stage I permitted him to make his submissions. In support of his submissions, he has placed reliance on Konchada Ramamurthy Subudhi and Another Vs. Gopinath Naik, to contend that the compromise decree between the parties is nothing but it creates a licence in favour of the occupant allowing him to continue to remain in possession. Reliance was also placed on another decision of the Supreme Court reported in Prithvichand Ramchand Sablok Vs. S.Y. Shinde, , wherein it held that:

"A decree passed on the basis of a compromise by and between the parties is essentially a contract between the parties which derives sanctity by the Court super adding its seal to the contract."

The Supreme Court has further observed that:

"But all the same the consent terms retain all the elements of a contract to which the Court's imprimatur is affixed to give it the sanctity of an executable Court order."

Relying on these principles Mr. Rane contends that, since the order passed by the City Civil Court dated 21st July, 1969 is essentially on the basis of a compromise arrived between the parties it had the effect of creating a new licence in favour of petitioners. There is no merit in this contention. As already held above, the Petitioners continued to remain in occupation of the premises on 1-2-1973 not because of the licence created in their favour as such, but purely because of the order of the Court. It is inappropriate to ascribe intention of creation of a new licence on the basis that the landlord entered into a compromise or consent terms. On perusal of the said order it is seen that the City Civil Court stayed the execution of the decree passed by the Small Causes Court till 30-6-1973 and having done so, the landlord had no option but to agree that the decree will not be executed till such time. A consent terms filed before the Court may ordinarily possess an element of a contract, but what is to be seen is whether the consent terms filed in the present case can have the attributes of creating a new licence in favour of the occupant of the premises. The landlord, while agreeing before the Court states that he will not execute the decree till the date of stay granted by the Court, obviously, had no intentions to create new legal relations with the occupants; and, therefore, the possession of the premises is not on account of new relationship of licensor and licensee as such. Moreover, to my mind, a person who has given undertaking before the Court cannot be heard to take this plea unless he has been relieved or absolved from that undertaking by the Court or by operation of law. In the present case, nothing of the kind has happened. Accordingly, reliance placed on both the abovesaid decisions is wholly inapposite. These decisions are not with reference to the provisions of Section 15-A of the Bombay Rent Act, with which we are presently concerned and more importantly the unequivocal undertaking given before the City Civil Court to hand over vacant and peaceful possession of the suit premises to the respondent No. 1 on or before 30th June, 1973. That undertaking is still operating against the petitioners and in fact, they are in breach thereof by not vacating the suit premises as per the undertaking. There is nothing in Section 15-A of the Act that even if the parties have given undertaking before the Court of competent jurisdiction and they continued to remain in possession on 1st of February 1973 because of such undertaking, would be protected by the said provision. In absence of an express provision to that effect, it is not possible to countenance that contention. If the contention of Mr. Rane were to be accepted, it would amount to legitimizing the breach of the said undertaking by the petitioners. Moreover, as observed earlier the decision in the case of Narendra (supra) completely concludes the matter. Assuming that the plea advanced by Mr. Rane can be said to be a new contention, which, to my mind, is not, the same cannot be entertained. Any new contention though raised cannot be looked into when

the decision of Narendra's case (supra) has prevailed over more than two decades and has been consistently followed. The Rule of stare decisis would not permit me to do so.

8. While parting I have no hesitation to say that in the peculiar facts of the present case the petitioners deserves to be saddled with exemplary costs. They have succeeded in protracting the execution of the decree of possession originally granted on 23-3-1968 in one way or the other till now. Moreover, the petitioners are in contempt of Court in not vacating the suit premises in spite of the undertaking to do so on or before 30-6-1973.

9. In this view of the matter, I see no reason to interfere. Hence this petition is rejected with exemplary Costs quantified at Rs. 25,000/-. Costs be deposited within two weeks.

10. At this stage Mr. Rane prays that the operation of this order be stayed. I see no reason to entertain his request. This prayer is rejected.

All concerned to act upon the copy of this order duly authenticated by the Sheristedar of this Court.