
(1994) 03 BOM CK 0001

In the Bombay High Court

Case No : Letters Patent Appeal No. 28 of 1985

Bhika Cullianji and Co.

APPELLANT

Vs

Avon Electric Company and Others

RESPONDENT

Date of Decision : 02-03-1994

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15(2)
Evidence Act, 1872 — Section 3, 58, 61, 64
Transfer of Property Act, 1882 — Section 105

Citation : (1995) 1 BomCR 377 : (1994) 96 BOMLR 621

Hon'ble Judges : M.F. Saldanha, J;H.H. Kantharia, J

Bench : Division Bench

Advocate : Navin Shah, K.A. Shah and M.P. Bhatt, for the Appellant; Kum. K.C. Nichani, for respondents 1(a) to 1(e), for the Respondent

Final Decision : Allowed

Judgement

M.F. Saldanha, J.—The appellants before us were the original plaintiffs in Bombay City Civil Court Suit No. 3904 of 1962. The dispute that is the subject-matter of the litigation consists of part of Block No. 7, Devakaran Mansion, 24, Vithaldas Road, Bombay - 400 002. The original plaintiffs claim to be the tenants in respect of the premises which are business premises and consist of five rooms, apart from a common passage, toilet, etc. We are not very much concerned with several of the ancillary arrangements to which there is a reference in the course of the proceedings, but the present two parties have effectively agitated the litigation in relation to one of these five rooms which is identified as room B in the plan which is at page 76 of the compilation. We need to mention that the plaintiffs had entered into a series of agreements with the defendants starting from 29-10-1957 under which agreements the defendants were permitted to store their goods as also to do business from a part of the premises. It is true that the agreements do not refer to a specific room and that there are stray references to the fact that the area originally allotted to the defendants was room A and subsequently that it was shifted to room B, but as far as the present

state of the litigation is concerned, we need to record that the position has crystallized to a point whereby both the parties admit that after the execution of the last agreement on 9-8-1960 that it was room B which is the area under the use of the defendants. Also, the agreed position that emerges in that this particular room did have a door of its own, but that in order to enter the room the only access was through the main entrance after which one needs to pass through the common passage and then to enter room B. This aspect of the matter is of some significance which is why we have specifically referred to it.

2. The agreements, which we do not propose to refer to in great detail, are the stereotyped so-called leave and licence agreements that are common in the city of Bombay. The agreements are for a duration of eleven months each and they contain the usual clause that there is no intention whatsoever to confer any tenancy rights, etc., etc. A lumpsum consideration for the period of eleven months has been provided for. The amount which originally started at Rs. 1,650/- has subsequently been raised to Rs. 2,250/-. After the amendment to the Bombay Rent Act on 21-5-1959, the defendants addressed a letter dated 3-8-1960 to the plaintiffs in which they claimed that they were sub-tenants and tendered a certain amount as rent. This position was contested by the plaintiffs who reiterated the position that there was never any intention to confer any lease or tenancy rights on the defendants and that they were licensees simpliciter. It is material to point out that after all this correspondence, one more agreement of the same type was entered into on 21-9-1961, which is the last of the agreements. Since the defendants did not vacate the premises in their possession, the plaintiffs filed a suit before the City Civil Court at Bombay wherein they prayed for a decree for possession on the ground that the licence had been terminated and that the defendants were wrongfully withholding the possession of the premises in question. The defendants took up the contention that, in fact, by virtue of their having been in what they contended exclusive possession of room 8 and by virtue of the amendment dated 21-5-1959 to the Bombay Rent Act that they were lawful sub-tenants and, consequently, that they were not liable to vacate the premises. They also challenged the jurisdiction of the City Civil Court at Bombay on the ground that since their status had changed by virtue of the amendment of the Bombay Rent Act that the Court of Small Causes at Bombay would have exclusive jurisdiction to try any such disputes and that it was wrong to label them as licensees. The learned trial Judge, after going through the pleadings and hearing the parties, framed the necessary issues and thereafter recorded the evidence. The plaintiffs examined one Shri Damodardas Bhuta on their behalf; whereas on behalf of the defendants the proprietor of the firm Govindram Chaudhari gave evidence. Some supportive evidence is also there, which we do not need to refer to in great detail. The learned trial Judge rejected the defence and held that the defendants were licensees simpliciter having regard to the terms of the agreements and, consequently, decreed the suit. The defendants thereafter filed First Appeal No. 781 of 1974 challenging the decree that had been passed against them. This appeal came to be disposed of

by a learned Single Judge on 18-1-1985. The Appeal Court accepted the contention originally canvassed by the defendants, who were the appellants before that Court and held that the plea of sub-tenancy that had been canvassed on their behalf was liable to be upheld in law and that, consequently, the decree passed against the defendants was liable to be set aside. The present appeal challenges the correctness of the appellate order.

3. Appearing on behalf of the appellants, Shri Navnit Shah, learned Counsel, has submitted before us that the appellate order is unsustainable on a point of law in so far as without going into any elaborate debate with regard to the material before the Court that it was wholly unjustified for the learned Appellate Judge to have interfered with the well-considered judgment and decree of the trial Court whereby the evidence had been carefully and correctly appraised and, more importantly, the law on the point had been correctly applied. Shri Shah contended that the Appeal Court has preceded on only one ground, namely, the fact that the defendants were in exclusive possession of the room in question and that, consequently, they come squarely within the four-corners of the amendment to the Bombay Rent Act. Shri Shah has advanced a subsidiary submission which we will need to seriously deal with is the fact that the amendment of 1959 has no application whatsoever in law to the facts of the present case. In substance, Shri Shah contended that since it is both feasible and permissible in law to confer a short-term licence in respect of premises that it is wholly impermissible to conclude that each and every agreement of leave and licence must, in fact, be taken as a camouflage in every situation and construed as conferring tenancy rights. Learned Counsel submitted that this is a total misreading of the law and even if in some stray cases this may be the position that there is no inflexible rule to that effect nor is there any legal sanction to indiscriminately brand each and every licence as one conferring tenancy. This aspect of the matter is of some importance and we shall presently deal with the same.

4. Shri Shah has taken us through the pleadings and the documents which consist of the agreements and the correspondence. He has also drawn our attention to the oral evidence in this case which, in our considered view, is not of any serious consequence. Shri Shah has, in the first instance, demonstrated to us that the undisputed position is that the room B cannot be approached from any manner whatsoever other than the main entrance to Block No. 7, that the plaintiffs were the tenants in respect of the whole of Block No. 7 and that the main entrance and certain parts of the premises were under their use and occupation is more than fully established from the evidence on record. In addition to this, Shri Shah pointed out that there is a specific averment from Damodardas Bhuta as also from his partner that at all material times the key in respect of the main entrance was retained by the plaintiffs and that this key was never given to the defendants or anyone on their behalf. This is not a stray piece of evidence because both in examination-in-chief as also in cross-examination the position that has been established is that the control in respect of the main

entrance was exclusively with the plaintiffs. It has also come on record that the plaintiffs used to open the premises and close the same depending on the timings of their business and that there used to be several occasions, such as holidays, week-ends, etc., when the premises never used to be opened at all and that the defendants were entirely dependent for entry and exit from room B on the plaintiffs opening the main door. This aspect of the matter assumes considerable significance. With regard to this head of evidence, Shri Shah has advanced the submission that his particular aspect of the case has virtually gone uncontroverted. He has demonstrated to us from the cross-examination that this material aspect of the case has virtually not been disputed. Adverting to the position in law, Shri Shah has relied on a decision of the Calcutta High Court in the case of A.E.G. Carapiet Vs. A.Y. Derderian, ; and a decision of the Andhra Pradesh High Court in the case of Tavva Venkata Gurunadha Rao Vs. Badam Rosaiah (died) and Others, . Shri Shah also relied on a Single Judge's decision of this Court in the case of Badriprasad K. Agarwal & another v. Premier Garage & others, 1980(1) All IRC J 385. In sum and substance, what emerges from these three decisions is that the challenge to the oral evidence must be reflected in the course of cross-examination. If the defendants decline to put the essential material setting out their case in cross-examination, it would have to be regarded virtually as an admission and that such an uncontroverted evidence must be acted upon by the Court. The position in law is crystal clear and Shri Shah has only restated the position by referring to these cases.

5. Kumari Nichani appearing on behalf of the respondents, who are the original defendants, has seriously disputed this aspect of the matter. It is her case that there is no specific admission with regard to this head of evidence and she relies on the observations of the learned Single Judge whereby the Appeal Court had held that there are no specific pleadings with regard to the retention of the key, the manner in which the premises were opened, closed, etc., and that in the absence of such specific averments that the oral evidence must be taken to be an afterthought. Kumari Nichani submitted that some attempt had been made to point out that the defendants were never prevented or restrained from entering into or exiting from room B, but the learned Counsel basically advanced the contention that the aspect of considering the main entrance is wholly irrelevant. It is her case that if it can be demonstrated that the area given out to her client did constitute a room and if as has been demonstrated by the defendants the room had a door of its own which the defendants used to lock, then according to Kumari Nichani it is virtually the end of the matter. She submitted that the only criterion which the Court has to take into consideration for deciding the aspect of exclusive possession is the question as to whether or not the defendants were allowed at all times without any interruption from any third party, including the plaintiffs, to store their goods and to do their business in room "B" and the question as to the manner of access or exit is a secondary one. Kumari Nichani further submitted that even the provisions of the Bombay Rent Act, on which her clients propose to place reliance, refer to the premises which are defined as a

"room" and that there is no specific provision in the law whatsoever which either defines the term "exclusive possession" or waters it down merely because access and exit is through some other premises over which her clients may not have exclusive control. On the basis of this latter argument, Kumari Nichani submitted that the trial Court was grossly in error in having decreed the suit against her clients and that the Appeal Court has correctly stated the law.

6. Shri Shah also drew our attention to a similar case reported in *Bengal Water Proof Works v. A.J. Works*, 1983 Bom.R.C. 275.

7. Next, Shri Shah placed reliance on a decision of the Supreme Court in the case of *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, ; as also on another decision of the Supreme Court in the case of *Mrs. M.N. Clubwala and Another Vs. Fida Hussain Saheb and Others*, . As far as the former case was concerned, Shri Shah strongly relied on the principle enunciated by the Supreme Court wherein a plea of lease or tenancy in respect of a hotel room was completely turned down, principally, on the ground that even if it was demonstrated that a party was in total and exclusive use and control of that room that in so far as it constituted a part of the larger premises to which that party had no exclusive access and control that the plea was unsustainable. Similarly, Shri Shah submitted that in the latter decision, the Supreme Court was dealing with a more or less similar situation to the one in the present case wherein certain stalls situated within a market were sought to be treated as being on tenancy and the plea was turned down because it was pointed out that, apart from certain other reasons, essentially the stall-owners could not be said to have been in exclusive possession because they could only enter and leave the premises when the main market was opened by the landlord.

8. Shri Shah has thereafter dealt with an earlier Division Bench decision of this Court in the case of *Aninha D'Costa v. Parvatibai* ,67 Bom.L.R. 452, which is essentially the basis on which the Appellate Judge has allowed the appeal. That case was the fore runner of several similar decisions wherein for a variety of reasons the Division Bench of this Court construed a leave and licence agreement to be one that has, in fact, conferred tenancy. Shri Shah submitted that the case is virtually per incurium. Secondly, the facts are entirely different between what had happened in that situation and the present one. He has drawn our attention to the entire judgment which consists of the appellate judgment of the learned Single Judge of this Court and the Division Bench judgment and submitted that the reasoning that held good in that case would not be applicable to the present facts. In that situation, the Division Bench was dealing with a small flat that had been let out through the mediation of a broker and the Division Bench, after a detailed analysis of the material before it, came to the conclusion that the execution of the leave and licence agreement was sham and that it was a deliberate attempt to deprive the lady concerned of the protection which the Bombay Rent Act would otherwise confer on her. On the facts before Court in that instance, it was held that on a correct evaluation of the real intention of the

parties, it must be held that the agreement conferred tenancy. Shri Shah submitted that if one were to scrutinize clauses (2) and (6) of the present agreement that it has very clearly been specified that the parties did not intend to confer any rights of tenancy or subtenancy. There is a definite exclusion contained in the clauses in question. Clause (2) of the agreement reads as follows :

"2. It is hereby expressly agreed and declared that the intention of the parties is to afford leave and licence only to the licensees and that the arrangement between the parties is and shall always be deemed to be that the Licensor has granted permission to the Licensees to occupy such portion of the said premises as the Licensor may from time to time and in his absolute discretion be in a position to spare and that there is no intention to create any relationship of tenancy between the licensor and the licenses."

9. Shri Shah re-enforces his arguments by pointing out to us that it was never the intention of the parties, who are businessmen to confer any long-term rights. He pointed out that even if after 11 months, depending on the availability of the space, that the licence may have been renewed, but that this arrangement was perfectly permissible and cannot, under any circumstances, be read to mean that the plaintiffs either intended to confer subtenancy or for that matter defeat the provisions of the law. He also submitted that it is very material to point out in the present case that even if they had wrongly taken up the plea of subtenancy in the correspondence exchanged between the parties in the year 1960 that they have even thereafter executed further licence agreements, making it very clear thereby that it was only a temporary user of the premises that was permitted to them. He relied heavily on this last circumstance because he submitted that if the Court were to gather the intention of the parties, nothing could prove his case better than this last aspect of the matter. Coupled with this act, Shri Shah relied very heavily on the oral evidence for one limited aspect in so far as he submitted that the learned trial Judge has, on substantial grounds, held that the defendants' evidence is unreliable and worthless. Shri Shah only cited one example wherein the defendant has quite candidly admitted that he possessed two rubber stamps, one showing him as proprietor and another showing him as partner of the same firm and he used either of the rubber stamps depending on the situation in question. He, therefore, submitted that quite apart from everything else, where the evidence of the defendant is in shambles, that the learned Appellate Judge was wholly unjustified both on facts and in law in having opposed the decree passed by the trial Court.

10. We have already dealt with one aspect of the submission canvassed by Kumari Nichani appearing on behalf of the defendants whereby she has vehemently contended that if it is demonstrated that her clients were in exclusive use and occupation of room B that the aspect of who was in control of the main entrance would be totally irrelevant. She has further elaborated on this submission by contending that the decision of this Court in *Aninha D'Costa's*

case (supra) wholly and completely supports the present defendant. In this regard, Kumari Nichani drew our attention to the fact that it was not a single case of licence being conferred but that it was a continuous process which started in October, 1957 and went on beyond the year 1961. She submitted that regardless of what might have been written in the agreements that the intention of the parties was very clear, namely, that the premises should be let out to the defendants. She also drew our attention to the fact that the agreements were kept at all times vague and ambiguous and that there was no reference to the room B or for that matter that the premises were a room which was within the domain of her clients and which was kept under lock and key by them. She submitted that from this material the Court will have to gather that it was certainly the attempt on the part of the plaintiffs to as far as possible deprive her clients of the protection which the law would otherwise afford to them. Kumari Nichani also drew our attention to the amendment to section 15(2) of the Bombay Rent Act in the year 1957 on the basis of which she sought to counter the submissions advanced by Shri Shah by contending that even if her clients had continued to execute licence agreements after the amendment of 1959 and after they had pleaded lawful subtenancy that it was only because of the fact that they very much required the premises, that they were at the mercy of the plaintiffs and as has been pointed out by the Division Bench of this Court in Aninha D"Costa's case (supra), that the party in need is in no position to dictate as to what type of agreement is required to be executed. She submitted that merely because such an agreement may be executed under duress that this Court cannot close its eyes to two important factors, the first of them being that there was continuous execution and re-execution of the agreements one after another identical to the agreements in Aninha D"Costa's case, and secondly, that there is nothing on record to indicate that the defendants had been asked to vacate the premises on the expiry of such agreement and that they were re-allotted thereafter. This material, according to Kumari Nichani, would clearly indicate that it was, in fact, a long-term lease and nothing else and that the Court would, therefore, have to construe the agreements in that manner. Dealing with the decision of the Supreme Court in Associated Hotels of India v. R.N. Kapoor's case, Kumari Nichani submitted that there is no parallel on facts between that decision and the present one because admittedly these are business premises and not a hotel. She submitted that it may be absurd for an occupant of a hotel room for whatever period of time to claim tenancy in respect of the premises situated within the hotel, but that in the present instance, admittedly, there was no such business of which the present defendants were part and parcel. She contends that there was no interconnection between the defendants' business and the plaintiffs nor was there any overall association or authority between the two parties. Similarly, Kumari Nichani seeks to rely on the decision of the Supreme Court in M.N. Clubwala's case by pointing out that stalls in a market are effectively places where parties come for a limited period of time, deposit their goods, or at the most keep a part of them there and thereafter return only during the market hours. She points out that admittedly the present

room is not situated within a market nor is it a stall and that consequently, the ratio of M.N. Clubwala's case will not apply to the present proceedings. It is her submission that since the defendants were in possession of room B since they were in total use and control of the room, that the Appellate Order is correct and ought not to be disturbed under any circumstances.

11. The short issue that falls for determination is as to whether the learned Single Judge was justified in holding that the defendants were in exclusive possession of the room B on the basis of which, perhaps, some rights of subtenancy could flow to them having regard to the amendment of 1959. We however, cannot disregard one very important aspect of the case, namely, the fact that this is one more of those disputes where parties, for whatever reasons, seek to insist upon the unusual procedure of a Court discarding the documentary evidence in favour of oral evidence. Where there are a series of agreements on record and where the execution of the agreements are admitted and where the agreements are quite unambiguous and unequivocal, the normal principle of law would be that those agreements must be acted upon and accepted. It is only in exceptional cases that a Court may, if very strong grounds are advanced, reject the agreement or construe it as in fact reflecting something otherwise. The intention of the parties that has to be gathered by the Court is most reliable, most correctly reflected in the contemporaneous document executed and which is signed. Under these circumstances, even though in Aninha D'Costa's case a contrary view may have been taken, we are not prepared to discard the documents that have been produced in evidence and which, according to us, represent the correct state of affairs. We need to clarify that even if in exceptional circumstances pertaining to individuals such a document may be read otherwise, that it is unimaginable for the principle of "tenant protection" being pleaded and upheld in cases of firms, companies, corporations and the like.

12. As regards the aspect of exclusive possession, we need to record that the basic ingredient of a lease as emerges from the provisions of section 105 of the Transfer of Property Act would presuppose not only the possession but control. These are virtually two sides of the same coin and both these ingredients must co-exist. It is insufficient for a party to argue that the party was in possession of some particular premises if it is demonstrated that the party was not in uninterrupted control. Thus, as regards the aspect of possession, it would not be correct in law for a party to contend that the possession was exclusive if the facts indicate that the party did not have access to the premises uninterruptedly at all points of time. The aspect of exclusive possession presupposes once again the unrestricted access whenever the party wants and if there are restrictions on such access or exit, then it would not be construed in law as being exclusive possession. All that one can hold in such a situation is that it is a permissive user and if that is the case, the essential ingredients of a lease being non-existent it would at the highest be held to be a licence. We do find on a consideration of the letter as also the material placed before us that the learned trial Judge was perfectly justified in having recorded the conclusion that the defendants were

mere licensees and on the expiry of the licence that the rights conferred on them stood extinguished and, therefore, that a decree was liable to be passed against them. The grounds on which the learned Single Judge of this Court has interfered with the well-considered decree passed by the trial Court are unsustainable, both on the facts of the present case as also the position in law.

13. In the result the appeal succeeds and is accordingly allowed. The judgment and order of the learned Single Judge is set aside and the decree passed by the learned trial Court is restored. In the circumstances of the case, there shall be no order as to costs.

14. At this stage, Kumari Nichani, learned Counsel appearing on behalf of the respondents-defendants prays for stay of the operation of this judgment for a period of six weeks. This application is strongly objected to by Shri Shah who pointed out that the plaintiffs had approached the City Civil Court 32 years back and that at this point of time when it is conclusively held that the defendants have no semblance of right that it would be unfair to grant any stay. There is considerable substance in the objection. The application for stay accordingly stands rejected.