

(1991) 12 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 3452 of 1981

Dattaram Tukaram Bordekar, since deceased by his heirs and
legal representatives

APPELLANT

Vs

Prakash Dattatraya Tiwatane

RESPONDENT

Date of Decision : 09-12-1991

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 4(1)
Presidency Small Cause Courts Act, 1882 — Section 41

Citation : (1992) 2 BomCR 598

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : C.R. Dalvi, for the Appellant; Bhimrao N. Naik, V.B. Rajure and A.S. Chandurkar, for the Respondent

Judgement

M.F. Saldanha, J.—An interesting but immensely important dimension concerning proceedings u/s 41 of the Presidency Small Cause Courts Act has been raised in this proceeding which is being summarised below:

Whether an applicant, who applies for ejectment of a tenant u/s 41 of the Act is required to satisfy the Court that there is some justification in support of the application or whether as hitherto a held by the Courts, possession can be claimed on the simple ground that the lease has been terminated and that the opposite party has failed to restore possession regardless of there being any justification for such termination.

2. It would be useful to first set out the salient facts. The petitioner was the tenant in respect of a shop bearing No. 6 in Jaykar House Girgaum, Bombay 400 004. The admitted position is that in 1942, Prabhakar Tiwatane, father of the original tenant sublet shop No. 6 to the petitioner. After the death of his father in a 1952, Prabhakar became the tenant in respect of the said premises. In 1954, he filed a suit against the petitioner for possession of the shop on the ground that he required the same reasonably and bonafide for personal use. This suit,

which was filed under the provisions of section 13(1)(g) of the Rent Act came to be dismissed. Within less than a year, Prabhakar filed another suit on the same ground which came to be dismissed once again, this time, with compensatory costs. The appeal from this order was also dismissed and the Special Civil Application filed in the High Court against that two orders was also rejected.

3. In 1972, the owner of the building sold the same to the Bombay Municipal Corporation. The petitioner continued to be in possession of a shop No. 6 as a lawful sub-tenant of the opponent, by a notice dated 2-7-1974, the opponent Prabhakar sought possession of the premises on the ground that the petitioner was in arrears of rent. By his reply dated 20-7-1974 the petitioner informed the opponent that he was always ready and willing to pay the rent and that the money order for the amount of rent was wrongly refused. Along with the reply, the petitioner remitted the entire amount of rent. On 30-10-1974, Prabhakar filed an application in the Court of Small Causes for a decree for possession u/s 41 of the Presidency Small Cause Courts Act. The contention raised was to the effect that in view of the provisions of section 4 of the Bombay Rent Act, the premises were exempt from the provisions of that Act. The petitioner in his written statement contended that the provisions of Section 4 of the Rent Act would and must apply to the shop premises in the special circumstances of the case. He contended that in the two earlier proceedings, the relationship of landlord and tenant between him and the opponent and the applicability of the provisions of the Rent Act had both been undisputed and that the said relationship remained unaltered and he contended that this issue was barred from being re-agitated by the principles of res judicata. The learned trial judge rejected these contentions and held that the premises belonged to the Bombay Municipal Corporation which was a public authority and consequently, by virtue of section 4 of the Rent Act, which was attracted in this case, whereby the provisions of that Act were exempt from application to the premises. By a judgment dated 11-6-1981, the petitioner was directed to vacate and hand over peaceful possession of the shop premises on or before 31-5-1982. It is against this order that the present petition has been filed.

4. Mr. Dalvi, learned counsel appearing on behalf of the petitioner canvassed a submission to the effect that the facts of this case are unusual and distinct from the general set of proceedings u/s 41. He stated that unlike in many other cases, the present proceeding has been preceded by two earlier suits filed under the provisions of the Rent Act. He further pointed out that the petitioner was a sub-tenant and that consequently, even if the original owner or landlord was now replaced by a public authority viz., the Bombay Municipal Corporation, though Prabhakar had become a tenant of the Bombay Municipal Corporation; as far as the inter se relationship between Prabhakar and himself are concerned, that there can be no alteration with regard to the original position. Mr. Dalvi submitted that the only situation in which the status of his client stood marginally modified was that if the possession were to be claimed by a public authority for a public purpose, then, in that event alone, the petitioner who is

sub-tenant would be under the same handicap as the opponent tenant because neither of them would be able to legally resist such a claim. According to Mr. Dalvi, barring such action from a public authority, which is on an entirely different footing, the status of his client has remained unaltered by the acquisition of the premises by the Bombay Municipal Corporation and that consequently, in disputes between the two of them, the provisions of the Rent Act would still apply. He emphasised the fact that in the two earlier proceedings, the provisions of that Act were invoked and that consequently, the question as to whether or not the Act applies having been determined between the parties, it could not be otherwise re-agitated nor was any other view permissible. Though appearing to be sound, this argument unfortunately ignores the fundamental fact that there has been change of status all around, after the conclusion of the earlier proceedings the property which was hitherto a private asset having now come under the ownership and control of the Bombay Municipal Corporation, which being a local authority is conferred with special privileges viz-a-vis matters of eviction against all occupants.

5. Mr. Bhimrao Naik, learned Counsel appearing on behalf of the opponent has seriously contested Mr. Dalvi's argument. He points out, and rightly to my mind, that there can be no question of *res judicata* because of a legal and factual alteration of the situation by virtue of the Bombay Municipal Corporation having become the owners of the premises in question. Mr. Naik has pointed out that section 4(1) of the Act is unambiguous wherein it is provided that:

"4 (1) This Act shall not apply to any premise belonging to the Government or a local authority".

Mr. Naik is perfectly correct in so far as on and from the date when the Bombay Municipal Corporation has become the owner of the premises, the provisions of section 4 will apply to the premises. One cannot dissect and separate the premises in occupation and possession of a sub-tenant from those in occupation and possession of a tenant because, in the first instance, the sub-tenant is claiming through the tenant and most importantly because section 4 applies to the premises land not to parties or persons. The Bombay Municipal Corporation being a public authority, a special provision is made in respect of properties belonging to such an authority and, therefore, it would be impermissible for a sub-tenant of the premises to contend that even though the provisions of the Rent Act would not apply to the tenant, that they would still apply in his case. Logically, such an argument would be irrational and would have ridiculous consequences because it would confer on a sub-tenant certain protections which a tenant does not enjoy. This dichotomy is not recognised by law. Mr. Naik has placed strong reliance on the celebrated judgment of a Division Bench of this Court consisting Chagla, C.J., and Gajendragadkar, J., in the case of *Rampratap Jaidayal v. Dominion of India*, reported in 54 Bombay Law Reporter, page 927 wherein the Court has interpreted the provisions of section 4(1) and has very clearly enunciated the principles that it is unnecessary that the original tenancy

or lease should have been created by the Government or a public authority. The section would be equally applicable in cases where the property has been subsequently acquired by a local authority.

6. Mr. Dalvi's next submission was that rights have vested in his client who was a lawful sub-tenant which rights cannot be extinguished by virtue of the ownership of the building having changed hands. This question has once again been answered by the Division Bench in the same judgment referred to supra wherein the Court has clearly laid down that once the Government or a public authority acquires at the promises by operation of law, the provisions of Rent Act will cease to apply and consequently, rights that can be claimed under that Act would necessarily stand extinguished.

7. Mr. Dalvi has thereafter canvassed an unusual submission but which, to my mind, is one of essence and which deserves serious consideration. He contends that the principles relating to recovery of possessions of premises by a public authority have been examined and crystallised by the courts and that it is now well settled law that the exercise of the power must be in the public interest, and that, it must be based on reasonable and fair considerations. Mr. Dalvi has placed reliance on the decision of the Supreme Court in the case of *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, of that judgement, Their Lordships have reproduced the following passage from *Rampratap's* case referred to by me supra:

"it is not too much to assume, as the legislature did in this case assume, that the very Government whose object was to protect the tenants and prevent rent being increased and prevent people being rejected, would not itself when it was the landlord do those very things which it sought to prohibit its people from doing and, therefore, the underlying assumption of this exemption is that Government would not increase rents and would not eject tenants unless it was absolutely necessary in public interest and unless a particular building was required for a public purpose."

In the course of this judgment, the Supreme Court has examined the scope of the exemption which public authorities enjoy in this regard and the Court has in no uncertain terms endorsed the principle that the action cannot be motivated, mala fide, capricious or arbitrator, quite apart from the aspect of public interest and that if it acted to the contrary, the decision is capable of judicial review. In sum and substance, therefore, the Supreme Court laid down that even though the codified principles enunciated in the Rent Act cannot be pleaded as a defence, that if it appears to the Court that the action was liable to be struck down because it was otherwise unfair or unjust, that interference was permissible.

8. Drawing a parallel from these principles, Mr. Dalvi submitted that as far as the petitioner was concerned, if he can demonstrate on the facts of the present case, that there was no valid ground whatsoever for the termination of the tenancy

and that had the Rent Act been applicable, he could never have been evicted, that he is justified in claiming that the principles of fair play would entitle him to protection against the action even if the provisions of the Rent Act did not apply to his case. Mr. Dalvi has submitted that the principles which protect the opponent vis-a-vis the Bombay Municipal Corporation must be the same principles to be applied if the order against him was to be sustainable. Undoubtedly, Mr. Dalvi is breaking new ground, about being a veteran in this field of law, it is both admirable and understandable.

9. Mr. Naik has vehemently disputed Mr. Dalvi's contentions because, he submits that the two actions are dissimilar in so far as action instituted against the tenant by a public authority has no parallel with a proceeding before a court of law u/s 41 of the present Act. Mr. Naik points out that under the provisions of the transfer of property Act, once a lease is Validly terminated by notice, that the party in possession is legally obliged to restore the possession and if the party fails to do so, that section 41, can be invoked. his submission is that u/s 41, the legislature has not made it a requirement that any grounds should be pleaded nor is it a requirement of law because this is a summary procedure. Mr. submits that if Mr. Dalvi's arguments were to be accepted, it would be tantamount to grafting on the provisions of the Rent Act to section 41 and such a procedure has no legal sanction. He contends that it is well settled law that no grounds are required to be pleaded in an application u/s 41 and that, consequently, the Court is obliged to pass an order for possession without examining the circumstances under which it was asked for Mr. Naik relies on a decision of the Supreme Court in the case of Nagji Vallabhji and Company Vs. Meghji Vijpar and Company and Another, . While dealing with the cases of sub-lessees, the Supreme Court observed as follows:

"it is significant that the exemption granted under the earlier part of sub-section (1) of section 4 is in respect of the premises and not in respect of the relationship In order to confer the protection of the provision of the Bombay Rent Act, to the sublessees occupying the premises in any building erected on Government land or on land belonging to a local authority irrespective of the question as to who has put up the building as against the lessees of the land but without affecting the impunity conferred to the Government or local authorities as contemplated by sub-section (1) of section 4 of the Bombay Rent Act, the Court would have to practically rewrite the provisions of section 4 and it is not open to the court to do that. It is for the legislation to do that."

Mr. Naik submitted, therefore, that the position is quite unambiguous and that the issue is concluded to the extent that neither a lessee nor a sub-lessee can claim the protection of the Rent Act. Consequently, he submitted that such persons cannot have are escort to a situation whereby they indirectly achieve what is not permitted directly.

10. The submission canvassed by Mr. Naik is not altogether correct because the protection claimed by Mr. Dalvi is not something which flows from the provision

of the rent Act. The protection claimed by Mr. Dalvi is what the petitioner is entitled to in a situation where the action may have been instituted against him by the public authority. If the protection of the Rent Act is taken away because of Section 4, the petitioner cannot be relegated to a statement of limbo. In other words, it cannot be argued that neither the Rent Act nor the principles governing eviction by State authority will apply to him. These principles have been codified by the Supreme Court in *Dwarkadas Marfatia*, case referred to *supra* and it is, therefore, those principles which would apply in the present situation.

11. On facts, it has been demonstrated that in the face of two earlier proceedings instituted by prabhakar in both of which, the Court had rejected his plea for recovery of possession, that the once again terminated the tenancy in 1974 without assigning any valid reason. The ground of areas of rent had been disputed in so far as it was pointed out that prabhakar had refused to accept the rent and in any event, the amount had been paid up. In the absence of any ground having been pleaded, the action in these circumstances could be attacked on the ground of high-handedness or arbitrariness. If the action is vitiated by mala fides, it would run counter to the principles of fair play and would, therefore, disentitle the plaintiff to a relief.

12. The law has made considerable advancement in the changed social and economic situation since the decision in *Rampratap's* case in 1952 and it is now well settled that a Court will not contenance arbitrariness or lack of fair play in relation to action of the present type. In that view of the matter, the order passed by trial Court would stand vitiated and is liable to be set aside.

13. The present interpretation would undoubtedly constitute a definite departure from the hitherto accepted position but this, to my mind, is not only necessary but would be in keeping with the now well established position in law. The focal point of the issue revolves around the principles governing properties belonging to a public authority. In that regard, it would be useful to advert to a decision of this Court in the case of *Jayantilal Dharamsi v. Board of Trustees of the Port of Bombay*, reported in 1991 (1) A I RCJ 576 wherein Daud, J., was called upon to decide as to whether it was illegally permissible for the Bombay Port Trust to grossly enhance the lease rent in respect of its properties. Simultaneously, the problem of termination of tenancies on the ground of alleged non-payment of the enhanced rent had arisen. In a detailed judgement, Daud, J., considered the increase to be astronomical and struck it down as being arbitrary and capricious. This Court proceeded on the basis that the action of the public authority was subject to judicial review, if that authority was found to be acting in manner that was opposed to principles of fairness and reasonableness.

14. The Supreme Court in *Baburao Shantaram More Vs. The Bombay Housing Board and Another*, had occasion to observe as follows:

"The Board (Housing Board). on the other hand, is an incorporated body brought into existence for the purpose of framing housing schemes to solve the purpose

of acute shortage of accommodation in Bombay. There are no shareholders interested in the distribution of any profit. It is under the orders of the Government. In effect, it is a government sponsored body not having any profit making motive. No material has been placed before us which may even remotely be regarded as suggesting, much less proving, that the Co-operative Housing Societies or their members stand similarly situated vis-a-vis the Board and its tenants.....It is the business of the Government to solve the accommodation problem and satisfy the public need of housing accommodation. It was for the purpose of achieving this object that the Board was incorporated and established. It is not to be expected that the Government or local authority or the Board would be actuated by any profit making motive so as to unduly enhance the rents or reject the tenants from their respective properties as private landlords are or are likely to be. Therefore, the tenants of the Government or local authority or the Board are not in need of such protection as the tenants of private landlords are."

It was obvious from what is stated above that the expectation of the Court has always been that issues such as enhancement of rent and eviction are expected to be handled by public authorities with an even higher sense of responsibility than in the case of private landlords. In the case of *S. Kandaswamy Chettiar Vs. State of Tamil Nadu and Another*, there is a reiteration of this principle, where the Court has observed as follows:

"The legislature itself has made a rational classification of buildings belonging to Government and buildings belonging to religious charitable, educational and other public institutions and the different treatment accorded to such buildings obviously proceeds on the well founded assumption that the Government as well as the landlords of such buildings are not expected to and would not indulge in rack-renting or unreasonable eviction."

It would thus be seen that the judicial opinion has consistently taken the view that merely because of the exemption conferred from the application of the Rent Act, a public authority is not given a carte blanche to act in any manner that it so pleases.

15. In as follows :

"When the State, the local bodies and public authorities which are State within the meaning of Article 12 are exempted from purview of Rent Control Legislation, the basis of exemption is that such bodies would not be actuated by any profit making motives so as to unduly enhance the rents or reject the tenants from their respective properties as private landlords are or are likely to be. They would not act for their own purpose as private landlords do, but must act for a public purpose. It, therefore, follows that the public authorities which enjoy this benefit without being bound by the requirements of the Rent Act must act for public benefit Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to

examination either in /a civil suit or in writ jurisdictionEvery activity of a public authority especially in the background of the assumption on which such authority enjoys. Immunity from the rigours of the Rent Act must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities (like BPT) in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords, must be judged by that standard. If the governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional."

16. Bearing in mind the fact that the Legislature has to intervene in the case of private landlords governed by the Rent Act in the public interest and make laws to prevent landlords from exploiting tenants by seeking exorbitant rent or else face eviction, it is that the courts have now held, in the case of exempted premises that certain analogous principles would still be applicable. The law having been thus crystallised, it would no longer be permissible to mechanically uphold a plea of eviction in the special facts of the present case which relates to premises owned by local authority unless the action can be justified.

17. Mr. Naik is right when he points out that section 41 does not enjoin upon litigant to plead grounds for the action and in that view of the matter, his client did not consider it necessary to do so. He submits that if as a result of advancement of the law or as a result of new interpretation of the same, additional requirements do arise, that this client should be given an adequate opportunity of meeting such a situation. This contention is opposed by Mr. Dalvi who points out that arbitrariness of action was something that a Court has always frowned upon and that absence of any justification for the act of termination of tenancy and the action of recovery cannot now be either corrected or improved upon and that, therefore, the respondent does not deserve any further opportunity. To my mind, it is essential to be equally fair to the respondent and to this extent, if there is anything that he can show to the trial Court on the basis of which he can satisfy the Court that he has acted reasonably and fairly, he must be given an opportunity of doing so. To this extent, the order of the trial Court set aside and the proceedings are remanded to the trial Court for de novo hearing on this issue only. It shall be open to the respondent to seek an appropriate amendment to the plaint and for the petitioner to file a supplementary written statement/points of defence and for this purpose, for parties to adduce evidence, if necessary, before the trial Court. After hearing the parties, the trial Court shall pass order accordingly.

18. Rule is accordingly made absolute. In the circumstances of the case, there shall be no order as to costs.