
(1959) 07 BOM CK 0022

In the Bombay High Court

Case No : O.C.J. Miscellaneous Petition No. 68 of 1958

Daulatram Lachhmandas Nayar

APPELLANT

Vs

The State of Bombay

RESPONDENT

Date of Decision : 09-07-1959

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15
Constitution of India, 1950 — Article 226, 227, 32

Citation : (1960) 62 BOMLR 698

Hon'ble Judges : Shelat, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shelat, J.—This is a petition for direction to the respondent to cancel two orders, one an order of requisition and the other, an order of allotment dated respectively November 5 and 7, 1957, and for a further direction that the respondent should hand over possession of flat No. 1 in St. James' Court, Marine Drive, to the petitioners.

2. The petitioners are the owners of the building known as St. James' Court which consists in all of 24 flats. The petitioners are brothers and are the joint owners of the said building. Petitioner No. 1 has been staying all the while in a flat in another building called "Shiv Sadah", Marine Drive.

3. Upto September 30, 1957, one C.M. Agarwal was a tenant of the petitioners in respect of flat No. 1 in the building, St. James' Court. On July 25, 1957, a notice from the Accommodation Officer was received by petitioner No. 1. The notice stated that the Government had made inquiries and were considering the question of requisitioning the flat under the Bombay Land Requisition Act, 1948. The notice called upon petitioner No. 1 to see the Accommodation Officer on July 27, 1957, if necessary, with a written statement to show causa why the said flat should not be requisitioned. The petitioners, accordingly, put in their written statement inter alia setting out therein that petitioner No. 1 was in dire need of

accommodation and requested the Accommodation Officer to allot the said flat to him. By his letter dated August 22, 1957, the Officer wrote to petitioner No. 1 that the case was one of suppressed vacancy. The petitioners thereafter requested again the Accommodation Officer to allot the said flat to petitioner No. 1 but that request was not complied with.

4. On or about September 24, the petitioners received an order of requisition dated September 18, 1957, which recited that on an inquiry it was found that the flat had become vacant in the month of May 1957 and that the said flat was requisitioned for a public purpose, namely, for housing a Bombay State Government servant. The said tenant Agarwal by his letter dated September 28, 1957, informed the petitioners that he would not pay rent of the said flat as from October 1, for the reasons set out in his letter to the Accommodation Officer, a copy of which was enclosed with his letter to the petitioners. The petitioners' case was that as Agarwal vacated the flat as from October 1, there was an implied surrender by him to the petitioners of the said flat. The case of the petitioners further was that although the flat was requisitioned as early as September 18, 1957, the respondent did not put anyone in occupation thereof and the flat in fact remained vacant and closed. On October 20, 1957, petitioner No. 1 again pointed out to the Accommodation Officer that he was in urgent need of accommodation and that as the flat had been lying idle since the middle of September 1957, the same should be allotted to him. That request, however, was refused by the letter of the Accommodation Officer dated October 31, 1957.

5. The respondent, by an order dated November 4, 1957, released the said flat from requisition in exercise of the power reserved to it u/s 9 of the Bombay Land Requisition Act, 1948. That order of release was received by the petitioners on November 6. But on that very same day the petitioners also received an order dated November 5, 1957, which recited that on inquiry it was found that the flat had become vacant on November 2, 1957, "by reason of release from requisition" under the order dated November 4, 1957. This order of requisition also stated that the flat was requisitioned for a public purpose, namely, for housing a homeless person. On November 11, 1957, the petitioners received an order of allotment dated November 7, 1957, whereby the flat was allotted to one K.M. Kothari.

6. On these facts the petitioners urged that the order of requisition dated November 5, 1957, as also the order of allotment dated November 7, 1957, were illegal, invalid and ultra vires, made without or in excess or improper exercise of jurisdiction vested in the respondent. The principal ground upon which these orders are sought to be challenged is that upon the release of the flat from requisition it was obligatory upon the respondent by reason of the provisions of Section 9 of the Act to restore that flat to the petitioners and that it was not open to the respondent to requisition the flat in the manner and circumstances in which the respondent purported to do. The petitioners also urged that no vacancy arose or could be deemed to have arisen within the meaning of Section

6 of the Act on account of the release of the flat from requisition and that such a vacancy could only arise after the respondent had restored possession of the flat to the petitioners and a vacancy in respect of the flat arose thereafter. In these circumstances it was urged on behalf of the petitioners by Mr. Sorabjee that the order of requisition dated November 5, 1957, and the order of allotment dated November 7, 1957, were illegal, without jurisdiction and therefore bad in law.

7. Mr. Bhabha for the respondent raised a preliminary point that this Court has no jurisdiction to go behind the declaration of vacancy made by the inquiry officer or to consider the validity of the declaration of such a vacancy either on the ground of fact or of law and urged that once such a declaration of a vacancy was made by an officer making the inquiry, such a declaration was final and could not be inquired into except for a limited purpose which I shall presently mention. In support of this contention Mr. Bhabha relied upon the State of Bombay v. M.C. Menon (1958) 61 Bom. L.R. 75 which lays down (1) that a declaration of vacancy made under s. 6(4)(a) cannot be challenged either on the facts on which the declaration is based or (2) on the ground that in law such a declaration cannot be made. The decision also lays down that such a declaration can be challenged only on the ground that it was made mala fide or that there was some extraneous factor which led the Government to make it. Mr. Justice Coyajee, who tried the petition, had raised the question before him, namely, whether, if the petitioner was in fact or in law or was deemed in law to be the tenant under an assignment of a business as a going concern, there could be a declaration of vacancy? In considering that question he observed that the very basis of the jurisdiction of the inquiry officer to make the declaration was that there was a vacancy. But if the petitioner was in fact a tenant, then the very foundation or the condition precedent to the exercise of that jurisdiction would disappear. Accordingly he held that the petitioner in the case before him was deemed to be a tenant by virtue of the assignment in his favour under the provisions of Section 15 of the Rent Act and that he being in possession at the date of the declaration there was no jurisdiction in the inquiry officer to make the declaration as there was no vacancy in law. "When the matter went up before the Appeal Court, the Appeal Court held that Section 6(4)(a) of the Bombay Land Requisition Act, 1948, made the declaration of vacancy conclusive evidence that the premises were or had become vacant. The question, therefore, was whether the High Court can go behind that declaration. It was argued before the Court of Appeal that although it may not be open to the Court to go behind the declaration in order to ascertain the facts found by the officer who held the enquiry, it would be open to the Court to consider whether in law there was a vacancy, and if, in law, there was no vacancy, the Court could hold that the order was made without jurisdiction. It was urged that if there was no vacancy in law, there would be no jurisdiction in the inquiry officer to make a declaration. In considering this contention the Appeal Court referred to a previous decision in Mohsinali Mahomedali v. State of Bombay (1950) 53 Bom. L.R. 94. In that case Mr. Justice Tendolkar, who tried that petition, had taken the view that a

declaration was conclusive as to facts but not as to its legal consequences. That decision was taken to the Appeal Court where Chagla C.J. and Gajendragadkar J. took the view on the interpretation of the expression "conclusive evidence" that on a declaration made by Government that there was a vacancy, that declaration was conclusive both as to the facts and also as to the legal requirements which the law made necessary. On the basis of the decision in Mohsinali's case the Appeal Court observed at p. 78 as follows:

...Therefore, not only it is not competent to the petitioner to challenge the facts on which the declaration is based, but it is also not open to the petitioner to challenge the order on the ground that it does not comply with the requirements of vacancy laid down in the Requisition Act.

The Court of Appeal also held that both the requirements as to law and facts were questions which the Legislature had left for decision to the Government and, therefore, the Court could not go behind the conclusion arrived at by the Government. Reference was also made by the Court of Appeal to Lilavati Bai Vs. The State of Bombay, where their Lordships of the Supreme Court have cited with approval the decision in "Mohsinali's case. At p. 940 of that report the Supreme Court has observed:

...But the special powers aforesaid of this Court or of the High Court cannot extend to reopening a finding by the State Government u/s 5 of the Act that the tenant has not actually resided in the premises for a continuous period of six months immediately preceding the date of the order or u/s 6 that the premises had become vacant at about the time indicated in the order impugned.

Relying on these observations Mr. Sorabjee urged that the Supreme Court by these observations meant that the declaration cannot be challenged on the ground of facts. Reliance was also placed on another passage in the judgment of the Supreme Court at p. 940 where it is observed:

...But that does not mean that the jurisdiction of the High Court under Article 226 or of this Court under Article 32 or on appeal has been impaired. In a proper case the High Court or this Court in the exercise of its special jurisdiction under the Constitution has the power to determine how far the provisions of the statute have or have not been complied with.

Dealing with these passages the Court of Appeal in State of Bombay v. M.C. Menon has observed that it would be misreading these passages to mean that if there is no vacancy in law, the High Court can go behind the declaration of vacancy. The Appeal Court held that what these passages meant was that in appropriate cases, however conclusive the Legislature may make a decision of the Government, such a decision would be subject to the over-riding powers of the High Court under Article 226 and Article 227 but it observed at the same time that the challenge cannot be directed to the reopening of the declaration of vacancy or going behind it. It can only be on the ground that the declaration was made mala fide or that there was some extraneous factor which led the

Government to make that declaration. At p. 79 of the report, the Appeal Court makes a positive observation that:

...What the petitioner is doing is asking the Court to sit in judgment on the declaration made by the Government and to decide that in law such a declaration could not be made. That, this Court cannot do... The learned Judge should have assumed by reason of the conclusiveness of the declaration that all the legal requirements of a vacancy had been complied with.

8. In *Lila Vati Bai v. State of Bombay*, the argument which was urged before Coyajee J. in *State of Bombay v. M.O. Menon*, that the finding on the question of vacancy by the State Government was a "jurisdictional fact" was negated by their Lordships of the Supreme Court on the authority of the decision in *Rai Brij Raj Krishna and Another Vs. S.K. Shaw and Brothers*, and their Lordships expressed their conclusion at p. 940 of the report that they could not go behind the declaration made by Government that there was a vacancy.

9. Mr. Sorabjee, however, relied upon an unreported judgment of the Appeal Court in *The State of Bombay v. Pragji Purshottam* (1951) OC.J. Appeal No. 110 of 1050, on April 17, 1951 (Unrep.) decided by Chagla C.J., and Tendolkar J., There the facts were that the petitioners were owners of a certain property and godowns in that property. The petitioners had let out godowns Nos. 2, 3, 4 and 5 to an unregistered association called Mulji Jetha Market Grain Shop which carried on business of dealing in grain. On February 20, 1950, the petitioners received an information from the Association that it had given a notice to the Food Controller of its intention to close down the shop and that as soon as that permission was granted to them they would hand over vacant possession of the godowns to the petitioners. On March 1, 1950, the Government issued an order requisitioning these godowns and allotted them to a registered Society. The petitioners objected to these orders on the ground that the order of requisition was bad inasmuch as there was no vacancy at the date of the order as their former tenants had not handed over possession of the godown at the date of the order. Another contention raised was that as the order did not specify the Act under which the declaration of vacancy was made, it was *ex facie* bad. Dealing first with the second contention the Court of Appeal held that the order was bad on the ground that it did not indicate on the face of it under what law or source of authority the officer making it was exercising this power. As regards the first contention, the Court of Appeal observed that it was clear that before a valid order could be made u/s 6(4)(a) of the Act, two conditions had to be complied with, viz., that there was an inquiry as contemplated by that Sub-section and that there was a declaration with regard to the vacancy. Chagla C.J., who delivered the judgment of the Bench, then observed that the vacancy which had to be declared was not any vacancy, but it was a vacancy as defined by the Act. Therefore, the two conditions precedent could only be satisfied" provided the inquiry was made as required by the statute and the declaration with regard to the vacancy, was also made as required by the statute.

Not only the declaration must be made as required by the statute but the declaration must be with regard to the vacancy defined by the statute.

At the same time he also observed that the declaration properly made was conclusive and the Court was not entitled to go behind the conclusiveness of that order.

The Court must accept when it sees the order the finality of the order and must not permit the petitioners to challenge that declaration by asking the Court to go behind that order.

10. Mr. Sorabjee contended that these observations would show that the Appeal Court was of the view, when it stated that it was not every vacancy for which a declaration can be made but only that vacancy which is contemplated by the Act alone, that the Court can go behind the order to see if the vacancy was one in fact contemplated by the Act. In my view, that is not a correct view of the decision. Beyond saying that the vacancy in respect of which the declaration is made must be the one contemplated by the Act this decision does not say that the Court can substitute its view on the vacancy for the view taken by the Government or the officer making the inquiry. The observations made by the Appeal Court, on the contrary, emphasise the finality of the order as to the vacancy being there and in respect of which the declaration is made. In my view, the decision in the *State of Bombay v. Pragji Purshottam* is not in any way in conflict with the decision in *Mohsinali v. State of Bombay*, or the decision in *State of Bombay v. M.C. Menon*, or the Supreme Court decision in *Lila vaii Bai v. State of Bombay*. In view of the decision in the "*State of Bombay v. M.C. Menon* it must, therefore, be held that the declaration of vacancy made in this case by the inquiry officer is final both as to fact and law and this Court is not competent to go into the question whether the vacancy in respect of which the declaration is made was a vacancy in law or not. My decision on the preliminary point raised by Mr. Bhabha would be sufficient to dispose of the petition, but since the question whether in the circumstances of the case the declaration is valid or not has been argued at some length, it would be proper that I should deal with it also.

11. Mr. Sorabjee's contention was that the declaration of vacancy in the order of requisition dated November 5, 1957, was bad in law as there was no vacancy at the date of that order within the meaning of the Explanation to Section 6 of the *Bombay Land Requisition Act, 1948*. What he urged was that u/s 9 of the Act the Government has the authority to release from requisition any premises requisitioned, and under Sub-section (2)(a) of that section upon such release the Government was obliged to restore the premises to the owner thereof. Therefore a vacancy in respect of which a declaration can be made must be one that occurs after the premises have been restored to the owner. The premises in question not having been restored to the petitioners upon a release thereof from requisition there was no question of such a vacancy having occurred and consequently there could be no valid declaration. He also urged somewhat strenuously that the Government was not (entitled to by-pass the provisions of

Section 9(2)(a) of the Act and taking advantage of their own omission make a declaration as to a vacancy which in fact has not occurred.

12. In support of this contention, Mr. Sorabjee relied on the Explanation to Section 6 of the Act and pointed out that under that Explanation premises are deemed to be or become vacant when a landlord ceases to be in occupation or when a tenant or a sub-tenant thereof ceases to be in occupation upon termination of his tenancy by eviction, assignment or transfer in any other manner of his interest in the premises or otherwise. Mr. Sorabjee pointed out that this Explanation does not include a vacancy that may occur by reason of the premises having been released from requisition and, therefore, the Explanation fortified his contention that there cannot be a vacancy in respect of requisitioned premises unless there is first an order of release followed by restoration of the possession of the premises to the landlord and then a vacancy arising after the event of restoration.

13. But the answer to Mr. Sorabjee's contention is afforded by Section 6 itself. Section 9, on which so much stress was laid, is not a section dealing with vacancy or the power of requisition and therefore cannot be depended upon to ascertain when a vacancy can be said to occur and when a declaration in respect thereof can be made. For that purpose one has to turn to Section 6(4) which confers the power, of requisition on Government. That power can be exercised in the circumstances set out in Sub-section (7) of that section. Section 6(7) provides that if any ? premises are vacant on the date of the notification and wherever any such premises are vacant or become vacant after such date by reason of (1) the landlord, the tenant or the sub-tenant ceasing to occupy the premises or (2) by reason of the release of the premises from requisition or (3) by reason of the premises being newly erected or reconstructed or for any other reason, the landlord in each case shall give intimation thereof to the Government. The concept of a vacancy is thus by a legal fiction artificially widened to include circumstances which in normal course of things or parlance would not mean a vacancy. It is obvious that under head (2) a vacancy occurs when premises are released from requisition, but that would not mean and Section 6(7) does not warrant the meaning that it occurs only after possession of the premises is restored to the landlord. Besides, the Explanation to Section 6 does not seek to define "vacancy", but is intended to define the expressions "premises which are in the occupation of the landlord, the tenant or the sub-tenant, as the case may be, shall be deemed to be or become vacant" and "premises newly erected or re-constructed shall be deemed to be or become vacant". It is, therefore, not correct either to say that the Explanation defines "vacancy" or that because it does not include the words "by reason of release of requisition" that therefore there can be no vacancy or a valid declaration in respect thereof. In my view, on a proper construction of Sub-sections (7), (4) and the Explanation to Section 6, the contention raised on behalf of the petitioners cannot be sustained.

14. The second contention of Mr. Sorabjee was that the order of requisition dated November 5, 1957, was bad in law as it stated that the premises had become vacant on November 2, 1957, instead of November 4, when they were released from the previous requisition. He urged that since the premises were released on November 4, 1957, there could not have been any vacancy in respect thereof on November 2, 1957 and that the discrepancy in the date showed that the officer, who held the inquiry, had not applied his mind or that no inquiry in fact had been held by him. In support of this argument reliance was placed on the decision in the State of Bombay v. Pragji Purshottam wherein the Court of Appeal has observed that the inquiry officer was expected to exercise care and caution. It is true that the order of requisition in that case was held to be bad by the Court of Appeal on the, ground that the order failed to indicate the Act under which it was made even though it was conceded that the omission to state the source of authority viz. the Act had not caused any prejudice to the petitioners. The decision undoubtedly lays down that an order of an expropriatory character like the one of requisition must be strictly viewed. But the decision in Pragji Purshottam""s case is based on the point that the officer who made that order had not applied his mind and had not exercised care and caution expected of him and therefore the order was bad. That cannot be said in respect of the present order nor can it be said that the order does not indicate the circumstance causing the vacancy In respect of which the inquiry was made and the declaration issued. The order, on the contrary, expressly mentioned that the premises became vacant by reason of the release from requisition by an order dated November 4, 1957. It would not thus be right to say that the officer had failed to apply his mind and that because there is an error as to the date when the premises became vacant, the order was ex facie bad. As held in P. Balakotaiah Vs. The Union of India (UOI) and Others, . the order in question if made with jurisdiction must be judged on a consideration of its substance and not its form. In the view I take of the order, the mistake occurring in the matter of the date of the vacancy is one of inadver-tence and cannot be ascribed to want of care and caution on the part of the inquiry officer. The contention of Mr. Sorabjee, therefore, must fail.

15. For the reasons aforesaid the petition fails and is dismissed with costs. Costs fixed at Rs. 250. The petitioners will also pay the costs of the appeal in accordance with the order made in that appeal.