
(1996) 12 BOM CK 0022
In the Bombay High Court
Case No : First Appeal No. 114 of 1988

Dr. Suresh Madhukar Nagarkar	Vs	APPELLANT
Ujubala Madhav Desai and Others		RESPONDENT

Date of Decision : 24-12-1996

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A, 5(4)
Easements Act, 1882 — Section 52

Citation : (1997) 4 ALLMR 98 : (1997) 4 BomCR 250

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

Bench : Single Bench

Advocate : V.T. Walawalkar and K.K. Vyas, for the Appellant; S.L. Kapse, for the Respondent

Final Decision : Dismissed

Judgement

V.H. Bhairavia, J.—This appeal is directed against the judgment and decree dated 9th December, 1987, passed by the City Civil Court, Bombay in S.C. Suit No. 6958 of 1972.

2. Gist facts of the suit are that, the plaintiff Dr. Madhav Dattatraya Desai (Dead) was a General Medical Practitioner running a dispensary in the name and style of National Medical Hall at Shop No. 1. Bai Panabai Gangji Building, Ground floor, Lalbag, Bombay-12. The plaintiff was a monthly tenant of the said premises. The appellant-defendant Dr. Suresh Madhukar Nagarkar is a qualified Dental Surgeon. It is the case of the plaintiff that Dr. Madhav Desai and Dr. Suresh Nagarkar, defendant-appellant entered into an agreement of leave and licence on 18th November, 1968. Under the agreement,, the appellant-defendant was allowed to use a small portion of premises on leave and licence basis. The royalty or licence fee was fixed at Rs. 380/- p.m., payable on 10th day of each succeeding month. In the agreement, the terms and conditions were laid down. The defendant licensee should use the said accommodation and the said facilities granted to him in a manner so as not to cause inconvenience and obstruction or

loss or damage as a result of any act or omission on his part. In breach of terms and conditions, the agreement also provides the termination of leave and licence agreement before the expiry of the agreed period. The agreed terms were as follows:-

"4. In consideration of the licence granted by the Licensor to the Licensee hereby, the Licensee shall pay to the Licensor a royalty of Rs. 380/- per month payable per calendar month, and payable on or before the 10th day of each succeeding calendar month.

6. The Licensee shall conduct his Dental Clinic in the said dispensary premises at his own risk and on his own responsibility and shall save the Licensor harmless against any loss or damage that may be caused to him or to the said premises or to the articles and things lying and being in the said dispensary premises belonging to the Licensor, as a result of any act or omission or default or negligence or misconduct of the Licensee.

9. The Licensee shall use the said accommodation and the said facilities granted to him for the conduct of his Dental Clinic in a manner so as not to cause any inconvenience or obstruction to the Licensor in the conduct of his own dispensary on the said premises, or otherwise.

11. In the event of the Licensee committing breach of any of the terms and conditions of this agreement, the licensor shall be entitled to terminate this agreement.

12. The Licensee may terminate this agreement before the expiry of the said period of ten years if he so desires by giving one calendar month's notice in writing to the Licensor, to that effect."

3. It is the case of the plaintiff that the defendant-licensee has failed to pay the licence fee, royalty or the compensation at the rate of Rs. 380/- as agreed in the agreement for a period from 18th November, 1968 to 17th June, 1972 and he was in arrears of aggregating to Rs. 15, 960/-. On account of demand of this arrears, it is stated that the defendant-licensee had inimical feelings and had started behaving in such a way so as to cause obstructions to the plaintiff and jeopardize the tenancy right of the plaintiff. It is stated that the defendant-licensee was given permission by the plaintiff-licensor to set up a small reservoir or a water tank for his Dental Clinic in the premises of the said National Medical Hall. It was agreed between the plaintiff and the defendant that the said tank was to be set up with necessary Municipal permission that before putting the said tank, the defendant was to obtain necessary permission from the B.M.C. but he set up a water tank without B.M.C. permission. Therefore, a notice was issued to the plaintiff by the B.M.C. for unauthorised construction. Further, it is stated that with a view to annoying the plaintiff, the defendant was willfully keeping the said premises open much beyond the business hours. Despite repeated requests, the defendant continued to keep the Dental Clinic open during the night time also. Therefore, the plaintiff by notice dated 12th April, 1944, terminated the leave

and licence agreement. It is submitted that on receiving the notice, the defendant become more aggressive and belligerent towards the plaintiff. He put up a big sign board above the door of the said premises and he shifted the original sign board of the plaintiff to one side of the National Medical Hall. Not only that, but he has made an allegation against the plaintiff that the plaintiff had given proposal for marriage with Ujbala and as the defendant rejected the proposal, the plaintiff finds false excuses with the defendant. Hence the suit was filed against the defendant for ejectment of possession. In the written statement, the defendant has denied the allegation and has contended that the plaintiff has filed false suit because he refused the offer of the plaintiff to marry with Ujbala.

4. After recording the evidence, the learned Judge found that there was a breach of terms of conditions and decreed the suit on 9-12-1987. Hence this appeal.

5. Heard the learned Counsel Mr. Walawalkar for the appellant. It has been vehemently submitted that the order of ejectment is bad-in-law as there is no valid termination of leave and licence agreement. It is submitted that the plaintiff has failed to prove the pleadings of the suit. The plaintiff has not stepped into the witness box but his Power of Attorney stepped into the witness box who has no personal knowledge regarding the terms of agreement and breach of those terms. The learned Counsel submitted that there was no specific terms inserted in the agreement of leave and licence regarding the timing of business and the witness had no personal knowledge. There is no finding to held that the water tank was put by the appellant-defendant and that amount to breach of terms. It has been submitted that there is no arrears of rent. The typed copies of the receipt produced by the appellant is the proof of payment to the plaintiff-respondent. It is submitted that the Issue No. 1 decided against the defendant based on no evidence. The learned counsel submitted that as the leave and licence agreement is for a period of 10 years and that expired in 1978, this long period of agreement is indicative of intention to give the said premises not as special permission or leave and licence but it was given for permanent use as a tenant for substantial consideration paid as rent and the appellant is protected under the amended provision of section 15-A of the Rent Act and no decree for eviction could be passed. In support of his argument, the learned Counsel has relied on certain authorities as under:---

Associated Hotels of India Ltd. Vs. R.N. Kapoor, .

S. Mohan Lal Vs. R. Kondiah, .

Ram Jiwan Singh v. Sis Ram AIR 1979 S.C. 931.

Dinoo F. Byramji Vs. Dolly Jahangir Ranji (Mrs.), .

6. With respect, it is not possible to agree with the argument of Mr. Walawalkar. The agreement of leave and licence is a creation of the sweet and cordial relations between the licensor and licensee, the period fixed in the agreement definitely indicate the bona fide intention of the licensor to facilitate the young

dentist for making his career in the profession that does not create any right or lease or tenancy in the suit premises. If the licensee creates any embarrassing position for licensor, makes impossible to continue him no more as his licensee, the licensor is entitled to revoke the licence before the expiry of the period. In para 41 of the Judgment, the learned Judge has observed as under:--

"By looking to all the clauses of the agreement Exh.P-1 of Leave and Licence, the recital clause will indicate that clear understanding between the parties that the defendant was given permissive use of the portion of the said dispensary even the 1st Clause of the said agreement will also indicate permissive use of the portion of the premises. Clause No. 3 will also indicate that the plaintiff's articles alongwith the defendant's articles would be there. The plaintiff has not intended any act, detrimental to the tenancy right of the licensor, but the water tank without the permission of the B.M.C. is the instance which would jeopardize the tenancy of the plaintiff. The defendant in his evidence has also admitted that he has read the entire agreement Exh.P-1 and after going through the entire agreement, he has affixed the signature. He has followed the terms and conditions of the agreement. He was conscious when he has signed the agreement, that it was a leave and licence agreement and also the terms and conditions were of leave and licence. After all, this is a written document and Dr. Nagarkar knows it very well, when he has affixed his signature, what he was doing. Dr. Desai, the plaintiff, somewhat out of generosity and sympathy has helped the new entrance in the medical field to start his dental practice and had given permissive use of the portion of his dispensary. With this background and looking from all the angles, one can infer the said agreement of leave and licence cannot be described as lease, but it can be described as a leave and licence only."

7. The view taken by the Supreme Court in *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, is not applicable in the instant case.

8. In view of the facts emerged from the record that the intention of the licensor is incorporated in writing and the learned Judge has rightly, observed. It is further observed by the learned Judge in para 42 as under:----

"It is true that it is given for a long time of 10 years. It might be one of the factors, but as I have stated that the relation between the parties before the execution of this document was very cordial and they were knowing each other, so it might have given for 10 years, but it was equally true that when breaches were committed, the plaintiff was entitled to terminate the licence earlier also. In this case, also one novel and interesting suggestion was made to the P.W. 1 Miss. Ujubala that the proposal was made by her father for her marriage with the defendant, but it was refused by the defendant, so the motive suggested for filing this suit, was the refusal of the proposal of the marriage by the defendant."

9. By putting such question, the appellant-defendant has created very embarrassing position for witness P.W. 1. It has been brought on record that the relations between the plaintiff-respondent and the appellant-defendant were

much deteriorated to the extent that the defendant had filed a criminal complaint against the plaintiff and dragged into the Court. It reveals from the record that the defendant is in closed relationship with the plaintiff viz. defendant is a son of plaintiff's wife's brother and out of that relationship and sympathy towards the young dentist, the plaintiff wanted to help the defendant in making his career as Dentist but his hopes turned to be futile within the time of 3 years and the relations became strained. Naturally, the licensor would not tolerate or condone such behavior of the licensee at the cost of his life and right. As he breached the terms and conditions, the right of tenancy was jeopardized and he had to face the notice issued by the Municipal Corporation.

10. It has been submitted by the learned Counsel Mr. Kapse on behalf of the respondents that even if it is held that the licence was not validly terminated and the appellant was entitled to continue in the suit premises as per the terms of the agreement upto 1978. The learned Counsel Mr. Kapse submitted that the appellant is not entitled for the protection of section 15-A of the Act as the definition of section 5(4)(a) is excluded from the definition of licence. In support of his argument, he has relied on the case reported in S. Mohan Lal Vs. R. Kondiah, . I am not impressed by this argument of Mr. Kapse. Therefore, this argument is rejected. However, I am in full agreement with the finding of the learned Judge on the point of breach of terms of conditions and the revocation of the leave and licence and the view expressed by me above; the decree in question is required to be confirmed.

In the result, appeal fails and the same is dismissed with costs.