
(1989) 09 BOM CK 0049
In the Bombay High Court
Case No : Writ No. 1882 of 1984

Fatimabai Noor Mohamed (Mrs.)

APPELLANT

Vs

M. Khallil Ahmed and Another

RESPONDENT

Date of Decision : 29-09-1989

Acts Referred:

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

Citation : (1990) 1 BomCR 606 : (1992) MhLj 1605

Hon'ble Judges : M.L. Dudhat, J

Bench : Single Bench

Advocate : A.A. Kudrolli, for the Appellant; S.H. Thatte, instructed by Thatte and Co., for the Respondent

Judgement

M.L. Dudhat, J.—This writ petition is preferred against the judgment and order dated 21st of March, 1984, passed by the Appellate Bench of Small Causes Court, Bombay, in Appeal No. 644 of 1982 confirming the judgment and order dated 30th of September, 1982, passed by the learned Judge of the same Court decreeing the suit of the plaintiff holding that he is a deemed tenant and/or protected licensee.

2. Few facts which gave rise to this litigation are that the present petitioner defendant was carrying on the business of pan beedi through her husband as her constituted attorney in the suit premises at Jacob Circle, Bombay. It is not disputed that by an assignment deed dated 16th September, 1964, the petitioner purchased the said business and it is also mentioned in the said assignment deed that the said business of pan beedi was being carried on by the predecessor-in-title of the petitioner since the year 1954. On 1st of September, 1972, the present petitioner entered into an agreement with the respondent plaintiff for conducting the said business for a period of 11 months. The grievance of the petitioner is that during that time he was sick suffering from tuberculosis and it was impossible for him to carry on the said business on account of his illness. It is further his case that during this period the present respondent approached him

with a request that he may be allowed to conduct the said business. In the aforesaid circumstances, the said business was given to the respondent for conducting for a period of 11 months on 1st of September, 1972, and the said period expired on 31st July, 1973. After the expiry of this period of 11 months, the petitioner further entered into a second agreement for a further period of 11 months by a further agreement dated 27th August, 1973. However, the respondent even after the expiry of this period of 11 months continued to conduct the said business till January, 1977. On 6th January, 1977, petitioner gave a notice calling upon the present respondent to vacate the suit premises. After the receipt of the said notice, the respondent filed suit being R.A. Decl. Suit No. 523 of 1977 in the Court of Small Causes on 10th of March, 1977, stating that he was in exclusive possession of the suit premises as a protected licensee from the year 1970 and he may be declared as a protected licensee or deemed tenant under the amendment of the Bombay Rent Act which came into force in the year 1973. I may mention here that nowhere in the plaint the present respondent made a mention of any written agreement executed between him and the petitioner, but merely made averment that he is a protected licensee from the year 1970 and, therefore, on 1st of February, 1973, when the new Rent Act came into force his licence was in subsistence. The defendant filed his written statement in the said suit and denied the contentions of the plaintiff-respondent that he was a protected licensee. He submitted that the said premises was a business premises where he was conducting the Pan beedi business. He further submitted that the said business was purchased by him on 16th September, 1964, by the said deed of assignment and in the said deed of assignment it was clearly mentioned that in the suit premises his predecessor-in-title was conducting the said business from the year 1954. He also submitted that he was suffering from tuberculosis and was handicapped to do the said business for some time. During this period the present approached him and requested him the he may be allowed to conduct the said business. It was in these circumstances that the petitioner entered into the said agreement with the respondent plaintiff on 1st of September, 1972. According to him, the dominant intention of the said leave and licence agreement was to allow the respondent to conduct the business of the said pan beedi in the suit premises on payment of compensation of Rs. 200/- per month to the petitioner and in order to express this intention the said writing was created in favour of the respondent. He also submitted that the said agreement was again renewed on 27th August, 1973, for a further period of 11 months, though the respondent continued to conduct the said business even after the expiry of this second term. Subsequently on 6th January, 1977, the petitioner called upon the respondent to hand over the said business back to him along with the suit premises and it is because of this action by the petitioner, the respondent has filed the present suit.

3. It is pertinent to note that in the written statement the defendant has taken a specific plea that since on the basis of the written agreement the said business was given to the respondent for conducting, the respondent plaintiff is excluded

from the definition of "licensee" u/s 5(4A) of the Bombay Rents, Hotel and Lodging Houses Rates control Act, 1947 (hereinafter for brevity sake referred to as "the said Act of 1947"). In the trial Court both the parties led the evidence and after going through the oral and documentary evidence, the trial Court came to the conclusion that the respondent was a "licensee" in the suit premises and the said premises was in exclusive possession of the respondent. Since the licence was in subsistence on 1st of February, 1973, the respondent was entitled to protection under the amended provisions of the Bombay Rent Act, which came into force in the year 1973. However, while rejecting the plea of the respondent-plaintiff that he was conducting the said business in the suit premises from the year 1970, both the Courts below proceeded on the footing that the respondent was introduced in the suit premises on 1st of September, 1972, by the first agreement between the parties. Since there was no writ petition against this finding. I shall now proceed on the footing that the respondent-plaintiff was introduced in the suit premises on 1st of September, 1972.

4. On a mere perusal of the record I find that the trial Court has not framed the proper and necessary issues. It can also be seen that since the specific stand is taken by the petitioner-defendant that the respondent-plaintiff was introduced in the suit premises by an agreement of conducting, his case does not fall within the definition of "licensee" u/s 5(4A) of the said Act of 1947. However, surprisingly enough, the trial Judge did not bother to frame any issue in this respect and this error apparent on the face of the record has resulted in the wrong interpretation of the documents virtually misleading the parties. The trial Judge decided the issue as if the agreement is simplicitor a license agreement. If one goes through the clauses of this agreement it can be seen that the agreement was meant for conducting the pan beedi business. There are three documents produced by the present petitioner before the trial Court. The first document is the deed of assignment dated 16th of September, 1964, on the basis of which the petitioner had purchased the goodwill of the said shop. The averments in the said document clearly go to show that the business of pan beedi was being carried on in the side shop since the year 1954. It is, therefore, abundantly clear that even much prior to the purchase of the said shop by the petitioner, pan beedi business was being carried on in the suit premises. The next document is the agreement between the petitioner and the respondent dated 1st of September, 1972. Clause 3 of the said agreement points out that the furniture and the other articles lying in the suit premises belonged to the owner petitioner. However, they were handed over to the respondent for conducting the said business under the said agreement and, therefore, it was made clear that permissive user was also granted to the respondent for effectively conducting the said business. Clause 4 further makes it clear that all the expenses in respect of the said business during the period of the said agreement such as servants salary, purchase of good etc. shall be made by the conductor-respondent. In my opinion, all these facts together point to only one conclusion that what was expected by the said agreement is not a licences simplicitor, but a licence

exclusively for conducting the business of the pan beedi. There is also a mention in Clause-5 that the owner agrees to renew the said licence every year and that he should attend to all the matters concerning the licence of the said business during the tenure of the said agreement. I fail to understand that if the intention of the parties to the agreement was simplicitor to transfer the suit premises why this clause has been incorporated in the said agreement. Further, Clause 6 uncovers the falsity of the claim of the respondent that the dominant intention of the parties was to transfer the suit premises. It has been clearly incorporated in this agreement that the goods meant for sale were purchased by the respondent and in the same manner while taking the possession of the suit premise back the petitioner also to pay Rs. 1,000/- to the respondent towards the value of the goods lying in the shop premises meant for sale. There is not a single word anywhere in the said agreement that the petitioner had let out the suit premises to the respondent. What is meant by this agreement was that the respondent was allowed to run the said business of pan beedi in the suit premises on payment of compensation of Rs. 200/- per month and for that purpose he was entitled to use the said premises along with other articles mentioned in the agreement. It was also a condition that the respondent should carry on the said business as per Clauses 7 and 8 of the said agreement.

5. Apart from the above, the falsity of the claim of the respondent is further clear from his own admission in the cross examination before the trial Court. Though it was his case in the plaint that he came in admitted of the suit premises in 1970, in his cross-examination he admitted that he came in possession of the suit premises under the said leave and licence agreement, which agreement is of the year 1972. From this admission it is crystal clear that the respondent came in possession of the suit premises for the first time on the basis of the agreement dated 1st of September, 1972. The fact that there was stock-intrade in the suit premises for which the payment was made by the respondent clearly points out that at the time when the respondent stepped in the suit premises, the business was already in existence and being conducted by the present petitioner which fact is also supported by the shops and establishment licence which was in existence at the relevant time. Unfortunately, both the courts below have completely lost the sight of this fact and proceeded on the footing as if the premises simplicitor was given to the respondent under the said licence.

6. I am at loss to read the observations of both the courts below that the said agreement of conducting is sham and bogus. The plaintiff had knowingly suppressed this agreement from the Court in order to make a false claim that he came in possession of the suit premises in the year 1970, though in the deposition he admitted that he came in possession of the suit premises on the basis of this agreement. It is for the first time when the written statement was filed by the present petitioner that these two conducting agreement saw the light of the day. Even then, the respondent did not bother to make amendment to his plaint. I have already pointed out above that both the courts below have come to the conclusion that the respondent came in possession of the suit premises on

the basis the conducting agreement of the year 1972 and not from the year 1970. This being the position, I fail to understand why both these Courts treated this agreement as a sham and bogus one, especially when there is no reference in the plaint that these agreement were in fact sham and bogus and were not to be acted upon and even no oral evidence was led by the respondent plaintiff to this effect. In view of the above, the concurrent findings arrived at by both the courts below are patently illegal and liable to be quashed and set aside as the same are beyond the scope of the pleadings and evidence led by the plaintiff respondent. At this juncture I shall refer to the provisions of section 5(4A) of the said Act of 1947:

"5(4A) "licensee" in respect of any premises or any part thereof means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960 but does not include a paying guest a member of a family residing together, a person in the service or employment of the licensor, (or a person conducting a running business belonging to the licensor or a person having any accommodation for rendering or carrying on medical or para-medical services or activities in or near a nursing home hospital or sanatorium) or a person having any accommodation in a hotel lodging house, hostel, guest house, club, nursing home, hospital, sanatorium, dharamshala, home for widows, orphans or like premises marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges licence fee or charge for such premises of the employee or suppose not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any under-taking or institution; and the expressions "licence", "licensor", and "premises given on licence" shall be construed accordingly."

7. The aforesaid provisions of section 5(4A) of the said Act of 1947 make it abundantly clear that the permission given for conducting the said pan beedi business in the suit premises does not fall within the definition of the word "licence" and, therefore, there is no question of protection of the present respondent under the Bombay Rent Act. These provisions coupled with the three agreements produced by the petitioner would make it further clear that the dominant intention of the parties was to create a conducting licence for conducting the said pan beedi business and incidentally the premises was allowed to be used by the respondent as permissive user and, therefore, the case of the present respondent clearly falls within the exception of the word "licensee"

as mentioned above. He cannot, therefore, be deemed to be a protected licensee as claimed by him.

8. It is true as contended by Shri Thatte, the learned Counsel appearing on behalf of the respondent that this Court in writ petitions under Article 227 of the constitution should not normally disturb the concurrent findings of facts arrived at by the courts below and also should not reappreciate the evidence as it has only limited power to that effect. In my opinion, however, in the case before me both the courts below have committed patent illegality apparent on the face of the record. They have not only not bothered to frame the basis issues involved in the suit, but they even went to make perverse observations that both the agreements of conducting are sham and bogus, though even the plaintiff has not said a single word about the same and came to such an erroneous conclusion. In such a case it is not the function of this Court to act as a mere post office looking at the patent illegalities committed by its subordinate courts which are apparent on the face of the record and simply allow justice to be sealed. In my opinion, if the intention of the legislature was that the High Court should not interfere with the pervert concurrent findings of facts arrived at by the Courts below, then the right of an aggrieved party to approach this Court under Article 227 of the constitution becomes meaningless and, therefore, in exercise of the power of superintendence over its subordinate courts, this Court has the power to interfere with the concurrent findings of the courts below in order to remove the illegalities committed by them and it is only for this purpose this Court may also peep into the evidence and the documents produced before the courts below. In my view, therefore, it is the function of this Court to interfere with and disturb the findings of this type in order to impart justice.

9. In the result, both the judgments and orders passed by the trial Court dated 31st August, 1982, as well as the judgment and order dated 1st March, 1984, passed by the Appellate Bench of the Small Causes Court, Bombay, are quashed and set aside and the plaintiff's suit is dismissed with costs. Rule made absolute accordingly.

10. At this stage Mr. Thatte on behalf of the respondents orally applies for suspension of the operation of the order in order to enable the respondents to move the Supreme Court. In my opinion, by this order the respondent in this case is not going to lose the possession. It is only in the proceedings before the City Civil Court the order of possession, if any may be passed. Therefore, there is no apprehension whatsoever that within a period of 2/3 months time the respondent will lose the possession. Apart from that, I am also told that the respondent has not paid huge arrears of compensation amounting to Rs. 32,000/-. In view of the above, the application is rejected.