
(1998) 01 BOM CK 0014
In the Bombay High Court
Case No : First Appeal No. 683 of 1996

Ghulamnabi B. Khan

APPELLANT

Vs

Bombay Housing and Area Development Board and others

RESPONDENT

Date of Decision : 08-01-1998

Acts Referred:

Easements Act, 1882 — Section 52, 52
Evidence Act, 1872 — Section 3, 59, 61
Maharashtra Housing and Area Development Act, 1976 — Section 2, 88, 89, 90, 91
Maharashtra Housing and Area Development Act, 1977 — Section 2(25), 90, 91

Citation : (1998) 4 ALLMR 473 : (1999) 1 BomCR 522 : (1998) 2 BOMLR 632

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : M. Arshad Haindaday, for the Appellant; K.K. Tated, A.G.P. and Sandeep J. Ghogare, for the Respondent

Judgement

F.I. Rebello, J.—This appeal is directed against the judgment dated 12th March, 1996 whereby the suit filed by the present appellant has been dismissed. The appellant herein had filed a suit against the respondents Nos. 1 to 4 who are Authorities under the Maharashtra Housing and Area Development Act, 1976. Respondent No. 5 is allottee of a premises allotted by respondent No. 1. It was the contention of the appellant herein that he was a licensee of respondent No. 5 in a room admeasuring 10 "x 10" in Jagdish Bhavan, Mahim. A portion of the said building collapsed pursuant to which the respondent No. 1 issued notice to the occupants. Pending development, the occupants were rehabilitated in what is known as transit accommodation. The dispute between the appellant and respondent No. 5 is in respect of the allotment of the premises of the respondent No. 1 to the occupant. It is the contention of the appellant that he was the occupant and as such entitled to be allotted premises in the newly constructed building; whereas it was the contention of the respondent No. 5 that he was the tenant of the premises and as such the occupant and the room in the newly constructed premises known as Sea Breeze has been rightly allotted to him. The

appellant in the plaint prayed for a declaration that he is entitled to use the transit camp premises until construction of the new building is complete at the site of the demolished building and for an injunction to restrain respondents Nos. 1 to 4 from acting or purporting to act on the note of surrender of the transit premises dated 21st January, 1987 between respondent Nos. 1 to 4 on the one hand and respondent No. 5 on the other. Some other reliefs have been prayed for also. The appellant herein initially had filed a suit being S.C. Suit No. 923 of 1987. The said suit was withdrawn with liberty to file the fresh suit. Thereafter a writ petition came to be filed before this Court which was numbered as Writ Petition No. 342 of 1988. In the said petition it was the contention of the appellant herein that he should be restored forthwith to the premises from which he has been dispossessed. In para 21 of the petition he had averred that one year from 21st January, 1987 the respondent in a high-handed manner had dispossessed him. The said petition was dismissed in limine. Thereafter the appellant filed the present suit which was numbered as S.C. Suit No. 2883 of 1988.

2. The trial Court framed as many as eleven issues and also some additional issues. The trial Court on the material before it came to the conclusion that the appellant was unable to prove that he was occupying the premises in the demolished building as a licensee of respondent No. 5 on a monthly compensation of Rs. 50/-. The trial Court also held that the appellant had failed to prove that respondent No. 1 had given to the appellant alternate premises after the original suit premises were demolished. The trial Court further held that the appellant was not entitled to get newly constructed premises as he was not in use and occupation of the suit premises prior to demolition. The trial Court negated the contention of the appellant herein that he was entitled for a declaration and injunction as prayed for. The trial Court held in the affirmative that the respondent No. 5 had been able to show that he has been in use and occupation of the suit premises till 21st January, 1987 and thereafter he surrendered the premises in favour of respondents Nos. 1 to 4.

3. In this appeal the appellant seeks to contend that he was the occupier in respect of the premises and as such he is entitled to be allotted the new premises instead of respondent No. 5. Reliance has been placed on the provisions of "The Maharashtra Housing and Area Development Act, 1976" hereinafter referred to as MHADA. Sub-section (25) of section 2 sets out the definition of an occupier. Similarly, reliance is placed on sub-section (27) of section 2 as also the provisions of sections 88, 89, 90 and 91 of MHADA. It is contended on behalf of the appellant that there was sufficient documentary evidence on record including ration card, milk card, birth certificate of the children as also school leaving certificate and other documentary evidence to establish that he was residing in the old premises i.e. Jagdish Bhavan since June of 1978 and thereafter he continued to reside in the premises of respondent No. 1 in the transit camp at Goregaon from where he was forcibly dispossessed. It is sought to be contended that respondent No. 5 had agreed to sell the premises to

the appellant for a consideration of Rs. 20,000/- which has been paid. Apart from that it is pointed out that the appellant was paying monthly compensation of Rs. 50/- apart from the landlord's dues. It is further pointed out that as such he was in occupation of the premises as a licensee and as such fell within the definition of occupant and consequently was entitled to be allotted the premises.

4. With this background the following points arise for determination :-

(1) Whether the appellant proves that he was in exclusive possession of the premises in the building that was demolished as a licensee of respondent No. 5?

(2) Assuming it is held that appellant was in possession of the premises in the year 1978 does he fall within the definition of occupant within the meaning of sub-section (25) of section 2 of Maharashtra Housing and Area Development Act, 1976?

(3) If the appellant falls within the definition of occupant, is he entitled to be allotted the premises to the exclusion of respondent No. 5 who was admittedly the tenant of the premises?

5. Dealing with the first point as to whether the appellant was in exclusive possession of the premises in the building that was demolished as a licensee the evidence oral and documentary will have to be considered. In so far as the appellant is concerned Exhibit "C" is a copy of the envelope received by the appellant at Jagdish Bhavan. Exhibit "E" are progress reports of the appellant's children wherein the address is shown as the demolished suit structure. Exhibit "F" is the certificate of Birth dated 19th June, 1980, of one of the daughters of the appellant. The date of registration therein is shown as 1980 and the address is Lohar Chawl, Mahim that is where the Jagdish Bhavan is situated.

Similarly Exhibit "G" is the School Leaving Certificate of a daughter of the appellant. Exhibit "H" is a letter dated 7th February, 1981 which is addressed to the appellant. Similarly, there are other documents including Exhibit "J". All these documents would show that the appellant was in occupation of the premises at Jagdish Bhavan. On the part of respondent No. 5 the respondent No. 5 has produced rent receipt in respect of the structure which are Exhibit 3 (Colly). Various other Exhibits regarding payment to Maharashtra Housing and Area Development Authority as also Exhibit 10 which are a bundle of letters of post cards addressed to respondent No. 5 at Room No. 11 at Jagdish Bhavan, Lohar Chawl, Mahim, These letters date from 13th May, 1978 onwards.

The appellant herein apart from himself has not led any other evidence of any witness. Respondent No. 5 on the other hand apart from his own evidence through his Power of Attorney has examined as defence witness No. 3 Vijaykumar Poonamchand Vyas, landlord of the premises, who has deposed that respondent No. 5 was residing at Room No. 11. The suggestion put to the said witness that respondent No. 5 was not residing in the premises, has been denied. Similarly, respondent No. 5 has examined D.W. 4 Mohammad Munir Abdul Shakit

who was also a resident in Jagdish Bhavan. He deposed to the fact that respondent No. 5 was residing in the Room No. 11. One more witness who has been examined is D.W. 5 Iqbal Hussain Amir Hussain. He also deposed to the effect that he was a secretary of Jagdish Bhavan Tenants' Association and was a tenant of Room No. 38. He also deposed that it was respondent No. 5 who was in occupation of the premises. At this stage, it may also be mentioned that D.W. 5 has deposed that respondent No. 5 went to reside at Goregaon, in the Transit Camp. From the oral and documentary evidence what emerges is that, the appellant was able to show that he was residing in the premises but he has been unable to show that respondent No. 5 was not residing in the premises. In other words what is seen is that from the material oral and documentary both the appellant as well as respondent No. 5 have been able to show that they were residing in the premises. In other words, it cannot be said that respondent No. 5 has ceased to occupy the premises. If this be the case clearly appellant has failed to prove that he was in exclusive possession of Room No. 11.

The next question is whether the appellant has been able to prove that he has been residing in the premises as a licensee of respondent No. 5? In this case the only evidence as pointed out is oral evidence of the appellant himself and one diary. From the said oral evidence and the diary it cannot be said that the appellant has been able to establish that he was paying Rs. 50/- as compensation for occupying the premises as a licensee. At the same time the appellant has taken a stand also that he was paying the rental dues of the premises sometimes to the landlord and sometimes to respondent No. 5 or his employees. This is not proved by the documentary evidence on record or through the evidence of the landlord D.W. 3. The other material that has come on record is in the matter of payment of Rs. 20,000/- by the appellant to the respondent No. 5. The claim is not supported by any documentary evidence. The appellant on his own showing at the time he first occupied the premises was a student. In the evidence of appellant it has come on record that respondent No. 5 was contesting his claim because he refused to pay an additional amount of Rs. 20,000/- whereas at the same time it has also come on record that it was an understanding that initially Rs. 20,000/- will be paid and subsequently the another payment of Rs. 20,000/- for transfer of the tenancy. If the appellant who has deposed that he was a student has not brought in any evidence to show that how he came to have an amount of Rs. 20,000/- whether this was a loan taken or he had a Bank deposit from which the amount had been withdrawn. There is a total silence in that respect. The case of the respondent No. 5 has been that he allowed the appellant to occupy the room to study and that is how the appellant was allowed to stay in the premises. In the cross-examination of D.W. 4 the appellant has sought to make out that it was D.W. 4 and his father who were instrumental in arranging the premises i.e. Room No. 11 in Jagdish Bhavan for the appellant. D.W. 4 has denied the same. Whatever be the position, the evidence does not support the stand of the appellant that he was a licensee in the premises for a consideration. At the same time the material on record does

not support the case of respondent No. 5 that he was merely allowed to occupy the premises to study. The occupation of the appellant in the premises seen from the material on record is continuous till the premises were handed over to Maharashtra Housing and Area Development Authority for reconstruction.

In this view of the matter, Point No. 1 for determination has to be held against the appellant. As I am holding the first point against the appellant there is no need to go into the issue as to whether the appellant was exclusively residing in the transit camp premises at Goregaon to the exclusion of respondent No. 5 or whether both appellant and respondent No. 5 were residing in the transit camp premises.

6. Once I have held that the appellant has failed to prove that he was residing as a licensee for consideration, the only other point that requires consideration in Point No. 2 i.e. whether mere occupation of the premises would make the appellant also an occupant in respect of the premises and if so whether he alongwith respondent No. 5 are jointly to be allotted the said premises. Sub-section (25) of section 2 of MHADA, defines who is an occupier.

"2(25)" occupier" includes -

- (a) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;
- (b) an owner in occupation of, or otherwise using, his land or building;
- (c) a rent-free tenant of any land or building;
- (d) a licensee in occupation of any land or building; and
- (e) any person who is liable to pay to the owner damages for the use and occupation of any land or building."

Therefore, from a perusal of the said definition what is relevant to note is, to be an occupier a person has to be paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable. The appellant cannot fall under this category as admittedly the respondent No. 5 was paying rent to the landlord who is D.W. 3 who has deposed to that effect. In so far as (b) is concerned, the same is not attracted as it relates to an owner in occupation. Similarly (c) also is not attracted. (d) is a case of a licensee in occupation of land or building. Learned Counsel for the appellant tried to contend that licence is not defined and therefore one will have to fall back on the definition of licence under the Easement Act. Licence under the Easement Act is defined as under :

"Where one person grants to another or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property the right is called

a licence."

This is sought to be argued in the context of the provisions of section 90 read with section 9 of MHADA Act. Section 91 refers to an "Occupier" and makes applicable mutatis mutandis. Section 90 casts a duty on the Board to give temporary accommodation to occupiers in the cases covered by section 90 and/or section 91. In the instant case, therefore, it is sought to be pointed out that the appellant being in occupation of the premises may be with the respondent No. 5 still was residing in the premises as a licensee and once he is a licensee he falls within the definition of an occupier in so far as the MHADA Act is concerned. This submission, therefore, will have to be considered qua the definition of occupier u/s 2(25). In a case where one of the person in possession is able to establish that he had been paying or paid to owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable then in such an event will another person residing in the premises with the permission of the person defined as occupier in clause (a) also becomes as occupier for the purpose of MHADA Act. Consequently, would respondents Nos. 1 to 4 be bound to allot such transit camp accommodation and thereafter premises in the newly constructed building also to such other person. It is sought to be contended that the definition is inclusive. It is, therefore, sought to be contended that it is not impossible to conceive of a situation where in the same premises two persons are in occupation as in the instant case who will be occupier for the purpose of MHADA Act.

7. At the first instance the argument seems to have merit in as much as all that is contemplated under the definition is that a person in possession must fall as an occupier in either of the categories as set out under (a) to (e) of definition of an occupier. However, considering each of five categories what emerges is what the definition contemplates is a "person" who will be an occupier. In so far as the authorities under the Act are concerned, they are bound to look at the person who falls in the definition of occupier. Inter se rights between an occupier who is a tenant and another person residing with such tenant would not make such a person as an occupier in so far as authorities under the MHADA Act are concerned. That would be a dispute between the occupier and the person in occupation with the occupier. In the instant case D.W. 3 who is a landlord has accepted the respondent No. 5 as a tenant. Once he accepts respondent No. 5 as a tenant respondent No. 5 satisfies the definition of occupier. Therefore, in so far as the authorities under the Maharashtra Housing and Area Development Authority Act are concerned, occupier in the instant case would be the person who was paying rent. Once one of the categories is included it is impossible to conceive of a situation that thereafter any other categories as set out in the said definition can also be joint occupant alongwith the occupier. The legislature has contemplated as to who is an occupier. The definition itself gives some indication that ultimately what the Act has considered is an "occupier". Once I hold that there is an occupier in respect of the said premises the mere fact that another is residing with the said occupier would not make the said other also occupier for

the purpose of sub-section (25) of section 2 of the MHADA Act.

8. For the aforesaid reason though the appellant has been able to show that he was also in possession of the premises, he cannot be said to be an occupier within the meaning of sub-section (25) of section 2 of MHADA Act in so far as respondent Nos. 1 to 4 are concerned. This is also a case of a licence created in the year 1978 i.e. after 1973 when an amendment was made to the Bombay Rent Act viz. section 15-A whereby the licensees were made tenant of the landlord. The appellant having proved that he was in occupation with the permission of respondent after 1973 i.e. year 1978 therefore, also cannot make out his case under category (a) of sub-section (25) of section 2 of the MHADA Act for the purpose of contending that he is an occupier. For the aforesaid reason, Point No. 2 has to be held against the appellant.

9. In view of what has been stated above it is not necessary to answer Point No. 3.

10. The suit was filed by the appellant herein for reliefs of a declaration that the appellant was entitled to occupy tenement No. 1935 in Block No. 97 at Goregaon till the new construction of the building is completed on site of the demolished building and for an injunction restraining respondents Nos. 1 to 4 from evicting the appellant and further for an injunction to restrain respondents Nos. 1 to 5 from preventing the plaintiff from using and occupying tenement No. 1935 in Block No. 97. As already pointed out the appellant was evicted. Petition challenging the eviction was dismissed. In the meantime the new building came to be reconstructed and has been named as Sea Breeze. Respondents Nos. 1 to 4 had allotted a tenement in the said building to respondent No. 5 which is tenement No. 410 on the 4th Floor. In respect of the said premises, a Receiver was appointed and the appellant was allowed to reside in the said premises as an agent of the Receiver. The reliefs as prayed for by the appellant cannot be granted in the suit. For the aforesaid reasons, this appeal is dismissed.

11. In the circumstance, Receiver to be discharged. All costs and charges of the Receiver to be borne and paid by the respondent No. 5. At the time the appellant was appointed as Agent of the Receiver, this Court did not fix any compensation to be paid by the appellant as Agent of the Receiver. I see no reason why this Court at this stage must call on the appellant to deposit any amount considering the facts and circumstances of the case. If the respondents Nos. 1 to 4 are entitled to claim any amount, they are free to claim the said amount from the allottee i.e. respondent No. 5. In the circumstances of the case, there shall be no order as to costs.

12. At the request of the Counsel for the appellant, on the appellant filing the usual undertaking in this Court within four weeks from today, time to vacate the premises is granted up to 30th June, 1998. It is made clear that Counsel for the respondent No. 5 has opposed this application and was agreeable to give time only upto 31st March, 1998. However, considering the circumstances, I felt it

proper that time should be given upto 30th June, 1998.

13. Issuance of certified copy expedited.

14. Appeal dismissed.