
(1978) 07 BOM CK 0008
In the Bombay High Court
Case No : Insolvency No. 65 of 1975

Hargovind Dharamsey and Co. and others	APPELLANT
Vs	
Ruby and Co.	RESPONDENT

Date of Decision : 21-07-1978

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15, 15(1), 15(11)
Presidency Towns Insolvency Act, 1909 — Section 17

Citation : AIR 1979 Bom 89

Hon'ble Judges : Sujata v. Monohar, J

Bench : Single Bench

Advocate : M.O. Chinoy, instructed by Manu Hormusji and Co. for the Official Assignee, A.N. Desai and R.S. Daruwalla, instructed by Mulla and Mulla and Craigie Blunt and Caroe, for Hiraji Govindji LandlordsG.J. Desai, instructed by Shah and Sanghvi, for Acme Mirror Works, N.V. Adhia, for InsolventsK.P. Khambatta, for Intending Purchases, Ahmed Omer, instructed by Manilal Kher and Ambalal, Ghelani of Romer Dadachandji and Shethna for Hira Mistan intending Purchaser R.S. Daruwalla, for Hirji Govindji and Co. Landlord Muchala, for A.A. Patharia Landlords J.S. Balchandani, for the Appellant;

Judgement

1. The present report of the Official Assignee dated 24th January 1977 is in respect of the sale of right, title and interest of the insolvents in the business known AS M/s. Hargovind Dharamsey & Co. situate at 344, New Nagpada Road, Bombay-8 as a going concern together with stock-in-trade, goodwill and benefit of tenancy rights. On 2-7-1975 an order of adjudication was made against the firm M/s. Hargovind Dharamsey & Co. and its partners. As a result all the estate and effects of the insolvents have become vested in the Official Assignee.

2. On the date when the order of adjudication was made the debtors were contractual tenants of the business premises in question. Earlier on 12th April 1962 the landlord had given a notice to quit to the debtors and had filed a suit in the Court of Small Causes at Bombay for ejecting them. Admittedly, how ever, the suit was compromised. Under the consent terms the debtors had continued

as contractual tenants of the suit premises right till the date of their adjudication. Therefore, what vested in the Official Assignee was the contractual tenancy in respect of the shop premises.

3. After the order of adjudication the landlord served three notices all dated 24th September 1975 on the Official Assignee asking him to pay the arrears of rent and terminating his tenancy. The three notices pertain to the three premises where business was carried on by the insolvents prior to the order of adjudication viz. shop premises at 344, New Nagpada Road, Bombay-8 shop premises at 346, New Nagpada Road, (together constituting the shop) and a godown adjoining these premises. On receipt of these notices terminating his tenancy, the Official Assignee made a report to the Insolvency Court dated 11th Nov. 1975 asking for directions. The notice of hearing of this report was given to the parties concerned including the landlord. The landlord however, chose not to appear before the Court. On 18th November 1975 the learned Insolvency Judge passed the following order:

"P.C.: Notice terminating tenancy dated 24th September 1975 not binding on Official Assignee. Official Assignee is permitted to sell the business as a running concern with benefit of the tenancy rights."

Thereafter on 3rd April 1976 the landlord made an application asking for leave u/s 17 of the Presidency Towns Insolvency Act to file a proposed suit for ejectment against the insolvents firm and the Official Assignee- The application came up for hearing on several occasions before the Insolvency Court and was adjourned from time to time. The landlord submitted to the Court a draft of the plaint of the proposed suit. It may be noted that the landlord himself offered on various occasions during the pendency of this application to purchase the premises and the matter was adjourned from time to time for this purpose. Ultimately the landlord made an offer of Rs. 26,046/- for these premises-On 6th September 1976 this application for leave u/s 17 was withdrawn by the landlord with liberty to file a fresh application if so advised- Thereafter on 9th November, 1976 the landlord again made an application for leave u/s 17 of the Presidency Towns Insolvency Act for filing the proposed suit for ejectment against the insolvents-firm and the Official Assignee. In the affidavit dated 9th November, 1976 the landlords have stated that they "were granted leave to file a fresh application upon the same causes of Action if they were so advised. Accordingly the applicants are preferring the present application."

4. Mr. Daruwala, who appears for the land-lords, also stated that the suit proposed to be filed by the landlord was substantially in terms of the draft which was earlier submitted by them to the Court. This application is also before me for consideration along with the report of the Official Assignee,

5. On the report the Official Assignee seeks directions regarding the sale of the above business as a going concern together with tenancy rights, stock-in-trade and goodwill in view of the fact that the tenancy of the Official Assignee has been

terminated by the landlord by their notice dated 24th September, 1975. As far as this aspect of the report is concerned, an order has already been passed by the Insolvency Court on 18th November, 1975 as referred to earlier, under which it has been held that the notice terminating the tenancy dated 24th September, 1975 is not binding on the Official Assignee. If this is so, then, there can be no doubt that such contractual tenancy can be sold together with stock-in-trade and goodwill when the entire business is sold as a going concern and in fact such a direction for sale has already been given by the Insolvency Court.

6. The landlord, however, has argued that the tenancy of the insolvents and/or the Official Assignee has been terminated by his notice dated 24th September, 1975. The only right that the tenant now possesses is a personal right of occupation as a statutory tenant under the Bombay Rents, Hotel and Lodging House Rates Control Act (hereinafter called the "Rent Act"). Such a statutory tenancy of business premises cannot be sold under the notification dated 24-9-1948 issued under the proviso to Section 15(1) of the Rent Act.

7. In *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, the Supreme Court considered the provisions of the Bombay Rent Act including Section 15. According to the learned Judges, as a statutory tenant had only a personal right of occupation, he could not transfer his rights as a statutory tenant anyway. There was therefore no need to expressly prohibit such transfers. They therefore, held that Section 15 which inter alia prohibits transfers and assignment of tenancies, applies only to contractual tenancies and not to Statutory tenancies. The notification under the proviso to Section 15(1) would also, therefore, apply to only contractual tenancies of business premises. This reasoning of the Supreme Court has however, been expressly disapproved by the Supreme Court itself in a later decision in the case of *Damadilal and Others Vs. Parashram and Others*, The Supreme Court in this case disagreed with the assumption that a statutory tenant had only a personal right of occupation. It said that a statutory tenant was a creation of statute. In order to ascertain his legal rights it was therefore, necessary to examine the provisions of the law which created him. Under the M. P. Accommodation Control Act, 1961, which was under consideration before the Supreme Court even a statutory tenant was held to have a transmittable interest in property.

8. It is relevant to examine the reasons which prompted the Supreme Court to come to the conclusion that a statutory tenant has something more than a personal right of occupation in the premises of which he is such a tenant- As mentioned earlier the Supreme Court was considering the M. P. Accommodation Control Act. In Section 2 (i) of the M. P. Accommodation Control Act a tenant is defined to mean, inter alia, any "person continuing in possession after the termination of his tenancy....but shall not include any person against whom any order or decree for eviction has been made". Construing this definition the Supreme Court held that a person continuing in possession after the determination of his tenancy, who is generally known as a statutory tenant, is

put on a par with the persons whose contractual tenancy still subsists. The incidents of such a tenancy and a contractual tenancy must therefore, be the same unless any provision of the Act conveyed a contrary intention. They then referred to Section 14 of the M. P. Accommodation Control Act, which says, "(1) No tenant shall without the previous consent in writing of the landlord, (a) sublet the whole or any part of the accommodation held by him as tenant or (b) transfer or assign his rights in the tenancy or in any part thereof. The Court held that there is nothing to suggest that this section does not apply to all tenants as defined in Section 2 (i). Reading both these sections together they came to the conclusion that a statutory tenant also has an interest in the premises occupied by him. They in terms referred to the earlier decision of the Supreme Court in *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, and to this aspect of its reasoning in particular. They distinguished this case by saying that "Both these cases, *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, and *Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another*, proceed on the basis that a tenant whose tenancy has been terminated, described as a statutory tenant, has no estate or interest in the premises but only a personal right to remain in occupation. It would seem as if there is a distinct category of tenants called statutory tenants having separate and fixed incidents of tenancy. The term "Statutory ten-ancy" is borrowed from the English Rent Acts. This may be a convenient expression for referring to a tenant whose tenancy has been terminated and who would be liable to be evicted but for the protecting statute, but courts in this country have sometimes borrowed along with the expression certain notions regarding such tenancy from the decisions of the English courts. In our opinion it has to be ascertained how far these notions are reconcilable with the provisions of the statute under consideration in any particular case". The judgment goes on to say that under the M.P. Accommodation Control Act and other similar Acts a statutory tenant has an interest in property and not merely a personal right to retain possession.

9. It is true that the later judgment of the Supreme Court in *Damadilal and Others Vs. Parashram and Others*, was dealing with the provisions of the M, P. Accommodation Control Act and not the Bombay Rent Act. Nevertheless, the two sections of the M. P. Accommodation Control Act which have been emphasised by the Supreme Court in coming to the conclusion that the statutory tenant also has a transferable interest in property are in pari materia with the Bombay Rent Act. Section 2 (i) of the M. P. Accommodation Control Act which defines "tenant" is similar to Section 5(11)(d) of the Bombay Rent Act. The Bombay Rent Act also defines "tenant" to include "any person remaining after the determination of the lease, with or without the assent of the landlord..

Hence under the Bombay Rent Act also prima facie a contractual tenant and a statutory tenant remaining in possession after the determination of lease are both put on the same footing. The second section on which the Supreme Court has relied is Section 14 of the M. P. Accommodation Control Act which is in pari materia with Section 15(1) of the Bombay Rent Act. u/s 15(1) also there is a

prohibition on a tenant to sublet the whole or any part of the premises let to him Or to assign or transfer in any other manner his interest therein. Since Section 14 of the M. P-Accommodation. Control Act in terms is held to apply to statutory tenants also, there is no reason why Section 15(1) of the Bombay Rent Act also should not be held to so apply to statutory tenants, particularly in view of the fact that the reasoning on which the Supreme Court has based its earlier decision in Anand Nivas case has been distinguished by the Supreme Court itself in Damadilal and Others Vs. Parashram and Others, .

10. The Judgment of the Supreme Court in Damadilal's case is a later judgment. Hence it should be preferred to the earlier judgment in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, . The later judgment is also a unanimous judgment of three Judges of the Supreme Court. The earlier judgment was a majority judgment of two judges with one Judge dissenting. This dissenting judgment has been cited with approval by the learned Judges in the later decision in Damadilal's case. Hence the views expressed in Damadilal's case should prevail.

11. A later judgment of a Single Judge of the Delhi High Court, however, follows the ratio of Anand Nivas case. This is the case of Mohan Lal Goela Vs. Siri Krishan, . The learned Judge was construing the provisions of the Delhi Rent Act and in particular the amendments made in 1976 to this Act under which a detailed list of persons who would be entitled to the tenancy rights of a deceased tenant has been appended to the definition of a tenant. This Act is different from the Bombay Act as well as the Madhya Pradesh Act in material respects. Hence the decision of the Delhi High Court cannot be of much assistance in the present case.

12. A statutory tenancy in business premises is, therefore, transferable under the notification of 24th September 1948 issued under the proviso to Section 15(1) of the Bombay Rent Act. Whenever it is possible for the Official Assignee to transfer such a tenancy incidental to the sale of business as a going concern together with stock-in-trade and goodwill, it would vest in the Official Assignee for the benefit of the creditors of the insolvent.

13. My attention has been drawn to a decision of the Division Bench of this Court in Zarina Umer Chamdewala Vs. Sati Lalchand Verumal Lalwani, where it was held that a contractual tenancy in residential premises cannot vest in the Official Assignee because such tenancy rights cannot be sold for the benefit of the creditors of the insolvent. Hence such property does not vest in the Official Assignee. In view, however, of the notification dated 24-9-1978 issued under the proviso to Section 15(1) of the Bombay Rent Act, which permits transfers of business promises to certain circumstances, the learned Judges had left the question of business premises of an insolvent open. Since such tenancy rights are transferable if sold along with the business as a going concern together with its stock-in-trade and goodwill, they would vest in the official Assignee in all such cases.

14. My attention was also drawn to a decision of the Supreme Court in Ganpat Ladha Vs. Sashikant Vishnu Shinde, . In this judgment the question was whether u/s 5(11)(c) of the Bombay Rent Act the tenancy of business premises could be claimed by a member of the tenant who is residing with him at the time of his death. This was the only question which was under consideration before the Court and the Court came to the conclusion that the benefit of Section 5(11)(c) of the Rent Act could be given only to residential premises and not to business premises. It was sought to be argued that by implication it would mean that the interest of a statutory tenant in business premises was not held heritable and that this would go to show that the statutory tenant had merely a personal right to occupy the business premises and not interest in property. In the first place, the attention of the Supreme Court was not drawn to this aspect of the question at all In the second place, in view of the judgment of the Supreme Court in Damadilal and Others Vs. Parashram and Others, which expressly deals with this aspect of the case 1 do not see how any such implication can be drawn from the judgment Ganpat Ladha Vs. Sashikant Vishnu Shinde, It was also strongly urged before me that Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, in terms deals with the Bombay Rent Act. It has expressly construed the provisions of Sees. 12 and 15 of the Bombay Rent Act. Hence as far as the construction of the Bom bay Rent Act is concerned, this judgment alone should be applied and the judgment in Damadilal's case would have no application. In view, however, of the fact that the reasoning of the majority judgment in Anand Nivas case has been in terms distinguished and the minority judgment of Sarkar J. in Anand Nivas case has been cited with approval, and in view of the fact that in Damadilal's case the Supreme Court has in terms referred not merely to the M. P. Accommodation Control Act but in several places to "other Indian statutes like the one we are concerned with", it would seem that Damadilal's case is not confined merely to the construction of sections in the M. P. Accommodation Control Act but would apply to all statutes where similar provisions are to be found unless there is a strong indication to the contrary in any other provision of the statute concerned.

15. If tenancies of such business premises are held to be not covered by the notification of 24th September 1948, grave injustice would be caused to the creditors of an insolvent in; a commercial city like Bombay. The tenancy rights in business premises are extremely valuable. A different interpretation of the proviso to Section 15(1) would enable a dishonest insolvent to collude with the landlord by asking him to send a simple notice of termination of tenancy of the insolvent in such business premises. As a result, the creditors of the insolvent would be deprived of extremely valuable property, which would have otherwise been for their benefit. Hence, such an interpretation should be avoided.

16. Next we come to the application of the landlord u/s 17 of the Presidency Towns Insolvency Act to file a suit to eject the Official Assignee and the insolvents from the above premises. In the draft plaint which has been submitted by the landlord the cause of action is based on the notice dated 24th September

1975. This notice seeks to terminate the tenancy of the Official Assignee on the ground of non-payment of rent. The arrears of rent mentioned in it, however, have admittedly been already paid by the Official Assignee to the landlord under the directions of the Insolvency Court. Secondly, by the order passed on 18th November 1975 it has already been held by this Court that this notice is not binding on the Official Assignee. Admittedly no fresh notice to quit has been issued by the landlord. Under circumstances, there is no prima facie case made out by the landlord which would justify me in granting him leave u/s 17.

17. Secondly, filing a suit of this nature appears to be a vicarious method of going to appeal against the order dated 18th November 1975. The notice of the report in which the above order was passed was given to the landlord. He is therefore, bound by the order made therein. In the suit which he proposes to file he has alleged that the Official Assignee has no right to sell the tenancy rights in respect of the premises in question and he has asked for an injunction restraining the Official Assignee from selling the premises and from alienating and or disposing of the same. In effect this amounts to preventing the Official Assignee from acting in accordance with the order of the Insolvency Court telling him to sell these premises along with the sale of business as a running concern. I do not see how such a suit can be allowed to be filed. The question of Official Assignee's right to sell the premises could have been argued by the landlord at the stage of the earlier report as it has been argued even to-day. When the Insolvency Court has already come to a decision on 18th November 1975 that the Official Assignee is entitled to sell the business together with tenancy rights therein, permission to file a suit would merely harm the interest of the creditors of the insolvent

18. Mr. Daruwala, who appeared for the landlord argued that it would not be proper for the official Assignee to have this question decided on the report and proper procedure would be for him to take out a Notice of Motion. I do not see any substance in this contention. Under Rules 189 to 191 of the Insolvency Rules it is open to the Official Assignee to come by way of a Report. No prejudice is caused either to the insolvent or to the landlord by this procedure as it is open to them to go in appeal from the order that may be passed on such a Report.

19. Mr. Daruwala, has also argued that this Court has no jurisdiction to decide the above question. The only Court which would have jurisdiction would be the Court of Small Causes at Bombay, since the question concerns the application of the Bombay Rent Act. He, therefore, argued that in all matters where the landlord proposes to file a suit in ejectment against the insolvent and/or the Official Assignee, obtaining of leave by him is merely a formality and the Court cannot examine the merits of the case even prima facie in order to decide whether leave should be granted or refused. If this argument is to be accepted, in every single such case the Insolvency Court would be bound to give leave to the landlord, I do not think this is the correct interpretation of the provisions of Section 17. Granting of leave is a matter of discretion of the Court. If this

discretion is to be properly exercised, the Court can certainly examine the case in order to see whether at least a prima facie case is made out on merits for granting leave. In the present case, I am satisfied that there is no prima facie case made out by the landlord for filing a suit in ejectment in terms of the draft plaint. I, therefore, refuse leave u/s 17.

20. Costs of the Official Assignee to come out of the estate of the insolvent.

21. Official Assignee is directed to sell the business of the insolvent as a going concern together with the stock-in-trade and goodwill and the benefit of tenancy rights under the order dated 18th November 1975 passed by the Insolvency Court. Pursuant to this order offers were invited by the Official Assignee. The highest offer of Rs. 4,40,000/- is made by M/s. Hira Mistan. The Official Assignee is directed to sell the business of the insolvent as a going concern, with stock-in-trade, goodwill and tenancy rights, to M/s. Hira Mistan and/or their nominee or nominees for a sum of Rs. 4,40,000/-. The purchasers are taking this property subject to the claim, if any, of M/s. Acme Mirror Works who claim to be the licensees of a portion of these premises and the claim, if any, of the landlord. The purchasers are aware that the landlord has given three notices to quit in respect of the said premises and they are also aware of the contentions raised by the landlord in these proceedings.

22. The Official Assignee has personally made an inventory of the stock-in-trade lying in the godown of these premises and he has also taken an undertaking from the insolvent regarding this stock-in-trade of which he has taken an inventory on or about 5th April 1978. The Official Assignee is not to be held responsible for the shortage, if any, in the stock-in-trade lying in the said godown. The purchasers would be at liberty to take such steps as they may be advised against any other party in the event of there being any shortage.

23. Out of the sale proceeds the Official Assignee to pay the arrears of rent and municipal taxes to the landlord up-to-date. These are expenses legitimately incurred by the Official Assignee in respect of the property vested in him. The liability for payment of rent and municipal taxes from August 1978 will be that of the purchaser.

24. Sale to be completed within a tort-night if possible, after obtaining N. O. C. from the Controller of Accommodation and on realization of the purchase price by the Official Assignee.

25. Liberty to the purchasers to keep a watchman on the said premises. Name and address of the watchman to be given by them to the Official Assignee.

26. Mr. Daruwala applies for stay of the operation of the order accepting the highest bid made by M/s. Hira Mistan and/or their nominee or nominees.

P. C. : Stay refused.

Order accordingly.