

(1999) 07 BOM CK 0108

In the Bombay High Court

Case No : Criminal Revision Application No. 270 of 1998, alongwith
Miscellaneous Application No. 778 of 1999

Jagdishprasad Agarwal

APPELLANT

Vs

Transport Corporation of India Ltd.

RESPONDENT

Date of Decision : 15-07-1999

Acts Referred:

COMPANIES ACT, 1956 — Section 630
Criminal Procedure Code, 1973 (CrPC) — Section 313

Citation : (1999) 101 BOMLR 874

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.G. Deshpande, J.—Heard Mrs. Thorat for the petitioner and Mr. Raja Thakare for the opponent No. 1 and the learned A.P.P. for the State.

2. The opponent No. 1 had filed complaint against the petitioner u/s 630 of the Companies Act. He was convicted by the Trial Court and was sentenced to pay fine of Rs. 1,000/- in default to undergo S.I. for 60 days and he was also directed to hand over possession of the disputed premises. The petitioner preferred an appeal before the Additional Sessions Judge, Mumbai, against the said conviction but the same was also dismissed. Hence this writ petition.

3. It was contended by Mrs. Thorat that the respondent No. 1 Company could not prove its ownership over the flat in dispute, that the defence of the petitioner-accused was also not properly considered, that the witnesses of the respondent Company did not have personal knowledge of the events that took place in 1968, that the respondent Company was not the owner of the flat, that the petitioner had filed a civil suit for declaration against the respondent Company in the Small Causes Court, that he was a deemed tenant of the suit premises. She also contended that the respondent Company had filed a civil suit for declaration of ownership against the petitioner in this Court and these factors were not properly

considered by the Trial Court or Appellate Court. She pointed out that the petitioner had filed an application in this Court for amendment of the petition so as to enable the petitioner to file a document, namely leave and licence agreement executed between the petitioner and the original or real owner Prabhu Dayal Agarwal in 1972 and according to her this document squarely supports the defence raised by the petitioner. She further submitted that from the circumstances brought on record before the Trial Court and the Appellate Court, as well as the other circumstances mentioned above, the petitioner has succeeded in proving that a bona fide civil dispute existed between him and the respondent Company and consequently the judgment of both the Trial Courts were liable to be set aside and quashed. She also submitted that in the civil suit filed by the petitioner before the Small Causes Court, the respondent Company had given an undertaking that the petitioner will not be evicted from the suit premises till the suit before the Small Causes Court was decided and therefore according to her in view of the undertaking, the judgments of the Criminal Courts, which are challenged in this writ petition could not be enforced against the petitioner.

4. Counsel for the respondent Company firstly contended that so far as the civil suit of the respondent in the High Court was concerned, the same was mainly filed against the society, as the society was insisting on charges for transfer of the flat in the name of the respondent Company from the name of the Transport Corporation of India, which was a partnership firm. Counsel for the respondent Company pointed out that Navyug Nagar Co operative Housing Society Limited, which was joined in that suit as defendant No. 2 had written a letter to the respondent Company on 29.9.1997 by which the respondent has been Informed that the proposal to recognise the respondent Company as owner of the suit flat or Hat in dispute has been accepted by the society in its Special Annual General Meeting. Counsel for the respondent Company stated that in view of this letter, the respondents intend to withdraw the suit filed in the High Court. In view of this statement, the objection of Mrs. Thorat that till the declaratory suit filed by the respondent Company is decided, the Court cannot recognise the respondent as the owner of the suit flat is required to be rejected as it does not survive.

5. It is true that when Company files a complaint u/s 630 of the Companies Act, it has required to prove that the property in respect of which the complaint is filed is the property of the respondent Company. Section 630(1) of the Companies Act provides that "if any officer or employee of the Company (a) wrongfully obtains possession of any property of a Company ; or (b) having any such property in his possession, wrongfully withholds it...he shall, on the complaint of the Company...be punished with fine which may extend to one thousand rupees."

6. This section admittedly requires the Company to prove that the property in respect of which the complaint is filed is the property of the Company. It was contended by Mrs. Thorat that the witnesses of the respondent Company had

failed to prove that the disputed property was the property of the respondent Company. Perusal of the evidence which is forming part of the revision application shows in order to prove that the disputed property was the property of the respondent Company, the respondent Company has relied upon Memorandum of Association and Articles of Association which have been accepted by the Trial Court, copy of the same was produced by the counsel for the respondent since the original record was not before this Court. The Memorandum of Association as amended upto 6.5.1981 are accompanied by Certificate of Incorporation consequent on change of name issued by the Registrar of Companies, Andhra Pradesh, Hyderabad and this certificate stated that Transport Corporation of India Private Limited is changed to Transport Corporation of India Limited. Clause 3(1) of the Memorandum of Association speaks about the object of the Company and it provides that the objects of the Company are to acquire and take over as a going concern the business now carried on under the name and style of Transport Corporation of India and acquire all or any of the assets and liabilities of that business in connection therewith as shall be considered expedient. The two witnesses of the respondent Company who were examined before the Trial Court have contended that the disputed flat was the flat of the Company and the same was allotted to the petitioner - accused in 1968 i.e. while the Company was a Private Limited Company. In this context it was the defence of the petitioner accused that formerly a partnership existed between one Prabhu Dayal Agarwal and Badri Prasad Agarwal in 1965. This partnership was dissolved and the suit flat came to the share of Prabhu Dayal Agarwal, who in his capacity as the owner gave it on leave and licence to the petitioner - accused. This is consistently the defence of the petitioner - accused before the Trial Court as well as before the Appellate Court. My attention was drawn by Mrs. Thorat to certain suggestions put by the petitioner- accused to the two witnesses of the respondent Company in this regard e.g. P.W. 1 expressed his inability to say whether after the dissolution of the partnership firm, namely TCI the disputed flat came in the share of Prabhu Dayal Agarwal.

7. It is true that initially the burden of proving a criminal case is always on the prosecution or the complainant, who initiates criminal proceedings. However, when accused raises a particular defence facts of which are within his special knowledge then the burden of proving that defence is always on the accused. If it is consistently in the case of the petitioner -accused that the partnership firm was dissolved in 1965 and thereafter the suit flat came to the share of Prabhu Dayal Agarwal, one of the partner as exclusive owner, then it was equally necessary for the petitioner accused to prove this defence, though the burden of proof may not require the accused to prove his defence beyond any reasonable doubt but he could succeed if the accused proves strong probabilities in support of his defence. However, the accused has totally or miserably failed in even proving the probabilities in support of his defence on record. Accused admittedly could not examine the said Prabhu Dayal Agarwal because he was reportedly

dead. There is nothing with the petitioner - accused in the form of document or in the form of agreement of leave and licence or any exchange of correspondence or letters between him and Prabhu Dayal Agarwal establishing relationship of licensor and licensee between Prabhu Dayal Agarwal and himself. Merely giving suggestions to the witness cannot be considered as proving the defence to the extent of creating probabilities before the Court.

8. The petitioner - accused has after his examination u/s 313 of the Cr.P.C. filed a written statement in his defence. It is true that in this written statement the accused had again contended that on dissolution of the partnership firm the flat came to the share of Prabhu Dayal Agarwal as absolute and exclusive owner of the disputed flat. It appears from the record and the judgment of the Trial Court as well as the Appellate Court that the petitioner accused was simultaneously trying to take advantage of the civil suit for declaration filed by him before the Small Causes Court. Copy of plaint of that suit has been filed in this revision application at Exhibit "C. However, it is very surprising to note that even though the petitioner -accused does not recognise the respondent No. 1 as owner of the property and even though according to the petitioner, the respondent Company has no legal right vis-a-vis the disputed property and the respondent is a trespasser or a person wrongly and illegally asserting any right over the disputed flat and Prabhu Dayal Agarwal is the real owner of the property, the said Prabhu Dayal Agarwal is not at all joined as a defendant or plaintiff in the suit.

9. The plaintiff (petitioner) is seeking declaration of being a tenant or a protected licensee of certain property and from the manner in which the suit is filed it is clear that he wants to get a declaration of tenancy or protected licensee in respect of certain property without joining the owner. In other words, the plaintiff (petitioner) is trying to get a declaration of his rights vis-a-vis certain property as between himself and stranger or trespasser or a person having no right. It is true that the suit is still pending and not yet decided but since the fact of filing of the said suit is pressed into service as a circumstance in defence by the petitioner, the Court cannot be refrained from making observations which go to the root of the matter. It is altogether different as to what will be the fate of the said suit but if filing of the suit is to be considered as a circumstance showing existence of bona fide dispute, then it has to be held that the suit filed by the petitioner in the form and manner revealed by Exhibit "C cannot be considered to be a bona fide dispute nor filing of the suit can be taken as a circumstance establishing bona fide nature of the dispute between the petitioner and the respondent Company.

10. The petitioner has in order to substantiate his being a protected tenant or a licensee of the disputed premises has filed an application for amendment of the present revision application, by which the petitioner intends to bring on record an agreement of leave and licence purported to have been executed by Prabhu Dayal Agarwal on 25.1.1972. Since the application for amendment was required to be decided along with revision application, I heard Mrs. Thorat on this application of filing of the document. The amendment of the revision application

is required to be allowed because this document is being filed by the petitioner in support of his defence.

11. However, the original document could not be produced by Mrs. Thorat today during arguments because according to her the petitioner is seriously ill or not physically fit to come to the Court. A perusal of the xerox copy of this document which is termed as agreement of leave and licence falsifies the defence of the petitioner accused, which he has consistently raised before the Trial Courts. In the said criminal case the defence of the petitioner accused was that the partnership between Prabhu Dayal Agarwal and Badri Prasad was dissolved and thereafter disputed property came to the share of Prabhu Dayal Agarwal as exclusive owner, and thereafter Prabhu Dayal Agarwal gave this property to the petitioner on leave and licence. This agreement of leave and licence to the contrary shows that Prabhu Dayal Agarwal (if at all this agreement is genuine) has executed this agreement as authorised Director of Transport Corporation of India Pvt. Ltd. which means that this agreement is between Transport Corporation of India Pvt. Ltd. through its authorised Director Prabhu Dayal Agarwal as licensor and petitioner as licensee.

12. Not only on this count the defence of the petitioner-accused is required to be declared as false, but in para 4 of the plaint filed in the Small Causes Court at Exhibit "C to the revision application, the petitioner -plaintiff has positively asserted. "Out of faith and confidence, no written agreement of leave and licence was entered into between the parties." This statement in the plaint is obviously supported by verification clause of the plaint, wherein petitioner-plaintiff has declared that what is stated in the foregoing paragraphs including paragraph 4 was true to his own knowledge. The document which is now tried to be produced before this Court is in contrast with the aforesaid statement in paragraph 4 of the plaint. Prima facie, either the statement in paragraph 4 is false or what is stated in agreement is false. Two contradictory things cannot coexist and therefore even if the petitioner is permitted to amend the revision and file this document, the same cannot be of any help to the petitioner. To the contrary it has taken away all the force in the defence raised before the Trial Courts. In view of these observations, it is necessary to direct and order the petitioner-accused to produce the original agreement of leave and licence before this Court within eight days from today.

13. It was contended by Mrs. Thorat that in the civil suit the respondent Company have made statement or given an undertaking that they will not evict the petitioner - plaintiff from the disputed premises till the suit before the Small Causes Court is decided. According to her this undertaking will prevail over the order of the Criminal Courts. I am not in agreement with the submissions made by Mrs. Thorat. If no injunction could be obtained against the person from prosecuting any case before the Civil or Criminal Court as provided under the Specific Relief Act then the undertaking given by the respondent Company to the Civil Court I.e. Small Causes Court cannot come in their way in implementing the

order of the Criminal Courts. In fact once the complaint is filed u/s 630 of the Companies Act, accused is convicted and ordered to vacate the premises, the matter does not remain as a matter between the complainant and the accused but it is a matter between the Court and the accused. Therefore, even if undertaking is given, it is not binding on the Criminal Courts, and taking possession pursuant to the order of the Criminal Court is not an act to be done by the respondent Company of their own accord but it will be enforcing the order of the Criminal Courts for which no undertaking was given. Further no such undertaking can bind a Criminal Court.

14. For all these the revision application is required to be dismissed. Hence, the order :

ORDER

Criminal Revision Application dismissed with costs. Rule discharged.

Consequently, Criminal Application No. 778 of 1999 is disposed of accordingly.

Petitioner is hereby ordered and decreed to produce the original agreement of leave and licence before the Registrar within eight days from today. Suit before the Small Causes Court will be disposed of according to law.

On the prayer of Mrs. Thorat, operation of this order is stayed for four weeks. However, this will not apply to the production of the document before this Court.

After four weeks the respondent Company will have a right to take possession of the disputed flat from the petitioner, if the matter is not further stayed by a Competent Court.