
(2000) 08 BOM CK 0046
In the Bombay High Court
Case No : Writ Petition No. 3727 of 2000

Jasmeet Hoon

APPELLANT

Vs

Smt. Rita Johar and Others

RESPONDENT

Date of Decision : 04-08-2000

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13A(2)
Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2001) 1 BOMLR 82 : (2001) 1 MhLj 649

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Shri R.C. Sengupta, for the Appellant; Shri Madhav Jamdar, for the Respondent

Judgement

Dr. D. Y. Chandrachud, J.—Rule, returnable forthwith. Respondents waive service. By consent, Petition is taken up for final hearing forthwith.

2. The Petitioners seek to impugn the validity of two orders, dated 16.6.2000 passed by the Competent Authority, Konkan Division, Mumbai. The first order has been passed rejecting an application filed by the Petitioner herein for setting aside an order closing the evidence. The second order has been passed allowing the application filed by the Respondents herein u/s 13A(2) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 and decreeing the eviction of the Petitioner to whom the premises have been held to have been granted under a Leave & Licence Agreement of 1st October, 1989. The circumstances in which the Competent Authority declined to accede to the request of the Respondents to reopen the order closing the evidence will be adverted to hereinafter. The relevant facts, briefly stated, are as follows :

3. On 1st September, 1987 an Agreement was entered into between the Petitioner and the 1st Respondent ("the Respondent" for brevity), by virtue of which the Petitioner was appointed as a "Caretaker" of a residential flat, being Flat No. 51, situated on the 5th floor of a building known as "Sea Breeze

Apartments" situated at Bullock Road, Band Stand, Bandra, Bombay. The term of the Agreement under clause 2 thereof was three years and it was provided that the Petitioner would pay monthly compensation in the sum of Rs. 4000/-. Clause 7 of the Agreement stipulated that the Respondent shall have an unfettered right of access and entry and the owner, the 1st Respondent herein, shall retain control over one bed room for occasional residence in the flat at her discretion.

4. Thereafter, on or about 1st November, 1988 a Leave and Licence Agreement came to be entered into between the Petitioner and the Respondent. The term of the aforesaid Leave and Licence Agreement was for a period of 11 months. Upon the expiry of the term of the first Leave and Licence Agreement, a second Leave and Licence Agreement was executed on 1st October, 1989 between the Petitioner and the Respondent. Since the Agreement of 1st October, 1989 is the foundation of the application which was made before the Competent Authority by the Respondents, the relevant clauses of that Agreement are material and may now be adverted to. Clauses 1, 5, 11 and 12 of the Agreement provided as follows :-

"1. The Licenser hereby agrees to allow the Licensee the use of and occupation of the said Flat being Flat No. 51, on the 5th floor of the building Sea Breeze Apartments, Band Stand Bullock Road, Bandra Bombay - 400 050, (hereinafter called the said flat) on leave and licence basis for a temporary period of 11 months. The licence shall be deemed to have commenced from 1st October, 1990.

5. The Licence granted herein is only temporary and the licensee shall not claim any tenancy rights or any other right, title or interest of whatsoever nature in respect of the said flat or any part thereof.

11. On the expiry of the licence period or on the termination of the licence prior to the expiry of the licence period on the ground of breach of any of the terms and conditions of the licence as hereinabove stated, the licensee shall be liable to vacate the said flat along with her belongings forthwith.

12. This agreement shall be subject to the provisions of Section 13A(2) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 as amended up to date."

5. The term of the Leave and Licence Agreement was deemed to have commenced on 1st October, 1990 and, as is usually the case in such agreements. It was to be in existence for a period of eleven months. The Respondents filed an application before the Competent Authority constituted in pursuance of the provisions of Section 13A(2) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 seeking possession of the flat. It appears that an order had been passed by the Competent Authority directing the Petitioner to deposit the monthly compensation during the pendency of the proceedings before it. The order of the Competent Authority came to be challenged by the Petitioner in this Court in Writ Petition No. 2606 of 1995. By an order dated 27th September, 1995, a learned Single Judge of this Court (A. P. Shah. J.) recorded the

statement of the Counsel for the Respondents that the case which was pending before the Competent Authority was the oldest matter pending on the subject before the Authority. Consequently, the Competent Authority was directed to decide the application as expeditiously as possible and in any event by the end of January, 1996. Apart from the aforesaid, the learned Single Judge directed that in the event of the Petitioner not complying with the order of deposit of compensation, the defence of the Petitioner was liable to be struck off. The observations made in this regard by the learned Single Judge are as follows :-

"I do not see any reasons to interfere with the impugned order directing the petitioner to deposit the arrears of licence fees, which is essentially an Interlocutory order. Hence, petition is dismissed summarily. Arrears of licence fees which is quantified at Rs. 2,52,000/- to be deposited by 30th November, 1995. It is made clear that in case, the Petitioner fails to deposit the said amount within the extended period, the defence of the petitioner shall be liable to be struck off."

In para 22 of the order passed by the Competent Authority, reference has been made to the fact that even after the order passed by the learned Single Judge, the Petitioner fell into arrears of compensation and, a plea was taken on behalf of the Petitioner that an application for fixation of standard rent had been filed in the Court of Small Causes, being Application No. 4 of 1991.

6. Sometime before the Respondents moved the application before the Competent Authority, the Petitioner filed a Declaratory Suit in the Court of Small Causes claiming to be a protected tenant. The Declaratory Suit which had been filed by the Petitioner, being R.A.D. Suit No. 2507 of 1990 is, I am informed, pending before the Small Causes Court.

7. Though the order passed by the learned Single Judge of this Court, (A. P. Shah, J.), mandated that the application filed by the Respondent u/s 13A(2) be disposed of not later than January, 1996, that did not take place and what has been described as the oldest application pending on the file of the Competent Authority continued to remain pending. In February, 1996, the Petitioner had filed an application u/s 10 of the CPC for stay of the proceedings pending the Declaratory Suit. This application had been rejected in September, 1994. Ultimately, some time in 1999, the evidence of the Applicant, the Respondent herein, came to be recorded. The Competent Authority in its first order dated 16th June, 2000 has made a reference to what transpired before it during the course of the recording of the evidence. On 20th August, 1999, the Advocate for the Defendant, the Petitioner herein, was absent when the cross-examination of the witness for the Respondent was to take place. The case was, thereafter, closed for arguments on 21st August, 1999. At 3. p.m. on 21st August, 1999, the parties appeared before the Competent Authority with their Advocates and the Petitioner herein filed an application for setting aside the order dated 20th August, 1999 and for permission to cross-examine the Power of Attorney Holder of the Respondent. After hearing both the sides, the application was allowed and

the matter was thereafter placed on 21st December, 1999 so as to enable further cross-examination of the witness. On 21st December, 1999 the Petitioner and the learned Advocate appearing on behalf of the Petitioner were once again absent. However, the Competent Authority adjourned the matter in the interests of justice for cross-examination on 28th December, 1999. On 28th December, 1999 the Petitioner and the Advocate were again absent and the case was once again adjourned for cross-examination on 29th December, 1999. On 29th December, 1999, the Petitioner and the learned Advocate being absent, the matter was once again adjourned to 30th December, 1999 when again the Petitioner and the learned Advocate were absent. The case was thereafter posted for Judgment on 13th January, 2000. On 5th January, 2000 an application was filed on behalf of the Petitioner for taking the case on Board and for permitting the Petitioner to cross-examine the witness for the Respondents. By the first order dated 16th June, 2000, the Competent Authority, after adverting to the facts and circumstances in which several adjournments had been taken earlier and in view of the directions of this Court to dispose of the case, declined to grant a further opportunity for cross-examination.

8. By the second order dated 16th June, 2000, the Competent Authority has allowed the Application preferred by the Respondent and has directed the Petitioner to hand over vacant and peaceful possession of the flat to the Respondent within a period of 30 days of the order. A consequential order in regard to the payment of compensation after the expiry of the term of the Leave and Licence Agreement at the rate of Rs. 8,000/- per month has been passed in pursuance of the provisions of Section 13A(2) of the Act.

9. Before dealing with the issue on merits, a reference may be made to the application which was filed by the Petitioner for recalling the order closing the evidence and for allowing the Petitioner to cross-examine the witness for the Respondents. In that application which is in the form of an affidavit filed by one Shri Vipen Hoon, the Constituted Attorney of the Petitioner, it has been stated that on 21st December, 1999 when the matter was posted for cross-examination before the Competent Authority, the learned Advocate appearing for the Petitioner was unable to attend as he was engaged in another matter before the City Civil Court Bombay. According to the Petitioner, the diary in which the Petitioner had maintained the list of commitments was lost on 18th December, 1999 and the Petitioner was, therefore, not aware that the matter was on Board on 21st December, 1999. It has been further stated that the Advocate believed that the Petitioner would attend before the Competent Authority on 21st December, 1999 and inform the Advocate of the next date of hearing. It has been stated that in the premises, the petitioner did not attend before the Competent Authority to find out which was the next date of hearing and neither the Petitioner nor the learned Advocate were present on 28th, 29th, and 30th December, 1999. Having considered the explanation which had been tendered by the Petitioner. I am of the view that it is not worthy of credence and belief. As regards the absence of the learned Advocate on 21st December, 1999 there is no

reason not to accept the statement that the Advocate was not able to attend before the Competent Authority in view of the fact that he was in a matter before the City Civil Court. Therefore, for the purpose of the present matter, we may proceed on the basis that the learned Advocate had a justifiable reason for his absence from the Court on 21st December, 1999. However, the story which is now sought to be made out on behalf of the Petitioner that the Petitioner lost the diary on 18th December, 1999 and was thereafter not able to communicate with the Advocate to find out the next date of hearing cannot be relied upon or accepted. On 21st December, 1999 neither the Petitioner nor the Advocate were before the Court. It was the duty of the Petitioner thereafter to find out as to when the matter was to be posted for hearing before the Competent Authority. The Petitioner had already defaulted on a previous occasion in the month of August, 1999 in attending the hearing before the Competent Authority and the recording of evidence had, in fact, been closed. On the application of the Petitioner, the order had been recalled and the matter had been once again placed for cross-examination. The Competent Authority in the interests of justice had placed the matter on 21st December, 1999 for the purpose of cross-examination. Even though on 21st December, 1999 the Petitioner and the Advocate were absent, the matter was thereafter placed on 28th, 29th and finally on 30th December, 1999 so as to grant a further opportunity to the Petitioner to remain present for cross-examination. These opportunities were not availed of, and the entire record of the matter leaves a strong impression that this was done in order to delay the hearing of the case. This, despite the order of the learned Single Judge of this Court dated 27th September, 1995 by which the case was directed to be disposed of by the end of January, 1996. The conduct of the Petitioner, in my view, leaves no manner of doubt that the absence of the Petitioner on 28th, 29th and 30th December, 1999 was not bona fide but a deliberate attempt to delay the proceedings.

10. But the matter need not rest on whether there was in fact a bona fide reason or otherwise for the absence of the Petitioner before the Competent Authority on 28th, 29th and 30th December, 1999. That is because the absence of the opportunity which is claimed by the Petitioner is not a matter of prejudice since as a result of the conclusive evidence rule provided by Section 13A(2), no amount of evidence can nullify the operation of an agreement, such as the one under scrutiny, as a Leave & Licence Agreement. Section 13A(2) was enacted specifically to exclude evidence from being adduced to establish that what is styled as a Leave & Licence Agreement is in fact not a licence but a lease or for any other purpose. Section 13A(2) of the Bombay Rent Act came to be inserted byway of an amendment in order to provide a speedy and expeditious remedy to landlords in respect of premises which were granted under Leave & Licence Agreements. The provisions of the section make the Leave and Licence Agreement a matter of conclusive evidence. Section 13A(2) of the Bombay Rent Act reads as follows :

"13A(2) Landlord entitled to recover possession of premises given on licence on

expiry of licence.

(1) Notwithstanding anything contained in this Act, a licensee in possession or occupation of premises given to him on licence for residence shall deliver possession of such premises to the landlord on expiry of the period of licence; and on the failure of the licensee to so deliver the possession of the licensed premises, a landlord shall be entitled to recover possession of such premises from a licensee, on the expiry of the period of licence by making an application to the Competent Authority; and the Competent Authority, on being satisfied that the period of licence has expired, shall pass an order for eviction of a licensee.

(2) Any licensee who does not deliver possession of the premises to the landlord on expiry of the period of licence and continues to be in possession of the licensed premises till he is dispossessed by the Competent Authority shall be liable to pay damages at double the rate of the licence fee or charge of the premises fixed under the agreement of licence.

(3) The Competent Authority shall not entertain any claim of whatever nature from any other person who is not a licensee according to the agreement of licence.

Explanation.- For the purposes of this section -

(a) the expression "landlord" does not include a tenant or a sub-tenant who has given premises on licence;

(b) an agreement of licence in writing shall be conclusive evidence of the fact stated therein."

11. In several Judgments of this Court, it has been held that Section 13A(2) lays down a special procedure for eviction of licensees before the Competent Authority which is a special forum constituted under Part IIA of the Act. Explanation (b) to Section 13A(2) prescribes a special rule of evidence. It provides that an agreement of licence in writing shall be conclusive evidence of the facts stated therein. In view of this special rule of evidence, this Court has held that it is not permissible for the Court to go behind the document to find out the real intention of the parties or to arrive at a conclusion that the document is of a lease and not of leave and licence. The licensee cannot lead evidence to establish that the real transaction was of tenancy or is not what it professes to be. The agreement is conclusive evidence that the transaction is of leave and licence. In other words, it has been held that the words in Explanation (b) to Section 13A(2) have the effect of shutting out any other evidence on the subject which might be adduced before the Court. This view was taken by a learned Single Judge of this Court (A. P. Shah, J.) in *Swami Attah v. Mrs. Thirty Poonawalla*, In paras 4 and 5 the learned Judge held as follows :-

"4. The Explanation (b) to section 13A2 prescribes a special rule of evidence, which provides that an agreement of licence in writing shall conclusive evidence of the facts stated therein. In view of the special rule of evidence, it is not

permissible for the Court to go beyond the document to find out the intention of the parties and to arrive at a conclusion that the document is of lease and not of leave and licence.

5 But where a document or evidence is made conclusive it creates a presumption *juris et de jure* in favour of the truth and legality of the matter stated and no evidence can be adduced to contradict it. Conclusive evidence means an absolute evidence of a fact for all purposes for which it is so made evidence *R. v. Levi*, Therefore, the words appearing in Explanation (b) "an agreement of licence in writing shall be conclusive evidence of the fact stated therein" must in the ordinary and grammatical meaning, have the effect of shutting out any other evidence on the subject which might be adduced before the Court."

The same view has been reiterated in the earlier Judgment of another learned Single Judge Mr. Justice R. G. Vaidyanatha in *Amarjit Singh v. R. N. Gupta*,. In para 4 of his Judgment, the learned Judge held thus :

"4. It is true as observed by the Supreme Court in *Associated Hotels of India's Ltd. v. R. N. Kapoor*, that the question whether in a particular case the transaction is one of a lease or licence is a question of fact to be decided on the peculiar facts and circumstances of the case, the contents of the document, the intention of the parties etc. But in my view, in the present case, we are guided by a special legislation viz. the Bombay Rent Act which contains provisions for leave and licence in addition to tenancies. A special forum is created for eviction of licensees who are continuing in the premises after the expiry of the licence period.

Section 13-A-2(1) of the Bombay Rent Act provides a procedure for eviction of a licensee before a Competent Authority. Then a special rule of evidence is prescribed in section 13-A-2(3)(b) which provides that an agreement of licence in writing shall be conclusive evidence of the facts stated therein.

In view of this special rule of evidence prescribed under the Act we cannot go beyond the document to find out the intention of the parties, the circumstances of the case, the nature of possession etc. as pointed out by the Supreme Court in the *Associated Hotels of India's* case. That rule may be applicable to leases under the general law. But we are concerned with the leave and licence under a particular statute which prohibits taking of extraneous factors other than the contents of the document of find out the nature of the transaction."

Apart from these Judgments, two other learned Single Judges Mr. Justice P. S. Patankar and Mr. Justice R. M. Lodha have interpreted the provisions of section 13A(2) in *Automatic Electric Ltd. v. Sharadchandra Vinayak Tipnis* ,; *Sails India v. Rita M. Rupani* , and *Ramesh Ramrao Hate v. Parvez B. Bhesania*,,. Mr. Justice Patankar, referred in para 11 of his judgment in (1996) 1 M. L. J. 619 to the Statement of Objects & Reasons underlying Section 13A(2) which is as follows :

"There are many a landlord who prefer to keep their premises vacant instead of

letting them or giving them on licence fee for fear of not getting the premises back when they want the same for their own use as it requires several years to get possession of such premises through the Court of law. It is therefore proposed to encourage the system of giving premises by landlords on licence basis and, on the failure of the licensee to deliver possession of the licensed premises to the landlord on expiry of the period of licence, to enable the landlord to get the possession of the premises from licensee as speedily as possible. For that purpose it is proposed to amend section 6 suitably, and to insert new section 13A2. This special machinery for this purpose is proposed to be created by clause 19."

The learned Judge then holds as follows :-

"The objects and reasons make it clear that many landlords do not let out the premises or on licence fee in view of the difficulty in getting back the premises under the provisions of the Act, whenever they want the same for their own use. It clearly condemns about the long delays caused in prosecuting the litigation in Courts of law regarding getting the possession of the premises. It was necessary to change this scenario and to encourage landlords to give the premises on licence basis and to provide the machinery to enable the landlords to get back the premises immediately after the expiry of the period of licence. It was necessary to introduce some speedy remedy. This was done by section 13A2 and special machinery was provided. It was thought by the legislature to induce the landlords to give the premises on licence basis."

In 1997 (1) M. L. J. 295 Mr. Justice R. M. Lodha has held in para 9 of his Judgment as under :-

"9. Once the legislature by Explanation (b) of Section 13A(2) has provided that a written agreement of licence shall be conclusive evidence of the facts stated therein, it provided a special rule of evidence for the purpose of proceedings u/s 13A(2) of the Bombay Rent Act. The intention of the legislature was to give finality to the existence of a fact occurring in the written agreement of leave and licence. In other words legislature intended to shut out any other evidence which would detract from the conclusiveness of that evidence. The object of expression "conclusive evidence of fact stated therein" is aimed to give finality to the establishment of the existence of the fact or facts stated in the written leave and licence agreement from the proof of another. The argument of learned counsel for the Petitioner that Explanation (b) only makes the written agreement of licence conclusive evidence as regards the licensor and not against the licensee is very difficult to be appreciated. Once it is provided by the legislature that an agreement of licence in writing shall be conclusive evidence of the facts stated therein, it prohibits from leading any other evidence which may affect the conclusiveness of that evidence. The law laid down by the Apex Court in Smt. Somawanti and others case (supra) is clear answer to the contention of the learned counsel for the petitioner wherein the Apex Court has held that once the law says that certain evidence is conclusive it shuts out any other evidence which

would detract from the conclusiveness of that evidence. Not only that when a certain evidence is made conclusive evidence, it prohibits any other evidence to be led which may detract from the conclusiveness of that evidence, but also the Court has no option to hold the existence of the fact otherwise when such evidence is made conclusive. Once an execution of the agreement of leave and licence is not disputed before the Competent Authority in an application u/s 13A(2) based on such Leave and Licence Agreement, it is conclusive evidence of the facts stated therein and no other evidence can be led inconsistent with the said facts by either of the parties and is conclusive between the parties of the facts stated therein. The Competent Authority has no option but to hold that the facts stated therein do exist. Same position holds good also in a case where the execution of written agreement of leave and licence is denied and the Competent Authority after recording evidence reaches the conclusion that execution of such agreement for leave and licence has been proved by the licensor."

In the present case, the law as laid down in these Judgments is squarely attracted.

12. The execution of the Leave and Licence Agreement of 1st October, 1989 is not denied. The Agreement leaves absolutely no manner of doubt that it was a Leave and Licence Agreement to be valid for a period of 11 months. The Leave and Licence Agreement is, in view of the express provisions of Section 13A(2) a matter of conclusive evidence to the effect that it is in fact an Agreement of Leave and Licence as it purports to be. The parties are completely shut out from leading evidence to establish anything to the contrary. Consequently, whether or not the Petitioner should or ought to have been given an opportunity to lead evidence is to my mind immaterial for the simple reason that in view of the express provisions of Section 13A(2) the leading of such evidence cannot be countenanced since the contents of the Agreement are conclusive of the fact that it was in fact a Leave & Licence Agreement.

13. The learned Counsel for the Respondents, however, adverted to a letter which was exchanged between the parties on 1st November, 1988 in which it has been stated that due to certain requirements of the Cooperative Housing Society, the parties executed a Leave & Licence Agreement on 1st November, 1988 which however would not nullify or vitiate the terms and conditions of the earlier Agreement dated 1st September, 1987. The submission urged was that if an opportunity was given to the Petitioner it would have been possible to confront the witness of the Respondent with the letter of 1st November, 1988. In my view, this submission cannot be accepted for two reasons. First and foremost, the Agreement of 1st October, 1989 came to be executed after the letter of 1st November, 1988 and that Agreement, the execution of which has not been denied, expressly provides that it was an agreement of Leave and Licence. The letter dated 1st October, 1988 refers to an earlier Leave and Licence Agreement of 1st November, 1988 and the subsequent Agreement of 1st October, 1989 cannot be detracted from by the aforesaid letter. But apart from this

consideration in view of the express provisions of Section 13A(2) of the Act, it would not be open to the Petitioner by means of evidence to take away the effect of the express terms of the Leave & Licence Agreement which was executed on 1st October, 1989.

14. In the premises aforesaid, I do not find any infirmity in the impugned orders passed by the Competent Authority on 16th June, 2000. The Petition is consequently dismissed. So far as the Civil Application, being Civil Application No. 4860 of 2000 is concerned, it does not survive in view of the orders passed on this Petition and hence is dismissed.

15. The Learned Counsel on behalf of the Petitioner seeks stay of operation of this order so as to enable him to pursue, his legal remedies. The learned Counsel for the Respondents adverted to the fact that the order which was passed by the Competent Authority on 16th June, 2000 initially granted 30 days time to the Petitioner to hand over possession. Thereafter, the Petitioner applied for extension of stay. Stay came to be extended by an order dated 19th July, 2000 until 27th July, 2000 subject to the Petitioner depositing all the arrears of monthly compensation in accordance with the Judgment dated 16th June, 2000.

16. Having regard to the facts and circumstances of the case, operation of this order shall remain stayed for a period of four weeks from today.

Parties to act on an ordinary copy of this order duly authenticated by the Personal Secretary of this Court.