

(1981) 03 BOM CK 0040

In the Bombay High Court

Case No : Letter Patent Appeal No. 104 of 1976

Kausar Husein Mohamed Hushin

APPELLANT

Vs

Mohamed Umer Bhota and Others

RESPONDENT

Date of Decision : 25-03-1981

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 14(1)

Citation : AIR 1982 Bom 91

Hon'ble Judges : Rege, J; Kanade, J

Bench : Division Bench

Advocate : D.L. and M.V. Paranipe, for the Appellant; V.O. Menghant and Firdosh and Co., for the Respondent

Judgement

Rege, J.—This is a Letter Patent Appeal by the original first defendant against the order of Joshi, J. Summarily dismissing his appeal against the order and judgment of the learned Judge of the City Civil Court dated 14th Oct. 1976 decreeing the plaintiff's suit and declaring the plaintiff's to be the tenants in respect of the suit premises and to be entitled to continue in possession thereof and granting perpetual injunction against the first defendant restraining him from interfering with the possession of the plaintiffs and, in particular, for executing the order/decreet of possession passed by the Court of Small Causes at Bombay in an ejectment application by the first defendant against the plaintiff and one other person being No. R. A. 201/E/62.

2. The main question that arises is, whether on the facts of this case the landlords respondents Nos. 2 to 7 could lawfully create a tenancy in favour of the plaintiff when the first defendant was under S. 14 of the Bombay Rent Act, a deemed tenant of the landlords by reason of being a lawful sub tenant on the tenancy of original contractual tenant being determined and had thereafter transferred possession thereof to the plaintiff and one Mohamed Umer Abdul Majid under a leave and licence agreement executed with them.

3. It may be pointed out at the outset that at the initial stage the contention

was raised by the first defendant that the Court had no jurisdiction to entertain and try the suit as the same being solely within the jurisdiction of the Court, of Small Causes u/s. 28 of the Bombay Rent Act, The trial Court had initially held that it had no jurisdiction to entertain and try the suit the same being within the exclusive jurisdiction of the Court of Small Causes and had ordered the return of the plaint for preoccupation to proper Court. However, in appeal to this Court against the said order being appeal No. 360/64. This Court held that the City Civil Court had jurisdiction to entertain and try the suit. It, therefore, set aside the said order of the City Civil Court and referred the matter back for being heard on merits.

4. To appreciate the contentions raised before me, it would be proper to set out certain facts involving prior to litigation between the parties in respect of the suit premises.

5. The building in which suit premises being shop No. 1 is situated belongs to a trust of which defendant Nos. 2 to 7 are the present trustees (hereinafter referred to as the landlords). In respect of the suit shop one Hussein Shamanddin was mutually a contractual tenant. Admittedly, the said tenant had subjected the suit premises to defendant No. 1. Thereafter the landlords filed a suit against the said tenant and defendant No. 1 as the sub-tenant. In the Court of Small Causes being R. A. E. Suit No. 3810 of 1959 for eviction and possession. At the hearing of the suit the tenant did not appear. The suit was, however, defended by defendant No. 1. On 25th Jan., 1960 the Court passed an ex parte decree of eviction against the original tenant only, directing him to vacate the premises on or before 30th Jan., 1960. However, the suit against defendant No. 1 was dismissed with no orders as to costs, the landlords at the hearing recognising the first defendant as a lawful sub-tenant. It is not disputed that on 29th Dec., 1961 defendant No. 1 entered into an agreement of leave and licence with the plaintiff herein i.e. Mohamed Umer Bhole and one Mohamed Umer Abdul Majid and handed over to them possession of the premises under the said agreement. It is the plaintiff's case that though the said agreement was termed as a leave and licensee agreement. It was in camouflage for an agreement of sub-tenancy.

6. Thereafter the landlords under in application dated 25th Jan., 1962 for execution of decree of eviction against the original tenant, obtained a warrant of possession. When the landlords themselves had, while obtaining a decree for eviction against the original tenant, recognised and first defendant as a lawful sub-tenant on the footing that he was in possession of the premises. It was difficult to envisage the purpose of taking out a warrant of possession against the original tenant who was admittedly not in possession against the original tenant who was admittedly not in possession and as to how it could have been executed. However, it is not disputed that when the landlords sought to execute the said warrant of possession, the execution was obstructed. It is difficult to say from the record as to which of the two persons viz, the plaintiff or the said Mohamed Umar Abdul Majid had obstructed execution. However, it appears from

the record that the landlords had taken out an obstructionist notice being Obstructionist Notice No. 124 of 1962 against only one obstructionist named Mohamed Umar. The said proceedings were compromised between the landlords and the said obstructionist Mohamed Umar under the consent terms dated 29th Mar., 1962. The consent terms provided;

(I) that the obstructionist notice was discharged:

(ii) the landlords accepted the obstructionist Mohamed Umar as his tenant in respect of the premises in notice; and

(iii) the said obstructionist had paid to the landlords the arrears of rent till 31st Mar., 1962.

Although the plaintiff herein claims to be the person against whom the said obstructionist notice was taken out and who had signed the consent terms, the consent terms filed in the Court the original of which is in the record and was produced before us and a copy of the certified copy of which is a part of the paper book) show that the only person who had signed the said consent terms as an obstructionist was the other person Mohamed Umar Abdul Majid and not the plaintiff who is Mohamed Umar Bhola. Although the learned counsel for the plaintiff has by relying on the plaint filed by the first defendant in the subsequent selectmen proceedings that he took viz., E. A. 282. Of 1962. Contended that it was the plaintiff against whom the landlords had taken out obstructionist notice and had signed the said consent terms, the record of the proceedings and the plaintiff's subsequent conduct would show that the said obstructionist proceedings were taken out only against and the consent terms were signed only by the said Mohamed Umar Abdul Majid and not against or by the plaintiff and the plaintiff had nothing to do with it.

7. Continuing the narration, thereafter the first defendant took out a Miscellaneous Notice No. 387 of 1983 in the landlords original ejectment suit No. R. A. E.2800 of 1959 making the said Mohammed Umar. The obstructionist, a party therein, to set aside the said consent order between the landlords and the obstructionist, the said, Mohamed Umar Abdul Majid on 29th Mar., 1962 in the landlords obstructionist proceedings. It is the plaintiff's case that the said notice was served on him, but since at the hearing of the notice defendant No. 1 told him that the said notice was not against him, he had withdrawn from the proceedings. In reply to the said notice by the first defendant the said Mohamed Umar Abdul Majid has as the obstructionist filed an affidavit denying that he was ever a sub-tenant of the premises, that an affidavit made by the plaintiff was not his affidavit and stating that he was the only obstructionist who has signed the consent terms and had no objection to the cancellation thereof and restoring the possession to the first defendant. The learned Judge of the Court of Small Causes by his order dated 23rd Mar., 1963 allowed the first defendant's said application and set aside the said consent terms and awarded to the first defendant compensatory costs of Rs. 300/- The learned counsel for the plaintiff

has objected to the said affidavit of Mohamed Umar Abdul Majid being referred to and looked at as it was not part of the proceedings in the City Civil Court. That objection has no substance, as the learned Judge of the Court of Small Causes in his said order dated 28th mar., 1963 while setting aside the consent terms has in terms referred to the said affidavit. An appeal by the learned Judge setting aside the consent terms and awarding costs, to the appellate Bench of that Court was refused, Against that order, revision application No. 330 of 1964 filed by this Court by an order ated 24th June, 1967. The resule, therefore, was that the consent terms obtained in the obstructionist proceedings whereunder the landlords had accepted the obstructionist Mohammed Umar Abdul Majid as a tenant, no longer subsisted, nor was there any further execution of the decree of eviction obtained by the landlords against the original tenant.

8. At the same time, it is not disputed that the present plaintiff though being aware of the proceedings by the first defendant to set aside the consent terms between the landlords and the obstructionist, who according to the plaintiff was he himself and not the said Mohamed Umar Abdul Majid, the notice admittedly being served on him, did not take any steps against the said order setting aside the consent terms and has stood by.

9. After the first defendant filed the said miscellaneous application to set aside the consent terms dated 29th Mar., 1962 between the landlords and obstructionist Mohamed Umar Abdul Majid, he also filed in the Court of Small Causes an ejectment application being E. A. No. 292 of 1962 against both, the present plaintiff Mohamed Umar Bhola and the Other, obstructionist Mohamed Umar Abdul Majid u/S. 41 of the presidency small Cause Courts Act, as it then stood for an order of ejectment. At the hearing the plaintiff herein has sought to substantiate his tenancy by producing a solitary rent receipt for the month Mar., 1962 in his favour issued by the landlords for payment of rent. The Court held that the said act of the landlords done begun the back of the first defendant was not binding on him. The Court further held that the first detedant's tenancy not having been terminated, the landlords had no right to create a tenancy of the suit premises in favour of Mohamed Umar Abdul Majid and the same was not legal and valid. The Court, therefore, by its order dated 19th Nov., 1963 ordered the plaintiff and the said Mohamed Umar Abdul Majid to quit and vacate the premises on or before 20th Dec., 1963.

10. The said Mohamed Umar Bhola has, therefore, filed this suit on title, as permissible under the said Act. Claiming direct tenancy with the landlords. In the plaint his case was that in pursuance of the settlement in obstructionist proceedings by the landlords, the landlords got the obstructionist notice dismissed and got the fact of the acceptance of the plaintiff as their tenant recorded in Court, for which the plaintiff relied on the rent receipt issued by the landlords in his name. As pointed our above from the record, the landlords accepted the plaintiff as their tenant appears to be false. In fact it appears from the record in the said settlement that it was only the said Mohamed Umar Abdui

Majid who was a party to the said obstructionist proceedings and who had signed the consent terms, was recognised as a tenant. The main contention of the plaintiff in para 6 of the plaint was that he was in possession of the suit premises as a lawful tenant of the landlords, defendant Nos. 2 to 7, by reason of tenancy created by them. In his favour on 29th mar., 1962, that the decree from possession was passed in favour of the landlords against the original tenant huseinbhai Shamsuddin, that the agreement of leave and licence executed between the plaintiff and defendant No. 1 even on the basis that it was intended to be acted upon. Came to an end on the reentry by title paramount when defendants Nos. 2 to 7 attempt to execute the decree for possession passed in their favour in R. A. E. Suit No. 3801 of 1959 and that the tenancy created by the landlords in favour of the plaintiff was valid and subsisting one and therefore, the plaintiff was entitled to continue possession of the suit premises. On that basis the plaintiff sought a declaration that he was a tenant of the suit premises and that he was entitled to continue in possession of the suit premises.

(Underlining supplied)

11. The first defendant in his written statement contended that the agreement of leave and licence executed by him in favour of the plaintiff and the said Mohamed Umer Abdul Majid had not come to an end on the alleged re-entry by title paramount, as the decree was executed against the tenant only, and no decree was passed against him in the said proceedings. He also contended that no valid tenancy could be created by the landlords, defendants nos. 2 to 7 in favour of the plaintiff, in view of what had happened in the past and in fact no such tenancy was created.

12. It appears that when the plaintiff filed the suit, the Supreme Court had not given its decisions in the case of Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, on which both the trial Court in its judgment as well as the learned counsel for the plaintiff before us to support his case, have strongly relied. The said decision dealt with the nature of statutory tenancy under S. 12(1) of the Bombay Rent Act. However, at the hearing of the suit the said decision was available. Thereafter without amending the pleadings the Court raised an additional issue being issue No. 8 viz. Whether the statutory tenancy of the first defendant if any, came to end on 29th Dec., 1951 on account of defendant No. 1 ceasing to be in possession of the premises in suit.

13. At the hearing, the landlords defendants nos. 2 to 7 remained absent and did not take part in proceedings. The contest was, therefore, only between the plaintiff and the first defendant who alone gave evidence in support of their respective cases. The learned Judge, only on the basis of the solitary undated rent receipt for the month of March issued by the landlords in the name of the plaintiff, held that the landlords had created tenancy in favour of the plaintiff. The Court solely relying on the aforementioned decision of the Supreme Court in Anand Nivas case, held that since in this case the first defendant who was a statutory tenant had admittedly parted with the possession of the premises, his

statutory tenancy had come to an end and therefore, the tenancy created by the landlords in favour of the plaintiff was valid. The learned trial Judge, therefore, decreed the plaintiff's suit, Appeal by the first defendant against the said judgment and order was summarily rejected by Joshi J. Hence this Letters Patent Appeal by the first defendant.

14. Before dealing with the contentions advanced by the learned counsel for the plaintiff and the first defendant it may be mentioned at the outset that the plaintiff's claim of being a direct tenant of the landlords appears to be unsustainable. The plaintiff's claim in the plaint to the tenancy is on the basis of the consent terms dt 29th Mar., 1962. Obtained in the obstructionist proceedings. As pointed out above, the plaintiff was not a party to the said proceedings, nor had he signed the said consent terms. However, even if the plaintiff's plea that the obstructionist proceedings were taken out against him and that he had signed the consent terms were to be accepted still, the said consent terms having been set aside by a competent Court, they ceased to exist and as a result thereof the tenancy supposed to have been granted by the landlords to the plaintiff under the said consent terms also came to an end and ceased to exist. The plaintiff had made out no case in the plaint that independently of the said consent terms also came to an end and ceased to exist. The plaintiff had made out no case in the plaint that independently of the said consent terms the landlords had granted a tenancy to him. If the tenancy was on the basis of the consent terms which no longer existed, then it was difficult to see how on a mere production by the plaintiff of a stray undated rent receipt issued by the landlords in his name without a fresh tenancy being properly proved by the plaintiff, particularly when the above stated facts created a suspicion of collusion between the landlords and the plaintiff, could be said to create a new tenancy in favour of the plaintiff. That by itself was sufficient to negative the plaintiff's claim/

15. However, in spite of the said position and on the basis that the landlords had granted a fresh tenancy to the plaintiff as contended by him other contentions of the parties be considered.

16. The first main contention of the plaintiff was that since under S. 14 of the Bombay Rent Act, the first defendant was a statutory tenant of the suit premises, on his parting with the possession thereof to the plaintiff and the said Mohamed Umar Abdul majid, under a leave and licence agreement, his statutory tenancy which entitled him under the said Act to the protection of his possession only automatically came to an end and therefore, the tenancy created by the landlords in favour of the plaintiff thereafter was valid.

17. In support of his said contention the learned counsel for the plaintiff very strongly relied on the aforementioned decision of the Supreme Court in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, The learned Judge had also relying on the said decision only, decreed the plaintiff's suit.

18. Before dealing with the said contention it would be proper to consider generally the incidence of a statutory tenancy and also to consider the ambit of S. 14 of the Bombay Rent Act under which admittedly the present case is covered.

19. A general nature or incidence of statutory tenancy, a term borrowed by us from the English law, was considered by the Supreme Court in its decision in the case of Damadilal and Others Vs. Parashram and Others, . Which was a case arising under the provisions of M. P. Accommodation Control Act permitting sub-letting by a statutory tenant, which was not a cas under Ss. 12(1) and 15 the B. R. Act. However, the observations of the Court in that decision, which were or a general nature as regards the nature of a statutory tenancy, were considered to be applicable by a Division Bench of this Court in its decision in Vasant Tatoba Hargude and Others Vs. Dikkaya Muttaya Pujari, The said observations of the Supreme Court at p. 2234 of the report were:

"We find it difficult to appreciate how in this country we can proceed on the basis that a tenant whose contractual tenancy has been determined but who is protected against eviction by the statute, has no right or property but only a personal right to remain in occupation without ascertaining what his rights are under the statute. The concept of a statutory tenant having no estate or property in the premises which he occupies is derived from the provisions of the English Rent Acts, But it is not clear how it can be assumed that the position is the same in this country without any reference to the provisions of the relevant statute. Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject matter of the tenancy and heritability is an incident of the tenancy, it cannot be assumed, however, that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status he had in the premises in his occupation. It is not possible to claim that the "sanctity" of contract cannot be touched by legislation."

(Underlining supplied)

20. While dealing with the nature of statutory tenancy as laid down in the said decision as against the observation of the Supreme Court in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, with which we will deal presently the Division Bench of this Court in its decision in the case of Vasant Tatoba Hargude and Others Vs. Dikkaya Muttaya Pujari, , at page 234 of the report (Mah LJ); (at p. 344 of AIR Bom) observed:-

"It is difficult to escape the conclusion that the view expressed in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, as to the statutory tenant basically not having any interest, estate or property in the demised premises is irreconcilable with the view of Damadilal and Others Vs. Parashram and Others, , that inheritability is the guidance of the tenancy and that a statutory tenant does not cease to hold such an estate interest and property therein as such an estate,

interest and property therein as such ordinary incidence of tenancy unless the statute protecting his such possession provides to the contrary. Transferability is as such the incidence of any tenancy as heritability. Origin of tenancy being in the contract, the same is enforceable by or against the heirs and transferees, unless any personates element is involved in the contract itself".

(Underlining supplied)

21. The above quoted observations, therefore would show that as a general rule, it cannot be said that, such that, each and every statutory tenancy would come to and end every statutory tenancy would come to an end ipso facto on transfer of possession by him. Transferability was as much an incidence of statutory tenancy as of a contractual tenancy and, therefore, the nature incidence of a statutory tenancy in each case has to be determined on the provisions of the statute creating statutory tenancy.

22. In the light of the said observations, we may consider the contentions of the learned counsel for the plaintiff that in this case, where the first defendant's statutory tenancy had arisen under S. 14(1) of the Rent Act, the same came to an end on his transferring and/or parting with the possession of the premises to the plaintiff under a leave and licence agreement and the landlords could take possession of the premises in the manner they have sought to do in this case.

23. S. 14(1) of the B. R, Act provides: -

"When the interest of a tenant of any premises is determined for any reason any subtenant to whom the premises or any part thereof have been lawfully sub-let before the commencement of the Bombay Rents Hotel and Lodging House Rates Control (Amendment Ordinance. 1950. Shall subject to the provisions this Act, be deemed to become the tenant of the landlord on the same terms and conditions as the would have held from the tenant if the tenancy had continued." (Underlining supplied)

In this particular case it is not disputed that the original tenant Huseinbhai who was the contractual tenant had during the subsistence of the contractual tenancy created a subtenancy in favour of the first defendant and that than he created that said sub-tenancy. It was lawful. It cannot be disputed that when the Court or small Causes in the suit filled by the landlords against the original tenant as well as the first defendant had on 25th Jan., 1960 passed a decree of eviction only against the said tenant as required under the said section, the interest of the said tenant in the suit premises was determined, with the result that the first defendant who was a lawful sub-tenant as required under the said tenant in the premises was deternuned, with the result that the first tenant who was lawful sub-tenant was under the said section considered to be a deemed tenant of the landlords defendants Nos. 2 to 7 on the same terms and conditions as were between him and conditions as were between him and the original tenant. It may be that ordinarily tenant. It may be that ordinarily on the termination of the contractual tenancy of a tenant, the sub-tenancy would came to an end.

However, since by reason of the said S. 14, the lawful subtenancy of defendant No.1 was protected, loosely speaking the first defendant who was a lawful sub-tenant, on being deemed to be a tenant of the landlords, could be termed as a statutory tenant.

24. In that connection, the decision of the supreme Court in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, on which strong reliance has been placed both by the trial court as well as by the learned counsel for the plaintiff, be first considered.

25. In that case the court was mainly concerned with the nature of statutory tenancy under S. 12(1) of the B.R. Act.

26. The said S. 12(1) of the Act provides :-

"12 (1) :- A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy in so far as they are consistent with the provision of the Act."

27. The facts of the case shortly, were: A, the landlord had given the suit premise Anand Nivas to B, as a tenant. B's tenancy had come to an end by efflux of time. There after B had created a sub-lease in respect of the part of the premises in favour of C. The landlord instituted a suit against B, the tenant, for eviction in the court of small Causes under S. 28 of the B.R. Act, and obtained a decree. In execution of the decree the landlord took possession of the first floor which was in possession of the tenant B, but C resisted the execution in respect of the ground floor in his possession claiming to be a sublessee from the tenant and, therefore, having acquired a right of tenancy, C filed a suit in the court of small causes for a declaration that he was not bound to deliver possession of the premises in their occupation in execution of a decree by the landlord against the tenant. Interim stay of execution was refused by the trial court as well as by the High court against which an appeal to the supreme court came to be filed.

28. As the judgment shows that the court in that case was only concerned with the right of B as a statutory tenant after the period of lease had expired as arising under Ss. 12(1), 13 and 15 of the Act. The extent to which the court was concerned with S. 14 was only to consider whether sub-tenant C was only to consider whether sub-tenant C was a lawful sub-tenant to be protected under S. 14 of the Act and the court held that C was not a lawful subtenant to be protected under S. 14 of the Act and the court held that C was not a lawful sub-tenant as B, the tenant, had created a sub-tenancy in favour of C only after B's contractual tenancy had come to an end by efflux of time and B had become a statutory tenant. While dealing with S. 12(1) of the Act the court at p.422 observed :-

"S. 12(1) of the Act merely recognised his right to remain in possession so long as he pays or is ready and willing to pay the standard rent and permitted increases and performs the other conditions of the tenancy, but not the right to enforce the terms and conditions of the original tenancy after it is determined."

The court further observed at Page 423 :

"As a statutory tenant he had no estate or interest capable of being assigned or transferred and his statutory right to occupy could not in law be sub-let , because a lawful subletting postulates a right to enjoy the property and a right to transfer the same to an other. There can be no sub-letting when there is no right in the premises especially when the statutory tenancy ceases when the tenant parts with the possession."

29. In that case to show that a statutory tenant was entitled to the benefit of the terms and conditions of the contract of tenancy, the court was referred to the provisions of the English Act viz. S. 15(1) of increase of Rent and Mortgage Interest (Restrictions) Act 1920 which provided that the tenant who by virtue of the provisions of the said Act retained possession of any dwelling to which the Act applied shall so long as he retained possession be entitled to benefit of the terms and conditions of the general contract so far as consistent with the provisions of the Act. The court on the difference in the wording of English Act as against the wording of S. 12(1) of the B.R. Act, merely granted conditional protection to a statutory tenant and did not invest him with the right to enforce the benefit of any of the terms and conditions of the agreement of tenancy and that the said difference in phraseology of the two enactments was vital to the matter under discussions.

30. Both, the learned Judges, as well as the learned counsel for the plaintiff laid great emphasis on the above quoted observations of the supreme court in support of their case that in this case as well though arising under S. 14, the statutory tenancy of the first defendant on his parting with possession of the premises in favour of the plaintiff under leave and licence agreement came to an end.

31. It is clear from the said decision of the supreme court in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, that the court there was concerned only with the nature of statutory tenancy as arising under S. 12(1) of the said Act, which expressly produced only the possession of the statutory tenant and gave him no other right, with the result that on his parting with the possession of the premises the statutory tenancy ipse facto came to an end. The said observations, however, do not have application to every case of a statutory tenancy without reference to the provisions of statute under which the same was created. As pointed out by the supreme court in the afforested Damadilal and Others Vs. Parashram and Others, and by this court in Vasant Tatoba Hargude and Others Vs. Dikkaya Muttaya Pujari, transferability out of possession could be an incidence of statutory tenancy.

32. The question is whether the said incidence of statutory tenancy under S. 12(1) of the Act, as held by the supreme court in the said decision in Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, would be said to apply also to a statutory tenancy under S. 14 of the Act where a person being a lawful sub-tenant on the determination of the tenancy, was deemed to be the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued?

33. As pointed out by the supreme court in the aforesaid decision in Damadilal and Others Vs. Parashram and Others, the nature of the statutory tenancy was to be determined from the wording of the provisions of each statute. It is apparent that the wording as well as the object of S. 14 of the Rent Act are quite different from that of S. 12(1). The object of S. 14 appears to be to protect lawful sub-tenancy in toto by making the lawful sub-tenant, a tenant directly of the landlord but on the same terms and conditions as existing between the tenant and the sub-tenant. In like S. 12(1), the said S. 14 does not seek to protect merely the possession of the statutory tenant, i.e. The tenant who has continued in possession after the contractual tenancy was determined only on his paying standard rent and performing and observing the other conditions of tenancy. Section 14 gives to the lawful sub-tenant as the deemed tenant of the landlord also the benefit under the contract between him and the landlord along with his liability to perform and observe the conditions and the obligations thereunder. The nature of the statutory tenancy under S. 14 would therefore depend on the terms and conditions which the lawful sub-tenant had with the tenant. If one of such terms and conditions were to permit the sub-tenant to part with the possession by granting leave and licence or did not prohibit the same if otherwise permissible under law, then transferability could be considered to be an incidence of such a statutory tenancy and the same under S. 14 of the Act, therefore, would not come to an end merely because the statutory tenant had transferred possession of the premises.

34. In support of his said contention, the learned counsel for the plaintiff relied on certain observations in the decision of this court in the case of Motwani v. Albert Sequeira AIR 1960 Bom 18 of the report to the effect :-

"Protection given to a sub-tenant u/s 14 does not confer title in land. It is not an estate in land which S. 14 creates. It is now well settled that the protection which the Rent Act gives to a tenant or a subtenant is a personal right and not a right to property."

35. The court had made the said observations only in connection with the contention that the tenant's title had never been determined and his contractual title had merged with the statutory title and therefore even according to explanation to S. 43 of the Presidency Small Causes Court Act, there was no difficulty on the part of sub-tenant in obtaining possession under Chap. VII of the said Act. The court there was only concerned with the nature of jurisdiction of the court of small cause under S. 43 with the explanation and S. 46 under

Chap.VII of the Act. The court was not concerned with finding out the nature of statutory tenancy as such on the wording of S. 14. The said observations were therefore, of a general nature and cannot be considered to be laying down the nature of a statutory tenancy under S. 14. On the other hand, the observations of the supreme court in the afforested decision in Damadilal and Others Vs. Parashram and Others, as accepted by the Division Bench of this court in its decision in Vasant Tatoba Hargude and Others Vs. Dikkaya Muttaya Pujari, would go to show that depending on the wording of the statute, transferability could be an incidence of statutory tenancy.

36. In our view, in this case since the court had to consider the nature of the statutory tenancy under S. 14 of the Act, it would not have without ascertaining the terms and conditions of tenancy between the tenant and defendant No.1 transferring possession of the suit premises to the plaintiff under a leave and licence agreement, the statutory tenancy of the first defendant ipso facto came to an end.

37. The learned counsel for the plaintiff urged before us that although the wordings of S. 14 the Act were quite different from those of S. 12(1) of the Act, the afforested observations of the supreme court in the case of Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, should be taken as having universal application to every type of a statutory tenancy under the B.R. Act and, therefore, in spite of the different wording of that section, particularly the provision for creation of deemed tenancy on the same terms and conditions as existed between the tenant and the sub-tenant, the court must hold that the only protection that a statutory tenant would get under S. 14 of the Rent Act was as regards his possession as under S. 12(1). While interpreting the said S. 14, there would be no justification for omitting the said part of the section and holding that in spite of the said provision, the nature of the statutory tenancy would be the same as under S. 12(1). As we have pointed out above, the object of S. 14 is quite distinct from that of S. 12(1). It is to keep lawful sub-tenancy alive and intact along with its terms and conditions which would have otherwise come to an end along with the tenancy. The only thing that is sought to be done is to establish a direct contact between the landlord and the lawful sub-tenant, which was not there before but on the same terms and conditions as those of subtenancy existing between the original tenant and the landlord.

38. In our view, therefore on proper interpretation of S. 14 of the Act and in view of the aforesaid observations of the supreme court in Damadilal and Others Vs. Parashram and Others, the contention of the learned counsel for the plaintiff that on the proper interpretation of S. 14 of the Rent Act the protection granted to the lawful sub-tenant thereunder was dependent only on his being in possession of the premises and that the said protection was not available to him and came to an end on his parting with the possession, cannot be accepted.

39. A part from this, the next question was, firstly, whether in this case the learned judge was right in assuming that factually the landlord had obtained

possession of the premises and then created a tenancy in favour of the plaintiff who was in the position of an obstructionist, only on the basis that the statutory tenancy of the first defendant had come to an end as a result of his parting with possession of the suit premises to the plaintiff under leave and licence agreement.

40. In this case, it is not disputed that the plaintiff had got into possession of the suit premises under a leave and licence agreement with the first defendant and the landlords had during the obstructionist proceeding sought to create tenancy in favour of the plaintiff without actually obtaining possession of the premises from either the first defendant or the plaintiff. The whole transaction appears to have been brought about behind the back of the first defendant by collusion between the landlords and the plaintiff who was in possession as the first defendant's licensees, from whom otherwise without the order of the court the landlord could not have been able to obtain the possession of the premises.

41. In this case the fact that the first defendant had under an agreement of leave and licence given possession of the premises to the plaintiff and one Mohamed Umar Abdul Majid is not disputed, disputed. However, landlords defendants Nos. 2 to 7 who were the only persons to say in what manner of right they had purported to take possession of the premises and/or create tenancy of the premises in favour of the plaintiff, have not taken part in the proceeding nor had the plaintiff examined any of them to support his case. There is, therefore, no evidence on record to show that the landlords had purported to take possession of the suit premises on the basis that the tenancy of the suit premises on the basis that the first defendant's tenancy had come to an end on his parting with possession. On the other hand, the plea of the plaintiff in para 6 of the plaint in that connection was that the landlords had caused re-entry in the suit premises when they attempted to execute the decree for eviction against the original tenant. Therefore, even according to the plaintiff the landlords had entered into possession not on the footing that the first defendant's statutory tenancy had come to an end on his parting with possession to the plaintiff, but it was in attempting to execute the decree against the original tenant. It is difficult to see how the landlord could be said to have got possession of the premises from the first defendant and the plaintiff on only attempting to execute a decree against the tenant. The said plea, therefore, by the plaintiff was difficult to be sustained. However, the said plea on the part of the plaintiff clearly shows that the landlord had not sought to create tenancy had come to an end on his parting with possession of the suit premises to the plaintiff under a leave and licence agreement, but only on the footing of the possession being taken by the landlords on the attempted execution of the decree of eviction against the tenant.

42. Apart from this, and assuming that the contention of the learned counsel for the plaintiff were to be accepted, still, the further question was whether the landlords could and/or were entitled to take possession of the premises in a

manner they have purported to do in this case i.e, in collusion with the plaintiff , so as to become entitled to create a tenancy in favour of the plaintiff. There is a difference between a right to possession and a right to enforce possession. In the existing case while the obstructionist proceedings were pending if the landlords wanted to create tenancy in favour of the third party, they could not have been able to do so without first obtaining from the court an order determining the first defendant's tenancy and as a consequence an order to recover possession. Although on the plaintiff's contention, at all times he could be said to have a right to the possession of the premises by reason of the termination of the first defendant's statutory tenancy on his parting with the possession of the premises and the possession of the plaintiff being lawful as coming from the statutory tenant. In the ordinary course, therefore the landlord could not have got possession of the premises excepting either by surrender of premises by the first defendant, which is not the case here, or by an order of the court for recovery of possession. In this case the landlords having failed to obtain possession of the premises in execution of the decree against the tenant they have purported, without any order of the court, to obtain constructive possession of the premises, in collusion with the plaintiff who was in possession under leave and licence agreement with the first defendant and behind the back of the first defendant, who was recognised by the landlords as their lawful sub-tenant. Such a possession of the premises taken by the landlords cannot be considered to be lawful to entitle them to create tenancy in favour of the plaintiff.

43. Under the circumstances, in our view, the landlords were not entitled to create a tenancy in favour of the plaintiff as they have sought to do and the tenancy purported to have been created by the landlords in favour of the plaintiff cannot be considered to be lawful.

44. In the result the appeal is allowed with costs throughout. The plaintiff's suit is dismissed.

45. The learned counsel for the plaintiff/respondent makes an oral application for leave to appeal to the supreme court. The same is rejected. However, the execution of the order of the court of small causes dated 19th Nov., 1963 in the first defendant's application by E.A.292/E of 1962 stayed for four weeks from today on the same terms and conditions as in this court's order dated 29th sept., 1978 in civil Application No.3459 of 1976.

46. Appeal allowed.