
(1980) 07 BOM CK 0020

In the Bombay High Court

Case No : Spl. Civil Application No. 2776 of 1975

Kazi Cumrddin Hussein

APPELLANT

Vs

Rajendrakumar Maneklal and Another

RESPONDENT

Date of Decision : 15-07-1980

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 15(1)

Citation : AIR 1982 Bom 17 : (1981) MhLj 239

Hon'ble Judges : Kanade, J

Bench : Single Bench

Advocate : Raju S. Mohite, for M.A. Rane, for the Appellant; Ramachandra K. Shah and A.R. Pandit, for the Respondent

Judgement

1. This application under Article 227 of the constitution of India has been filed by the petitioner-tenant challenging the judgments and orders passed by the lower courts.

2. Few facts leading to this application are as under :

A piece of land admeasuring 1500 sq. Feet from City Survey No. 1789 situated at Bombay parel-sewree Division Municipal street No.89, Tokersey jivraj Road, sewree, Bombay-400 015 was leased out to the petitioner some where in the year 1924. The respondents are admittedly the owners of the said piece of land. It is also an admitted fact that the petitioner raised a structure on the said piece of land at his own costs

3. Respondents-plaintiffs filed suit No. 2257 of 1955 against the petitioner and one mohmed Gafoor in the City Civil Court at Bombay for a declaration that the petitioner and others trespassed on the suit land. The said suit was contested by the petitioner denying the claim of the respondents. The petitioner also filed suit No 63 of 1957 against the respondents and the said Mohmed Gafoor in the City Civil Court at Bombay for a declaration that he was the tenant of the suit land

and the shed thereon and for injunction restraining them from disturbing his possession of the suit land and the structure thereon.

4. Both the suits were ordered to be heard together and the parties arrived at the compromise in the both the suits and a decree in terms of the compromise was passed on Nov.9 1959 in both the suits . It was decreed that the petitioner was the monthly tenant of suit land admeasuring 1500 sq. Ft. On a monthly rent of Rs. 35/- The petitioner agreed to pay to the respondents-defendants Nos. 1 and 2 in the Suit No. 63 of and also the permitted increase under the Bombay Rents, Lodging and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Bombay Rent Act") It was further agreed and decreed that the petitioner shall pay to the respondents herein the increased municipal taxes levied and to be levied by the Bombay municipality be reasons of the petitioner having sublet a portion to Bapu Vasudeo who was carrying on business of Bidies and Tobacco. The petitioner also agreed to pay to the defendants--respondents herein all the arrears of rent and permitted increases as well as the municipal taxes levied by the Bombay Municipality by reason of the Bombay Municipality be the reason of the petitioner having kept sub-tenant as from sept. 1, 1948. It was further agreed:

"The said dispute between the parties shall be referred to Mr.G.R. Ganatra, Advocate as the sole arbitrator and the parties hereto agree to be bound by his award as final and binding upon them."

The petitioner in the last paragraph of the consent terms agreed not to dispose of the demised premises of his business until the amounts due to the respondents as per Cls. 4 and 5 are paid off by the petitioner to the respondents hereon.

5. It is , therefore, the respondents filed R.A. E. Suit No. 2146 of 1963 against the petitioner in the Court of small Cause at Bombay for recovery of possession of the suit land on the allegation that the petitioner unlawfully sublet the suit land and parted with possession or transferred interest in the suit land without their consent.

6. The said suit was resisted by the petitioner. He filed his points of defences and denied the allegation of unlawful subletting of the suit land..The petitioner denied the legality of the notice to quit. It is also denied that he has illegally sublet. Assigned and/or parted with the possession and/ or transferred his interest as alleged. Lastly it is contended that by the consent terms filed in the City Civil Court in Suit No., 63 of 1957, the petitioner-defendant only agreed not to dispose of the demised premises.

7. The learned trial Court recorded the evidence adduced by the parties and after careful consideration of the evidence on record was pleased to pass a decree for possession by the judgment and decree, dated March 9, 1967 and directed the petitioner to deliver possession of the suit land. It was held that the petitioner has unlawfully sublet the suit premises.

8. The petitioner feeling aggrieved by the said judgment and decree passed by the trial Court preferred an appeal being Appeal No.198 of 1967 to the small Causes Court at Bombay . The Appellate Court on consideration of the evidence confirmed the findings recorded by the trial Court and dismissed the appeal by the judgment and decree, dated sept.6. 1975. Against the said judgment and decree passed by the Bench of the small Causes Court at Bombay, the petitioner has filed the present special civil Application under Art. 227 of the Constitution of India challenging the legality and correctness of the said appellate court's judgment and decree.

9. Shri Raju S. Mohite, the learned counsel appearing on behalf of the petitioner. Submitted that the consent decree passed by the City Civil Court in suit No. 63 of 1957 has been misconstrued by both the Courts below. It is argued that both the Courts below had cast the burden on the petitioner to prove that the suit land has not been illegally sublet to the subtenant. He pointed out that the admissions of the petitioner relied upon by the lower courts are not the admissions. In fact, the transfer of the interest in the suit land has not been effected by the petitioner or that he has not transferred his interest in the open land to the subtenant. It is further argued that the Sub-tenants inducted on the superstructure on the land are not inducted as unlawful sub-tenants. Lastly, it is argued by Shri Mohite that in any case. There is no transfer of interest so far as the open land is concerned. What has been let out is the superstructure and the landlords have no transfer of interest in the Immovable property belonging to the respondents or that there is no unlawful tenancy created by the petitioner giving rise to a right to the landlords to get a decree for eviction on the ground of subletting as provided by the provisions of S. 13(1)(e) of the Bombay Rent Act. Shri Mohite very strongly relied upon the unreported judgment of the Division Bench of this court in Civil Revn. Appln. No. 1511 of 1960 decided by D.V. Patel and K.K. Desai JJ. On Nov. 21, 1962. He also cited reported judgment of this court in Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, . While relying upon the said two judgments of this Court, Shri Mohite contended that since the petitioner was merely a tenant of the open plot and the superstructure was built by him, it cannot be said that he has sublet the open piece of land.

10. Shri Hemchandra K.Shah, the learned counsel appearing on behalf of the respondents submitted that while entertaining an application under Art. 227 of the Constitution of India, this court will not be justified in reappreciating the evidence on record and disturb the finding recorded by both the courts below. He further pointed out that it was alleged in the plaint that the petitioner-defendant had unlawfully sublet the suit premises and this fact has not been specifically denied by the tenant in the written statement. He brought to my notice the averment Made in para 4 of the plaint and in para 3 of the written statement of the petitioner. According to Shri Shah, there is no specific denial of the fact that the petitioner-defendant has unlawfully sublet the suit premises. It is further argued that the petitioner-defendant has categorically admitted the transfer of interest in favour of the sub-tenant. Shri Shah strongly relied upon the later part

of the judgment of justice Vaidya, referred to above in Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, and contended if this Court comes to the conclusion that there is no unlawful subletting, then admittedly the petitioner had inducted subtenants on the superstructure and thereby assigned or transferred his interest in the said manner, and it is therefore the judgments and decrees by the Courts below are correct in law.

11. Having heard the learned counsel appearing on behalf of both the sides, it appears that both the courts below have misdirected themselves on the question of law as well as on the question of facts in this case. It is not a disputed fact in the present case that the open plot was leased out to the petitioner. It is also not disputed that the superstructure was built at the cost of the petitioner-tenant. It also appears from the record that the petitioner pleads from the record that the petitioner had let out the superstructure to Bapu Vasudeo who conducted a business of bidies and tobacco. In para 3 of the consent decree, the landlords admitted and approved this fact of subletting and the parties agreed that the petitioner to pay to the respondents herein the increased municipal taxes levied and to be levied by the Bombay Municipality by reasons of the petitioner having sublet a portion to Bapu Vasudeo who does the business of Bidies and Tobacco. In para 6 of the consent decree it is stated that the petitioner herein agreed it is stated that the petitioner herein agreed not to dispose of the demised premise or his business until the amounts due to the defendants Nos. 1 and 2 - the respondents herein as per Cls. 4 and 5 of the consent terms are paid off by petitioner to the respondents herein. The petitioner has stated that he had paid part of arrears of rent to the respondents as per the consent terms, by money order. Respondents did not accept money order sent by him after consent terms. Taking into consideration the terms in the consent decree, it does not appear that the landlords put a restriction on the petitioner to sublet the suit premises. As stated above, it appears that they have admitted the fact that the petitioner-tenant was entitled to sublet the suit premises. In view of these facts, it cannot be said that the tenant has unlawfully sublet the suit premises. The provision of S. 15(1) of the Bombay Rent Act provides:

"15 (1) Notwithstanding anything contained in any law, but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any 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 and after the date of commencement of the Bombay Rents, hotel and Lodging House Rate Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises."

The words "but subject to any contract to the contrary" have been inserted and shall be deemed always to have been inserted by Bombay Act, No. 49 of 1959. Having regard to the said amendment to section 15 and having regard to the fact that the land-holder had given a right to tenant to sublet the superstructure,

the alleged subtenancy shall not be unlawful within the meaning of S. 15 of the Bombay Rent Act. It is in this view of the matter, the decree of eviction passed by the lower courts will have to be set aside.

12. On another ground also, the decrees for possession passed by the lower courts are erroneous. The Division Bench of this Court consisting of D.V. patel and K.K. Desai, JJ. On the facts of that case observed us under:-

"As held by the learned trial Judge, with whom we agree, since the petitioner was merely a tenant of the superstructure belonging to opponent No.2, it cannot be said that by that reason alone he was also a sub-tenant in respect of the open piece of the plot. As the learned Judge says, it only means that he was a licensee of the land is held that he was merely a licensee of the land is held that he was merely a licensee of the land, there can be no question of application either of S. 14 or of Ordinance III of 1949 or the subsequent amended section 15 of the Rent Restriction Act."

It is clearly held by the Division Bench of this court that if there is a lease in respect of the open land and the superstructure is built by the tenant, the tenant occupying the superstructure cannot be said to be the sub-tenant in respect of open piece of the plot. It only means that the sub-tenant was a licensee of the land and not tenant of the superstructure (sic). The said Division Bench judgment is binding on me. In view of the ratio laid down in the said case, it means that the lower courts have committed an error in coming to the conclusion that the superstructure was unlawfully sublet by the tenant-petitioner. In subsequent judgment, Vaidya, J. In Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, considered the observations of the Division Bench of this Court and also two more unreported judgments of this court delivered in Ibrahim Ahmed Welder v. Ramesh Janardan Shroff. Spl. Civil Appln. No. 1 of 1966, decided by pal J., on March 2, 1966 and in Dina Manekji, mody v. Malshi Bharmal, spl. Civil Appln No.1191 of 1967 decided by Bhasme J., on Mar 10, 1970. Vaidya J. Observed that as stated above, the decision of Division Bench of this court is binding on him and it is unnecessary for him to consider the Validity of the view taken by Bhasme, . It is further observed by Vaidya, J. It is further observed by Vaidya, J. (At p. 221 of AIR) :-

"With respect, what patel and K.K. Desai, JJ. Decided was also in the context of the question before them as to whether the obstructionist could be regarded as sub-tenant under the provisions of the Bombay Rents. Hotel and Lodging House Rates control Act, 1947 of the plot of land in dispute in that case. It is clear that they have laid down that the tenant of a structure built by a tenant could never claim the sub-tenancy in respect of the plot of land.

In view of the aforesaid two judgments of this court, it must be held that there was no unlawful subletting by the petitioner in respect of the superstructure built by the petitioner-tenant. In that view of the matter, the decisions rendered by both the Courts below are not correct in law and therefore deserve to be set

aside.

13. Shri Shah strongly relied upon the later part of the judgment of Vaidya, J. in Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, He argued that under the provisions of S. 13(1)(e) of the Bombay Rent Act unlawful subletting is not the only ground but there is another ground viz. If the tenant assigns or transfers in any other manner his interest therein. Relying upon this ground, Shri Shah contended that the petitioner has inducted M/s. Metal works Tin wood Manufacturing Company and thereby assigned and transferred the tenant's interest in the said land without plaintiffs' respondents' consent. It is true in the later part of the judgment Vaidya, J. Has observed (at p. 221 of AIR :

"If the landlord establishes any other assignment or transfer of any interest of the tenant other than unlawful subletting, he is entitled to succeed under S. 13(1)(e)." It is further observed that the words "in any other manner"; have reference to the unlawful subletting referred to earlier, however, in certain circumstances, such other manner may be even creation of a sort of irrevocable licence. In the said case, it appears that after the termination of the tenancy of the tenant by the landlord, the tenant inducted defendant Nos. 2 , 9 ,13 and 17. It was considered in that case that it was a transfer or assignment "in any other manner of his interest" within the meaning of sec. 13(1)(c) of the Bombay Rent Act. In that case, the tenant became a statutory tenant after the termination of his tenancy by a quit notice. In view of that fact, Vaidya, J. Held that there was a transfer or assignment "in any other manner of his interest" within the meaning of S. 13(1)(e) Accordingly, in the said case, against respondents that the landlord's case against respondents must fail as they were mere licensees and the landlord if became entitled to recover possession from defendant No. 1, the decree for eviction can be landlords-respondents as to when M/s. Metal works Tin Wood Manufacturing Company was inducted as tenant or sub-tenant on the superstructure. It is stated in para 4 of the plaint ;

"The plaintiffs say that the defendant is not ready and willing to observe and perform the terms of tenancy inasmuch as he has illegally sublet or assigned and/or parted with possession and /or transferred his interest in the said land without the plaintiffs' knowledge and consent in writing and contrary to the provisions of Bombay Rent Act and in breach of the consent terms filed in the City Civil Court suit No. 63 of 1967 to one M/s. Metal works Tin Wood manufacturing company".

Admittedly by quit notice, the landlords terminated the tenancy of the petitioner by letter, dated dec. 15, 1962. There is nothing in evidence of the plaintiffs as to when the said Metal works Tin Wood Manufacturing company was put in possession of the superstructure. In the absence of such evidence on record , it is not possible to come to the conclusion that the tenant had assigned or transferred "in any other manner his interest" within the meaning of section 13(1)(e) of the Bombay Rent Act.

14. Shri shah very strongly argued that this Court will not be justified to interfere with the finding of fact recorded by both the courts below , while entertaining an application under Art. 227 of the Constitution of India. It is true the powers of this court under Art 227 of the Constitution are limited. This court cannot convert itself into a court of appeal and reappreciate the evidence on record and record a finding reversing the findings recovered by the appellate Court. It is, however the duty of this Court to see that the subordinate Courts acted within the bounds of law. In the present case. The consent terms have been misconstrued or there is no proper application of mind to the consent terms. So-called admissions have no support in the evidence. Stray sentences have been picked up without the references to such sentences. In the last para of deposition of the petitioner, he has stated as under:-

"I have given the premises as sub-tenant to tin factory. I again say, I gave chapra on leave licence basis to tin factory". From this admission, the lower Court, picked up first sentence and arrived at the conclusion that the tenant has admitted that the suit premises have been sublet to Tin factory. Careful reading of that part of the evidence shows that there was no admission whatsoever by the tenant that he had sublet the open plot to the said factory. Similarly, evidence of the Manager Makarand has not been properly appreciated and considered. Admittedly, Makarand could not be present at the time of letting out to the said company. That piece of evidence of Makarand cannot be availed of by the landlords to prove what were the terms between the petitioner-tenant and respondents. The entire approach of both the courts below is entire approach of both the Courts below is misdirected and one may say that the findings recorded by both the courts below are perverse or without any evidence on record, and accordingly cannot be sustained. In the said circumstances, this court will be justified to reverse the said findings as the said findings are not based upon the evidence available on record. From the tenor of both the judgments of the Courts below they have failed to follow the principle laid down by this court in the judgment of the Division Bench referred to above. It appears that both the courts below misunderstood the ratio of the case laid down by Vaidya, J. In the case referred to above. In this context and in view of the facts and circumstances, the judgment and decree cannot be sustained.

15. In the result, Rule in this special Civil Application is made absolute. The judgment and decree passed by the Bench of the small cause court at Bombay dated sept. 16, 1975 in Appeal No. 198 of 1967 confirming the judgment and decree passed by the judge of small cause Court at Bombay, dated March 9, 1967 in R. A.E. Suit No.2146 of 1963 is set aside and the plaintiff's suit for possession is dismissed with costs throughout.

16. Rule made absolute.