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In the Bombay High Court

Case No : Letters Patent Appeal No. 143 of 1999

Kharatilal Haveliram Kalra and Others — APPELLANT

Vs

Jagdish Rajaram Shah — RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 18, 18(1)

Citation : (2015) 6 ALLMR 364 : (2016) 2 BomCR 421

Hon'ble Judges : N.H. Patil, J;S.B. Shukre, J

Bench : Division Bench

Advocate : Chandana Salgaonkar, for the Appellant; Aashish Agarwal instructed by Anita Agarwal, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.B. Shukre, J—This is an appeal preferred against the judgment and order dated 25th September 1998 passed in First Appeal No. 563/1982 thereby allowing the appeal and partly decreeing the suit of the appellants by declaring that they are entitled to refund of Rs. 25,001/- together with interest at the rate of 6% per annum from the date of suit till the date of realization of the amount from the respondent.

2. The appellants are the original plaintiffs and the respondent is the original defendant No. 1. A suit was filed by the appellants claiming decree of specific performance of oral agreement of lease and also decree of possession of suit premises. The suit premises is a shop in the building constructed on the land bearing CTS No. 1049 situated at Pune. It was the case of the appellants that an oral agreement was entered into between them and the respondent whereby appellants were to pay to the respondent an advance of Rs. 51,300/- by way of construction loan and it was agreed that in lieu thereof, the respondent would let out the suit premises to the appellants on monthly rent of Rs. 850/-. Towards part performance of the oral agreement, the appellants paid an amount of Rs. 25,001/- to the respondent by cheque on 15th October 1978 which was

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encashed by him. The suit premises were to be let out by executing a lease in favour of the appellants. The lease agreement that was agreed to be entered into between the parties was initially for a period of 9 years with an option to renew the same. It was also agreed that out of the rent amount of Rs. 850/-, an amount of Rs. 475/- per month would be deducted towards repayment of loan. However, the respondent refused to execute the lease as promised, though appellants were always ready and willing to perform their part of contract.

3. The suit was resisted by the respondent. They took a defence that the oral agreement was not capable of enforcement it being opposed to law inasmuch as there was no readiness and willingness on the part of the appellants to perform their part of the contract.

4. The trial Court, on merits of the case, decreed the suit in favour of the appellants. An appeal was preferred against the said judgment and decree of the trial Court, being First Appeal No. 563/1992, before High Court. After considering the evidence adduced by both sides and their arguments, learned single Judge of this Court disposed of the appeal by his order passed on 25th September 1998. While disposing of the appeal, the learned single Judge declared that the appellants are entitled to only relief of refund of Rs. 25,001/- which the appellants had paid towards part performance of the oral agreement between them and the respondent. An interest at the rate of 6% per annum on the said amount was also granted. Being aggrieved by the same, the appellants/ original plaintiffs, who have sought the relief of specific performance of the agreement, are before this Court in the present appeal.

5. We have heard the learned counsel for the appellants and learned counsel for the respondent. With their assistance we have gone through the paper book of the appeal including impugned judgments and order.

6. The first contention of learned counsel for the appellants is that learned single Judge has committed grave error of law when he found that the oral agreement of lease was opposed to law it being contrary to the provision of section 18(1) of the Bombay Rent Act, 1947 ("Rent Act" for short). She submits that learned single Judge erroneously proceeded on the premise that underlying consideration of the oral agreement was extension of loan amount by the appellants to the respondent for execution of lease agreement in their favour by the landlord i.e. respondent. According to her, the underlying consideration was not really in the nature of loan but advance rent, a permissible act under the provisions of section 18 of the Rent Act. In support of her contention, she has taken us through the provisions of section 18 and also relied upon the judgments in the cases of Smt. Sulochana Ganpat Rege Vs. Madan Dattatray Wadke, (1970) 72 BOMLR 351 : (1970) MhLj 852 ; and Ranganayaki Ammal Vs. M. Chockalingam, (1966) 79 LW 378 : (1966) 2 MLJ 139 .

7. Learned counsel for the respondent submits that the provision of section 18(1) is very clear and it lays down that when a landlord receives any fine, premium or

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other like sum or deposit or any any consideration other than the standard rent or the permitted increases, in respect of the grant, renewal of continuance of lease of any premises, the landlord commits an offence punishable thereunder. He submits that when the oral agreement was entered into between the parties, the agreement was only executory in nature and at that time no offence was committed as the lease agreement had not come into being. He further submits that the moment the lease would come into existence the offence would be complete as the consideration for creation of lease in favour of the appellants would be extension of loan by the appellants to the landlord, a consideration other than the standard rent and, therefore, prohibited under the law. He further submits that under the scheme of section 18 any payment made by any person to the landlord by way of loan for the performance of financing the erection of residential building is permissible, subject to certain conditions, as could be seen from the provision of sub-section (3) of section 18. He submits that in the instant case, however, the suit premises were commercial in nature and the agreement was not in writing and, therefore, the oral agreement between the parties would not be covered by exception to the provision of sub-section (1) carved out under sub-section (3) of section 18 of the Rent Act.

8. In the case of Smt. Sulochana Rege (supra), learned single Judge of this Court took a view that section 18 of the Rent Act does not prohibit extension of loans to the landlord by tenant or intending tenant but only casts certain obligations on the landlords to obtain such loans. While taking this view, the learned single Judge considered the scheme of section 18 and construed in particular the provision of sub-section (3) of section 18 to hold that under the Act taking of loans by landlords from the tenants is not prohibited, if the conditions prescribed therein for obtaining of such loans are fulfilled. We have no reason to take a different view. The exception carved out to prohibition of obtaining of any fine or premium or any other amount other than standard rent by the landlords from the tenants applies only to amount taken by way of loan for the purpose of financing residential building and not commercial building and, that too, subject to fulfillment of various conditions delineated in sub-section (3) of section 18. This provision does not apply to loans taken for the purpose of construction of commercial building. In this case, there is no dispute between the parties that the suit premises were commercial. Therefore, the ratio of the case of Smt. Sulochana Rege (supra), in our considered view, would be of no assistance to the case of the appellants.

9. However, it is also the case of the appellants that ultimately the transaction lying at the root of the oral agreement between the parties was in the nature of rent in advance and this is something which is permissible under section 18. Learned counsel for the appellants has submitted that there is a clear distinction between "rent" on one hand and "premium" or "other like sum" on the other and that provision of section 18(1) of the Rent Act being penal in nature, as per the settled law would require strict construction. Learned counsel for the appellants has also placed reliance upon the observations contained in N.S. Bindra''s

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Interpretation of Statutes, tenth edition, published by Lexis Nexis Butterworths, pages 1162 to 1166. If we go through the provisions of section 18(1), we would find, what has been prohibited is fine or premium or other like sum or deposit or any consideration, which is not the standard rent or the permitted increases, in respect of the grant, renewal or continuance of lease of any premises. It is certainly a penal provision and, therefore, by applying the settled principles of interpretation of statutes, which, in fact would be the rule of strict interpretation of statutes and the doctrine of ejusdem generis, which doctrine has been applied in Ranganayaki Ammal (supra), we would have to read and understand the expressions "any fine, premium or any other like sum or any consideration" and "standard rent or permitted increases". By this method, what would emerge without any equivocation is that acceptance of anything in the nature of rent, present or future, in respect of grant or renewal or continuance of lease is not proscribed under section 18(1) of the Rent Act.

10. The conclusion so reached is further strengthened by explanation I which reads as under:

"Explanation I. - For the purposes of sub-section (1)-

(a) except as provided in sub-section (3) receipt of rent in advance for more than three months in respect of premises let for the purpose of residence, or

(b) where any furniture or other article is sold by the landlord to the tenant either before or after the creation of tenancy of any premises, the excess of the price received over the reasonable price of the furniture or article,

shall be deemed to be a fine or premium or consideration."

It would be clear from Explanation-I that for the purpose of sub-section (1) of section 18 of the Rent Act even the advance rent for more than three months is deemed to be a fine or premium or consideration as contemplated under section 18(1), provided the advance rent is in respect of premises leased out for the purpose of residence. It is evident from it that the legislature was conscious of the fact that in order to circumvent the provision of section 18(1) an unscrupulous landlord may accept certain sums of money other than the standard rent by giving them colour of advance rent and, thus, exploit insecure tenants desperately seeking shelters. Therefore, the legislature in its wisdom thought it fit to even include those residential advance rents which were in excess of three months in the expression "fine or premium or consideration" appearing in section 18(1). But, the advance rents accepted by the landlords in respect of leases of commercial premises have been kept out of this explanation. The distinction made by the legislature between the advance rent for the residential premises and the advance rent for the commercial premises appears to be made with a purpose. The commercial tenants may not have so much disadvantageous position as like residential tenants while dealing with the landlords with their comparative easy access to finance and, therefore, the legislature left out the category of advance rent taken for leasing commercial

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premises. Thus, under the scheme of section 18, advance rent taken for lease of commercial premises is permissible.

11. Now the question would be whether the underlying transaction of the oral agreement between the appellant and the respondent was in the nature of taking of advance rent by the landlord or purely a loan transaction prohibited under section 18(1). If we consider carefully the terms of oral agreement between the parties, which are discernible from the evidence available on record, we would find answer to the question. What was agreed between the parties was advancement of loan of Rs. 51,300/- by the appellants to the respondent for construction of commercial building and, in lieu of that, the respondent was to lease out the suit premises to the appellants on rent of Rs. 850/- per month. Out of the amount of Rs. 51,300/-, an amount of Rs. 25,001/- was already paid to the respondent. It was further agreed that an amount of Rs. 475/- per month would be deducted from the amount of Rs. 850/- and, thus, effectively the appellants were to pay to the respondent only an amount of Rs. 375/- per month. The initial period of lease that was to be executed in favour of the appellants was to be of nine years or, in other words, of 108 months. As rightly submitted by learned counsel for the appellants, if sum of Rs. 475/- is multiplied by 108 months, the resultant figure would be Rs. 51,300/-. This would only show that under the oral agreement what was paid and agreed to be paid was ultimately the advance rent. We must mention here that there is no dispute between the parties about the oral agreement being a concluded contract between them. Thus, the consideration of the oral agreement, in reality, was not any construction loan but the rent in advance for more than three months and it being for the purpose of letting out of a commercial premises, it was not covered by explanation-I and, therefore, by the prohibition of section 18(1) of the Rent Act. Learned single Judge, we must say, was not right when he found that agreement could not have been specifically enforced in the court of law under the scourge of section 18(1) of the Rent Act.

12. There is one more reason for which the learned single Judge did not endorse the decree of specific performance of the contract. The learned single Judge, relying upon the ratio of the judgment of the Supreme Court in the case of N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, AIR 1996 SC 116 : AIR 1995 SC 116 : (1995) 5 JT 553 : (1995) 4 SCALE 465 : (1995) 5 SCC 115 : (1995) 2 SCR 53 Supp , found that the appellants did not prove their continuous readiness and willingness to perform their part of the contract right from the date of execution till the date of decree. Learned single Judge considered two facts appearing in the evidence as disproving the claim of the appellants in respect of their persistent readiness and willingness to perform their part of contract. Referring to the specific admission given by appellant No. 2 that he had no funds in his account in November 1976 and also failure on the part of the appellants to give any notice offering the amount to the respondent, learned single Judge held that the respondent has conclusively proved the fact that no readiness and willingness contemplated under the law was shown by the

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appellants.

13. The learned counsel for the appellants submits that it is not necessary that in a case of this kind there has to be a formal tender of the remaining amount to the defendant and it is enough to show that at the relevant time the plaintiff was having with him the requisite funds. Learned counsel for the appellants in this regard has placed reliance upon the judgments of the Supreme Court in the cases of Sukhbir Singh and others Vs. Brij Pal Singh and others, (1996) 6 AD 72 : AIR 1996 SC 2510 : (1996) 2 CTC 295 : (1996) 6 JT 389 : (1996) 5 SCALE 342 : (1997) 2 SCC 200 : (1996) 2 SCR 863 Supp ; and International Contractors Ltd. Vs. Prasanta Kumar Sur., AIR 1962 SC 77 : (1961) 3 SCR 579 . She has also submitted, referring to the observation of the Hon''ble Apex Court in the case of Boramma Vs. Krishna Gowda and Others, (2000) 8 JT 13 : (2000) 9 SCC 214 , that while appreciating the evidence the Court should not pick up an answer from the cross-examination of the witness and draw inference taking it to isolation, as has been done by the learned single Judge in the instant case.

14. There can be no doubt about the principles of law set out in the above-referred cases relied upon by learned counsel for the appellants. The question is, whether, in the facts and circumstances of the case, those principles of law could be applied to this case and, according to us, on a careful consideration of the evidence adduced by the parties, the answer is "No". It is true that no formal tender of an amount is required to be made by the plaintiff to the defendant and it is enough for the plaintiff to show that he was always ready with the cash or finance during the relevant period of time. It is also true that a single admission given in isolation cannot be picked up for reaching a conclusion. But here the evidence of the appellants does on the whole show that the appellants failed to prove their ceaseless readiness and willingness to perform their part of contract which is an essential ingredient of a decree for specific performance of the contract as held in the case of N.P. Thirugnanam (supra).

15. The readiness and willingness of the party are to be ascertained from the overall conduct of the party prior and subsequent to the suit along with other attendant circumstances. The evidence of PW1- Kharatilal Havelilal Kalra (appellant No. 1) shows that he had a bank account with cash credit facility sanctioned to him by his bank and its limit was of Rs. 35,000/-. His evidence points out that he dealt in sports goods and sports gears and also scientific goods through his firms, Quality Sports Company and Atlas Scientific Era. The evidence discloses that he is an experienced businessman who sought financial assistance of bank for his business purposes. It also indicates that he was aware of maximum limit of the cash credit facility granted to him by his bank. His evidence further reveals that he had borrowed Rs. 25,001/- from his bank. This evidence would lead to an inference that the appellant No. 1 is an experienced businessman having reasonable knowledge of banking transactions and, it is in this background that some of the admissions given by him are required to be considered.

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16. P.W.1- Kharatilal (appellant No. 1) has admitted that in November 1976, he had no bank balance. When a businessman like appellant No. 1 gives an admission to the effect "I have no bank balance in Nov. 1976", what conclusion should be drawn by the court other than the one that the cash credit limit account that the appellant No. 1 was talking about did not have any inexhausted credit limit therein enabling the appellants to draw some amount therefrom. This is what the learned single Judge has done in the present case. He has rightly inferred about lack of funds by taking into consideration all the attendant facts and circumstances of the case and not by reading an admission dehors its contextual setting. Apart from this admission, appellant No. 1 has also admitted that he did not issue any notice to defendant No. 1 i.e. respondent herein till the date of suit calling upon the respondent to sign the agreement or to come for registration. At one stage, he even admitted the relations obtaining between himself and the respondent were of landlord and tenant, though the lease agreement was waiting to see the light of the day. Therefore, it is strange on his part to have not even issued any notice to the respondent requesting him to execute the lease agreement in his favour knowing fully well that the deadline of 1st November 1976 had already been crossed, his amount of Rs. 25,001/- was stuck and the landlord or the respondent was refusing to come forward in the matter. This conduct of appellant No. 1 would show that he was also not very much keen on performing his part of contract and this would further explain yet another admission given by him to the effect that he did not attempt to send agreed rent to defendant No. 1.

17. The above-referred discussion of the evidence of the parties would reasonably establish the fact that the conduct of the appellants was such as would not lead one to infer that the appellants were always and all the time ready and willing to perform their part of contract. The requisite bank balance in November 1976 was not available with them. The availability of funds could possibly have been presumed, had the appellants at least intimated the respondent about their being ready with the remaining amount out of amount of Rs. 51,300/- and called upon him to execute the lease agreement in their favour. In the case of Aniglase Yohannan Vs. Ramlatha and Others, AIR 2005 SC 3503 : (2005) 5 CTC 800 : (2005) 2 CTLJ 301 : (2006) 142 PLR 779 : (2005) 7 SCALE 471 : (2005) 7 SCC 534 : (2005) 3 SCR 440 Supp : (2005) AIRSCW 4789 : (2005) 6 Supreme 535 , the Hon''ble Apex Court has held that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout thereby entitling him to the specific relief. Such is not the case here and, therefore, the learned single Judge was right in finding that the overall conduct of the appellants did not exhibit unabated readiness and willingness on their part and, therefore, they were not entitled to the relief of specific performance of contract but entitled only to an alternate relief of refund of Rs. 25,001/-, paid by them to the respondent, with interest.

18. Learned counsel for the appellants has also placed reliance on the judgments of the Supreme Court in the cases of Prakash Chandra Vs. Angadlal and Others,

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AIR 1979 SC 1241 : (1979) 4 SCC 393 : (1979) 11 UJ 277 ; S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others, AIR 1995 SC 1607 : (1995) 3 JT 614 : (1995) 2 SCALE 720 : (1995) 4 SCC 15 : (1995) 3 SCR 312 ; and P. D''Souza Vs. Shondrilo Naidu, (2004) 4 CTC 150 : (2004) 6 JT 126 : (2004) 6 SCALE 364 : (2004) 6 SCC 649 : (2004) 3 SCR 186 Supp : (2004) AIRSCW 4653 : (2004) AIRSCW 5364 : (2004) 8 Supreme 228 : (2004) 6 Supreme 28 in support of her contention that ordinarily specific relief should be granted, unless equitable consideration points to its refusal and only because a claim for liquidated damages as alternate relief has been sought, prayer of specific performance should not be refused and that escalation in the prices of the suit property should be no ground for denial of specific performance.

19. There is no quarrel about the principles of law so laid down in the above-referred three cases but, in the instant case, we have found no error of law or fact in the conclusion reached by the learned single Judge regarding failure of the appellants to establish, by their conduct and other attendant circumstances, their being always ready and willing to perform their part of contract, an essential ingredient of the suit for specific performance of contract. Therefore, no assistance could be seen to be lent by these judgments to the case of the appellants here.

20. In the circumstances, we find that learned single Judge was right in refusing specific performance of the contract and granting alternate relief of refund of amount of Rs. 25,001/- together with 6% interest per annum. No illegality or perversity is seen in the impugned judgment and order. Appeal deserves to be dismissed.

21. Appeal stands dismissed. No costs.

22. After pronouncement of the judgment, learned counsel appearing for the appellants prays for continuation of interim order for eight weeks. Said prayer is opposed by learned counsel for the respondent. In the facts, we direct that the interim order passed by this Court earlier to continue for a period of four weeks.

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