

(2002) 09 BOM CK 0062

In the Bombay High Court

Case No : Writ Petition No. 1031 of 1989

Laxmandas Sarvottamdas and Co.

APPELLANT

Vs

Govindas Ramdas and Co., Gopaldas Govindas Doshi (since deceased through Lrs Shri Narayandas Gopaldas Doshi, Shri Narendra Gopaldas Doshi, Shri Haresh Gopaldas Doshi, Sou. Damyanti Ashokdas Gujarathi and Sou. Rekha Narayandas Daulatabadkar), Vithaldas Govinddas Doshi, Natwarlal Govindas Doshi, Hiralal Govindas Doshi and Narayandas Gopaldas Doshi

RESPONDENT

Date of Decision : 05-09-2002

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)
Constitution of India, 1950 — Article 227

Citation : (2002) 09 BOM CK 0062

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : A.K. Abhyankar, for the Appellant; S.B. Deshmukh, for the Respondent

Final Decision : Dismissed

Judgement

1. This writ petition, under Article 227 of the constitution of India, takes exception to the judgment and decree passed by the 2nd Additional District Judge, Satara dated 21st January 1989 in Regular civil Appeal No. 278 of 1985. The premises in question is consisting of an accommodation of 16 Khans wit Padvi and verandah of 8 khans which forms part of City Survey Nos. 223, 223/1, 223/2, 223/3, 223/4, 223/5 and 223/6 situated at Satara. The suit property was given on monthly rent basis to the petitioner No. 1, which is a registered partnership firm of which the Petitioner Nos. 2 to 6 are the partners. A deed was executed on July 2, 1974 (Exh. 73) in favour of the Petitioner No. 7 purporting to entrust the management of business conducted by the petitioner No. 1 firm for a period of 5 years. Besides the said deed, power of attorney was also executed i

favour of the petitioner No. 7 on the same day vide Exh.134. According to the Respondents-landlords the suit transaction was in the nature of subletting and/or creating licence in favour of the Petitioner No. 7. On that basis the Respondents instituted a suit before the Court of the Civil Judge, J.D., Satara being Regular Civil Suit No. 455 of 1980 for possession of the suit premises on the ground of unlawful subletting and/or creating licence in favour of the petitioner No. 7 without authority of law. The trial court by its judgment and decree dated 31st July 1985 was pleased to decree the suit on the premise that the transaction in question was one of creating licence in favour of the Petitioner No. 7 which was clearly prohibited by virtue of Section 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Act). Against this decision the Petitioners carried the matter in appeal before the District Court, Satara being Regular Civil Appeal No. 278 of 1985. According to the petitioners the transaction was not a licence as such, but was in the nature of agreement permitting the petitioner No. 7 to conduct the business of the petitioner No. 1 and, therefore, that transaction was permissible within the meaning of the provisions of the Bombay Rent Act. On the other hand, the Respondents filed Cross Objection before the Appellate Court contending that the trial Court completely erred in proceeding on the premise that the transaction was one of licence, whereas it clearly amounted to unlawful subletting. The Appellate Court analyzed the materials on record and accepted the stand taken by the Respondents that the transaction clearly amounted to unlawful subletting and parting possession and creating interest in the premises in favour of the petitioner No. 7. On the basis of that finding of fact the Appellate Court confirmed the decree for possession passed by the trial Court and dismissed the appeal preferred by the petitioners by impugned judgment and decree dated 21st January 1989. It is this decision which is subject matter of challenge in this writ petition under Article 227 of the Constitution of India.

2. The only argument pressed into service on behalf of the Petitioners is that on close scrutiny of the subject document being agreement dated 2-7-1974 (Exh.73) and the power of attorney executed in favour of the petitioner No. 7 of the same date (Exh.134), it would appear that the said transaction was only a conducting agreement and not licence as observed by the trial Court or for that matter amounting to subletting as concluded by the Appellate Court. On the other hand, Mr. Deshkukh, the learned Counsel for the Respondents contends that no fault can be found with the ultimate conclusion reached by the Appellate Court that the subject transaction is one of transferring interest in respect of the suit premises in favour of the petitioner No. 7 who was a stranger to the partnership firm. he submits that in such a situation the transaction would fall within the mischief of prohibition provided by the Bombay Rent Act.

3. Having considered the rival submissions, to my mind, no fault can be found with the ultimate conclusion reached by the Appellate Court. No doubt the trial Court proceeded on the premise that the transaction was one creating licence in favour of the petitioner No. 7, whereas the Appellate Court has found that it

amounted to subletting and creating interest in the premises in favour of the petitioner No. 7 and, therefore, prohibited. However, on close examination of the judgment of the trial Court it would appear that the trial Court has not found that the transaction was not a lease or not a case of subletting as such, but proceeded on the premise that the same qualified the test of licence and even in that case the decree for possession was inevitable. On the other hand, as observed earlier, the Appellate Court has clearly found on analyzing the documents in question and other evidence on record that the transaction was not only one of transfer of business but give exclusive possession of the property to the petitioner No. 7 for running the business in question. This is obviously a finding of fact recorded by the Appellate Court which, in exercise of writ jurisdiction, it is not possible to over turn the same.

4. To get over this position, it was contended that the Appellate Court has not properly construed the subject document and the matter involves question regarding interpretation of the said document. For that purpose my attention was drawn to the said document as well as other evidence on record. What is relevant to note is that, although the allegations of subletting and creating license has been made against the petitioner No. 1 firm, who was the tenant, but admittedly none of the partners entered the witness box to prove the fact that it was neither subletting or licence but that transaction was pure and simple one of permitting the Petitioner No. 7 to conduct or run business of partnership firm. If that be so, no amount of other evidence would be relevant for deciding the present case, since the onus was on the tenant to enter the witness box and establish the fact that it was neither subletting or parting the property in favour of an outsider but was pure and simple transaction of conducting agreement. That is lacking in the present case. Mr. Abhayankar however contends that the petitioner No. 7 was the son of the petitioner No. 2 who was partner in the firm and he as well as another son of the Petitioner No. 2 have entered the witness box. That, however, would not enure to the benefit of the petitioners or extricate the tenant from his obligation to prove his case. He further submits that the firm had executed power of attorney in favour of the petitioner No. 7 and, therefore, evidence adduced in the shape of examining the petitioner No. 7 can be also treated as evidence adduced for and on behalf of the partnership firm. It is not possible to accept every this submission because, nowhere in the examination in chief the Petitioner No. 7 has stated that he was deposing for himself and on behalf of the petitioner Nos. 1 to 6 and in particular the partnership firm petitioner No. 1 herein. If that be so, the position which emerges is that the tenant has not established on record to support his defence that it was pure and simple transaction between the parties to permit the petitioner No. 7 to conduct the running business of the petitioner No. 1 firm. No amount of any other evidence would be relevant for deciding the present case and issue will have to be straight way answered against the petitioners. Whereas, the evidence adduced by the Defendant-tenants was of a person who was allowed to enter the premises and run the business therein. That will be of no avail because, the law

requires that the tenant must prove the fact that it was not a case of subletting or creating licence but it was purely a transaction of creating right of conducting business in favour of the petitioner No. 7. Understood thus, the petitioner should fail on this count alone and no fault can be found with the conclusion reached by the appellate court that the transaction was clearly prohibited by virtue of the provisions of Rent Act.

5. Be that as it may, the courts below have however, considered the matter by analyzing all the relevant materials on record. I would now proceed to find out as to whether any fault can be found with the approach or the view taken by the Appellate Court. The Appellate Court has adverted to all the relevant clauses of the subject document and has found that the position that clearly emerges is that possession of the goods, stock-in-trade and properties of the firm was made over to the petitioner No. 7 and it was not only transfer of business but he was given exclusive possession of the property for running the business. No fault can be found with the said conclusion reached by the Appellate Court. Because, on reading the document as a whole, it is more than clear that it was only a camouflage document - so as to get extricated from the rigors of the provisions of the Bombay Rent Act, whereas the petitioner No. 7 was put in exclusive possession of not only the business but the transaction also amounted to transfer of interest in the suit property. If that be so, then the transaction would clearly fall within the mischief of the prohibition stipulated by the provisions of the Bombay Rent Act.

6. The learned counsel for the Respondents has rightly relied on the decision of the apex Court reported in AIR 1989 93 (SC) . The facts of that case are more or less similar to the present case. Besides the contention which has been raised in the present case was squarely raised in that case before the apex Court but has been negated by the apex Court, on analyzing the evidence on record in that case. Some of the clauses in the document before the apex Court, which are found to be amounting to creating interest in the property are very much present in the present document. In that case, the argument advanced was that the agreement only intended to transfer the rights pertaining to the business alone and not the lease hold rights of the Appellate in the lease premises. But on adverting to the various clauses of the agreement, the apex Court in para 7 proceeded to hold that what was really meant was surrendering the possession of the building but in order to conceal, the word "business" has been used in the place of "building". For that purpose the apex Court has adverted to the fact that though the agreement is initially for a period of 11 months the renewal clause would enable the parties to go on extending the lease for any length of time. Similar is the position in the present case in the shape of Clause 7 which stipulates that initially the agreement was for 5 years but subject to renewal on condition mentioned therein. The apex Court further adverted to the fact that in that case the Appellant had handed over the furniture, utensils etc. to the second respondent and received a sum of Rs. 5000/- as security. Even in the present case by virtue of Clause 1 of the agreement the partnership firm has handed

over the entire stock in trade along with the properties of the firm to the petitioner No. 7. Besides, in the case before the apex Court the rent of Rs. 250 per month was to be paid by the second respondent through the appellant. In the present case, Clause 11 of the agreement clearly mandates that the Petitioner No. 7 shall be responsible to pay the monthly rent in respect of the suit premises. Besides, by virtue of clause No. 7 the petitioner No. 7 is obliged to pay sum of Rs. 5,000/- to each of the partner per year. If the agreement was one of conducting business there is no reason why sum of Rs. 5,000/- per year was made payable to each of the partner and not to the firm as such. Be that as it may, what is relevant to note is that, by virtue of Clause 3 the parties have agreed that the petitioner No. 7 would be entitled to use the goodwill of the firm while doing business. It is not understood as to when the power of attorney was simultaneously executed, how the question of charging the royalty would arise. On the other hand, the Petitioner No. 7 has been put in charge, in whose favour there has been transfer of interest in respect of the suit premises, it is only for that reason his liability to pay royalty would arise. Moreover, if the Petitioner No. 7 was to remain in the suit premises as the Manager as described in the Power of Attorney then he should be given remuneration and not require to pay to the Petitioners. The Apex Court has further observed that the clauses if read in its proper perspective would indicate that the agreement confers proprietary rights on the second respondent over the hotel business inasmuch as he is made the sole authority to appoint the staff as well as terminate their services and also take disciplinary action against them. Even in the present case by virtue of Clause 9 of the power of attorney similar power has been given to the Petitioner No. 7. The apex Court therefore observed that 2nd Respondent was empowered to run the business on his own account and responsibility and all the taxes, fees, rates and other authority outgoings are to be paid by the second respondent himself. Even in the present case similar provision has been made by virtue of Clause 6 - where the liability is fastened on the petitioner No. 7 for discharging all the responsibilities in relating to Income Tax, Sales tax, Shops and Establishment Acts and Market Committee Act. In the case before the apex Court the second Respondent was made responsible to pay the costs of effecting repairs to the business premises and painting and colour washing etc. to be borne by him alone. Even in the present case, by virtue of Clause 11, similar responsibility is fastened upon the petitioner No. 7 to carry out repairs and maintaining the suit premises. With regard to such clause, the apex Court observed that "if what was transferred to the second respondent was only the right to manage the hotel business, it is incomprehensible that he would be called upon to effect repairs to the leased premises or to undertake painting, colour, washing etc. at his own expense". Similar reasoning would apply with all force to the present case. In the case before the Apex Court by virtue of Clause 15 the respondent No. 2 was to peacefully and quietly surrender and hand over possession of the business to the first party with all the furniture, fixtures, utensils etc. In the present case, as observed earlier, by virtue of Clause 1 the possession has been made over to the Petitioner No 7 in respect of entire stock

in trade and properties of the petitioner No. 1 firm. To my mind, therefore, there is no much difference between the nature of transaction which was examined by the apex Court in the above said judgment. The principle enunciated by the apex Court in that case would squarely apply on all fours to the present case. If that be so, no further investigation into the matter would be necessary and it will be sufficient for this court to observe that no fault can be found with either the approach or the reasoning given by the Appellate Court to conclude that the transaction in question amounted to transfer of interest in the suit premises in favour of the petitioner No. 7 and which was prohibited by the provisions of the Bombay Rent Act.

7. To get over this, Mr. Abhyankar, contends that the Court will keep in mind that the Petitioner No. 7 was none else but the son of the petitioner No. 2. Moreover the firm was essentially a joint family business. This aspect has been considered by the appellate Court and by adverting to the relevant documents in para 26, the appellate Court has negated that submission. It has rightly observed that it was not possible to conclude that the business of the firm was one run by the joint family as such. That being a finding of fact, it is not open for this court to go into that aspect of the matter. Besides, as rightly pointed out by Mr. Deshmukh for the Respondent, the partnership deed executed on 2-7-1974 would clearly indicate that earlier partner Haridas Laxmandas retired from the firm and the firm was reconstituted. It is therefore not possible to accept the plea that the business was really a joint family business. In any case, as that is a question of fact and has been answered by the appellate Court, it is not open for this Court to reappreciate the same as suggested by Mr. Abhyankar. Hence I find no force in this submission as well.

8. While parting it should be mentioned to the credit of Mr. Deshmukh for the efforts taken by him in thoroughly preparing the case and ably assisting the court and also citing number of decision on the subject, although I have adverted to only one which squarely answers the matter in issue.

9. In the circumstances this petition fails and the same is dismissed with costs all throughout.

Certified copy expedited.