
(2000) 11 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 2845 of 1991

Narain G. Mirchandani and Another

APPELLANT

Vs

Vinodrai R. Vora and Another

RESPONDENT

Date of Decision : 10-11-2000

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2001) 2 BomCR 654

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : V.K. Punwani, for the Appellant; Mahabaleshwar Morje, for the Respondent

Final Decision : Allowed

Judgement

D.K. Deshmukh, J.—By this petition, the petitioners challenge the order passed by the Maharashtra State Co-operative Appellate Court dated 18-9-1990 in Appeal No. 382 of 1987. That appeal was filed by the present respondent No. 1 challenging the award passed by the Co-operative Court dated 27-8-1987 in Case No. C/I/442/1158/79 of 1987. That dispute was filed by the present petitioner claiming the order of eviction against the respondent No. 1. It was the case of the disputants that the disputant No. 2 is a Co-operative society, in whose building the disputant No. 1 is an allottee of flat No. 406 on the 4th floor. The disputant No. 2 is the tenant Co-partnership Housing Society and the disputant No. 1 is the member of that society. It was alleged that by leave & licence agreement dated 25-6-1970, the disputant No. 1 granted licence of the flat to the respondent No. 1. It was the case of the disputant No. 1 that this licence was created in favour of the respondent No. 1 contrary to the bye-laws of the society and therefore the disputants were entitled to the possession of the suit premises from the respondent No. 1.

2. The defence of the respondent No. 1 was that the licence created in his favour

is not in breach of the provisions of the bye-laws. It was his case that, even if it is assumed that it is in breach of the bye-laws, the licence was subsisting on 1-2-1973, when the provisions of section 15(a) of the Bombay Rent Act came into force and converted the licence of the respondent No. 1 into deemed tenancy. The Co-operative Court decreed the dispute in favour of the disputant and directed the respondent No. 1 to vacate the premises. The respondent No. 1 preferred an appeal against the said decree before the Appellate Court. The Appellate Court held the licence granted in favour of the respondent No. 1 was subsisting licence from 1-2-1973 and therefore by intervention of the provisions of section 15(a) of the Bombay Rent Act it got covered into the deemed tenancy and therefore in terms of the law laid down by the Supreme Court in the case of *Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others*, , the dispute before the Co-operative Court is not tenable. As a result the appeal was allowed, the award passed by the trial Court, namely the Co-operative Court was set aside. It is this order passed by the Appellate Court, which is challenged in the petition by the original disputants.

3. The learned Counsel for the petitioner submits that the only reason why the Appellate Court set aside the award passed by the Co-operative Court is that according to the Appellate Court the licence granted in favour of the respondent No. 1 was subsisting on 1-2-1973 and therefore he becomes a deemed tenant because of the provisions of section 15(a) of the Bombay Rent Act. The learned Counsel submits that the respondent No. 1 had filed a R.A.D. Suit No. 2456 of 1997 before the Small Causes Court seeking a declaration that his licence was subsisting on 1-2-1973 and therefore because of the provisions of section 15(a) of the Bombay Rent Act he has become a deemed tenant. The Small Causes Court by its judgment dated 27-6-1976 dismissed the suit of the respondent No. 1. The appeal filed by the respondent No. 1 before the Appellate Bench of the Small Causes Court was also dismissed. Against these orders Writ Petition No. 6914 of 1998 was filed before this Court and this Court confirmed the findings recorded by both the Courts below and dismissed the petition by order dated 21st December, 1998. The respondent No. 1 challenged all these orders before the Supreme Court in petition for Special Leave to Appeal No. 5278 of 1999 and the Supreme Court by order dated 16-4-1999 dismissed the said Special Leave Petition. The learned Counsel, therefore, submits that now a competent Court in a suit filed by the respondent No. 1 himself has recorded a finding that the licence of the respondent No. 1 was not subsisting on 1-2-1973 and therefore by intervention of the provisions of section 15(a) he does not become a deemed tenant. The learned Counsel submits that in the face of these findings recorded by all the Courts, now a finding recorded by the Appellate Court that the licence of the respondent No. 1 was subsisting on 1-2-1973 would not survive and has to be set aside. Once that finding is set aside, then the position that emerges is that the licence of the respondent No. 1 was not subsisting on 1-2-1973. It means that the licence of the respondent No. 1 had come to an end and therefore the disputants were entitled to possession of the flat from the

respondent No. 1.

4. The learned Counsel appearing for the respondent No. 1, on the other hand, submits that the bye-laws of which breach has been alleged was not implemented by the society, in as much as, it has come on record that several flats in that building were in possession of others and very few flats are in possession of the members of the society. The learned Counsel further submits that the findings recorded by the Small Causes Court in a declaratory suit do not amount to res-judicata, because, according to the learned Counsel, the suit in the Small Causes Court was not filed for decree of eviction. The learned Counsel submits that unless there is a suit filed for decree of eviction and in that suit a finding is recorded, it will not amount to res-judicata. The learned Counsel, therefore, relies on section 11 of the Civil Procedure Code. The learned Counsel also relies on the provisions of section 28 of the Bombay Rent Act. The learned Counsel further submits that the reasons that have been given by the Appellate Court for recording a finding that the licence granted in favour of the respondent No. 1 was subsisting licence on 1-2-1973, have to be examined by this Court on the basis of the evidence on record and merely because a contrary finding has been recorded by the Small Causes Court, the finding recorded by the Appellate Court cannot be set aside. The learned Counsel also relies on the observations of the Supreme Court in its judgment in *Kejriwal's* case.

5. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that the Appellate Court has held that the licence granted in favour of the respondent No. 1 was subsisting on 1-2-1973 and therefore in terms of the provisions of section 15(a) of the Bombay Rent Act, he becomes a deemed tenant and therefore the Appellate Court relying on the judgment of the Supreme Court in *Kejriwal's* case holds that the Co-operative Court will not get jurisdiction to pass an award of eviction against the respondent. Perusal of the judgment of the Supreme Court in *Kejriwal's* case makes it clear that the Supreme Court has held that normally a dispute filed by a society for recovery of possession of flat, which has been given in possession of a licensee in breach of bye-laws would be tenable before the Co-operative Court. However, if because of the intervention of the legislation, bar created by the bye-laws is removed, then, though the licence, that may be unauthorised, gets legalised because of the statutory intervention and the licensee became a deemed tenant and therefore the only forum for filing a suit for eviction is the Small Causes Court under the Bombay Rent Act. It is, thus, clear that unless and until the licence is found to be subsisting on 1-2-1973, the licensee does not become a deemed tenant in terms of section 15(a). Therefore, the crucial question for deciding whether the Co-operative Court will get jurisdiction to decide the dispute is the question whether the licence granted in favour of the respondent No. 1 was subsisting on 1-2-1973. Precisely, that question was raised by the respondent No. 1 by filing a suit before the Small Causes Court, to which the disputant No. 1 was a party and in that suit a categorical finding has been recorded that the licence in favour of the respondent No. 1 was not subsisting on

1-2-1973. That finding has been confirmed by this Court as also by the Supreme Court and therefore, that finding now estops the respondent No. 1 from claiming that the licence in his favour was subsisting on 1-2-1973. Once the finding recorded by the Appellate Court that the licence was subsisting on 1-2-1973 goes, then it follows that the provisions of section 15(a) do not protect the respondent No. 1 and if protection of section 15(a) is not available to the respondent No. 1, the Co-operative Court will get jurisdiction to pass an Award of eviction against him. In this view of the matter, therefore, as a result of the decision of the Small Causes Court, which has been confirmed upto Supreme Court, the order passed by the Appellate Court cannot survive and has to be set aside. So far as the submission of the learned Counsel for the petitioner that the bye-law is not enforced by the society is concerned, non-implementation of the bye-law by the society in some cases will not denude the bye-law of its effect in law, and hence the submission has no force.

6. In the result, therefore, the present petition succeeds and is allowed. Rule is made absolute in terms of prayer Clause (a) with no order as to costs. Writ to go immediately.

At the request of the learned Counsel for the respondent No. 1, the execution of the award passed by the Co-operative Court is stayed for a period of six weeks from today.

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