
(1990) 04 BOM CK 0006
In the Bombay High Court
Case No : Suit No. 595 of 1976

Narayan Sadashiv Bhalerao and Another	APPELLANT
Vs	
Navnitdas Narayandas Barshikar and Others	RESPONDENT

Date of Decision : 16-04-1990

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A
Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 116

Citation : (1990) 2 BomCR 483 : (1991) 1 MhLj 407

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : Thakkar, A.R. Mehrai, Sunkersett and Vaidya, for the Appellant;
Kothari and Yagnik for defendant No. 1, Toprani, for defendant No. 2 and S.A.
Gandhi, for defendant No. 4, for the Respondent

Judgement

S.M. Daud, J.

1 This is a suit for possession and damages in relation to Block No. 4 described with precision in Ex. A which is an annexure to the plaint.

2. The block aforementioned, hereinafter referred to as the "flat", or "suit flat", is part of a larger building belonging to the fourth defendant which is a co-operative housing society registered under the Bombay Co-operatives Societies Act, 1925 and deemed to be registered under the Maharashtra Co-operative Societies Act, 1960. Defendant 4 is a tenant co-partnership variety society. Sadashiv, whose legal representatives the plaintiffs 1-A and B, are had by a notice given to defendant 1 on 9-6-1966 called upon him to vacate and deliver vacant possession of the suit flat to him. The notice not having been complied with, Sadashiv filed a dispute being A.C. No. 729 of 1966 u/s 91 of the Maharashtra Co-operative Societies Act, 1960 (MCS Act). That dispute is still pending. A little later the society also filed a dispute against defendant 1 and obtained an award. The said award was set aside in appeal and the matter

remanded for a reconsideration. That proceeding is also pending. To counter the two proceedings, defendant 1 instituted R.A.D. Suit No. 759/4776 of 1969 in the Court of Small Causes, claiming a declaration about his being the society's tenant entitled to the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Rent Act) and injunctions to restrain Sadashiv and the society from going ahead with the proceedings initiated by them. The trial Court held that defendant 1 was inducted into the flat as a licensee by Sadashiv, that there was relationship of a landlord and tenant between the society and him and that it had no jurisdiction to try the suit. The plaint was ordered to be returned to defendant 1 for presentation to the proper Court. Defendant 1 assailed the order by Appeal No. 382 of 1983. The Bench hearing the appeal held that defendant 1 was inducted into the flat by Sadashiv and that he was not a tenant of the society. These findings led the Bench to dismiss the suit, though it was of the view that prima facie the suit as framed was within section 28 Rent Act jurisdiction. Much before the decision in the above suit, Sadashiv had filed the present suit.

3. Sadashiv's claim, later adopted by his son and grand daughter, is to the effect that defendant 1's licence came to an end within 11 months of May/June 1954. He had no right to retain possession. Not only did he do so, defendant 1 had gone ahead and inducted defendants 2 and 3 into the suit flat. The occupation of defendants 2 and 3 was illegal. All the three defendants were trespassers and were liable to be evicted and to further pay Rs. 74,230/- representing unpaid licence fee and compensation as detailed in Ex. D annexed to the plaint. No relief was claimed against the society.

4. Defendants 1 to 3 took the stand that defendant 1 was a tenant of the society and had nothing to do with Sadashiv. It was false to say that Sadashiv had inducted defendant 1 into the suit flat. This Court's jurisdiction to try the suit was questioned. Defendant 2 further contended that it was in occupation of the flat under a licence on 1-2-1973 and had therefore acquired protection u/s 15-A of the Rent Act. As to the occupation charges, the said had been paid to the Court Receiver as directed by this Court. Plaintiffs 1-A and B's right to prosecute the suit was not admitted.

5. Pleadings aforesaid gave rise to the issues detailed below with my findings recorded against them:---

Issues Findings

1. Do plaintiffs 1-A and 1-B prove that they have acquired the right, title and interest

Plaintiff 1-A has.

of Sadashiv?

2. Do plaintiffs 1-A and 1-B establish

that Sadashiv had inducted deft. 1 into the

Yes.

premises as a licensee in about the year 1954 ?

3. Do plaintiffs 1-A and 1-B prove that

defendant 2's predecessor was illegally inducted into the premises by the 1st defendant ?

Yes.

OR (a) Does defendant 2 prove that defendant

1 had acquired the status of a tenant of the suit

No.

premises?

(b) Do defendants 1 and 2 prove that in the

year 1967 defendant 1 inducted defendant 2 as a No.

licensee into the suit premises, and, if so whether

defendant 2 has become a protected licensee under

section 15-A of the Rent Act ?

4. What damages-If any-are defendants Defendant 1

1 to 3 or either of them liable to pay to the Rs. 74,230/-;

plaintiffs ? Defendant 2 liable

jointly with defend-

ant 1 to the extent

of Rs. 70,790/- only.

5. Whether this Court has jurisdiction to

try the suit ? Yes.

6. Relief and costs ? See paras 14 & 15.

REASONS

6. Plaintiffs 1-A and B are the son and grant-daughter respectively of Sadashiv. The first-named person has entered the witness box and testified that he is the only heir of Sadashiv and that his daughter has been joined as she was nominated by the deceased for the records of the society. There is no evidence to the contrary. The testimony of the witness though self-serving, has to be

accepted seeing that he is the father of the nominee and will not tell a lie to favour himself at her cost. The question of legal representatives obtaining letters of administration does not apply as their right to continue the suit as such has been duly recognised at the stage of substitution of heirs. In fact defendants 1 had himself impleaded them as Sadashiv's heirs in the declaratory suit brought by him.

7. The crucial questions are (i) whether Sadashiv was an allottee of the flat and (ii) whether he had inducted defendant 1 into the flat or whether defendant 1 was a tenant of the society. For plaintiff it is argued that the decision in the declaratory suit more or less concludes the matter. The finding there was that the society had allotted the flat to Sadashiv who had inducted defendant 1 therein. Defendant 1's claim to being an allottee from the society was negated. The reliance placed by him on what he termed "rent receipts" was held to be misconceived. It is argued that the Court trying the declaratory suit had no jurisdiction to try the same. The dispute was within the exclusive jurisdiction of the authority constituted for determination of disputes falling u/s 91 of the MCS Act. This argument sounds strange coming as it does from defendant 1 and his inductee, the 2nd defendant. The 1st defendant had gone to the Small Causes Court contending that Sadashiv and the society be injuncted against prosecuting disputes u/s 91 of the MCS Act as he was a tenant entitled to the protection of the Rent Act. Defendant 2 and 3 who are claiming through him cannot be allowed any greater latitude than him seeing that there is no evidence of collusion between plaintiff and defendant 1. It was next argued that the Small Causes Court's decision was erroneous and did not bind this Court. A decision whether right or wrong binds the parties as also the Court before which the point is re-agitated in a later litigation. To get over this difficulty it was contended that what was in issue between parties was the question as to who was an allottee-member and this question was beyond the jurisdiction of the Small Causes Court. The contention is without merit for defendant 1 was putting forth a plea of his being defendant 4's tenant entitled to the protection of the Rent Act. In fact that is his stand even now. And the finding that defendant 1 was not an allottee of defendant 4 but an inductee would operate as res-judicata by virtue of Explanation VIII to section 11 of the CPC (CPC). The Explanation is worded thus :

"An issue heard and finally decided by a Court of limited jurisdiction competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

The Small Causes Court was competent to decide the issue raised by defendant 1 viz. that he was a tenant of the society. To decide this issue it had to appraise the rival plea raised by plaintiffs viz. that Sadashiv as an allottee of the society had inducted defendant 1 into the flat. The present suit is one for possession on the basis of title as an allottee. Therefore even if the Small Causes Court did not

have jurisdiction to decide the issue of title i.e. who was the member-allottee, it had the limited jurisdiction to rule upon defendant 1's claim. To negative that claim it had to assess plaintiff's plea of defendant 1 being Sadashiv's inductee. In affirming this plea it was deciding a question incidental to the exercise of its limited jurisdiction. Therefore though the issue of title may be outside its purview, the decision given by it would attract the Eighth Explanation.

8. Apart from the legal aspect, we have the bare word of defendant 1 about his being an allottee member of the flat. The resolution of allotment, payment of share money and maintenance charges, all stand in the name of Sadashiv and plaintiff 1-A. Defendant 1's reliance on the so-called rent receipts is of no avail. The best evidence falsifying him is Ex. P-6-A which admittedly is addressed to Sadashiv by defendant 1 in relation to the suit flat. The cheque to which a reference is made in the letter was for Rs. 3,000/- and towards rent of the suit flat. In the declaratory suit defendant 1 seems to have taken the stand that the cheque was sent with Sadashiv to the society for rent payable to it. The Appellate Bench rightly negated this explanation by pointing out that if rent were being paid to the Society, the proper thing to do so would have been by means of an account payee cheque in the name of the Society itself. Aware of this, defendant 1 tried a different tack. He now says that a bearer cheque and Rs. 3,000/- was sent to Sadashiv. Sadashiv was to encash the cheque and take the proceeds with him to Bombay for being made over to the society towards rent due from him. In other words, Sadashiv was a mere errand boy. In that case it was not necessary to ask him for an acknowledgement as did defendant 1 by the use of the Marathi words "Poch dyavi". The exact rendition of these words would be "give acknowledgement". But if Sadashiv was acting as an errand boy the letter would have been more detailed. Sadashiv would have been told to what period the amount related and the need to get a detailed receipt from the society. The letter is bereft of the normal courtesy extended to one doing a favour. Sadashiv was doing a favour by carrying the money to Bombay and paying it on defendant 1's behalf to the society. It was most improper to load him with the additional obligation of encashing the bearer cheque. Therefore, the letter at Ex. P-6-A had to be more respectful. Far from that being the case, Sadashiv was being asked in peremptory language to give an acknowledgement. To conclude, defendant 1's gloss on Ex. P-6-A is untrue. Going by the words used it is payment of Rs. 3,000/- by defendant 1 to Sadashiv and for the suit flat. The only conclusion consistent with the above is that defendant 1 was inducted into the flat by Sadashiv and the sum of Rs. 3,000/- represented unpaid fee due from him. This explains the use of the last two words wherein Sadashiv was asked to acknowledge receipt of the sum.

9. It is argued that there is no proof of Sadashiv even having occupied the suit flat and it is not therefore possible to believe that defendant 1 was inducted by him. The resolution allotting the flat to him, receipt of different sums from or on his behalf and Ex. P-6-A, go against this submission. Ex. P-6-A in fact clinches the issue even if it be assumed that Sadashiv never physically occupied the flat.

Defendant 1's being a member of the society does not imply that he was an allottee. In fact he could not be such an allottee for the resolution allotting the flat to Sadashiv was not cancelled. There is no resolution allotting the flat to him. Membership by itself copied with the purchase of some shares does not confer title to the suit flat upon him. In fact as late as July 1963 we find him acknowledging Sadashiv's title vide Ex. P-6-A.

10. Defendants 2 and 3 came to the suit flat by virtue of Ex. 20-1 dt. 9-10-1967. Under Ex. P-7 the licence granted to defendant 1 stood terminated as from the last day of June 1966. Of course, defendant 1 did not comply with the demand to vacate and deliver possession of the flat. Would continuance in occupation authorise defendant 1 to create a sub-licence and would the beneficiary of the said sub-licence get the benefit of section 15-A of the Rent Act ? Ex. 2-D-1 was for a period of 11 months as from 9-10-1967, with the licensee having an option to renew it for a further eleven months period. Thus the extended period would end in about September 1969. There was no further extension. The argument is that defendants 2 and 3 continued in occupation and defendant 1 accepted the compensation. This would therefore make the license a subsisting one on the day section 15-A came into the statute book by virtue of Mah. Act XVII of 1973. It is not possible to accept this contention. Section 15-A conferred protection upon a specified class of licensees. As section 5(4-A) makes clear the expression "licensee" referred to is "a person in occupation under a subsisting agreement for a licence". Now on 1-2-1973 neither defendant 1 nor defendant 2 and 3 could be said to be in occupation as licensees whose licence was subsisting. Defendant 1's licence had been expressly determined and the licence in favour of defendant 2 ended by efflux of time. Licence is a matter of agreement and cannot be left to inferences. This is all the more so when Ex. 2-D-1 specifies a period of 22 months as the termination point, and, as reckoned from 9-10-1967. If there had been a renewal it would have been in writing. Reliance is placed upon *Sanwarmal Kejriwal v. Vishwa Co-operative Housing Society Ltd. and others*, Civil Appeal No. 1369 of 1990 decided by the Supreme Court on 8-3-1990: 1990(1) B.C.R. (S.C.)796. Far from that decision supporting the contention of defendants 2/3, it reaffirmed the view taken in earlier decisions that a person not in occupation of the premises under a subsisting licence as on 1-2-1973, could not invoke the protection of section 15-A of the Rent Act. Quoted with approval in the other case relied upon by defendants 2/3 i.e. *A.V.R. and Co. and others v. Fairfield Co-operative Housing Society Ltd.* 1989(1) B.C.R. 325 : 1989 M.R.C.J. 103 : is this passage from *D.H. Maniar and Others Vs. Waman Laxman Kudav*, .

"In order to get the advantage of section 15-A of the Bombay Rent Act, the occupant must be in occupation of the premises as a licensee as defined in section 5(4-A) on February 1, 1973. If he be such a licensee the non-obstante clause of section 15-A(1) gives him the status and protection of a tenant in spite of there being anything to the contrary in any other law or in any contract But if he is not a licensee under a subsisting agreement on February 1, 1973, then he does not get the advantage of the amended provision of the Bombay

Rent Act."

10-A. To sum up, the plea that defendant 1 was a tenant of the society is not true on facts and is barred by res judicata on the competing claims of defendant 1 and Sadashiv vis-a-vis title as tenant members, the matter has to be found in favour of the latter-again on facts and by virtue of an earlier decision. Lastly, and on the same basis, is the finding that defendant 1 was inducted into the flat as a licensee by Sadashiv and was therefore estopped from questioning his licensor's title. The claim to protection u/s 15-A of the Rent Act is not available to defendants 1 to 3. In fact defendant 1 does not make that claim in the proper sense of the concept for he has set up an adverse title to his licensor. A licensee recognises the superior title of his licensor and where the claim set up by him conflicts with the licensor's title, he is not a licensee or entitled to the benefit of section 15-A. I emphasise this for defendants 2/3 have pleaded that defendant 1 was or had represented himself to be a tenant that it was on this representation that they had entered into the licence transaction with him. In Ex. 2-D-1 there is an averment about defendant 1 being a tenant. This of course has to be construed as a reference to his claiming to be a tenant-member from the society and not a tenant of Sadashiv. I deduce this from the contents of Ex. P-8 which is defendant 1's reply to plaintiff's quit notice Ex. P-7. In Ex. P 8 appears the assertion that defendant 1 is a yearly tenant of the society. It is doubtful if a licence created by a sub licensor setting up a title hostile to the head tenant, even though in force on 1-2-1973, can get the protection of section 15-A. But it is not necessary to go further into the matter for on the facts proved no licence subsisted on 1-2-1973 in favour of either set of defendants. And that suffices to find the issues against defendants.

11. The issue of jurisdiction has to be appraised in the context of the plaint averments and the finding on facts. The plaint proceeds on the footing that defendant 1 had become a trespasser after the termination of the licence, that he could not induct defendants 2 and 3 and that they had to be evicted besides being made to pay damages. The defences about defendant 1 being a tenant-allottee of defendant 4 and defendants 2/3 being entitled to the protection of section 15-A having been negatived, it must be held that the suit is a simple one for eviction and damages against trespassers. It was argued that section 91 of the MCS Act is attracted because the question arising in the suit is one touching the business of the society. Defendant 1 and plaintiffs are setting up rival claims to the allotment of the flat and this brings the case squarely within the confines of section 91. *Kalawati v. Shankarrao*, being Special Civil Application No. 1699 of 1969 decided on 26-4-1973 by a Division Bench of this High Court goes against this contention. It was there held that a dispute between a member of a Co-operative Housing Society and his licensee in regard to the possession of a flat does not fall within the four corners of section 91. What is in issue before me is plaintiff's title and the trespass by defendants 1 to 3. Significantly, no relief is claimed against the society defendant 4. Defendant 1's claim to be a tenant of the society has been negatived by a competent Court and cannot be re-agitated.

Therefore, there is no bar to the entertaining of the suit by this Court.

12. The issue surviving relates to damages. Defendant 3 was in defendant 2's employ and in occupation as such. The liability to pay damages is on defendants 1 and 2. As to the quantum plaintiffs have claimed the same " Rs. 80/- per month from 1-2-1964 to 30-9-1967 and from 1-10-1967 to 31-3-1976 " Rs. 65/- per month. The date fixed under the leave and licence agreement Ex. 2-D-1 dt. 9-10-1967 between defendants 1 and 2 is Rs. 850/- per month. Thus the rate at which plaintiffs claim past damage, is, eminently modest. For the 1st period defendant 2 will not be liable as it was not in occupation. I find defendant 1 liable to pay Rs. 3,440/- and defendants 1 and 2 liable for Rs. 70,790.00/-.

13. To sum up, the claim for possession will have to be decreed against defendants 1 to 3. Defendant 1 will be solely liable to pay damages for the period 1-2-1964 to 30-9-1967 amounting to Rs. 3,440/-. Defendants 1 and 2 will be jointly and severally liable to pay damages for the period 1-10-1967 to 31-3-1976 totalling Rs. 70,790.00. Plaintiffs will get their costs from defendants 1 and 2 who together with the other defendants are left to bear their own costs. Damages pendente lite and until delivery of possession will be ascertained in a separate proceeding. The Court Receiver who is in possession of the suit flat as also the compensation paid during the pendency of the suit, will deliver and pay on behalf of defendants to the above extent. Delivery of possession stayed for three months as from today to enable defendant 2 to test this verdict on condition that it gives a written undertaking within 7 days containing the usual terms plaintiff 1-A has testified that plaintiff 1-B has no actual right or interest in the fruits of this suit. She has been joined because of Sadashiv having nominated her. This version has been accepted. Hence the decree will be in favour of plaintiff 1-A only.

14. Ordered that defendants 1 to 3 do vacate and deliver vacant possession of the suit flat to plaintiff 1-A. Defendant 1 do pay Rs. 3,440/- to plaintiff 1-A. He in jointness and individually with defendant 2, shall pay to plaintiff 1-A Rs. 70,790.00. Plaintiffs shall get their costs from defendants 1 and 2. These defendants, together with the other defendants, shall bear their own costs. Damages, pendente lite, and upto delivery of possession to be ascertained in a separate proceeding. Plaintiff 1-A to get the fruits of the decree from the Court Receiver to the extent of the assets with him. Dispossession of defendant 2 held in abeyance for three months on its furnishing within 7 days from today a written undertaking incorporating the usual terms. Advocate fees for two Counsel.

15. Decree in the above terms to follow.