

(1983) 06 BOM CK 0024
In the Bombay High Court
Case No : Writ Petition No. 216 of 1983

Pandurang Ganeshlalji Lohiya Bharajkar and Others	APPELLANT
Vs	
Prabhakar Warkari	RESPONDENT

Date of Decision : 24-06-1983

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (1984) 1 BomCR 46 : (1983) MhLj 1002

Hon'ble Judges : M.P. Kanade, J

Bench : Single Bench

Advocate : S.N. Loya, for the Appellant; P.R. Deshmukh and S.V. Chandola, for the Respondent

Final Decision : Dismissed

Judgement

M.P. Kanade, J.—A short question involved in this writ petition is as to the interpretation of section 15(3)(a)(iii) of the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954. Section 15(3)(a)(iii) of the Hyderabad Houses (Rent, Eviction and Lease) Control Act, reads as under :---

"16. Eviction of tenants.---(3)(a) A landlord may, subject to the provisions of Clause (d) apply to the Controller for an order directing the tenant to put the landlord in possession of the house---

.....

(iii) in case it is any other non-residential house, if the landlord is net occupying for purpose of a business which he is carrying on, a non-residential house in the city, town or village concerned which is his own or to the possession of which he is entitled."

2. It is concurrently held by the courts below that the landlord has proved his bona fide requirement for use and occupation of a non-residential house at Ambajogai, District Beed.

3. Shri S.N. Loya, the learned Counsel appearing in support of this petition relied upon a judgment of the Division Bench reported in ILR 1977 Bombay. 1334, in case of Shantabai Alias Jadhavbai s/o Keshrimal Kabra Petitioner v. Modonlal s/o Mansukhlal Kabra and another, opponents. The Division Bench of this Court while construing the words "to the possession of which he is entitled" held that---

"All that Clause (iii) of sub-section 3(a) requires is that the landlord who requires such premises for his bona fide personal use must not be occupying for the purpose of his business any other non-residential premises in the same town, either as owner or on rent."

In the instant case the landlord is admittedly in occupation of a tenanted premises for the purpose of carrying on his business. Relying upon this judgment of the Division Bench of this Court, Shri S.N. Loya contended that the application filed by the landlord for eviction is not maintainable, since he is in occupation of a tenanted premises.

4. Shri P.R. Deshmukh, the learned Counsel appearing on behalf of the respondents at the admission stage drew my attention to a judgment of the Supreme Court, reported in M. Padmanabha Setty Vs. K.P. Papiiah Setty, in case of M. Padmanabha Setty, Appellant v. K.P. Papiiah Setty Respondent.

5. In this case the Supreme Court had an occasion to consider the view taken by the two High Courts, one is of Madras High Court and the other is of Mysore High Court, under the respective Rent Acts. In para 6 of the judgment the Supreme Court refers to a case decided by Madras High Court in V. Thanappa Chetty Vs. Arcot Govindaswami Naicker and Another, . In that case it is held that---

"the tenant under the Madras Buildings (Lease and Rent Control) Act Madras Act XV of 1946) had a right to possession unless and until he was evicted under the provisions of the Madras Act, and, therefore, the landlord would not be entitled to possession of a non-residential building if he was in possession of another non-residential building as a tenant, for in such a case he would be entitled to possession of those premises."

The judgment was rendered by Subba Rao, J., then a Judge of the High Court of Madras. The reasoning given in the judgment is reproduced ;

"It was argued that a statutory immunity is different from a right to possession. But in my view a statutory immunity is not inconsistent with a right to possession. The statutory immunity itself creates a right in him to continue in possession till he is evicted under the provisions of the Act."

It is then that a reference is made to the Mysore High Court judgment that which dissented from the decision of the Madras High Court, and the reasoning of Ahmed Ali Khan, J., is stated, in the Mysore case it is held that---

"The provision of the Act on the strength of which a tenant may resist the landlord's claim to evict him cannot be described as a right to possession, but

only as a statutory immunity from eviction as observed by the Federal Court in case of Kai Khushro Bezorjee Capadia v. Bai Jerbai AIR 1947 F.C. 124 ."

It is further observed in the Mysore case that :---

"It appears that his Lordship in the Madras case distinguished the said observations in the said case of the Federal Court by stating that a statutory immunity is not inconsistent with the right to possession and that such immunity may itself create a right. The right to immunity from eviction involves a negative element in it. In other words, it restricts the right of possession of the landlord. Hence, it cannot be construed to have an effect of creating a right of possession to a tenant. Though the statutory immunity from eviction may not be consistent with the right to possession, the fact remains in view of the inherent element involved in both the rights that the immunity from eviction cannot be equated to the right to possession."

These two views of the respective High Courts are considered by the Supreme Court in the said judgment, and it is held that---

"In our opinion, with great respect to Subba Rao, J., Ahmed Ali Khan J., arrived at the correct conclusion. A tenant who can be evicted under the conditions prescribed in section 8(2) of the Act cannot be said, in our view, to be entitled to the possession of the premises of which he is a tenant. No doubt he cannot be evicted till one or more of the conditions prescribed by the section are fulfilled, but it is difficult to equate his right to stay in the premises till he is evicted to an entitlement of the possession of the premises. Section 8(3)(a)(ii) deals with two types of cases ; first where the landlord is in occupation of a non-residential building which is owned by him, and secondly, a non-residential building of which he is in occupation not as a landlord but otherwise. The object of the Act is to prevent unreasonable evictions of tenants. Can it be said that the legislature is considering it to be unreasonable for a landlord to shift to his own premises while he is in occupation of tenanted premises over which he has not an absolute right of possession till one of the conditions in section 8(2) is satisfied, and over one of which he has no control ?"

The wording of section 15(3) (a) (iii) is identical with the Madras and Mysore Rent Act. The question of interpretation of the words, in section 15(3)(a)(iii), "to the possession of which he is entitled" was under consideration of Madras and Mysore High Courts. The Supreme Court in the above referred case took a view that the opinion expressed in the Mysore High Court judgment was a correct one. The judgment of the Supreme Court was not cited before the Division Bench of this Court, referred to above. It is true that the judgment of the Division Bench of this Court is binding on me. But, with respect I feel that the said judgment in view of the judgment of the Supreme Court is no longer a good law. In view of the judgment of the Supreme Court referred to above, the contention raised by the learned Counsel as to the interpretation of words "to the possession of which he is entitled" cannot be accepted.

6. This application is filed under Article 227 of the Constitution of India. There are concurrent findings of the fact recorded by the courts below as to the bona fide requirement of the landlord for use and occupation of the premises in Ambajogai, District Beed. The point was not specifically raised in both the courts below as to the interpretation of the words "to the possession of which he is entitled". However, a number of authorities were cited before the District Judge as to the point of the interpretation of the said words. The learned District Judge has taken a view that the said words would not apply to a case where the landlord carries on his business in a tenanted premises.

7. Since there are concurrent findings of fact on all issues, this Court while entertaining an application under article 227 of the Constitution of India is not entitled to disturb such a finding of fact or allow the parties to raise new point which is in the nature of mere mistake of law or fact. In this view of the matter the writ petitions summarily dismissed.