

(1997) 02 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition No. 1641 of 1982

Pandurang Maruti Patil and Others

APPELLANT

Vs

Ganesh Hari Dharmadhikari and Others

RESPONDENT

Date of Decision : 26-02-1997

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13, 15, 15A, 16

Constitution of India, 1950 — Article 227

Citation : (1997) 99 BOMLR 705(1)

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

D.K. Deshmukh, J.—Regular Civil Suit No. 590/1972 was filed by the original respondent in the petition - Ganesh Hari Dharmadhikari of whom the present respondents are the legal representatives - before the Joint Civil Judge, Junior Division, Kolhapur, claiming therein that the petitioners are tenants of the building owned by him, standing on C.T.S. No. 835. It was claimed that Maruti, since deceased, of whom the defendants are the heirs, was the tenant in relation to two rooms and a courtyard. It was contended by the landlord in the civil suit that the tenant had constructed a permanent shed in the back-yard without written consent of the landlord. The landlord also claimed that the tenant was in arrears of rent. Therefore, notice dated 25.11.1970 was issued terminating the tenancy of the tenant. Thus, a decree of eviction was sought against the tenant on the ground of erecting a permanent structure without written consent of the landlord and also on the ground of default.

2. The Trial Court passed a decree in favour of the landlord on the ground of erection of a permanent structure in the back-yard without the written consent of the landlord. The tenant-defendants preferred an appeal before the Appellate Court under the Bombay Rent Act, being Regular Civil Appeal No. 105/1979, but

the appeal was dismissed. The tenants have filed this petition under Article 227 of the Constitution of India, challenging both the orders of the Courts below.

3. The first contention which is urged by the learned Counsel for the petitioners is that it is found by the Courts below that the construction was made in the month of September 1959. The notice was issued in the month of November 1970. Therefore, in the submission of the learned Counsel, the landlord has acquiesced in the construction and therefore the suit could not have been decreed on this ground. Learned Counsel for the landlord - respondents, relying on the Judgment of the Supreme Court in Pulin Behari Lal Vs. Mahadeb Dutta and Others, urged that as the section contemplates written consent and admittedly as there is no written consent, no fault can be found with the orders of the Courts below passing the decree of eviction against the tenants on this ground.

4. It is to be seen that in the present case the admitted position is that in the month of September 1959, the original tenant had erected a structure in the backyard of the suit premises. It is also not in dispute that the structure is of a permanent nature. It is also not in dispute that written consent of the landlord has not been obtained. Section 13(1)(b) of the Bombay Rent Act, which is relevant for the purpose of the petition, reads as under:-

13. (1) Notwithstanding anything contained in this Act but subject to the provisions of Sections 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied -

x x x

(b) that the tenant has, without the landlord's consent given in writing, erected on the premises any permanent structure;

Thus, what is contemplated by the section is written consent of the landlord. Perusal of the Judgment of the Supreme Court in Pulin Behari Lal's case would show that the Supreme Court was considering a case of creating sub-tenancy without the previous consent in writing of the landlord and in that regard the Supreme Court has, in paragraph 4 of of the Judgment, observed thus:-

4. A perusal of the above provisions clearly show that when there was no previous consent in writing of the landlord for creation of sub-tenancy it shall be a ground for eviction in terms of Section 13(1)(a) of the Act. Even in case of creation of such sub-tenancy with the consent of the landlord in writing it was necessary to follow the further procedure prescribed u/s 16(1) of the Act. Mere knowledge and/or acceptance of rent cannot defeat the landlord's right to get a decree for ejectment on the ground of sub-letting. If the view as contended on behalf of the appellant is accepted the provisions of both the above Sections 13 and 16 would become nugatory. There is a clear mandate in Section 13(1)(a) that the protection against eviction to the tenant shall not be available in case the tenant transfers, assigns or sublets in whole or in part the premises held by

him without the previous consent in writing of the landlord.

It is further to be seen that this Court in *Kasturchand Panachand Doshi and Others Vs. Yeshwant Vinayak Sainkar and Another*, has held that when the provision itself contemplates a written consent, in the absence of a written consent, the tenant cannot erect any permanent structure without incurring the liability of eviction. It is further to be seen that both the Courts below have considered the plea of the petitioners regarding waiver by the landlord. Both the Courts below have, after appreciating the evidence on record, held that there is no evidence led by the tenants to establish waiver on the part of the landlord.

5. The next contention that is urged on behalf of the petitioners is that the Courts below have found that the permanent structure was erected in the month of September 1959; the civil suit was filed in the year 1972; therefore, in the submission of the learned Counsel, the suit is barred by limitation. In the submission of the learned Counsel, the cause of action for filing a suit arose in the month of September 1959 and therefore the suit could have been filed within a period of 12 years from September 1959. Learned Counsel for the respondents submitted that though the structure was raised in the month of September 1959, the suit of the landlord is based on the notice dated 25.11.1970 issued by the landlord determining tenancy. It is urged by the learned Counsel for the respondents, relying on the judgment of the Supreme Court in *V. Dhanapal Chettiar Vs. Yesodai Ammal*, that when the landlord seeks eviction of a tenant not on the ground of default in payment of rent but on some other ground, then it is not compulsory for the landlord to issue a notice determining the tenancy. However, he has an option either to institute the suit without issuing a notice or issue a notice and then institute the suit. He also relied on a judgment of this Court in the case of *Hemchand v. Smt. Shakuntala* 1987 MRCJ 159 : (1987) BRC 366 1987 (2) BCR 428. In the submission of the learned Counsel, once the landlord exercises the option and issues notice and institutes the suit, then instead of Article 66 of the Limitation Act, Article 67 of the Limitation Act would be applicable and therefore the limitation has to be counted from the date of the notice determining to tenancy. In fact, both the sides have relied on the judgment of the Supreme Court in the case of *Smt. Shakuntala S. Tiwari Vs. Hem Chand M. Singhania*, . It may be noted here, in this case, the Supreme Court was deciding an appeal from the Judgment of this Court in *Hem Chand's* case referred to above.

6. In *Shakuntala's* case, the Supreme Court was considering the question whether limitation of the suit filed by a landlord seeking decree of eviction against a tenant would be governed by Article 66 or 67 of the Limitation Act. The Supreme Court, in paragraphs 8 and 9 of the Judgment, has observed thus:-

8. ...According to the appellant only one article for recovery of possession is reserved under the Limitation Act by a landlord from a tenant, that is Article 139, Limitation Act, 1908. This article is the exact predecessor of Article 67. Article 66 is a general article, says the appellant, which does not apply to landlord or

tenant and it was further submitted that when a specific article applied, a general article should not be applied specially when it was not free from doubt. Some authorities were referred to in this behalf.

9. We accept this submission on the principle of construction....

Thus, it appears that the Supreme Court has clearly held in this Judgment that so far as a suit filed by a landlord for possession against a tenant is concerned, the limitation is governed by Article 67 of the Limitation Act because it is a specific provision. Learned Counsel for the petitioners, relying on the observations in paragraph 11 of the judgment of the Supreme Court in Shakuntala 's case, urged that the Supreme Court has held that either of the two articles, namely. Article 66 or 67, would be applicable to the facts of this case and therefore in the submission of the learned Counsel for the petitioner, it is Article 66 which would be applicable. However, reading the judgment of the Supreme Court, it is clear that Article 66 being general in nature, it may also cover cases of suits between a landlord and a tenant. However, in so far as suits filed by a landlord for recovery of possession against tenant is concerned, it will be only Article 67 which will govern limitation, it being a special article. In this view of the matter, in my opinion, there is no substance in the contention urged on behalf of the petitioners that the suit is barred by limitation.

7. In the result, therefore, the petition fails and is dismissed. Rule is discharged with no order as to costs.

8. At this stage, the learned Counsel for the petitioners requests that the interim order made in the present petition should be continued for a period of 8 weeks obviously to enable him to approach the higher Court. The learned Counsel for the respondents has no objection. In this view of the matter, therefore, it is directed that the interim order made in this petition shall continue, despite dismissal of this petition, for a period of 8 weeks from today. It is, however, directed that during this period, the petitioners shall not create any third party interests and shall not part with possession of the suit premises in favour of anybody but the respondents.

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