

(2008) 12 BOM CK 0109

In the Bombay High Court

Case No : Writ Petition No. 3710 of 2005

Ramdayal Gulabachand Khandelwal and Others

APPELLANT

Vs

Mahendra Badrinarayan Khandelwal and Others

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 227

Citation : (2009) 3 BomCR 410 : (2009) 2 MhLj 782

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : Rohit Deo, for the Appellant;

Final Decision : Dismissed

Judgement

Dharmadhikari B.P., J.—By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioners/landlords have challenged the concurrent judgments delivered by the courts below holding that because of the compromise entered into by their father with the father of respondents and a consequential decree, a tenancy was created. As the said tenancy was governed by the provisions of C.P. and Berar Premises, Rent Control Order, 1949 (hereinafter referred to as "Rent Control Order"), the landlords/petitioners could not have executed the said compromise decree.

2. The facts in brief are that, the predecessor of present petitioners filed Civil Suit No. 134/1967 against one Badrinarayan Khandelwal, father of the present respondents. The suit was for his ejectment and for possession on the basis of title. It was contended that the suit property was purchased by the plaintiffs from the defendant vide sale deed dated 17.1.1959. Part of the said property was given to the defendant Badrinarayan for occupation as licensee of the plaintiffs and he agreed to vacate it when ever demanded by the plaintiffs. It was stated that agreement of licence was oral and made on "Gudipadwa" day i.e. on 9.4.1959. It was complained that since past 2-3 years, Badrinarayan was picking

up false quarrels and relations between the parties therefore deteriorated. The plaintiffs therefore demanded vacant possession by terminating his licence. The prayer in the suit was thus for delivering vacant possession. The suit was opposed by Badrinarayan who in written statement contended that the sale deed was nominal one and was not supposed to be acted upon, He pointed out that there was a partnership and in order to save the property from claims of other partners, the arrangement was accordingly evolved and on 17.1.1959 a nominal sale deed was executed in the name of plaintiff No. 1 by Badrinarayan. It appears that after filing of this written statement on 14.2.1968, the matter proceeded further and ultimately on 12.9.1972 a compromise was entered into between the parties. As per the terms of the said compromise, defendant Badrinarayan withdrew his contentions about nature of transaction between the parties and mentioned that he claimed no title thereto. By Clause 4 of the compromise, he was given 15 years right to stay i.e. period from Diwali of 1972 ending with Diwali of 1987 and for each year, which was to be counted from Diwali to Diwali, the defendant agreed to pay Rs. 900/- inclusive of all taxes. The said clause further contemplated that "in case of default in payment of rent of any three years" the plaintiffs would be entitled to claim immediate possession of all portions. Little later, in the said Clause-4, it is observed that "if rent falls into arrears such an amount shall carry interest at Re. 1/- per month till payment." Clause 6 stated that at Diwali, 1987 when the defendant was supposed to vacate the premises, he would deliver possession of all premises including any additional permanent structure raised by him on the site. Other terms of this document are being looked into little later herein. As after expiry of the said period the possession was not handed over, plaintiffs/decreed holders filed execution against the legal heirs of defendants/judgment debtors Badrinarayan. The execution appears to have been filed on 1.1.1988. The judgment debtors/present respondents, opposed the execution and claimed that as the compromise had the effect of creating a tenancy, the execution was not maintainable. Court of Civil Judge, Junior Division, Morshi vide order dated 3.10.1988 passed below Exh. 20 accepted the objection as raised by the judgment debtors and concluded that they were tenants and hence the execution was not maintainable. This order was then challenged in Regular Civil Appeal No. 318/1988 by the present petitioners and vide judgment dated 20.2.1995 the Appellate Court dismissed the said appeal as not maintainable. Thereafter Civil Revision Application No. 815/1995 was filed by the petitioners before this Court, however, in view of the subsequent amendment to Section 115 of the Code of Civil Procedure, on 8.2.2005 the revision was allowed to be withdrawn with liberty to file writ petition. Accordingly this writ petition has been filed in which the order dt. 20.2.1995 has been challenged with prayer to permit the Execution case No. 10/1988 to proceed further.

3. In this background I have heard Advocate Shri R. Deo, for petitioners. No body has appeared for respondents.

4. Learned Counsel for petitioner has invited attention to the application of mind

by the trial Court to point out that the trial Court has without considering the effect of Clauses properly or then without considering the ratio of the various judgments cited before it, suddenly recorded a finding that the deceased Badrinarayan was tenant. It is pointed out that the part of suit premises was used for residential purpose and part for non residential purposes. The trial Court has found that as per the provisions of the Rent Control Order, the structures constructed on site lying vacant on 1.1.1967 or made vacant thereafter were only exempted and hence in present facts even on the date of recording of compromise the non residential structure in possession of the respondents was governed by the provisions of Rent Control Order. In so far as the residential part is concerned, it relied upon the judgment reported in Prabhakar Tanbaji Rokde v. State of Maharashtra 1986 B.C.I. 117(N.B.): 1985 Mh. L.J. 548, to notice that it declared that the Government Notification dated 6.2.1952 which exempted structures erected after 1.1.1951 to be void and therefore, the Rent Control Order became applicable to even the residential premises and tenancy of the respondents/Badrinarayan, was therefore governed by the provisions of said Rent Control Order. With the result it found that without permission of the Rent Controller under Clause 13[3] of the Rent Control Order, the landlords could not have asked for recovery of possession.

5. Advocate Shri Deo, contends that appreciation by Court below is perverse and contrary to the settled law. He has invited attention to the judgments in the case of (1) Konchada Ramamurthy Subudhi and Another Vs. Gopinath Naik, ; (2) Bai Chanchal and Others Vs. Syed Jalaluddin and Others, ; (3) State of Haryana and Ors. v. Rani Devi and Anr., 1996 (3) S.L.J. 88 (SC) ; (4) Kamlabai and Others Vs. Mangilal Dulichand Mantri, to show how the approach of Court below is erroneous.

6. Perusal of judgment of Hon''ble Supreme Court in the case of Konchada Ramamurthy (supra), shows that there the suit filed was for ejectment of tenant and in compromise reached therein time of 5 years was given to the tenant to vacate mentioning that if the tenant failed to vacate, the landlord was free to execute the decree. The other term was in relation to failure to pay rent for any three consecutive months, and liberty was given to landlord to adjust the advance towards arrears and also to evict the tenant from suit house without waiting for expiry of said period of 5 years. In paragraph No. 6, in this background, the Hon''ble Apex Court has noticed the argument that as landlord had filed suit to evict the judgment debtor/tenant, his intention would not have been to create a fresh tenancy. In paragraph No. 12, the Hon''ble Apex Court has considered the effect of deposit of Rs. 300/- by the judgment debtor with the landlord and found that the amount was really paid as a security for the amounts due under compromise deed. It also noticed the significance of the condition which enabled the decree holder to execute the decree, if the judgment debtor failed to pay rent for any three consecutive months. The Hon''ble Apex Court therefore, gathered that the intention of parties was not to enter into a relationship of landlord and tenant. It is in this background in paragraph No. 11,

the use of word "Rent" has been considered by the Hon''ble Apex Court and it has been held that it was not determinative of the status of the judgment debtor. In paragraph No. 13 the Hon''ble Apex Court found that the long period of 5 years which weighed with the High Court was totally irrelevant because it did not militate against the construction that compromise only created a licence, for the decree holder had apparently lost in the trial Court and it was in the Court of appeal the compromise was arrived at. These facts therefore, clearly show that in the backdrop of consent to compromise given by the judgment debtor in appeal filed by the landlord when the judgment and decree of trial Court was in favour of judgment debtor, the terms and conditions have been construed by the Hon''ble Apex Court.

7. In judgment in case of *Bal Chanchal v. Syed Jalaluddin* (supra), again there was a compromise decree for eviction of a tenant and in paragraph No. 6 the Hon''ble Apex Court has considered the argument that new tenancy was created which was to continue for 5 years. Perusal of the said paragraph shows that the document of compromise revealed that though judgment debtor were liable to immediate eviction, the decree holder agreed to let them in possession for five years. As this was being granted as a special case, the decree holder insisted that mesne-profits should be paid at much higher rate and the Hon''ble Apex Court has pointed out that, between all the defendants governed by the two decrees, the amount payable as mesne-profits worked out to Rs. 7314-08-0 p.a., which had no relation with original rent of Rs. 199/- per annum for the entire land fixed by the lease of 1895. The Hon''ble Apex Court also found that decree holder sought further protection by requiring the judgment debtors to pay the mesne profits in monthly installments and the installments were so worked out that entire mesne-profits for 5 years were to be received by him within period of three years. There was also a clause, that in case of default of mesne-profit, the defaulting judgment debtors could be immediately called upon to deliver the possession. It is in this background, the Hon''ble Apex Court found that these terms could not have been interpreted to conclude creation of new tenancy. Again it is apparent that the view taken is in the facts of the matter.

8. In the case of *Kamlabai v. Mangilal* (supra), the proceedings were under Clause 13 of the Rent Control Order, 1949 itself for grant of permission. During pendency thereof before the Rent Controller, parties entered into compromise and tenant admitted the claim of landlord and surrendered the tenancy. Tenant undertook to vacate the cinema theater premises by 31/3/1974 and Rent Controller directed proceedings to be filed, as there was no provision for recording of compromise. Thereafter from time to time tenant sought extensions to vacate the premises and as per agreement between parties, the matter was referred to Arbitrators. In arbitration there was further compromise and time till 31/3/1977 was given to the tenant to vacate and award was accordingly passed on 29/3/1974. Compensation for use and occupation was fixed at Rs. 1301/- P.M. plus taxes. Accordingly a decree also came to be passed by the Civil Court which was sought to be executed as tenant did not vacate even after further extensions

up to 31/12/1977 and then up to 31/12/1980. The Hon''ble Apex Court in paragraph 20 and 21 of the judgment has held that this was a case of surrender and therefore, objection about permission of Rent Controller was misconceived.

9. In the case of Rangrao v. Kamalkant (supra), there was already a decree of eviction passed by the competent Civil Court against a tenant of a building which stood exempted from Rent Control Order because of a notification.. The question was what would be the effect of subsequent setting aside of that notification. The date of decree was 3.1.1985 and the notification was set aside vide decision of this Court dated 19.6.1985. The tenant raised objection that decree became inexecutable as Civil Court lost jurisdiction to pass a decree or order of his eviction in view of the said decision as the property stood covered by the Rent Control. The Hon''ble Apex Court found the landlord entitled to execute the decree as on 3.1.1985 the Civil Court had jurisdiction to pass such decree and Court verdict rendered on 19.6.1985 could not have effect of rendering the said decree a nullity, as it had become final. The Hon''ble Apex Court has held that judgment of any Court can not have retrospective operation because that is the plenary power of Parliament. Thus the judgment does not consider the issue which falls for consideration before this Court i.e., whether the compromise had effect of creation of any tenancy between the parties. In facts before me, the lower courts have found that because of compromise deed dated 12.9.1972 a tenancy was created between the parties. It is to be noted that the said arrangement between the parties was to remain in operation till Diwali of 1987. In other words, the tenancy held as created was to continue till Diwali, 1987 and before that i.e. on 19.6.1985 this High Court has quashed the notification of exemption. Thus after the said date of judgment, the tenancy was found continuing and hence the provisions of Rent Control Order have been held to be applicable to such tenancy.

10. In present facts, it is to be noted that the period for vacation as envisaged in the compromise decree is of 15 years. Rent has been specified to be Rs. 900/- and period of one year has also been specified as from Diwali to Diwali. The Suit as filed was for eviction of licensee on the ground that the original plaintiff had purchased the property from him and defence of licensee was that he had not executed any sale deed in favour of the plaintiffs. He had pleaded that sale document was only a nominal agreement entered into to avoid liabilities of other partners. It is in this backdrop that the compromise needs to be interpreted. The background in which the Hon''ble Apex Court in its various judgments interpreted the compromise decrees are already mentioned above, and it is clear that as such the facts of each case are determinative to find out the application or otherwise of Rent Control protection. Coming to the present controversy, the petitioners'' claim in the suit itself was that the original defendant-Badrinarayan was licensee and as he had started picking up quarrels with the plaintiffs, the relations between the parties had deteriorated. Decree for his eviction was therefore sought in Suit. The grant of period of 15 years and the conditions mentioned above, therefore leave no manner of doubt that the parties entered

into a compromise but real intention was to permit Badrinarayan to occupy the premises by paying charges therefore i.e. as tenant. Relevant definitions of Tenant, Landlord in Rent Control Order are considered by the trial Court in its judgment and there is no dispute about correctness of the said consideration. The question argued is only about the interpretation and effect of the compromise deed. The use of word "rent" as appearing in the compromise deed therefore, has been high-lightened by the trial Court. Grant of period of 15 years to a licensee to vacate with whom the relations were strained clearly militates with arguments of petitioners before me. Badrinarayan only withdrew his claim to title of suit property and never agreed to vacate immediately. He was not given time to vacate but as per Clause 4 he got right to occupy and use the premises for limited period of 15 years against obligation to pay annual rent. His 3 defaults in paying rent enabled the landlord to recover the possession by executing the decree. But then except for this clause, there is no other clause entitling landlord to immediate possession. His late payment of rent entitled landlord to charge interest. Similarly his failure to vacate at the end of 15 years enabled landlord to recover damages at 5% per day for alleged unauthorised user. It appears that the defendant/judgment debtor was free also to erect permanent structure but ultimately it was to go to plaintiffs after Diwali of 1987. Thus the compromise nowhere records declaration of Badrinarayan to forthwith vacate or that time of 15 years was given to him to vacate. On the contrary it grants and records right of Badrinarayan to use and occupy for 15 years. The compromise appears to be part of few other suits and resolution of some other disputes between parties but then in this situation, petitioners ought to have brought on record the need of such type of arrangement. Compromise did/does not grant any concession to deceased Badrinarayan and it can not therefore be said that he got time of 15 years to vacate. It accepted his right to continue in occupation subject to payment of charges therefore and then introduces time-limit of 15 years. The compromise dated 12/9/1972 therefore has the effect of and created a tenancy at least for 15 years.

11. When that tenancy was current, because of the judgment of this Court dated 19.6.1985 the provisions of Rent Control Order, 1949 became applicable to residential part of the tenanted premises. Because of this superimposition of Rent Control Order, 1949, the tenancy could not have been terminated except without the permission of Rent Controller. The execution therefore was not maintainable in so far as the residential premises are concerned. In so far as the non residential premises are concerned, in present facts it is clear that the structure existed prior to 1.1.1967. The suit filed by the predecessors of plaintiffs was itself instituted on or about 20.9.1967 and on the basis of a sale deed dated 17.1.1959. It is therefore, clear that on the date on which the compromise decree was entered into, the structure was subject to rent control legislation. Therefore the tenancy of non residential premises then created on 12.9.1972 was subject to provisions of Rent Control Order since its inception and hence, execution was not maintainable as said tenancy also could not have been

terminated without the permission of Rent Controller.

12. It is therefore, obvious that the execution of compromise decree has been rightly held to be not maintainable. No case is made out warranting interference in writ jurisdiction. Writ petition is therefore, dismissed. No costs.