

(1994) 09 BOM CK 0017
In the Bombay High Court
Case No : Writ Petition No. 10 of 1991

Rukmini Malbari and Others

APPELLANT

Vs

Shri Shankar Vithal Shinde and Others

RESPONDENT

Date of Decision : 13-09-1994

Acts Referred:

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 22(2)
Petroleum Act, 1934 — Section 2
Evidence Act, 1872 — Section 115

Citation : (1995) 3 BomCR 418

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : M.B. D" Costa, for the Appellant; S.K. Kakodkar and R.V. Kamat for the respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Da Silva, J.—The challenge in this petition is the judgement of the Administrative Tribunal, Goa, Daman and Diu, dated 10th September, 1990 in Eviction Appeal No. 49/85 which has unsettled the judgment of the Rent Controller, North Division, Panaji, dated 23rd April, 1985 in Case No. RENT/17/82. By the aforesaid judgment the Rent Controller has allowed an application for eviction moved by the original late petitioner Shri Anand Malbari now represented by his legal representatives, the petitioners for eviction of the respondent No. 1. (hereinafter called the respondent) on two grounds of change of user of the premises and causing nuisance to the neighbours as a result whereof the respondent was directed to hand over vacant and peaceful possession of the suit premises to the said late Anand within a period of sixty days from the date of the receipt of the order.

2. The brief facts of the case are that the late Anand by deed dated 1st December, 1973 granted on lease to the respondent the shop no. 5 on the ground floor of his building "Anand Niwas" situated at Vivekanand Road, Panaji.

Clause 4 of the lease deed provided that the shop was for the purpose of setting up a business dealing in mineral oils such as kerosene, lubricant oils, diesel petrol, etc. and should not be used for any other purpose. Clause 7 provides that the shop should be kept in good condition and any damage to it had to be made good by the lessee. There was also a provision that the lessee should not store or cause to be stored therein any foul smelling or explosive materials. The case of the petitioner is that the respondent, in accordance with the terms of the agreement, initially used the premises for office to carry on his aforesaid business. However, later on he began to store kerosene in barrels in the said shop. This fact apart from being in breach of the agreement was creating a nuisance to the occupants of the building and the neighbours. Besides there was also risk of fire in that kerosene is highly inflammable and, stocked in closed barrels, was also an explosive. The late petitioner therefore filed eviction proceedings against the respondent by his application dated 4-3-1982 on two grounds namely (1) change of user alleging that the respondent was carrying on actual business in the suit shop which has been leased only for the purpose of running or establishing an office in the premises; and (2) nuisance created to the occupants and neighbours of the building by storing kerosene and petrol in the shop and selling it to customers. By judgment dated 23-4-1985 the Rent Controller allowed the application and directed the eviction of the respondent. An appeal filed by the respondent to the Administrative Tribunal was allowed whereby the Tribunal dismissed the petitioner's application by judgment dated 10-9-1990 which is being impugned by the petitioner in this petition filed under Articles 226 and 227 of the Constitution.

3. Upon hearing Shri Kakodkar, learned counsel for the respondent, Shri B. D. Costa, learned counsel for the petitioners, has fairly given up the ground of change of user and submitted that the question which arises for determination of this Court is whether there is or not nuisance caused by the respondent by storing and selling kerosene in the suit premises in violation of Clauses 4 and 7 of the lease agreement. In this respect the grievance of the learned counsel is that the impugned judgment of the Tribunal by setting aside the order of the Rent Controller which has allowed the late petitioner's application for eviction of the respondent on both the grounds pleaded by him has negatived the plea of the petitioner and said that every person used to store kerosene at home and that if this would be an objectionable action, in that case everybody had to stop using or keeping kerosene in his house. However it was also said that kerosene could not be compared with cooking gas which one used to keep in the house for domestic consumption. It was contended by the learned counsel that nobody could deny that kerosene was a highly inflammable substance and although cooking gas might be slightly more inflammable substance than kerosene, the Tribunal went wrong in applying different standards while assessing the question of nuisance. It was urged by learned counsel that if cooking gas could be kept in the house, in that case there was no reason why such gas should not be stored in a shop. This was submitted by the learned counsel in respect of a judgment

relied by the Tribunal in the case of Ghansham Dass, Proprietor M/s. Janta Gas Depot v. Gurdwara Shri Guru Nanak Sat Sangh Sabha Regd., Sonapat, AIR 1983 C J 295. This was a case under the Haryana Urban (Control of Rent and Eviction) Act, 1973 namely its section 13(2) (ii) (b) and the Court was dealing with the question of scope and applicability of that section. The shop had been let out for cloth business and the tenant started selling oxygen gas cylinders later on without the permission of the landlord. The Punjab and Haryana High Court has observed that it is a matter of common knowledge that oxygen gas is highly inflammable and when cylinder's full of this gas are kept in the shop, there are greater possibilities of their catching fire by accident. Even if the original use was not specified and the shop was let out for business, that would imply that the shop was being acquired by the tenant for carrying on a business in innocuous articles. When that user was changed in the sense that highly inflammable articles for sale were kept in the shop, it should have to be held that there was a change of user which would disqualify the tenant to use the shop. Thus the Court ruled that this fact would amount to a change of user and the tenant was bound to be ejected. The learned counsel then contended that it would make a lot of difference between storing small quantity of kerosene in the house and storing kerosene for selling in large quantities in the leased shop. Therefore a dividing line should be established bearing in mind that here was a case of a building wherein about 30 to 40 people were living in flats leased for residential purpose. Thus it was a question of gradation and assessment of the potentiality of the danger which would be caused to these occupants of the building in special circumstances of the case. The learned counsel has also made another grievance that the Tribunal has not answered in the impugned judgment the question raised by the ruling relied by the parties in the case of Biswanath Chatterjee Vs. Ajit Kumar Sarkar, . That was a case under the West Bengal Premises Tenancy Act, 1956, namely its section 13(1) (e), and the question which was being discussed was regarding the nuisance or annoyance to the landlord caused by the tenant as a ground for eviction of the tenant from the premises under his tenancy. While dealing with the question of nuisance or annoyance the Court observed that annoyance or nuisance has not been defined in the Act and accordingly it has to be construed in the normal connotation according to plain and sober notions of living. According to judicial decisions, nuisance is anything which interferes with the normal comforts of human life or endangers the health and safety of the neighbour while annoyance is wider and covers anything which reasonably troubles or disturbs the mind or pleasure not of a fanciful or skilled person but of an ordinary sensible person. Thus it was not possible to lay down any rule of law applicable to every case as it would be at all times a question of fact with reference to the surrounding circumstances. In this regard the learned counsel contended that the Tribunal failed to consider the danger created to the occupants of the building and neighbours by the respondent in storing large quantities of kerosene in barrels in a residential building which was located in the heart of Panaji city. It was urged that the Tribunal had not applied its mind to the fact that the respondent was not dealing with small quantity of kerosene which

was being stored in the suit shop not for domestic consumption but instead with large quantity of explosive substance for commercial and business purposes. Hence the Tribunal had not given any finding as to whether the storing of large quantities of explosive and inflammable substance was endangering or not the common safety of the neighbours of the building. It was further submitted by the learned counsel that the issue which was placed for consideration was regarding the interpretation the Court should give to Clauses 4 and 7 of the agreement which should be read with the fact that nobody was free or supposed to create nuisance to others.

4. Further the learned counsel stated that the landlord could not authorise also a tenant to cause nuisance to third person. As such if the first issue would be the question as to whether a large scale of storing and selling of kerosene being an inflammable substance in the leased shop located on the ground floor of a residential building, wherein admittedly about 40 persons were living, would amount or not to nuisance, the next issue was whether a landlord could authorise a tenant to cause such nuisance to other tenants or neighbours of leased premises. In this regard the learned counsel made reference to a case of prohibition of sub-letting without permission of the landlord which could be authorised if the landlord gives consent for such sub-letting. The same position would be in connection with material alteration of the leased premises. It was submitted by the learned counsel that so far nuisance is concerned the landlord could not authorise any nuisance to be committed in the premises because this would by itself be an illegal action. Therefore Clause 4 should be viewed in its light and the interpretation of the words "dealing in business of kerosene, petrol, etc.," should be interpreted as restraining the landlord to permit the tenant to carrying on his business so as to cause nuisance and endanger the safety of the remaining occupants of the building. The learned counsel took objection to the observation made by the Tribunal that kerosene was not a highly inflammable substance like petrol and gas. According to the learned counsel the main question was not as to whether the tenant had been authorised by the landlord to store and sell kerosene but whether he could have authorised the tenant to store inflammable or explosive substances when in Clause 4 of the agreement he had permitted the tenant to set up a business dealing in mineral oils such as kerosene, lubricant oils, diesel, petrol, etc. According to the learned counsel while interpreting the lease deed the Court would have to construe clause 4 in a manner which it did not lend any interpretation which would suggest that the landlord had authorised the tenant such an legal act of nuisance and more particularly had given him permission to store inflammable and risky substances in a residential building thus endangering the safety of its occupants. Therefore while interpreting clause 4 the question which would arise was whether the landlord could reasonably permit a person to store and sell kerosene and other inflammable substances on the ground floor of a residential building. If clause 4 was to be interpreted to mean that the words "dealing in" was including also "storing and selling" then such clause would logically authorise the tenant to

store and sell not only kerosene in the suit premises but also petrol and other mineral oils which might carry higher explosive potentialities. The learned counsel argued that it was impossible to hold this type of interpretation of the clause of the agreement because by giving this permission the landlord would have authorised the tenant to do an illegal act and cause nuisance to other people. Thus by rejecting the petitioner's plea and refusing to accede to the interpretation sought to be given by him to Clauses 4 and 7 the Tribunal has failed to give to such clauses a reasonable interpretation. In other words an interpretation which would not amount to the landlord authorising nuisance or illegality to be committed by a tenant in detriment of the remaining occupants of the building.

5. In order to appreciate the submissions of the learned counsel, it is important to advert to the reasons given by the Tribunal to discard the ground of nuisance sought to be made by the petitioners to get the respondent evicted from the suit premises. In this regard the impugned judgment has said that once it was found by the Tribunal that clause 4 of the agreement was meant for storage of mineral oils such as kerosene and therefore storage of kerosene could not be said to be nuisance under the agreement. What was prohibited under clause 4 was storing of any foul smelling or explosive materials. Thus when under clause 4 either expressly or by necessary implication the storage of mineral oils like kerosene was permissible it would be contradictory in terms of the deed that such sale was prohibited. Besides it would be difficult to hold that kerosene would by itself be an explosive material or its storage would be causing nuisance or that kerosene was material emanating foul smell. It was in that context that the Court took note of the judgment in Ghansham Dass case reported in AIR 1983 CJ 295 and sought to distinguish the said judgment on the ground that in that case the shop was given for business without specifying the reasons and therefore it was to be presumed that the business would be of innocuous articles and when that was changed to business of highly inflammable articles in that case it was to be held as change of user. However, in the present case the shop had been let out for the purpose of setting up a business dealing in mineral oils and the business conducted was the same. Besides, kerosene by itself could not be said also to be a highly inflammable substance and therefore the said decision was not attracted. Further the Tribunal was also of the view that it was common knowledge that though kerosene has a peculiar smell however that smell could be felt only when one comes close and therefore it could not be said that it emanates foul smell. Secondly, though kerosene was inflammable however it was not a highly inflammable substance like petrol or gas. It was in this background that the Tribunal held that storing of kerosene could not be considered to be a nuisance within the meaning of section 22(2)(d) of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (hereinafter called the Act).

6. It thus follows that Shri D" Costa seeks to lay emphasis on the question of the landlord's authorisation to store and sell amounting to illegal permission to

commit an illegal act due to the dangerous and explosive nature of kerosene which according to the learned counsel would create a potential risk to the safety of the occupants of the building and also of its neighbours besides emanating foul smell thus causing also nuisance. According to the learned counsel apart from the fact that the Tribunal failed to consider that the respondent was not dealing with small quantity of kerosene stored in the premises for domestic consumption and on the contrary was keeping large quantity of explosive substance in barrels meant for commercial or business purposes, the interpretation sought to be given by the Tribunal in condoning such storage of kerosene by the respondent in the shop situated on the ground floor of a residential building would lead to an unreasonable construction of the clauses of the agreement since the same would amount to permit the landlord to authorise the tenant to commit an illegal act and cause nuisance to the other occupants of the building.

7. With due regard it does not appear to me that the questions placed by Shri D" Costa are the correct questions to be adjudicated in the facts and circumstances of the case. In my judgment the real issue seems to be as to whether the lease agreement has actually permitted the respondent to store mineral oils in the leased shop for the purpose of his business in terms of the deed executed by him with the late Anand Malbari. Shri D" Costa has not pressed the first ground of his petition which was dealing with the change of user alleged to have been committed by the respondent in respect of the suit shop which according to the late petitioner, had been leased not for the use of storing and selling mineral oils like kerosene but instead for the purpose of establishing therein his office only. The tribunal in a true interpretation of the relevant clauses of the agreement, namely clauses 4 and 7, has held that the said agreement would permit the tenant to run his business of storing and selling mineral oils like kerosene in addition to setting up office in the premises. In my view this finding appears to be quite a sound and consistent with a very wording of the agreement and there is no reason to discard the same. Being so the question of the landlord being not supposed to give to the tenant such permission to store and sell in the leased premises inflammable substances which would cause nuisance and risk to the safety of the occupants of the building does not appear to be relevant in the context of the legal relationship between him and the tenant.

8. As rightly pointed out by Shri Kakodkar, the ground of nuisance provided in Section 22(2)(d) of the Act necessarily contemplates only two parties i.e. the landlord and the tenant. Section 22(1) provides that a landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf and sub-section (2)(d) reads that if the Controller, after giving to the tenant a reasonable opportunity of showing cause against the application is satisfied that the tenant has been guilty of such acts and conducts which are a nuisance to the occupiers of the other portions of the same building or of building in the neighbourhood he shall make an order directing the tenant to put the landlord in possession of the building. This means that if the landlord has authorised the tenant in the lease

deed to do something which may cause nuisance to the other tenants or the neighbours of the building he cannot certainly take advantage of his own wrong and spouse the cause of other tenants or neighbours. Needless to say that in such situations the neighbours of the building or the remaining tenants can take necessary steps to react against such nuisance by approaching the concerned District Magistrate and, in this particular case of storing and selling kerosene, secure the respondent's prosecution under Petroleum Act or get the licence obtained by him cancelled. The landlord in such circumstances is totally incompetent to spouse the cause of the other tenants or neighbours of the building for his own private gains.

9. Shri Kakodkar has also disputed the petitioners contention that kerosene is an explosive or an explosive substance. According to the learned counsel the storage and sale of kerosene and other petroleum substances is regulated under the Petroleum Act, 1934 which requires that a licence should be granted by the District Magistrate for a person to sell and store petroleum products, that is to say to deal with the selling of such types of products. There is also in force of the Explosives Act, 1884 and the Explosives Substances Acts, 1908 which regulates the matter and defines what is explosive or explosive substance. The learned counsel has taken me through section 4(d) of the Explosives Act, 1884 which gives an exhaustive definition of the word "explosive" and from which it can be seen that kerosene is not included in this definition. Similarly section 2 of the Explosives Substances Act, 1908 defines "explosive substance" as including any materials for making any explosive substance. In other words the definition by itself from its implications excludes kerosene from the definition of "explosive substance". Thus it is seen that the business of storage and sale of kerosene is defined under the Petroleum Act. Admittedly kerosene is a petroleum product in terms of the definition of "petroleum" in section 2(a) of the Petroleum Act which defines "petroleum" as a liquid hydrocarbon or mixture of hydrocarbons, and any inflammable mixture (liquid, viscous or solid) containing any liquid hydrocarbon. Section 2(c) refers to "flash-point" of any petroleum which means the lowest temperature at which it yields a vapour which would give a momentary flash when ignited. Section 2(b), (bb), and (bbb) lays down three categories of petroleum according to its flash-point. It was contended that kerosene sold for domestic consumption falls normally in the Clause (c) and at the most in clause (d). Thus in a correct perspective of law kerosene cannot be said as being a dangerous or highly inflammable product. It is not also an explosive nor an explosive substance.

10. On the other hand nowhere the petitioners pleaded that the respondent had no licence granted by the District Magistrate to deal with petroleum or kerosene business. Section 7 of the Petroleum Act, 1934 provides that no licence is needed for transport or storage of limited quantities of petroleum class B or petroleum Class C. Section 8 also provides that no licence is needed for import, transport or storage of small quantities of petroleum Class A.

11. According to Shri Kakodkar when a licence is required the same is granted always in respect of certain premises wherein the business of petroleum is intended to be run. Such licence is granted only after the application is duly advertised in the Gazette inviting objections and the same is issued after all considerations like danger, nuisance, etc. are taken into account. The learned counsel has placed before me a Government Gazette and some xerox copies of licences granted to the respondent by the concerned authorities right from 1975 giving him permission to store kerosene in the suit shop for the purpose of running his business.

12. I have gone through these licences and I am satisfied that the respondent was running his business of storing and selling kerosene in the suit shop soon after the lease agreement was entered into by him with the late petitioner. The petitioner has not denied or disputed the genuineness of the documents shown to me by the learned counsel for the respondent. Hence in such circumstances it is difficult to accept the petitioner's contention which was also otherwise pleaded by him in the petition that the respondent, in accordance with the terms of the agreement, initially used the premises for office to carry on his business and only later on began to store kerosene in barrels in the suit shop. Admittedly the lease agreement was executed by the late Anand with the respondent in December, 1973 and the licences issued by the concerned authorities to the respondent for the storage of kerosene oil in the suit shop are prior to 1975 i.e. the licences were originally issued as being valid upto 31st December, 1975 and subsequently renewed till 1988. The eviction proceedings on the ground of illegal storage of kerosene and change of user was instituted by the late petitioner only in 1982. Besides the respondent has also produced a xerox copy of the Registration Certificate of Establishment issued by the Inspector from which it is seen that on 22nd August, 1975 the respondent's establishment under the name and style of "Jawan Agencies" was established by him in Shop No. 5, Anand Niwas, i.e. the suit shop, for the purpose of selling kerosene, lubricants, etc. This being the position it is clear that if right from 1975 the respondent was carrying on the business of selling kerosene in the suit shop it is impossible to accede now to the petitioners proposition that such storage and sale of kerosene in the suit premises amounts to a nuisance which is likely to endanger the safety of the occupants of the building as well as of its neighbours.

13. Thus in my judgment the finding of the Tribunal that in the facts and circumstances of the case the storing and sale of kerosene by the respondent in the suit shop cannot be said as amounting to a nuisance within the meaning of section 22 (2) (d) of the Act appears to be a correct one need not be interfered with by this Court in the exercise of its extraordinary or supervisory jurisdiction under Articles 226 and 227 of the Constitution.

14. In this view of the matter the petition is bound to fail and deserves to be rejected. Hence the petition is hereby dismissed and the judgment of the Administrative Tribunal dated 10th September, 1990 is upheld. Rule accordingly

discharged with however no order as to costs.