
(1969) 09 BOM CK 0007

In the Bombay High Court

Case No : Special Civil Application No. 262 of 1966

S. Kumaran

APPELLANT

Vs

The Competent Authority (The Assistant Housing
Commissioner, Maharashtra Housing Board, Bombay and
Another)

RESPONDENT

Date of Decision : 12-09-1969

Acts Referred:

Bombay Housing Board Act, 1948 — Section 53

Constitution of India, 1950 — Article 227

Transfer of Property Act, 1882 — Section 108

Citation : AIR 1970 Bom 177 : (1970) 72 BOMLR 487 : (1970) MhLj 513

Hon'ble Judges : Vaidya, J;K.K. Desai, J

Bench : Division Bench

Advocate : K.K. Singhavi and M.S. Ramamurty, for the Appellant; M.C. Shah, for the Respondent

Judgement

K. K. Desai, J.—In this petition under Article 227 of the Constitution, the petitioner has challenged the legality of the order of the Competent Authority, being the Assistant Housing Commissioner, South Bombay, dated September 13, 1963, made u/s 53-A of the Bombay Housing Board Act, 1948, directing the petitioner to vacate tenement No. 28/991 situated at Tilak Nagar, Chembur, which was then being occupied by the petitioner as a tenant and the appellate order dated February 10, 1966, made by the State Government confirming the above order of eviction.

2. The facts which require to be noticed are as follows: The petitioner was a tenant of the Housing Board in respect of the above premises from 1954 and was paying rent at the rate of Rs. 28,55. His case is that he got married in 1958 and he had been continuously residing in the tenement. He was served with a show-cause notice dated February 23, 1963, by the Competent Auth authority whereby he was informed that-

(1) he had sublet without the permission of the Housing Board the whole or part of the premises; and

(2) he had accommodated persons and he himself was not staying in the tenement.

In pursuance of the provisions in Subsection (1) (a) of Section 53-A of the Bombay Housing Board Act, 1948, he was called upon to tender an explanation and produce evidence, if any, and show cause within 14 days from the date of service of the notice as to why an order of eviction on the above two grounds should not be made against him. The petitioner by his reply dated April 15, 1963, stated that he was surprised about the two grounds mentioned in the above show-cause notice and stated that the facts mentioned were totally wrong. He further stated that it should be noted that no one except those authorised by the Housing Board were staying with the petitioner in the tenement and he himself was occupying the premises. He submitted that the statements made would meet with the requirements.

3. Nothing further transpired and the above impugned order dated September 13, 1963, was passed against the petitioner directing him to vacate the tenement. The respondent's case is that the order made in September 1963 was pasted on the tenement. The petitioners case is that the order was never served on the petitioner and ultimately, an order dated March 5, 1965, was pasted on the tenement stating that the petitioner had not vacated the tenement in spite of Competent Authority's eviction order having been served on him. He was informed that vacant possession of the premises would be taken by execution of warrant of possession unless he handed over the same forthwith to a representative of the Housing Board. By further correspondence the petitioner stated that he had never been served with the above order of eviction and time should be given to him for filing an appeal. He was informed that the eviction order was served on him on September 22, 1963. The petitioner then filed an appeal on March 8, 1965, to the State Government u/s 53-C of the Act. By the appellate order dated February 10, 1966, on behalf of the State Government, it was recited that it had called for a report from the Competent Auth authority and upon the consideration of the contents of the report after hearing the petitioner, it had formed an opinion that the eviction order was fit and proper on the ground that the petitioner was not found to be staying in the tenement with his family and had accommodated number of unauthorised persons all the .time in the tenement and the petitioner's case that he was residing in the tenement with his wife and son was not correct. The order of eviction was confirmed.

4. In the affidavit in reply made by Padmakar Jagannath Tipnis, the following further facts were stated: The tenement was checked on various occasions on 7-2-1963, 3-7-1963, 20-3-1964, 27-5-1964, 7-6-1964, 2-7-1964, 21-10-1964, 4-3-1963, 9-7-1965. An unauthorised occupant had given under his signature a statement on February 7, 1963, to the effect that the petitioner was residing in another tenement No, 19/218 at Chembur. One Thankappar and one Surendran

were residing in the tenement on February 20, 1964. One K. M. Pillay and N. Jayasingh were similarly residing unauthorisedly in the tenement. The information gathered was that the petitioner was not a married person and in June 1964 he was residing in the tenement with his sister's husband, brother and nephew. The Competent Auth authority was satisfied that the petitioner had committed breaches of terms and conditions of tenancy and, therefore, the eviction order dated September 13, 1983, was passed.

5. It requires to be stated that the petitioner's case is that the eviction order was never served on the petitioner at any time. He had instituted the appeal to the State Government in the time prescribed.

6. The contentions made on behalf of the petitioner in support of the reliefs claimed in the petition are that in the matter of making of the impugned order of eviction dated September 13, 1963, the Competent Auth authority had committed breach of the provisions in Sub-section (1) (a) of Section 53-A relating to affording of reasonable opportunity to the petitioner before the eviction order could be passed under that section against the petitioner. The contention was that having regard to what is stated in the affidavit in reply, the information on the basis whereof the show-cause notice dated February 23, 1963, was served on the petitioner was a statement in writing under signature of an alleged unauthorised occupant made on February 7, 1963, disclosing that the petitioner had sublet the tenement to some unauthorised persons, Apart from that statement, no other information was the basis of the show-cause notice served on the petitioner. This statement was not disclosed to the petitioner and was not furnished to him at any time either before, along with or after the show-cause notice. Some information appears to have been gathered by the Competent Auth authority on July 3, 1962. Apart from these two pieces of information evidence, the Competent Auth authority was not in possession of any facts (at the date of the order of ejectment dated September 13, 1963) towards the allegation of defaults made by the petitioner and mentioned in the show-cause notice. It was obligatory under the provisions of Sub-section (1) (a) of Section 53-A on the Competent Auth authority before arriving at any decision about evicting the petitioner from the tenement to convey to the petitioner both the above pieces of evidence to enable the petitioner to show cause and in that connection to tender explanations and produce evidence to prove that the allegations of defaults made against the petitioner were false, Since the order of eviction was made on the basis of the above two pieces of evidence which were not brought to the knowledge of the petitioner, reasonable opportunity was not afforded to the petitioner and the order was in violation of provisions in Sub-section 1 (a) of Section 53-A in connection with affording of opportunity to the petitioner to show cause. For this reason, the order must be set aside.

7. The further contention was that the scheme of the above Sub-section (1) (a) and the provision of appeal as contained in Section 53-C and the withdrawal of jurisdiction of Civil Courts u/s 53-D goes to show that in the matter of depriving

occupants of the premises belonging to Housing Board by ejectment orders, it was intended by the Legislature that a full and complete opportunity of reasonable hearing similar to that in a Court of law must be provided to the occupants. The appellate auth authority in this case on the face of the appellate order proceeded to decide on information gathered by the Competent Auth authority much subsequent to the date of the order of ejectment No Tribunal of appeal could proceed to decide any appeal on fresh facts brought on record after the order of the first Tribunal. The order of the appellate auth authority was accordingly entirely contrary to ordinary principles of law and was liable to be set aside. The second argument was that in fact the two allegations made against the petitioner were false and the petitioner was, therefore, not liable to be ejected.

8. In connection with the above first contention, it requires to be noticed that u/s 53-A (1), the State Government is empowered to appoint officers of certain rank as Competent Auth authority for performing functions of the Competent Auth authority as prescribed in Chap. V-A of the Act. u/s 53-A(1), this auth authority is empowered notwithstanding anything contained in any law for the time being in force to make an order of eviction against the unauthorised occupant of the premises of the Housing Board on the ground mentioned in Sub-section (1). Subsection (1A) provides:

"Before an order under Sub-section (1) is made against any person, the Competent Auth authority shall inform the person by notice in writing of the grounds for which the proposed order is to be made and give him a reasonable opportunity of tendering an explanation and producing evidence, if any, and to show cause why such order should not be made, within a period to be specified in such notice..... Any written statement put in by such person and documents produced in pursuance of such notice shall be filed with the record of the case and such person shall be entitled to appear before the officer proceeding in this connection by an advocate, attorney or pleader."

Under Sub-section (2) powers of executing ejectment order are conferred on the Competent Authority, Section 53-C provides for an appeal to the State Government within a period of one month from the date of service of the ejectment order. The State Government is under Sub-section (3) of that section authorised to stay the execution of the previous orders made. Section 53-D is for depriving the ordinary Civil Courts of jurisdiction in respect of the examination of the correctness and legality of the orders passed by the State Government and Competent Authority.

9. In connection with true construction and effect of the provisions in Sub-section (1A) of Section 53-A, it first requires to be remembered that the scheme in the section is for depriving the ordinary Civil Courts of jurisdiction to pass orders of eviction in respect of the premises of the ownership of the Housing Board and creates an administrative tribunal empowering it to eject occupants from premises belonging to the Housing Board. Apparently, the Legislature was

desirous that the prescribed administrative tribunal must not act unreasonably and arbitrarily and the rights of occupants must not be affected unreasonably and in that connection reasonable safeguards must be provided. It is towards that objective that right of appeal was created u/s 53-C and provision was made under Sub-section (1A) of Section 53-A for compelling the Competent Auth authority to give reasonable opportunity to show cause to the concerned delinquent occupants. Now, on the language of the subsection (1A), the submission on behalf of the respondents has been that the opportunity that is afforded to a delinquent occupant is to show cause by himself. The obligation was on such delinquent occupant to produce his evidence in defence, The right given to him is only of tendering explanations by himself. Unless he claimed a hearing, it was not necessary for the Competent Auth authority to fix any dates for a hearing. It was not necessary that such dates should be fixed and thereby only reasonable opportunity would be available to the delinquent occupant. The obligation was on such a delinquent occupant to tender his explanations and mere denial by his written statement was entirely insufficient. The delinquent occupant would know of his own misconduct and the provision in Sub-section (1A) was towards enabling him to tender his own evidence--documentary and oral--towards explaining his misconduct. Now, it appears to us that to construe the provisions in this Sub-section in the manner suggested on behalf of the respondents would render the provisions entirely nugatory in respect of the opportunity that the Legislature intended that the delinquent occupant must have and would further render the provisions in the section ultra vires of the Constitution, inasmuch as the occupant's proprietary right of occupation would be liable to be destroyed without any safeguards.

10. In this connection it first requires to be remembered that Legislature could not have forgotten that ordinarily in every trial before any tribunal, the positive will be required to be proved by those who affirmed the positive. The Legislature was always aware that burden of proof could never be imposed by any Tribunal on a defendant to prove the negative that he affirms by way of defence, in the enquiry to be held under Sub-section (1A), having regard to Sub-section (1), amongst others, the following issues would arise for decision:--

- (1) Whether the tenant had failed to pay rent lawfully due from him in respect of the premises in question for a period of more than two months?
- (2) Whether the tenant had sublet without the permission of the Board the whole or any part of the premises?
- (3) Whether the tenant had committed and was committing acts contrary to the provisions of clause (o) of Section 108 of the Transfer of Property Act?
- (4) Whether the tenant had made and was making material additions or alterations in the premises without the previous written. permission of the Board?
- (5) Whether the tenant had acted in contravention of the directions, express and/or implied, under which he was authorised to occupy the premises?

(6) Whether the person in occupation of the premises of the ownership of the Board was an unauthorised occupant?

The trial before the Competent Auth authority would, therefore, be to establish the truth of the questions of facts and law raised in the above issues. Affirmatives will have to be the findings of the Competent Auth authority before it could pass any relevant order by way of decree for rents and/or eviction or of any other alternative nature. In that connection Sub-section (1A) provided that the Competent Auth authority should inform the delinquent occupant by a notice in writing of the grounds on which the proposed order was intended to be made. This provision Either has the effect of providing that every and all relevant facts come to the knowledge of the Competent Auth authority will have to be in complete details disclosed and furnished to the delinquent occupant by the notice mentioned in this part of the Sub-section or it has the meaning of mentioning of grounds in the notice and furnishing of all the relevant materials in complete details to the delinquent occupant at a subsequent stage. Whatever be the position, it is quite clear, having regard to what is mentioned in this part of the Sub-section that before any order was passed by the Competent Authority, it was the right of the delinquent occupant to be furnished with complete details of the positive evidence on the basis whereof the Competent Auth authority proposed that the order would be made against the delinquent occupant. It is after this material was in possession of the delinquent occupant that he would have the reasonable opportunity of tendering an explanation and producing evidence as mentioned in the second part of the Sub-section. It is on the basis of the information thus come to the knowledge of the delinquent occupant that he would have a right to show cause and defend himself. It is in connection with these matters that he is given a right to file a written statement and appear before the officer with the assistance of an attorney or pleader. It is in this connection that he has been given right to produce all his evidence including documentary evidence. This being the scheme of Sub-section (1A), it is surprising that an argument is advanced on behalf of the respondents that the delinquent occupant under Sub-section (1A) was himself and by himself required to lead his own evidence in the first instance without having any opportunity to cross-examine the positive evidence which could be led in support of the issues which arise for decision in the enquiry to be held under the Sub-section. We have no doubt that in this case the Competent Auth authority entirely failed to furnish to the petitioner any facts on which reliance had been placed on behalf of the Competent Auth authority to make the proposed order of eviction. The Competent Authority, therefore, failed to furnish an opportunity within the meaning of Sub-section (1A) to the petitioner when it passed the eviction order dated September 13, 1963. That order having been made in the above circumstances could not justifiably and lawfully be confirmed by the State Government as appellate authority. It is trite that an appellate auth authority cannot confirm the order made by the first Tribunal on the basis of the facts and circumstances which are brought to its notice in an irregular manner at the

hearing of an appeal. The appellate auth authority was, therefore, wrong in confirming the eviction order on the basis of facts which had transpired after the date of the order of eviction and were brought to its notice at the stage of the hearing of the appeal. The order of the appellate auth authority is, therefore, liable to be set aside.

11. In this petition under Article 227 of the Constitution, we are not concerned to make any findings on the above second contention made on behalf of the petitioner.

12. For the reasons mentioned above, petition succeeds. Rule is made absolute with costs.

13. Petition allowed.