

(1993) 08 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 1760 of 1980

Sahebrao Shankarrao Mistry

APPELLANT

Vs

Smt. Azizabai Hussein Ahmed Mulla since decd. by her heirs

RESPONDENT

Date of Decision : 24-08-1993

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31

Citation : (1994) 1 BomCR 513

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : A.S. Oka, for the Appellant; H.A. Solkar, for the Respondent

Judgement

M.F. Saldanha, J.—The petitioner in this case was the original tenant in respect of an open piece of land admeasuring 45" x 36" x 60", situated at Old Agra Road, Thane. He had by a lease-deed dated 1-3-1967 obtained from the original landlady (since deceased) this plot of land for purposes of running a motor garage on a rent of Rs. 50/- per month. The lease-deed did specify that the petitioner was entitled to put up such constructions as were necessary for purposes of running a garage provided, however, that these were authorised by the requisite authorities.

2. The landlady filed Regular Civil Suit No. 337 of 1975 in the Court of the learned Civil Judge, Senior Division, Thane against the petitioner for possession of the suit premises. It was alleged that the petitioner had committed certain serious breaches in so far as he had converted part of the premises in to a residence by constructing an upper storey which, in fact, is more aptly described as a potmala. It was also alleged that he had sublet the premises to one Ramdas Ramu for purposes of conducting a tyre repairing business. On this dual plea, the trial Court framed as many as seven issues and proceeded to hear the parties. It is relevant for me to indicate here that the petitioner disputed the act of subletting and contended that the tyre repairing business was being done by his

servant and was part and parcel of his garage. We are not concerned very much with this aspect of the matter because it was given up at the appellate stage and it is, therefore, the first aspect, namely, the allegation that the petitioner had changed the user of the premises by residing there, that really survives. As far as the factual position is concerned, both in his written statement and in his pleadings before the trial Court the petitioner had hardly disputed the position that he and his family were, in fact, residing in the upper portion of the premises. The trial Court, therefore, held that a breach was apparent and, consequently, a decree came to be passed against the petitioner on the ground of change of user.

3. The case was thereafter carried in appeal to the Court of the learned Second Extra Assistant Judge, Thane. The Appeal Court heard the parties and dismissed the appeal, being Civil Appeal No. 108 of 1978. It is against this judgment that the present writ petition has been preferred. During the pendency of this petition, the respondent landlady died and her heirs have been brought on record.

4. As regards the charge of change of user, Shri Oka, learned Counsel appearing on behalf of the petitioner, advanced the submission that the findings of the trial Court, which have hardly been re-examined by the Appeal Court, do not represent the correct position. It is his submission that it was incumbent upon the trial Court to have recorded very clearly as to whether or not the original purpose for which the premises were let still held good in so far as at no time has his client ceased to run the motor workshop in those premises. Shri Oka proceeds to contend that once this position is established that the only charge which he is required to deal with is the question as to whether a decree could have been passed against his client if he also resided in the premises for some time. Shri Oka hastens to add that this arrangement was a temporary one and that even during the pendency of the appeal, the petitioners had moved out and that he is at present residing elsewhere. He advances this last submission for purposes of satisfying this Court that at no time has the purpose for which the premises were let out ever ceased to exist.

5. In support of his submission, Shri Oka contended that a correct interpretation of section 13(1)(k) of the Bombay Rent Act would require that there must be a total alteration or, in other words, a cessation of the original purpose of letting and its replacement by some other purpose. He submitted that if instances had been demonstrated that the garage had been closed down and that the petitioner was residing there and not doing any business that then alone the provisions of section 13(1)(I) of the Bombay Rent Act could be fatally applied to this case. He draws support for this submission from a judgment of this Court in the case of Babhutmal Raichand v. Laxmibai 74 Bom.L.R. 214. Justice Bhasme (as he then was), while interpreting section 13(1)(k) of the Bombay Rent Act, had occasion to deal with the manner in which similar provisions have been interpreted by English Courts and carved out the concept that it was essential to demonstrate that the dominant purpose for which the premises had been let out had not only

ceased to exist but that it had been altered. In that case also, the allegation was that part of the premises had been converted for residential purpose. The Court held that in so far as the original purpose for which the premises had been let out still subsisted and in so far as the findings did indicate that the dominant purpose of letting was unaltered that it would not be permissible to pass a decree u/s 13(1)(k) of the Bombay Rent Act.

6. Shri Oka further drew my attention to a somewhat similar situation that arose before the Supreme Court in the case of Sant Ram Vs. Rajinder Lal and Others, . While considering the case of a cobbler who had, for a variety of reasons, been left with no option but to cook food and reside in the little shop where he was carrying on his business, the Supreme Court had occasion to observe as follows :

"It is impossible to hold that, if a tenant, who takes out petty premises for carrying on a small trade, also stays in the rear portion, cooks and eats, he so disastrously perverts the purpose of the lease. A different "purpose" in the context is not minor variations but majuscule in mode of enjoyment. This was not a case of a man switching over to a canteen business or closing down the cobbler shop and converting the place into a residential accommodation. On the other hand, the common case is that the cobbler continued to be cobbler and stayed in the shop at night on days when he was running this shop but left for his home on shop holdiays. A sense of proportion in social assessment is of the judicial essence. The irresistible inference was that the provisions of section 13(2) (ii) had not been attracted."

It a Shri Oka's contention that in essence and in spirit what is contemplated in section 13(1)(k) of the Bombay Rent Act is that there has got to be a complete abandonment of the original purpose and a change of user in the total sense which case would be actionable.

7. Shri Solkar, learned Counsel appearing on behalf of the respondents, vehemently contested this position. He stated that it would not be permissible to do violence to the wording of section 13(1)(k) of the Bombay Rent Act and to argue that as long as one held out a facade that the original purpose is still continuing and under the cover of the same to put the premises to any other use would be wholly impermissible. Shri Solkar contended that in the present case unlike musters of the other reported decisions where the letting was under an actual contract that we have on record very specifically a written document which circumscribes the purpose for which the land was being leased out. As regards this aspect of the matter, Shri Oka sought to contend that the first lease was for a period of five years and that after its expiry when the subsequent lease was executed that it is silent with regard to the user and he, therefore, submitted that it could never be strictly argued that anything other than total user for purpose of a garage was prohibited. Shri Solkar has, however, met this argument by contending that the second lease was an extension of the original arrangement or agreement and that it was, therefore, unnecessary for all the restrictive clauses to be once again set out. To my mind, this aspect of the

matter is of some consequence because the document in question would ultimately be the terms and conditions by which the parties would have to stand or fall. Undoubtedly, when the second lease was executed, it was an extension of the earlier arrangement, but, to my mind, it would have been essential to specify if the draftsmen desired to be brief that the earlier terms and conditions would still hold good. In the absence of any such clause, it is a separate act of leasing and would have, therefore, to be circumscribed to the terms and conditions of that document. This document, admittedly, did not have any such restrictive clause. This, undoubtedly, is a factor which is in favour of the petitioner.

8. Shri Oka had drawn my attention to another judgment of this Court in the case of Anita M. Harretto Vs. Abdul Wahid Sanaullah, . Jahagirdar, J., (as he then was), while dealing with the provisions of Order 41, Rule 31 of the Code of Civil Procedure, 1908, had laid down that it is the duty of the Appeal Court to state the point for determination and that these points must cover all important questions that fall for determination in the case. This Court observed in the decision referred to supra that it is insufficient to frame a blanket issue, such as whether the learned trial Judge was right in passing a decree for possession in favour of the plaintiff. It is Shri Oka's contention that particularly in cases under the Bombay Rent Act where the First Appeal Court is virtually the end of the road for the parties and where it is a requirement of law that the Appeal Court must review the matter that was before the trial Court and the reasons and findings, that it would not be permissible to merely frame a composite issue which does a cursory appraisal of whether the decision was right or wrong. That ultimately is the last function of the Appeal Court, but in arriving at that decision, it is essential that a de novo consideration must be gone through. To this extent, learned Counsel criticised the approach of the Appeal Court and I am in complete agreement with the submission that has been canvassed that it is not possible for the Appeal Court, particularly in serious issues of the present type, to adopt a cavalier approach while deciding these appeals. That the judgment of the Appeal Court is vulnerable on this ground is understandable, but, under these circumstances, the question that arises is as to whether this Court would be justified in exercising its jurisdiction under Article 227 of the Constitution of India.

9. With regard to this aspect of the matter, Shri Solkar, learned Counsel appearing on behalf of the respondents, has submitted that under the scheme of the Bombay Rent Act, an appeal has been provided for and that the appellate remedy has been exhausted and that where there are concurrent findings on fact that it is well-settled that this Court ought not to interfere. There is absolutely no dispute with regard to this proposition and Shri Solkar has only drawn my attention to one such decision of this Court in the case of Arvind Narhar Wagh Vs. Chintaman G. Khire and Others, . Learned Counsel contends that irrespective of the arguments that have been canvassed that where there is a concurrent finding of fact this Court would be totally precluded from granting reliefs in the present petition. He submitted that both the courts below have held that there has been a breach of the provisions of section 13(1)(k) of the Bombay

Rent Act, both on facts and on law, and, therefore, there can be no re-appraisal of the evidence.

10. With regard to this last aspect of the matter, what needs to be noted is that the submission canvassed by Shri Solkar is, as indicated by me earlier, without dispute absolutely correct. There can be no re-appraisal of the evidence in these proceedings, but I am faced with an entirely different situation here, the first aspect of which is that the Appeal Court has not only abdicated its responsibility in law while deciding the appeal and has, therefore, erred grossly. Secondly, as contended by Shri Oka, there has been an error while applying the law as laid down by this Court in so far as section 13(1)(k) of the Bombay Rent Act has, in fact, been interpreted, and both the trial Court and the Appeal Court, had they applied the ratio of the decisions referred to supra, could not have either passed or confirmed the decree.

11. I need to observe here that, undoubtedly, the interpretation as set out in Babhutmal Raichand's case, 74 Bom.L.R. 214, delivered by Bhasme, J., does fit in with the facts of the present case. The proposition, however, is one which has far-reaching consequences and, perhaps, could not be laid down as an absolute proposition of law to cover all cases. For instance it would be extremely hazardous to go into the question as to what is the dominant purpose for which the premises or the land that has been let out is being used and the mechanics of arriving at that decision could equally be perilous. In the present case, the position that emerges is that the purpose for which the land was let out had never ceased, nor has it been altered. All that had happened is that for some short period of time the structure in question was put to some additional use. That would not alter or rescind the original user. Under these circumstances, it would not be permissible to hold that the decree has been validly passed. This, however, may not be the position where the facts are different.

12. Having regard to the aforesaid situation, the petitioner succeeds. At this stage, Shri Solkar pointed out that this aspect of law, namely, the question as to whether the plaintiff has established that the defendant is no longer using the land for the dominant purpose for which it was let out, namely, the conducting of a motor garage, was not gone into by the trial Court and that, consequently, in fairness to the heirs of the original landlady, they should be afforded an opportunity of establishing this aspect of the matter. Shri Oka has objected to any remand at this stage and he submitted that the position in law being clear apart from which that since several years have elapsed, no useful purpose would be served by remanding this old litigation. Unfortunately, I do find that this aspect of the matter was never canvassed before either of the two courts below. Under these circumstances, to my mind, it would only be fair that the plaintiff be afforded an opportunity that has been asked for. The decree passed by the trial Court and the confirmation thereof by the Appeal Court are both set aside. The trial Court shall permit the parties to amend their pleadings only to the extent of this one issue. The de novo consideration of the case shall be confined strictly to

this aspect of the matter alone as was done in Babhutmal Raichand's case (supra). The necessary issue shall be framed, the parties shall be permitted to lead evidence which shall be confined only to this issue and after hearing learned Counsel, the trial Court shall decide the matter according to law. Having regard to the fact that this is very old proceeding, the trial Court shall dispose of the matter on a priority basis and as expeditiously as possible.

13. The petition accordingly succeeds. The rule is made absolute. There shall be no order as to costs.