

(1999) 02 BOM CK 0039
In the Bombay High Court
Case No : Writ Petition No. 127 of 1998

Smt. Anusuyabai Narayanro Ghate

APPELLANT

Vs

Smt. Maktumbi S. Nadaf

RESPONDENT

Date of Decision : 17-02-1999

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(2)
Presidency Small Cause Courts Act, 1882 — Section 41

Citation : (1999) 3 ALLMR 1 : (1999) 2 BomCR 374 : (1999) 1 MhLj 836

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : B.S. Desai, for the Appellant; D.G. Aras, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.—An eviction application was filed against the petitioner by the respondent as EA/444 of 1974 seeking possession of the shop room belonging to the respondent. It is not disputed that the said shop room was entrusted to the petitioner by the respondent under an agreement dated 1-2-1972 for conducting of the tailoring business for 11 months. The period of the said agreement was subsequently extended by another agreement dated 1-1-1973. When the aforesaid eviction application was filed before the Small Causes Court u/s 41 of the Presidency Small Cause Courts Act, 1882 (hereinafter called "the Act"), the petitioner contested the same contending inter alia that the application is not maintainable before the Small Causes Court because he is tenant in possession of the shop room. That plea of tenancy was heard as preliminary issue and the learned Small Causes Court by its order dated 21-12-1981 rejected the plea of tenancy set up by the petitioner. An appeal was filed at the instance of the petitioner as Appeal No. 44 of 1982, the said appeal was dismissed by the appellate Court on 7-2-1984. Against this order, writ petition was filed before this Court as Writ Petition No. 1728 of 1984 by the petitioner challenging the order of the trial Court, which was confirmed by the appellate Court rejecting the claim of the petitioner as a tenant of the shop room. By the judgement dated 16-11-1989, this Court also confirmed that the

petitioner is not tenant as the agreement between the parties was only with respect to the business of conducting tailoring business.

2. It is necessary for the purpose of this case to refer to the certain observations of this Court made in that case which is annexed and marked as Exh. F in this case. In para 4 of the judgement, this Court has held :

"Since the trial Court had not done the same, the Court of appeal considered the material which was placed before it and after hearing the arguments and considering the agreement and all the facts of the case came to the conclusion that the petitioner was put in possession under a conducting agreement of tailoring business."

This Court has further observed in the same para as :

"Therefore, the agreement must be given its due meaning, as the agreement speaks for itself. In that context, the Appeal Court rightly came to the conclusion that what was given to the petitioner under the agreement was the right to conduct or the permission to conduct the tailoring business for a certain period and the period having expired, the respondent was within her right to ask for possession of the premises and the business conducted from the petitioner."

3. After this Court dismissed the writ petition, it appears that the petitioner had amended the written statement wherein he has also raised among other things another issue that the suit is not maintainable. In short, even considering the aforesaid agreement as one for conducting the business, section 41 of the Presidency Small Cause Courts Act, 1882 cannot be invoked because the said section clearly expresses that it applies only to the immovable property. Rightly or wrongly, the aforesaid amendment was not challenged by the respondent. With the amended written statement, the Small Cause Court went on trial. The parties were permitted to adduce evidence and trial Court had granted decree in favour of the respondent for handing over the possession of the shop room. The petitioner challenged the decree in the appellate Court. The appellate Court also confirmed the decree of delivery of possession ordered by the trial Court. It is in this circumstances, is a second round litigation that this matter has come before this Court by way of this writ petition.

4. The learned Counsel for the petitioner Mr. Desai has contended that having this Court interpreted the said agreement to be one for conducting the business, the Small Causes Court has no jurisdiction. I find substance in the contention. This Court has interpreted the agreement and found that what was agreed between the parties is for conducting the business of tailoring. Therefore, possession of the room has become consequential thing. It has become indivisible part of the contract that for conducting the business, occupation of the room is necessary. In view of this categorical finding of the courts below, which was confirmed by this Court in aforesaid Writ Petition No. 1728 of 1984, what has been contended by the learned Counsel for the petitioner is legal. The learned Counsel for the respondent in this context brought to my notice, the

Supreme Court decision in Vinod Kumar Arora Vs. Surjit Kaur, . He relied upon Paragraph 14 of the aforesaid judgement which reads as follows:

"Moreover, the appellant had given up his case in the written statement that the hall was let out for his residential use as well as for running a clinic and had taken a categorical stand during the enquiry that he had taken the hall on rent only for running his clinic and not for his residential needs as well. Having taken up such a stand the appellant cannot reprobate and contend that the lease of the hall was of a composite nature and as such the benefit of the enlarged definition of a "non-residential building" given in the Amendment Act would ensure to his aid in the case."

5. I am afraid whether the said decision can be applied to the case of the respondent or whether it can be agitated at this stage. As I earlier pointed out, after this Court has pronounced its finding on the agreement, written statement was sought to be amended. But it is pertinent to note that no objection has been raised by the respondent at that stage pointing out the inconsistent stands taken by the petitioner. Therefore, the contention of the learned Counsel for the respondent cannot be at this stage entertained on account of the amendment of the written statement. Issue has been framed and parties went on trial and I am called upon to examine the legality of the judgement or otherwise of the judgement passed by the trial Court. As I observed earlier, when this Court has found that the contract was for conducting the business, section 41 of the said Act cannot be invoked and the decree passed against the petitioner by the trial Court and confirmed by the Appellate Court, is only to be set aside.

6. In the result, writ petition is allowed.

Rule is made absolute. The decree passed by the Court below against the petitioner is set aside. However, this judgement will not preclude the respondent from adopting legal proceedings before appropriate forum for the recovery of the rooms on question.

In the circumstances, there is no order as to costs.

7. Writ Petition allowed.