(2004) 06 BOM CK 0031

In the Bombay High Court

Case No : Writ Petition No. 151 of 1990

Smt. Arundhatti R. Shetty APPELLANT

Vs

Yadav Vishnu Ponkshe and Others RESPONDENT

Date of Decision : 28-06-2004

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15, 15(2), 15A
Constitution of India, 1950 — Article 227

Citation : (2004) 06 BOM CK 0031

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Y.S. Jehagirdar and P.S. Dani, for the Appellant; R.S. Apte, for the Respondent

Final Decision : Dismissed

Judgement

D.G. Karnik, J.—By this petition, the petitioner -landlord challenges the judgement and order dated 18th July 1989 passed by the 2nd Addl. District Judge, Thane reversing the judgement of the Civil Judge, Jr. Division Kalyan and thereby dismissing the petitioner''s suit for possession.

2. The petitioner is an owner of the premises bearing shop no. 3 situated at Sita Niwas Dombivali (hereinafter referred to as ''suit premises''). The suit premises were let out by the petitioner to M/s.Hanuman Stores, a partnership firm consisting of three partners viz. Mr.Bhide (respondent no. 2 herein), Mr.Ponkshe (husband of respondent no. 1 herein) and Mr.Shah in the year 1966. Mr.Shah and Mr.Bhide retired from the partnership firm M/s.Hanuman Stores in the year 1967 and thereafter Mr.Ponkshe the husband of respondent no. 1, continued the business. Mr.Ponkshe, died in the year 1969 or thereabout. After his death, the respondent no. 1 carried out the business with the help of her son for some time but thereafter the respondent no. 2 who was an erstwhile partner in M/s.Hanuman Stores has been conducting the business. By a deed of assignment

dated 6th June 1974, the respondent no. 1 sold and transferred to the respondent no. 2 the running business along with the stock-in-trade and the goodwill thereof and incidental to the sale of the running business assigned the tenancy rights in the suit premises to the respondent no. 2. Soon thereafter the respondents informed to the petitioner about the assignment of the business along with the stock-in-trade and the goodwill and incidental assignment of the tenancy rights as permitted under the notification issued u/s 15 of the Bombay Rents Hotel and Lodging House Rates Control Act 1947 (for short ''the Rent Act''). By a notice to quit dated 24/25th September 1974, the petitioner terminated the tenancy of the respondent no. 1 alleging that the assignment was invalid and was of no effect and the respondent no. 2 was an illegal sub tenant and had no right to continue in occupation of the suit premises. After expiry of the period of notice, the petitioner filed a suit for possession against the respondent nos. 1 and 2 on the ground that the respondent no. 1 had unlawfully sub let the suit premises to the respondent no. 2. The petitioner alleged that the deed of assignment dated 6th June 1974 was not valid and not binding on her. The respondents appeared and contested the suit. The respondents firstly pleaded that the respondent no. 1 had validly and lawfully transferred the running business alongwith the stock-in-trade and the goodwill and incidental to the said transfer had lawfully assigned the tenancy rights in the suit premises to the respondent no. 2. In reply to the amendment of the plaint, the respondents filed additional written statement and in the alternative pleaded that in the event it was held that the respondent no. 2 was conducting or carrying on the business in the suit premises as a licensee of the first respondent, such licence was subsisting on 1st February 1973 and therefore the respondent no. 2 had become a deemed tenant by reason of an amendment to the Rent Act made by Maharashtra Act no. 17 of 1973.

3. The trial Court held that on 6th June 1974, the respondent no. 1 was not carrying on business personally but the business was being carried on by the respondent no. 2 and therefore, the respondent no. 1 could not transfer the business as a going concern with the stock-in-trade and the goodwill and could not assign the tenancy rights of the suit premises in favour of respondent no. 2. Consequently, it held that respondent no. 2 was unlawful sub tenant in the suit premises. It also negatived the alternative claim of the respondent no. 2 that he was a protected licensee u/s.15-A of the Rent Act. On appeal, the appellate Court held that the respondent no. 1 had failed to prove that she had transferred the running business along with the stock-in-trade and goodwill to the respondent no. 2 by a deed of assignment dated 6th June 1974 and consequently it held that respondent no. 2 was a sub-tenant of respondent no. 1. The appellate Court also held that the respondent no. 2 had not proved that he was a licensee of the respondent no. 1 on 1st February 1973 and therefore was not entitled to the protection u/s 15-A of the Rent Act. The appellate Court further held that on 1st February 1973, the respondent no. 2 was not a licensee but was a sub-tenant of respondent no. 1. The appellate Court however, held that the respondent no. 2

was protected under sub section (2) of section 15 of the Rent Act as amended, and therefore a decree for possession could not have been passed on the ground of illegal subletting. In this view, the Appellate Court allowed the appeal and dismissed the petitioner''s suit for possession. That judgement of the Appellate Court is impugned in this petition.

4. Learned counsel for the petitioner submits that the respondent no. 2 had never pleaded that he was a sub-tenant in possession on 1st February 1973 and in the absence of pleadings, the appellate Court could not have held that the respondent no. 2 was a sub-tenant of respondent no. 1 on 1st February 1973. Consequently, the protection granted to the sub-tenant under sub-section(2) of section 15 of the Bombay Rent Act was not available to the respondent no. 2 and the appellate Court erred in dismissing the suit of the petitioner holding that the respondent no. 2 was a protected under sub-section(2) of section 15. Learned counsel for the respondent supports the judgement of the appellate Court not only on the ground on which it was passed in his favour but also justifies it saying that the respondent no. 2 was a lawful assignee of a running business alongwith the stock-in-trade, the goodwill and the tenancy rights of the suit premises.

5. It is not disputed that the respondent no. 1 had executed a registered deed of assignment in favour of the respondent no. 2 on 6th June 1974. By the said deed the respondent no. 1 transferred the running business carried on in the suit premises along with the stock-in-trade and the goodwill of the business, and also assigned the tenancy rights in the suit premises to the respondent no. 2 as incidental to the transfer of the running business. Despite the registered deed of assignment, the Courts below have held that there was no valid assignment of the tenancy rights. The notification issued by the Government of Maharashtra u/s 15 of the Rent Act permits assignment of tenancy rights where the assignment is incidental to a transfer of a running business along with the stock-in-trade and the goodwill thereof. The trial Court held that the assignment of tenancy rights was not valid for two reasons. Firstly, because the business, according to the learned Judge, had no goodwill. In para 9 of i ts judgement, the trial Court held:

"However, it is pertinent to note that he has stated that during 1967 to 1969, the business was not in profit hence, business was given to the respondent no. 2. According to me, these circumstances, which go to show that the suit shop had no goodwill at all."

The trial Court held that there was no goodwill for the business because the business was in losses from 1967 to 1969. "No profit, no goodwill" is an utterly wrong statement. A business may run in losses in initial years but a customer who once visits a shop may come back again and again for purchasing of same or similar goods. As time passes, a new customer may also visit and revisit the business would increase. A business which is running in losses initially may become profitable with the passage of time. The goodwill of a business means a chance that a customer who once purchases goods or services might come back to purchase the same or similar goods or services again and again. Sometimes an accountant uses a method of multiplying the average profit of last few years by a fixed number to measure in monetary terms the value of the goodwill of a business. Higher the profit, higher is the goodwill. This method of measuring the value of goodwill in monetary terms adopted by accountants does not necessarily mean that a business which is incurring losses has no goodwill. Take an illustration of a Lodging business. It is common experience that Lodging business usually incurs losses for the first few years till it establishes itself. The goodwill is not built in a day. The goodwill builds up with the passage of time as more and more customers visit and the chance of they visiting again and again increases as the total base of customers increases. In case of a lodging business which was incurring losses upto the fifth year and makes a profit for the first time in the sixth year, can it be said that for the first five years the business had no goodwill and goodwill was generated for the first time in the sixth year? It cannot. Profit made in the sixth year was because of an increase in the business on account of the goodwill which was being generated, day to day, during the first five years of the business. Therefore, the first reason given by the trial Court for invalidating the transfer of a tenancy on the ground that business had no goodwill is erroneous in law.

6. Secondly, the trial Court held that though the deed of assignment mentioned the list of articles which were transferred and given to the respondent no. 2 at the time of transfer of the business there was in fact no stock in trade, because stock register was not produced. Iti also held that the stocks did not belong to the respondent no. 1 as she was not carrying on the business personally. Production of a stock register may be one of the many circumstances which would be required to take into consideration for considering whether the stock-in-trade was transferred along with business and whether the business that was running. It was not the case of the petitioner that the business was not running at all. The argument was that the respondent no. 2 was running a business as a business conductor for respondent no. 1. This argument presupposes that there was a business which was going on and it is nobody''s case that such business was going on without there being any stocks. It is inconceivable that a business of grocery and stationery would be running without there being any stocks at all. If the respondent no. 2 was carrying on the business in the suit premises, then he could do so in either of the three capacities viz. i) he could be carrying on the business as a sub-tenant as has been held by the appellate Court in which case he would be protected u/s 15(2) of the Rent Act. ii) he could be carrying on such business on his own and only occupying the suit premises as a licensee of respondent no. 1, in which event, he would be protected u/s.15-A of the Rent Act. iii) he could be carrying on business as a business conductor i.e. merely as an agent of respondent no. 1. If the business was carried on by him as an agent of the respondent no. 1, the business would belong to the respondent no. 1. It would be no ground to reject the transfer of a business made by the respondent no. 1 by a registered instrument only on the ground that the business was not

carried out by the respondent no. 1 personally but was carried out on by her through an agent - a business conductor. In either of the three cases, a decree for eviction could not have been passed for the reasons indicated earlier.

7. The appellate Court held that the respondent no. 2 was conducting the shop in the suit premises from 1969 to 1974. It further held that the business which the respondent no. 2 was carrying in the suit premises was not on behalf of respondent no. 1 but on his own account. On the basis of this finding that respondent no. 2 was carrying on the business in the suit premises between the year 1969 to 1974 on his own account the appellate Court came to the conclusion that respondent no. 1 could not have validly executed a deed of assignment dated 6th June 1974, because she was not carrying on the business and it was the respondent no. 2 who was carrying on the business. If the finding of the appellate Court that respondent no. 2 was carrying on business on his own account in the suit premises between the year 1969 to 1974 is accepted, and it being a finding of fact it has to be accepted unless it is shown to be perverse, then two things would follow (i) deed of assignment dated 6th June 1974 would be invalid because the respondent no. 1 was not running the business and it was the respondent no. 2 who was running the business on his own account (ii) the respondent no. 2 would be a sub-tenant protected u/s 15(2) of the Rent Act. The appellate Court was therefore, right in reversing the decree for possession.

8. There is yet another aspect which needs mention. In the plaint, the petitioner has alleged that the suit premises were given on rent to a partnership firm of M/s.Hanuman Stores consisting of three partners, viz. the husband of respondent no. 1, Mr. Shah ,and Mr.Bhide - the respondent no. 2 himself. A partnership firm is not a person in the eye of law. A partnership name is merely a compendious name given to a body of persons who form a partnership. When the plaintiff says that the suit premises were given on rent to a partnership firm, it means that the suit premises were given on rent to its partners. The partners of the firm included respondent no. 2. Thus the respondent no. 2 himself was one of the original tenants. No case of surrender of tenancy by the respondent no. 2 is pleaded in the plaint. Therefore, the respondent no. 1 cannot be called as an illegal sub-tenant. Though this aspect has not been considered by the Courts below, this would be a ground for non interference in exercise of discretionary jurisdiction under Article 227 of the Constitution of India because the ultimate decision of dismissal of the suit is right. Hence, Writ Petition is dismissed.

Rule discharged. No costs.

