
(1993) 02 BOM CK 0099
In the Bombay High Court
Case No : Writ Petition No. 1902 of 1982

Smt. Asha Naresh Thakur and Others APPELLANT
Vs
Vithal Jagannath Godambe (Deceased) through L.R.'s and Others RESPONDENT

Date of Decision : 24-02-1993

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 3, 5
Constitution of India, 1950 — Article 227

Citation : (1993) 95 BOMLR 160

Hon'ble Judges : Bhimrao N. Naik, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bhimrao N. Naik, J.—This is the petition filed by Obstructionists in Obstructionist Notice No. 263 of 1979 taken out by the Respondents-Decree holders.

2. Few facts which are relevant for the purpose of this petition are that the dispute relates to two blocks of rooms adjoining each other situated on the ground floor of House No, 62/K, at Parel village, Bombay-12 and one Gajanan Moreshwar Thakur was the tenant of these premises. This Gajanan Thakur died on 1st February, 1955. The following geneology is necessary to ascertain the rights of the Petitioners to this Petition.

3. In 1962 R.A.E. Suit No, 3932 of 1962 was filed by the landlord against four brothers i.e. Madhukar Gajanan Thakur, Sharad Kumar Gajanan Thakur, Naresh Gajanan Thakur, and Suresh Gajanan Thakur. Two daughters were not joined as parties. This was a suit filed for possession on the ground of bona fide requirements. The allegations in the plaint were as follows :-

1. The plaintiffs are the owners of a property known as Godambe building situate at 64 K, Parel Village, Parel, Bombay.

2. Prior to the termination of his tenancy the 1st defendant was plaintiff monthly

tenant in respect of Block Nos. 1 and 2 of the said building, each block having two rooms with water tap inside. The 2nd, 3rd and 4th defendants are the brothers of the 1st defendant and have been residing with him.

3. The plaintiffs reside at Poona but desire to come down and stay at Bombay as their sons are required to stay in Bombay, The plaintiffs appraised the 1st defendant of their circumstances and their needs and requested him to vacate the premises in suit. The Plaintiffs by their Advocate's letter of the 27th July, 1961 terminated the tenancy of the 1st defendant and called upon him to vacate the premises. The plaintiffs with a view to minimise the hardship caused even agreed to accept one block of rooms for their personal requirements but the 1st defendant refused to surrender even one block.

4. The plaintiffs further say that since then the 1st defendant has acquired a suitable premises at Township Colony, Chembur, where he has been residing with his family. The 2nd, 3rd and 4th defendants are in occupation of the said premises which consists of 2 blocks each having 2 rooms.

5. The plaintiffs therefore seek to recover from the 1st defendant quiet and vacant possession of Block Nos. 1 and 2 of Godambe building situate at 64 K Parel Village, Bombay, occupied by the 1st defendant as plaintiffs' monthly tenant which tenancy has been duly determined. The Defendants No. 2, 3 and 4 are joined as parties as they are in occupation, of the said premises under Defendant No. 1. The monthly rent is Rs. 29. 80 and the annual rack rent is Rs. 357.60.

4. From the averments made in the plaint, it is clear that defendant No. 1 was treated as tenant and other defendants viz. his brothers were joined as defendants since they were in occupation of the premises under Defendant No. 1 and plaintiffs wanted to get decree for possession as against them.

5. Madhukar Gajanan Thakur-Defendant No. 1 and other defendants jointly filed their points of defence. The relevant portion of the Written Statement is as follows :

4. After the demise of their father some time in 1955, for the sake of convenience the tenancy of these premises was transferred to Defendant No. 1's name, as he was the eldest brother, though Defendant Nos. 2, 3 and 4 were joint tenants. At the time of their father's death two of the defendants were minors. Defendant Nos. 1, 2, 3 and 4 resided with their father in his life time and at the time of the death of the deceased and as such they were legal representatives of the deceased father.

5. Defendant No. 1 denies having at any time acquired rented premises at Chembur as alleged by the plaintiffs.

6. Defendant No. 1 has had his residence continuously and jointly along with Defendant Nos. 2, 3 and 4 in these premises ever since 1937,

12. The defendants say that the suit is bad in law, as the ejectment notice was served on Defendant No. 1 as far back as 27-7-61 and the plaintiffs by their subsequent conduct of accepting rents without any reservations have waived the contents of the said notice. Hence the suits is bad as the tenancy has not been terminated by a fresh notice.

14. Without prejudice to the aforesaid contentions the defendants say that they are joint tenants of these premises and hence the suit is bad in law against the Defendant Nos. 2, 3 and 4 as their tenancy has not been terminated.

6. On the basis of these rival contentions, in the Suit No. 3932 of 1962 following issues were framed:

1. Whether by acceptance of the rent of the suit premises by the plaintiff, the notice determining the tenancy is deemed to have been waived by the plaintiff.

2. Whether the plaintiff proves the premises are required reasonably and bona fide for his personal requirement?

3. Whether greater hardship would be caused to the defendants by passing a decree than to the plaintiff by refusing to pass the same?

7. It is important to note that in para 3 of the Judgment it is specifically stated that though the defendants had raised the contention that the plaintiffs had accepted the rent subsequent to the determination of tenancy and therefore such conduct of the plaintiffs should be construed as waiver of the notice of determination of tenancy, the defendants have not averred anything in respect of this issue. Neither is any question asked to the plaintiffs on this point. It is important also to note that Mr. Shroff, Advocate appearing for defendant in the said suit gave up issue as regards the joint tenancy and, therefore, the only issues mentioned above were framed. Thus the husband of the present petitioner who was Defendant No. 3 in that suit gave up the plea regarding the joint tenancy and ultimately in this suit the only issue that was thrashed out was whether plaintiff proves his bona fides and whether greater hardship would be caused to whom and ultimately the suit came to be dismissed on 17th November, 1965.

8. After the dismissal for the said suit, the Respondents-plaintiffs filed R.A.E. Suit No. 5350 of 1971 only against Madhukar Gajanan Thakur who was Defendant No. 1 in R.A.E. Suit No. 3932 of 1962 on the ground of nonpayment of rent. The arrears due and payable were from 1st December, 1970 to 31st July, 1971. This suit was contested by Madhukar and ultimately the suit was decreed on the ground of non-payment of rent.

9. Being aggrieved and dissatisfied by the aforesaid order, Madhukar filed CA No. 140/79 and C.A. was dismissed on 2nd April, 1979 and decree passed on the ground of non-payment was confirmed.

10. The Respondent-decree holder thereafter sought to execute decree on 22nd

July, 1979 and the present petitioners raised an obstruction on 26th July, 1979 and, therefore, on 9th August, 1979 respondents took out Obstructionist Notice No. 263 of 1979 and prayed for removal of the obstruction. It appears, meanwhile on 20th April, 1979 R.A. Declaration Suit No. 2050 of 1979 was filed by the present Petitioners for declaration that they are tenants and on 23rd July, 1980 they filed detailed reply to the obstructionist notice. The sum and substance of the contentions in reply was that they caused obstruction in their own rights independently of the defendant and they claimed protection of the Rent Act. They contended that originally Rent Bills of the suit premises stood in the name of Gajanan Thakur who died on 1 st February, 1955 leaving behind him as his heirs and legal representatives to continue to remain in the suit premises as tenants in common several persons such as Smt. Renuka M. Thakur-mother of late Shri Gajanan Thakur, Smt. Anasuya-widow of Gajanan M. Thakur, Miss Revati-daughter of Gajanan Thakur, Madhukar, Naresh, Sharad and Suresh-sons of Gajanan M. Thakur as also Piroj Mhatre-married daughter of Gajanan Thakur whose marriage was performed in the year, 1954 and they contended that such tenancy is common and each one of them became entitled to the suit premises in their own rights and each one of them became tenant of the suit premises by the provisions of Rent Control Act at least in respect of those who resided with deceased Gajanan Thakur at the time of his death as member of his family. Secondly, they contended that after death of Gajanan Thakur, landlords transferred rent bill in the name of Madhukar Gajanan Thakur treating him as the Karta of family consisting of above mentioned heirs of deceased and thereby conceded that each of the heir and right of their own to the suit premises in as much as the landlords after transfer of rent bill in the name of Madhukar, filed ejectment proceedings wherein Madhukar, was shown to be residing at Building No. 36, Township Colony, Chembur, Bombay. It was also contended that Renuka Moreshwar died in or about the year, 1957 Smt. Anasuya died in or about the year, 1959 and Revati got married in or about the year, 1951 and became Mrs. Seema Patil and started residing with her husband at Prabhadevi, Bombay, that Madhukar G. Thakur permanently shifted to reside at Chembur and as a matter of abundant caution and as advised permitted Smt. Asha Naresh Thakur (Obstructionist No. 1) to continue to occupy exclusively the suit premises along with members of her family as his licensee and started receiving from her the compensation since the month of December, 1965 and went on passing receipts in respect of such payments. It was contended that Obstructionist No. 1 i.e. Petitioner No. 1 duly paid to Madhukar for period ending January, 1979 the licence fee. It was further contended that Petitioner No. 1 became entitled to the suit premises in her own right through her husband Naresh who as tenant in common became entitled to the same independently of others and in the alternative being a licensee of the suit premises for consideration since 1965 and as such became entitled to protection of the Rent Control Act on the said ground which are taken out by Petitioner No. 1 herein without prejudice to each other and in the alternative. It appears, on 5th August, 1980 Rejoinder was filed by the decree holder to this reply.

11. The evidence was recorded between 27th August, 1980 to 9th February, 1981 and after recording of the evidence on 11th February, 1981 following issues were framed by the Executing Court :-

(1) Whether the obstructionists have right, title and interest in the suit premises?

(2) Whether they are obstructing in their own right? and

(3) What order?

The Trial Court recorded finding on the first issues in the negative and made Obstructionist Notice absolute on 21st February, 1981.

12. Being aggrieved and dissatisfied by the aforesaid order, Appeal No. 189/81 was filed before the Division Bench of Small Causes Court and the Division Bench of the Small Causes Court by its judgment and order, dated 22nd April, 1982 dismissed the Appeal.

13. Being aggrieved and dissatisfied by the aforesaid order, the present Writ Petition is filed under Article 227 of the Constitution of India. It appears, after filing of this Petition, on 9th January, 1987 Mrs. Seema Patil expired and on 15th July, 1988 even Mrs. Piroj Mhatre expired. Shri Patil, learned Counsel appearing for the Petitioners raised following contentions.

14. He pointed out that after death of Gajanan Thakur who was admittedly the tenant u/s 5(11)(c), every member of Gajanan's family who was residing along with him acquired tenancy rights in view of the provisions of Section 5(11)(c) of the Bombay Rent Act. Section 3(11)(c) reads as under :

Any member of the tenant's family residing with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court.

In view of this Section 5(11)(c) Mr. Patil contended that on 1st February, 1955 when Gajanan expired, the persons who were residing along with him were his mother-Smt. Renuka, his wife-Anasuya, his four sons including the father of the Petitioners. Naresh and his two daughters and everyone of them became tenant and they were all tenants in common. However, it appears that immediately after the death of Gajanan on 1st February, 1955 the rent receipt was transferred in the name of eldest son-Madhukar in 1955 itself and the rent was being paid by and on behalf of Madhukar. Mr. Patil further contended that the present respondents-decree holders who earlier instituted R.A.E. Suit No, 3932/62 had taken care to file suit not only against Madhukar but it was filed against other brothers of Madhukar, viz. Naresh, Sharad and Suresh were joined as defendants one they were joined obviously as defendant because they were co-tenants along with Madhukar and in fact they were joint-tenant residing in the suit premises at the time of death of Gajanan. He thus contended that it was obligatory upon landlords when they instituted fresh R.A.E. suit No. 5350 of 1971 to have joined remaining brothers, and, therefore, suit filed only against Madhukar and the

decree obtained against Madhukar is not binding upon the other members of Gajanan's family and the landlords deliberately chose not to join other brothers as defendants to the said suit and since the Petitioner's father was not joined as party defendant, the decree obtained in R.A.E. Suit No. 5350/71 is not binding upon present obstructionists. In any event, it was contended that u/s 5(11)(c) there was no agreement treating Madhukar alone as the tenant nor there is any declaration by the Court declaring a particular member of the tenant's family as the tenant and in the absence of this, it was obligatory upon decree holder to have filed suit against" every member of the tenant's family who was residing with tenant at the time of death of the tenant. This having not been done, the decree obtained only against Madhukar is not binding upon them. Alternatively he contended that the present Petitioners were paying licence fee to Madhukar and this they were paying since 1965 and they were in possession as such licensees upto 1st February, 1973 and, therefore, they were protected licensees and notwithstanding the production of evidence on this aspect, this issue has been cursorily dealt with. In view of this, he contends that an error is committed by both the Courts below and, therefore, interference of this Court under Article 227 of the Constitution is required. Lastly, Mr. Patil submitted that after the amendment of the Civil Procedure Code, the obstructionists proceedings have to be tried as suit and the matter cannot be decided summarily and all the procedure prescribed for trial of the suit is applicable, and since this procedure not having been followed and the matter having been dealt with summarily, the proceedings are vitiated. In fact, he pointed out that the issues were framed after recording of the evidence, and in view of this he points out that the petition deserves to be allowed.

15. Shri Dalvi, learned Counsel appearing for Respondents contends that the two courts have concurrently recorded a finding that Madhukar alone was the tenant against whom decree for possession was obtained. He relied heavily upon the earlier proceedings which were initiated against Madhukar and Naresh, husband of Petitioner No. 1 and father of Petitioner Nos. 2 and 3 and notwithstanding the fact the plea regarding the joint tenancy was raised, the issue was not pressed and in fact it was given up and the earlier suit proceeded treating Madhukar alone as the tenant, and since that decision is binding upon Naresh, it is equally binding upon present Petitioners. He in addition to this fact, relies upon the circumstance of passing of the rent receipt in the name of Madhukar and the filing of earlier suit in the name of Madhukar and joining other defendants only since they were occupying the suit premises as brothers of Madhukar and the totality of these circumstance is that agreement as contemplated u/s 5(11)(c) can be inferred and it is rightly inferred by the two courts below and in view of this, he points out that there is no substance in the contention raised by Shri Patil that merely because there is earlier suit, other brothers were joined as party and it was incumbent upon decree holder to have joined them as defendants in the present suit. He points out that, it is true that constructionist proceeding has to be tried as Suit and the procedure prescribed under the

provisions of the CPC has to be followed. However, Shri Dalvi points out that in this case the principle of natural justice was followed. The obstructionists led their evidence and after framing of the issues, they did not ask for any fresh opportunity to lead evidence and hence no prejudice is caused to the Petitioners and, therefore, mere not following the procedure will vitiate the proceedings and this is not a case where this Court in its exercise of powers under Article 227 of the Constitution should interference with such a finding.

16. After hearing rival contentions of the parties, I am not inclined to accept the submission of Shri Patil and my reasons for the same are as follows.

17. It is true that after death of original tenant in 1955, every one of the members of tenant's family who were residing with him, was entitled to seek his claim for becoming a tenant, but every one of them will not be entitled, only one person is entitled to be a tenant and according to Section 5(11)(c), if there are more than one members in the tenant's family., then there is required to be an agreement amongst members of the tenant's family and in the absence of such an agreement from the conduct of the parties agreement can be inferred and in the absence of this ultimately declaration has to be given by the Court. In this matter, the first circumstance which is relevant is passing of rent receipt in favour of Madhukar, who was defendant in earlier suit to the knowledge of the present petitioners and their husband and father. In fact, when joint written statement was filed by all the brothers, they admitted that for the sake of convenience, rent receipt was transferred in the name of Madhukar. It is also important to note that in that proceedings, Naresh and other defendants had raised a plea that they are joint tenants, but notwithstanding raising of such a plea, they gave up such a plea. If they were not to give up such a plea, perhaps in the absence of any agreement even the Court was competent to give declaration as contemplated u/s 5(11)(c). This having not been done and in fact his suit came to be dismissed, but one fact which was established as a result of earlier decision was that Madhukar was the tenant and since Madhukar was tenant the suit for non-payment of rent was rightly filed against Madhukar alone and it was not obligatory on the part of the landlord to join other brothers who were only brothers or at the most members of tenant's family. Therefore, I do not see any flaw in the decree passed in R.A.E. Suit No. 5350/71, equally I do not see any substance in the contention of alternative case made out by the Petitioners regarding their licence. Both the Courts have concurrently held that the licence is not established. In fact it appears that by raising such an alternative plea, they admitted that Madhukar was the tenant. So this alternative plea is one more circumstance from which an inference can be drawn that u/s 5(11)(c) by agreement Madhukar alone was treated as tenant. Lastly, I find no substance in the contention regarding not following the procedure of treating obstructionists proceedings as a suit. Detailed reply was filed by the present petitioners which almost was treated as a plaint. In fact, evidence on each and every aspect was led by the petitioners and then subsequently issues were framed. No fresh opportunity was asked for to lead any evidence. Even at this

stage, when I asked Shri Patil to point out to me what was the prejudice caused to his clients, by not following the procedure, he was unable to point out to me anything. Under these circumstances, merely because procedure is not followed and if no injustice is caused or prejudice is caused to the petitioners, then the proceedings will not vitiate and in view of this, I do not find any substance in the last submission also. For the reasons stated above, I reject the Petition, discharge the Rule. However, in the facts and circumstances of the case, there shall be no order as to costs.

18. At this stage, Mr. Patil prays for some time to vacate. Mr. Dalvi objects such a time being given. However, in the peculiar circumstance of this case, it would be difficult for any one in a place like Bombay to find out immediate accommodation and I am inclined to grant time till 31st December, 1993 to vacate on Petitioners filing an undertaking that they are in exclusive possession of the suit premises that they have not created no/ they will create any third party interest in the suit property, that they will compensation due and payable by them within a period of 15 days from today and they will go on paying compensation before 10th of every month. They undertake to this Court that they will hand over vacant and peaceful possession by 31st December, 1993. In the event if such an undertaking is filed by the Petitioners within a period of two weeks from today, the Respondents shall not execute the decree upto 31st December, 1993 obtained by them in R.A.E. Suit No. 5350/71. In the event if the Petitioners fail to file such an undertaking within a period of two weeks from today, then after expiry of period of two weeks Respondents would be free to execute decree for possession obtained by them in R.A.E. Suit No. 5350/71. Whatever compensation has been deposited in this Court and in the Small Causes Court Respondents-decree holders are at liberty to withdraw the same.