

(2009) 09 BOM CK 0099
In the Bombay High Court
Case No : Writ Petition No. 759 of 2008

Smt. Savitri Ganashyam Rajadhyax (deceased) and Others	APPELLANT
Vs	
Shri Shamboo alias Shambu Atmaram Pai Panandikar	RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2009) 09 BOM CK 0099

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : Sudesh Usgaonkar, for the Appellant; P. Rao, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Joshi, J.—Rule is made returnable and is heard by consent.

2. This is a petition by the respondents- tenants against whom the order of injunction was passed by the Rent Controller and the same has been confirmed by the Administrative Tribunal. According to plaintiff he is the owner of a house which has been given two house numbers 269 and 265. Ramchandra husband of respondent No. 1 and father of respondent No. 2, 3 and 6 was tenant of the said house. Respondents Nos. 3, 5 and 7 are wives of respondent Nos. 2, 4 and 6 respectively. Respondent Nos. 9 and 10 were minor children of respondent No. 8 when the proceedings for eviction were initiated.

3. According to the land lord:

(a) he was in the United States for his employment.

(b) After retirement he has come back to Goa.

(c) At present is staying in a rental accommodation and is paying monthly rent of Rs. 750/-.

(d) He needs suit house for his bonafide personal use and occupation.

4. The petition for eviction was filed by the land lord on 7.4.1994.

5. In the eviction proceedings, the respondents have appeared, engaged lawyer. They did not file their written statement.

The respondents and their advocate remained absent in the proceedings before the Rent Controller. The Rent Controller has proceeded ex-parte.

6. Record shows that the Rent Controller had noted may be on being shown by the parties, that respondent Nos. 9 and 10 are minors and some steps were necessary to appoint a guardian. Record shows that at no point of time steps were taken to appoint the guardian either by the Rent Controller or by the applicants, or respondent No. 8 - the natural guardian.

7. Record shows that on 25.3.1997 and 9.4.1997 oral evidence of the applicant was recorded. He has testified his bonafide and personal requirements that he is residing in a tenanted house and needs suit house for personal occupation. The witness was not cross examined, as none for tenants had appeared.

8. The learned Rent Controller has decided the application for eviction by judgment and order dated 23.7.1997.

9. In the judgment, the Rent Controller has taken resume in landlord's claim and recorded that inspite of service, no written statement was filed and case had proceeded ex-parte. He has further recorded that he has perused the statement of the applicant, took a resume of the facts deposed by him and has recorded the satisfaction that the applicant has succeeded in proving his case and as such he is entitled for relief prayed by him in his application dated 7.4.94.

10. The aggrieved tenants filed appeal. The memo of appeal is at page 81 to 86. The crux of the challenge as is spelt out from grounds (c), (e), (f), (i) and (k) thereof.

11. The tribunal heard the appeal and dismissed it by judgment and order dated 14.11.2008.

12. Present petition is filed by the tenants, challenging the judgment of the Tribunal in which the order of Rent Controller has merged.

13. Heard both learned advocates and perused the records tendered in appeal.

14. Learned advocate Mr. Usgaokar for the applicant has placed reliance on following reported judgments:

1. Ramlal and Ar. v. Sher Singh and Ors. 2002 A I H C 3672

2. Diwalibai Damjibhai Bhatti and Others Vs. Jaikumar Gopaldas Jain and Others, .

3. Abdullamiyan Abdulrehman Vs. The Government of Bombay, .

4. Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs., .

5. Ram Chandra Arya Vs. Man Singh and Another, .

6. Gian Devi Anand v. Jeevan Kumar and Ors. (1985) 2 SCC 633.

15. In answer to oral submissions learned advocate Shri P. Rao holding with Mr. Mahesh Sonak has placed reliance on the following judgments:

1. Smt. Sushilabai Dantye v. Ganpat Kudtarkar 1998 (2) GLT 266.

2. N. Jayaram Reddy and Another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool, .

3. Ballabhdas Saligram and Another Vs. Thakur Parmal Singh Rai Padam Singh and Others,

4. Naresh and Others Vs. Smt. Dauja and Others, .

5. Mr. Francisco Jose Hilario D'Cruz v. Mrs. Maria da Lourdes A.O.No. 22/2009.

16. Petitioner's submissions advanced in this appeal can be summarised as follows:

1. The landlord has not proved that the suit house came to his share as the document of partition was not produced when the defendants were appearing and were contesting though they had demanded the document, and the land lord has failed to prove that the property, subject matter has really fallen to his share.

2. The bonafide requirement was not proved.

3. Respondent Nos. 9 and 10 though sons of respondent No. 8 were tenants as they were residing with the original tenant and they were not duly represented, as no guardian was appointed for them.

4. The order of eviction is nullity on the sole ground, to fail to appoint guardian for minor respondents, apart that appeal can sustain on other grounds.

5. The definition of tenant as provided in Section 2(p) includes the class of persons among whom petitioner No. 9 and 10 are as the order of eviction is not capable of separation if it is void against this petition, it would be set a side in its entirety.

6. For all purpose petitioner did not get fair trial and fair hearing and therefore in the interest of justice interference is necessary and matter sent back for hearing and disposal after fresh participation by petitioner Nos. 9 and 1.

18. In reply the respondent has advanced following submissions:

1. Admittedly original tenant was paying rent to the applicant. There are no valid grounds available to the tenants to challenge the title of landlord.

2. Bonafide personal requirement is always a personal need and requirement of the land lord- who is the best judge of his need.

3. Landlord has stepped into the witness box and deposed his need.
4. Land Lord's testimony was not shattered by way of cross examination etc.
5. The learned Rent Controller has recorded satisfaction about landlord's need of personal requirement and said finding is endorsed by tribunal in approval.
6. Bonafide personal requirement being a question of fact, unless the findings are shown to be perverse, any interference in the writ jurisdiction under Article 226 and 227 of Constitution of India cannot be sought.
7. As regards the writ petitioners' submissions on the point of impugned judgment being void due to failure to appoint guardian for minors, following points are raised:
 - (a) As respondent Nos. 1, was wife of tenant and 2, 4, 6, and 8 being sons and were staying with the father who was a tenant have become tenants, however so nor daughter's children even though they reside with their father (son or daughter of original tenant) do not become tenants by fiction of law by reading Clause (p) of Section 2 in any manner.
 - (b) These minors i.e. petitioner Nos. 9 and 10 are not sons of original tenants, and therefore they cannot be regarded as tenants.
 - (c) In the appeal memo filed before the tribunal appellant No. 8 Ashok is shown to be the guardian of the appellant No. 9 and 10. The appeal contained a statement which reads as follows:

The appellants Nos. 9 and 10 are the children of appellants No. 8 and are represented herein by father and natural guardian whose interest is not adverse to or in conflict with the interest of the appellants No. 9 and 10.
 - (d) Interest of minors was not in exclusion to father or in their own personal right, and their interest what so ever is solely through father's father.
 - (e) Ashok the son of original tenant, who himself became a tenant by virtue of Clause (p) Section 2 of Rent Control Act had sufficiently represented the interest if any of respondent No. 9 and 10 as their natural guardian and minors' interest was inseparable from father's interest.
 - (f) It is not permissible after long acquiescence to urge that the minors were not duly represented.
8. It was a mistaken belief on the part of landlord to have impleaded in his application for eviction that respondent Nos. 9 and 10 are tenants and if need be he may be permitted to delete them. Analysis of submissions.
20. This Court would now deal with the points raised by the petitioner.
 - (a) It would be necessary and hence analysis of the definition of tenant requires to be done.

(b) The class of persons included in the definition of tenant, the following persons, the later class therein would become tenant in the absence of the former.

1. A person who is required to pay the rent.

2. If the tenant dies surviving spouse or son or an an unmarried daughter or father or mother who had been living with him as member of his family upto the date of death of the tenant.

3. Sub tenant.

4. Any person continuing in possession after termination of tenancy [exclusion a person who continues in possession after decree or order of possession is not a tenant.

21. From plain reading Clause (p) analyzed herein before, it is clear that the children of the son of the tenant or a married daughter or her children or children of unmarried daughter are not included in the definition of tenant.

22. The point as to whether minors sons of Ashok are tenants goes to the root of the case. Admittedly it is not the case of respondents that either the respondent No. 8 was himself a tenant or that with him respondent No. 9 and 10 were joint tenants, in his or their own right till the death of original tenant.

23. Respondent No. 9 and 10 are claiming the benefit of tenancy sheerly as they are children of respondent No. 8 and by taking the benefit of the statement contained in the eviction petition.

24. This Court has to keep in mind oral submissions namely; that it was a mistaken belief on the part of landlord to have pleaded in his application for eviction that respondent Nos. 9 and 10 are tenants and if need be he may be permitted to delete them. Since this request of deletion is conditional and made at the fag end, at this stage it may not be considered particularly when minors are not tenants.

25. This above said exposition of law by this Court does not escalate the definition u/s 2(p) to include the definition of tenancy, the grand children of original tenant. Admittedly, to the petitioners. Ganashyam Rajadhyax was the original tenant. This admission by itself excludes the grand children from the areas of those which claims to be tenants. Failure to appoint guardian to the minors.

26. In a civil suit this point would ordinarily go to the root of the case. In the present case, since on facts this Court has held that the minor did not have the status of tenant in absence of the statutory status of tenant being available to the parties, all other legal submissions are superfluous and has no bearing on the case.

27. It is clear that Ganashyam Rajadhyax was a tenant and present petitioners

Nos. 1 to 8 alone have gained status as tenant is consequent of his death and no other person is a tenant.

28. The well settled legal position that a decree would be vitiated when minors were not provided the defence through a guardian appointed by court. This provision will apply only when the minor has a list to defend or pursue. This aspect does not have a decisive effect on the present case as the minors have no legal right or cause to defend as they were arrayed parties before the Rent Controller when they had no right of their own, or with their natural guardian jointly or otherwise.

As to fair trial as hearing was ex-parte.

29. The point as to want of fair trial due to failure to appear is a question of fact. At no point of time present petition offers an explanation towards their failure in appearance and reasons leading to their failure to appear before the Rent Controller was a fact which could have been brought by them on record and permitted by trial court.

30. While petitioners have a legal right i.e. going before trial authority or before Rent Controller and not choosing clear ground for challenging the order on the ground of ex-parte.

31. Perusal of records reveals the following:

(a) Admittedly present petitioners who were noticed, appeared, but failed to file their written statement and also failed to participate in the proceedings.

(b) Petitioners were expected to take recourse of moving the Rent Controller for setting aside the said ex parte order of eviction.

(c) Rent Controller was the forum of first resort where a party who was precluded from contesting on account of the reasons sheerly within personal knowledge, should have approached the same for and make a request or prayer for setting aside ex-parte order by disclosing the grounds which had precluded such party from participating in the courses of hearing.

(d) When ever such a recourse is taken, the fact finding authority i.e. trial forum which is enjoined with the powers of recording the events and recording its fact findings is competent to decide as to whether a party has made out a case by offering explanation towards failure to appear in the trial and then to grant to such party an opportunity of fresh hearing.

(e) Such opportunity can as well be available by making out a case on the same grounds before the appellate forum. It is always the choice to be exercised and forum to be elected by the party. In the present case, present applicant elected to appeal than to go before the same authority for setting aside ex-parte order.

(f) In the appellate forum as has been pointed out by the respondent not only the respondent No. 8 but all respondents Nos. 1 to 7 together have asserted that

Ashok Rajadhyax ? opponent No. 8- being the natural guardian and father of respondent No. 9 and 10 was competent to represent them.

(g) More over during pendency of appeal, the petitioner Nos. 9 and 10, have attained majority, could have availed of opportunity to independently contest the case, which they have not done.

32. The petitioners are for all purpose caught by own act of failure. Matters within sheerly personal knowledge as to what precluded them against trial authority should have been brought before this Court, in absence plea about denial of fair trial cannot be scrutinised.

33. Once the trial court and this Court is deprived of actual information, reiteration of the ground for all purpose, that the order is ex-parte, turns out to be a clamor without foundation then a justifiable ground.

34. Learned advocate Mr. Usgaokar took this Court to the pleadings and oral evidence of the landlord. This court has found that essential and crucial pleading for bonafide personal requirement are reflected in the petition for eviction. The pleading and proof in this regard are on record. The order is not vitiated on the ground of absence of these factors.

35. The perusal of the impugned judgment reveals that the trial court was satisfied about landlord's need. The satisfaction is recorded as follows:

In view of what has been discussed above, I come to the conclusion that the applicant has succeeded in proving his case and as such he is entitled for relief prayed by him in his application dated 7.4.1994. Accordingly I pass the following order.

(quoted from page 34 of paper book)

36. The question as to whether the Rent Controller was satisfied about bonafide personal requirement is a jurisdictional fact. It however being a question of fact, unless the finding is shown to be perverse, it is not open for scrutiny. A meek submission has been made to urge that satisfaction by Rent Controller has not been properly recorded.

37. In this background the satisfaction in specific terms recorded by the Rent Controller which is quoted in para 4 of the judgment is unambiguous. Petition has no merits and is dismissed. Rule is discharged with costs.