

(2011) 06 BOM CK 0191
In the Bombay High Court
Case No : First Appeal No. 246 of 2009

Sulochana Rajaram Gurav (Smt) and Another	APPELLANT
Vs	
Harischandra Shivram Gurav and Others	RESPONDENT

Date of Decision : 10-06-2011

Acts Referred:

Maharashtra Housing And Area Development Act, 1976 — Section 103L, 173, 177, 2, 2(25)

Citation : (2012) 4 BomCR 284

Hon'ble Judges : Oka A.S., J

Bench : Single Bench

Advocate : Suresh Gole, for the Appellant; Jyoti Chavan, Advocate for respondent No. 1 and A.R. Patil, A.G.P., for the Respondent

Judgement

Oka A.S., J.—This is an appeal by the unsuccessful plaintiffs. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to make a brief reference to the facts of the case. The plaintiff No. 1 is the widow of one Mr. Rajaram Tatya Gurav (deceased) and the plaintiff No. 2 is the daughter of the deceased Rajaram. The dispute is about a room bearing No. 24 B/S.F in a newly constructed building, which is more particularly described in paragraph No. 1 of the plaint. The said room has been allotted in lieu of Room No. 24 in Chawl No. 1 at Parkar Wadi, Mahim, Mumbai 400 016. Room No. 24 B/ S.F. is hereinafter referred to as "the suit premises" and the Room No. 24 in Parkar Wadi is hereinafter referred to as "the earlier tenanted premises". The allegation in the plaint is that the defendant No. 1 got the rent receipt in respect of the earlier tenanted premises illegally transferred in his name. The defendant No. 2 is the Secretary of the Karnataka Co-operative Housing Society Limited. The said society, according to the plaintiffs, was entrusted with the job of reconstruction of the original chawl. The defendant No. 3 is the Maharashtra Housing and Area Development Authority, which has been established under the Maharashtra Housing and Area Development Act, 1976 (hereinafter referred to as "the said Act of 1976").

2. The case made out by the plaintiffs is that one Bhikaji Atmaram Bhutal was the tenant in respect of the earlier tenanted premises. The case made out in the plaint is that the deceased - Rajaram Tatya Gurav acquired the earlier tenanted premises from the said Bhikaji. It is stated in the plaint that in the year 1965, the son of the Rajaram's brother came to Mumbai and started residing with the family of the plaintiffs in the suit premises. The case made out is that he also brought his wife and children to which the Rajaram did not raise any objection considering the close relationship. The son of the brother of deceased Rajaram is the defendant No. 1. The case made out in the plaint is that though there were minor differences between the plaintiffs and the family of the defendant No. 1, they continued to stay in the earlier tenanted premises as members of the same family. It is stated that electricity charges were equally shared by the plaintiffs and the defendant No. 1. It is alleged that after the demise of the said Rajaram, the defendant No. 1 started torturing the plaintiffs. It is alleged that the defendant No. 1 illegally got the rent receipt in respect of the earlier tenanted premises transferred in his name though there was no surrender by the plaintiffs. It is contended that it was the duty of the defendant Nos. 2 and 3 to transfer the rent receipt in the name of the plaintiff No. 1. The earlier tenanted premises was demolished. It is alleged that the defendant No. 1 maneuvered to obtain the transit accommodation in lieu of the earlier tenanted premises and prevented the entry of the plaintiffs in the transit accommodation. Various allegations have been made regarding the action of the defendant No. 1 of preventing the plaintiffs from occupying the transit accommodation. It is submitted that the plaintiffs have no other premises.

3. The first prayer in the plaint is for declaration that the transfer of rent receipt by the defendant Nos. 2 and 3 in respect of the earlier tenanted premises in the name of the defendant No. 1 was illegal, bad in law and that the said transfer deserves to be struck down. The second prayer in the plaint is that the defendant Nos. 2 and 3 be directed to transfer the rent bill in respect of the earlier tenanted premises and the premises be allotted u/s 94 of the said Act of 1976 in the name of the plaintiff No. 1. The third prayer in the plaint is for directing the defendant Nos. 2 and 3 to allot permanent alternative accommodation in lieu of the earlier tenanted premises in the name of the plaintiffs in accordance with section 94 of the said Act of 1976. The fourth prayer is for injunction restraining the defendant No. 1 from interfering with the plaintiffs' joint occupation of the suit premises to be allotted in the name of the defendant No. 1.

4. The suit was contested by the defendant No. 1 by filing written statement. It is contended that the plaintiffs are not the occupiers within the meaning of the said Act of 1976. It is contended that apart from the Room No. 24 (the earlier tenanted premises), there was Room No. 5 in a chawl in the same property of which one Shivram (the father of the defendant No. 1) and one Bhikaji Akaram Bhutal were joint tenants. It is contended that the chawl in which Room No. 5 was situated was demolished by the defendant No. 2 for the purposes of redevelopment. It is contended that the defendant No. 2 accommodated the

father of the defendant No. 1 and the said Bhikaji in Room No. 24 (the earlier tenanted premises) as monthly tenants. It is contended that only for the sake of convenience, rent receipt was issued in the name of the said Bhikaji though the he and the said Shivram were jointly sharing the rent. It is contended that the defendant No. 1's father filed a suit in the Small Causes Court against the defendant No. 2 for declaration of tenancy. The said suit was dismissed and an appeal was preferred against the decree. During the pendency of the said appeal, the rent receipt in respect of the earlier tenanted premises was transferred in the name of the defendant No. 1 and therefore, the appeal was withdrawn.

5. It is contended that the deceased Rajaram was merely allowed to use the address of the earlier tenanted premises for the purposes of correspondence. It is contended that sometimes the deceased Rajaram used to sleep in the Verandah of the building or in the earlier tenanted premises. It is contended that the plaintiffs have no right in respect of the earlier tenanted premises and they are not the occupants within the meaning of subsection (25) of section 2 of the Act of 1976.

6. It appears that the plaintiffs did not press for prayer Clause (a) and accordingly, the following issues were framed:

ISSUES

FINDINGS

1) Do the plaintiffs prove that they were an "occupier" along with defendant No. 1 as defined u/s 2(25) of MHADA Act of original tenanted premises?

No.

2) Whether the Court has jurisdiction to try and entertain the suit Indenture section 173 of MHADA Act?

Yes.

3) Whether the suit is maintainable for want of notice u/s 177 of MHADA Act?

Yes.

4) Whether the plaintiffs are entitled to declaration and injunction, as prayed for?

No.

5) What order and decree?

As per final order

7. Thus, it appears that the only material issue pressed into service by the plaintiffs was that whether they were the occupiers of the original tenanted premises within the meaning of sub-section (25) of section 2 of the said Act of 1976.

8. The learned Counsel appearing for the plaintiffs invited attention of the Court to sub-section (25) of section 2 of the said Act of 1976. He pointed out that definition of occupier is very wide and when it was established that the plaintiffs were in possession of the old tenanted premises along with the defendant No. 1, the plaintiffs are entitled to status of the occupier. He fairly pointed out a decision of the learned Single Judge of this Court in the case of Ghulamnabi B. Khan Vs. Bombay Housing and Area Development Board and others, . He invited attention of the Court to what is held by this Court in the said decision. He submitted that though said decision holds that the person residing with the original tenant in the premises without any consideration claiming a right to allotment to a room in reconstruction premises cannot be an occupier within the meaning of sub-section (25) of section 2 of the said Act of 1976, the said decision cannot be read as a binding precedent in view of the decision of the Division Bench in the case of Taj Mohamed Yakub Vs. Abdul Gani Bhikan, . He pointed out that the Division Bench by the said judgment, interpreted the expression "occupier" u/s 2(e) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (hereinafter referred to as "the said Act of 1971"). He submitted that the definition "occupier" u/s 2(e) of the said Act of 1971 is absolutely no different than the definition of the same word under sub-section (25) of section 2 of the Act of 1976. He submitted that the Division Bench held that even a trespasser will squarely fall within the expression "occupier" u/s 2(e)(v) of the said Act of 1971. He pointed out that the Division Bench observed that if such interpretation is not put, the provisions under the said Act of 1971 for removal or eviction of the occupier will become redundant. He submitted that the said decision of the Division Bench in the case of Taj Mohamed Yakub (supra) was not noticed by this Court while deciding the case of Ghulamnabi B. Khan [supra]. He placed reliance on a decision of the Apex Court in the case of Union of India (UOI) Vs. Prabhakaran Vijaya Kumar and Others, . Relying Upon the said decision, he submitted that when words used in a beneficial or welfare statute are capable of two constructions, the one which is more in consonance with the object of the enactment and for the benefit of the person for whom the Act was made should be always preferred. Therefore, he submitted that the plaintiffs being occupiers are entitled to occupy the suit premises. He submitted that the appellants will be liable to pay damages to the owner and therefore, they will be covered by sub-clause (e) of sub-section (25) of section 2 of the Act of 1976.

9. The learned Counsel appearing for respondent No. 1 relied upon another decision of the Division Bench in the case of Property Owners' Association and Others Vs. State of Maharashtra and Others, . He submitted that the Division Bench has in terms held that a trespasser is not entitled to claim status of occupier u/s 2(25) of the said Act of 1976. She submitted that the view taken by the learned Single Judge in the case of Ghulamnabi B. Khan (supra) is consistent with the decision of the Division Bench and therefore, the view taken by the trial Court as regards the interpretation of section 2(25) of the said Act of 1976 is correct.

10. In reply, the learned Counsel appearing for the plaintiffs submitted that there are merely passing observations made by the Division Bench in the case of the Property Owner's Association and others (*supra*). He submitted that the view taken by the earlier Division Bench in the case of Taj Mohamed Yakub (*supra*) still holds the field. He placed reliance on section 103I of the said Act of 1976. He submitted that it was the obligation of the co-operative society to ensure that all the occupiers in the demolished building are joined as members of the co-operative society. He submitted that section 103 I of the said Act of 1976 will have overriding effect in view of section 103L of the said Act of 1976. He also relied upon a list tendered across the bar, which is dated 13th July, 2007, which shows the names of the plaintiffs as the occupants.

11. I have given careful consideration to the submissions. The plaint records admitted position that the tenancy in respect of the earlier tenanted premises was in the name of the defendant No. 1. It was alleged that the transfer of tenancy in the name of the defendant No. 1 was illegal and therefore, the first prayer was made in the plaint for declaration that the action of transfer of the tenancy was illegal. First prayer has not been pressed and therefore, this Court will have to proceed on the basis that there is no challenge to the status of the defendant No. 1 as the tenant in respect of the earlier tenanted premises. Perusal of the impugned judgment shows that the only contention raised by the plaintiffs was that they being occupiers of the earlier tenanted premises within the meaning of sub-section (25) of section 2 of the said Act of 1976 are entitled to permanent accommodation in their name in accordance with section 94 of the said Act of 1976.

12. It will be therefore, necessary to make a reference to sub-section (25) of section 2 of the said Act of 1976. It must be noted here that in the plaint, the plaintiffs have not claimed to be licensees in occupation. Their claim is that the rent receipt ought to have been transferred in the name of the plaintiff No. 1 and the defendant No. 1 was not entitled to claim tenancy. The learned Counsel appearing for the plaintiffs submitted that their case will be covered by Clause (iii) of sub-section (25) of section of the said Act of 1976 inasmuch as the plaintiffs will be liable to pay damages for the use and occupation to the owner of the earlier tenanted premises. It must be noted here that no such case is made out either in the pleadings or in the evidence. Nevertheless, I proceed to consider the submissions made by the learned Counsel appearing for the plaintiffs on the interpretation of the word "occupier" u/s 2(25) of the said Act of 1976. Sub-section (25) of section 2 of the said Act of 1976 reads thus:

(25) "occupier" includes -

(a) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;

(b) an owner in occupation of, or otherwise using, his land or building;

- (c) a rent-free tenant of any land or building;
- (d) a licensee in occupation of any land or building; and
- (e) any person who is liable to pay to the owner damages for the use and occupation of any land or building;

13. The learned Counsel appearing for the plaintiffs fairly pointed out a decision of the learned Single Judge of this Court in the case of Ghulaunnabi B. Khan (supra). This was a case where the appellant before this Court contended that he was the occupier in respect of the original premises within the meaning of sub-section (25) of section 2 of the said Act of 1976. The appellant claimed, to be licensee of the premises in the original building, which was demolished. The question considered by this Court was whether the appellant becomes occupier under sub-section (25) of section 2 of the said Act of 1976. This Court in paragraph No. 6 observed thus:

6. Once I have held that the appellant has failed to prove that he was residing as a licensee for consideration, the only other point that requires consideration in point No. 2 i.e. whether mere occupation of the premises would make the appellant also an occupant in respect of the premises and if so whether he along with respondent No. 5 are jointly to be allotted the said premises.

This Court considered sub-section (25) of section 2 of the said Act of 1976. In paragraph No. 7, this Court had held thus:

7. At the first instance the argument seems to have merit in as much as all that is contemplated under the definition is that a person in possession must fall as an occupier in either of the categories as set out under (a) to (e) of definition of an occupier. However, "considering each of five categories what emerges is what the definition contemplates is a "person" who will be an occupier. In so far as the authorities under the Act are concerned, they are bound to look at the person who falls in the definition of occupier. Inter se rights between an occupier who is a tenant and another person residing with such tenant would not make such a person as an occupier in so far as authorities under the MHADA Act are concerned. That would be a dispute between the occupier and the person in occupation with the occupier. In the instant case D.W. 3 who is a landlord has accepted the respondent No. 5 as a tenant. Once he accepts respondent No. 5 as a tenant respondent No. 5 satisfies the definition of occupier. Therefore, in so far as the authorities under the Maharashtra Housing and Area Development Authority (sic) Act are concerned, occupier in the instant case would be the person who was paying rent. Once one of the categories is included it is impossible to conceive of a situation that thereafter any other categories as set out in the said definition can also be joint occupant along with the occupier. The legislature has contemplated as to who is an occupier. The definition itself gives some indication that ultimately what the Act has considered is an "occupier". Once I hold that there is an occupier in respect of the said premises the mere fact that another is residing with the said occupier would not make the said other

also occupier for the purpose of sub-section (25) of section 2 of the MHADA Act.

(Emphasis added)

14. This Court observed that the respondent No. 5 was accepted as a tenant and the appellant was claiming to be a licensee. What was held by this Court was that once a person establishes his status as a tenant, as far as MHADA is concerned, he becomes occupier and it is impossible to conceive to a situation that thereafter, the persons falling under the other categories set out in sub-section (25) can also become joint occupant along with the occupier. Therefore, this Court proceeded to observe that once it was held that the tenant was occupier within the meaning of sub-section (25) of section 2 of the said Act of 1976, the mere fact that another person was residing with the said occupier would not make the said other person an occupier within the meaning of sub-section (25) of section 2 of the said Act of 1976.

15. In the case of Taj Mohamed Yakub (supra), the Division Bench dealt with the issue of meaning of expression "occupier" as defined u/s 2(e) of the said Act of 1971. The Division Bench after considering the scheme of 1971 came to the conclusion that the expression occupier under the said Act of 1971 will cover every person who is in occupation of the area declared as the slum area and irrespective of the character of possession of such person. As pointed out earlier, the submission of the learned Counsel appearing for the plaintiffs is that the expression occupier under the said Act of 1976 is similarly defined. The submission is that a person who occupies old premises along with the tenant will be also an occupier under the said Act of 1976.

16. In the case of the Property Owner's Association and others (supra), the Division Bench was dealing with the writ petition where there was challenge with the constitutional validity of Chapter VIII-A of the said Act of 1976. It appears that one of the contentions raised by the petitioners before the Division Bench was that the expression occupier will take in its fold even a trespasser. In fact one of the challenge to Chapter VIII-A was on the basis of the submission that the expression occupier as defined in sub-section (25) of section 2 will include even a trespasser. The Division Bench dealt with the said submission in paragraph No. 12 of the said decision. Relevant part of paragraph No. 12 reads thus:

12.....The definition of expression "occupier" in section 2(25) is inclusive and Clause (e) covers person who is liable to pay to the owner damages for use and occupation of any land or building. It was contended that this clause enables the trespasser to claim that application can be filed by him as he is liable to pay damages for the use and occupation to the owner. We are unable to read Clause (e) to conclude that a trespasser is entitled to claim character of occupier. In our judgment, what the Legislature contemplated by Clause (e) are such persons whose initial entry on the land or the building was in accordance with law but whose continuance thereon on termination of their right makes them liable to

pay damages. For instance, a licensee in occupation of any land or building is covered by Clause (d) and if the license under which the licensee is no occupation stands terminated, then such person will be required to pay to the owner damages for use and occupation. The legislature contemplated such kind of cases while enacting section 2(25) (e). We are not prepared to accept the contention that Clause (e) includes trespasser and that was also not the claim made on behalf of the State Government. Reference was made to the decision of the Division Bench of this Court reported in 1991 MLJ 263 [Taj Mohamed Yakub Vs. Abdul Gani Bhikan] and to which one of us (Pondse. J) was a party. While considering an identical expression in section 2(e) (v) of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, it was held that a person who wrongfully uses the land is liable to pay damages and, therefore, would be covered by the expression. The Division Bench put this construction on the clause in that Act by perusal of various sections of the Act which clearly contemplated that person in occupation of area declared as slum area irrespective of character of possession of such person is an occupier. It was held that the provisions were enacted for improvement of the slum area and unless a wider meaning is given to the expression, it will not be possible for the Competent Authority to evict the occupants from the building and also to carry out expansion of work of improvement of the slum area. It would also not be possible for the Competent Authority to recover from such trespasser expenses incurred by the Competent Authority for maintenance of works or enjoyment of amenities provided for improvement of the slum area and, therefore, a wider meaning was required to be given. In the present case, it is not necessary to extend such a wider meaning to Clause (e) because the object of the present Act is entirely different from that of the Slum Area Act. Shri Setalvad submitted that it is not permissible to read down the clause so as to exclude the trespasser but we are unable to accede to the submission for more than one reason. In the first instance, the plain reading of Clause (e) excludes the rank trespasser in occupation and, therefore, there is no occasion to read down the provision and secondly even if it is necessary to read down Clause (e). it is only for the purpose of achieving the object of the Legislature, and therefore perfectly permissible.

(Emphasis added)

17. Thus, what is held by the Division Bench is that Clause (e) of sub-section (25) of section 2 of the said Act of 1976 excludes a trespasser. The Division Bench also held that the earlier decision in the case of Taj Mohamed Yakub (supra), which interpreted section 2(e) of the said Act of 1971 will have no application to sub-section (25) of section 2 of the said Act of 1976. Therefore, the submission of the learned Counsel appearing for the plaintiffs that the interpretation of expression "occupier" in sub-section (25) of section 2 of the said Act of 1976 will be governed by the decision in the case of Taj Mohamed Yakub (supra) has been rejected by the Division Bench of this Court.

18. Thus what is holding the field is that the view taken by the learned Single Judge in the case of Ghulamnabi B. Khan (supra). As pointed out earlier, the status of the defendant No. 1 as tenant is not subjected to challenge. The plaintiffs have not claimed to be the licensees. Therefore, the plaintiffs who were at highest occupying the earlier tenanted premises along with the defendant No. 1 will not be included in Clause (e) of sub-section (25) of section 2 of the said Act of 1976. As the defendant No. 1 is an occupier being falling in sub-clause (a) of sub-section (25) of section 2, as held by this Court in the case of Ghulamnabi B. Khan (supra), even if the appellants fall in any other category under sub-section (25) of section 2 of the said Act of 1976, they are excluded from the definition of occupier. u/s 94 of the said Act of 1976, only an occupier is entitled to temporary as well as alternative accommodation.

19. The last submission made by the learned Counsel appearing for the plaintiffs was on the basis of section 103 I, which is part of Chapter VIII-A of the said Act of 1976. Apart from the fact that in one of the prayers in the plaint, the right is specifically claimed u/s 94 of the said Act of 1976, there is not pleading that Chapter VIII-A will apply to the present case. Chapter VIII-A of the said Act of 1976 is applicable only when there is an acquisition made of the property for the benefit of the co-operative society formed by the occupiers of the building. In the present case, section 94 of the said Act of 1976 was invoked and the occupiers were required to vacate the premises in the old building to enable a new building to be constructed. There is nothing on record to show that the provisions of Chapter VIII-A of the said Act of 1976 were invoked. Therefore, reliance on section 103 I will not help the plaintiffs. The plaintiffs will not be benefited by the document tendered across the bar as the said document has been created in July 2007 during the pendency of the suit and in any event there is no application made by the plaintiffs seeking permission to lead additional evidence.

20. Hence, there is no merit in the appeal and the same is accordingly dismissed with no order as to costs. Civil Application No. 2643 of 2009 does not survive and the same is disposed of.