

(1992) 07 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 1405 of 1988

Super Tiles Works and Others

APPELLANT

Vs

Additional District Magistrate and Others

RESPONDENT

Date of Decision : 07-07-1992

Acts Referred:

Citation : (1992) 3 BomCR 730

Hon'ble Judges : H.D. Patel, J

Bench : Single Bench

Advocate : S.P. Dharmadhikari, for the Appellant; S.V. Manohar, for the respondents 3 to 6, for the Respondent

Judgement

H.D. Patel, J.—The petitioner No. 1 M/s. Super Tiles Works is a partnership firm duly registered under the Indian Partnership Act and the petitioner Nos. 2 to 7 are its partners. Likewise the petitioner No. 8 Vikas Industries is also a partnership firm registered under the Indian Partnership Act and the petitioner Nos. 9 & 10 are its partners. Both the firms are doing independent business. The petitioner No. 1 is carrying on the business of manufacturing tiles whereas the petitioner No. 8 has a fabrication unit. The business is carried on by either of the two units on Plot No. 31, situated in Timber Market, Great Nag Road, Nagpur. The said plot admeasuring 12471 sq. ft. is owned by respondent Nos. 2 to 6.

2. The aforesaid property was given on licence to the petitioner No. 1 M/s. Super Tiles Works under a deed dated 8-1-1963. The licence records payment of Rs. 400/- per month as licence fee. As per terms in the licence-deed, the licence commenced from 16-11-1962. The licence was specifically granted for the purposes of residence-cum-Industrial Establishment. The business of manufacture of tiles, which the petitioner No. 1 was to do, was specified therein. Prohibition to deal in timber business was also stipulated in the document. The petitioner No. 1 was held liable for payment of municipal tax and other levies that may be imposed on the property. The licence period was for a period of 11 months. According to respondent/landlords, the property in question was placed

in possession of petitioner No. 1 at the commencement of the licence. Though the document under which the possession was given as styled as "document of licence", it was in substance a rent note because exclusive possession of the property is said to have been given. The relationship between the parties is that of landlord and tenant.

3. The respondents/landlord filed application before the Rent Controller invoking Clauses 13(3)(ii) and (iii) of the C.P. & Berar Letting of Houses and Rent Control Order (hereinafter to be referred to as "the Rent Control Order") praying for permission to determine the lease of petitioner No. 1 M/s. Super Tiles Works. One of the grounds in the application was about the petitioner No. 1 being a habitual defaulter. The Rent Controller rejected that ground and in the absence of any appeal being preferred by the respondent/landlords, the finding as given stands finally adjudicated. The ground of habitual defaulter is hence not involved in the petition.

4. The only other ground raised in the application is sub-letting a portion of the premises by petitioner No. 1 to Vikas Industries - the petitioner No. 8. It is alleged that this sub-letting was without the written permission of the respondent/landlords. It is alleged that a substantial portion was sublet and respondent No. 8 has established a factory; installed a telephone, the number of which is 41451, and several employees are engaged in that Industry. The respondent/landlords have claimed that the petitioner Nos. 1 to 7 have incurred a disqualification furnishing a cause of action to them under Clause 13(3)(iii) of the Rent Control Order. The petitioner Nos. 8 to 10 were also joined as parties.

5. Separate replies were filed by petitioner Nos. 1 to 7 and petitioner Nos. 8 to 10. Almost identical defence is raised in both the replies in so far as the ground for subletting is concerned. The sum and substance of the defence was that no question of obtaining the permission did arise because the creation of licence or lease was in the nature of joint tenancy or co-tenancy of different parts of the same plot to different persons at one and the same time. It was hence denied as false that sub-tenancy was created without the permission of the respondent/landlords. It was further pleaded in defence that creation of co-tenancy was subjected to one condition and that condition was that the liability for rent was the responsibility of the petitioner Nos. 1 to 7 of the entire plot and the respondent/landlords will not be anyway concerned about payment of rent by petitioner Nos. 8 to 10. In this context, it was pleaded that petitioner Nos. 1 to 7 and petitioners Nos. 8 to 10 simultaneously approached the respondent/landlords for lease of the land and at their behest and direction one portion was occupied by petitioner Nos. 1 to 7 and the remaining portion was occupied by petitioner Nos. 8 to 10. According to the replies, each of firms was thus in exclusive possession of the portions of plot right from the inception of their lawful relationship with the respondent/landlord.

6. It is a settled principle of law that in order to prove tenancy or sub-tenancy, two ingredients are necessary to be established. Firstly, a tenant must have an

exclusive right of possession or interest in the premises or part of the premises in question and secondly, that right must be in lieu of payment of some compensation or rent. Based on this principle, it was submitted on behalf of the petitioners that once it is established that petitioner Nos. 1 to 7 and petitioner Nos. 8 to 10 were simultaneously inducted in their respective portions by respondent/landlords and particularly respondent No. 2, since deceased, with arrangement that petitioner No. 1 alone should be responsible for payment of rent, the result would be the creation of co-tenancy in favour of the two firms and allegations of creation of sub-tenancy must fail. It is in this background that the Counsel for the petitioners took me through the entire record so that his contention of co-tenancy should be upheld. It may be relevant to mention here that though joint tenancy was also pleaded, the contentions were restricted to co-tenancy only.

7. In order to establish that the petitioner Nos. 1 to 7 and petitioner Nos. 8 to 10 are co-tenants of the plot, reliance is heavily placed on the oral evidence in the case and in particular, the evidence of Nayabhai who was a party to the agreement. The documents relied upon are Exh. 1 N.A. 8.- a factory licence issued in favour of Vikas Industries-dated 11-3-1963 and Exh. 2-N.A. 8- which is a registration under the Small Industries dated 30-10-1963.

8. Nayabhai wanted the Court to, believe that the discussion for giving the premises on rent was held with Veerjibhai respondent No. 2 - since deceased and no one else. In that discussion, Veerjibhai told him that the plot was sufficiently big and the rent would be Rs. 400/-. Acceptance was not immediately communicated. When the witness again approached Veerjibhai, it was he who informed the witness that one more party consisting of Shri Kulkarni and Shri Belurkar were also coming for negotiations in respect of the same plot. It was at the instance of Veerjibhai that the Godown portion was to be given to Shri Kulkarni and Belurkar. Veerjibhai is also said to have informed the witness that the total rent would be Rs. 400/- per month when should be paid by petitioner No. 1 and the said petitioner should recover Rs. 75/- per month from the petitioner No. 8 Vikas Industries. This was accepted by all the petitioners and accordingly Rs. 400/- per month was being paid to respondent/landlords by petitioner no. 1 and they recovered Rs. 75/- per month from petitioner No. 8. Apart from the fact that the story given out is an afterthought and its admissibility can be questioned, the deposition as such does not conform with their pleadings, according to which, both the petitioners Nos. 1 to 7 and petitioner Nos. 8 to 10 simultaneously approached the respondent/landlords at one and the same time and it was at the behest of respondent/landlords, the petitioners No. 1 occupied a major portion of the plot and the remaining was occupied by petitioner No. 8. The simultaneous approach by the two industries together at one and the same time is not to be found in the deposition of Nayabhai. The whole approach is changed as if it was Veerjibhai who trusted petitioner No. 8 upon petitioner No. 1. There are also other reasons why the defence as put up was not found acceptable to the learned Authorities below.

9. Exh. A-4 is the document which came to be executed by parties on 8-10-1963. The execution of document was after more than one and a half month from the date the possession of entire plot as described therein was given to petitioner No. 1. A stipulation in that document is very pertinent, and that stipulation is regarding the business which petitioner No. 1 must carry on the plot. The petitioner No. 1 was not to use the plot given to them on licence for any other business except manufacture of tiles. The document reveals that exclusive right of possession and interest, which is one of the ingredients of creation of tenancy, in the entire plot was given to petitioner No. 1. It is, therefore, hard to believe that the plot was also simultaneously given to petitioner No. 3 at one and the same time. Had it been a fact, such a document would not have come into existence at all. Exh. A-4 purporting to be a licence - deed is also signed by Devsi Veerjee Patel who has been examined on behalf of respondent/landlords. He asserts that he was present at the time of initial talk which took place at the time of giving the plot on licence or lease to petitioner No. 1. Merely because Veerjibhai was not examined, no inference, muchless adverse, is liable to be drawn as urged on behalf of the petitioners.

10. It will be of interest to note the stand adopted by petitioner Nos. 1 to 7 in the reply notice dated 12-2-1980 (Exh. A. 27). Initially, they admit execution of the "document of licence" without disputing its terms. Thereafter, the defence as put forth was that in 1963 Vikas Industries also approached the respondent/landlords for permission to occupy the plot but was not in need of such a big one and at the same time the petitioner No. 1 was also in need of the said plot and they also demanded permission to occupy the same. It was at the behest of respondent/landlords that liability to pay rent for the entire plot was accepted by petitioner No. 1. A specific date is then given, namely, 1-7-1963 for starting of the business by petitioner No. 8 Vikas Industries, whereas the date of starting of the business by petitioner No. 1 was March, 1963. According to the reply (Exh. A-27) the petitioner No. 8, Vikas Industries, was in occupation of the plot with permission of respondent/landlords practically since the beginning of the lease. It will be worthwhile to extract some portion of the reply which clearly admits sub-letting. These portions are as under:

"It is submitted that sub-letting in favour of Vikas Industries being with your permission and in existence since last 20 years with your permission therein, does not and could not give any cause of action to make any complaint against my client"

".....It is submitted that till this notice you never objected to the occupation of Vikas Industries as subletting as it was with your permission but it appears that you want to resile from the same in order to find a ground to evict my client from the plot."

The clear admission given in the reply about creation of sub-tenancy albeit with permission falsifies the defence that Vikas Industries is a co-tenant of respondent/landlords.

11. With the existence of documentary evidence Exh. A-4 the document evidencing the grant of licence - which is nothing but a lease, it is not open for the petitioners to lead contrary evidence than what is contained in that document. In any event, there is yet documentary evidence on record to show that petitioner Nos. 1 to 7 have sublet a portion of the plot to the petitioner No. 8 Vikas Industries. The two documents are the declaration given by petitioner No. 1 to the City of Nagpur Corporation as required by section 125 of the Nagpur Corporation Act. These declarations are at Exh. A-28 and Exh. A-30 which are respectively dated 10-1-1978 and 23-7-1965. In the column No. 6 the question to be answered is whether you have sublet the premises and the same is answered in the affirmative mentioning the name of sub-tenant as "Vikas Industries" Even the rent charged is mentioned therein. The explanation given for these admissions is rather astonishing. By placing reliance on Exh. NA-11, which is also a declaration dated 30-10-1967 in which the column of sub-tenant is left blank, it was urged that these declarations cannot be taken to be at its face value because the declaration are based on the conception which the petitioner No. 1 had, I do not think that the conception of petitioner Nos. 1 to 7 is so poor, that they would make such blunders. Mere omission to fill up the column relating to sub-tenancy once cannot lead to a conclusion which the Counsel for the petitioners want me to draw. Can it be said that admission given in reply notice (Exh. A-27) was also due to wrong conception of the petitioners.

12. At this juncture, it will be proper to deal with the two documents (Exh. 1- NA 8) and (Exh. 2- NA 8) relied upon by the petitioners. The first document is a factory licence dated 11-3-1963 and the second is the Registration Certificate of Small Scale Industry dated 30-10-1963. My attention was invited in order to show that petitioner No. 8 Vikas Industries was in existence in the same compound, that is, on the very plot since the beginning of the lease and the probability of being a co-tenant since then. It cannot be forgotten that commencement of the lease was in November, 1962 and even presuming that Vikas Industries had come into existence on 11-3-1963 - which is the date of the licence, it can never be held that the respondent/landlords had inducted the petitioner No. 8 at the same time the lease was granted to the petitioners Nos. 1 to 7 Super Tiles Works.

13. Exh. A-4, the document of lease though styled as licence clearly shows exclusive right of possession and interests of entire premises in question by petitioner Nos. 1 to 7. A part of the plot is sublet by them to Vikas Industries for their business and that too without the written permission of the respondent/landlords. This letting out appears to be soon after the creation of the lease. This fact came to the Knowledge of the respondent/landlords in November, 1996 when they objected to assessment of tax based on letting value being assessed on basis of rent also paid by petitioner Nos. 8 to 10. That objection was raised by letter dated 11-11-1966 (Exh.N.A. 15). A plea of waiver was hence raised on behalf of the petitioners contending that despite knowledge, the respondent/landlords permitted the continuance of sub-letting of the premises in question for

about 18 years and, therefore, it should be presumed that they have waived their right from evicting the tenant on the ground of subletting. I cannot agree with the proposition firstly because waiver is a question of fact which has to be tested by facts and evidence. There is no conscious relinquishment of the advantage of any statute. The Authorities below have not gone into this fact for want of such a plea. Apart from this, the requirement of a statute which is in the public interest, there cannot be any question of a waiver of right, dealing with the rights of the tenants or the landlord. It is held in *Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others*, , that the requirement of consent to be in writing was to serve a public purpose, that is, to avoid dispute as to whether there was consent or not. At the most, the continuance of the sub-tenant on the plot for long time could be described as acquiescence or even sufferance on the part of respondent/landlords. In no case the acquiescence or even sufferance could be equated with granting written permission to sublet the premises.

14. Referring to a passage in the decision of Supreme court in *A.S. Sulochana Vs. C. Dharmalingam*, , the Counsel for the petitioner contended that it squarely applies to the facts in the present case as well and, therefore, the tenant could be evicted on the ground of sub-letting. The passage on which reliance is placed is extracted below.

".....The mere fact that for as many as 18 years no objection was raised, and no action for possession was instituted against the father of the appellant (respondent?) in his lifetime notwithstanding the fact that a sub-tenant was openly in occupation of a part of the rented premises, would give rise to an inference that it was never treated as unlawful subletting by the appellant or her father. There is nothing on record to show that the subletting in question, which was made in 1952, 18 years before the institution of the suit in 1970, was in violation of the relevant provisions of law. The appellant cannot succeed unless the appellant establishes that section 10(2)(ii)(a) has been violated and the tenant has incurred the liability to be evicted on the ground of unlawful subletting notwithstanding the fact that the lease did not confer on him any such right, and that such unlawful subtenancy was created without the written consent of the then landlord. There is no evidence, direct or circumstantial, on the basis of which it can be said that the lease did not confer on the father of the respondent the right to create a sub-tenancy. Or that it was done without the written consent of the then landlord, that is to say, the father of the appellant. Under the circumstances, in any view of the matter the appellant cannot successfully evict the respondent on the ground of having created an unlawful sub-tenancy within the meaning of section 10(2)(ii)(a) of the Act."

I cannot agree with the submission for more than one reason. Firstly, both the landlord as well as the tenant are alive being parties to the litigation whereas in the Supreme Court case the parties to the agreement of tenancy were not alive and, therefore, it was held that the tenant's successor could not be held liable for creation of sub-tenancy by the tenant. It is observed in the Supreme Court

case that the flouting of the law, the sin under the Rent Act must be the sin of the tenant sought to be evicted and not that of his father or predecessor-in-interest, Secondly, the above extracted passage, if carefully read, would show that there was nothing on record of the Supreme Court case to show that subletting in question, which was made in 1952, 18 years before the institution of the suit in 1970, was in violation of the relevant provisions of law. Therefore, the evidence was lacking which is not so in the case at hand.

15. For the foregoing reasons, the writ petition is devoid of any merit and is accordingly rejected. Rule stands discharged. The parties shall bear their respective costs.