
(2001) 02 BOM CK 0019

In the Bombay High Court

Case No : L.P.A. No. 13 of 1997 in F.A. No. 114 of 1998 in B.C.C.C. Suit No. 6958 of 1972

Suresh Madhukar Nagarkar

APPELLANT

Vs

Ujubaia Mahav Desai and Others

RESPONDENT

Date of Decision : 15-02-2001

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13, 15A

Citation : (2002) 4 BomCR 212 : (2001) 2 MhLj 923

Hon'ble Judges : T.K. Chandrashekhara Das, J;P.S. Patankar, J

Bench : Division Bench

Advocate : P.K. Dhakephalkar, for the Appellant; S.L. Kapse, for the Respondent

Final Decision : Allowed

Judgement

T.K. Chandrashekhara Das, J.—Heard both sides.

2. The defendant in B.C.C.C. Suit No. 6958 of 1972 on the file of the City Civil Court, Bombay is appellant herein.

3. An agreement of licence was executed between the plaintiff and defendant on 18-11-1968. As per the said agreement the suit premises which is a portion of National Medical Hall at Bai Panbai Gangli Building, Ground Floor, Lalbaug, Bombay 400012 was given on licence by the plaintiff to the defendant for the purpose of running Dental clinic. The agreement was for the fixed term for a period of 10 years. The royalty amount of Rs. 380/- per month was also fixed to be paid by the defendant to the plaintiff. In that agreement there are two clauses which enable the parties to terminate the licence before the period. Those Clauses are 11 and 12 which are reproduced hereunder :

"11. In the event of the licensee committing breach of any of the terms and conditions of this agreement, the licensor shall be entitled to terminate this agreement.

12. The licensee may terminate this agreement before the expiry of the said period of ten years if he so desires by giving one calendar months notice in writing to the licensor, to that effect."

4. On the basis of the allegation that the defendant has committed breach of the terms of the licence agreement, the agreement was terminated on 12-4-1972 by the plaintiff. Thereafter the plaintiff had filed aforesaid suit for eviction. The suit was decreed by the trial Court and the defendant filed appeal before this Court as First Appeal No. 114 of 1998 and the same appeal is dismissed by the judgment of the learned Single Judge dated 23/24th December, 1996. Against that judgment, this L.P.A. has been filed by the defendant.

5. Both the trial courts and Id. Single Judge have found that there is breach of the terms of the licence and therefore, termination of the licence is justified.

6. The learned Counsel for the appellant submits the following points for our consideration; attacking the decree of eviction.

(1) The termination of licence is premature as the licence was for the fixed term of 10 years. Both the clauses relating to the termination of lease, as cited above, have come into operation. Neither the defendant did terminate the licence after notice as contemplated in Clause 12 nor he has committed any breach as provided in Clause 11 enabling the plaintiff to terminate the licence.

(2) The term of the agreement expires only on 18-11-1978. In the meantime, section 15-A of the Bombay Rent Act was amended and brought into force with effect from 1-2-1973. Resultantly, the defendant has become tenant and therefore, he has got protection under the Rent Act and his eviction from the suit premises can only be under the provisions of the Bombay Rent Act. City Civil Court could not have decreed the suit.

7. The learned Counsel for the appellant and the respondent were heard on these points. The allegation in the plaint for termination of the licence is that the defendant has committed breach of payment of royalty continuously for the period of five years, that defendant has constructed water-tank without the permission of the plaintiff and the timing of the dispensary was not maintained. On these counts, the plaintiff alleges breach of terms of the agreement by the defendant, for appreciating this argument, we have examined the pleadings and evidence in this case. The plaintiff has not chosen to enter into the witness box. Instead, his daughter was examined on behalf of the plaintiff, she admits that at the time of filing of the suit, she was minor. She further admits that she has given evidence only as per the information passed on to her by her father. She says that she has no direct knowledge about the facts of the case. She says that the suit room is of two portions. One portion is in the possession of her father and the other portion is occupied by the defendant. She categorically states that as envisaged under the agreement the defendant has not used the portion which her father was using nor her father was using the portion that was being used by the defendant. She also states that the defendant is using the entire blue shaded

portion on Exh. D-1 and her father was using red shaded portion. The defendant is using the blue shaded portion along with his servants and patients and nobody from plaintiff's side is using that portion. There is a wooden partition between the blue portion and the red portion separating both portions. Therefore, it is clear that the defendant is using the portion of the room exclusively as per the agreement of licence.

8. Regarding breach of conditions in the licence which enabled the plaintiff to terminate licence, the case of the plaintiff is that the royalty is in arrears. This case cannot be believed because according to the plaintiffs, 5 years royalty was in arrears and according to defendant he was regularly paying the royalty. The defendant says that plaintiff was not issuing the receipts. In this background, we cannot appreciate the case of the plaintiff that he had waited for five years for claiming the arrears of rent. Further, the case of the plaintiff that the defendant has violated the terms of licence by constructing water tank has also not been proved because the averment in the plaint goes against his case. Para 4 of the plaint reads as follows :

"4. The defendant with the permission of the plaintiff, set up a small reservoir or a water tank for purpose of his dental clinic in the premises of the said National Medical Hall. It was agreed between the plaintiff and the defendant that the said tank was to be set up with the necessary municipal permission or authorisation."

In addition to this no such term in the agreement prohibiting setting up of the water tank and the witness of the plaintiff has admitted that she had no knowledge about this.

9. As seen from the plaint, the tank was constructed by the defendant with the permission of the plaintiff. Relying upon Clause 6 of the agreement which stipulates that any damage or loss that may be caused to the premises or that articles lying in the premises, the defendant is responsible for that. On the basis of this clause, plaintiff has argued that the Water tank was constructed without permission of the Municipal Corporation and the Municipal Corporation in fact has sent notice to the plaintiff for unauthorised construction of the water tank. As we noted above, there was permission given by the plaintiff to the defendant to construct water tank. The learned Counsel for the respondent Mr. Kapse submits that even though the permission was given for constructing water tank, that construction was put up without licence being obtained from the Municipal Corporation as agreed to between the parties. This argument also cannot be accepted because in order to succeed in this case, the plaintiff has to prove that there is agreement between the parties that the construction of water tank can only be made after obtaining permission of the Corporation by the defendant. Except averment, there is no evidence adduced before the trial Court that the permission was given for constructing water tank on a condition that the defendant should obtain licence from the Corporation. In the absence of any evidence, we do not think that there is any violation of the conditions of the agreement and licence. In fact water tank was constructed as admitted by the

plaintiff with the permission of the plaintiff and as such there is no violation. Similarly we find that there is no restriction put up on the defendant regarding timing of the dispensary in the agreement and there is no evidence in that respect.

Therefore, in considering the above factual matrix, we find that on both counts the termination of the licence by the plaintiff was illegal. Consequently, as contended by the Counsel for the appellant, if the termination of the licence was illegal, the licence should run for its full term of 10 years. If that be so, we have to accept the contention of the learned Counsel for the appellant Shri Dhakephalkar that the defendant is entitled to protection u/s 15-A of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 which came into force on 1-2-1973 during the continuance of the licence and agreement. Section 15-A of the said Act reads as follows :

"(1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day of Feb., 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for purpose of this Act, the tenant of landlord, in respect of the premises or part thereof, in his occupation."

10. As noted above, the licence agreement was executed on 18-12-1968. In the normal course, it would expire on 18-12-1978 and in the mean time the statute intervened giving protection to the licensee like the defendant and therefore, is entitled to protection under Rent Act from 1-2-1973. Here we have to consider the argument of the learned Counsel for the appellant Mr. Kapse. According to him the defendant is in possession of the premises jointly with the plaintiff. As per the provisions of the agreement, the only a portion has been given to the defendant. This room has only a common door. Therefore, defendant can never claim exclusive occupation of the portion of that room. It should be mentioned here that it is true that two portions have only a common door but it has come out in the evidence that both the defendant and plaintiff are keeping duplicate key of the front door for the better use of the premises. In the light of the evidence adduced by the daughter of the plaintiff, it cannot be said that the room is in joint possession of both the plaintiff and defendant. The evidence is that both the defendant and plaintiff are using the portions of the room separately and exclusively. Therefore, contention of the learned Counsel for the plaintiff/respondent cannot be accepted. The pleadings and evidence unequivocally establishes that both the defendant and the plaintiff are in exclusive occupation of the two separate and distinct portion of the room and therefore, the defendant has to be treated as tenant in respect of the portion of the room which he occupies. In the circumstances, we have no doubt in our mind that the portion which defendant is occupying is deemed to have occupying as tenant from 1-2-1973. In view of this finding, the decree of the trial Court as well as the judgment of the learned Single Judge are liable to be set aside.

11. In the result, L.P.A. is allowed. The decree of the trial Court as well as judgment of the learned Single Judge is set aside. The B.C.C.C. Suit No. 6958 of 1972 stands dismissed.

12. In the circumstances of the case, nor orders as to costs.