

(1996) 01 BOM CK 0012

In the Bombay High Court

Case No : Civil Revision Application No. 638 of 1995

Swami Attah alias Rapheal Alfandary

APPELLANT

Vs

Mrs. Thrity Poonawalla

RESPONDENT

Date of Decision : 15-01-1996

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13A2
Constitution of India, 1950 — Article 254
Evidence Act, 1872 — Section 52, 60, 92
Land Acquisition Act, 1894 — Section 6(3)

Citation : AIR 1996 Bom 257 : (1996) 2 BomCR 691 : (1996) 98 BOMLR 321 : (1996) 1 MhLj 603

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : C.R. Dalvi and S.M. Gorwadkar, for the Appellant; Pankaj Savant, instructed by M/s. Gagrath and Co., for the Respondent

Judgement

A.P. Shah, J.—This revision application takes exception to the order passed by the Competent Authority, Pune, u/s 13A2 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1847 (for short, "the Act") directing the petitioner to deliver vacant possession of the licensed premises to the respondent.

2. The respondent is the owner of a bungalow situated at 1-B, Dr.Koyaji Road, Pune. Under, an agreement of leave and licence dated March 2, 1993, the respondent inducted the petitioner as licensee in respect of the first floor of the said bungalow for a period of two years. After the expiry of the licence period, the respondent filed a petition for eviction against the petitioner before the Competent Authority alleging that the petitioner is staying in the suit premises as a licensee and since the period of licence is expired, he is liable to be evicted.

In contesting the petition, the petitioner's contention was that he is not a licensee, but he is a tenant in possession and he, therefore, is entitled to

protection of the Act. The petitioner also contended that he has spent a huge amount in making renovations and repairs to the suit premises and, therefore, the respondent has no right to claim the possession.

After recording evidence and hearing both the sides, the Competent Authority has held that the transaction between the parties is one of leave and licence and since the period of licence has expired, he directed the licensee to vacate the suit premises. The Competent Authority further held that the defence that the transaction is a lease, is not available in view of the presumption raised under explanation (b) to Section 13A2. The defence that the respondent has made major alterations and repairs was also rejected by the Competent Authority.

3. Mr. Dalvi, learned counsel appearing in support of the petition, contended that the question whether a particular transaction is one of lease or licence is required to be decided by ascertaining the real intention of the parties and with reference to the circumstances of the case and the finding of the Competent Authority is erroneous. Mr. Dalvi urged that to ascertain whether document creates a lease or licence, the substance of the document must be preferred to the form. Mr. Dalvi further urged that under the suit agreement, the petitioner got exclusive possession of the property and, therefore, prima facie, he should be considered to be a tenant. He placed strong reliance upon the decisions of the Supreme Court in *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, and *Rajbir Kaur and Another Vs. S. Chokesiri and Co.*, .

4. There cannot be a quarrel about the legal position on the principles covering the interpretation of a document of the nature of leave and licence. These principles are fairly well established, but the difficulty is about the application of those principles to the facts of the present case where we are dealing with a special legislation, which contains provisions for leave and licence and prescribes a remedy in eviction of licensee, who has overstayed in the premises after the licence period is over. Section 13A2, which was introduced by amending Act No. 18 of 1987, lays down the procedure for eviction of licensee before the Competent Authority, which is a special forum provided under Part 11A of the Act, which has been inserted by the aforesaid amending Act. The explanation (b) to Section 13A2 prescribes a special rule of evidence, which provides that an agreement of licence in writing shall be conclusive evidence of the facts stated therein. In view of the special rule of evidence, it is not permissible for the Court to go beyond the document to find out the intention of the parties and to arrive at a conclusion that the document is of lease and not of leave and licence.

5. Mr. Dalvi urged that the presumption raised by clause (b) must be restricted to names of parties, description of premises, duration of transaction and quantum of payment, etc. But, according to Mr. Dalvi, no such presumption can be raised as far as the question of real intention of the parties is concerned. Mr. Dalvi further urged that it is open for a party to lead evidence in proceedings u/s 13A2 to establish that the real transaction is of tenancy. Mr. Dalvi placed reliance on the judgment of Agarwal, J. in *Shri C. K. S. Rao v. Miss Kanta Udharam Jagasia*

1991 Mh RCJ 206. There is no merit in the contentions of Mr. Dalvi. The object of adducing evidence is to prove a fact. The Evidence Act deals with the question as to what kind of evidence is permissible to be adduced for that purpose and states in Section 3 when a fact is said to be proved. That section reads thus :

" "Evidence" means and includes --

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

But where a document or evidence is made conclusive it creates a presumption *juris et de jure* in favour of the truth and legality of the matter stated and no evidence can be adduced to contradict it. Conclusive evidence means an absolute evidence of a fact for all purposes for which it is so made evidence, *R. v. Levi*, (1865) 34 LJMC 174. Therefore, the words appearing in explanation (b) "an agreement of licence in writing shall be conclusive evidence of the fact stated therein" must in the ordinary and grammatical meaning, have the effect of shutting out any other evidence on the subject which might be adduced before the Court.

6. In *Smt. Somavanti and Others Vs. The State of Punjab and Others*, , the Supreme Court, while interpreting the provisions of Section 6(3) of the Land Acquisition Act, observed at Pp. 159 & 160 :

"Since evidence means and includes all statements which the Court permits or requires to be made, when the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact it implies that that fact can be proved either by that evidence or by some other evidence which the Court permits or requires to be advanced. Where such other evidence is adduced it would be open to the Court to consider whether, upon that evidence, the fact exists or not. Where, on the other hand, evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. Statutes may use the expression "conclusive proof" where the object is to make a fact non-justiciable. But the legislature may use some other expression such as "conclusive evidence" for achieving the same result. There is thus no difference between the effect of the expression "conclusive evidence" from that of "conclusive proof", the aim of both being to give finality to the establishment of the existence of a fact from the proof of another".

7. I am fortified in my view by a decision of Vaidyanatha, J. in *Amarjit Singh Vs.*

R.N. Gupta, , where the learned Judge has" rejected similar contentions raised on behalf of the petitioner therein. In paragraph 4 of the judgment, the learned Judge observed :

"It is true as observed by the Supreme Court in Associated Hotels of India Ltd. Vs. R.N. Kapoor, that the question whether in a particular case the transaction is one of a lease or licence is a question of fact to be decided on the peculiar facts and circumstances of the case, the contents of the document, the intention of the parties etc. But in my view, in the present case, we are guided by a special legislation viz, the Bombay Rent Act which contains provisions for leave and licence in addition to tenancies. A special forum is created for eviction of licensees who was continuing in the premises after the expiry of the licence period.

Section 13A2(1) of the Bombay Rent Act provides a procedure for eviction of a licensee before a competent authority. Then a special rule of evidence is prescribed in Section 13A2(3)(b) which provides that an agreement of licence in writing shall be conclusive evidence of the facts stated therein.

In view of this special rule of evidence prescribed under the Act we cannot go beyond the document to find out the intention of the parties, the circumstances of the case, the nature of possession etc. as pointed out by the Supreme Court in the Associated Hotels of India's case. That rule may be applicable to leases under the general law. But we are concerned with the leave and licence under a particular statute which prohibits taking of extraneous factors other than the contents of the document to find out the nature of the transaction".

8. The reliance placed by Mr. Dalvi on the judgment of Agarwal. J. in Shri C.K.S. Rao's case (supra) is completely misconceived. In that case, the learned Judge was dealing with the provisions of Section 13A1(1)(A), which made special provisions for a landlord, who holds a scientific post in the department of Atomic Energy of the Central Government or in any of its aided institutions. Under the said provisions, a landlord, who is a scientist, is required to produce a certificate signed by the competent officer and it is provided that the contents of the said certificate are conclusive proof of the facts stated therein and it is not open to the Court to go beyond the certificate. On appreciation of the material produced on record, Agarwal, J. came to the conclusion that a false certificate has been issued by the concerned official and, therefore, it can be challenged on the ground of mala fide or colourable exercise of powers. The said case has been decided on its own facts and it does not support Mr. Dalvi in any manner.

9. In view of the foregoing discussion, it is clear that the Competent Authority was right in holding that the agreement is a conclusive evidence and that the transaction is of a leave and licence. Mr. Dalvi faintly contended that the provisions of explanation (b) are beyond legislative competence of the State Legislature. Mr. Dalvi contended that the said provisions are repugnant to the provisions of Section 92 of the Indian Evidence Act and Sections 52 and 60 of the

Easement Act, which are the Central Statutes and keeping in mind the provisions contained in Article 254 of the Constitution, the provisions of the Central Acts would prevail. The contention of Mr. Dalvi is required to be stated only to be rejected. Section 92 of the Indian Evidence Act merely provides for exclusion of evidence oral agreement while the provisions of Sections 52 and 60 of the Easement Act define "licence" and provide for revocation of the licence. It is really difficult to understand as to how these provisions can be said to be in any way inconsistent or repugnant with the explanation (b), which provides a special rule of evidence.

10. In the result, the revision application fails and the same is dismissed summarily.

11. On the oral application of Mr. Dalvi, ad interim stay to continue till February 29, 1996.

12. Application dismissed.