
(1990) 12 BOM CK 0012
In the Bombay High Court
Case No : Writ Petition No. 123 of 1989

Tukaram S. Vichare	Vs	APPELLANT
Dattaram S. Vichare and Others		RESPONDENT

Date of Decision : 03-12-1990

Acts Referred:

Maharashtra Housing and Area Development Act, 1976 — Section 66, 66(1)

Citation : (1991) 2 BomCR 250 : (1991) MhLj 1414

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : N.H. Gursahani, M.A. Deshpande and S.R. Swar, for the Appellant; Bharat Joshi, for respondent No.1, R.D. Rane, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

M.F. Saldanha, J.—This is a writ petition under Article 227 of the Constitution of India and is directed against an order dated 5-1-1989 passed by the Appellate Officer constituted under the Maharashtra Housing and Area Development Act, Bombay. The case presents a rather unusual set of facts and circumstances and also raises issues of both importance and interest, namely, that it calls for an interpretation of the term "subletting" in the special context of section 66 of the Maharashtra Housing and Area Development Act, 1976 (hereinafter referred to as "the Act").

2. The petitioner before this Court and respondent No. 1 are both real brothers. The dispute in question concerns a one-room tenement No. 16/1097, situated at Abhyudaya Nagar, Kalachowki, Bombay, which premises are, admittedly, Housing Board Premises. The Premises in question were remarked for allocation to Industrial workers. In the year 1964, respondent No.1 applied for allotment of the tenement in question to him because he was eligible for such allocation by virtue of his income. There is no dispute about the fact that the tenement was originally allotted to respondent No. 1, who is the elder brother of the present

petitioner. The record, however, indicates that at the time when the original transaction took place, respondent No. 1 had filled in what is known as Form "C" and that in the Form "C", respondent No. 1 had indicated the name of his younger brother, i.e., the present petitioner, and his wife as the persons forming part of his family who would be residing with him in the tenement in question. It is the contention of the petitioner that respondent No. 1 at the relevant time, was residing at some other premises at Girgaum and that the petitioner and his wife have continued in exclusive possession of the premises from the date of allotment right upto the year 1987 when a serious dispute between the brothers took the matter to the City Civil Court.

3. Respondent No. 1 does not admit this position. It is his contention that since the premises were extremely small and since it was impossible for the two brothers and their families to reside in one room, purely as matter of convenience, he had shifted out to certain alternative premises available to him in Girgaum and that he had allowed his brother and the family to continue in occupation of the tenement. It is his further contention that even though the parties are brothers, the relationship between the parties deteriorated and that the present petitioner tried to grab the premises which originally belonged to him; that it was for this reason that the present petitioner tried to get the Housing Board to evict the original allottee and regularise the occupation of the present petitioner. It is further the contention of respondent No. 1 that in order to support his application to the Housing Board for regularisation of the tenement, the present petitioner filed a suit before the City Civil Court at Bombay and sought to obtain interim orders against respondent No. 1 restraining him from entering the premises. Respondent No. 1 contends that the he had gone back to stay in the premises that are in dispute and that it was for this reason, after examining the respective contentions and the material before the Court, that the City Civil Court refused the interim reliefs that were prayed for by the plaintiff and, on the other hand, recorded a finding that the two brothers were in joint possession of the premises.

4. Against this interim order of the City Civil Court dated 3-3-1988 in Suit No. 4001 of 1987, the present, petitioner filed Appeal from Order No. 555 of 1988. The learned Single Judge of this Court finally disposed of the appeal through a speaking order dated 8-12-1988. The present petitioner seeks to place strong reliance on that order because the High Court, after examining the record and the contentions raised by the rival parties, decided that the present petitioner was entitled to continue in exclusive use and occupation of the tenement until the disposal of the appeal that was pending of the fact that the Competent Authority of the Housing Board by order dated 20-3-1987 had passed an order evicting the original allottee, that is to say, the present respondent No. 1 from the tenancy of the premises and had also directed the Estate Manager to regularise the tenancy in the name of the present petitioner. Respondent No. 1 had filed an appeal this order which was pending at the time when the High Court decided the interim application. It was for this reason that the learned

Counsel appearing on behalf of respondent No. 1 pointed out that the interim order, whereby the present petitioner was permitted to continue in exclusive occupation of the tenement, must necessarily come to an end if the Appellate Authority were to allow the appeal, and consequently if it were to set aside the order of eviction passed against respondent No. 1. For the purposes of safeguarding the interest of respondent No. 1, in that event, the High Court had recorded an undertaking from the present petitioner to the effect that he would handover possession of the premises in the event of the final decision in the eviction matter going against the present petitioner.

5. As indicated earlier, the Appellate Authority, by order dated 5-1-1989, allowed the appeal and set aside the eviction order as also the direction for regularisation of the tenancy in the name of the present petitioner. It is that order which has been challenged in the present writ petition. The operation of the order was also stayed at the time when this writ petition was admitted. It appears that pursuant to the passing of the order by the Appellate Authority, respondent No. 1 instituted contempt proceedings against the present petitioner on the ground that he had not handed over the possession of the premises, which contempt petition was rejected as being premature by the High Court principally because the present writ petition was pending and the dispute regarding the eviction had not been as yet finally adjudicated upon. Subsequently, the present petitioner took out contempt proceedings against respondent No. 1 on the ground that he had not vacated the premises and that it was pursuant to these proceedings that respondent No. 1 has vacated the premises within the time allotted to him by the High Court. It also appears that respondent No. 1 filed Review petition No. 1994 of 1990, which came to be rejected by Jahangirdar, J., 18-4-1990. Against this order, respondent No. 1 filed Letters Patent Appeal No. 82 of 1990, which was also rejected by the Division Bench on 20-4-1990. It was thereafter that respondent No. 1 moved the Court for an expeditious hearing of this writ petition, as a result of which the matter was listed for hearing and has now been taken up.

6. Mr. Gursahani, learned Counsel appearing on behalf of the petitioner, has placed strong reliance on the earlier order passed by the High Court, that is to say, the order to Jahangirdar, J., (as he then was) dated 8-12-1988. It is his contention that the High Court has at that point of time evaluated the factual position as it existed and that the High Court has very clearly recorded a finding in that order to the effect that the present petitioner has been residing in the tenement right from the very inception upto the time when the dispute came to Court, and furthermore, that there was material on record to suggest that respondent No. 1 was, in fact, not residing there but was residing at Girgaum as is evident from a very important piece of material that was taken note of by the High Court, namely, the electoral roll, which shows him to be resident at that particular address. It is, therefore, the contention of Mr. Gursahani that if the original allottee of the premises, regardless of the fact that he is the real brother of the petitioner, has not physically resided in the tenement in question, which

fact is beyond doubt, and which is supported by the report of the officer of the Housing Board on the basis of which the eviction proceedings were commenced, that the Competent Authority was fully justified in having passed an order of eviction against him. He has further submitted that a dispute was sought to be raised to the effect that respondent No. 1 had not been served with the notice of the proceedings. It is his contention that the Court is required to decide as to whether the procedure prescribed u/s 66 of the Act has been duly complied with or not. According to Mr. Gursahani, so long as the Court is satisfied that necessary attempts were made to convey to respondent No. 1 the fact that certain proceedings were being instituted against him and so long as respondent No. 1 has knowledge of those proceedings, he cannot be heard to contend that he had no notice. Mr. Gursahani has pointed out that there is a reference in the order in question to the fact that not only was the notice sent to respondent No. 1 under registered post acknowledgment due, which appears to have been returned undelivered, but that officers of the Housing Board had pasted the notice in the manner as is prescribed u/s 66 of the Act. Section 66 of the Act requires the Authority to attempt service on the allottee at the premises in question. Section 66 of the Act does not cast any obligation on the officers of the Housing Board to find out the exact whereabouts of an allottee who has left the premises and is reading elsewhere, nor does it cast any obligation on the officers of the Housing Board, in case of substituted service, to paste the notice at the actual place of residence of the allottee in question, if he is not residing at the allocated premises. This provision is a very reasonable one and it only follows that an allottee who has abandoned the possession and is no longer in possession cannot expect the officers of the Housing Board to go in search of him. On the other hand, if he is absent and if the party who is in occupation is a relative or an agent of his staying there with his knowledge and permission, it is then to be assumed that with the substituted service at the premises the requirement of law is complete, because the service is effected on the authorised representative of the allottee and it is presumed that the representative will convey the notice to the allottee himself.

7. As against this, it was forcefully contended by Mr. Joshi, learned Counsel appearing on behalf of respondent No. 1, that admittedly, respondent No. 1 had not been heard by the Competent Authority at the time when the eviction order was passed. It was the case that even a scrutiny of the record would substantiate his contention that there is no evidence to indicate either that the notice of the proceedings, namely, the one which resulted in the eviction order being passed against him, had at any time been physically delivered to him or posted to him. It is his contention that respondent No. 1 had only received a copy of an initial notice dated 15-10-1986, which had been sent to the petitioner by the officers of the Housing Board in connection with the regularisation of his tenancy. His further contention was that the officers were in the knowledge of the fact that he was residing at a particular address at Girgaum and that nothing prevented them, if they so desired, from communicating with him on that

address. The service, if any, through pasting of the notice outside the dispute premises, according to him, is no service in the eye of the law and consequently it will have to be concluded that the initial order was passed without notice to him.

8. That issue, to my mind, is purely academic for more than one reason, the first of them being that, as indicated earlier, the procedure prescribed u/s 66 of the Act had been complied with in this case. If respondent No. 1 was not staying at the disputed premises, he cannot make any grievance of the fact that the notice allegedly did not reach him. It is necessary to bear in mind that, admittedly, respondent No. 1 had received the earlier notice from which he was certainly aware of the fact that the Authorities were contemplating the transfer of the tenancy to the present petitioner and it is quite obvious that respondent No. 1, who had lost interest in the premises at that time, did not take any steps to resist any such action. More importantly, apart from the fact that the procedure prescribed had, in fact, been complied with, it is necessary to take note of the further fact that respondent No. 1 has been fully heard before the Appellate Authority and, therefore, in the overall view of the matter, this technical plea cannot carry the case of respondent No. 1 any further. If this were a case where respondent No. 1 had a valid defence and if respondent No. 1 was prevented from placing cogent and substantial material before any of the authorities which would have materially altered the case of respondent No. 1, only in that event could a grievance of some sort have been put forth. Respondent No. 1 even at this stage has no defence worthy of consideration. I have heard learned Counsel for respondent No. 1, and as will be presently indicated, all aspects of the case that he desired to urge have been taken into consideration. In that event, to my mind, the grievance with regard to the aspect of service of the notices is wholly uncalled for.

9. Mr. Joshi sought reliance on the wording of the original notice from the Competent Authority setting out the grounds for the proposed eviction. The two grounds are as follows:-

"(i) that you have sublet without the permission of the Board, the whole or part of the said premises, to Shri T. S. Vichare and his family.

(ii) that you yourself with your family are not staying in tenement and the same is in sole accommodation of unauthorised person."

10. Mr. Joshi contends that, in the first instance, the charge against respondent No. 1, which is to the effect that he has sublet the tenement, is wholly unjustified and factually incorrect. He has pointed out that, in the present case, there is no evidence whatsoever of any form of subletting. He states that the petitioner is the younger brother of respondent No. 1, that the petitioner was permitted to stay in the premises from the very beginning and that this was to the knowledge of the concerned authorities, because the names of the petitioner and his wife have been disclosed by him in the Form "C" at the earliest point of time. He has

further contended that if for the purpose of conveniences he has shifted to some other accommodation on a temporary basis that this under no circumstances can be construed as an act of sub-letting. It is Mr. Joshi's contention that a mere act of handing over possession to his younger brother cannot, in law, be termed as sub-letting, and it is his further contention that the offence of sub-letting being condition precedent, the order passed by the Competent Authority is wholly misconceived and without jurisdiction.

11. It is necessary in this context to refer to the wording of section 66(1)(a)(ii) of the Act, which reads as follows :-

"(ii) sub-let, without the previous permission of the Authority the whole or any part of such premises."

Dealing with the factual aspect of the matter, there is no dispute whatsoever that the premises had been let to respondent No.1 by the Housing Board and not to any other person or to his family. The record also indicates that respondent No. 1 had indicated/included the name of his brother and brother's wife as the persons belonging to his family. It, however, needs to be clarified that even assuming that respondent No. 1 moved out of the tenement in question as per his case, and that too not for a short period of time, that this was not a temporary arrangement. Furthermore, as there is no evidence of respondent No. 1 having been in occupation of the tenement at any point of time even in the beginning, it will have to be construed that respondent No. 1 has transferred the rights vested in him by the Housing Board, namely, the occupancy rights in respect of the tenement exclusively to the present petitioner who was, in fact, residing in the premises all through. It will also have to be noted that respondent No. 1 did not at any time obtain the permission of the Authority for the purpose of installing the present petitioner in exclusive occupation of the tenement.

12. Black's Law Dictionary, Fifth Edition, Page 1278, defines the term "sub-letting" as follows :-

"A leasing by lessee of a whole or part of premises during a portion of unexpired balance of his term."

The present Act does not define the term "sub-letting". Considering the fact that the allottees of the flats enter into an agreement covering the terms and conditions under which they are authorised to occupy the premises, it will have to be decided as to under what circumstances an allottee can be said to have sub-let. The first of such situations would be where the allottee inducts a third party into the premises. A reasonable construction would require that the term "third party" would normally presuppose a person other than a dependent or an immediate family member. In the cities, it would certainly cover a case where the allottee allows the use even of a part of the premises to a third party in exchange for compensation. The second test, and the very necessary one, would be the period of time which such an arrangement be entered into. Considering the restrictions imposed on sub-letting, the cases where a written contract of

subletting or tangible evidence of payment is forthcoming would be few and far between, the parties concerned realising that they are on the wrong side of the law would probably not create any such evidence. The time factor, however, is crucial. If an allottee is required to leave the premises because he is on holiday or for a temporary period of time due to circumstances beyond his control, he may arrange with a relative or an acquaintance that they should occupy the tenement until his return. The intention to return can be judged from the reason behind the absence, such as where an employee has gone on a temporary posting or has gone to his home town for a prescribed period of time, but where the evidence shows that the allottee is, in fact, resident at some other place, either in the same town or elsewhere, there could be no manner of doubt that it is a clear case of sub-letting. As far as the Housing Board is concerned, transfers are permissible between certain categories of persons and it is, therefore, essential that if a person does not require the tenement that he should either transfer it to a person in that category, that is to say, a person of his choice or that the same should be surrendered. Where there are immense pressures on housing, particularly at the lower levels, it is quite unpardonable for an allottee to want to hold on to a tenement that he does not require and one that he is not using, to the exclusion of somebody else who needs a roof above his head. Dealing with the concept of sub-letting, Halsbury's Laws of England, Fourth Edition, Volume 27, has defined the transaction to mean re-letting in different forms depending on the nature of the premises. Such re-letting does not necessarily have to be to an outsider or to a total stranger and it would encompass a situation whereby a party re-lets the premises to his own brother or sister. The fact that possession has been given to that party to the exclusion of others would be the ultimate test and if such letting continues for a long period of time, that too without the knowledge or consent of the landlord, it would be a clear case of sub-letting. Where such an agreement is in operation, it is inconceivable for the allottee to argue that it is without consideration, because the mere fact that the allottee chooses to hold on to the premises which he does not require will raise the presumption that he must be getting a return at market rate and such profiteering is both impermissible and unjustified as far as the Housing Board premises are concerned.

13. In this view of the matter, there can be no dispute about the fact that respondent No. 1 has committed a breach of the conditions on which the tenement was let out to him in so far as he had sub-let the tenement to the present petitioner without the previous permission of the Authority, and in this case it was not a part of the premises but the whole of the premises that were sublet. Furthermore, it needs to be added that, admittedly, respondent No. 1 and his family had not been staying in the premises and the same were in exclusive possession of the present petitioner. In this view of the matter, the Competent Authority was fully justified in having instituted the evicting proceedings against respondent No. 1 and the consequent order that followed was also wholly justified.

14. Mr. Joshi has placed strong reliance on a decision of the Supreme Court in the case of *Delhi Stationers v. Rajendra Kumar* 1990 M. L. J. 1131. The Supreme Court had, in that case, construed the term "sub-letting" in the context of a proceeding under the Rent Act and had observed that mere occupation of the premises in the possession of a tenant by a third party is not sufficient to infer either sub-tenancy or parting with possession. It is necessary to record that the facts of the case before the Supreme Court were entirely different to the present one in so far as the original tenant continued to be in occupation of the house in that case and merely because the third party was allowed the use of the kitchen and lavatory, it was sought to be argued that a part of the premises had been sub-let. In the context of those facts what the Supreme Court has observed is that merely because a third party may be permitted the user of certain premises alone, the inference of sub-letting would not arise. It is necessary to distinguish the facts of the present case from the one before the Supreme Court, and consequently, it is essential to note that the present proceeding is not a proceeding under the Rent Act. As far as the present proceeding is concerned, we are limited to situation whereby the Authority, namely, the Housing Board, has inducted respondent No. 1 as its tenant. In this view of the matter, when respondent No. 1 moved/ left and conferred the occupancy rights exclusively on the present petitioner, it would definitely constitute a case of sub-letting.

15. Mr. Gursahani had vehemently contended that the Appellate Authority of the Housing Board has grossly erred in virtually sitting in judgment over the findings recorded by the High Court. There is considerable justification in the grievance made by Mr. Gursahani. As a matter of propriety, Mr. Gursahani pointed out, that where a judicial authority and that too, in the present case, the learned Judge of the High Court has arrived at certain conclusions, that the Appellate Authority of the Housing Board, to say the least, was very wrong in trying to question the findings of the High Court. He submitted that where there is a respect for the rule of law that it necessarily follows that public authorities must subjugate their decisions to judicial findings. Undoubtedly, the Appellate Authority could not have overlooked the fact that this is a case in which the High Court had occasion to examine the very issues and that, having done so, it was for the Appellate Authority to respect that verdict rather than detract from it. It is rather unfortunate that in this case scant respect was shown for the findings of the High Court, and it is essential that Government Officers, in particular, take note of the express obligations enjoined on them to respect and abide by Court decisions. It is necessary to remember that as far as the proceeding before the High Court was concerned, that the learned Judge was only deciding the issue of interim possession; whereas the Appellate Authority was essentially examining the correctness or otherwise of the order passed against respondent No. 1 by the Competent Authority. The Appellate Authority has, however, definitely gone wrong when he held that there was no proper service on respondent No. 1 in so far as he has overlooked the provisions of section 66 of the Act and the material parts of the record. The Appellate Authority has also erred in construing the

concept of "family". Relying on the position as it obtains in Hindu Law, the Appellate Authority has sought to contend that the present petitioner, being the brother of respondent No. 1, would come within the definition of a member of a Hindu Undivided Family. This finding is also erroneous in so far as it cannot be argued in a proceeding of the present type, and that too on the facts of the present case, that there was existence of a joint family. The Appellate Authority has also gone wrong by holding that the Competent Authority could not have directed the Estate Manager to regularise the tenancy in the name of the present petitioner. It has been pointed out to me by Mr. Rane, the learned Assistant Government pleader, that as far as this aspect of the matter is concerned, once the Competent Authority has on valid grounds passed an order of eviction against the original allottee that it is within the entire discretion and jurisdiction of the Housing Board or the Authority to regularise the tenancy of the person in actual occupation on such terms and conditions as the Housing Board considers fit. Having held that the grounds on which the tenancy of respondent No. 1 has been terminated are valid and justified, it is also necessary to hold that the Appellate Authority has gone wrong in setting aside the direction of the Competent Authority as far as regularisation of the petitioner's tenancy is concerned.

16. In this view of the matter, the Writ Petition succeeds and is allowed and the rule is made absolute accordingly in terms of prayers (a) and (b). The order passed by respondent No. 2 in Appeal No. 334 of 1988 dated 5-1-1989 is set aside and the order of the Competent Authority dated 20-3-1987 is confirmed. In the circumstances of the case, there shall be no order as to costs. The interim orders to stand vacated.

17. At this stage, Mr. Patel, the learned advocate appearing on behalf of respondent No. 1, prays for leave to appeal to the Supreme Court. This is not a case which raises any substantial point of law of public importance. Hence leave is refused. Mr. Patel, however, submits that the operative part of this judgment be stayed for a period of 8 (eight) weeks in order to enable his client to take further steps in the matter. This application is granted. Accordingly, the operation of this judgment is stayed for a period of 8 (eight) weeks and the interim orders earlier passed to continue until the expiry of 8 (eight) weeks.