

(2001) 02 BOM CK 0090

In the Bombay High Court

Case No : Writ Petition No's. 4171 and 4195 of 1993

Vasant Mahadev Pandit and another

APPELLANT

Vs

Zaibunnisa Abdul Sattar and others

RESPONDENT

Date of Decision : 08-02-2001

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)(e), 13(1)(j), 15A

Citation : (2001) 2 ALLMR 289 : (2001) 2 BomCR 616 : (2001) 2 BOMLR 437 : (2001) 3 MhLj 118

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Abhay S. Oak in W.P. No. 4171 of 1993 and A.K. Abhyankar In W.P. No. 4195 of 1993, for the Appellant; Prasad Dani and J.A. Barday for Respondent No. 1 In W.P. No. 4195 of 1993, Served for Respondent No. 1 and Prasad Dani for Respondents 1 and 3a In W.P. No. 4195 of 1993, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—Both these writ petitions are directed against the judgment of the Additional District Judge, Thane dated 2-9-1993 in Civil Appeal No. 295 of 1989.

2. Both these writ petitions can be disposed of by a common judgment as they relate to the same suit property between the same parties arising from the suit instituted by the Respondent No. 1.

3. Briefly stated, the Respondent No. 1 herein filed suit against (1) Vasant Mahadev Pandit-Petitioner No. 1 in W. P. No. 4171 of 1993;

(2) Laxman Mahadev Pandit-brother of Vasant Pandit and husband of Sunanda Pandit-Petitioner No. 2 in writ petition No. 4171 of 1993; and (3) V.R. Salvi father of the Petitioner in writ petition No. 4195 of 1993. The said suit was filed before the Civil Judge, S.D., Pune being R. C. Suit No. 759 of 1977 for possession of the

suit property bearing Tika No. 3 City Survey No. 243, Mahagiri, Thane. The gravamen of the ground in the said suit was that the suit premises were let out to Vasant Pandit Defendant No. 1 for residence, however, he left the suit premises and inducted his brother Laxman Original Defendant No. 2 and Mr. V.R. Salvi - Defendant No. 3 the father in law of his another brother Bhalchandra. In other words, the suit for possession was instituted by Respondent No. 1 on the ground that the original tenant Vasant unlawfully sublet the suit premises to Defendants 2 and 3. Besides the ground of subletting, in para 2 of the plaint, Respondent No. 1 further asserts that Vasant Pandit original Defendant No. 1 also indulged in profiteering by charging monthly rent of Rs. 50/- from Defendants 2 and 3 without consent and/or permission of Respondent No. 1 herein. Although other ground is mentioned in the plaint, however, parties have confined the matter only to the ground of subletting and profiteering.

4. This suit was resisted by Defendants 1 and 3 by filing written statement. In the written statement, besides denying the allegations in the plaint, specific case is made out that the suit premises were originally let out to Mahadev Ramchandra Pandit viz. father of original Defendants 1 and 2 as tenant thereof on monthly rent and that the said Mahadev Pandit died on or about 29-6-1947 leaving behind his four sons Bhalchandra, Vasant, Laxman, Chandrakant and his widow Yashodabai. The Defendants further claim that originally the rent in respect of the suit premises consisting of three rooms was Rs. 21/- per month, but the same was increased to Rs. 30/- after the Defendant inducted his brother Laxman Defendant No. 2 and V.R. Salvi-Defendant No. 3 father in law of his brother Bhalchandra. In other words, it was pleaded on behalf of the Defendants that Defendants 2 and 3 were inducted with the consent and knowledge of the Plaintiff. In para 7 of the written statement it is further stated that Defendant No. 1- Vasant was allotted quarters by the company and therefore left the suit premises and occupied the said quarters; and after Defendant No. 1 started living separately, his brothers occupied the suit premises along with mother Yashodabai. It was contended that suit premises were let out for the residence of the family and that both Defendants 2 and 3 were staying in the suit premises as family members. The Defendants categorically denied the allegation of subletting and profiteering. According to the Defendants, Defendant No. 2 was staying in the suit premises being brother of Defendant No. 1 and son of original tenant Mahadev, whereas, Defendant No. 3 being father in law of another brother Bhalchandra was staying in the suit premises on account of compelling circumstances since he was forced to vacate the premises at Thane due to threat of demolition by municipal council. In other words, it was contended that both the Defendants 2 and 3 were staying in the suit premises along with mother Yashodabai as family members.

5. With these rival pleadings the parties went to the trial. The trial Court by judgment dated 30-6-1989 was pleased to dismiss the suit. The trial Court mainly observed that Defendants 2 and 3 were occupying the suit premises prior to 1-2-1973 and therefore they were protected by virtue of provisions of Section

15A of the Bombay Rent Act. The Trial Court also observed that there is absolutely no evidence regarding subletting and profiteering except the bare words of the landlord. In the circumstances the trial Court dismissed the suit and decided the ground of subletting and profiteering in favour of the Defendants-tenants.

6. The Respondent No. 1 carried the matter in appeal before the Additional District Judge, Thane, being Civil Appeal No. 295 of 1989. The Appellate Court was pleased to reverse the order dismissing the suit passed by the trial Court. The Appellate Court held that the suit premises was originally let out to Defendant No. 1 alone and that he left the suit premises and inducted the Defendants 2 and 3 without obtaining prior permission of the Plaintiff. According to the Appellate Court there was no specific case made out that Licence was given in favour of Defendants 2 and 3 by the Plaintiff so as to get protection under the provisions of Section 15A of the Bombay Rent Act. The Appellate Court observed that Defendants 2 and 3 were trespassers in the suit premises. For the said reasons the Appellate Court allowed the appeal preferred by the Plaintiff and decreed the suit for possession against the Defendants.

7. At this stage it is relevant to point out that when the suit was pending before the trial Court, the original Defendants 2 and 3 viz. Laxman Pandit and V.R. Salvi both expired and no steps were taken by the Plaintiff for bringing their legal heirs on record. In the circumstances, the said suit stood abated against Defendants 2 and 3. Later on, the Plaintiff moved an application for substitution and for setting aside abatement but the same came to be rejected by the trial Court on 25-10-1992. Against the said decision matter was unsuccessfully carried in Appeal. The said appeal was dismissed on 3-5-1986. In other words, the order holding that the suit stood abated against Defendants 2 and 3 became final. It is only thereafter that the wife of deceased Laxman-Defendant No. 2 and R.V. Salvi s/o Late Shri V.R. Salvi Defendant No. 3, preferred an application purported to be one under order 1 Rule 10 for impleading them as Defendants. It is not in dispute that the said application was allowed and they have been impleaded as Defendants in the suit which was pending before the trial Court at the relevant point of time. These facts are only mentioned to complete the narration of events, though the same are not relevant for the adjudication of issue that arises for consideration.

8. Accordingly, writ petition No. 4171 of 1993 has been filed by Vasant Pandit (Defendant No. 1) and Sunanda Laxman Pandit (impleaded Defendant No. 2/1); whereas writ petition No. 4195 of 1993 has been filed by R.V. Salvi (impleaded Defendant No. 3/1).

9. The question that arises for consideration is whether the possession of Defendants 2 and 3 of the suit premises amount to unlawful subletting of the suit premises by Defendant No. 1. As mentioned above it is not in dispute that Defendant No. 2 as well as Defendant No. 3 are closely related to Defendant No. 1. Original Defendant No. 2, since deceased, was the real brother of Defendant

No. 1; whereas original Defendant No. 3, since deceased, was the father in law of the real brother of Defendant No. 1. The case made out on behalf of the Defendants before the Court below was that both the Defendants 2 and 3 were occupying the suit premises only as family member of Defendant No. 1. It was contended on behalf of the Defendants that since Defendants 2 and 3 were not strangers, the onus of establishing that the premises were unlawfully sublet to Defendants 2 and 3 and that the Defendants No. 1 was profiteering out of the said transaction by charging sum of Rs. 50/-per month from them was very heavy on the Plaintiff. No doubt the Appellate Court has recorded a finding that the Plaintiff has established the case of unlawful subletting in favour of Defendants 2 and 3, however, it is contended that, the said conclusion has been reached on the basis of surmises and conjectures. On the other hand the learned Counsel for the Respondent No. 1-Plaintiff essentially adopted the conclusions reached by the Appellate Court.

10. It is well settled that to make out a case of subletting the party has to establish that the party is in exclusive possession of the suit premises upon payment of consideration for such purpose. In the present case, on the basis of evidence on record and as analyzed by both the Courts below it is not possible to even remotely suggest that Defendants 2 and 3 were in exclusive possession of the suit premises. Inasmuch as, besides Defendants 2 and 3, other family members including mother of Defendant No. 1 were all along staying in the suit premises. At any rate, there is absolutely no positive evidence brought on record by the Plaintiff to show that Defendant No. 1 was charging consideration that too a sum of Rs. 50/- per month from Defendants 2 and 3. On close examination of the pleadings it would appear that vague allegation has been made that Defendant No. 1 handed over exclusive possession of the suit premises to Defendants 2 and 3 at the monthly rent of Rs. 50/- with or without the permission of the Plaintiff. The assertion in the plaint is too vague and general, for it is not clear as to whether Rs. 50/- was being charged either from Defendant No. 2 or from Defendant No. 3 or from both. Be that as it may, the said assertion in the plaint was categorically denied by the Defendants in their written statement. Besides denial the Defendants came out with a specific case, as stated in para 7 of the written statement. Besides the specific pleading, the Defendant adduced oral evidence of Vasant Defendant No. 1 as well as of D.W. 2 Sunanda impleaded Defendant No. 2/1 and of R.V. Salvi impleaded Defendant No. 3/1. All the Defendants have consistently deposed on oath that Defendants 2 and 3 were staying in the suit premises as family members and there was no question of subletting the suit premises to them by Defendant No. 1. The said Defendants have also consistently deposed that no amount was paid either by Defendant Nos. 2 or by Defendant No. 3 towards consideration for occupying the suit premises as sub-tenants.

11. In the light of denial by the Defendants with regard to the averments of subletting and profiteering, the onus naturally shifted on the Plaintiff to adduce positive evidence to show that Defendants 2 and 3 were put in exclusive

possession of the suit premises and that the Defendant No. 1 had in fact charged any amount either from Defendant No. 2 or from Defendant No. 3 or from both towards consideration of subletting. No such evidence has come on record except the bare words of the Plaintiff. As a matter of fact rebuttal by the Defendants of the allegations of subletting and profiteering has gone unchallenged since the Plaintiff failed to adduce any positive evidence to counter the same. I have no hesitation in holding that in view of the relation between the Defendants inter se it can be presumed that Defendants 2 and 3 were staying only as family members; of Defendant No. 1. To rebut this presumption onus was very heavy on the Plaintiff to lead positive evidence and not merely his bare words.

12. It is not unknown in our society that brothers and the wives of the deceased brother would come and stay in case of distress. It is also not unknown that relatives in distress would take shelter with their relations. The evidence adduced on behalf of Defendants would clearly go to show that Defendant No. 2 was none else but the real brother of Defendant No. 1. Assuming that the suit premises were let out to Defendant No. 1 the fact remains that Defendant No. 2 was using the suit premises only in the capacity of a family member of Defendant No. 1. After Laxman expired, his wife Sunanda impleaded Defendant No. 2 continued to occupy the suit premises along with her mother in law Yashodabai i.e. mother of Defendant No. 1. The evidence which has also come on record and not seriously challenged by the Plaintiff is that the Defendant No. 3 was the father in law of the: real brother of Defendant No. 1. In that sense he was also related to the Defendant No. 1. Although, Defendant No. 3 was not a blood relation, but generally he was closely related to the brother of Defendant No. 1 and therefore can be said to be a family member. Obviously because of the close relation the Defendant No. 3 was accommodated in the suit premises while in distress. The evidence adduced on behalf of Defendants go to show that Defendant No. 3 was compelled to shift in the suit premises due to threat of demolition of his accommodation which he was occupying at Thane. In other words, the evidence would unfailingly indicate that Defendants 2 and 3 were occupying the suit premises only as the family members of Defendant No. 1 and in no other capacity. If the premises are occupied by the family member, even if such member has joined the original tenant subsequently that by itself will not amount to creation of any sub-tenancy in his favour. Such interpretation cannot be countenanced at all, for even the legislature in its wisdom has thought it appropriate to exclude family members from being licensee. If reference is made to the definition of licensee, it would be seen that a member of the family residing together with the tenant is expressly excluded from the definition of licensee. If the principle underlying this legislative intent is applied to the fact situation I have no hesitation to hold that even if a family member starts staying with the original tenant at a later stage that by itself will not attract the mischief of unlawful subletting. Observations made by this Court in judgment reported in the case of Babanrao Shankarrao Chavan v. Chandrashekar Ramchandra Shinde, 1984 (2) Bom, OR. 671, would be useful, which reads thus:

9. ...

....It is not unknown in our country that when a widowed sister comes to reside with her brother and when she starts residing with him she resides not as a servant or a stranger, but resides as part and parcel of the family. This is the rule. There may be exceptions. But if there are exceptions, the exceptions have got to be proved by special evidence. In the absence of any such evidence to the contrary, it must be assumed that a widowed sister who comes to stay with her brother along with her, young one would be staying with him not as a stranger but as brother's family. " Likewise her younger son would be part of that very family.

(emphasis supplied).

13. Applying the aforesaid principle to the fact situation I have no hesitation to observe that Defendant No. 2 being real brother of Defendant No. 1 and impleaded Defendant 2/1 Sunanda being widow of the deceased brother, were staying in the suit premises only as family members. Similar position would apply even in respect of Respondent-Defendant No. 3 V.R. Salvi impleaded Defendant No. 3/1 R.V. Salvi since they were closely related through the real brother of Defendant No. 1 i.e. Bhalchandra. Since these facts have gone unchallenged the only conclusion that can be drawn is that Defendants 2 and 3 were not staying in the suit premises as sub-tenants or even licensees but as family members of Defendant No. 1. In either situation the ground of unlawful subletting within the purport of Section 13(1)(e) of the Bombay Rent Act can have no application.

14. Besides, the Plaintiff having failed to establish the ground of subletting on the aforesaid legal basis; even on facts what is seen is that there is absolutely no positive evidence adduced by the Plaintiff to indicate that the Defendants 2 and 3 were paying any amount to Defendant No. 1 towards compensation or consideration for occupying suit premises. Since, the evidence regarding consideration is lacking, it is not possible to hold that there was any transaction which would take the colour of subletting within the meaning of the Bombay Rent Act. The Plaintiff, undisputedly, approached the Court for eviction on two fold grounds; that the Defendant No. 1 had unlawfully sublet the suit premises and having indulged in profiteering. The Plaintiff having failed to adduce any evidence regarding profiteering, naturally, therefore failed to make out the case as alleged in the plaint. In my view, want of evidence on profiteering would have direct bearing on the ground of unlawful subletting. In other words, since there is no legal evidence on record that Defendant No. 1 was taking consideration from Defendants 2 and 3, the Plaintiff failed to make out the case of subletting. Taking any view of the matter there is absolutely no legal evidence on the basis of which the Plaintiff can be said to have succeeded in establishing the ground either of unlawful subletting or profiteering within the meaning of Section 13(1)(e) and 13(1)(j) of the Bombay Rent Act.

15. While parting I would like to clarify that I have not dealt with each of the

findings recorded by the trial Court as also the Appellate Court which were seriously assailed at the time of arguments by the rival sides, for, in my view, it is wholly unnecessary to delve upon the said aspects particularly for the view that I have taken in the foregoing paragraphs. Since there is absolutely no legal evidence to establish the ground of subletting or profiteering the Plaintiff has failed to make out any case that would entitle him for a decree u/s 13(1)(e) or 13(1)(j) of the Bombay Rent Act.

16. For the aforesaid reasons both these writ petitions would succeed and the impugned order passed by the Additional District Judge, Thane dated 2-9-1993 in Civil Appeal No. 295 of 1989 is quashed and set aside and the order passed by trial Court dismissing the suit filed by Respondent No. 1 is restored. Rule made absolute in above terms. No order as to costs.