

(2010) 09 BOM CK 0178

In the Bombay High Court

Case No : Civil Revision Application No. 181 of 2010

Viraf G. Ichhaporia

APPELLANT

Vs

Mr. Mancherji Jamshedji Cama and Others

RESPONDENT

Date of Decision : 09-09-2010

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 5(4A)
Easements Act, 1882 — Section 52
Maharashtra Rent Control Act, 1999 — Section 22, 23, 24, 28, 39
Presidency Small Cause Courts Act, 1882 — Section 41, 41(1), 41(2)

Citation : (2011) 1 ALLMR 352 : (2011) 1 BomCR 734

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : N. Dinkar Rao, for the Appellant; B.K. Bali, instructed by Bali Associates, for the Respondent

Final Decision : Dismissed

Judgement

J.H. Bhatia, J.—The respondents, as trustees of M.F. Cama Ahornan Institute and M.M. Cama Education Fund, filed L.E. Suit No. 96/143 of 2008 in the Court of Small Causes at Bombay for eviction of the defendant and possession of the suit premises and also for payment of mesne profits and/or compensation for unauthorised occupation by the defendant. In that suit, the plaintiffs filed application Exhibit 12 seeking direction to the defendant to deposit the entire arrears of compensation at the rate of Rs. 5,000/- per month from October 2008 till the date of filing of the application and also to continue to deposit the same in future. The defendant, who is the present revision applicant, contested the application and contended that the Small Cause Court had no jurisdiction to entertain the suit for eviction and possession as in view of the provisions of Chapter VIII of the Maharashtra Rent Control Act, 1999 (hereinafter for short, "the Rent Act"), the plaintiffs could have filed application before the competent authority and by virtue of Section 47 of the Rent Act, the jurisdiction of Civil Court has been ousted.

2. To appreciate the controversy, it will be useful to state the pleadings of the parties in brief. According to the plaintiffs, the defendant, who is the revision applicant before this Court, was in service of the Trust. He was allotted the suit premises as a gratuitous/service licensee without payment of rent or charges. As the services of the defendant were no more required, the plaintiffs terminated the services of the defendant on 18.11.2004 with the immediate effect and requested him to vacate the premises and hand over the possession to the plaintiffs. Due to his failure to vacate the premises, firstly, the plaintiff had filed Suit No. 2974/2005 before the High Court. However, it was held that the High Court did not have jurisdiction and that the jurisdiction to entertain the suit was with the Small Cause Court. In the result, the plaint was returned to the plaintiffs for presentation before the appropriate Court. During the pendency of that suit, the High Court had appointed the Court Receiver of the premises and the defendant was appointed as an agent of the Court Receiver and he was directed to pay amount of Rs. 5,000/- per month as royalty for occupation of the premises. That order was confirmed in Appeal (L) No. 180/2006 by order dated 19.7.2007 by the Division Bench of the High Court. Later on, when the High Court returned the plaint for presentation before the appropriate Court, the High Court also directed that the appointment of the Court Receiver as per the order dated 27.10.2005 shall continue for some time to enable the plaintiffs to move the concerned Court. In view of these circumstances, the plaintiff filed the suit before the Small Cause Court for eviction and possession and sought the direction from the Small Cause Court to the defendant to deposit royalty amount of Rs. 5,000/- per month. The defendant denied that he was provided the premises as service accommodation. According to him, he was inducted as a tenant independently of his service with the plaintiffs. According to him, in view of the plea taken by the plaintiffs, there was a relationship of the licensor and licensee and, therefore, the proceedings could be filed only before the competent authority under Chapter VIII of the Maharashtra Rent Control Act, 1999 and not before the Small Cause Court under the Presidency Small Cause Courts Act, 1882. After hearing the parties, the trial Court rejected the contention of the defendant and held that he had jurisdiction to entertain the suit and he also directed the defendant to deposit the arrears of compensation as claimed and also to continue to pay amount of Rs. 5,000/- per month till the final disposal of the suit. That order is challenged by the defendant in the present Revision Application.

3. Mr. Dinkar Rao, learned Counsel for the revision applicant pressed the Revision Application only on the point of jurisdiction of the Small Cause Court u/s 41 of the Presidency Small Cause Court Act. According to him, the legislature has specially provided for summary disposal of certain applications by the competent authority, including the application by the landlord/licensor for recovery of possession from the licensee. The learned Counsel contended that Section 47 appearing in Chapter VIII of the Rent Act specifically excludes the jurisdiction of Civil Court in respect of any matter which the competent authority or the State

Government or an officer authorised by it is empowered to decide. The learned Counsel contended that in view of this, the jurisdiction of the Small Cause Court u/s 41 of the Presidency Small Cause Court is ousted and, therefore, the suit would not be tenable before the Small Cause Court and if the plaintiffs claim to be the licensors, their remedy is in the form of application before the competent authority under Chapter VIII of the Rent Act.

4. Mr. Bali, the learned Counsel for the respondents/plaintiffs vehemently contended that the provisions of the Rent Act and the provisions of Chapter VIII are applicable only when the licensee has been paying the license fee. According to him, "licensee" as defined by Section 7(5) of the Rent Act clearly provides that the licensee means the person who is in occupation for the premises under a subsisting agreement given for a licence fee or charge. When no license fee or charge is to be paid by the licensee, he will not be covered by the definition of licensee within the meaning of Section 7(5) of the Rent Act. He contended that the word "licensee" in Section 41 of the Presidency Small Cause Courts Act has wider import and it includes a licensee who pays license fee or charge or is only a gratuitous licensee. As the defendant in the present case was not paying any license fee or charges for occupation of the premises and accommodation was provided to him only because he was in service of the plaintiffs, he is a gratuitous licensee. Therefore, the suit for possession and for mesne profits would be tenable before the Small Cause Court u/s 41 of the Presidency Small Cause Courts Act, but not under the Rent Act.

5. Section 41 of the Presidency Small Cause Courts Act reads as follows:

41(1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of Sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject matter of such suits or proceedings.

(2) Nothing contained in Sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955 the Bombay Municipal Corporation Act [the Maharashtra Housing and Area Development Act, 1976 or any other law for the time being in force, apply].

From Sub-section (1), it is clear that the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between the licensor and licensee or a landlord and tenant relating to recovery of the license fee or charges or rent therefor. However, Sub-section (2) makes it clear that Sub-section (1) shall not be applicable to the suits or proceedings for recovery of

possession of any immovable property or of license fee or charges or rent thereof to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 or any other law for the time being in force apply. Bombay Rent Act, 1947 has been replaced by the Maharashtra Rent Control Act, 1999 and, therefore, in Sub-section (2) of Section 41 rent Act, 1999, will have to be read. If the provisions of the Rent Act are applicable to any suit or proceeding for recovery of possession of any immovable property or a license fee or charges or rent, Section 41(1) shall not be applicable. Therefore, the question before this Court is whether the provisions of Rent Act are or are not applicable to the facts of the present case.

6. In *Prabhudas Damodar Kotecha and Another Vs. Smt. Manharbala Jeram Damodar and Others*, the Full Bench of this Court has settled the legal position that the Small Cause Court has jurisdiction to entertain and try the suit u/s 41 of the Presidency Small Cause Courts Act for recovery of possession of any immovable property between the licensor and licensee irrespective of whether the licensee is paying any license fee or charge or is a gratuitous licensee. It is material to note that the Presidency Small Cause Courts Act does not define "licensee" anywhere, while Section 7(5) of the Maharashtra Rent Control Act defines the "licensee" as a person who is in occupation of the premises under a subsisting agreement for license given for a license fee or charge. In view of this, it is clear that under the Rent Act, only a licensee who is required to pay license fee or charge for occupation of the premises is covered and a person who is a licensee but is not required to pay any license fee or charge is not covered within the definition of "licensee" under the Rent Act. The difference between the meaning of the word "licensee" used in Section 41 of the Presidency Small Cause Courts Act and Section 5(4A) of the Bombay Rent Act, 1947 has been discussed at length in *Prabhudas Damodar Kotecha* (supra) by the Full Bench of this Court. It may be noted here that the definition of licensee in Sub-section (4A) of Section 5 of the Bombay Rent Act, 1947 is *pari materia* with the definition of licensee under sub. 7(5) of the Rent Act, 1999. The Full Bench of this Court observed thus in paras 42, 43, 45 and 48:

42. The PSCC Act does to define expression "licensor" and "licensee". Both these expressions find a place in Section 41(1) of PSCC Act. Under this provision the Court of Small Cause is conferred with the jurisdiction to entertain and try all the suits and proceedings between a "licensor" and a "licensee" relating to recovery of possession of any immovable property or relating to recovery of licence fee. Section 5(4A) of the Rent Act defines the term "licensee" while Section 52 of the Indian Easement Act, 1882 defines the term "licence". A mere look at both these provisions would show that Sub-section (4A) of Section 5 of the Bombay Rent Act clearly provides that the "licensee" means a person who is in occupation of the premises or such part as the case may be, under a subsisting agreement for licence given for a "licence fee or charge". The definition of "licensee" under Sub-section (4A) of Section 5 is very exhaustive and is inclusive and exclusive in character. However, it would suffice to note that the licensee under Sub-section

(4A) must be a licensee whose licence is supported by material consideration. In other words, a gratuitous licensee is not covered under the definition of licensee under Sub-section (4A) of Section 5 of the Rent Act.

43. As opposed to this, the expression "licence", as defined u/s 52 of the Indian Easement Act, provides that where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to easement or an interest in the property, the right is called a license. Section 52 does not require any consideration, material or non material, to be an element of the definition of licence, nor does it require that the right under the licence must arise by way of contract or as a result of a mutual promise. Thus, licence as defined in Section 52 of the Indian Easement Act can be a unilateral grant and unsupported by any consideration. The Supreme Court in *State of Punjab and Others Vs. Brigadier Sukhjit Singh*, has observed that, "payment of licence fee is not an essential attribute for subsistence of licence."

45. The concept of "licence" as reflected in the definition of licensee under Sub-section (4A) of Section 5 of the Bombay Rent Act and Section 52 of the Indian Easement Act are contra distinguishable. Under Sub-section (4A) there cannot be licence unsupported by any material consideration whereas u/s 52 payment of licence fee is not an essential attribute for subsistence of licence. Therefore, we are considering as to whether meaning of the expression "licensee", as reflected in Sub-section (4A) of Section (5), could be attributed to the expression "licensee" employed in Section 41(1) of PSCC Act or the meaning of the expression "licence" as reflected in Section 52 of the Indian Easement Act could be derived for making the expression "licensee" used in Section 41(1) wider so as to cover the term "gratuitous licensee" as well."

48. The provision of Section 41(1) of PSCC Act neither specifies as to what the expression "licensee" used therein exactly means, nor does it expressly exclude any particular category of licensee. A plain reading of Section 41(1) would show that the expression "licensee" is used in a general sense. It does not exclude a gratuitous licensee from its purview. The defined meaning of the expression "licensee" u/s 5(4A) of the Rent Act cannot be assigned or attributed to the word "licensee" occurring in Section 41(1) of PSCC Act. Merely because some expressions in Section 28 of the Rent Act are *pari materia* with the expressions employed in Section 41(1) of PSCC Act does not mean the wider meaning of the expression "licensee" stands restricted or shrunk to mean only the licence given for licence fee or charge....

The Full Bench had formulated the following questions for consideration:

(i) Whether the expression "Licensee" used in Section 41(1) in Chapter VII of PSCC Act, not having been defined therein, would derive its meaning from the expression "licensee" as used in Sub-section (4A) of Section 5 of the Rent Act

and/or whether the expression "licensee" used in Section 41(1) of PSCC Act is a term of wider import so as to mean and include a "gratuitous licensee" also?

(ii) Whether a suit by a "licensor" against a "gratuitous licensee" is tenable before the Presidency Small Cause Court u/s 41 of PSCC Act?

After taking into consideration the different provisions of law and authorities and after making above observations, the Full Bench answered the questions as follows:

62. Thus, looking at the controversy raised in these petitions from all points of view, we answer the questions formulated by us as follows: The expression "licensee" used in Section 41(1) of PSCC Act does not derive its meaning from the expression "licensee" as used in Sub-section (4A) of Section 5 of the Rent Act. The expression licensee used in Section 41(1) is a term of wider import so as to mean and include a "gratuitous licensee" also. In view of this, we hold that a suit by a licensor against a gratuitous licensee is tenable before the Presidency Small Cause Court u/s 41 of PSCC Act.

7. u/s 7(15) of the Rent Act, "tenant" means any person by whom or on whose account the rent is payable for any premises. Therefore, for becoming a tenant of a premises, it is necessary that he should be required to pay rent for occupation of premises. As noted earlier, licensee within the meaning of Section 7(5) must also be a person who is in occupation of any premises under an agreement for licence given for a license fee or charge. Section 22 of the Rent Act makes provisions for termination of tenancy and recovery of possession of the premises from a person in whose favour tenancy was created whilst such person was in service and when such person ceases to be in the employment. Section 24 provides for recovery of possession of the premises on expiry of license. Chapter VIII, containing Sections 39 - 52, provides for summary disposal of the applications for recovery of possession of premises in occupation of service tenant u/s 22, or when the landlord is a member of Armed Forces or a scientist or a Government servant referred to in Section 23 and if the landlord is a person who has given premises on License for residence referred to in Section 24. In such cases, the competent authority has to follow special procedure for disposal of the application. It is material to note that the tenant or licensee, who is covered under Sections 22, 23 or 24 and against whom such application is filed before the competent authority, does not have legal right to defend the proceedings unless within 30 days of service of summons on whom he files an affidavit setting out grounds on which he seeks to contest the application for eviction and obtains leave from the competent authority. Thus, without leave, such a tenant or licensee cannot contest the application for eviction. Section 44 provides that an order of the competent authority shall not be appealable and against his orders only a revision will lie before the State Government or such officer as the State Government may, by general or special order, authorised in this behalf. Section 47 excludes the jurisdiction of the Civil Court in respect of all such proceedings. Thus, a special mechanism has been provided under Chapter

VIII, but before the application u/s 42 can be filed before the competent authority, the case must be covered by Section 22, 23 or 24 of the Rent Act.

8. As noted above, according to the pleadings of the plaintiff, the defendant was not paying either license fee or charge or any rent and therefore he was neither a licensee as defined in Section 7(5) nor he was a tenant u/s 71(15) of the Rent Act and therefore his case would not be covered either u/s 22 or 24 of the Rent Act. Therefore, the landlord could not have made an application before the competent authority and the provisions as contained in Chapter VIII would not be applicable. Therefore, the competent authority does not have jurisdiction to entertain application of the plaintiff and as a result of this, the jurisdiction of Small Cause court u/s 41 of the Presidency Small Cause Court Act is not ousted. In view of these facts and legal position, it must be held that the Small Cause Court is competent to entertain the suit of the plaintiff u/s 41 of the Presidency Small Cause Court Act. Therefore, I do not find any illegality or irregularity in the findings of the trial Court in respect of its finding about jurisdiction.

9. For the aforesaid reasons, the Revision Application stands dismissed.