

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1690 OF 2015

ABATS & K.B. Auto Traders & Ors.

... Petitioners

Versus

Purnima Ashok Shah

... Respondent

Mr. A. P. Wachasundar and Mr. Navin L. for the Petitioners.

Mr. Tushar Sonawane for the Respondent.

CORAM :- M. S. SONAK, J.

Judgment Reserved on :- 11 AUGUST 2015.

Judgment Pronounced on :- 14 AUGUST 2015.

JUDGMENT :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] This petition challenges the judgments and decrees dated 3 May 2013 and 13 November 2014 made by the Trial Court and the Appeal Court ordering the eviction of the petitioners from the suit premises.

3] By registered Leave and Licence Agreement dated 27 March 2006, the suit premises were licenced by the respondent to the petitioners for a term of sixty months. Upon the expiry, the respondent

demanded the possession. Since the same was not restored, the respondent instituted Special Court Suit No. 589 of 2011 in the Court of Civil Judge, Senior Division, Nashik (Trial Court) for recovery of possession, damages and future mesne profits.

4] The suit was decreed by the Trial Court by the judgment and decree dated 3 May 2013. The petitioners appealed. The District Judge, Nashik (Appeal Court) by judgment and decree dated 13 November 2014 dismissed the petitioners appeal. Hence, the present petition.

5] Mr. Wachasundar, learned counsel for the petitioners, submitted that the Appeal Court has acted in excess of jurisdiction in holding that the provisions of the Maharashtra Rent Control Act, 1999 (Rent Act) are inapplicable to the suit premises. Such finding is contrary to the provisions contained in Sections 2, 7(5), 7 (15) and 33 of the Rent Act. Mr. Wachasundar contended that by registering the Leave and Licence Agreement dated 27 March 2006, the parties have acted in accordance with Section 55 of the Rent Act and thereby accepted the applicability of the Rent Act. Mr. Wachasundar further contended that there are only certain situations in which the Rent Act

does not apply and since such situation do not operate, by default, the provisions of the Rent Act apply to the present case. Mr. Wachasundar further submitted that upon the petitioners continuing in possession of the suit premises beyond the date stipulated in the Leave and Licence Agreement dated 27 March 2006, the petitioners become the tenants in respect of the suit premises and were therefore, entitled to the protection of the Rent Act. In any case, Mr. Wachasundar contended that the issue of applicability of the Rent Act never arose before the Trial Court and therefore, the Appeal Court would have at the highest remanded the matter by resort to the provisions in Order 41 Rule 25 of the Code of Civil Procedure, 1908 (CPC). Mr. Wachasundar also contended that the suit was instituted before the Civil Judge, Senior Division at Nashik, which had been conferred with the powers of Small Causes Court under the provisions of the Rent Act. This is also a circumstance which establishes that the protection of the Rent Act was available to the petitioners and the same has been incorrectly denied to the petitioners.

6] Mr. Tushar Sonawane, learned counsel for the respondent, submitted that in this case there was registered Leave and Licence

Agreement dated 27 March 2006 governing the relations between the parties. The terms of Leave and Licence Agreement make it absolutely clear that the parties never intended to any relationship of landlord and tenant. In the course of deposition, the one of the petitioners has clearly admitted that the tenants of the Leave and Licence Agreement dated 27 March 2006 are true and proper and that the term of the licence expired on 14 November 2010 and the same was never renewed. Mr. Sonawane further placed reliance upon the decision of this Court in case of *Ashok T. Kallanawar & ors. vs. Shrenik B. Kotecha*¹, to submit that the suit premises in this case was rightly instituted before the Civil Court and there is absolutely no error of jurisdiction.

7] The rival contentions now fall for my determination.

8] In this case, the Appeal Court has not really held that the provisions of the Rent Act do not apply to the area where the suit premises are located. As such, there is no necessity to make reference to Section 2 of the Rent Act which only provides that the Rent Act shall, in the first instance, apply to premises in the areas specified in

¹ Writ Petition No. 501 of 2004 decided on 4 June 2007

Schedule I and Schedule II. The Trial Court and the Appeal Court have merely held that the petitioners were licensees in respect of the suit premises, and consequently are not entitled to the protection of the Rent Act.

9] Adverting to the definition of the expression '*licensee*' under Section 7(5) of the Rent Act, Mr. Wachasundar submitted that since the terms of the licence expired on 14 November 2010 and the suit was instituted on 30 July 2011, on the date of institution of the suit, the petitioners were not in occupation of the suit premises under any subsisting agreement for licence. Therefore, according to Mr. Wachasundar, the petitioners are not '*licensee*' within meaning assigned to this term under Section 7(5) of the Rent Act, but by default are tenants. This submission, obviously cannot be accepted. The submission virtually suggest that licensee continuing in occupation after the term, if any, of the licence or after termination of licence is, by default to be regarded as a lessee. Such submission, with respect, is contrary to both law as well as logic in the scheme of the provisions contained under the Rent Act. In this case, the special provisions for eviction of licensee is contained in Section 24 of the

Rent Act may be inapplicable because the suit premises had not been licensed for residential purposes. However, even Section 24 of the Rent Act provides that the licensor may institute proceedings for recovery of possession from any licensee, who does not deliver the possession of the premises to the licensor upon expiry of period of licence and continues to be in possession of the licensed premises. There is, accordingly, no provision under the Rent Act to support the submission of Mr. Wachasundar.

10] Mr. Wachasundar then contended that the protection of the Rent Act does not apply only in the following contingencies :

- I. Lease of Land and matters connected therewith U/S 105 to 111 of Transfer of Property Act.
- II. To the areas not being Municipal Areas.
- III. For the enforcement of Title to property.
- IV. For recovery of possession from any trespasser
- V. Where parties are not Landlord or Tenant for the purposes of Section 33 of the Act or licensor or Licensee for the purposes of chapter VIII of the Act.

11] Mr. Wachasundar, on the basis of the aforesaid premise, contended that in all other contingencies, protection of Rent Act has

to be extended. On such basis, Mr. Wachasundar submitted that the petitioners cannot be made to suffer eviction on any ground other than those set out in Sections 15 and 16 of the Rent Act.

12] Again, the aforesaid contentions of Mr. Wachasundar, cannot be accepted. The basic premise is itself unacceptable and consequently the structure, which Mr. Wachasundar seeks to build thereupon, cannot stand. In order that the protection of the Rent Act is availed, relationship of landlord and tenant is required to be accepted or established. A mere licensee, cannot claim the protection of the Rent Act. The real issue in the present case is therefore whether the document governing the relationship between the parties is a document of Leave and Licence or whether the same is a Lease Deed.

13] The contention of Mr. Wachasundar that the Appeal Court, for the first time, has held that the protection of the Rent Act is not available to the petitioners and that the matter ought to have been remanded under Order XLI Rule 25 of the CPC, cannot again be accepted. In this case, both the Trial Court as well as the appeal Court have held that the petitioners, not being tenants in respect of the suit

premises, were dis-entitled to the protection of the Rent Act. This was clearly not a case call for remand under Order XLI Rule 25 of the CPC. The petitioners, it appears, are bent upon delaying the proceedings, so as to hold on to the suit premises, on account of such delay.

14] The real issue is whether, the registered Agreement dated 27 March 2006 is a Leave and Licence Agreement as stated therein or whether, the same is a camouflage for a Lease Deed. The two Courts, on the basis of the material on record in the form of oral as well as documentary evidence have held that the document is indeed a Leave and Licence Agreement as stated therein. There is really no reason to interfere with such concurrent findings of fact. In case of ***Delta International Limited Vs. Shyam Sundar Ganeriwalla & Another***², the Hon'ble Apex Court has laid down the following tests for determining whether a document is a Lease or a License. The summary of such test is contained in paragraph 17, which reads thus:-

17. *From the aforesaid discussion what emerges is:*

(1) *To find out whether the document creates lease or license real test is to find out 'the intention of the parties'; keeping in mind that in cases where exclusive*

² (1999) 4 SCC 545

possession is given, the line between lease and licence is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges that the tenant has sublet the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the subtenant may jointly set up the plea of a license against the landlord which is a camouflage. In such cases, the mask is to be removed or veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances. Same would be the position where the owner of the premises and the person in need

of the premises executes a deed labelling it as a licence. deed to avoid the operation of rent legislation.

(5) *Prima facie, in absence of a sufficient title or interest to carve out or to create a similar tenancy by the sitting tenant, in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But, this question is not required to be finally determined in this matter.*

(6) *Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act inter alia provides that leases of Immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well laid principles for construction of contractual terms, viz. for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.”*

(emphasis supplied)

15] The Apex Court has further held that the intention of the parties is to be gathered mainly from the meaning and words in the

document itself and due weight is required to be given to what the parties have stated. The contract between the parties is to be construed on the basis of the terms of the documents, particularly where the document has been executed by parties, who are not illiterate, layman or poor person in need of premises for their residence or business. The Apex Court in such circumstances, has held that when parties are capable of understanding their rights fully and have expressly agreed and declared that the document should not be construed in any manner as creating any relationship of landlord and tenant between them, it would be impermissible to conjecture or infer that their relations should be construed as that of landlord and tenant.

16] Applying the aforesaid principle to the present case, the concurrent findings of fact recorded by the two Courts that the document dated 27 March 2006 was indeed a document creating Leave and Licence shall have to be accepted. In Clause 11 of the Leave and Licence Agreement dated 27 March 2006, it is stipulated as under:

“11. No landlord and tenant relationship is created by virtue of this agreement and the licensee shall never claim any right, as tenant of the said premises against the licensor as per The Maharashtra Rent Control Act

1999, although the provisions of leave and licence as incorporated in the said Act shall be binding on both the parties. The licensee shall not create or deem to create any right either of tenancy or subtenancy or any other such rights by which any ownership interest or claims created or intended to be created in favour of the licensee by reasons of this agreement or any other document, correspondence and circumstance arising out of execution of the instrument of licence. So also it is expressly understood by the licensee that this is a bare licence to use the said premises and there is no intention amongst the parties to create any lease.”

17] The circumstance that Section 55 of the Rent Act makes Leave and Licence Agreement compulsorily registrable and since in the present case, the Leave and Licence Agreement dated 27 March 2006 was indeed registered by the parties does not mean and imply that the protection of the Rent Act is available to the licensee. The circumstance that the Leave and Licence Agreement dated 27 March 2006 came to be registered by the parties, may be, in deference to the provisions contained in Section 55 of the Rent Act does not render such Leave and Licence Agreement, a Lease Deed. There is accordingly, no merit in the contention of Mr. Wachasundar that the petitioners can be evicted upon only upon the grounds contained in Sections 15 and 16 of the Rent Act.

18] Accordingly, there is no case made out to interfere with the concurrent findings recorded by the two Courts. The findings are amply borne from the material on record. In exercise of jurisdiction under Article 227 of the Constitution of India, this Court does not exercise any appellate powers. There is no jurisdictional error involved in making of the impugned judgments and decrees.

19] There is no merit in the contention that the suit was instituted before the Trial Court, which acts as the Court of Small Causes Court in terms of Section 33 of the Rent Act. As at Nashik, there is no Small Causes Court, it is true that the powers of Small Causes Court have been conferred upon the Trial Court. However, this circumstance, does not mean or imply that the suit was instituted by the respondent before the Small Causes Court. This Court, in case of *Ashok Kallanawar (supra)*, has held that the remedy of recovery of possession from a Licensee in respect of non-residential premises is not under Section 24 of the Rent Act. Rather, the remedy is by way of instituting a Suit under the general law. Where the claim is above Rupees One Lac, the suit is maintainable before the Civil Judge, Senior Division. Accordingly, the Trial Court, in the present case, had

jurisdiction to entertain and decide the suit.

20] The Trial Court and the Appeal Court have directed the petitioners to pay damages at the rate of Rs.20,000/- per month for the period between 14 November 2010 till the date of institution of the suit i.e. 30 July 2011 to the respondent. Besides, the two Courts have also made decrees for mesne profits to compensate the landlord for wrongful deprivation of the suit premises. Accordingly, there is some overlapping involved. The direction for payment of damages for the period between 14 November 2010 and 30 July 2011 is accordingly set aside. Save and except this modification, there is no case made out to interfere with the impugned judgments and decrees.

21] Accordingly, the impugned judgments and decrees on the aspect of eviction from the suit premises and mesne profits are not interfered with. However, the direction for payment of damages for the period between 14 November 2010 and 30 July 2011 is set aside. Rule is, accordingly, made absolute to this limited extent only. There shall, however, be no order as to costs.

(M. S. SONAK, J.)