

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.428 OF 2013

a/w
CAF/1695/2013

Ramsumer Amarnath Chourasia ... Appellant

Vs.

Ramnath Anturam Kumbhar ... Respondent

Mr.G.S. Godbole a/w Parag Tilak i/b Nitin Muley for the Appellant
Mr.G.R. Mishra for Respondent

CORAM: **MRS.MRIDULA BHATKAR, J.**

ORDER RESERVED ON: **9th OCTOBER, 2015**
ORDER PRONOUNCED ON: **28th NOVEMBER, 2015**

ORDER:

1. This appeal is directed against the judgment and order dated 6.3.2013 passed by the learned City Civil Court at Bombay by which the learned Judge decreed the S.C. Suit No.427 of 2012. The defendant is directed to vacate the suit premises i.e., Paan beedi shop situate at Suman Juice Centre on the ground floor, Marine Mansion building, Chowpatty and vacate the same within two months from the date of the decree. The defendant in the suit filed the appeal challenging the said order.

2. It is the case of the plaintiff that he is a tenant in the premises wherein there is a small paan beedi stall which owned by him for which he

holds a licence of the said business. So, he entered into an agreement with the defendant dated 25.3.1975 to conduct the said business for a period of five years with a condition of optional renewal. Some amount of royalty was also fixed. The defendant had filed RAD Suit No.6 of 1979 for declaration as a deemed tenant. In the said suit, the parties filed consent terms on 7.2.1979 and the defendant was allowed to conduct the business as a licensee. It is the case of the plaintiff that he did not pay royalty and, therefore, the plaintiff demanded the possession of the paan beedi stall. At that time, the defendant/appellant assaulted the plaintiff's son and therefore, a criminal case was filed against the defendant. However, he handed over the possession of the suit premises with the fear of prosecution. Then, for some period, the stall was in the possession of the plaintiff but thereafter again, the defendant took forcible possession of the said stall. Then, the defendant again filed RAD Suit No.4702 of 1983. The said suit was dismissed on 12.6.1998. Thereafter, the plaintiff gave notice to the defendant / appellant on 20.6.1998 and terminated the contract of the paan beedi stall for non-payment of royalty and other grounds. Initially, L.E. Suit No.237 of 2002 was filed before the Small Causes Court Suit for eviction of the defendant from the suit premises. The said suit was dismissed on 30.3.2007 against which the appeal was filed on the ground of jurisdiction. The plaintiff filed appeal No.363 of 2007 before the appellate bench of the Small Causes Court and the appellate

bench held that under section 41 of the Small Causes Courts Act, the Small Causes Court has no jurisdiction in view of the status of the defendant who was conducting a business under the agreement as a licensee and accordingly the plaint was returned for presentation before the appropriate Court. The appeal was decided on 28.10.2009 and thereafter the plaintiff presented the suit before the City Civil Court.

3. The defendant appeared in the suit; filed his written statement and denied that he is only a conductor of the business. He also challenged the impugned agreement dated 25.3.1979. He denied that the plaintiff has right to recover the possession and the defendant has committed any default in payment and there is no cause of action for the plaintiff to file a suit for eviction. All the averments made in the plaint in respect of criminal case or handing over the possession for temporary period were denied by the defendant. On the basis of the pleadings of both the parties, the learned trial Judge framed issues and after considering the documentary as well as oral evidence, the learned trial Judge gave findings on the issues as follows:

Issues	Findings
1) Whether the plaintiff proves that on the agreement dated 25/3/1975 at the request of defendant the plaintiff had given him the Pan bidi Stall situated at Suman Juice Center for conducting?	Yes

2) Whether the plaintiff proves that the said license was terminated by the notice dated 20.6.1998?	Yes
3) Whether the suit is barred by limitation?	No
4) Whether the defendant proves his right of tenancy in respect of the suit premises?	No
5) Whether the plaintiff is entitled for a decree of eviction against the defendant?	Yes
6) What order and decree?	As per final order

4. At the outset, Mr.Godbole, the learned Counsel for the appellant, restricted his submissions on the point that the City Civil Court is not a proper forum to file the suit. The said Court has no jurisdiction to entertain the suit filed in respect of the licensee in the immovable property. He argued that he may not be having a good case on merit, but he challenges the judgment wholly on the ground of its jurisdiction to entertain a suit between a licensee and a licensor. On the basis of the ratio laid in the case of **Prabhudas Damodar Kotecha vs. Manharbala Jeram Dmodar & Anr¹**, he submitted that the appellant is a licensee since 1972. He has filed RAD Suit No.6 of 1979. He submitted that the learned Judge of the Small Causes Court while dismissing the second suit i.e., RAD Suit No.4702 of 1983 filed by him, held that the appellant is a conductor of the business and so in view of section 5(4A) of the Bombay Rent Act, the City Civil Court is a proper forum. Thereafter, Appeal No.381 of 1998 was filed before the appellate forum of the Small Causes Court. The appeal was

1 2007 (5) Mh.L.J. 341

also dismissed on 2.7.2003. However, the learned Counsel pointed out that while dismissing the said appeal, the appellate bench of the Small Causes Court held the status of the appellant as a licensee. The said order of dismissal though was challenged on the point of jurisdiction by filing CRA No.23 of 2010 in the High Court by the respondent i.e., the plaintiff, it was withdrawn unconditionally. Thereafter, the Suit No.427 of 2012 was presented in the City Civil Court. The learned Counsel submitted that in the case of **Prabhudas Damodar Kotecha (supra)**, the Supreme court has taken a view that gratuitous licensee is also covered in the definition under section 41(1) of Presidency Small Causes Courts Act by Maharashtra Amendment Act. He placed reliance on paragraphs 57, 58 and 59 of the said judgment wherein the Supreme Court has held that under section 41(1) of the Presidency Small Causes Courts Act (for short, 'the PSCC Act'), all the cases are to be clubbed relating to the recovery of licence fee and one umbrella policy is adopted to avoid unnecessary delay, expenses and hardship. It is held that the expression 'licensee' used in section 41 of the PSCC Act is used in general sense of the terms as defined in section 52 of the Indian Easements Act. He submitted that by the judgment of the Supreme Court in **Prabhudas Damodar Kotecha (supra)**, he is covered under section 52 of the Indian Easements Act and not under section 5(4A) of the Bombay Rent Act. Therefore, he comes within section 41 of the Presidency Small Causes Courts Act. Because of

one umbrella policy, very wide meaning is given to the word 'licence' and 'licensee' under section 41 of the Act, which is borrowed from section 52 of the Indian Easements Act. He relied on the consent terms signed by the parties before the Small Causes Court and submitted that the status of the appellant is not only as a mere conductor but he is a conductor with a licence, who is put in possession of the suit premises. He further submitted that it is not a case of the original plaintiff that he was having joint possession of the suit property but he has filed a suit for possession and it means that he had lost the possession and he is not a mere conductor but is a conductor with a licence.

5. Mr.Mishra, the learned Counsel for the respondent, submitted that the original plaintiff has no case on merits and also under the law. He submitted that the pleadings in the plaint should be considered to decide the jurisdiction. It is mentioned in the plaint that the paan beedi shop was given to conduct the business. He submitted that the appellate bench of the Small Causes Court of Mumbai in Appeal No.363 of 2007 has specifically mentioned that the contract was for conducting the business and when the contract is for the conducting the business, the provisions of section 41 of the Presidency Small Causes Courts Act cannot be invoked. He relied on the agreement dated 25.3.1975 where it is specifically mentioned that the plaintiff is running a business of selling fruit juice in one part of it, he is running a paan beedi shop and as he has obtained

necessary permission from the municipal corporation for putting up a stall and run the business of paan beedi, he put him to conduct the business. He further relied on the consent terms in RAD Suit No.6 of 1979 which were filed by the appellant wherein it was mentioned that the defendant agreed to pay "conducting" charges. He also read over the evidence of the plaintiff. He pointed out that the plaintiff, in the cross-examination, denied that he has given the stall on rental basis to the defendant and a gumastha licence was in his name and he was paying him Rs.100/- for running a business. He has specifically mentioned in para 4 of his evidence that he has given paan shop for conducting and he was recovering conducting charges from him. He also relied on the evidence of cross-examination of the defendant where he admitted that the licence of the shop and also electric meter of the jurisdiction is in the name of the plaintiff and he has further admitted in his cross-examination that as per the consent terms, he was paying the conducting charges. Specific admissions are given by the defendant that he was having a licence to conduct the business. It means that he was not a licensee for the said shop who can conduct some other business than the business of paan shop. The licence was for conducting business and not for the suit premises and for the purpose of conducting business, it is necessary to give physical possession of the suit premises. There may be a joint possession or there may be handing over of the physical possession. All

admissions are given by the defendant in the cross-examination that he was paying conducting charges to the plaintiff. In the present case, it is the understanding of the appellant that he was conducting a business of paan beedi shop on behalf of the plaintiff and he was not allowed to carry on some other business in the said premises.

6. The present appeal rests entirely on the interpretation of the term “licensee” under section 41 of the Act and under section 5(4A) of the Bombay Rent Act in the light of ratio laid down by the Supreme Court in the case of **Prabhudas Kotecha (supra)**. Earlier, Suit was filed by the plaintiff against the respondent in the present case before the Small Causes court. However, it was challenged on the ground that under section 5(4A), he is not a licensee and the proper forum to file a suit for eviction is City Civil Court and not Small Causes Court. That decision was challenged by the plaintiff i.e., the appellant. L.E. Suit No.237 of 2002 was dismissed on 30.3.2007 on the ground of jurisdiction against which the respondent filed appeal No.363 of 2007 challenging the said order, which was partly allowed holding that the present appellant i.e., the respondent in the appeal, being a conductor of business, Small Causes Court does not have jurisdiction and hence, the plaint was returned for filing it in the proper Court. The respondent filed Civil Revision Application No.23 of 2010 before the High Court but it was withdrawn and not persuaded. So he filed the present Suit No.427 of 2012. Both the parties tendered

evidence. The plaintiff and the defendant in the suit examined themselves. The appellant has taken categorical stand that there was no business conducting agreement between the parties. The said contention of the present appellant was rightly rejected by the City Civil Court. The appellant gave admission that he used to pay fee for conducting the business. The Respondent is running a fruit juice shop and in the said premises only, he has made small stall admeasuring 4' x 3' for paan beedi shop and he gave the said stall to the appellant to conduct the business of paan beedi. The original plaintiff has obtained necessary permission from the Municipal Corporation for putting up the stall board for the purpose of carrying on business. The agreement between the original plaintiff and the defendant is produced. So also, the certificate was obtained under the Food and Safety Standards Act, 2006 in respect of Paan patti shop stood in the name of the plaintiff and that certificate is renewed till 2007, is also produced. It is submitted that consent terms were filed in RAD Suit No.6 of 1979 between the appellant (plaintiff in that suit) and the respondent (the defendant in that suit), wherein it was agreed and mentioned specifically that he was ready to pay conducting charges. Though there is no mention of the word 'business', however, it is necessary to read as conducting charges for the business. Moreover, in the plaintiff's cross-examination, the plaintiff has stated that the paan stall which is in his juice shop is owned by him and he is having gumastha licence in his name and

the appellant had put his name fraudulently in the licence of his paan shop but however, his name was deleted. Thus, it shows that license was only for conducting business. It is not a case that plaintiff was having licence for business of paan shop and the defendant after obtaining license of the premises, *inter alia* the possession, started running some other business. He continued to run the same business. However, in the present case, though the possession was given by the original plaintiff to the defendant, it was for the purpose of conducting business of paan beedi shop which was earlier run by the plaintiff. Considering the evidence of both the witnesses of the plaintiff and the defendant, the appellant has no case on merit. He is a defaulter in payment of charges and original plaintiff wants the suit premises back.

7. The competency of the City Civil Court to try and entertain the suit is the main challenge set by the counsel for the appellant.

Section 5(4A) of the Bombay Rent Act, wherein the word 'licensee' is defined reads thus:

“5. 4(A) 'licensee', in respect of any premises or any part thereof, means the 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; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Co-operative Societies Act, 1960; **but does not include** a paying guest, a member of a family residing together, a person

in the service or employment of the licensor, or a person
conducting a running business belonging to the licensor,

(emphasis added)

The definition is inclusive as it states about the persons who are covered under the section and it is also exclusive as it takes out some persons from the definition. Some persons who are occupying the premises and not paying the fee or charge for the same are excluded from the definition of licensee under the Bombay Rent Act. (equivalent section 7(5) of Maharashtra Rent Control Act). Amongst them, a person conducting a running business belonging to the licensor is excluded from the definition of licensee under the Bombay Rent Act. Thus, the suits filed for eviction against those persons are not filed before the Small Causes Court which is otherwise a proper forum for the suits for eviction under the Bombay Rent Act, but are filed before the Civil Court.

8. Earlier, in the case of **Ramesh Dwarkadas Mehra vs. Indravati Dwarkadas Mehra**², the Division Bench of the Bombay High Court held that the word 'licence' contemplated under section 41 of the Act must take its colour from section 5(4A) of the Rent Act of 1947 which specifically excludes the gratuitous licensee and therefore, the suit against the gratuitous licensee is maintainable only before the civil Court. Later on, when a similar issue came before the learned Single Judge of the Bombay

² AIR 2001 Bom. 470

High Court in the case of **Prabhudas Damodar Kotecha (supra)**, it was referred to Full Bench and the Full Bench of this Court overruled the decision of the Division Bench of this Court of **Ramesh Mehra (supra)**. In the case of **Prabhudas Kotecha (supra)**, the respondents original plaintiff, filed a suit No.430/582 of 1978 under section 41 of the Act before the Small Causes Court for recovery and vacant possession of one bedroom in the flat on the ground that they were permitted to use the premises without any consideration and no monetary consideration was charged by them. So, the suit was filed for eviction. The suit was decreed on 7.2.1997 against the appellants on the ground that they are gratuitous licensees. The appellant Prabhudas Kotecha preferred an appeal before the appellate bench of the Small Causes Court which was dismissed on 5.4.2013 against which the appellants challenged the said order and filed Writ Petition before the High Court and the respondent/landlord filed Writ Petition for mesne profits. In the writ petition, the appellants i.e., the original defendants, questioned the jurisdiction of the Small Causes Court and placed reliance on the judgment of the Division Bench in **Ramesh Mehra's case (supra)** and contended that as he is not a licensee covered under section 5(4A) r/w section 15A of the Rent Act, the suit is to be tried before the City Civil Court and not by the Small Causes Court. The Full Bench was constituted and it dealt with the scope of section 41(1) of the PSCC Act and the jurisdiction of the Small Causes Court under section 41

of the Act. The Full Bench held that the gratuitous licensee is also covered under section 41(1) of the Act and therefore, the Small Causes Court has jurisdiction to try the cases against or by the gratuitous licensee. The Full Bench of this Court in the case of **Prabhudas Damodar Kotecha (supra)**, overruled the judgment in the case of **Ramesh Dwarkadas Mehra (supra)** and held that the expression 'licensee' must be given a widest interpretation, which should be consistent with the object with which the 1976 Amendment of PSCC Act was brought into force. The Full Bench held that under section 41 of the PSCC Act, the word 'licensee' should be given a meaning which is defined under section 52 of the Indian Easements Act. Section 52 of the Indian Easements Act reads thus:

“52. “License” defined. - 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 an easement or an interest in the property, the right is called a license.”

9. The judgment of the Full Bench was challenged before the Supreme Court and the Supreme Court confirmed the decision of the Full Bench in appeal. The Supreme Court has discussed extensively the definition of licensee under section 5(4A) of the Rent Act, section 15A of the Rent Act, interpreted section 52 of the Indian Easements Act. By referring to various earlier decisions of the Supreme Court, it analysed section 41(1) of the Act

threadbare. Section 41 reads thus:

S.41. Suits or proceedings between licensors and licensees or landlords and tenants for recovery of possession of immovable property and licence fees or rent, except to those to which other Acts apply to lie in Small Cause Court. - (1) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, but subject to the provisions of sub-section (2), the Court of Small Cause 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 any 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 of 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 Bombay Housing Board Act, 1948 or any other law for the time being in force applies.

(emphasis added)

10. Section 41 of the PSCC Act states that the suits and the proceedings between the licensor and licensees, landlords and tenants, for recovery of possession of immovable property and licence fee or rent, shall lie in Small Causes Court except which are mentioned under section 41(2). Section 41(2) gives a list of the Acts which are exception to section 41 i.e., Bombay Rents, Hotel and Lodging House rates Control act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay

Municipal Corporation act, the Bombay Housing Board Act, 1948 or any other law for the time being in force. Thus, a suit filed against a person who is a licensee, covered under the Maharashtra Rent Control Act, will not be controlled under PSCC Act but will be under Maharashtra Rent Control Act. Section 5(4A) of the Bombay Rent Act defines who is a licensee and also excludes certain persons from the definition of licensee under the Act. Section 41 carves out exception to the applicability to certain Acts like Maharashtra Rent Control Act, and is mentioned in section 41(2) of the PSCC Act. However, the defining section of 'licensee' 5(4A) of the Bombay Rent Act is in two parts – firstly, it classifies the persons who are covered under the definition of licensee for the purpose of Bombay Rent Act. Secondly, it specifies the persons who are not included therein. “A person conducting a running business belonging to the licensor” falls in the second part of the definition and, therefore, he is out of the meaning of the licensee for the purposes of the Bombay Rent Act. Thus, these group of persons, who are not the licensee for the purpose of section 5(4A) of Bombay Rent Act, are taken within the sweep of section 52 of the Indian Easements Act.

11. The Supreme Court held that the expression 'licensee' which is used in section 41(1) is a term of wider import intended to bring in all the persons who can be licensee under section 52 and, therefore, all the persons, who are excluded from the definition of the licensee under

section 5(4A) of the Bombay Rent Act are under section 52. The Supreme Court held in para 50 thus:

50. We are of the considered view that the High Court has correctly noticed that the clubbing of the expression 'licensor and licensee' with "landlord and tenant" in Section 41(1) of the PSCC Act and clubbing of causes relating to recovery of licence fee is only with a view to bring all suits between the "landlord and tenant" and the "licensor and licensee" under one umbrella to avoid unnecessary delay, expenses and hardship. The act of the legislature was to ring all suits between "landlord and tenant" and "licensor and licensee" whether under the Rent Act or under the PSCC Act under one roof. We find it difficult to accept the proposition that the legislature after having conferred exclusive jurisdiction in one Court in all the suits between licensee and licensor should have carved out any exception to keep gratuitous licensee alone outside its jurisdiction."

The Supreme Court thus has laid down umbrella policy for all the licensee licensor in the ambit of section 41 of the Act.

12. Therefore, though the respondent has a good case on merits, for want of appropriate forum, should again go before the Small Causes Court. Accordingly, the plaint is returned and to be presented before the Small Causes Court. The Court is fully aware of the hardship of the plaintiff, however, I rely on the judgment in the case of **Smt.Isabella Johnson vs. M.A. Susai (dead)by Lrs.**³, wherein it is held that "in our opinion, the Court which has no jurisdiction in law, cannot be conferred with jurisdiction by applying principles of *res judicata*. It is well settled that

3 AIR 1991 SC 993

there can be no estoppel on a pure question of law and in this case, the question of jurisdiction is a pure question of law". Therefore, it be presented before the Small Causes Court and the Small Causes Court is directed to hear and decide the suit within six months from the date of filing the suit.

13. First Appeal is disposed of accordingly.

14. In view of the disposal of the First Appeal, Civil Application also stands disposed of.

15. R & P to be sent forthwith.

16. Parties and the City Civil Court as also the Small Causes Court to act on an authenticated copy of this Order.

(MRIDULA BHATKAR, J.)