

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6088 OF 2016

Shri Vispi Burjor Mistry

...Petitioner

Versus

M/s. Hermes Developers Through
Partner Shri Ketan Thakkar

...Respondent

WITH

Writ Petition NO. 6089 OF 2016

WITH

Writ Petition NO. 6100 OF 2016

....

Mr.V.A. Shastry, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 1st July, 2016

P.C.

1. Heard Mr. V.A. Shastry, learned Counsel for the petitioner in all the Petitions, at length.

2. By these Petitions under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'opponent', has challenged the judgment and order dated 2.4.2016 passed by the Competent Authority, Rent Control Act Court, Pune Division, Pune – 1 (for short, 'Competent Authority')

in applications filed by the petitioner under Order 6 Rule 17 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for amending the written statements.

3. As common questions of law and facts arise in these Petitions, the same can conveniently be disposed of this common order. For appreciating the controversy in the Petitions, the facts from Writ Petition No.6088/2016 are considered.

4. Respondent M/s. Hermes Developers, hereinafter referred to as the 'applicant' has instituted application under Section 24 of the Maharashtra Rent Control Act, 1999 (for short, 'Act') through its Partner Ketan R. Thakkar *inter alia* contending that it is owner of a row house No.10, admeasuring about 1165 sq. ft. in the scheme known as Hermes Heritage Phase II, Shastri Nagar, C.T.S. No.2167, 2168, Pune – 411 006 (for short, 'suit property'), within the Municipal limits of Pune Municipal Corporation

5. It is the case of the applicant that the suit property was given in use and occupation of the opponent under leave

and licence agreement dated 2.4.2007 which was enclosed along with the application. The applicant alleged that the opponent is illegally occupying the suit property without making payment of licence fee and other charges for the period from 15.12.2006 to 14.11.2007, being licence period of 11 months and even after expiry of licence period. The opponent has instituted Regular Civil Suit No.1191/2009 before the Court of Civil Judge, Junior Division, Pune claiming that he is the owner/purchaser of the suit property. The applicant, therefore, has prayed for recovery of the possession of the suit property together with amount of Rs.5,74,948/- along with interest @ 24% per annum.

6. Opponent resisted the application by filing written statement dated 3.12.2013. During pendency of the proceedings, opponent filed application under Order 6 Rule 17 of C.P.C. for amending the written statement. By the proposed amendment, opponent intends to incorporate paragraphs-3A and 3B. Paragraphs-3A and 3B read thus :

“3A. Without the prejudice to any contention and without admitting the alleged Leave and License Agreement dated 2nd April 2007, it is submitted that the true extract of the Register of Firms, Form A – ie. Application

for Registration of Firms and the Deed of Partnership of firm of M/s. Hermes Developers reveals that Mr. Ketan R. Thakkar was not a partner of M/s. Hermes Developers at the time executing the alleged Leave and license agreement dated 2nd April 2007, as well as on the date of filing of this Application no.43 of 2009, and, therefore, the said application filed by Mr. Ketan R. Thakkar on the basis of the alleged agreement dated 2nd April, 2007 is clearly hit by provisions of section 69(2) of the Indian Partnership Act, 1932 and therefore, the said application is not maintainable.

3B. It is submitted that, the construction of the suit property is carried on the lands bearing S. no.185-A, 199-A, 199-B, 200/A-B and 201 totally admeasuring about 115,621 sq. mtrs. situated at village Yerwada, Tal. Haveli Dist. Pune belonging to Russet Co operative Housing Society, a registered cooperative society and Applicant M/s. Hermes Developers were entrusted with the work of development and construction of the structures thereupon and further, were conferred upon the rights to 'alienate' the units and the other premises constructed thereupon by virtue of an agreement dated 25th April 1989 executed between the said co-operative housing society and M/s. Hermes Developers. In the municipal records of the suit property also, the Applicant M/s. Hermes Developer is not shown as the owner of the suit property. In view of the above position(s), the Applicant M/s. Hermes Developers have no rights, title and interest in the suit property. Therefore, the very status referred by Applicant 'M/s. Hermes Developers' in the alleged agreement dated 2nd April 2007, as an owner of the suit property, is incorrect. The

Applicant 'M/s Hermes Developers' is neither a registered owner of the suit property nor have any title to the suit property. In view of this position, the self claimed status of 'owner' of the suit property does not survive for execution of alleged Leave & License agreement dated 2nd April 2007 and also for filing of the present Application under section 24 of the Maharashtra Rent Control Act, 1999 in a capacity of owner of the suit property.

In view of this position, the alleged Leave & License agreement dated 2nd April 2007 is void-ab-initio and the Applicant 'M/s. Hermes Developers' has no locus to file the present Application under Section 24 of the Maharashtra Rent Control Act, 1999 and therefore, the same deserves to be dismissed.”

7. By paragraph-3A, the opponent submitted that Mr. Ketan R. Thakkar was not a partner of M/s. Hermes Developers at the time of executing the alleged leave and licence agreement dated 2.4.2007 as well as on the date of filing of the application No.43/2009. The application filed by him on the basis of the leave and licence agreement dated 2.4.2007 is hit by Section 69(2) of the Indian Partnership Act, 1932 (for short, 'Partnership Act'). The application is, therefore, not maintainable. By paragraph-3B, the opponent intends to contend that M/s. Hermes Developers is neither a registered owner of the suit property nor have any title to the suit property. The suit

property belongs to Russet Co-operative Housing Society, a registered co-operative housing society and the applicant was entrusted with the work of development and construction of structures thereupon and was conferred upon the rights to alienate the units and other premises constructed thereupon by virtue of an agreement dated 25.4.1989 executed between said society and the applicant. The applicant is not shown as owner of the suit property. In view thereof, the leave and licence agreement dated 2.4.2007 is void-ab-initio and the applicant M/s. Hermes Developers have no locus to make application under Section 24 of the Act. By the impugned order, the Competent Authority rejected the application. It is against this order, opponent has instituted the present Petition.

8. In support of these Petitions, Mr. Shastry strenuously contended that the application filed by the applicant under Section 24 of the Act itself is not maintainable as Mr. Ketan R. Thakkar was not a partner of the applicant at the time of entering into the leave and licence agreement on 2.4.2007 and at the time of filing application under Section 24 of the Act. Even as of today, he is not a partner of the applicant, a

partnership firm. Application filed under Section 24 of the Act is, therefore, not maintainable in view of Section 69(2) of the Partnership Act. He heavily relied upon sub-section (3) of Section 69 to contend that the provisions of sub-sections (1) and (2) of Section 69 apply also to a claim of set off or **other proceeding** to enforce a right arising from a contract. In other words, the provisions of sub-sections (1) or (2) of Section 69 also apply to the proceedings under Section 24 of the Act.

[Emphasis supplied]

9. He submitted that while considering the application for amendment, the Court cannot go into the merits of the amendment. He relied upon decisions of **Andhra Bank v. ABN Amro Bank N.V. and Ors. AIR 2007 SC 2511** and **Rajesh Kumar Aggarwal & ors. v. K.K. Modi & Ors., AIR 2006 SC 1647**. He further submitted that Section 39 of the Act is not applicable while considering the provisions of the Partnership Act -and the said provisions are applicable in relation to other provisions and more particularly Chapter-VIII of the Act, namely, Maharashtra Rent Control Act, 1999. He also relied upon the decision of Apex Court in the case of **Shreeram Finance**

Corporation v. Yasin Khan, 1989(3) SCC 476 to contend that the application filed under Section 24 of the Act is not maintainable in view of Section 69(2) of the Partnership Act.

10. I have considered the submissions advanced by Mr. Shastri. I have also perused the material on record. It is not in dispute that the application is instituted under Section 24 of the Act. Section 24 of the Act reads thus :

“24. Landlord entitled to recover possession of premises given on licence on expiry.- (1) Notwithstanding anything contained in this Act, a licensee in possession or occupation of premises given to him on licence for residence shall deliver possession of such premises to the landlord on expiry of the period of licence; and on the failure of the licensee to so deliver the possession of the licensed premises, a landlord shall be entitled to recover possession of such premises from a licensee, on the expiry of the period of licence, by making an application to the Competent Authority, and, the Competent Authority, on being satisfied that the period of licence has expired, shall pass an order for eviction of a licensee.

(2) Any licensee who does not deliver possession of the premises to the landlord on expiry of the period of licence and continues to be in possession of the licensed premises till he is dispossessed by the Competent Authority shall be liable to pay damages at double the rate of the licence fee or charge of the premises fixed under the agreement of licence.

(3) The Competent Authority shall not entertain any claim of whatever nature from any

other person who is not a licensee according to the agreement of licence.

Explanation.-- For the purposes of this section,--

- (a) the expression "landlord" includes a successor-in-interest who becomes the landlord of the premises as a result of death of such landlord; but does not include a tenant or a sub-tenant who has given premises on licence;
- (b) an agreement of licence in writing shall be conclusive evidence of the fact stated therein.”

11. Perusal of explanation (b) to section 24(3) of the Act shows that an agreement of licence in writing is conclusive evidence of the facts stated therein. In view of explanation (b) to Section 24(3) of the Act, extracted hereinabove, statutorily it is provided that an agreement of leave and licence in writing is conclusive evidence of the facts stated therein.

12. The heading of Chapter-VIII of the Act shows that applications under Chapter-VIII are to be disposed of in a summary manner. Section 39 reads thus :

“39. Provisions of this Chapter to have overriding effect.- The provisions of this Chapter or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained elsewhere in the Act or in any other law for the time being in force.”

13. Perusal of Section 39, extracted hereinabove, shows that the provisions of Chapter-VIII or any rule made therein shall have effect notwithstanding anything inconsistent therewith contained elsewhere in the Act or **in any other law for the time being in force.** The provisions of Chapter VIII and the Rules framed thereunder have been given overriding effect. Section 43 of the Act lays down special procedure for disposal of applications. Sub-section (4)(a) of Section 43 provides that the tenant or licensee on whom the summons is duly served in the ordinary way or by registered post in the manner laid down in sub-section (3) shall not contest the prayer for eviction from the premises, unless within thirty days of the service of summons on him as aforesaid, he files an affidavit stating grounds on which he seeks to contest the application for eviction and obtains leave from the Competent Authority and in default of his appearance in pursuance of the summons or his obtaining such leave, the Statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant or the licensee, as the case may be, and the applicant shall be entitled to an order for eviction on the ground aforesaid. Clause (b) of sub-section (4) of Section 43 lays down that the Competent

Authority shall give to the tenant or licensee leave to contest the application if the affidavit filed by the tenant or licensee discloses such facts as would disentitle the landlord from obtaining an order for the recovery of possession of the premises on the ground specified in section 22 or 23 or 24 of the Act. Clause (c) of sub-section (4) of Section 43 of the Act lays down that where leave is granted to contest the application, the Competent Authority shall commence the hearing of the application as early as practicable and shall as far as possible proceed with the hearing day to day and decide the same as far as may be within six months of the order granting of such leave to contest the application. Sub-section (5) of Section 43 lays down that the Competent Authority shall, while holding an inquiry in a proceeding to which Chapter-VIII applies, follow the practice and procedure of a Court of Small Causes, including the recording of evidence. [Emphasis supplied]

14. Section 47 of the Act reads thus:

“47. Bar of jurisdiction.- Save as otherwise expressly provided in this Act, no civil court shall have jurisdiction in respect of any matter which the Competent Authority or the State Government or an officer authorised by it is empowered by or under this

Act, to decide, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power so conferred on the Competent Authority or the State Government or such Officer.”

15. The scheme of Section 43 of the Act shows that the tenant or a licensee, as the case may be, as a matter of right is not entitled to contest the proceedings filed under Section 24 of the Act unless he obtains leave to defend. In case there is default on the part of the tenant or licensee in appearance in pursuance of the summons or his obtaining leave to defend, the statement made by the landlord in the application for eviction is deemed to be admitted by the tenant or the licensee, as the case may be, and the applicant is entitled to an order of eviction on the grounds stated in the application.

16. The scheme of Section 43 of the Act shows that the Competent Authority is expected to dispose of the proceedings under Section 24 of the Act expeditiously in a summary manner. While considering the applications under Section 24 of the Act, the Court has to bear in mind the scheme of Section 43. Invariably while opposing application under Section 24, the licensees raise following objections :

- (i) the leave and licence agreement is not a registered instrument,
- (ii) though the leave and licence agreement is in writing, it does not bear the signature of the licensee or the signature of the licensee is forged, and
- (iii) the licensor has orally agreed / executed the agreement of sale in writing in favour of the licensee.

17. It is in that context necessary to consider the decision of this Court in ***Surendra B. Agarwal and another v. AML Merchandising Pvt. Ltd., 2010(1) Mh.L.J. 223***. This Court has held that once the application under Section 24 of the Act is filed by the licensor, the Competent Authority has to decide the application in accordance with law. The Competent Authority is not really concerned with the title of the licensor. All that is required to be examined is whether the applicant is a licensor and whether the opponent is a licensee and whether there was a leave and licence agreement for residential use of the suit property. In case where the licensee is claiming some other rights in relation to the premises in dispute, adjudication of said rights cannot be made by the Competent Authority. In

paragraphs-10 and 11, it is observed thus :

“10. Thus, the special provision has been made under the said Act for evicting the licensees of premises given on licence for residence. A special procedure laid down under Chapter VIII governs the application made under Section 24 of the said Act. The said Act contemplates a summary disposal of the applications. By the very nature of the proceedings as reflected from the aforesaid statutory provisions, the jurisdiction of Competent Authority is very limited. It can decide a dispute between a landlord (lincesor) and the licensee. It is obvious that considering the summary nature of the proceedings, issue of title to the disputed premises can never be decided in such proceedings. The Sub-section (1) of Section 24 starts with non-obstante clause. Moreover Section 39 of the said Act gives overriding effect to the provisions of Chapter VIII. Therefore, pendency of a suit governed by Section 33 of the said Act or a suit on title cannot prevent the Competent Authority from deciding an application for eviction. There is no statutory power vesting the Competent Authority to stay the proceedings of the application under Section 24 of the said Act on the ground of pendency of a civil suit relating to the property.

11. All that is required to be considered by the Competent Authority is whether the landlord has given the premises on licence for residence and whether on expiry of period of licence the licensee has not delivered the possession of the premises subject matter of licence. Sub-section (3) of Section 24 of the said Act specifically prevents the Competent Authority from considering a claim of any stranger. The intention of legislature of

making an Agreement of Licence in writing as a conclusive evidence of the facts stated therein cannot be altogether ignored.”

18. Mr. Shahstry stated across the bar that he is not pressing his challenge to rejection of the amendment incorporated in paragraph-3B of the application. He has restricted his challenge only to the proposed amendment incorporated in paragraph-3A.

19. Keeping in mind the scheme of Section 43 of the Act and considering the application, I do not find that the Competent Authority committed any error in rejecting the application. The Competent Authority while rejecting the application has observed that it cannot go into the question of ownership of the suit property. The Competent Authority has further observed that opponent has not denied existence of leave and licence agreement. Even if the opponent has denied the execution of the same, denial of the opponent has no meaning in view of explanation (b) to Section 24(3) of the Act.

20. By paragraph-3A, opponent wants to contend that the application under Section 24 of the Act is not maintainable in

view of section 69(2) of the Partnership Act.

21. Perusal of leave and licence agreement dated 2.4.2007 *prima facie* shows that said leave and licence agreement is entered into between M/s. Hermes Developers, represented by its Partner Mr. Ketan R. Thakkar as licensor and the petitioner as a licensee. Clause (4)(a) lays down that the licensee was to use the suit property only for permitted legal residential use. Perusal of the application filed under Section 24 also shows that the application is filed by M/s. Hermes Developers through Mr. Ketan R. Thakkar. Perusal of the compilation filed by Mr. Shastry shows that M/s.Hermes Developers is a firm registered and has registration No-BA-48472 and the date of entry is 22.7.1991. In other words, M/s. Hermes Developers is a registered partnership firm.

22. Mr. Shastry submitted that in view of sub-section (2) of Section 69 of the Partnership Act, no suit to enforce a right arising from a contract can be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered **and the persons suing are or have been shown in the Register of Firms as partners in the firm.** Mr. Shastry

submitted that it may be that M/s. Hermes Developers is a registered Partnership Firm, however, Mr. Ketan R. Thakkar is not shown as a Partner in the Register of Firms and consequently he cannot maintain application under Section 24 in view of Section 69(2) of the Partnership Act.

23. I do not find any merit in this submission for more than one reason. In the first place, Section 39 of the Act, extracted hereinabove, lays down that the provisions of Chapter-VIII or any Rule made thereunder shall have the effect notwithstanding anything inconsistent therewith contained elsewhere in the Act or in any other law for the time being in force. In other words, provisions of Chapter-VIII or any Rule made thereunder have been given overriding effect over any other law for the time being in force, which will also include the Partnership Act. Secondly, by the proposed amendment in terms of paragraph-3B, the applicant contended that M/s.Hermes Developers is neither a registered owner of the suit property nor have title to the suit property. However, during the course of arguments Mr. Shastry submitted that he is not pressing challenge to refusal to allow amendment for incorporating

paragraph-3B. In other words, the petitioner has accepted the ownership of M/s. Hermes Developers. Even independent of this concession, perusal of the leave and licence agreement and in particular recital shows that M/s. Hermes Developers (licensor) is absolute and undisputed owner of the suit property. In view of explanation (b) to sub-section (3) of Section 24 an agreement of licence in writing is conclusive evidence of the fact stated therein. In view thereof, the petitioner cannot question the title of the respondent. This position is settled by the decision of this Court in the case of **Surendra B. Agarwal (supra)**. Thirdly, during the course of argument, Mr. Shastry submitted that in written statement, the opponent has specifically contended that he is the owner/purchaser of the suit property and in fact he has instituted R.C.S. No. 1191/2009 before the Court of Civil Judge, Junior division, Pune claiming that he is the owner/purchaser of the suit property. During the course of hearing, I repeatedly called upon Mr. Shastry to substantiate his plea that the opponent is the owner/purchaser of the suit property. He was, however, not in a position to substantiate this plea by producing any document of title. Thus one has to proceed on the premise that M/s. Hermes Developers

is the owner of the suit property. Fourthly, under the leave and licence agreement executed by M/s. Hermes Developers represented by its Partner Shri Ketan R. Thakkar, opponent is put in possession of the suit property. It is, therefore, not open to him to contend that since Mr. Ketan R. Thakkar is not a Partner of M/s. Hermes Developers, he cannot maintain application under Section 24 of the Act. At the highest it is a matter between Shri Ketan R. Thakkar on one hand and other Partners of M/s. Hermes Developers on the other.

24. Though the opponent has disputed existence of leave and licence agreement, in the impugned order the learned trial Judge has *prima facie* recorded a finding that the opponent has not denied the existence of leave and licence agreement. *Prima facie* perusal of agreement of leave and licence shows that it is signed by Shri Ketan R. Thakkar on behalf of M/s. Hermes Developers and by the opponent. Lastly, having regard to the limited jurisdiction conferred on the Competent Authority, the defence so raised by the opponent that as Shri Ketan R. Thakkar is not recorded as a Partner in the extract of the register of Partnership Firm, he cannot maintain the application

cannot be raised before the Competent Authority and the Competent Authority cannot go into this aspect. If the Competent Authority is permitted to go into this aspect, it will enlarge the scope of the proceedings instituted under Section 24 of the Act as also enlarging jurisdiction of the Competent Authority. It will also be contrary to Scheme under Section 43 of the Act.

25. Mr. Shastry relied upon the decisions in the case of ***Andhra Bank (supra)*** and ***Rajesh Kumar Aggarwal (supra)*** to contend that while considering the application for amendment the Court cannot go into the merits of the case. There is no dispute with the proposition of law. The question in the present case is whether the opponent could have raised this contention by filing an application based on Section 69(2) of the Partnership Act in the application for amendment. In my opinion, in view of Section 39 of the Act, the provisions of Chapter-VIII and the Rules made thereunder have been given overriding effect over any other law for the time being in force, including the Partnership Act. In my opinion, it is not open to the opponent to raise this contention. I have already dealt with

the objections invariably raised by the licensee. In my opinion, this objection is also raised with a view to delaying the proceedings filed by the application under Section 24 of the Act.

26. In view of Section 39 of the Act as also having regard to the Scheme of Section 43, I do not find any merit in this submission as well. Reliance placed by Mr. Shastri in the decision of the Apex Court in the case of **Shreeram Finance Corporation (supra)**, does not assist the case of the petitioner. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petitions fail and the same are dismissed.

27. In view of Section 43(4)(c) of the Act, the Competent Authority is expected to dispose of the proceedings under Section 24 of the Act as early as possible and in any case within six months from the authenticated copy of this order being produced before the Competent Authority. Order accordingly.

(R. G. KETKAR, J.)