

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2345 OF 1997

K. K. Hansa Mohammad & Anr.	..	Petitioners
vs.		
Bajirao Parvatrao Sawant & Ors.	..	Respondents

Mr. Venkatesh A. Shastry for Petitioners.
None for Respondents.

CORAM : M. S. SONAK, J.
DATE: 01 SEPTEMBER 2017

ORAL JUDGMENT :

1] Heard Mr. Shastry for the petitioners. Neither the respondents nor their Advocates are present.

2] The matter relates to the year 1997 and therefore, it is not possible to adjourn the matter any further.

3] The petitioners challenge judgments and decrees dated 31st March 1987 and 21st March 1997 made by the trial Court and the appeal Court ordering their eviction on the grounds that they are unauthorised sub lessees in the suit premises.

4] The respondents – landlords had initially instituted a suit seeking eviction of the original lessee and the sub lessees on the grounds of unauthorised subletting and *bona fide* requirement. The

trial Judge by judgment and decree dated 31st March 1987 had accepted both the grounds and made a decree for eviction. However, on an appeal by the present petitioners, the appeal Court set aside the eviction decree on the ground of *bona fide* requirement but maintained the eviction decree on the ground of unauthorised subletting by its judgment and decree dated 21st March 1997. Hence, the present petition by sub lessees urging *inter alia* protection under section 15(2) of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (Rent Control Act).

5] Mr. Shastri, learned counsel for the petitioners has made the following submissions in support of the petition:-

(A) He submits that the original landlord Ganpat Krishnaji Salunkhe had instituted regular civil suit no. 60 of 1969 against the lessee and some of the sub lessees, which includes some of the petitioners a suit for eviction on the grounds of unauthorised subletting. However, such suit was compromised and the relief of eviction on the ground of sub letting was specifically withdrawn/ abandoned. Such withdrawal / abandonment was without seeking the leave of the court to institute a fresh suit on the same cause of action. Mr. Shastri submits that in such circumstances the bar contained under Order XXXIII Rule 1(4) of the CPC was clearly attracted. He

submits that the trial Judge and the appeal Judge misdirected themselves in law in failing to apply such a bar on the ground that 1969 suit had been withdrawn by the power of attorney of the original landlord Salunkhe or that the present suit in which the decree of eviction has been made was instituted by a landlord who had purchased the suit premises from the original landlord, Mr. Salunkhe. Mr. Shastry submits that the withdrawal / abandonment of the first suit completely extinguishes the cause of action to sue for eviction on the ground of subletting. He submits that the impugned judgments and decrees are in excess of jurisdiction for failing to take note of the provisions contained in Order XXIII Rule 1(4) of the CPC in their proper perspective.

(B) Mr. Shastry submits that there is no dispute and in any case, there is an overwhelming material on record which establishes that the so-called subletting has taken place in the years 1966-67 or in any case prior to 1st February 1973. He submits that since this is the position borne out from the pleadings as well as the evidence on record, the petitioners, are entitled to the protection under section 15(2) of the Rent Control Act and the denial of such protection by the two Courts is contrary to the express provisions of the statute which have been grossly misinterpreted by the appeal Court.

6] Since, I am satisfied that the petitioners in the present suit are entitled to the protection under Section 15(2) of the Rent Control Act, there is no necessity to decide on the first contention raised by Mr. Shastry in support of the present petition.

7] Section 15 of the Rent Control Act, reads thus :

“15. In absence of contract to the contrary, tenant not to sub-let or transfer] [or to give on licence]

(1) Notwithstanding anything contained in any law [but subject to any contract to the contrary], it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer, in any other manner his interest therein [and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises]:

[Provided that the [State] Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such [leases or class of leases [or the giving on licence any premises or class of premises] and no such extent as may be specified in the notification.]

(2) The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section be deemed to have had no effect [before the 1st day of February, 1973], in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order a Court, any such sub-lease, assignment or transfer of any such purported sub-lease, assignment or transfer in favour of any person who has entered into possession, despite the prohibition in sub-section (1) as purported sub-lessee,

assignee or transferee and his continued in a possession [on the date aforesaid] shall be deemed to be valid and effectual for all purposes, and any tenant who has sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of section 13.

The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the [date aforesaid].”

8] There is no dispute that the original landlord Salunkhe had instituted civil suit no. 60 of 1969 seeking eviction on the ground of unauthorised subletting. This means that there was subletting prior to 1969. The appeal Court has itself noted the documentary evidence to the effect that the sub lessees had obtained registrations in respect of their respective businesses in the years 1966-67. This is clear from the perusal of paragraph 36 of the judgment and decree dated 31st March 1987 rendered by the trial Court (internal pages 28, 29 and 30). In fact, it was the case of the landlord that the petitioners were sub tenants in respect of the suit premises but that such sub tenancy was illegal and unauthorised.

9] The petitioners had raised the defence that they are entitled to protection under section 15(2) of the Rent Control Act and such issue has in fact been considered by the appeal Court in paragraphs 24 and 25 of its order dated 21st March 1997.

10] Paragraphs 24 and 25 read thus :

“24. It is submitted that in view of amendment to Bombay Rent Act in 1973 these defendants the alleged to be sub tenants, have become lawful tenant, hence plaintiff is not entitled to claim possession of the premises on the ground of sub tenancy. It appears that there is some misconception about the amendment of 1973. It relates to giving the licensee the status of tenant and not legalising the sub tenancy. It is section 15 of the Bombay Rent Act which has been inserted by the alleged amendment. So far as legalisation of sub tenancy is concerned it is in section 15. As per section 15 the persons whose sub tenancy was unlawful due to section 15(1) of Bombay Rent Act, by amending section and inserting sub section 2, the tenancy of sub tenant who are to 1979 have been legalised and they are given status of lawful tenants and entitle to protect possession, even after eviction of the original tenant.

25. In the present case it has to be noted that though the plaintiff has alleged that defendant No. 2 to 8 are sub tenants, except defendant No. 6 the other defendants have not admitting the fact. On the contrary they are trying to show that they are not sub tenants but they together with defendant No. 1 are managing the business in the premises. In that case they cannot claim the status of sub tenant, contemplated u/s 15 (2) of Bombay Rent Act. Only those sub tenants who were tenants on or prior to the proposed amendment are given the status of tenants. In that case it is for the defendant to allege and prove that they are the sub tenants of defendant No.1 since prior to 1959.”

11] In paragraph 24, the appeal Court, has held that there is some misconception about the amendment of 1973 and that the benefit of such amendment is extended only to licensees and therefore, the benefit of such amendment cannot be availed to regularize sub tenancy. In paragraph 25, the appeal Court has held that except for original defendant no. 6, the rest of the defendants i.e. defendants no. 2 to 5 and 7 and 8 have not themselves claimed that they are

the sub tenants but rather, they have claimed that they were, together with the original tenant i.e. defendant no. 1, managing the business in the suit premises. The appeal Court has held that unless the defendants themselves claim that they are the sub tenants, they cannot be given the protection under section 15(2) of the Rent Control Act.

12] As noted earlier, section 15(1) or 15(2) does not deal with the protection of licensees prior to 1st February 1973. That is a matter which is dealt with under section 15A of the Rent Control Act, with which we are not concerned in the present proceedings. However, section 15(1) of the Rent Control Act specifically bars subletting by a tenant or grant of license by a tenant. Section 15(2) of the Rent Control Act however makes it clear that the prohibition against subletting contained in section 15(1) shall, subject to the provisions of this sub section, be deemed to have had no effect before the 1st day of February 1973, in any or in which this Act was in operation before such commencement. Section 15(2) proceeds to add that accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order of a court, any such sub lease or such purported sub lease in favour of any person who has entered into possession, despite the prohibition in sub section (1), is purported sub lessee and has continued in possession on 1st day of

February 1973, shall be deemed to be valid and effectual for all purposes, and any tenant who has sublet any premises was not be liable to eviction under clause (e) of sub section (1) of section (13).

13] This means that by a legal fiction, protection has been accorded to sub tenancies created prior to 1st February 1973 in any area in which the Rent Control Act was in operation. Such protection is notwithstanding the fact that such sub tenancy may have been created in breach of a prohibition in section 15(1) of the Rent Control Act, as long as such sub tenancy was created prior to 1st February 1973.

14] The appeal Court was therefore not right in refusing to extend the protection under section 15(2) of the Rent Control Act to the petitioners, who, on the basis of material on record, came to be inducted as sub tenants much prior to 1st February 1973. The reasoning of the appeal court in paragraphs 24 and 25 is quite unsustainable. The benefit under section is not, as observed by the appeal Court, available only to licensees. The benefit is very much available to the sub tenants provided, such sub tenancy was created prior to 1st February 1973. Secondly, the appeal Court was required to go by the case set out by the landlord in his plaint seeking eviction. The landlord had very clearly stated that the

petitioners were sub tenants in respect of the suit premises though, it was his case that such sub tenancy was illegal or unauthorised. The petitioners, as defendants, were very much entitled to take alternate defences. The petitioners cannot be denied the benefit of protection under section 15(2) merely because some of them had denied that they were sub tenants but had pleaded that they were only managing the business of the original tenant in the suit premises. If the appeal court were to have accepted this case of some of the petitioners, then, in the same breath the appeal Court, could never have styled them as sub tenants or unauthorised sub tenants and then order their eviction on the ground that there was unauthorised sub tenancy.

15] The eviction order has been made on the grounds of unauthorised subletting, which means that the factum of subletting has in fact been accepted by the two Courts. Since, subletting has taken place much prior to 1st February 1973, the provisions of section 15(2) apply and such sub tenants, are entitled to the protection of the said provision. The impugned judgments and decrees to the extent they order the eviction of the petitioners on the grounds of unauthorised subletting are therefore in excess of jurisdiction. The decrees failed to take cognizance of the protective provisions of section 15(2) of the Rent Control Act and therefore,

are required to be set aside.

16] The Rule is accordingly made absolute in terms of prayer clause (A). There shall be no order as to costs.

17] At the very conclusion of the dictation of this judgment and order, Advocate Ms Rohini Dandekar, appears and informs this Court that Mrs. B. P. Jakhade, whose name appears on the cause list has expired nearly two years ago. This is noted. However, at this stage, and on this ground, it is not possible to adjourn the matter.

(M. S. SONAK, J.)

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