

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST.) NO.1111 OF 2018

Shital H. Ghia ... Petitioner
Vs.
Abdul Razzak Merchant and others ... Respondents

Dr. Birendra Saraf a/w. Ms Ayesha Damania, Mr. Shadab Peerzade,
Mr. Ravindra Khillare i/b. MZM Legal for Petitioner.
Mr. Vishwajit P. Sawant a/w. Ms Tanaya Patankar i/b. Ms Asha Shah for
Respondents No.1 to 4.
Ms Kavita N. Solunke, AGP for Respondents No.5 & 6-State.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 27, 2018

P.C. :

Heard Dr. Birendra Saraf, learned Counsel for the petitioner and
Mr. Vishwajit Sawant, learned Counsel for respondents No.1 to 4 and
Ms Solunke, learned AGP for respondents No.5 and 6-State at length.

2. Leave to amend so as to challenge the order dated 22.03.2017 of
the Competent Authority, Konkan Division, Mumbai (for short
'Competent Authority') rejecting the petitioner's application for leave to
defend is granted. Amendment shall be carried out forthwith.

3. By this Petition under Articles 226 and 227 of the Constitution of
India, petitioner has challenged - (i) order dated 22.03.2017 rejecting the
application for leave to defend and (ii) judgment and order dated
22.03.2017 allowing the application made by respondents No.1 to 4
under Section 24 of the Maharashtra Rent Control Act, 1999 (for short
'Act', both, passed by the Competent Authority as also the (iii) judgment
and order dated 30.11.2017 passed by the Additional Commissioner,
Konkan Division, Mumbai (for short 'Commissioner') rejecting the
revision application preferred by the petitioner.

4. In support of this Petition, Dr. Saraf invited my attention to the recital B of leave and licence agreement dated 18.07.2009 executed between respondents No.1 to 4 and the petitioner in respect of Flat No.61, admeasuring 1710 sq.ft. built up area situate on the 6th floor of building 'Ashiana Apartments' situate at TPS IV, Road No.1, Almedia Park, Bandra (West), Mumbai 400 050 (for short 'suit premises'). He submitted that under recital B(4), respondents No.1 to 4 represented to the petitioner that they do not need suit premises for around three years from now and there is no legal impediment for granting the suit premises on leave and licence to the petitioner, for residence and **for conducting her business activities AND to petitioner in pursuance of such licence, using the suit premises as residence cum residential office space for conducting her activities therein**. He also invited my attention to clause 14 of the agreement, which provides that the said agreement represents the sole and exclusive agreement and arrangement between the parties. It supersedes and nullifies any former agreement or arrangement between the parties in respect of the subject matter thereof. Neither party will be bound by any condition, definition, warranty or representation other than those set forth in the agreement. Any variation, amendment or modification to the agreement will become binding only upon written agreement signed by each party. *(emphasis supplied)*

5. He submitted that the second leave and licence agreement was executed between the parties on 20.10.2012. He has invited my attention to recital B(4) of the said agreement which in effect is substantially identical with recital B(4) in the agreement dated 18.07.2009. Clause 1 thereof provided that the period commencing from 01.05.2012 and expiring on 31.01.2015 shall be treated as a lock-in period. Clause 3 provided for payment of licence fee and it was made essence of contract. Clause 9 provided that on expiration of license

agreement, the licensee (petitioner) shall forthwith remove all persons using the licensed premises (suit premises) and or their belongings, furniture, fixtures, interiors, chattels, articles and things etc. from the suit premises and hand over peaceful and vacant charge and possession of the suit premises and car parkings to the respondents No.1 to 4. In the event of termination of the agreement by either party, both the parties shall settle their mutual accounts and shall forthwith pay their respective dues payable to the other. He invited my attention to clause 15 which is a hand-written clause to contend that this was insertion made by respondents No.1 to 4 fraudulently and unilaterally.

6. Dr. Saraf also invited my attention to the leave and licence agreement dated 31.03.2007 executed by respondents No.1 to 4 in favour of Mumbai Merchant Marine India Private Limited, and in particular clauses 1, 22, 25 and 28 thereof, which specifically recorded that the suit premises will be used for residence of its executives. Dr. Saraf submitted that in the first place, the application made by the respondents No.1 to 4 under Section 24 of the Act before the Competent Authority was premature. The licence was to expire on 31.01.2015. Respondents No.1 to 4 filed application under Section 24 on 08.10.2014. He relied upon Section 24(1) of the Act, which lays down that “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**. In the present case, as the licence was to expire on 31.01.2015, respondents No.1 to 4 could not have filed the application before the expiry of the licence period. Even the Competent Authority could not have entertained and passed the impugned orders.

(emphasis supplied)

7. Dr. Saraf submitted that even otherwise, application under Section 24 of the Act is not maintainable. He submitted that a perusal of recital B(4) clearly shows that the suit premises is given on licence for residence and for conducting the business activities of the petitioner. Section 24 can be invoked only if the premises is given for residence. In the instant case, the suit premises is given on licence for residence as also for conducting the business activities, and therefore, the application under Section 24 is not maintainable. The remedy, if any to respondents No.1 to 4, is to invoke Section 41 of the Presidency Small Cause Courts Act, 1882. The orders passed by the authorities below are therefore, bad in law as they are suffering from inherent lack of jurisdiction. He submitted that this issue goes to the root of the matter and even if this issue was not raised while deciding application for leave to defend as also application under Section 24 of the Act before the Competent Authority, it was specifically raised before the Commissioner. The Commissioner, however, dealt with this issue in paragraph 3 of the impugned order and observed that petitioner failed to produce any documents such as licence issued by Mumbai Municipal Corporation or permission from society. He submitted that the Commissioner failed to appreciate that application under Section 24 of the Act would be maintainable only if the premises are given for residence. In the present case, the suit premises are given on licence, both, for residence and for conducting the business activities of the petitioner. The Commissioner, therefore, committed serious error in dismissing the revision application.

8. Dr. Saraf invited my attention to the statement of objects and reasons in support of his contention that the application under Section 24 can be made only upon expiry of the licensed period.

9. On the other hand, Mr. Sawant supported the impugned orders.

He submitted that in the present case, notice was issued by respondents No.1 to 4 to the petitioner on 23.06.2014. Application under Section 24 was filed on 08.10.2014. On 01.11.2014, summons was issued to the petitioner, returnable on 17.12.2014 and directing the petitioner to obtain the leave to contest the application for eviction. Though the petitioner was served, she failed to appear. Summons was issued on the second occasion through R.P.A.D. and Bailiff on 28.11.2014 calling upon the petitioner to appear before the Competent Authority on 28.01.2015 and to obtain leave to contest the application for eviction. The petitioner again failed to appear and even failed to file application for leave to defend. Petitioner filed her application for leave to defend on 10.04.2015. He submitted that in the application for leave to defend, petitioner contended that the lock in period was for 33 months commencing from 20.10.2012 and expiring on 31.01.2015. In other words, the application filed by the respondents No.1 to 4 was premature.

10. The other contention that was raised before the Competent Authority was that the real transaction between the parties was suppressed by respondents No.1 to 4. Respondents No.1 to 4 had offered the suit premises for sale on payment of Rs.2,50,00,000/- in the year 2008. Petitioner agreed to buy the same and could pay Rs.2,00,00,000/- in cash and balance Rs.50,00,000/-, she had given surety letter from M/s. Banat Majed General Trading Company, who assured to pay the amount. He submitted that the contention, which is sought to be raised namely, that the suit premises was given on licence for residence and for conducting business activities, was not raised before the Competent Authority. Even otherwise, he submitted that Section 24 of the Act lays down that if the premises are given on licence, for residence, the landlord / licensor can make application before the Competent Authority recovery of possession. In the present

case, the suit premises is admittedly given for residential purpose. Section 24 does not use the expression 'only for residential purpose'. As in the present case, the suit premises is given for residential purpose, respondents No.1 to 4 were justified in making application and the Competent Authority was justified in entertaining and deciding the application under Section 24 of the Act. He has invited my attention to the rejoinder filed by the petitioner, and in particular paragraph 14, wherein the petitioner contended that respondent No.1 - Abdul Razzak Merchant offered two flats namely, flats No.61 and 62 on the sixth floor for sale to her but she made it clear that her requirement was only of one flat for her residence cum resident office and for her 80 years father's residence. He submitted that by order dated 22.03.2017, the Competent Authority rejected application for leave to defend. On the same day, the Competent Authority allowed the application under Section 24 of the Act. He submitted that perusal of these orders would indicate that petitioner has not contested the leave and licence agreement and in fact accepted the said agreement by contending that the lock-in period was 33 months commencing from 20.10.2012 and expiring on 31.01.2015.

11. He submitted that in any case, the impugned orders were passed by the Competent Authority on 22.03.2017 when admittedly the licensed period expired. It, therefore, now cannot be contended that application under Section 24 is premature. In support of this, he relied upon the decision of the Apex Court in ***Vithalbhai (P) Ltd. Vs. Union Bank of India, (2005) 4 SCC 315***, and in particular paragraphs 9 and 17 thereof. He further submitted that basically application for leave to defend was not filed within the time permissible under Section 43 of the Act. The Competent Authority does not have power to condone the delay. In support of this proposition, he relied upon the decision of Apex Court in ***Prakash H. Jain Vs. Marie Fernandes, (2003) 8 SCC 431***. He also

submitted that the pre-dominant user of the suit premises was for the residential purpose, and therefore, application under Section 24 is maintainable. In support of this proposition, he relied upon the decision in *Precision Steel & Engineering Works Vs. Prem Deva Niranjana Deva Tayal*, (1982) 3 SCC 270, and in particular paragraph 11 thereof.

12. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Relying upon recital B(4) of the leave and licence agreement dated 20.10.2012, Dr. Saraf submitted that as the suit premises is given on licence for residence as also for conducting the business activities, application under Section 24 itself is not maintainable. It is not possible to accept this submission for more than one reason. Recital B reads thus,

“B. The Licenser has also represented to the Licensee as follows:

(1) That the said building “Ashiana Apartments” has been constructed in accordance with the building plans sanctioned by the concerned authorities.

(2) That the sanctioned use of the said building is residential.

(3) That the Society of the building has accorded sanction to this Leave and License by the Licenser.

(4) And that Licenser does not need Licensed premises for around three years from May 2012, and that there is no legal impediment to the Licenser granting the licensed premises on leave and licence to the Licensee, for residence and for conducting her business activities. AND to licensee, in pursuance of such license, using the licensed premises as residence cum residential office space for conducting her activities therein.”

13. A perusal of clauses 1 and 2 shows that building 'Ashiana Apartments' has been constructed in accordance with the building plans sanctioned by the concerned authorities and the sanctioned use of the building is for **residential purpose**. The society of the building had also

accorded sanction to the said leave and licence agreement by respondents No.1 to 4. If clauses 1 to 3 are harmoniously read, it has to be held that the leave and licence agreement is for residential purpose. Dr. Saraf heavily relied upon clause 4, extracted hereinabove. A perusal of that clause shows that the said clause recited that there was no legal impediment to respondents No.1 to 4 for granting premises on leave and licence to the licensee, for residence and for conducting her business activities. What follows thereafter is important “AND to licensee (petitioner herein), in pursuance of such license, using the licensed premises **as residence cum residential office space for conducting her activities therein**. Thus, this concluding portion of clause 4 clearly spells out that the suit premises is given on leave and licence basis for using the same as residence cum residential office.

(emphasis supplied)

14. Dr. Saraf submitted that if clause 4 of recital B is read in proper perspective, it will mean that the suit premises is given for residential purpose as also for conducting the business activities. It is not in dispute and is rather evident from the material on record that the said contention was not raised before the Competent Authority either in application for leave to defend or in reply to application filed under Section 24 of the Act. Section 43 (4)(a) reads thus,

“43. Special procedure for disposal of applications.-

(1) to (3) ...

(4)(a) The tenant or licensee on whom the summons is duly served in the ordinary 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 as hereinafter provided**, 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.

(emphasis supplied)”

15. A perusal of the above extracted provision shows that the tenant or licensee on whom the summons is duly served will not be permitted to contest the prayer for eviction from the premises unless within thirty days of the service of summons of him, 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, a statement made by the landlord in the application for eviction are deemed to be admitted and the applicant is entitled to an order for eviction on the ground aforesaid. It is, therefore, evident that the licensee has to state grounds on which he seeks to contest the application for eviction and obtains leave from the Competent Authority. In the instant case, petitioner did not raise ground that the suit premises is given for residence and for conducting business activities. The Competent Authority was, therefore, justified in rejecting the application for leave to defend and once the application for leave to defend is rejected, the licensor is entitled to an order for eviction on the grounds stated in the application under Section 24.

16. That apart, as far as the submission of Dr. Saraf that this is jurisdictional issue and being pure question of law, it could be raised before the Commissioner is concerned, I do not find any merit in this submission. In my opinion, this is not a pure question of law but is a mixed question of law and fact. If the petitioner were to press the contention that the suit premises is given on licence for residence and for conducting business activities, the Competent Authority would have ruled on this aspect and if the leave to defend was granted, would have

followed the procedure laid down under Section 43(4)(b) onwards. It would have been also open for respondents No.1 to 4 to contend that the conjoint reading of clauses 1 to 4 of recital 'B' conclusively shows that premises were given for residence. Respondents No.1 to 4 would also contend that the pre-dominant user of the suit premises is for residential purpose. Understood thus, it cannot be said that the plea raised by the petitioner is a pure question of law.

17. As noted earlier, the suit summons was repeatedly issued to the petitioner and the application for leave to defend was made on 10.04.2015. A perusal of the application for leave to defend does not indicate petitioner mentioning date of service of summons. It was within the special knowledge of the petitioner as to when the suit summons was served on her. The contention that petitioner did not file application for leave to defend within the stipulated time was not raised before the Authorities below. It is, therefore, not possible to record any finding on this aspect.

18. Dr. Saraf submitted that application under Section 24 was premature. Application could not have been filed before the expiry of lock in period, which expired on 31.01.2015. Application under section 24 was filed on 08.10.2014. I do not find any merit in this submission. Section 52 of the Indian Easements Act, 1882 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.”

19. A perusal of the definition of the expression of 'license' shows that where one person grants to another, 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 is called license. It is not in dispute that the leave and licence agreement is a registered instrument. Explanation (b) to Section 24 of the Act lays down that an agreement of licensee in writing shall be the conclusive evidence of the fact stated therein. It is also not in dispute that respondents No.1 to 4 had issued notice on 23.06.2014 and thereafter filed application under Section 24 on 08.10.2014. Thus, respondents No.1 to 4 had revoked the licence. In the case of ***Prakash G. Kothari vs. Balasaheb S. Jadhav***, **2007 (4) Bom.C.R. 460**, this Court observed in paragraph 11 thus,

“11. ... Expiry of licence can be also by way of termination thereof. ...”

20. In view thereof, I do not find any merit in the submission of Dr. Saraf that application was premature. In the light of the discussion, I do not find that the authorities below committed any error in passing the impugned orders. Hence, Petition fails and the same is dismissed.

21. At this stage, Dr. Saraf orally applies for stay of this order for a period of eight weeks from today. He states that the petitioner is in possession of the suit premises and nobody else is in possession. The petitioner has neither created third party interest nor parted with possession and the petitioner will hereafter neither create third party interest nor part with possession. He assures that the petitioner and all adult family members using/residing in the suit premises will give usual undertakings in this Court within two weeks from today with advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;
- (ii) that they have neither created any third party interest nor

parted with possession;

(iii) that they will hereafter neither create third party interest nor part with possession;

(iv) that they will pay arrears of rent within 2 weeks from today to the respondents;

(v) that they will not apply for further extension of time;

(vi) that in case they are unable to obtain suitable orders from higher Court within 8 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the respondents.

22. In view thereof, notwithstanding dismissal of Writ Petition, this order shall remain stayed for a period of eight weeks from today subject to the petitioner and all adult family members using/residing in the suit premises filing undertakings in the aforesaid terms within two weeks from today and serving copy in advance to other side. It is made clear that in case arrears upto and inclusive of 8 weeks from today are not paid as also the undertaking in the aforesaid terms is not filed within two weeks from today, the interim order shall stand vacated without further reference to the Court. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab