

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1734 OF 2017

Mrs. Ahraf Amir Mulani

...Petitioner

Versus

Shri. Ramesh Kisanrao More

Through POA Holder

Mr. Kishanrao Namdeorao More

...Respondent

....

Mr. Sanjay Kshirsagar, Advocate for the Petitioner.

Mr. Avinash V. Joshi, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 17th JULY, 2018

JUDGMENT:

1. Heard Mr. Sanjay Kshirsagar, learned counsel for the petitioner and Mr. Avinash Joshi, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 21.1.2015 passed by the Competent Authority (Rent Control Act), Pune Division, Pune (for short, 'Competent Authority') in Application No.38/2014 as also the judgment and order dated 20.10.2016 passed by the Additional Commissioner, Pune Division, Pune (for short, 'Commissioner') in

Revision No.15/2015. By order dated 21.1.2015, the Competent Authority set aside the order dated 8.10.2014 granting leave to defend application No.38/2014 to the petitioner herein. Aggrieved by this decision, the petitioner instituted Revision Application before the Commissioner under Section 44 of the Act. By order dated 20.10.2016, the Commissioner dismissed the Revision Application. It is against these orders, the petitioner has instituted present Petition.

3. In support of this Petition, Mr. Kshirsagar submitted that the petitioner was served with the summons on 4.9.2014. On 23.9.2014, the petitioner filed application before the Competent Authority seeking permission to engage Advocate as complicated questions of law and facts are involved in the matter. By order dated 29.9.2014, the Competent Authority allowed the application and directed the petitioner herein to file leave to defend within the stipulated period. Mr. Kshirsagar submitted that within the stipulated period of 30 days from the service of summons, the petitioner filed application for leave to defend on 4.10.2014. By order dated 8.10.2014, the Competent Authority granted leave to defend by passing following order :

“Allowed.”
Sd/- 8.10.2014.

4. Respondent filed reply dated 14.11.2014 opposing the

application for leave to defend. He submitted that instead of filing reply, respondent should have challenged the order dated 8.10.2014 before the superior forum. Even in the say dated 14.11.2014, respondent did not pray for setting aside the order dated 8.10.2014 passed by the Competent Authority. He submitted that by order dated 21.1.2015, the Competent Authority set aside the order dated 8.10.2014. While setting aside the order dated 8.10.2014, the Competent Authority went into the merits of the case. It was observed that in view of Section 91 of the Indian Evidence Act, 1872 (for short, 'Evidence Act') as also the decision of this Court in **Vivek Shetty v. Draupadi Dudhani and others, 2008(3) Bom. C.R. 863**, a tenant is precluded from averring any fact contrary to terms of the agreement.

5. In the present case, leave and licence agreement was executed between the parties. In the application for leave to defend, the petitioner herein has come with the case of landlord and tenant relationship. The Competent Authority observed that the leave and licence agreement will prevail and defence is meritless. The Competent Authority observed that the prayer of the applicant to dismiss the application for leave to defend is fit to be upheld and accordingly set aside the order dated 8.10.2014.

6. Mr. Kshirsagar invited my attention to the order passed by the Commissioner. The Commissioner observed that leave to defend was not made within 30 days. He submitted that this is contrary to the material on record and is factually incorrect. Application for leave to defend was made within 30 days. The Commissioner further observed that the leave and licence agreement was executed initially for a period of 12 months and the same was renewed for a further period of 12 months. As the cheque issued by the petitioner was dishonored, the respondent filed application before the Competent Authority. By order dated 21.1.2015, the Competent Authority set aside the order dated 8.10.2014 on the ground that the application for leave to defend was not made within limitation. He submitted that said order shows total non-application of mind on the part of the Commissioner.

7. In the alternative, Mr. Kshirsagar submitted that in any case the matter may be remitted to the Competent Authority for deciding the application for leave to defend afresh. He, therefore, submitted that the Petition requires consideration.

8. On the other hand Mr. Joshi supported the impugned orders. He submitted that in the reply dated 14.11.2014 to the notice issued by the respondent, the petitioner has admitted entering into leave and

licence agreement between the parties. In view of Explanation (b) to Section 24 of the Act, an agreement of licence in writing is conclusive evidence of fact stated therein.

9. In the present case, leave and licence agreement was executed on 14.5.2012, which is a registered instrument. Subsequently on 29.5.2013 another registered leave and licence agreement was entered into between the parties. He, therefore, submitted that basically the Competent Authority was not justified in granting leave to defend by simply passing one word order “allowed” on 8.10.2014. He submitted that no triable issues are raised by the petitioner warranting interference under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that earlier leave and licence agreement was executed on 14.5.2012, which is a registered instrument. Subsequently leave and licence was executed on 29.5.2013 which is also a registered instrument. Explanation (b) to Section 24 of the Act lays down that an agreement of licence in writing is conclusive evidence of the fact stated therein.

11. In the present case, the suit summons was served on the

petitioner on 4.9.2014. He filed application for leave to defend on 4.10.2014. I have already extracted the order dated 8.10.2014 passed by the Competent Authority. A perusal of that order shows that without applying mind the Competent Authority mechanically and without recording any reasons granted leave to defend. Grant or refusal of leave to defend is a serious step in the proceedings under Section 43 of the Act. Section 43(4)(a) of the Act 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) is precluded from contesting the prayer for eviction from the premises, unless within thirty days of the service of summons on 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, 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 stated in the application. Thus, while granting leave to defend or rejecting the application for leave to defend, the Competent Authority has to apply its mind to the material on record and by a reasoned order take appropriate decision depending upon the facts and

circumstances of each case. In the present case on 8.10.2014, the Competent Authority simply passed one word order “allowed” without giving any reasons and also without recording finding to the effect that triable issues are raised by the petitioner. That apart even the first respondent was not heard while passing the order on 8.10.2014. It is precisely for that reason, respondent being unaware of the order dated 8.10.2014, filed reply on 14.11.2014 opposing the application for leave to defend.

12. Mr. Kshirsagar submitted that respondent either should have filed review before the Competent Authority or should have challenged the order dated 8.10.2014 before the Commissioner. Even in the reply dated 14.11.2014, no prayer was made for setting aside the order dated 8.10.2014. He, therefore, submitted that the matter may be remitted to the Competent Authority for deciding the application for leave to defend afresh. It is not possible to accede to the submissions made by Mr. Kshirsagar as basically it is not in dispute that the leave and licence agreements executed between the parties are registered instruments. In view of Explanation (b) to Section 24 of the Act an agreement of licence in writing is conclusive evidence of the fact stated therein.

13. Mr. Kshirsagar invited my attention to paragraph-4 of the

application for leave to defend where it is asserted that the respondent has accepted rent of Rs.52,000/- towards the rent for a period from December, 2013 and January, 2014. Respondent No.1 has also issued rent receipt of Rs.52,000/-. However, mere use of the word 'rent' in the rent receipts will not establish the relationship of landlord and tenant between the parties. In the case of **Rajendra B. Nair vs. Suresh Dyanmote, AIR 2002 Bom. 382**, the learned Single Judge of this Court (Dr.D.Y. Chandrachud, J., as His Lordship then was) observed that mentioning of the word “rent” in clause 2 of the leave and licence agreement will not make any difference because it is well settled principle of law that the mere use of the words “rent” or for that matter “compensation” would not be dispositive of the legal relationship between the parties. In that case, first leave and licence agreement was entered into on 10.7.1991 and expired on 10.6.1992. The second agreement was entered into on 9.9.1992. Clause 1 expressly provided that the licensor had granted a licence to the licensee to use and occupy the premises only for a temporary period of three months commencing from 9.9.1992. In clause 2 while referring to payment of compensation fixed at Rs.3,500/- the word “rent” was used.

14. It is no doubt true that respondent did not specifically pray for setting aside the order dated 8.10.2014. After hearing both sides, by

order dated 21.1.2015 the Competent Authority had set aside the order dated 8.10.2014 granting leave to defend to the petitioner and said order is confirmed by the Commissioner. In view thereof, I do not find that the authorities below committed any error in passing the impugned orders.

15. Even otherwise I do not find that this is a fit case for invocation of powers under Article 227 of the Constitution of India for setting aside the impugned orders. In the case of **Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar and others, (1999) 8 SCC 16**, the Apex Court dealt with some what identical situation. The Apex Court referred to the decision in **Gadde Venkateswara Rao v. Government of Andhra Pradesh and Ors. AIR (1966) SC 828** where the Apex Court considered the action of the State Government under Andhra Pradesh Panchayats Samithis and Zilla Parishads Act, 1959 and came to the conclusion that the Government had no power under Section 72 of that Act to review an order made under Section 62 but refused to interfere with the orders of the High Court on the ground that if High Court had quashed the said order, it would have restored an illegal order. The Apex Court also referred to the decision in **Mohammad Swalleh and Ors. v. IIIrd Addl. District Judge, Meerut and Anr., AIR (1988) SC 94**. In that case the order passed by the Prescribed Authority under U.P.

(Temporary) Control of Rent and Eviction Act, 1947 was set aside by the District Judge in appeal though the appeal did not lie. The High Court came to the finding that the order of the Prescribed Authority was invalid and improper and the District Judge had no power to sit in appeal. The High Court did not interfere with the orders of the District Judge. The order of the High Court was affirmed by the Apex Court on the ground that though technically the appellant had a point regarding the jurisdiction of the District Judge but the order of the Prescribed Authority itself being bad, refusal of the High Court to exercise powers under Article 226 no exception can be taken.

16. In the case of **Surya Dev Rai v. Ram Chander Rai and others, (2003) 6 SCC 675**, the Apex Court held that the power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.

17. If the principles enunciated in the aforesaid decisions are applied to the present case, I do not find that any case is made out by the petitioner for exercising equitable jurisdiction under Article 227 of the Constitution of India. In the result, Petition fails and the same is dismissed. Rule is discharged with no order as to costs.

18. At this stage, Mr. Kshirsagar orally applies for continuation of the ad-interim order dated 8.2.2017 for a period of eight weeks from today. Mr. Kshirsagar states that the petitioner is in possession and he has neither created third party interest nor parted with the possession. He will hereafter neither create third party interest nor part with the possession. He further states that the petitioner and all adult family members residing with her are ready and willing to file usual undertaking within four weeks from today with advance copy to the other side. Learned Counsel for the respondent opposes said prayer.

19. Having regard to the fact that petitioner desires to challenge this order before the Apex Court, in my opinion, ends of justice would be met by continuing the ad-interim order dated 8.2.2017 for a period of eight weeks from today subject to the petitioner and all adult members residing with her giving usual undertaking to this Court within four weeks from today incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;

- (iv) that they will pay the arrears of compensation, if any, to the respondent within four weeks from today; and
- (v) that in case the petitioner is unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

20. In view thereof, notwithstanding dismissal of Writ Petition, ad-interim order dated 8.2.2017 shall remain in force for a period of eight weeks from today, subject to the petitioner filing undertaking in the aforesaid terms within four weeks from today, with copy in advance to the other side. In case the petitioner does not file undertaking in the above terms and/or arrears of compensation are not paid within four weeks from today, the interim order shall stand vacated without further reference to the Court. List the petition for reporting compliance after five weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)

Pradipkumar
Prakashrao
Deshmane
Digitally signed
by Pradipkumar
Prakashrao
Deshmane
Date: 2018.07.25
18:26:57 +0500