

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.4963 OF 2017**

Christina Dias] Petitioner

Vs.

Swati Jagannath More and others.] Respondents

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Mr. Suresh Rajeshwar, for the Petitioner.

Mr. Suresh Madhukar Kamble, for Respondent No.1 at length.

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CORAM : R.G. KETKAR, J.

DATE : 23RD MARCH, 2018.

P.C.

Heard Mr. Rajeshwar, learned Counsel for the petitioner and Mr. Kamble, learned Counsel for respondent No.1 at length.

2. On the motion made by Mr. Rajeshwar, leave to delete respondents No.2 to 4 is granted. Amendment shall be carried out forthwith.

3. Rule. Mr. Kamble waives service on behalf of respondent No.1. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 5th January, 2017 passed by the Additional Commissioner, Kokan Division, Mumbai (for short 'Commissioner') in Revision Application No.543 of 2012. By that order, the

Commissioner allowed the Revision Application preferred by the first respondent herein under Section 44 of the Maharashtra Rent Control Act, 1999 (for short 'Act') and set aside the order dated 4th October, 2012. and remitted the matter to the Competent Authority, Kankan Division Mumbai (for short 'Competent Authority') for fresh hearing. The relevant and material facts giving rise to filing of this Petition briefly stated are as under.

5. The petitioner and the first respondent entered into an agreement of leave and licence on 24th April, 2004. By that agreement, Room No.1 admeasuring 300 square feet on the first floor in Rajesh Charan Chawl, Andheri (East) Mumbai 400 099 (for short 'suit premises') was given on leave and licence basis to the first respondent for 11 months commencing from 24th April, 2004 and ending on 23rd March, 2005.

6. The petitioner filed Case No.36 of 2012 before the Competent Authority under Section 24 of the Act for recovery of possession of the suit premises. Respondent No.1 filed application on 10th July, 2012 seeking leave to defend as contemplated by section 43(4) (a) of the Act. By order dated 4th October, 2012, the Competent Authority rejected the application for leave to defend. By separate order dated 4th October, 2012, the Competent Authority allowed the application filed by the petitioner under Section 24 of the Act and directed the first respondent to hand over vacant and peaceful possession of the suit premises to the petitioner and to pay Rs. 12,000/- per month from September, 2007 till vacant possession of the suit premises is delivered to the petitioner. Aggrieved by this decision, respondent No.1 preferred Revision Application before the Commissioner. By the impugned order, the Commissioner has allowed the Revision Application and remitted the matter to the Competent Authority. It is against this order, the petitioner has instituted the present Writ Petition.

7. In support of this Petition, Mr. Rajeshwar submitted that Commissioner committed serious error in remitting the matter to the Competent Authority. He has taken me through the findings recorded by the Commissioner in the impugned order and submitted that the said finding is clearly contrary to the provisions of the Act and in particular explanation (b) to section 24 as also provisions contained in Chapter VIII.

8. On the other hand, Mr. Kamble supported the impugned order. He submitted that by the impugned order, Commissioner has remitted the matter to the Competent Authority. This is not a fit case for invocation of powers under Article 227 of the Constitution of India. He further submitted that though leave and licence agreement expired in the year 2005, the petitioner instituted the proceeding in the year 2012. In view of Article 137 of the Limitation Act, 1963, the application u/s 24 of the Act ought to have been instituted within a period of three years when the right to apply accrued. In the present case, right to apply accrued in the year 2005 and the application proceeding u/s 24 was instituted in the year 2012. The proceedings are, therefore, clearly barred by limitation. In support of this proposition, he relied on decision of this Court in the case of **Sumerlal M. Bafna and others Vs. D.D. Chothia and another**, 1997 (2) Mh. L. J 70.

9. Mr. Kamble further submitted that the petitioner is not a landlady. She is not owner of the suit premises. In fact, a third person, Hellen Pinto has issued NOC in favour of respondent No.1 for transferring electricity bill, ration card and election identity card. He has invited my attention to the Revision Application and in particular, paragraph 2 wherein it is contended that petitioner has agreed to sell the suit premises for consideration of Rs, 5,50,000/- and out of that has received Rs. 1,00,000/- on 10th September, 2005. The petitioner had executed receipt-cum-declaration on a stamp paper

and had given receipt of Rs.1,00,000/- out of Rs.5,50,000/-. Thus, respondent No.1 is a purchaser and the petitioner is seller in respect of the suit premises., He, therefore, submitted that petitioner has no locus to maintain proceeding u/s 24 of the Act.

10. Mr. Kamble further submitted that agreement of leave and licence dated 24th April, 2004 is not a registered instrument. He relied on section 55 of the Act. He submitted that under sub section (2) of section 55, the responsibility of getting such agreement registered is on the landlord and in the absence of written registered agreement, the contention of the tenant about the terms and conditions subject to which the premises have been given to him by the landlord on leave and licence or have been let to him prevails, unless proved otherwise. As in the present case, admittedly agreement of leave and licence is not registered, contention of the respondent about terms and conditions subject to which, premises have been given on licence to him will prevail. He submitted that as the petitioner is neither landlord nor owner of the suit premises, contention of respondent No.1 that the petitioner has no locus to maintain proceedings u/s 24 of the Act prevails. He, therefore, submitted that no case is made out for interfering with the impugned order.

11. I have considered the rival submissions of learned Counsel for the parties. I have also perused the material on record. It is not in dispute that on 24th April, 2004, agreement of leave and licence was entered into between the parties. Explanation (b) to section 24 lays down that agreement of licence in writing shall be conclusive evidence of the fact stated therein. Mr. Kamble submitted that the petitioner is neither landlady nor owner of the suit premises. I do not find any merit in this submission. Respondent No.1 has not disputed execution of leave and licence agreement dated 24th April, 2004. Section 116 of the Indian Evidence Act, 1872 reads thus;

116. Estoppel of tenant; and of licensee of person in possession. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof; shall be permitted to deny that such person had a title to such possession at the time when such licence was given”.

12. In view thereof, it is not open to the first respondent to deny ownership of the petitioner. That apart, respondent No.1 claims to have purchased the suit premises from petitioner for a total consideration of Rs.5,50,000/-. This also suggests that respondent No.1 had accepted the petitioner as owner of the suit premises. I, therefore, do not find any merit in the submission of Mr. Kamble that the petitioner has no locus to maintain proceedings u/s 24 of the Act.

13. Mr. Kamble submitted that in any case the licence period expired in the year 2005 and the proceeding instituted in the year 2012. In view of Article 137 of the Limitation Act, the petitioner ought to have instituted proceedings within three years from 2005. He relied on the decision in the case of **Sumerlal M. Bafna** (supra) and in particular paragraph 5. In that case, the learned Single Judge was considering closer of the lift. It is in that context, learned Single Judge observed that Authorities below were not justified in entertaining application u/s 24 as it is barred by limitation. In other words, question before the learned Single Judge was as regards closer of amenity of the lift. In the instant case, the claim made by the petitioner is for possession of the suit premises and the same is covered under Article 66 and/or 67 of the Limitation Act which prescribes period of 12 years. As the proceeding is instituted in the year 2012, it is well within the limitation. Reliance placed on the decision in the case of **Sumerlal M. Bafna** (supra), does not advance case

of the first respondent.

14. Mr. Kamble has relied on section 55 (2) of the Act to contend that in the absence of registered agreement of leave and licence, contention of the first respondent about terms and conditions subject to which suit premises was given to her will prevail. I do not find any merit in this submission. Mr. Kamble was not in a position to demonstrate which terms and conditions according to the first respondent will prevail over. That apart, explanation (b) to Section 24 lays down that agreement in writing is conclusive evidence of facts therein.

15. A perusal of the impugned order shows that the Commissioner has observed in paragraphs 2 to 6 thus;

- “2. The applicant raise the contention that Respondent is not the owner of the Application premises. The Applicant also made an application for deciding the issue of ownership. The Applicant place on record property card which shows that Respondent is not the owner/landlord of the Application premises.
3. The Respondent failed to place on record any documents to prove his ownership right in the Application premises. Further at the time of filing the Eviction Application before the Ld. Competent Authority Respondent has not produced any documents regarding his ownership.
4. The Respondent place on record Leave and License Agreement entered between the Applicant and Respondent. The said agreement was expired in the year 2006 and Respondent has not taken any actions since 7 years for vacating the Applicant from the Application premises.
5. The Respondent also not placed on record any further leave and license Agreement after expiry of last Agreement in the year 2006. The Respondent failed to place on record any Legal notice send to the Applicant after expiry of license period in the year 2006.
6. The Respondent further admitted that Applicant was ready to purchase the Application premises. The Applicant placed on record relevant documents in her own name regarding the Application premises. The Respondent has failed to take

initiative to approach the Applicant to handover the possession of the Application premises and to return the security deposit paid to the Respondent”.

In my opinion, the Commissioner has totally misdirected himself in considering these aspects. It is not open to the first respondent to dispute ownership of the petitioner. The Commissioner cannot go into the question of ownership. The Commissioner observed that the petitioner herein failed to produce document to prove her right in the suit premises.

16. In view of explanation (b) to section 24, that inquiry is not open. Commissioner also observed that leave and licence agreement expired in the year 2005 (wrongly mentioned as 2003). The petitioner did not take any any steps since seven years. However, no finding is recorded by the Commissioner. Even otherwise, I have already held that proceedings u/s 24 is not barred by limitation. The Commissioner observed in paragraph 5 that the petitioner did not place on record any further leave and licence agreement after expiry of last Agreement in the year 2006. In paragraph 6, Commissioner observed that respondent purchased the suit premises. As on today, it is not in dispute that respondent No.1 has not instituted suit for specific performance of the agreement of sell. Section 54 of the Transfer of Property Act, 1882 defines contract for sale which reads thus;

“54. ...

Contract for sale._ A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property”.

17. A perusal of above definition shows that agreement for sale by itself does not create any interest in or charge on such property. Thus, the Commissioner committed serious error in passing the impugned order. Hence, the same requires to be set aside and is accordingly set aside. The Revision

Application is restored to the file of Commissioner for deciding the same in the light of the observations made in this order. Rule is made absolute with no order as to costs. Commissioner is requested to dispose of the revision application within three months from the date of production of authenticated copy of this order.

18. All the parties including the Commissioner to act upon authenticated copy of this order.

[R.G. KETKAR, J.]