

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.2121 OF 2018

Augadsingh Bhairusingh Parmar] Petitioner
Vs.
Suresh R. Berde and another.] Respondents

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Mr. Siddharth P. Munghate, for Petitioner.

Mr. Suhas S, Deokar, for Respondent No.1.

Mr. A.A. Alaspurkar, A.G.P, for Respondent No.2.

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CORAM : R.G. KETKAR, J.

DATE : 20TH MARCH, 2018.

P.C.

Heard Mr. Munghate, learned Counsel for the petitioner, Mr. Deokar, learned Counsel for respondent No.1 and Mr. Alaspurkar, learned A.G.P., for respondent No.2.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 10th August, 2017 passed by the Competent Authority (Rent Act) Kokan Division, Mumbai (for short 'Competent Authority') in case No.3 of 2017 as also the judgment and order dated 30th December, 2017, passed by the Additional Commissioner, Kokan Division, Mumbai (for short 'Commissioner') in Revision Application No.884 of 2017. By order dated 10th August, 2017, the Competent Authority allowed the application made by the respondent u/s 24 of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the petitioner, herein to

hand over vacant and peaceful possession of the Flat No. 8/149, Building No.8, Jai Shastri Nagar, Mulund Colony, Mulund (West), Mumbai – 400 082 (for short 'suit premises'). The petitioner was further directed to pay to the respondent double rate of licence fee i.e Rs. 13,000 x 2 = 26,000/- from the date of expiry of leave and licence agreement i.e 15th March, 2016 till vacant possession of the suit premises is delivered to the respondent. By order dated 30th December, 2017, the Commissioner rejected the Revision Application preferred by the petitioner. It is against these orders, the petitioner has instituted this Petition.

3. Rule. Mr. Deokar waives service on behalf of respondent No.1. Mr. Alaspurkar waives service on behalf of respondent No.2. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the learned Counsel for the parties, Rule is made returnable forthwith and Petition is taken up for final hearing. The relevant and material facts giving rise to filing of this Petition briefly stated are as under.

4. It is the case of the respondent that the parties entered into registered leave and licence agreement dated 20th May, 2015 for a period of 11 months commencing from 15th April, 2015 and ending on 14th March, 2016. The licence fee of Rs. 13,000/- per month was payable by and before 15th of day of every month. The petitioner paid security deposit of Rs.50,000/-. It is the case of the respondents that the petitioner committed default in payment of licence fee from December, 2015. The respondent also received complaints from the Society members asking him to take necessary action. The respondent, therefore, issued notice dated 15th September, 2015 calling upon the petitioner to hand over possession by 15th October, 2015. As the petitioner did not hand over possession, he issued reminder on 1st February, 2016 calling upon the petitioner to hand over suit premises by 1st March, 2016. The

petitioner gave reply dated 24th February, 2016 requesting two months time after expiry of licence period in view of his children's examination in the month of April, 2016. The respondent gave reply on 3rd March, 2016 refusing to grant extension and calling upon the petitioner to hand over possession of the suit premises on expiry of the agreement as per the leave and licence agreement.

5. As the petitioner failed to vacate the premises, respondent filed complaint dated 15th March, 2016 with Mulund Police Station. Instead of vacating the suit premises, the petitioner instituted declaratory suit being S.C Suit No.1208 of 2016 and for perpetual injunction restraining the respondent from evicting him except by due process of law. The petitioner took out Notice of Motion for temporary injunction. By order dated 3rd June, 2017, Judge of the City Civil Court declined to give any relief. The respondent instituted application u/s 24 of the Act before the Competent Authority sometime in November, 2016.

6. In pursuance thereof, the Competent Authority issued summons on 1st December, 2017, calling upon the petitioner to appear on 8th March, 2017 and for filing application for leave to defend on 8th March, 2017. The petitioner appeared before the Competent Authority. As required by section 43 (4) (a), the petitioner was supposed to file application for leave to defend/affidavit seeking leave to defend within 30 days of service of summons. Even if, it is taken that the petitioner was served on 8th March, 2017, within 30 days, from that date, the petitioner did not file application for leave to defend. By order dated 10th August, 2017, the Competent Authority allowed the application u/s 24 of the Act.

7. Aggrieved by this decision, the petitioner instituted the Revision Application u/s 44 of the Act. By order dated 14th September, 2017, the

Commissioner stayed the order of the Competent Authority subject to the petitioner depositing Rs. 40,000/- before the Competent Authority on or before 25th September, 2017. Accordingly, the petitioner deposited Rs. 40,000/- before Competent Authority. Pending the Revision Application, the petitioner took out application on 6th September, 2017 seeking leave to defend. By order dated 30th September, 2017, the Commissioner rejected the Revision Application.

8. In support of this Petition, Mr. Munghate strenuously contended that the petitioner was not given opportunity to file leave to defend application. In fact, he was ill advised by the concerned Advocate and on the basis of that advice, he had instituted the suit in the City Civil Court, Mumbai in stead of filing application for leave to defend. He submitted that letter dated 25th March, 2016 addressed by the respondent to the petitioner clearly records payment of Rs.5,50,000/- by the petitioner towards the security deposit. He submitted that though the leave and licence agreement records payment of Rs. 50,000/- towards security deposit, in fact the petitioner had paid security deposit of Rs. 5,50,000/- to the respondent. As the demand was made subsequent to execution of agreement of leave and licence, explanation (b) of Section 24 and Section 55 cannot be resorted to.

9. Mr. Munghate further submitted that Roznama of the Competent Authority of 10th August, 2017 records that judgment was passed, application was allowed and proceedings were disposed off. However, Roznama is signed on 31st January, 2018. In other words, the Competent Authority did not decide the case on 10th August, 2017. Put it differently, Mr. Munghate submitted that order of the Competent Authority is anti-dated. He submitted that though stay was granted on 14th September, 2017, despite that respondent filed Execution Application on 13th October, 2017 for issuing warrant of possession for

obtaining possession with Police help. No notice of that application was given to the petitioner. That application was not even served upon the petitioner more so when the Revision Application was pending before the Commissioner. He submitted that on 17th January, 2018, the Competent Authority issued warrant of possession authorizing Enforcement Officer to evict the petitioner u/s 45 of the Act. He submitted that even warrant of possession also substantiates the petitioner's contention that the Competent Authority did not pass order on 10th August, 2017. Mr. Munghate has invited my attention to paragraph 24 ,26 and 26-A to of the Petition to indicate that the manner in which the respondent forcibly evicted the petitioner's family. He submitted that basically no procedure as laid down in the Act for execution of the orders was followed. In view of Section 5 of C.P.C, Rules-35 and 36 of Order- XXI are applicable for handing over possession of the immovable property. In the present case, no such procedure is followed before evicting the petitioner from the suit premises.

10. Mr. Munghate further submitted that Section 45 of the Act lays down that if any person refuses or fails to comply with the order of eviction made u/s 43 within 30 days of the date on which it has become final, the Competent Authority or any other officer duly authorized by the Competent Authority in this behalf, may evict that person from, and take possession of the premises and deliver the same to the landlord and for that purpose, use such force as may be necessary. He submitted that Revision Application was rejected on 30th December, 2017. On 17th January, 2018, the Competent Authority issued Warrant of Possession authorizing Shri A.V. Bhosale/Shri R.C. Kadam, Enforcement Officer to evict the petitioner. Mr. Munghate submitted that the Competent Authority was not justified in issuing warrant of possession before expiry of 30 days from the date on which order passed under Section 43 has become final. Respondent also without waiting for expiry of 30 days stipulated

in Section 45 executed warrant of possession on 23rd January, 2018. He, therefore, submitted that the Petition requires consideration.

11. On the other hand, Mr. Deokar supported the impugned orders. He submitted that clause 2 of the leave and licence agreement records that licensee had paid Rs. 50,000/- as interest free security deposit and not Rs. 5,50,000/- as alleged in the letter dated 25th March, 2016. He relied on Explanation (b) to Section 24 as also Section 55 of the Act to contend that such contention is not available to the petitioner. Mr. Deokar further submitted that the petitioner did not file application for leave to defend before the Competent Authority. The Competent Authority was, therefore, justified in allowing application u/s 24 of the Act. He submitted that the order was passed by the Competent Authority on 10th August, 2017 and not on 17th January, 2018 or 31st January, 2018 as contended by the petitioner. Roznama dated 10th August, 2017 of the Competent Authority clearly points out that judgment was passed, application was allowed and proceedings were disposed of on 10th August, 2017. Writing of Roznama on 31st January, 2018 will not establish that the Competent Authority passed order on 31st January, 2018. In fact, he submitted that warrant of possession dated 17th January, 2018 itself records that the Competent Authority decided the case on 10th August, 2017 and the Commissioner decided the case on 30th December, 2017. The contention that order of the Competent Authority is backdated cannot be accepted. He further submitted that reliance placed on Section 5 and Order XXI, Rules-35 and 36 is wholly misconceived as under the Act, remedy of execution of the orders passed under Chapter VIII is provided. He submitted that the Authorities below were justified in allowing the application u/s 24 of the Act. Though, the petitioner did not file application for leave to defend before the Competent Authority, he filed application for leave to defend before the Commissioner on 6th September, 2017 which was wholly misconceived.

12. In so far as taking possession on 23rd January, 2018, Mr. Deokar could not justify issuance of warrant of possession by the Competent Authority on 17th January, 2018 and execution of warrant of possession on 23rd January, 2018. He made feeble attempt to contend that Section 43 to 45 do not provide as to when order attains finality. He further submitted that by order dated 10th August, 2017, Competent Authority directed the petitioner to pay Rs. 26,000/- per month for the period 15th March, 2016 to 23rd January, 2018 i.e till handing over possession which comes to Rs.5,74,000/-. The petitioner has not paid that amount. He submitted that Petition deserves to be dismissed.

13. I have considered the rival submissions of the learned Counsel for the parties. I have also perused the material on record. It is not in dispute and is rather a matter of record that registered leave and licence agreement was entered into between the parties for a period of 11 months commencing from 15th April, 2015 and ending on 14th March, 2016. The suit premises is given on licence for residence of the petitioner's family. Clause 2 recites that licensee agreed to pay to the licensor an interest free security deposit of Rs.50,000/-. It is not disputed that leave and licence agreement is registered instrument. Explanation (b) to section 24 reads thus;

24. Landlord entitled to recover possession of premises given on licence on expiry-

(1).....

(2).....

(3).....

Explanation,- For the purposes of this section,-

(a).....

(b)An agreement of licence in writing shall be conclusive evidence of the fact stated therein.

Section 55 of the Act reads thus:

55. Tenancy agreement to be compulsorily registered.

(1) Notwithstanding anything contained in this Act or any other law for the time being in force, any agreement for leave and licence or letting of any premises, entered into between the landlord and the tenant or the licensee, as the case may be, after the commencement of this Act, shall be in writing and shall be registered under the Registration Act, 1908, (XVI of 1908)

(2) The responsibility of getting such agreement registered shall be on the landlord and in the absence of the written registered agreement, the contention of the tenant about the terms and conditions subject to which a premises have been given to him by the landlord on leave and licence or have been let to him, shall prevail, unless proved otherwise.

(3) Any landlord who contravenes the provisions of this section shall, on conviction, be punished with imprisonment which may extend to three months or with fine not exceeding rupees five thousand or with both.

14. In view thereof, contention of Mr. Munghate based on the letter dated 25th March, 2016 that the petitioner paid security deposit of Rs.5,50,000/- cannot be accepted. It is not in dispute that only after expiry of the licence period, respondent instituted the proceeding u/s 24 of the Act as after giving notice to the petitioner, he failed to hand over possession. It is also not in dispute and rather it is a matter of record that the petitioner did not file application for leave to defend within 30 days from 8th March, 2017.

15. Section 43 (4) (a) of the Act reads thus:

43. Special Procedure for disposal of applications;-

(1).....

(2).....

(3).....

(4) (a) 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 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,

16. In view of the aforesaid provision I, do not find that Competent Authority committed any error in allowing application u/s 24 of the Act. Mr. Munghate submitted that order is not passed on 10th August, 2017. He relied on Roznama of the Competent Authority to contend that it was signed on 31st January, 2018 and, therefore, till that time, it cannot be said that Competent Authority decided the application u/s 24 of the Act. I do not find any merit in this submission. Roznama dated 10th August, 2017 shows that judgment was passed on 10th August, 2017 by allowing application and the proceedings were disposed of. This is also substantiated from warrant of possession issued on 17th January, 2018. Opening paragraph of Warrant of possession itself records passing of orders on 10th August, 2017 and 30th December, 2017 by the Competent Authority and Commissioner respectively.

17. Mr. Munghate relied on section-5 and Order-XXI, Rules-35 and 36 of the C.P.C to contend that Act does not provide for manner in which the orders are executed. The order has to be executed by following procedure under Order-XXI. I do not find any merit in this submission. Section 45 of the Act reads thus;

45. Effect of refusal of failure to comply with order of eviction.- If any person refuses or fails to comply with the order of eviction made under section 43 within thirty days of the date on which it has become final, the Competent Authority or any other officer duly authorized by the Competent Authority in his behalf, may evict that person from, and take possession of, the premises and deliver the same to the landlord and for that

purpose, use such force as may be necessary”.

In view of express provisions in terms of Section 45, it is not necessary to have recourse under Order-XXI, Rules, 22, 35 and 36.

18. At the cost of repetition, the petitioner did not file application for leave to defend before the Competent Authority. After considering the material on record, the Competent Authority allowed the application filed by the respondent under Section 24 of the Act. The Revision Application preferred by the petitioner was dismissed by the Commissioner on 30th December, 2017. I do not find that the Authorities below committed any error in passing the impugned orders. In the light of the aforesaid discussion, I do not find any merit in the submission of Mr. Munghate that the impugned orders suffer from any infirmity.

19. Mr. Munghate submitted that no notice was issued to the petitioner when warrant of possession was issued on 17th January, 2018. He has taken me through paragraph 26-A of the Petition to indicate the manner in which the petitioners family was evicted from the suit premises. Family of the petitioner had to take articles and shift their luggage to their relatives at Dombivali. He submitted that because of the high handed action of the respondent, petitioner's family suffered mental agony and harassment. The petitioner is, therefore, entitled to claim damages and possession from the respondent.

20. The next question as to what relief the petitioner is entitled to. I have already upheld the orders passed by the Competent Authority and the Additional Commissioner. The Competent Authority had issued warrant of possession on 17th January, 2018. Action of the Competent Authority is clearly

in violation of section 45 of the Act. The respondent obtained possession of the suit premises on 23rd January, 2018 which is also in violation of Section 45 of the Act.

21. In case of **Ami Merchandising Pvt Ltd Vs. State of Maharashtra 2014 (3) Mh. L. J, 257**, this aspect was considered. In that case, the Commissioner decided Revision Application on 5th March, 2010. While dismissing the Revision Application, the Commissioner directed the Competent Authority to execute order immediately. In pursuance thereof, respondents filed Misc. Application No. 10 of 2010. On the very next date, i.e on 6th March, 2010, on the same day, Competent Authority issued warrant of possession and respondents No.4 and 5 executed warrant of possession and obtained possession on 8th March, 2010. It is in that context, it was observed in paragraphs 53 and 54;

“53.In view of section 45 of the Maharashtra Rent Control Act extracted hereinabove, in my opinion, the Competent Authority committed serious error in issuing warrant of possession on 6-3-2010. Though the Commissioner directed the Competent Authority to execute order **immediately**, it cannot issue warrant of possession contrary to section 45. In my opinion, the Competent Authority ought to have satisfied itself in terms of section 45 of the Maharashtra Rent Act whether the eviction order had become final and thereafter only issued warrant of possession. Respondents No.4 and 5 also committed grave error in filing application on the very next day of passing of the order by the Commissioner and executing warrant of possession on the basis of the order passed by the Competent Authority. The Competent Authority failed to appreciate that section 45 will become applicable only in the event if any person refusing or failing to comply with order of the eviction made under section 43 **“within 30 days of the date on which it becomes final”**.”

54.The next question is to what relief the petitioners are entitled to. I have already upheld the orders passed by the Competent Authority and the Commissioner. At the same time, the Competent Authority clearly acted in excess of its jurisdiction

while issuing warrant of possession on 6-3-2010. Respondents No.4 and 5 have also obtained possession in the teeth of section 45 of the Act. Though the petitioners are not entitled to possession of the suit premises, they are required to be compensated in that respect. Respondents No.4 and 5 shall pay Rs.2,00,000/- (Rs. Two Lakhs), being at a double rate of monthly compensation of Rs. 1 lakh in that regard. Hence, Writ Petition succeeds partly and is disposed of as under:

i)The impugned judgment and orders (a) dated 14-7-2008 rejecting the application made by the petitioners for leave to defend (b) dated 14-7-2008 rejecting the Intervenor's Application dated 11-7-2008 filed by Mr. Nirav Modi (c) dated 14-7-2008 passed by the Competent Authority (d) dated 5-3-2010 passed by the Additional Commissioner are upheld.

ii)Respondents No.4 and 5 are directed to pay Rs. 2,00,000/- to the petitioners for taking possession in contravention of section 45 of the Maharashtra Rent Act. The said amount shall be given due credit from the payment which is required to be made by the petitioners to respondents No.4 and 5.

22. In the present case, the Competent Authority committed error in issuing warrant of possession on 17th January, 2018 without satisfying itself about compliance of section 45 of the Act. Thus, the Competent Authority exceeded its jurisdiction while issuing warrant of possession on 17th January, 2018. Respondent also obtained possession on 23rd January, 2018 in violation of section 45 of the Act. Though the petitioner is not entitled to possession of the suit premises, he is required to be compensated in that regard. The respondent shall pay Rs. 26,000/- (being double rate of monthly compensation of Rs. 13,000/-) in that regard. Hence, Writ Petition succeeds partly and is disposed of as under:

- [1] The judgment and order dated 10th August, 2017 passed by the Competent Authority and judgment and order dated 30th December, 2017 passed by the Additional Commissioner are upheld.

- [2] The respondent is directed to pay Rs.26,000/- to the petitioner for taking possession in contravention of Section 45 of the Act.
- [3] As the petitioner has not paid Rs.5,74,000/- to the respondent. Amount of Rs.26,000/- shall be adjusted by the petitioner. The petitioner shall pay balance amount to the respondent.
- [4] Rule is partly made absolute in the above terms with no order as to costs.

[R.G. KETKAR, J.]