

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7356 OF 2018

Mrs. Asma Begum Mohd.

Siddique Shaikh

...Petitioner

Versus

Mrs. Farida Amin Tharani

and another

...Respondents

....

Mr. G.S. Godbole, Senior Advocate a/w. Jui Kanade i/b. Nikita Jacob & Ms. Shivani Samel, Advocate for the Petitioner.

Mr. R.S. Apte, Senior Advocate a/w. Aishwarya Hadkar a/w. Rounish Pandey i/b. M/s. Legal Vision, for Respondent No.1.

Mr. Rakesh Kumar a/w. Dipti Pednekar i/b. Vijendra Jabra, Advocate for Respondent No.2.

....

CORAM : R. G. KETKAR, J.

RESERVED ON : 23th JULY, 2018

PRONOUNCED ON : 07th AUGUST, 2018

ORDER :

1. Heard Mr.G.S. Godbole, learned Senior Counsel for the petitioner, Mr. R.S. Apte, learned Senior Counsel for respondent No.1 and Mr. Rakesh Kumar, learned Counsel for respondent No.2, at length.
2. It is said that good decisions come from experience and experience comes from bad decisions.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 8.6.2018 passed by the Competent Authority (Rent Act), Konkan Division, Mumbai (for short, 'Competent Authority') in Application No.995(A) dated 15.11.2017 filed by the petitioner for restoration of the possession of a duplex flat i.e. flat No.501 on the 5th floor & flat No.601 on the 6th floor of a building known as “Amen Apartment” at 2, Church Road, Marol Village, Andheri (East), Mumbai – 400 059 (for short, 'suit premises') as also for mesne profits.

4. Rule. Learned Counsel for respective respondents waive service. 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 the petition is taken up for final hearing. The relevant and material facts giving rise to filing of the present petition, briefly stated, are as under:

5. On 17.2.2005, a document styled as Leave and Licence Agreement was entered into by and between the petitioner as a Licensee and respondent no.1 as a licensor. Clause (3) recited that there is no monthly compensation mutually agreed by licensee and licensor. Clause (12) recorded that the petitioner-licensee shall deposit with respondent no.1 a sum of Rs. 10,00,000/- (Rupees Ten Lakhs only) as a security deposit, free of interest, which will be returned to the licensee on the expiry

of the agreement or on notice of one month in advance for vacation of premises and against vacant and peaceful possession of the suit premises after deducting the cost of the damages to the fixtures/fittings and outstanding electricity bills, if any. Clause (20) recited that in the event of the licensee desiring to vacate the suit premises before the expiry, the licensor shall allow the licensee to vacate after paying the compensation for the month unused and at the same time the licensor shall forthwith refund the deposit of Rs.10,00,000/-.

6. On 1.6.2010, respondent no.1 issued notice to the petitioner through Advocate revoking the leave and licence agreement and calling upon the petitioner to vacate the suit premises and hand over possession within 7 days from the date of receipt of the notice. Respondent no.1 also called upon the petitioner to pay an amount of Rs.55,000/- towards balance licence fees and other outgoings. The petitioner did not give reply to the notice.

7. On 22.10.2010, respondent no.1 instituted proceedings under section 24 of the Maharashtra Rent Control Act, 1999 (for short, 'Act') before the Competent Authority. On 9.12.2010, the petitioner filed application for leave to defend the proceedings as contemplated by Section 43(4)(a) of the Act. By order dated 12.8.2011, the Competent Authority granted leave to defend. On 19.10.2011, the petitioner filed

written statement resisting proceedings under Section 24 of the Act. On 21.7.2012, the Competent Authority framed the issues and adjourned the matter for evidence of the first respondent on 31.7.2012. Instead of adducing evidence, respondent No.1 filed application on 31.7.2012 *inter alia* praying for direction to the petitioner herein to pay a sum of Rs.24,35,000/- as per the statement of calculations annexed at Exhibit-2. Pending the hearing and final disposal of the application, respondent no.1 further prayed for direction to the petitioner to pay a sum of Rs. 85,000/- per month from 1.9.2012 onwards.

8. By reply dated 21.8.2012, the petitioner resisted that application by filing reply. On 6.9.2012, respondent no.1 filed affidavit-in-rejoinder and also written arguments in support of her application for depositing arrears. The petitioner filed affidavit in sur-rejoinder on 25.9.2012. The application was adjourned for arguments to 6.10.2012 at 12.30 pm. The Advocate for the first respondent was present. The petitioner was present. However, her Advocate was not present. As the petitioner herein was not ready for argument despite giving sufficient time for argument, the matter was kept for order and the case was closed for orders. On the same day, i.e. 6.10.2012, the Competent Authority disposed of the application filed by the first respondent for directing the petitioner to deposit licence fee by passing order to the effect that the interim application for payment/deposit

will be decided along with eviction application.

9. On 20.10.2012, the Competent Authority allowed the proceedings filed by the first respondent under Section 24 of the Act and directed the petitioner to hand over vacant and peaceful possession of the suit premises to the first respondent and further to pay Rs.85,000/- per month from June, 2010 to the first respondent till handing over vacant possession.

10. In November, 2012, the petitioner instituted Revision Application under Section 44 of the Act before the Additional Commissioner, Konkan Division, Mumbai (for short, 'Commissioner'). It is not necessary to make a detailed reference to the proceedings before the Commissioner. By order dated 14.8.2014, the Commissioner rejected the revision thereby upholding the order passed by the Competent Authority. The Commissioner further directed the petitioner to hand over vacant and peaceful possession of the suit premises to the first respondent and further pay arrears at the rate of Rs.85,000/- per month from June 2010 till handing over possession.

11. Aggrieved by these decisions, the petitioner instituted Civil Revision Application No. 909 of 2014 in this Court. It is not necessary to refer to various orders passed by this Court in that Revision Application. It

is the case of the petitioner that on 8.8.2016, the first respondent obtained warrant of possession without notice to her. On 23.8.2016, the petitioner along with her family members were dispossessed from the suit premises. Panchanama was also drawn to that effect. On 25.8.2016 respondent no.1 executed a registered leave and licence agreement in favour of the second respondent herein. The petitioner thereafter filed Civil Application No. 624 of 2016 for amending the proceedings as also for impleadment of the second respondent. After hearing both sides, Civil Application was allowed on 13.10.2016. C.R.A. was finally allowed on 6.12.2016.

12. By order dated 6.12.2016, this Court set aside the order dated 20.10.2012 passed by the Competent Authority and the order dated 14.8.2014 passed by the Commissioner and application No.60/2010 filed by the first respondent was restored to the file of the Competent Authority. The Competent Authority was directed to bear in mind the fact that the petitioner was granted leave to defend on 12.8.2011 and was further directed to follow the procedure laid down under Section 43(4)(c) and 43(5) of the Act and pass appropriate order on the basis of evidence on record and in accordance with law and uninfluenced by the observations made/findings recorded therein. All contentions of the parties were expressly kept open. Subject to the petitioner depositing arrears of interim deposit to the tune of Rs.40,15,000/- as also society charges to the tune of

Rs.1,76,400/- on or before 25.1.2017 with the Competent Authority, respondents No.1 & 2 herein were directed to hand over possession of the suit premises to the petitioner. The petitioner was further directed to continue to deposit monthly charges @ Rs.55,000/- from November, 2016 on or before 10th day of each succeeding month towards interim deposit before the Competent Authority. The petitioner was also ordered to pay monthly charges of the society from November, 2016 upon receipt of the society maintenance bill. The deposits and payments to be made by the petitioner were without prejudice to her rights and contentions. It was also made clear that in case the petitioner does not comply this direction, respondents No.1 & 2 herein will not be bound to hand over possession of the suit premises to the petitioner. On the oral request made on behalf of respondents No.1 & 2 herein, the direction to hand over possession was stayed for a period of eight weeks from the date of the order subject to respondent No.1 making statement that respondent No.1 will neither create third party interest nor parting with the possession and respondent No.2 herein making statement that respondent No.2 will not part with the possession. It was also made clear that if respondents No.1 & 2 herein are unable to obtain suitable orders from the higher Court within eight weeks, they will hand over vacant and peaceful possession of the suit premises to the petitioner. By way of abundant caution it was clarified that this Court

has not stayed the direction issued to the petitioner for depositing arrears of interim compensation to the tune of Rs.40,15,000/- as also payment of society charges to the tune of Rs.1,76,400/- which were to be deposited on or before 25.1.2017.

13. Aggrieved by this decision, respondent No.1 preferred Special Leave to Appeal No.2230/2017. By order dated 25.1.2017, notice was issued to the respondents and in the meantime order dated 6.12.2016 passed by this Court in C.R.A. No.909/2014 was stayed. Ultimately by order dated 4.8.2017, S.L.P. was disposed of after recording that the petitioner herein had deposited the amount. The Competent Authority was directed to decide the case within three months. Status quo existing as on that date was ordered to be maintained till final decision is reached by the Competent Authority.

14. The petitioner thereafter filed application being M.A. No.709/2017 *inter alia* for modification of order dated 4.8.2017 and in the alternate for withdrawal of the amount which she had deposited. By order dated 4.9.2017 the Apex Court dismissed the said application.

15. In pursuance of the direction issued by the Apex Court, the Competent Authority passed order on 27.10.2017. The Competent Authority held that it cannot entertain the application as the first

respondent is not landlady for the purpose of Section 24 of the Act. The application was returned to the first respondent for presentation to proper forum. All contentions were kept open. As regards the deposit of compensation amount of Rs.40,15,000/- and society charges of Rs.1,76,400/- made by the petitioner, the parties were given liberty to approach this Court or such appropriate forum for obtaining appropriate orders. The petitioner thereafter filed Application No.995(A) on 15.11.2017 *inter alia* praying for restoration of the possession; for return of the deposit made by her; and for being compensated by way of mesne profits @ 18% per annum from the date of her dispossession i.e. 23.8.2016 till the date of actual handing over of the possession. By the impugned order, the Competent Authority has rejected the application principally on the ground that the Authority is not invested with the power under Section 48 of the Act read with Sections 144 and 151 of C.P.C. The Competent Authority gave liberty to the petitioner to file appropriate application before the Competent Authority keeping all contentions open. It is against this decision, the petitioner has instituted this Petition.

16. In support of this Petition, Mr. Godbole invited my attention to the order dated 6.12.2016 passed by this Court in C.R.A. No.909/2014 as also the order dated 4.8.2017 passed by the Apex Court. He submitted that the order passed by this Court dated 6.12.2016 did not merge in the order

dated 4.8.2017 passed by the Apex Court. He relied upon the decision in **Kunhayammed and others vs. State of Kerala and another, (2000) 6 SCC 359** and in particular paragraph-44 clauses (ii), (iv) & (v). He submitted that an order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

17. Mr. Godbole submitted that if the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or Authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But this does not amount to saying that the order of the Court, Tribunal or Authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is

the only order binding as *res judicata* in subsequent proceedings between the parties.

18. In short Mr. Godbole submitted that the order dated 6.12.2016 passed by this Court in C.R.A. No.909/2014 has not merged in the order dated 4.8.2017 passed by the Apex Court in Special Leave to Appeal No.2230/2017. If that be so, the direction issued by this Court on 6.12.2016 directing respondents No.1 & 2 to hand over possession of the suit premises is not set aside by the Apex Court on 4.8.2017. By directing the status quo existing as on 4.8.2017 to be maintained till final decision is reached by the Competent Authority only means that the direction issued by this Court to respondents No. 1 and 2 herein to hand over possession of the suit premises is deferred/is kept in abeyance till actual decision is rendered by the Competent Authority. As the Competent Authority dismissed the application filed by the first respondent and said order is upheld by this Court in W.P. No.4794/2018, this is an eminently fit case to order restoration of the possession to the petitioner. He further submitted that the respondents may be directed to pay mesne profits for entire period of dispossession. In the alternative and without prejudice, Application No.995(A) of 2017 filed by the petitioner before the Competent Authority may be allowed.

19. He submitted that the petitioner was unlawfully dispossessed on 23.8.2016 on account of the mistake committed by the Competent Authority. It is settled principle of law that the litigant should not suffer because of the mistake committed by the authorities below. For all these reasons, he submitted that the Petition deserves to be allowed thereby granting reliefs claimed by the petitioner.

20. On the other hand, Mr. Apte supported the impugned order. He submitted that the Competent Authority rightly held that the provisions of Section 48 of the Act as also Sections 144, 151 of C.P.C. are not applicable to the proceedings before the Competent Authority. He further submitted that by order dated 4.8.2017 the Apex Court remitted the matter to the Competent Authority. The petitioner herein filed application dated 18.8.2017 before the Apex Court for modification of the order dated 4.8.2017. By order dated 4.9.2017, the Apex Court dismissed the application for modification of the order. In view thereof also the petitioner is not entitled to any relief in this Petition. He submitted that while allowing C.R.A. No.909/2014 this Court also held that Section 144 of C.P.C. is not applicable to the proceedings before the Competent Authority. This finding was recorded on the basis of submissions advanced by the petitioner before this Court as is evident from paragraph-27. In paragraph-27, the submission of the petitioner that the petitioner cannot approach the

Competent Authority for restitution/restoration of the suit premises as Sections 144 and 151 are not applicable to the Competent Authority, was recorded and the same was accepted as is evident from paragraph-65. This Court by referring to the decision of Apex Court in **Surya Dev Rai vs. Ram Chander Rai, (2003) 6 SCC 675**, exercised suo motu powers under Article 227 of the Constitution of India and directed respondents No.1 and 2 herein to hand over possession of the suit premises.

21. Mr. Apte submitted that by order dated 4.8.2017, while remitting the matter to the Competent Authority, the Apex Court directed status quo existing on that date be maintained till final decision is reached by the Competent Authority. He, therefore, submitted that the direction issued by this Court to respondents No.1 & 2 herein to hand over possession of the suit premises is set aside. Even on this count, the petitioner is not entitled to any relief in this Petition.

22. Mr. Apte invited my attention to the impugned order. In paragraph-12, the Competent Authority referred to Section 48 of the Act as also decisions of this Court in **Yamunabai Anandrao Baste v. Sakharam Sukhaji Jadhav, 1990(92) Bom.L.R. 233** and **Ramniklal Pitambardas Mehta v. Indradaman Amratlal Sheth, AIR 1964 SC 1676**. In Yamunabai Baste's case (supra), this Court considered Section 17 of the old Act, namely, the Bombay Rents, Hotel and Lodging House Rates Control

Act, 1947, which is *pari materia* with Section 48 of the present Act. This Court was considering the question whether Section 17 would still apply to the case of the landlord, who at the relevant time has already sold the application premises and, therefore, could not comply with the statutory obligation. It was held by this Court that sale of interest in the property by the landlord and re-letting the same are two different things. In short, he submitted that in the present case Section 48 will not be attracted as after obtaining possession of the premises in pursuance of the order passed by the Competent Authority, the landlord has neither occupied the premises nor **re-let** either the whole or any part of the premises, within two years from the date of such landlord recovering possession, to any person other than the evicted tenant. In the present case, respondent No.1 has given the suit premises on leave and licence basis to the second respondent which does not amount to creation of any right, title and interest in favour of the second respondent. Thus it cannot be said that respondent No.1 has re-let the suit premises to the second respondent. He, therefore, submitted that no case is made out for interfering with the impugned order.

[emphasis supplied]

23. Mr. Kumar invited my attention to paragraph-69(b) of the order dated 6.12.2016 passed by this Court in C.R.A. No.909/2014. That clause provided that subject to the petitioner herein depositing the arrears of

interim deposit to the tune of Rs.40,15,000/- as also society charges to the tune of Rs.1,76,400/- on or before 25.1.2017 with the Competent Authority, respondent No.1 and the licensee viz. Respondent No.2 herein shall hand over possession of the suit premises to the petitioner herein. The petitioner was directed to deposit monthly charges @ Rs.55,000/- from November, 2016 on or before 10th day of each succeeding month towards interim deposit before the Competent Authority. He submitted that the petitioner has not complied this part of direction.

24. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, by order dated 12.8.2011, the Competent Authority had granted leave to defend to the petitioner. Without following the procedure under Sections 43(4)(c) and 43(5) of the Act, the Competent Authority allowed the application filed under Section 24 on 20.10.2012. In short the Competent Authority did not permit the parties to adduce evidence and straightway allowed the application filed by the first respondent under Section 24 of the Act proceeding on the premise as if no leave to defend was granted. The order passed by the Competent Authority was confirmed by the Commissioner on 14.8.2014. Aggrieved by these orders, the petitioner had instituted C.R.A. No.909/2014 which was allowed to be converted into Writ Petition under Article 227 of the

Constitution of India. C.R.A. No.909/2014 was ultimately allowed on 6.12.2016. In paragraph-27 of that decision submission on behalf of the petitioner herein that the Competent Authority constituted under Chapter VIII is a statutory authority created for a definite purpose and to exercise powers in a quasi-judicial manner and that the petitioner cannot approach the Competent Authority for restitution/restoration of the suit premises as Sections 144 and 151 of C.P.C. are not applicable to the Competent Authority, was also recorded.

25. In paragraph-65, this Court held that Section 151 is applicable to the Court and not to a statutory authority like the Competent Authority created under Chapter VIII of the Act. In other words, Section 151 of C.P.C. cannot be invoked by a party to the proceedings before the Competent Authority. In view thereof as also in view of the decision of Apex Court in the case of **Prakash H. Jain v. Marie Fernandes, (2003) 8 SCC 431**, Section 144 cannot be invoked before the Competent Authority. This Court thereafter in paragraphs-67 & 68 considered invoking *suo motu* powers under Article 227 of the Constitution of India. Reference was made to the decision in **Surya Dev Rai's** case (supra). After exercising *suo motu* jurisdiction, respondents No.1 & 2 herein were directed to hand over possession of the suit premises to the petitioner. Aggrieved by that decision, respondent No.1 preferred Special Leave to Appeal No.2230/2017. Said

S.L.P. was disposed of on 4.8.2017 by passing following order :

“ Since the amount has been deposited, we deem it appropriate to direct the competent authority to decide the matter, after hearing the parties.

The parties to appear before the competent authority on 21.8.2017. Let the matter be decided within a period of three months. Let the status quo existing, as on today, be maintained till final decision is reached by the competent authority.

The special leave petition is, accordingly, disposed of.”

26. Thus, while allowing C.R.A., Application No.60/2010 filed by the first respondent was restored to the file of the Competent Authority with a direction to follow the procedure laid down under Sections 43(4)(c) and 43(5) of the Act and pass appropriate orders on the basis of evidence on record and in accordance with law uninfluenced by the observations made/findings recorded in the order. All contentions of the parties were expressly kept open. Respondents No.1 & 2 herein were directed to hand over possession of the suit premises to the petitioner. This order was made as this Court found that the petitioner was illegally dispossessed in pursuance of the orders passed by the Competent Authority and the Commissioner and, therefore, *suo motu* powers were exercised in view of decision in **Surya Dev Rai's** case (supra). The order passed by this Court directing respondents No.1 & 2 to hand over possession was to operate during pendency of the proceedings before the Competent Authority.

27. By order dated 4.8.2017, Apex Court directed status quo as of that date to be maintained till the decision is reached by the Competent Authority. In other words, interim arrangement ordered by the Apex Court was also during pendency of the proceedings before the Competent Authority. In my opinion, the direction issued by this Court to respondents No.1 & 2 to hand over possession to the petitioner was set aside by the Apex Court while passing the order on 4.8.2017. It is also material to note that the petitioner thereafter took out application for modification of the order dated 4.8.2017 and said application was dismissed on 4.9.2017. Thus while disposing of S.L.P. on 4.8.2017 and directing the parties to maintain status quo, the Apex Court had set aside the direction issued by this Court to respondents No.1 & 2 to hand over possession of the suit premises. As the provisions of Sections 144 and 151 are not applicable before the Competent Authority, the Competent Authority was fully justified in rejecting the application. That apart the application was made on 15.11.2017 when admittedly the Competent Authority had disposed of the proceedings on 27.10.2017. It is in that context I have quoted the saying that “good decisions come from experience and experience comes from bad decisions”. It has to be concluded that the order passed by this Court directing respondents No.1 & 2 herein to hand over possession was a bad decision which was corrected by the Apex Court by setting aside the

same. We must learn and evolve from the past experience. As the Apex Court did not uphold the direction and in fact set aside that part of the order, it is not possible to exercise *suo motu* power again under Article 227 of the Constitution of India. It will be open to the petitioner to approach the Apex Court for restoration of the possession as also for other prayers made in the application dated 15.11.2017. Subject to this, the Petition fails and the same is dismissed. Order accordingly.

(R.G. Ketkar, J.)

Pradipkumar
Prakashrao
Deshmane
Digitally signed
by Pradipkumar
Prakashrao
Deshmane
Date:
2018.08.07
18:14:02 +0500