

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7087 OF 2008

Vimalaben Gosalia
And Anr.

...Petitioners

Versus

Veena Dushyant Malgonnkar

...Respondent

....

Mr. T.D. Deshmukh, Advocate for the Petitioners.

Mr. Archit Jayakar a/w Abhay Dhadiwal a/w. Ms. Trupti Khadse I/b.
Jayakar & Partner, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 06th JULY, 2018

JUDGMENT:

1. Heard Mr.T.D. Deshmukh, learned counsel for the petitioners and Mr.Archit Jayakar, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 13.12.2017 passed by the Competent Authority (under Rent Act), Pune Division, Pune (for short, 'Competent Authority') in application No.27/2005 as also the judgment and order dated 12.9.2008 passed by the Additional Commissioner, Pune Division, Pune (for short, 'Commissioner') in Revision No.104/2008. By order dated 13.12.2007, the Competent Authority allowed the application filed by the

respondent under Section 24 of the Maharashtra Rent Control Act, 1999 (for short, 'Act') and directed the petitioner herein to hand over vacant and peaceful possession of twin bungalow / row house bearing No.37, admeasuring 2400 sq. ft. situate in Sopan Baug Co-operative Housing Society Ltd. , Pune – 411 001 (for short, 'suit premises'), as more particularly described in paragraph-1 of the application, to the respondent. The Competent Authority further directed the petitioners to pay damages @ Rs.18,000/- per month from 1.9.2005 till delivery of possession of the suit premises to the respondent. By order dated 12.9.2008, the Commissioner dismissed the Revision Application and confirmed the order of the Competent Authority. It is against these decisions, the petitioners have instituted present Petition.

3. In support of this Petition, Mr. Deshmukh advanced following contentions :

a) Leave and licence agreement dated 1.10.2004 is not a registered instrument. Section 55 of the Act lays down that the responsibility of getting the agreement registered is 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 the premises have been given to him by the landlord on leave and licence basis or even let to him shall prevail, unless proved otherwise.

- b) The leave and licence agreement does not bear the signature of the petitioners.
- c) The respondent had issued receipts wherein the word “rent” is used instead of “licence fee”.
- d) The petitioners are tenants in respect of the suit premises and not the licensee.

4. Mr. Deshmukh has taken me through the impugned orders. He submitted that the Competent Authority had granted leave to defend. After hearing both sides, by order dated 14.12.2005, the Competent Authority had allowed the application Exhibit-12 thereby granting leave to defend the proceedings.

5. Mr. Deshmukh submitted that as the leave and licence agreement dated 1.10.2004 is not a registered instrument, the contention of the petitioners that the premises were given on tenancy basis and not on leave and licence basis prevails. He submitted that neither the Competent Authority nor the Commissioner has considered the effect of Section 55 of the Act.

6. On the other hand, Mr. Jayakar supported the impugned orders. He submitted that before executing the present leave and licence agreement dated 1.10.2004, initially the suit premises was given

on leave and licence basis for a period of 11 months commencing from 1.3.1998 and ending on 31.10.1999. He has invited my attention to the leave and licence agreement dated 23.2.1998. Clause-2 thereof specifically recited that the suit premises will be used by the licensor for residential purposes only and for not other purposes. Subsequently the licence period was extended from time to time under different leave and licence agreements dated 31.1.1999, 31.12.1999, 1.12.2000, 1.11.2001, 1.10.2003 and 1.10.2004. He submitted that the petitioners failed to accompany the respondents for registration of the leave and licence agreement. The respondent herself submitted the leave and licence agreement dated 1.10.2004 before the Sub-Registrar, Haveli, Pune for the purpose of registration. He submitted that the petitioners were inducted as licensee in the suit premises in the year 1998 and at no point of time there was relationship of the landlord and tenant between the parties. He submitted that though the leave and licence agreements are not on record, save and except the leave and licence agreement dated 23.2.1998, the parties admitted execution of such agreements. He submitted that the authorities below have found that the petitioners have admitted their signatures on the leave and licence agreement and that petitioner No.2, who was examined, admitted that since 1998 there are agreements between the parties relating to the suit premises.

7. Mr. Jayakar also invited my attention to the evidence of Advocate Atul Parulekar at Exhibit-65, who was the attesting witness to the leave and licence agreement dated 1.10.2004 as also evidence of Handwriting Expert Mr. Salim Khan at Exhibit-67 and his opinions at Exhibits-68 and 69.

8. 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 14.12.2005, the Competent Authority granted leave to the petitioners to defend the proceedings under Section 24 of the Act. In pursuance thereof, the parties adduced evidence in support of their case. The respondent examined herself at Exhibit-39, Advocate Atul Parulekar one of the attesting witnesses at Exhibit-65 and handwriting expert Mr. Salim Khan at Exhibit-67. On behalf of the petitioners, petitioner No.2 Ms.Naina Jayesh Gosalia and her husband Jayesh Gosalia were examined. The respondent produced leave and licence agreement dated 1.10.2004 at Exhibit-57. Though the petitioners denied the execution of agreement at Exhibit-57, in the cross-examination petitioner No.2 stated that signatures on leave and licence agreement dated 1.10.2004 at Exhibit-57 appear to be her signatures and of petitioner No.1. She also admitted that since 1998 there were

agreements between the parties relating to the suit premises.

9. Mr. Jayesh Gosalia, husband of petitioner No.2, who is son of petitioner No.1, was referred leave and licence agreement dated 1.10.2004 at Exhibit-57. He deposed that the signature on Exhibit-57 looks like signature of his mother (petitioner No.1). He further deposed that the document does not bear the signature of his wife i.e. petitioner No.2. As petitioner No.2 herself admitted in cross-examination that her signature and signature of petitioner No.1 appear, the Authorities below rightly held that the respondent has proved execution of agreement Exhibit-57.

10. In paragraph-15, the Competent Authority observed that denial of execution of Exhibit-57 on the part of the petitioners herein is half-hearted. The witnesses were not bold enough to deny the existence of Exhibit-57 when it was referred to them in their cross examination. The Competent Authority further held that the evidence of handwriting expert Salim Khan at Exhibit-67 is corroborated by the witnesses examined by the respondent.

11. The Competent Authority also referred to explanation (b) of Section 24 of the Act as also the decision of this Court in **Ramesh Hate v. Parvez Bhesania, 1997(2) Bom C.R. 407**. In paragraph-18, the

Competent Authority observed that the leave and licence agreement between the licensor and licensee is conclusive evidence of the facts stated therein in two circumstances:

- (1) When the execution of the leave and licence agreement is admitted by the parties, or
- (2) When after recording the evidence, the Competent Authority comes to the conclusion that the parties have executed an agreement of leave and licence.

12. In paragraph-19, the Competent Authority observed that after considering the evidence on record the parties have executed the agreement of leave and licence and, therefore, is covered by second circumstance extracted hereinabove. In paragraph-21 the Competent Authority referred to the decision of this Court in **M/s. Sails India vs. Mrs. Rita Roopani, AIR 1997 Bom 247**, which considered the expressions “conclusive evidence of the fact stated therein” and the “conclusive proof”. This decision held that there is no distinction in law in expression “conclusive evidence of the fact stated therein” and the expression “conclusive proof.”

13. In paragraph-23 the Competent Authority observed that the petitioners relied upon one rent receipt filed along with list Exhibit-58 wherein the word 'rent' instead of the word 'compensation' is used. In paragraph-24, the Competent Authority referred to the decision of this

Court in **Rajendra B. Nair vs. Suresh Dyanmote, AIR 2002 Bom. 382.**

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. The learned Single Judge (Dr.D.Y. Chandrachud, J., as His Lordship then was) observed that mentioning of the word “rent” in clause 2 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. The Competent Authority, therefore, observed that mere use of the word “rent” for the monthly compensation will not confer the status of tenant on the petitioners.

14. Mr. Deshmukh submitted that the leave and licence agreement dated 1.10.2004 is not a registered instrument. Sub-section (2) of Section 55 of the Act lays down that 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 even let to him will prevail, unless proved otherwise. He, therefore, submitted that as the leave and licence agreement is not registered, the contention of the petitioners that the premises have been let out to them on tenancy basis prevails. I do not find any merit in this submission for more than one reason. In the first place, sub-section (1) of Section 55 of the Act lays down that after commencement of the Act, 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, has to be in writing and has to be registered under the Registration Act, 1908.

15. Sub-section (2) thereof lays down that the responsibility of getting such agreement registered is on the landlord. In the present case, a perusal of the leave and licence agreement dated 1.10.2004 shows that the leave and licence agreement was presented by the respondent before the registering authority on 27.1.2005, as is evident from page-10 of that agreement. A perusal of remark 1 on page-12 shows that the petitioners or their authorized representatives did not appear before the registering authority within the time allowed for presentation under Sections 23, 24, 25 and 26 of the Registration Act, 1908. Remark No.2 shows that the petitioners have disputed/denied registration of the instrument. Thus in so far as the respondent landlady

is concerned, she has done all that was within her reach to get the instrument registered and thus has discharged the responsibility of getting the agreement registered in terms of sub-section (2) of Section 55 of the Act. Secondly, sub-section (2) of Section 55 lays down that 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 will prevail, unless proved otherwise.

16. In other words, the presumption under sub-section (2) of Section 55 of the Act is a rebuttable presumption. In the present case, after adducing the evidence, the respondent has proved that the agreement in question is a leave and licence agreement and does not create relationship of landlord and tenant. In short, the agreement dated 1.10.2004 is not a tenancy agreement, but, is a leave and licence agreement. A perusal of clauses of the leave and licence agreement dated 1.10.2004 and in particular clause-7 thereof shows that the petitioners are expected to use the premises for residential purposes only. Clause-9 is to the following effect :

“9. That the Licensee shall be deemed to be only a Licensee for a period of eleven months only by virtue of this present and shall not make or have any claim to tenancy, sub-tenancy or any other rights, title or

interest of whatsoever nature in the said premises or portion thereof. It is agreed between the parties hereto that the Licensee shall not grant a sub-licence to any other person or shall not keep any other person in place or stated of the Licensee.”

17. Thus, in view of clause-9 of the agreement read with explanation (b) to Section 24, one has to proceed on the footing that the petitioners cannot claim tenancy. Thirdly, in the case of **Raj Prasanna Kondur v Arif Taker Khan and others, (2005) 4 Bom CR 383**, the learned Single Judge has considered Section 7(5) which defines the expression “licensee”, Sections 24 and 55 as also 17 and 49 of the Registration Act, 1908. In that case, leave and licence agreement was executed by the parties on 3.4.2001. The agreement was lodged for registration by the respondent on 31.12.2002, obviously beyond the period of eight months prescribed under the Registration Act, 1908. In paragraphs-11 to 14, it was observed thus :

“11. Plain reading of Section 55(1) would disclose that since enforcement of the said Act, if any premises are allowed to be occupied on leave and license basis, then the agreement in respect of such license has necessarily to be drawn in writing and it should be registered under the Registration Act, 1908. Sub-section (2) of Section 55 clarifies that it would be the responsibility of the landlord to get such agreement registered. Two consequences are enumerated under Sub-sections (2) and (3) of Section 55, in case of failure to comply with the obligation of the landlord to register such agreement. Under Sub-section (2), in the absence of registration of such agreement, the contention of the licensee regarding terms and conditions of the license

would prevail unless proved otherwise. In other words, the contention regarding the terms and conditions by the licensee will have a presumptive value. Secondly, in terms of Sub-section (3) of Section 55 of the said Act, the landlord will warrant penalty of punishment to the extent of three months' imprisonment or fine not exceeding Rs. 5,000/- or both. The said Act nowhere provides for any other consequences for failure on the part of the landlord to get the agreement drawn in writing or being registered. In other words, the said Act specifically provides only for two consequences on account of failure on the part of the landlord to get the agreement registered, as is otherwise required to be done under Sub-section (2) of Section 55 of the said Act. The said failure on the part of the landlord to get the agreement registered, however, does not result in denying other rights assured to the landlord under the said Act. Obviously, therefore, the right of the landlord under Section 24 of the said Act to get the person evicted from the premises of expiry of the license is not curtailed in any manner on account of absence of the agreement being in writing or registered.

12. It is also to be noted that the Explanation Clause (b) to Section 24 of the said Act specifically provides that "an agreement of license in writing shall be conclusive evidence of the fact stated therein." This is in relation to the evidentiary value of the written agreement of licence. It nowhere prescribes that such an agreement is necessarily to be a registered one. Undoubtedly, the conclusiveness spoken of under the said clause is in relation to the facts stated in the written agreement, irrespective of the fact that the agreement is registered or not.
13. The said Clause (b) in the Explanation to Section 24 may, at first glance, appears to be contrary to the provisions under Section 55 of the said Act, since Sub-section (1) of Section 55 requires an agreement to be in writing, besides its registration being mandatory, and Sub-section (2) thereof provides that in the absence of written registered agreement, the contention of the

licensee regarding terms and conditions of the agreement would prevail, unless proved otherwise. It is to be noted that the presumptive value attached to the contention of the licensee in relation to the terms and conditions of the license is for the eventuality of "absence of written registered agreement", whereas, the conclusive evidence spoken of under Clause (b) in the Explanation to Section 24 relates to "facts" stated in the written agreement. Harmonious reading of Section 55(1) and (2) along with the said Clause (b) in the Explanation to Section 24 of the said Act would reveal that though it is mandatory for the landlord to get the agreement of leave and license recorded in writing and registered under the Registration Act, 1908, failure in that regard would warrant consequences as stipulated under Section 55 of the said Act, however, once the matter reaches the stage of evidence, and if there is an agreement in writing, though not registered, even then the facts stated in such agreement could be deemed to be conclusively established on the basis of such written agreement itself and there would be no other evidence admissible in that regard. On the other hand, the provisions of Section 55(2) and 55(3) of the said Act relate to the consequences of failure on the part of the landlord to comply with the requirement of registration of the agreement. In other words though, in terms of Sub-section (2) of Section 55 of the said Act, there will be presumptive value to the contentions of the licensee in respect of the terms and conditions of the agreement in the absence of the registered written agreement, nevertheless, once the agreement is in writing and even though it is not registered, the same, as regards the facts stated therein, would be deemed to have been proved conclusively on production of the agreement itself, and in which case, any presumption arising in relation to the terms and conditions of the license contrary to the facts stated in such agreement would stand rebutted.

14. The contention of the learned Advocate for the petitioner that the absence of registered written agreement would render of license to be invalid and

therefore, it would result in the absence of jurisdictional fact to enable the competent authority to entertain the application under Section 24 of the said Act, cannot be accepted. The jurisdictional fact which is required for the competent authority to entertain the application for eviction under Section 24 of the said Act is the expiry of license for residence in favour of the person occupying the premises and moment the same is disclosed based on whatever material placed before the competent authority, it will empower the competent authority to take cognizance of such application and to proceed to deal with the matter. Absence of registration or even the agreement being not in writing, that would not render the license to be invalid. Undoubtedly, expiry of licence presupposes existence of license prior to its expiry. However, the existence of licence does not depend upon its record in writing or registration thereof. It depends upon the availability of permission by the landlord to another person to use the landlord's premises for consideration and moment those factors are established, the person using the premises would be the licensee within the meaning of the said expression under the said Act. Obviously, the written record in relation to the agreement of licence would be the conclusive proof about the terms of licence and in case of registration of such agreement would help the landlord to avoid the consequences stipulated under Section 55(2) and (3) of the said Act. This is apparent from the definition of the term "Licensee" under Section 7(5) of the said Act which nowhere requires the license granted to occupy the premises for license fee or charge to be necessarily in writing or the agreement to have been registered. If the contention of the learned Advocate for the petitioner is accepted, the provisions of Sub-section (2) of Section 55 of the said Act as well as the Clause (b) to the Explanation of Section 24 would be rendered otiose. No provision of law can be interpreted to nullify the affect thereof or to render the provision to be nugatory."

18. In paragraph-15, the contention advanced on behalf of the licensee that the provisions regarding requirement of registration of

leave and licence agreement found in Section 55(1) of the Act will have to be read along with the list of compulsorily registerable documents under Section 17 of the Registration Act, 1908 was not accepted. It was observed that while providing for the consequences of failure on the part of the landlord to get such agreement registered, the provisions of law in the said Act nowhere exclude unregistered agreement of leave and license to be inadmissible in evidence. On the contrary, the said agreement has been made specifically admissible under Clause (b) of the explanation to Section 24 of the Act which is not in consonance with the provision of law comprised under Section 49 of the Registration Act, 1908. If it was the intention of the legislature that the provision regarding the requirement of registration of leave and license agreement has to be read along with Section 17 of the Registration Act, 1908, nothing would have prevented the legislature to introduce amendment to Section 17 itself or at least to make such agreement inadmissible in the evidence rather than specifically providing for admissibility of such document in evidence as being a conclusive proof of the facts stated therein irrespective of the fact that the agreement is not registered.

19. In view thereof, I do not find any merit in the submission of Mr. Deshmukh that in the absence of registered instrument, the

contention of the petitioners that it is tenancy agreement and not leave and licence agreement cannot be accepted.

20. Mr. Deshmukh submitted that the Commissioner did not deal with the contention based on Section 55 of the Act as also the contention that the petitioners never executed the alleged agreement dated 1.10.2004. A perusal of the order passed by the Commissioner shows that the Commissioner has referred to explanation (b) to Section 24 of the Act as also the decision of **Ramesh Hate** (supra). The Commissioner also considered the decision in **Raj Kondur** (supra).

21. After considering the material on record, I do not find that the authorities below committed any error in allowing the application filed by the respondent under Section 24 of the Act. The petitioners are not in a position to demonstrate that the findings recorded by the authorities below are perverse, being based upon no evidence or that they are contrary to the evidence on record. The petitioners are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Authorities below. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Article 227 of the Constitution of India. Hence, no case is made out for

invocation of powers under Article 227 of the Constitution of India. Hence, Writ Petition fails and the same is dismissed with no order as to costs.

22. At this juncture Mr. Deshmukh orally applies for continuation of the interim order in terms of prayer clause (d) for a period of eight weeks from today. He states that the petitioners are in possession and they have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with the possession. He further states that the petitioners and all adult family members residing with them are ready and willing to give usual undertaking within two weeks from today. Learned Counsel for the respondent opposes said prayer.

23. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be met by continuing the interim order in terms of prayer clause (d) for a period of eight weeks from today subject to the petitioners and all adult members residing with them giving usual undertaking to this Court within two 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 rent, if any, to the respondents within two weeks from today; and
- (v) that in case the applicants are 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.

24. In view thereof, notwithstanding dismissal of Writ Petition, the interim order in terms of prayer clause (d) shall remain in force for a period of eight weeks from today, subject to the petitioners filing undertaking in the aforesaid terms within two weeks from today, with copy in advance to the other side. In case the petitioners do not file undertaking in the above terms and/or arrears of rent are not paid within two weeks from today, the interim order shall stand vacated without further reference to the Court. List the petition for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)

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