

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
CIVIL REVISION APPLICATION NO.247 OF 2016

Annaya Kocha Shetty	]	Applicant
Vs.		
Laxmibai Narayan Satose	]	
(since deceased) through LRs.	]	
Uma Shankar Padte & Ors.	]	Respondents

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Mr. A.S. Khandeparkar i/b Shilpa A. Joshi, for Applicant.
Mr. M.A. Dudhane, for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 16TH JULY, 2018.

P.C.

Heard Mr. Khandparkar, learned Counsel for the applicant and Mr. Dudhane, learned Counsel for respondent No.1 at length.

2. By this Civil Revision Application under section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C') the applicant, hereinafter referred to as 'plaintiff' has challenged the judgment and decree dated 17th August, 2015 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Appeal No. 547 of 2004. By that order, the Appellate Court allowed the appeal preferred by defendant No. 1(b) and quashed and set aside the the judgment and decree dated 20th/22nd March, 2004 passed by the learned Judge, Court Room No.11 of the Court of Small Causes at Mumbai in R.A.D. Suit No.1860 of 1997. The Appellate Court dismissed the suit instituted by the plaintiff. The plaintiff has challenged the order dated 21st July, 2015 passed by the Appellate

Court below Exhibit 32 filed by the plaintiff under Order-XLI, Rule-27 of the C.P.C for adducing additional evidence. By that order, the Appellate Court dismissed the application filed by the plaintiff.

3. The plaintiff had instituted suit for declaration that he is a protected licensee/deemed tenant of the first defendant Laxmibai Narayan Satose (since deceased) by virtue of the provisions of Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act') in respect of Shop No.5 and 6, Samarthashray Vishranti Gruha, Nanabhoy Court, Dr. Babasaheb Ambedkar Marg, Hindmata Junction, Dadar, Mumbai 400 014 (for short 'suit premises'). By way of interim relief, the plaintiff also claimed injunction restraining the defendants from dispossessing the plaintiff from the suit premises without following due process of law. It is the case of the plaintiff that he is carrying on business of hotel in the name of 'Samarthashray Vishranti Gruha'. Defendant No.1 (since deceased) was a landlady. Defendants No.1(a) and 1(b) are the heirs and legal representatives of defendant No.1. Defendant No.2 is the owner of the building known as 'Nanabhoy Court' where suit premises is situate.

4. It is the case of the plaintiff that defendant No.1 lost her husband. She was not in a position to carry on business of hotel in the suit premises. Defendant No.1, therefore, allowed her brother Namdeo Morye to carry on business of hotel. Namdeo Morye was paying Rs. 400/- per month to defendant No.1. Amount of Rs. 400/- per month was not sufficient to defendant No.1. The hotel was totally closed. Defendant No.1 wanted to give the suit premises on leave and licence/sublet so as to augment her income. However, the law prevailing at that time prevented defendant No.1 to sublet the premises or create any leave and licence agreement. With a view to getting over this aspect, document dated 16th August, 1987 was executed between the plaintiff

and defendant No.1. In fact, by that agreement, the suit premises were given on leave and licence basis to the plaintiff. The plaintiff has obtained various licences from the different statutory Authorities for running hotel business from the suit premises. After acquiring the suit premises, the plaintiff had furnished hotel. The utensils in the hotel were unusable and old. Accordingly, they were returned defendant No.1. After acquiring the suit premises, the plaintiff had spent Rs. 27,500/- for repairs of the suit premises including furniture in the hotel. The plaintiff is also paying various charges such as electricity charges, water charges. The plaintiff is paying sales tax in respect of business carried on in the suit premises. By undated letter received by the plaintiff on 28th March, 1997, defendant No.1 called upon the plaintiff to hand over possession of the suit premises, inter alia, contending that the suit premises was merely given for conducting hotel business. The plaintiff, therefore, instituted suit for declaration that as he is in possession of the suit premises from 1st February, 1973, he is a protected licensee or a deemed tenant.

5. Defendant No.1(b) filed written statement resisting the suit. Defendant No.1 (b) contended that hotel business was given to the plaintiff on conducting basis on terms and conditions set out in the agreement dated 16th August, 1967. The plaintiff cannot claim protection under section 15-A on the ground that he is in possession of the suit premises as on 1st February, 1973.

6. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. Both the parties adduced evidence in support of their respective cases. After considering the evidence on record, the learned trial Judge decreed the suit. Aggrieved by that decision, defendant No.1(b) preferred appeal. During pendency of the appeal, the plaintiff filed application Exhibit 32 under Order-XLI, Rule-27 of the C.P.C for adducing additional

evidence which was rejected by the Appellate Court on 21st July, 2015. The appeal preferred by defendant 1(b) was allowed on 17th August, 2015 and suit instituted by the plaintiff was dismissed. Against the order dated 21st July, 2015 passed below Exhibit 32 and the judgment and decree dated 21st July, 2015 passed by the Appellate Court, the plaintiff has instituted the present Application.

7. In support of this application, Mr. Khandeparkar has taken me through;

- (1) the document styled as "Agreement of Conducting" dated 16th August, 1967,
- (2) evidence of plaintiff and his cross-examination
- (3) cross-examination of defendant No.1 (a)
- (4) cross-examination of defendant No.1 (b)
- (5) the trial Court's judgment.

He submitted that the learned trial Judge has considered various clauses of the agreement dated 16th August, 1967 as also attending circumstances. Considering the evidence on record, the learned trial Judge held that nomenclature of the agreement dated 16th August, 1967 was camouflage and in fact under that agreement the plaintiff was inducted in the suit premises. As the plaintiff is in possession of the suit premises as on 1st February, 1973, he is a protected licensee. As against this, the Appellate Court committed error in rejecting application Exhibits 32 made by the plaintiff under Order-XLI, Rule-27. He invited my attention to the application Exhibit 32 as also irrevocable Power of Attorney executed by defendant No.1 Laxmibai Narayan Satose in favour of defendant No.1 (b) Uma Shankar Padate. In recital, it is specifically stated that under an agreement defendant No.1 had given hotel to the plaintiff on leave and licence basis till 31st March, 1997 on the terms and conditions contained therein.

8. Mr. Khandeparkar submitted that this conclusively establishes intention between the parties was of creating leave and licence in respect of the suit premises. In other words, the suit premises were not given for conducting hotel business therein.

9. Mr. Khandeparkar submitted that in the month of June and July, 1967, defendant No.1 reduced the rent from Rs. 1000/- to Rs. 700/- since there was no income. For the month of March, April and May, 1967, although no business was carried out, the plaintiff had paid rent of Rs. 1000/- to defendant No.1. This fact was borne out from paragraph 4 of examination-in-chief of the plaintiff. He submitted that the plaintiff has spent Rs. 27,500/- in 1967 for the purposes of carrying repairs in the suit premises and towards furniture and fixtures. This fact is borne out from paragraph 5 of plaintiff's examination-in-chief. He invited my attention to cross-examination of the plaintiff's witness by defendant No.1(a). The plaintiff deposed that he was not aware whether defendant No.1 Laxmibai sold sixteen big size glasses and fourteen chairs and fifteen tables and other articles and got an amount of Rs. 25,000/-. Mr. Khandeparkar submitted that in fact defendant No.1 Laxmibai sold utensils which were lying in the suit premises and all the utensils lying in the suit premises were purchased by the plaintiff. The plaintiff's witness also denied that during her lifetime, Laxmibai used to visit the suit premises and that Raghunath, defendant No.1(a) visits the suit premises. Mr. Khandeparkar submitted that the suit premises is in exclusive possession of the plaintiff and plaintiff's witness specifically denied visits of Laxmibai during her lifetime and of defendant No.1(a) Raghunath to the suit premises.

10. Mr. Khandeparkar invited my attention to the admissions given by defendant's witness in the cross-examination. He admitted that while Namdeo Morye was carrying on business between 1962 and 1967, all the licences were

standing in the name of defendant No.1 Laxmibai. He admitted that the plaintiff is paying sales tax. He further admitted that schedule of the agreement dated 16th November, 1970 as also schedule of the agreement dated 16th December, 1969 do not bear signature of the parties. He further admitted that after 1967, defendants did not purchase any new utensils and did not hand over the same to the plaintiff for cooking purpose in the hotel. The witness also admitted that they never directed the plaintiff either to appoint any employee or to remove any employee from the hotel business in the suit premises. The witness volunteered that the employees were engaged by the plaintiff and, therefore, the decision to appoint or remove any employee was with the plaintiff. He did not take insurance policy in respect of the hotel business being run in the suit premises after 1967. He admitted that even on 1st February, 1973, suit premises was in possession of the plaintiff as it was not in his possession since 1967.

11. Mr. Khandeparkar submitted that the plaintiff is in exclusive possession of the suit premises since 1967 and continued up to 1st February, 1973. The plaintiff has obtained independent sales tax registration. He is paying electricity charges and water charges. Employees are appointed by the plaintiff and the defendants have no control over them. All these factors clearly indicate creation of leave and licence in favour of the plaintiff and not conducting agreement. As the plaintiff was in exclusive possession of the suit premises as on 1st February, 1973, he is a protected licensee/deemed tenant.

12. In support of his submission, Mr. Khandeparkar relied on following decisions;

- [1] Associated Hotels of India Limited Vs. R.N. Kapoor, 1959 AIR (SC) 1262.

- [2] Union Bank of India Vs. Chandrakant Gordhandas Shah, (1994) 6 SCC 271.
- [3] Varisalli Vs. Abdul Sattar Gulam Hussein (since deceased) and others, 1991 (2) Mh. L.J 1523.
- [4] Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, AIR 1987 supreme Court 117.
- [5] Laxmibai widow of C.K. Shankar Iyers and others Vs. Jhaveri Bansilal Narayandas, Writ Petition No.1256 of 1979 with Writ Petition No.1259 to 1264 of 1979 decided on 29th February, 1980.
- [6] Balasaheb Anantrao Bahirat Vs. Rohidas Bapusaheb Tupe, 2007 (5) Bom. C.R. 839.
- [7] National Sports Club of India and others Vs. Nandlal Dwarkadas Chhabria & Others, 1997 (3) Bom. C.R. 565.
- [8] Vittal Daulat Lad Vs. Ashok Govind Tawade, 2002 (3) Bom. C.R. 475.
- [9] C. Mohammed Yunus Vs. Syed Unissa and others, AIR 1961, 808.
- [10] State of Uttar Pradesh & anr. Vs. U. P. Rajya Khanji Vikas Nigam S.S & Ors, 2009 (Supp.) AIR (SC) 927.

13. On the other hand, Mr. Dudhane supported the impugned order. He has taken me through the Appellate Court's judgment. He submitted that the first agreement was entered with the plaintiff on 16th August, 1967. The said agreement was renewed from time to time till 1985. The plaintiff never objected for executing the conducting agreement post to 1st February, 1973. In other words, the plaintiff accepted that he was conducting hotel business from the suit premises and that the suit premises was not given to him on leave and licence basis. He, therefore, submitted that no case is made out for interfering with the impugned orders.

14. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. On one hand, the plaintiff claims that by agreement dated 16th August, 1967, the suit premises was given to him on leave and licence basis and on the other, defendants claim that hotel business was given to the plaintiff on conducting basis. In order to appreciate these submissions, it is necessary to consider agreement dated 16th August, 1967. The title of this agreement is “Agreement of Conducting”. The plaintiff is described as “conductor”. Following recital is material;

“AND WHEREAS the Owner (Laxmibai, defendant No.1) is desirous of giving the said business on conducting basis and the Conductor (plaintiff) has agreed to take the same for conducting the same upon certain terms and conditions”.

Clause 1 recites that the owner i.e Laxmibai gives to conductor namely the plaintiff herein and the conductor accordingly took for conducting the business i.e hotel business of the owner carried on under the name and style “Shri Samarthashraya Vishranti Graha” in the suit premises and for the purpose of carrying on the same business, the hotel premises and to use fittings and fixtures and furniture and other accessories (more particularly described in the schedule written thereunder) for the period and upon the terms and conditions hereinafter contained.

15. Clause 3 refers to payment of royalty @ Rs. 1000/- per month. Clause 4 requires the plaintiff to incur and pay regularly and punctually all electric bills, water charges, other outgoings of the business including worker's wages, licence fees in respect of various licenses and permits required for the business and further pay and discharge all liabilities and debts of the business from time to time during subsistence of the agreement.

16. Clause 5 recites that rent of the premises shall be paid by the owner (defendant No.1) to the landlord (defendant No.2) and the rent or compensation for the use and occupation of the premises occupied by various occupants of abutting space of the hotel divided into various galas is receivable by the owner and conductor shall not have any claim over the said compensation of the said abutting galas.

17. Clause 7 recites that conductor shall use the said premises for carrying on the hotel business of the owner as aforesaid and he shall not change the name and nature of business. Clause 8 recites that conductor shall carry on and conduct the said business entrusted to him and he shall not give the same to anybody else for conducting or otherwise. Clause 10 recites that the conductor shall use the furniture and fixtures and business accessories as set out in the schedule written thereunder and shall hand over possession of the same along with the suit premises to the owner in the same condition. It is not in dispute that each page of this agreement bears signature of the plaintiff and defendant No.1. Even the schedule attached to the agreement also bears signature of the plaintiff and defendant No.1 Laxmibai.

18. As noted earlier, the learned trial Judge held that the agreement was not for conducting hotel business and in fact, is leave and licence agreement on the basis of which the suit premises was given to the plaintiff and, therefore, the plaintiff is a protected licensee under section 15-A of the Act.

19. As against this, the Appellate Court has considered this aspect from paragraphs 35 onwards of the impugned order. In paragraph 36, the Appellate Court noted that right from 1967 to 1985, agreements were executed by plaintiff and defendant No.1. All these agreements are conducting

agreements. The plaintiff admitted that these agreements were signed by him after following the contents thereof. The Appellate Court observed that the plaintiff now cannot turn around and deny execution of the conducting agreements on the premise that he was not well conversant with English language and therefore, was not aware of contents of the conducting agreements. Upon considering the agreements, the Appellate Court observed that defendant No.1 had granted permission to the plaintiff to run hotel business in the hotel styled as “Shree Samarthshraya Vishranti Gruha” without changing its name and without permission of defendant No.1. Utensils and furniture were also given to the plaintiff for running hotel business which were described in the schedule annexed to the agreement.

20. In paragraph 37, the Appellate Court held that all the terms and conditions of the conducting agreement show that exclusive possession was not handed over to the plaintiff. On the contrary, various clauses in the agreement indicate that defendant No.1 and her legal representatives retained their right to inspect the hotel at any point of time, offer pooja and archa to the photo of Swami Ramdas. In paragraph 38, after considering the evidence on record, the Appellate Court noted that prominent intention of the parties was to give hotel business on conducting basis to the plaintiff. There was no intention on the part of the parties to execute leave and licence agreement in respect of the premises. After considering Sections 91 and 115 of the Indian Evidence Act, 1872 as also considering the evidence on record, the Appellate Court held that the suit premises was given for running hotel business on conducting basis and not on leave and licence basis.

21. Mr. Khandeparkar relied on decisions referred hereinabove. In my opinion, these decisions are not applicable in the present case. Basically, the plaintiff has failed to establish that the suit premises was given to him on leave

and licence basis. On the other hand, defendants have established that the plaintiff was a conductor and was given hotel business on conducting basis.

22. In the light of the aforesaid discussion, I do not find that the Appellate Court has committed any error in allowing the appeal preferred by defendant No.1(b). Equally, I do not find that the Appellate Court committed any error in rejecting application Exhibit 32 filed by the plaintiff under Order-XLI, Rule-27 of the C.P.C. The plaintiff has not made out a case for adducing additional evidence. The plaintiff is not in a position to demonstrate that the findings recorded by the Appellate Court are perverse being based on no evidence or that on the basis of material on record, no reasonable or prudent person would have come to the conclusion arrived by the Appellate Court. The plaintiff is not in a position to show that the findings of the Appellate Court are contrary to the evidence on record. Merely because on the basis of the material on record, another view is possible that, by itself, is no ground for exercising the powers under section 115 of C.P.C. In the result, the Civil Revision Application fails and the same is dismissed.

[R.G. KETKAR, J.]