

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3251 OF 2004

Madhav Keshav Deshmukh ... Petitioner

V/s.

Badrinarayan Bansilal Jaju & Anr. ... Respondents

Mr. Pramod J. Pawar for Petitioner.

Mr. Nitin P. Deshpande for Respondent Nos.1 A to 1D.

CORAM: DAMA SESHADRI NAIDU, J.

DATE : 26th SEPTEMBER 2019.

P. C.:-

Background:

A landlord sues two brothers, his tenants. He fails in the suit. Then he appeals and wins it. Of the two brothers, one challenges the appellate judgment in this writ petition.

2. Let us see how the parties are arrayed. Here, the first respondent is the owner; the petitioner is one of the two defendants in the suit—that is, the second defendant. The first defendant, the other brother, is the non-contesting second respondent.

Facts:

3. The owner filed the suit for eviction on the grounds of rent-default, subletting, non-user, and *bona fide* requirement.

On 24th April 2001, the Trial Court dismissed the suit. It held in the second defendant's favour on all issues. The owner filed Civil Appeal No. 484 of 2001 before the 15th Ad-hoc Additional District Judge and Assistant Sessions Judge, Pune. On 1st January 2004, the appellate Court reversed the trial Court's judgment. It ruled in the owner's favour on all the issues. The second defendant, that is the younger brother, filed this Writ Petition.

4. On the facts, I may note that the owner has pleaded that the first defendant was the original tenant. Over time, he breached the terms of the lease and sublet the property to the second defendant, his own brother, though. According to him, the tenant did not pay the rent for many years. Later, in the early 1980s, he abandoned the leased property and started living elsewhere. In other words, he did not use the leased property, having acquired an alternative accommodation. Besides, the owner has also pleaded that for his expanding family, he needed the property. With the reversed findings, only the second defendant has filed this writ petition.

Submissions:

Petitioner-Second Defendant:

5. In the above factual backdrop, Shri Pramod Pawar, the learned counsel for the petitioner-second defendant, has submitted that the trial Court has properly appreciated the pleadings and the evidence on record and has justly concluded. But appellate Bench, according to him, has gone wrong in

upsetting the trial Court's well-considered findings. He has taken me through the record, especially the trial Court's findings and the evidence of DW 2, who is the tenant under the same landlord. Then, he has submitted that it is the defendants' father that had been the original tenant; he died in 1988. After the father's death, his second son, that is the second defendant, continued to live in the leasehold property. He has also submitted that the first defendant initially lived in the same property. Later, he shifted. But his leaving to another place later hardly affects the petitioner's right as a successor tenant to his father.

6. Shri Pawar has strenuously contended that the petitioner has been living in the property ever since he was born, that is from 1955. And DW2's evidence amply testifies to that effect.

7. About the non-payment of rent, Shri Pawar has drawn my attention to the petitioner's assertions. According to him, soon after the petitioner received the advocate's notice, he replied. He sent the money order, too; but to no avail, as the owner refused to receive it. About the *bona fide* requirement, Shri Pawar asserts that the owner has made a bald allegation without supplying any details about the total number of his family members and the necessity for the additional accommodation.

8. In the end, Shri Pawar has submitted that the first defendant, that is the petitioner's elder brother, has conspired

with the owner and filed a written statement, admitting the landlord's entire case. Yet, that does not affect the petitioner's right as an independent tenant. So he urges this Court to reverse the appellate Court's findings and allow the Writ Petition.

Respondent-Owner:

9. Shri Nitin P. Deshpande, the learned Counsel for the first respondent-owner, has submitted that the landlord discharged his initial burden that the first defendant was the original tenant. In this context, he has drawn my attention to a bunch of rent receipts the owner filed before the trial Court. Once it has been established that the first defendant was the landlord, Shri Deshpande stresses, it does not lie in the petitioner's mouth to assert that their father was the original tenant. Had it been so, the petitioner would have produced at least a sliver of evidence on that count because the burden squarely lay on him.

10. Shri Deshpande has taken me to Section 5(11)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. He contends that any successor to the original tenant could as well remit the rent because the term rent stands defined elaborately and inclusively under the description. Though the petitioner took a plea that his father was the original tenant, even after his death, the petitioner did not make any efforts to remit the rent until the landlord issued a statutory notice.

11. In the alternative, Shri Deshpande also contends that nothing prevented the petitioner from seeking a declaration about his tenancy from 1981-1998, that is when admittedly his elder brother left the tenanted property until the landlord filed a suit.

12. According to Shri Deshpande, the appellate Bench is the final court of fact. And it has examined all aspects of the case and rendered correct findings. So he urges the Court to dismiss the Writ Petition.

13. Heard Shri Pawar, the learned counsel for the petitioner; and Shri Deshpande, the learned counsel for the first respondent.

Discussion:

14. Indeed, the trial Court has framed these issues:

- “1) Does the plaintiff prove that the defendant is a defaulter in payment of rent?
- 2) Does he prove that the defendant no.1 has illegally sublet the suit premises to the defendant no.2?
- 3) Does the plaintiff prove that the defendant no.1 has kept suit premises non-used for the purpose let for more than six months prior to filing the suit?
- 4) Does the plaintiff prove that he required suit premises for his own use and occupation?
- 5) To whom greater hardship will cause?

15. On all these issues, it has favoured the second defendant-petitioner. In the appeal, the appellate Court has formulated identical points and rendered findings entirely in the owner's favour. Because the trial Court's judgment stood merged

with that of the appellate Court, we may consider the points the appellate Court formulated.

16. To begin with, the threshold issue is whether the second defendant, that is the petitioner, has any legitimate claim as the tenant. If the petitioner fails on this issue, all other issues render themselves *non-sequitur*.

17. So I will take up the issue whether the petitioner is a tenant. Indeed, the appellate Court has first considered the rent receipts. It has noted that all the rent receipts the owner produced before the trial Court were in the first defendant's name. And the first defendant did file his written statement admitting the plaintiff's case. I hasten to add, however, that his admission may not prejudice the petitioners if he has an independent right. With the rent receipts, *prima facie*, the owner's plea that the first defendant was the original tenant stood established. So the onus got shifted on to the petitioner to prove that he had been in possession of the property legitimately, say, as a tenant or as a successor to the original tenant—his father.

18. The petitioner has pleaded that it was his father, who had been the tenant and that he has been living in the house ever since he was born, that is from 1955. According to him, though his elder brother left the leasehold property in 1981, his father himself continued to pay the rents. In other words, from the inception, both the father and his two sons continued to live in the same property.

19. According to the petitioner, chronologically, his elder brother left the place in 1981; then, he and his father were living together. Finally, when his father died in 1988, the petitioner alone remained as the tenant.

20. In the context of the above assertions, we may have to note that the petitioner has not produced any iota of evidence that his father was the original tenant. If we were to assume that his father was the tenant, he admittedly died in 1988. The owner's plea that the original tenant, the elder brother, paid the rent until he left the place (1981) stands affirmed by that elder brother. In the face of that assertion, the petitioner could not produce any evidence that his father paid the rent on his name, at least, from 1981 onwards. Much less has he led any evidence to show that after his father's death, he himself paid the rent.

21. Accordingly, the trial Court recorded a finding that though for about a decade, the rent receipts were signed by the first defendant, later the father signed them. But all those rent receipts pertain to 1970. The first defendant left the place in 1982; after that, there were no rent receipts. Even the receipts signed or acknowledged by the father stood in the elder brother's name. I reckon rent may be remitted by any person living in the house or even outside, but in whose name is it paid? That assumes importance. Here, the first defendant was on record as the tenant, at least, as shown by the rent receipts on record. The father, too, I may repeat, signed the rent receipts only in his elder son's name.

22. At this juncture, I may address another aspect Shri Pawar has urged: the Municipal records have shown the petitioner as the tenant. Exhibit – 63 is the extract of the record reflecting the property tax. It refers to the tax paid for 1977-78; it reflects the petitioner's name as the tenant. Shri Pawar has insisted that this document conclusively shows that the petitioner's legitimacy as the tenant or as a successor to the original tenant, his father. And it is officially recognised.

23. I am afraid that plea fails on closer judicial scrutiny. The Municipal Authorities record the names of the occupants as well as the owners liable to pay the property tax. Therefore, a person in occupation of the leasehold property may have his name reflected in the municipal records. Mere physical possession, which the petitioner is admitted to have, cannot be equated with the contractual leasehold rights. Possession is a matter of physical act, and the tenancy is a matter of record—a contractual one, at that. Every person in possession may not hold the tenancy, but every tenant is supposed to have the possession, mediate or immediate.

24. Indisputably, the father and his two sons lived in the property. The tenancy stood in the elder son's name. He left the place in 1981. Then, the father and the second son continued to live in the property. The father died in 1988. After that, only the second son, the petitioner, remained. But he produced no evidence the tenancy was transferred to either his father or himself. Nor has he paid the rent at any point in time. The

municipal record, if ever, only records the fact that the petitioner occupied the property. That entry, serving entirely a different purpose, cannot equal nor does it replace a contractual tenancy—oral or written. Even, DW2, a tenant under the owner, only testified about the petitioner's occupying the property. Nothing more.

25. I, therefore, hold that the property register or the tax register cannot, without any further evidence, compel the Court to conclude the petitioner is the tenant. To conclude, I hold that the trial Court has erred in holding that petitioner must have been the tenant, and that error stood corrected by the appellate Court. Even otherwise, all the findings are findings of fact; they call for no interference.

26. As I have already observed, all other issues have become non sequitur if we accept that the petitioner is not a tenant. Only when we treated the petitioner as the tenant, then did we consider the question of bona fide requirement or other collateral issues. So I hold that those questions need no answer.

The Result:

27. As a result, I dismiss the Writ Petition. No order on costs.

The Reprieve:

The petitioner's counsel wants this Court to suspend the Judgment for a reasonable time to enable the petitioner to vacate the premises. The first respondent's counsel, however, submits that the petitioner has not been residing in the property,

for the electricity bills hardly show any use. Nevertheless, subject to the usual undertaking to be given by the petitioner, I suspend the operation of the Judgment for three months from the day it is uploaded. The petitioners should file the undertaking in three weeks after the upload of the Judgment.

[DAMA SESHADRI NAIDU, J.]