

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6058 OF 2018

Mrs. Eleanor Florence Noronha

...Petitioner

Versus

Mr. V. Sheshadri

...Respondent

....

Mr. Owen Menezes i/b. Johnson John, Advocate for the Petitioner.

Mr. Rajesh Parab, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 11th MARCH, 2019

P.C.

1. Heard Mr. Owen Menezes, learned counsel for the petitioner and Mr. Rajesh Parab, learned counsel for the respondent, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 9.3.2018 passed by the Additional Commissioner, Konkan Division, Mumbai (for short, 'Commissioner') in Revision No.1293/2017. By that order, the Commissioner partly allowed the Revision Application filed by the respondent herein and set aside the order dated 29.11.2017 passed by the Competent Authority (Rent Act), Konkan Division, Mumbai (for short, 'Competent Authority') in Case No.77/2009. The Commissioner remitted the matter to the Competent Authority for fresh enquiry.
3. By order dated 12.6.2018, notice for final disposal was issued to the respondent and in the meantime ad-interim order in terms of

prayer clause (b) was granted. The petitioner was directed to file compilation of documents before the next date of hearing and serve copy in advance on the other side.

4. In view thereof, Rule. Mr. Parab waives 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. The petitioner herein instituted the proceedings under Section 24 of the Maharashtra Rent Control Act, 1999 (for short, 'Act') by filing Case No.77/2009 before the Competent Authority for recovery of possession of Flat No.41, 4th floor, "Andre", Plot No.105, St.Leo Road, Bandra (West), Mumbai – 400 050 (for short, 'suit premises') *inter alia* contending that the suit premises admeasures 707 sq. ft. carpet area. The share certificates and maintenance bills in respect of the suit premises stand in her name. The petitioner is lawful and legal owner and bonafide member of Andre Co-operative Housing Society Ltd. (for short, 'society'). The society is a tenant Housing Society and is duly registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 bearing registration No.BOM/HSG/K-2457/1987 on 4.12.1987. The petitioner obtained friendly loan from the respondent which was to be

repaid in installments without any specific agreement or terms as to the date of repayment. Between April, 1985 and May, 1987 the petitioner obtained loan of Rs.3,17,000/- from the respondent. It is her case that she had repaid the entire friendly loan to the respondent between July, 1986 and December, 1989.

6. In support of her contention that she is owner of the suit premises, the petitioner relied upon :

- (i) agreement for purchase of the suit premises dated 3.12.1985 entered into by and between Trisons Builders (for short, 'Builder') and the petitioner,
- (ii) allotment letter dated 29.5.1987 issued by the Builder to the petitioner for taking possession of the suit premises,
- (iii) housing loan raised by the petitioner from Pfizer Limited,
- (iv) application for Provident Fund Loan taken by the petitioner from Pfizer Limited
- (v) Approval of the loan and payment made and received directly in the name of the Builder,
- (vi) Electricity bills in respect of the suit premises,
- (vii) Share certificate of the society, and
- (viii) Receipts of payments made to Builder.

7. The petitioner also contended that the suit premises was given to the respondent on leave and licence basis for a period of 33 months commencing from 1.12.1992. It is the case of the petitioner that after expiry of the licence period, she called upon the respondent on

several occasions to vacate the suit premises and hand over vacant and peaceful possession of the same to her. By letter dated 11.9.2006, the respondent gave certain options, set out therein, to the petitioner. One of the options of the respondent was to accept him as a tenant of the suit premises on long term basis, which was not accepted by the petitioner.

8. By letter dated 18.7.2009, the petitioner called upon the respondent to confirm whether he would pay licence fee @ Rs.70,000/- per month so that legal documents could be drawn. Reminder was sent to him on 22.7.2009. By reply dated 23.7.2009, the respondent falsely claimed that he is the owner of the suit premises. By reply dated 20.8.2009, the petitioner terminated the leave and licence agreement and called upon the respondent to quite, vacate and hand over peaceful possession of the suit premises to her. As the respondent did not hand over possession of the suit premises, the petitioner filed proceedings under Section 24 of the Act before the Competent Authority on 25.11.2009. Along with the application under Section 24 of the Act, the petitioner also filed list of documents on which she relied. One of these documents was agreement of leave and licence dated 1.12.1992.

9. It appears that the respondent instead of filing application for leave to defend or affidavit seeking leave to defend, filed written statement on 8.1.2010. By order dated 13.9.2010, the Competent Authority treated the written statement as an application for leave to

defend. Aggrieved by that decision, the petitioner filed Revision Application before the Commissioner being Revision No.681/2010. By order dated 31.1.2012, the Commissioner allowed Revision Application and set aside the order dated 13.9.2010 passed by the Competent Authority and directed that the eviction proceedings initiated by the petitioner to proceed exparte.

10. Aggrieved by that decision, the respondent instituted Writ Petition No.2527/2012 before this Court. This Court referred to Section 43(4) of the Act as also decision in Prakash H. Jain Vs. Marie Fernandes, (2003) 8 SCC 431 and dismissed the Writ Petition filed by the respondent. On the oral application made by the respondent, the proceedings before the Competent Authority were stayed till 9.7.2012.

11. It appears that after remand, application was made on 1.4.2015 for taking on record the original document. By order dated 7.12.2015, the Competent Authority rejected that application. Application was made on 21.12.2015 by the petitioner for marking the documents as Exhibits prior to commencement of cross-examination. By order dated 15.2.2016, the Competent Authority rejected that application. Aggrieved by that order, the petitioner instituted Revision Application before the Commissioner. By order dated 20.2.2017, the Commissioner rejected the revision application and confirmed the orders dated 7.12.2015 and 15.2.2016 passed by the Competent Authority. Aggrieved by the orders

dated 7.12.2015 and 15.2.2016 passed by the Competent Authority as also the order dated 20.2.2017 passed by the Commissioner, the petitioner instituted Writ Petition No.4911/2017. After hearing both sides, by order dated 3.5.2017 the Writ Petition was allowed and this Court set aside all the orders and directed the Competent Authority to proceed in accordance with Section 43(4)(a) of the Act and adjudicate upon the application filed under Section 24 of the Act on that basis. On the oral application made on behalf of the respondent, this Court granted ad-interim order for a period of eight weeks.

12. Ultimately by order dated 29.11.2017, the Competent Authority allowed the application filed by the petitioner under Section 24 of the Act and directed the respondent to hand over vacant and peaceful possession of the suit premises to the petitioner. The respondent was directed to pay to the petitioner double the rate of the monthly license fees, which was fixed at being equal to the monthly actual outgoings as per term No.5 of the Leave and License agreement dated 1.12.1992 from the date of termination of the agreement i.e. from 1.10.2009 till the date vacant possession of the suit premises is delivered to the petitioner.

13. Aggrieved by that decision, the respondent preferred Revision under Section 44 of the Act before the Commissioner. By the impugned order, the Commissioner partly allowed Revision Application and set aside the order of the Competent Authority and remitted the

matter to the Competent Authority for fresh enquiry. It is against this order, the petitioner has instituted present petition.

14. In support of this petition, Mr. Menezes submitted that the Commissioner committed several errors of law apparent on the face of record while passing the impugned order. He submitted that the Commissioner has virtually ignored the orders passed by this Court, firstly dated 18.4.2012 in W.P. No.2527/2012 and secondly dated 3.5.2017 in W.P. No.4911/2017. He submitted that once the application/affidavit for leave to defend is not filed, the consequences provided in Section 43(4) (a) of the Act must follow. The Commissioner was, therefore, not justified in remitting the matter to the Competent Authority. In fact, the Commissioner is in contempt of the orders passed by this Court in W.P. Nos.2527/2012 & 4911/2017. He, therefore, submitted that the impugned order deserves to be set aside thereby restoring the order dated 29.11.2017 passed by the Competent Authority.

15. On the other hand, Mr. Parab supported the impugned order. He raised following contentions :

- i. Leave and licence agreement is not on record;
- ii. The alleged leave and licence agreement was for a period of 33 months commencing from the year 1992 and expiring in the year, 1995. The proceedings under Section 24 of the Act are instituted in the year 2009 and, therefore, are hopelessly barred

by law of limitation;

- iii. No license fee or charges are fixed in the leave and licence agreement;
- iv. The Competent Authority did not record any reason while passing the order dated 19.11.2017; and
- v. Since the order passed by the Commissioner is of remand, no case is made out for interfering with the impugned order.

16. Mr. Parab relied upon the decision in **Shashikant G. Mehta Vs. Soonoo Minoo Khajotia and others, 2011 (4) Mh.L.J. 247** contend that the payment envisaged by clauses-2 and 5 of the leave and licence agreement are not the monetary terms. He submitted that as the respondent was not liable to pay any license fee or charge, the Competent Authority had no jurisdiction to entertain and try application under Section 24 of the Act. For all these reasons he submitted that no case is made out for interfering with the impugned order.

17. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the application filed by the petitioner under Section 24 of the Act shows that along with the application, she filed list of documents on which she relied upon. Sr. No.11 in the list is the agreement of leave and licence between the parties dated 1.12.1992. In paragraph-2 of the order dated 29.11.2017, the Competent Authority

also recorded that the petitioner has produced on record, among others, leave and licence agreement dated 1.12.1992. It is, therefore, not possible to accept the submission of Mr. Parab that the leave and licence agreement is not on record.

18. Mr. Parab submitted that the payment envisaged by clauses-2 and 5 of the leave and licence agreement are not the monetary terms. He submitted that as the respondent was not liable to pay any license fee or charges, the Competent Authority had no jurisdiction to entertain and try application under Section 24 of the Act. It is not possible to accept this submission. Clauses-2 and 5 of the leave and licence agreement read thus :

- “2. The licensor agrees that the premises will be used by the Licensee as a place of residence. The Licensee hereby agrees to bear all the expenditure and revised taxes as applicable and indemnifies the Licensor of all expenses that may arise.
- 5. Compensation for use and occupation of the said flat by the Licensee as described above, along with the parking space, shall be by way of actual municipal taxes, society maintenance charges and utility expenses, and car parking fee as charged by the Society and payable by the Licencee.”

19. A perusal of the leave and licence agreement shows that the same was entered into by and between the petitioner on one hand and the respondent on the other. Clause-2, extracted hereinabove, recited that the respondent will use the suit premises as a place of residence and

admitted to bear all the expenditure and revised taxes as applicable. Clause-5 thereof, extracted hereinabove, provided that the compensation for use and occupation of the suit premises by the respondent along with the parking space shall be by way of actual municipal taxes, society maintenance charges and utility expenses and car parking fee as charged by the society and payable by the respondent.

20. Mr. Parab relied upon the decision of **Shashikant Mehta** (supra). Paragraphs-19 and 20 of that report read thus:

“19. In the present case the perusal of the relevant clause of the agreement dated 3rd July, 1970 would be material, which reads thus

“It is agreed that the said Khajotia has allowed the said Mehta to use garage No. 11 in the aforesaid premises for a period of five years without payment of any rent or compensation by the said Mehta.”

20. It can thus clearly be seen that license from 3rd June, 1970 for a further period of five years was without payment of any rent or compensation by the Petitioner. It can thus clearly be seen that on 1st February, 1973 the Petitioner was not a "licensee" as defined under Sub-Section 4(A) of Section 5 of the said Act.”

21. I have already extracted clauses-2 and 5 of the Leave and Licence agreement in the earlier part of the order.

22. Thus, the decision in **Shashikant Mehta's** case (supra), does not advance the case of the petitioner. I, therefore, do not find any merit

in the submission of Mr. Parab that there was no license fee or charge payable by the respondent to the petitioner and, therefore, the Competent Authority had no jurisdiction to entertain and try the proceedings.

23. Mr. Parab submitted that the application filed by the petitioner under Section 24 of the Act in the year 2009 was hopelessly barred by law of limitation as by efflux of time the licence expired in the year 1995. I do not find any merit in this submission. As mentioned earlier, there was correspondence exchanged between the parties and finally by notice reply dated 20.8.2009, the petitioner was called upon to vacate the suit premises and hand over possession of the suit premises to the petitioner. The petitioner terminated the licence from 1.10.2009. The petitioner thereafter filed application under Section 24 of the Act on 25.11.2009. In view thereof, it cannot be said that the application under Section 24 of the Act filed by the petitioner is barred by law of limitation.

24. Finally, Mr. Parab submitted that the Competent Authority did not record any reason while passing the order dated 29.11.2017. I do not find any merit in this submission as well. In the present case, the respondent did not file application/affidavit for leave to defend. Section 43(4)(a) of the Act reads thus :

“43. Special procedure for disposal of applications .--

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(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,”**

25. Thus, section 43(4)(a) lays down that 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) is precluded from contesting the prayer for eviction from the suit premises, unless within thirty days of the service of summons on him, 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.**

(emphasis supplied)

26. That apart, in the earlier round of litigation before this Court, this Court directed the Competent Authority to proceed under Section 43(4)(a) of the Act as no leave to defend was obtained by the respondent. The Competent Authority accordingly allowed the application by passing order dated 29.11.2017. The Commissioner, however, totally misdirected himself in observing that the Competent Authority hurriedly and without following due process of law kept the matter for final argument and passed the order. The respondent ought to have been given an opportunity to prove his defence. Without giving such opportunity which resulted in curtailing the rights of the respondent as protected under Constitution of India. In my opinion, the findings recorded by the Commissioner are totally perverse and are without considering the statutory effect laid down under Section 43(4)(a) of the Act.

27. In view thereof, the impugned order of the Commissioner cannot be allowed to stand and is liable to be set aside. Accordingly, impugned order dated 9.3.2018 passed by the Commissioner in Revision No.1293/2017 is set aside. The order dated 29.11.2017 passed by the Competent Authority is restored. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)