IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12432 OF 2018

Ajay Brahmadin Mishra … Petitioner
Vs.
Ashok Kailashnath Tiwari … Respondent

Mr. Lokesh D. Zade for Petitioner.
Mr. A. M. Saraogi for Respondent.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 18, 2019

P.C. :

Heard Mr. Zade, learned Counsel for the petitioner and Mr.Saraogi, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order dated 24.04.2018 passed by the Additional Commissioner, Konkan Division, Mumbai (for short 'Commissioner') in Revision Application No.16 of 2018. By that order, the Commissioner partly allowed the Revision Application filed by the respondent under Section 44 of the Maharashtra Rent Control Act, 1999 (for short 'Act') and set aside the order dated 12.12.2017 passed by the Competent Authority (Rent Act), Konkan Division, Mumbai (for short 'Competent Authority') in Case No.1 of 2017. The Commissioner remitted the matter to the Competent Authority for fresh hearing.

3. Rule. Mr. Saraogi waives service for the respondent. 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.

4. The petitioner filed proceedings under Section 24 of the Act for

recovery of possession of flat No.201, second floor, 'B' Wing, Venus Mansion, plot No.20/21, Sector-20, Airoli, Taluka and District Thane, Navi Mumbai (for short 'suit premises'), inter alia contending that he is the owner of the suit premises. The petitioner had purchased the suit premises from M/s. Goodwill Builders and Developers through its Proprietor Mr. Qamar Ahmed Khan. The petitioner relied upon Memorandum of Understanding dated 27.09.2008, letter dated 20.08.2009 and Agreement of Sale dated 09.09.2016. The parties entered into leave and licence agreement on 10.06.2010 for the period of 33 months commencing from 10.06.2010 to 10.03.2013.

5. After the expiry of leave and licence agreement, petitioner requested the respondent to handover possession of the suit premises. The respondent did not handover possession. It is the case of the petitioner that respondent agreed to pay security deposit of Rs.25,000/- and licence fee of Rs.6,500/- per month. After the expiry of the licence on 10.03.2013, the compensation was to increase 10% after every 11 months. Thus, the respondent was inducted as a licensee in the suit premises. As he did not handover possession of the suit premises, the petitioner issued notice dated 10.12.2015. Even thereafter, respondent failed and neglected to vacate the suit premises. The petitioner therefore, issued notice dated 11.03.2016 calling upon the respondent to vacate the suit premises. This was followed by legal notice dated 19.10.2016. For the first time, respondent gave reply on 13.12.2016 dealing with contentions of the petitioner and refused to handover possession of the suit premises. The petitioner, therefore, instituted proceedings under Section 24 of the Act.

6. The respondent, on the other hand, contended that he had acquired the possession of the suit premises by virtue of oral agreement with Sushil Kumar @ Vijay Kumar Mishra, partner of M/s. C. B.

Infrastructure. He had paid Rs.19,00,000/- towards consideration for purchasing the suit premises. He has also instituted Special Civil Suit No.48 of 2017 before the Court of Civil Judge, Senior Division, Thane for specific performance, declaration and injunction. The respondent contended that the Leave and Licence Agreement is a forged one as he never signed the said document and also the stamp of Rs.100/- was brought in the name of the third person namely, Sushil Kumar Mishra. The receipts relied by the petitioner are forged and fabricated documents. The respondent never received letters dated 10.12.2015 and 11.03.2016 as claimed by the petitioner. The respondent contended that he had paid consideration of Rs.14,00,000/- in cash and remaining amount of Rs.5,00,000/- by cheque through RTGS in the account of M/s. C. B. Infrastructure.

7. By order dated 12.12.2017, the Competent Authority rejected the application made by the respondent for leave to defend. On the same day, the Competent Authority allowed the application made by the petitioner under Section 24 of the Act and directed the respondent to handover peaceful possession of the suit premises to the petitioner. The Competent Authority further directed the respondent to pay a sum of Rs.1,50,000/- towards the compensation till subsistence of Leave and Licence Agreement and double the rate of monthly licence fee i.e. Rs.18,000/- per month from the expiry of Leave and Licence Agreement i.e. from February, 2015 till handing over possession of the suit premises to the petitioner. Aggrieved by that decision, respondent preferred Revision under Section 44 of the Act, which was allowed by the impugned order. It is against this order, petitioner has instituted the present Petition.

8. In support of this Petition, Mr. Zade strenuously contended that the Commissioner was not justified in setting aside the order of the

Competent Authority. He has invited my attention to the - (i) Leave and Licence Agreement dated 10.06.2010, and in particular recitals and clauses 2 and 3; (ii) receipt dated 22.03.2014; (iii) Agreement of Sale dated 09.09.2016 between M/s. Goodwill Builders and Developers and the petitioner herein.

9. Mr. Zade submitted that the suit premises belongs to the petitioner. The respondent was inducted as a licensee in pursuance of the Agreement of Leave and Licence dated 10.06.2010. In view of explanation (b) to Section 24 of the Act, an agreement of licence in writing is conclusive evidence of the fact stated therein. The Competent Authority rejected the application for leave to defendant and allowed the application filed by the petitioner under Section 24 of the Act. As against this, the Commissioner held that the respondent had paid Rs.5,00,000/- by cheque in the name of M/s. C. B. Infrastructure. The Commissioner also held that the stamp paper is not purchased in the name of the petitioner or respondent. He submitted that the stamp paper is purchased in the name of Sushil Kumar B. Mishra, brother of the petitioner. He submitted that the Commissioner was, therefore, not justified in setting aside the order of the Competent Authority and remitting the matter to the Competent Authority for fresh hearing.

10. On the other hand, Mr. Saraogi supported the impugned order. He submitted that respondent specifically contended that respondent had agreed to purchase the suit premises for a valuable consideration of Rs.20,00,000/-, which was reduced to Rs.19,00,000/-. The respondent made payment of Rs.14,00,000/- between September 2010 and January 2014 and amount of Rs.5,00,000/- was paid by cheque drawn in the name of M/s. C. B. Infrastructure in the month of March, 2014. The respondent contended that the entire consideration for purchasing the

suit premises is paid by him. He submitted that not only that, the respondents have also instituted Suit for specific performance of contract and the same is pending. The Commissioner was, therefore, justified in passing the impugned order. He invited my attention to the findings No.2, 7 and 8 recorded by the Commissioner. He, therefore, submitted that no case is made out for interfering with the impugned order.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. On one hand, petitioner is contending that respondent was inducted as a licensee in the suit premises on the basis of the Leave and Licence Agreement dated 10.06.2010 and on the other, respondent claims to have purchased the suit premises. A perusal of the Leave and Licence Agreement dated 10.06.2010 shows that Rs.25,000/- was paid towards the security deposit by the respondent. The licence fee agreed between the parties was Rs.6,500/- per month. The licence was for a period from 10.06.2010 to 10.03.2013 and the licence fee was to be increased @ 10% after every 11 months. It is the case of the petitioner that respondent had paid licence fee upto May, 2010 and thereafter did not pay the licence fee.

12. My attention was invited to the receipt dated 22.03.2014 where the respondent agreed to pay licence fee to the petitioner. It is, however, material to note that if the petitioner claims that respondent had not paid the licence fee from June, 2011 onwards, no document is produced to show that at any time, petitioner called upon the respondent to pay the licence fee. That apart, the registered Agreement for Sale was executed on 09.09.2016. It is also evident from record that the respondent had paid Rs.5,00,000/- by way of cheque. The Commissioner, while

allowing the Revision Application, referred to payment of Rs.5,00,000/- by way of cheque. The Commissioner also considered the submission of the petitioner that amount of Rs.5,00,000/- was paid by the respondent towards licence fee. The Commissioner noted that Rs.5,00,000/- was not paid to the petitioner but was paid by way of cheque in the account of M/s. C. B. Infrastructure, where the petitioner is one of the partners. The Commissioner, therefore, held that the amount was not paid towards the licence fees. The Commissioner also noted that if the respondent had failed to pay the monthly compensation, why petitioner did not call upon the respondent to vacate the suit premises by issuing letters / notices. The Commissioner also observed that the Leave and Licence Agreement is not a registered instrument and the stamp paper is also not purchased in the name of the petitioner.

13. It is no doubt true that explanation (b) to Section 24 of the Act lays down that an agreement of licence in writing is conclusive evidence of the fact stated therein. In the present case, it is not in dispute that petitioner did not call upon the respondent to pay licence fee from May 2011 till 2014. If at all respondent was inducted in the suit premises as a licensee and he failed to pay licence fee from May, 2011, the petitioner would have certainly called upon the respondent to pay the licence fee. This fact assumes importance in the backdrop of the fact that an amount of Rs.5,00,000/- was paid by way of cheque in the account of M/s. C. B. Infrastructure and the said cheque was realized. Prima facie, the transaction between the parties is not of leave and licence but the respondent agreed to purchase the suit premises. As mentioned earlier, respondent has also instituted Suit for specific performance of contract and the Suit is pending. In view thereof, respondent has made out a prima facie case for grant of leave to defend his case. The Competent Authority, on the other hand, rejected the application for leave to defend

and allowed the application filed by the petitioner under Section 24 of the Act. The Commissioner rightly set aside that order and remitted the case to the Competent Authority for fresh hearing. In my opinion, the Commissioner should have granted leave to defend to the respondent and thereafter directed the Competent Authority to proceed with the matter from the stage of Section 43(3)(c). In view thereof, the Petition deserves to be partly allowed in the following terms:

a. The impugned order dated 24.04.2018 is modified;

b. The application for leave to defend made by the respondent stands granted. The Competent Authority shall follow the procedure laid down under Section 43(4)(c) onwards;

c. The parties shall appear before the Competent Authority on 04.03.2019 and for that purpose, no fresh notice be issued to them;

d. The Competent Authority shall fix a suitable date and proceed from the stage of Section 43(4)(c);

e. All contentions of the parties on merits are expressly kept open;

f. Rule is partly made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

Minal Parab