

Bhailal Hukamchand Shah and Another

Vs

Narandas Shamji (Deceased) By His Lrs and Another

Civil Appeal no. 3808 of 1989

(K. Jagannatha Shetty, A. M. Ahmadi JJ)

12.09.1989

JUDGMENT

AHMADI, J. –

1. Special leave granted.

2. This appeal is directed against the judgment of the High Court of Bombay in Writ Petition No. 1949 of 1983 whereby the High Court dismissed the writ petition filed by the present appellants. The brief facts giving rise to this appeal are as under :

The respondent Narandas Shamji (deceased) was the owner of Room No. 7 situated on the ground floor of Narayan Niwas, Podar Estate, Malad (East) Bombay-64 (hereinafter called the 'suit premises'). The said owner filed a suit for ejection against his tenant Navinchand Mohanlal Barfiwala in the Court of Small Causes at Bombay. Eviction was sought on the ground that the tenant was in arrears of rent from March 1, 1967 and had failed and neglected to pay the same despite service of notice; that the tenant had acquired suitable residence at Vile Parle and had shifted to the said residence since the last about one year and that the suit premises had remained locked since then. Before filing the suit on July 6, 1967, a notice terminating the tenancy was issued on September 7, 1966 and served on the tenant at the newly acquired residence. Along with the suit a notice of motion was taken out on July 8, 1967 to restrain the defendant from inducing a third party in the suit premises under a leave and licence agreement and an ad interim injunction was obtained to that effect on the same day which was later confirmed on August 21, 1968. In the meantime contempt proceedings were initiated on August 6, 1967 alleging that the tenant had induced the appellants herein in disobedience of the interim injunction of the court. The notice in the said contempt proceedings was discharged by the court in view of the facts disclosed in the affidavit filed by the appellant B. H. Shah and the contents of the leave and licence agreement Ex. 5 dated April 1, 1967. The learned Judge while taking note of the said agreement observed as under :

"The same is for 11 months starting from April 1, 1967. Obviously, therefore, the premises are occupied by B. H. Shah since April 1, 1967 i. e. since before the plaintiff took out the notice and the order of ad interim injunction was served on the defendant."

3. Against the said order a civil revision application was filed in the High Court but the same came to be dismissed. The tenant did not contest the eviction suit and an ex parte decree for eviction was passed therein on October 8, 1973 solely on the ground that the tenant had acquired a suitable residence elsewhere and had kept the suit premises locked for over 6 months prior to institution of

the suit. It may here be mentioned that notwithstanding the observations made by the court in the contempt proceedings the owner did not choose to make the appellant B. H. Shah party to the eviction suit.

4. The eviction decree was put to execution. The appellants obstructed the execution of the warrant for possession on the ground that they were in actual occupation of the suit premises since April 1, 1967 as licensees of the tenant and were, therefore, protected by virtue of Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter called 'the Act') as amended by Maharashtra Act 17 of 1973. It would be convenient to refer to relevant provisions which have a bearing on the question at issue at this stage. The newly inserted Section 15-A (1) reads as under :

"15-A. (1) Notwithstanding, anything contained elsewhere in this Act or anything contrary contrary in any other law for the time being in force, or in any contract, where any person is on the 1st of February, 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purpose of this Act; the tenant of the landlord, in respect of the premises or part thereof, in his occupation."

5. Section 14 (2) may also be extracted. This sub-section reads as under :

"14 (2) Where the interest of a licensor, who is a tenant of any premises is determined for any reason, the licensee, who by Section 15-A is deemed to be a tenant, shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord, on the terms and conditions of the agreement consistent with the provision of this Act".

6. It is obvious on a bare perusal of these two provisions that the legislature intended to give protection to the licensees against exploitation by the licensor and/or the owners of the premises. It, therefore, provided that persons in occupation on February 1, 1973 under a subsisting licence shall, for the purpose of the Act, be treated as statutory tenants and will receive protection as such under the Act. Section 15-A which begins with a non-obstante clause and overrides any law or contract to the contrary lays down that where any person is in actual possession of the premises, or any part thereof which is not less than a room, as a licensee on February 1, 1973, he shall be deemed to have become, for the purpose of the Act, the tenant of the landlord, in respect of such premises or part thereof, in his occupation. Section 14 (2) provides that where the interest of a licensor/tenant of such premises is determined for any reason, the licensee, who by Section 15-a is deemed to be a tenant, shall, subject to the provisions of the Act, be deemed to have become the tenant of the landlord, on the same terms and conditions to the extent they are consistent with the provisions of the Act. The appellants herein contend that they were in actual occupation of the suit premises since April 1, 1967 and at any rate before February 1, 1973 under the agreement of leave and licence, Ex. 5, and, therefore, they are entitled to the protection of Section 15-A and are also entitled to be deemed to have become the tenants of the landlord for admittedly the interest of the licensor/tenant in the suit premises was determined by the eviction notice dated September 7, 1966. Therefore, when the ex parte decree of October 8, 1973 was put to execution on February 11, 1975, the appellants obstructed the execution of the warrant of possession and hence the decree-holder was constrained to apply to the trial court for removal of the obstruction under Order XXI, Rule 97 of the Code of Civil procedure. The owner contended that the obstructionists, were inducted in the suit premises on or about August 1, 1967 after service of the interim injunction on the tenant and hence they had no

right to remain in possession of the suit premises by virtue of Section 15-A read with Section 14 (2) of the Act. The executing court came to the conclusion that the appellants were not entitled to protection since they were inducted after the service of ex parte injunction order on the tenant and were not, on their own saying, in exclusive possession of the suit premises prior to February 1, 1973. It, therefore, directed execution of the warrant for possession by removing the obstructionists.

7. Against this order the appellant referred an appeal which was heard by a bench of the Small Cause Court, Bombay. The appellant court also opined that the appellants were not in exclusive possession of suit premises under a subsisting licence prior to February 1, 1973 and that the tenant was not entitled to grant any such exclusive possession in the face of the interim injunction of the court. In this view that it took the appeal was dismissed.

8. The appellants, then moved the High Court by way of writ petition. The High Court came to the conclusion that the courts below had not committed any error in concluding that the appellants were not granted exclusive possession of the suit premises. It also took the view that the appellants were not in actual exclusive possession of the suit premises on February 1, 1973 under a subsisting licence. In that view that it took, it dismissed the writ petition, which has given rise to this appeal under Article 136 of the Constitution.

9. Mr. Soli J. Sorabjee, the learned counsel for the appellants, contended that the courts below had completely misread the evidence on the question of the appellants being in actual and exclusive possession of the suit premises, Ex. 5 is the leave and licence agreement dated April 1, 1967. The document recites that on the licensee having requested the licensor to permit him to use and occupy the premises, the licensor has agreed to allow him to do so for a period of 11 months. The evidence is that the duration was extended from time to time by mutual consent. Clause 5 of the document stipulates that the "licensee shall not let, sublet, or allow any other man or transfer the tenancy or this agreement without the previous permission of the licensor". Clause 6 further provides that the licensor had handed over the fixtures and furnitures to the licensee as per list signed by both the parties. It is manifest from these clause that the licensee was permitted to use and occupy the suit premises, exclusively. This inference is fortified by the averments in the eviction notice and the complaint that the tenant had vacated the suit premises and had shifted his residence to Vile Parle, a suburb of Bombay. The learned trial Judge, therefore, rightly observed that according to the averments in the complaint, the cause of the landlord was that the tenant had acquired suitable residence in Vile Parle sometime in June 1966 and had shifted there locking the suit premises. While taking out the notice of motion of interim injunction, the owner apprehended that the tenant may induct a third party in the suit premises. On July 13, 1967 the owner's wife filed a complaint that despite the court's injunction, she had asked a third party to occupy the suit premises. Thereafter cross-complaints were filed on August 1, 1967, the owner's wife complaining of third party's induction while the licensee complaining of wrongful interference in the occupation of the premises. This was followed by contempt proceedings were ultimately discharged on the trial court coming to the prima facie conclusion that the appellants had occupied the premises under the licence agreement with effect from April 1, 1967 i. e. before the ex parte injunction was issued and served on the tenant. It may be that the appellants started to reside in the suit premises regularly from August 1, 1967 which led to filing of cross-complaints but that cannot improve matters for the landlord since possession was taken earlier on April 1, 1967 and the injunction was obtained subsequently and that too against the tenant only.

10. The learned counsel for the landlord placed considerable emphasis on the fact that in the counter filed in the notice of motion taken out for the grant of interim injunction it was contended on behalf

of the appellants that they were in joint possession of the suit premises with the tenant. The courts below, therefore, came to the conclusion that this averment itself negated the claim of the appellants that they were put in exclusive possession of the suit premises. This fact has weighed considerably with all the three courts. It must be remembered that this averment was made at a point of time when admission of the fact that the appellants were in exclusive possession would in law tantamount to inviting eviction. The appellants have frankly stated that they made the above averment on the advice of their advocate. They have conceded that that statement of fact is not accurate. The question which the courts were required to answer was whether the appellants were right in stating that they had made the said averment under compulsion on the advice of their lawyer having regard to the state of law then prevailing. Instead of enquiring into the same all the three courts below held against the appellants on the plea that they had no regard for truth. But the courts below have failed to realise that the case of the landlord-owner in the eviction notice as well as in the plaint was that the tenant had vacated the suit premises, lock, stock and barrel, locked it and had shifted to Vile Parle since about June 1966. The eviction decree was solely on the finding that the tenant had vacated the suit premises and shifted to Vile Parle. The plea of joint possession now sought to be pressed by the landlord therefore flies in the face of the case set up by him in the suit and the premise on which the decree was granted. Besides, the suit premises consists of a single room measuring 18' X 8'. It is, therefore, not possible to believe that two families would jointly occupy the same notwithstanding the acquisition of suitable accommodation at Vile Parle by the tenant. Viewed in this context it becomes evident that the claim of joint possession put up by the appellants in defence of the notice of motion was presumably on legal advice to avoid eviction.

11. The courts below, therefore, committed a grave error in omitting to examine the appellants' contention that the averment regarding joint possession was made on legal advice to avoid eviction under law as it then stood and in brushing it aside on the ground that the appellant had no regard for truth. True it is, they made incorrect statements to protect their possession but that did not entitle the courts below to refuse to examine their explanation in this behalf. Even the owner tried to take advantage of this statement by departing from the case put up in the plaint and the basis on which he secured the ex parte decree. We are, therefore, satisfied that the finding of joint possession is clearly against the weight of evidence on record. We are, therefore, constrained to interfere with the findings of fact recorded by the courts below as it has resulted in miscarriage of justice.

12. In view of the above, we come to the conclusion that the appellants were put in possession of the suit premises under the agreement of leave and licence dated April 1, 1967. After obtaining possession the appellants took some time (presumably to carry out changes in the 1, 1967. Since no interim order was obtained against the appellants they were entitled to reside in the suit premises, possession whereof they had secured earlier possession before July 8 1967, although they shifted their residence to the suit premises later, they were not committing any breach of the interim injunction granted in the suit against the tenant subsequently. In this view that we take Order XXI, Rule 102, Civil Procedure Code can have no application.

13. In view of the above discussion we come to the conclusion that the appellant B. H. Shah was in actual possession of the suit premises since before February 1, 1973 and is therefore, entitled to the protection of Section 15-A (1) and to the benefit of Section 14 (2) of the Act. The courts below were wrong in directing eviction of the appellants from the suit premises in pursuance of the warrant of possession issued in the execution proceedings taken out on the strength of the ex parte decree passed in Suit No. 3549 of 1967 on October 8, 1973. The appeal is allowed. The order of eviction passed by all the three courts below against the appellants is set aside and it is held that the appellant B. H. Shah is entitled to protection under Section 15-A (1) read with Section 14 (2) of the

Act. In the facts and circumstances of the case there will be no order as to costs.

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