

Mani Nariman Daruwala and Bharucha (Deceased) through LRs. and others

Vs

Phiroz N. Bhatena and others

Civil Appeal No. 2135 (arising out of S.L.P. (Civil) No. 16512 of 1990) and Civil Appeal No. 2136 of 1981 (arising out of S.L.P (Civil) No. 8729 of 1991) (with I.A. No. 1 of 1991)

(B. C. Ray, S. C. Agrawal JJ)

30.04.1991

JUDGEMENT

S. C. AGRAWAL, J.:-

1. Special leave granted. Delay condoned and special leave granted.

2. We have heard counsel for the parties in these appeals which arise out of the judgment dated October 5, 1990 passed by the High Court of Judicature at Bombay in Writ Petition No. 1491 of 1984 filed under Art. 227 of the Constitution of India and they are disposed by this common judgment.

3. Briefly stated the facts are as follows :

Premises comprising Block D, on the 3rd Floor of Contractor Building at Bai Awabai Kashinath Road, Bombay, was let out by the owners to one Nadirshaw P. Bhatena (hereinafter referred to as "Bhatena") on a monthly rent of Rs. 57.30 paise. The appellants in the appeal arising out of S.L.P. No. 16512/ 90 (hereinafter referred to as 'the appellants) are the owners of the said premises. The other parties to these proceedings are also described with reference to the said appeal. The tenancy of Bhatena was terminated by notice dated November 6, 1969 and thereafter he continued in occupation of the premises as a statutory tenant by virtue of protection conferred by the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Bombay Rent Act). On October 12, 1971, Bhatena permitted respondent No.5 and his wife, respondent No. 6 to occupy, as licensees, for a period of 11 months, a portion of the said premises, consisting of two rooms with common user of kitchen under an agreement dated October 12, 1971, executed by respondent No. 5. Under the terms of the said licence agreement, respondent No. 5 agreed to pay by way of compensation for use and occupation a sum of Rs. 325 per month and paid a sum of Rs. 3575/- to Bhatena towards the said compensation for a period of 11 months. He also deposited a sum of Rs. 5,000/- with Bhatena under the terms of the agreement dated October 12, 1971. Bhatena died on November 15, 1971 leaving behind respondents Nos. 1 to 4 as his heirs. Respondents Nos. 5 and 6 continued to remain in occupation of that portion of the premises given to them as licensees after the death of Bhatena. The Bombay Rent

Act was amended by Maharashtra Act No. XVII of 1973, which came into force with effect from February, 1973. By the said amending Act, S. 15A was inserted whereby it was provided that where any person is in occupation of any premises or any part thereof as a licensee on February 1, 1973, he shall be deemed to have become for the purposes of the Bombay Rent Act the tenant of the landlord in respect of the premises or part thereof in his occupation. In the meanwhile, in March, 1972, the landlords filed an Ejection Application (E.A. No. 88 /E of 1972) in the Court of Small Causes at Bombay under S. 41 of the Presidency Small Cause Courts Act, 1882 against respondents Nos. 1 to 4 wherein it was stated that after the death of Bhatena, statutory tenancy had come to an end on November 15, 1971, the date of his death, and the defendants (respondents Nos. 1 to 4) were liable to deliver the vacant possession of the premises and it was prayed that the defendants be ordered to vacate the premises. Respondents Nos. 5 and 6 were not impleaded as parties in those proceedings. In the said proceedings, respondents Nos. 1 to 4 filed their written statement wherein it was claimed that they have inherited the tenancy and that they were entitled to continue in possession of the premises as tenants after the death of Bhatena. Respondents Nos. 1 to 4 did not, however, defend the proceedings and, the said proceedings were decided ex parte against them by the Court of Small Causes at Bombay vide order dated July 14, 1978 whereby respondents Nos. 1 to 4 were ordered to hand over vacant and peaceful possession of the premises on or before August 31, 1979.

4. It appears that in 1973 respondent No. 5 had also filed a declaratory suit (No. 1506/5225/73) against respondents Nos. 1 to 4 whereby he sought a declaration that he is the tenant in respect of the premises in his occupation and sought a permanent injunction restraining the defendants (respondents Nos. 1 to 4) from disturbing the plaintiff's enjoyment, possession and use of the said premises in any manner whatsoever except by the due process of law. In the said suit, respondent No. 5 asserted that the licence was subsisting in his favour on February 1, 1973 and he should be deemed to have become a tenant in accordance with the provisions of S. 15A of the Bombay Rent Act. The said suit was also not contested by respondents Nos. 1 to 4 and it was decreed ex parte against them on March 2, 1979.

5. Since the vacant possession of the premises was not handed over to the appellants by August 31, 1978 in accordance with the order dated July 14, 1978 passed in the Ejection Application the appellants took out warrant of possession and when they tried to execute the same through bailiff on September 12, 1978, respondents Nos. 5 and 6 raised an objection that they have a right to occupy the premises and they refused to hand over the possession.. Thereupon, the appellants took out 'an obstruction notice to remove]respondents Nos. 5 and 6 as well as for a general order the moving all, persons, which would be found from the premises., In the said proceedings, the appellants, submitted that respondents Nos. 5 and 6 have no legal right in the premises and that they cannot claim any protection under the provisions of the Bombay Rent Act as amended, by Maharashtra Act XVII of 1973, inasmuch as the licence was not subsisting in their favour on February 1, 1973. Respondents Nos. 5 and 6 submitted their reply to the obstruction notice wherein it was stated. that the eviction application filed by the appellants under S. 41 of the Presidency Small Cause Courts Act was misconceived and that the order passed therein was without jurisdiction and is not executable. It was claimed that respondents Nos. 5 and 6 have the right to occupy the premises lawfully and they are in lawful possession of the same and that they are protected licensees and the order passed on the eviction application in which they were not impleaded as parties is not binding on them. The said obstruction notice was disposed of by the Judge, Court of Small Causes at

Bombay, by his order dated February 17, 1982 whereby the said notice was discharged. It was held that the eviction application filed by the appellants under S. 41 of the Presidency Small Cause Courts Act was not maintainable and the order passed on the said application was a nullity having been passed by a Court having no jurisdiction. As regards the right of respondents Nos. 5 and 6 under the licence, the learned Judge held that since the contractual tenancy of Bhatena had already been terminated before the date of the grant of the licence, he had no right to grant a licence in favour of respondents Nos. 5 and 6 and they could not claim any protection on that basis under the amended provisions of the Bombay Rent Act. The learned Judge was, however, of the view that since the order passed on the eviction application was a nullity, it was open to respondents Nos. 5 and 6 who were in possession of the premises to challenge the said order. The appellants filed an appeal against the said order which was decided by the Appellate Bench of the Court of Small Causes at Bombay by order dated November 23, 1983. The Appellate Bench agreed with the finding recorded by the Judge, Court of Small Causes at Bombay that the order dated July 14, 1978 passed on the eviction application was a nullity inasmuch as the application filed, by the appellants under S. 41 of the Presidency Small Cause Courts Act was not maintainable and the Court had no jurisdiction to entertain and decide such an application. The appellate Bench, however, disagreed with the view of the Judge, Court of Small Causes at Bombay that respondents Nos. 5 and 6 could not claim to be protected licensees and held that a statutory tenant can create a licence and that the licence that was created in favour of respondents Nos. 5 and 6 by Bhatena was perfectly legal. The appellate Bench further found that the said licence was continued after the death of Bhatena and the same was not revoked at any time and it was subsisting on February 1, 1973 and, therefore, respondents Nos. 5 and 6 had acquired a right to become a deemed tenant protected under S. 15A of the Bombay Rent Act. In that view of the matter, the appellate Bench upheld the order of the Judge, Court of Small Causes at Bombay discharging the obstruction notice and they dismissed the appeal of the appellants. Feeling aggrieved by the said order of the appellate Bench, the appellants filed a petition under Art. 227 of the Constitution in the Bombay High Court which was dismissed by the High Court by judgment dated October 5, 1990. The High Court has set aside the finding recorded by the appellate Bench of the Court of Small Causes about respondents Nos. 5 and 6 being entitled to claim protection under S. 15A of the Bombay Rent Act and has held that the licence created in favour of respondents Nos. 5 and 6 by Bhatena or by his legal heirs stood revoked by efflux of time and, therefore, there was no question of respondents Nos. 5 and 6 being protected under the Bombay Rent Act. The High Court has, however, held that if it is found that the order dated July 14, 1978 was without jurisdiction and a nullity, it could be resisted by any party at any time at any stage whenever it is put in execution and, therefore,' respondents Nos. 5 and 6 were entitled to raise objection to the same. The Bombay High Court has upheld the findings of the Courts below that - the order dated July 14, 1978 passed on the eviction application under S. 41 of the Presidency Small Cause Courts Act was a nullity and on that view the writ petition filed by the landlords was dismissed.

6. Feeling aggrieved by the said decision of the Bombay High Court dismissing their writ petition, the appellants have moved this Court. Respondents Nos. 5 and 6 have also approached this Court to challenge the finding recorded by the High Court against them on 'the question that they are not entitled to Rent Act.

7. Dr. Y. S. Chitale, the learned counsel appearing for the appellants has submitted that the Courts below have erred in holding that the eviction application filed under S. 41 of the Presidency Small Cause Courts Act was not maintainable and that the order dated 14th July, 1978 passed on the said application was passed by a Court without jurisdiction and was a nullity. He has urged that the jurisdiction of the Court to entertain a suit has to be determined on the basis of the averments

contained in the plaint and that in the eviction application that was filed by them the case that was put forward by the appellants was that after the death of Bhatena, the tenancy came to an end and the legal heirs of the deceased tenant did not acquire any right to continue in occupation of the premises and in view of the said averments the said application was maintainable under S. 41 of the Presidency Small Cause Courts Act. In this regard, Dr. Chitale has placed reliance on the decisions of this Court in *Raizada Topandas v. M/s. Gorakhram Gokalchand* (1964) 3 SCR 214: (AIR 1964 SC 1348), *O. N. Bhatnagar v. Smt. Rukibai Narsindas* (1982) 3 SCR 681 : (AIR 1982 SC 1057) and *Sanwormal Kejriwal v. Vishwa Co-operative Housing Society Ltd.* (1990) 2 SCC 288. Dr. Chitale has also urged that even if it be assumed that the eviction application was not maintainable under S. 41 of the Presidency Small Cause Courts Act and the order dated July 14, 1978 was an order passed by a Court without jurisdiction it is not open to respondents Nos. 5 and 6 to challenge the same and that too in proceedings in execution under O. 21, R. 97, C. P. C.

8. Shri R. F. Nariman, the learned counsel appearing for respondents Nos. 5 and 6 has, on the other hand, submitted that the licence granted in favour of respondents Nos. 5 and 6 was subsisting on February 1, 1973, as found by the Appellate Bench of the Court of Small Causes and that respondents Nos. 5 and 6 were entitled to claim protection as deemed tenant under S. 15A of the Bombay Rent Act and that the High Court, in exercise of its jurisdiction under Art. 227 of the Constitution was in error in setting aside the finding of fact recorded by the Appellate Bench. Shri Nariman has also urged that since respondents Nos. 5 and 6 are to be treated as deemed tenants under S. 15A of the Bombay Rent Act, eviction proceedings under S. 41 of the Presidency Small Cause Courts Act were not maintainable and the order dated July 14, 1978 passed in the said proceedings was an order passed by a Court without jurisdiction and it was a nullity and it was open to respondents Nos. 5 and 6 to raise an objection about execution of the order dated July 14 ' 1978 against them in the execution proceedings filed by the appellants. Shri Nariman has placed reliance on the decisions of this Court in *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* (1986) 3 SCR 866: (AIR 1987 SC117) and *Kiran Singh v. Chaman Paswan* (1955) 1 SCR 117: (AIR 1954 SC 340).

9. Respondents Nos. 1 to 4 have adopted an ambivalent attitude. In the Eviction Application they had filed their written statement -opposing the said application but did not take further part in the proceedings and allowed the said proceedings being decided ex parte against them. In the declaratory suit filed by respondent No. 5 also they allowed an ex parte decree being passed against them. Before this Court a counter-affidavit had been filed by respondent No. 1 disclaiming any interest in the premises.

10. We will first deal with the question whether the respondents Nos. 5 and 6 can claim protection of S. 15A of the Bombay Rent Act?

11. Section 15A which was introduced in Bombay Rent Act by Maharashtra Act No. XVII of 1973 provides as follows:

(1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day 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 purposes of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-sec. (1) shall not affect in any manner the operation of subsec. (1) of S. 15 after the date aforesaid.

12. Clause (4A) of S. 5 which was introduced in Bombay Rent Act by Maharashtra Act No. XVII of 1973 defines the expression "licensee". The relevant portion of Cl. (4A) of S. 5 is as under:

"(4A) "Licensee", in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge; and.....

13. In order that a person may invoke the protection of S. 15A of the Bombay Rent Act, it is necessary that he should be in occupation of the premises as a licensee, as defined in S. 5(4A), on February 1, 1973 which means that there must be a valid licence granted in his favour and the said licence must be subsisting on February 1, 1973. (See *D. H., Maniar v. Waman Laxman Kudav* (1977) 1 SCR 403 : (AIR 1976 SC 2340) and *Ludhichem Agencies v. Ahmed R. V. Peer Mohamed* (1982) 1 SCR 712: (AIR 1981 SC 1998). A licence can be created by a statutory tenant, i.e., a tenant whose contractual tenancy is terminated and who continues in occupation by virtue of the protection afforded by the Bombay Rent Act and against whom a decree of eviction has not been passed. [See *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* (AIR 1987 SC 117) (supra)].

14. In the instant case, the Judge, Court of Small Causes, had held that respondents Nos. 5 and 6 were not entitled to any protection under the law on the view that after the termination of the contractual tenancy in 1969 Bhatena did not have any right to grant a licence. Relying upon a decision of the High Court wherein it was held that even a statutory tenant can create a licence, the Appellate Bench held that the licence created in favour of the respondents Nos. 5 and 6 by Bhatena was perfectly legal. This view of the Appellate Bench is in consonance with the law laid down by this Court in *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* (AIR 1987 SC 117) (supra). The Appellate Bench was, therefore, right in holding that the licence created by Bhatena on October 12, 1971 in favour of respondents Nos. 5 and 6 was perfectly legal and valid.

15. The question which next arises for consideration is whether the said licence was subsisting on February 1, 1973? This question was not considered by the Judge, Court of Small Causes but it was considered by the Appellate Bench. The Appellate Bench held that the licence was continued by the legal heirs of Bhatena after his death and the same was not revoked at any time and it was subsisting on February 1, 1973. The High Court has disagreed with the said finding of the Appellate Bench and relying upon Cl. (12) of the letter dated October 12, 1971 addressed by respondent No. 5 to Bhatena wherein it has been stated that the agreement would start from October 12, 1971 and would stand automatically determined on September 1-11-1972, the High Court has held that the licence expired on September 11, 1972 by efflux of time. The High Court has further observed that it is not the case of respondents Nos. 5 and 6 that the licence was renewed by respondents Nos. 1 to 4.

16. Was the High Court justified in taking this view and in upsetting the finding recorded by the Appellate Bench? While considering this question it has to be borne in mind that the High Court was exercising its jurisdiction under Art. 227 of the Constitution of India. In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior Court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the Court or tribunal who has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact. (See *Chandavarkar Sita Ratna Rao v.*

Ashalata S. Guram (AIR 1987 SC 117) (supra)). Applying these tests we are unable to persuade ourselves to hold that the findings recorded by the Appellate Bench suffer from such an infirmity so as to justify interference with the said finding under Art. 227 of the Constitution.

17. In the judgment of the Judge, Court of Small Causes, it is mentioned that after the death of Bhatena, respondents Nos. 5 and 6 had filed Declaratory Suit No. 1506/ 5225/ 73 against the legal heirs of Bhatena wherein an ex parte decree had been passed declaring that respondent No. 5 is tenant in respect of a part of premises in his occupation. The plaint of that suit is on record. In the said plaint, it is stated that after the death of Bhatena, the original tenant, respondent No. 1 had addressed a letter dated July 25, 1972 wherein respondent No. 5 has been described as a licensee and reference has also been made to the letter of the advocate of respondent No. 1 dated February 8, 1973 calling upon respondent No. 5 to pay to him the amount of compensation due up to February 11, 1983. In the said plaint, it was also averred that the licence that was created in favour of the plaintiff (respondent No. 5) was subsisting on February 1, 1973. An ex parte decree was passed in favour of respondent No. 5 in that suit and the same is on record. A reference to the same has also been made in the judgment of the Appellate Bench. The letters dated July 25, 1972 and February 8, 1973 are also on the record. In addition, there is a letter dated November 21, 1971 addressed by respondent No. 1 to respondent No. 5 whereby respondent No. 5 was allowed to stay as licensee on the same terms and conditions. It cannot, therefore, be said that there was no material on the basis of which it could be held that the licence in favour of respondents Nos. 5 and 6 was subsisting on February 1, 1973. In these circumstances, we are of the view that the High Court in exercise of its jurisdiction under Art. 227 of the Constitution was not justified in setting aside the finding of fact recorded by the Appellate Bench that the licence in favour of respondents Nos. 5 and 6 was subsisting on February 1, 1973. Once it is held that the licence created in favour of respondents Nos. 5 and 6 was subsisting on February 1, 1973, they become entitled to claim protection as deemed tenant under S. 15A of the Bombay Rent Act.

18. In view of the said protection which is available to them under S. 15A of Bombay Rent Act, respondents Nos. 5 and 6 can be evicted from the part of the premises which is under their occupation as licensees and in respect of which they are deemed tenant under S. 15 A of the Bombay Rent Act only In accordance with the provisions of the said Act. They cannot be evicted from that part of the premises on the basis of the order dated July 14, 1978 passed under S. 41 of the Presidency Small Cause Courts Act, in E.A. No. 88/ E of 1972.

19. The position in respect of the part of the premises which is not covered by the licence created in favour of respondents Nos. 5 and 6 is, however, different and respondents Nos. 5 and 6 cannot claim any protection from eviction in respect of the same. In fact, Shri Nariman appearing for respondents Nos. 5 and 6 clearly stated that he is not claiming protection and he has no objection to the eviction of that part of the premises which is not covered by the licence in favour of respondents Nos. 5 and 6. The order dated July 14, 1978 has not been challenged by respondents Nos. 1 to 4 who were parties to E.A. No. 88/ E of 1972 in which the said order was passed. The law is well settled that the jurisdiction of the Court' to entertain a suit or an application depends upon the averments contained in the plaint or the claim application and not on the defence taken by the adversary party. If the averments on the basis of which the Court has assumed jurisdiction are not established, the Court would dismiss proceedings on ground of failure to prove the jurisdictional fact. [See Sanwarmal Kejriwal v. Vishwa Co-operative Housing Society Ltd. (1990) 2 SCC 288 (supra) In the present case in Eviction Application (E.A.No. 88/ E of 1972), the appellants had stated that the statutory tenancy in respect of the premises came to an end with the death of Bhatena and that the defendants (respondents Nos. 1 to 4) who are the heirs and legal representatives of Bhatena are liable to deliver

over vacant possession of the premises and they have no right of their own in the same. Although in the written statement filed on their behalf respondents Nos. 1 and 4 had claimed that they were tenants of the premises but they did not take any steps to establish the said claim and the matter was decided ex parte against them on the basis of the averments contained in the eviction application. The order dated July 14, 1978 passed against respondents Nos. 1 to 4 in E. A. No. 88 /E of 1972 cannot therefore, be held to be without jurisdiction. Moreover, in appeal arising out of S.L.P. No. 16512/ 90, a counter-affidavit has been filed on behalf of respondents Nos. 1 to 4 wherein it is stated that after the death of Bhatena they did not become tenants of the premises and they have accepted the decree of ejection obtained by the appellants in respect of the premises. The order dated July 14, 1978 must be held to be binding on the said respondents insofar as it relates to the premises other than the part of the premises in respect of which protection of the Bombay Rent Act is available to respondents Nos. 5 and 6. Consequently, respondents Nos. 5 and 6 are entitled to succeed to the extent of the part of the premises which is covered by the licence in respect of which they are entitled to protection under S. 15A of the Bombay Rent Act and the appellants are entitled to succeed in respect of the rest of the premises. The orders of the Courts below discharging the obstruction notice in its entirety cannot, therefore, be upheld and the said obstruction notice taken out by the appellants has to be discharged to the extent of the part of the premises which is covered by the licence and for which the respondents Nos. 5 and 6 can claim protection under S. 15A of the Bombay Rent Act but the obstruction notice must succeed in respect of the rest of the premises and it is directed that the appellants be put in possession of the premises excluding the portion covered by the licence in favour of respondents Nos. 5 and 6.

20. Dr. Chitale has submitted that no amount by way of compensation for use of the portion of the premises in their occupation has been paid by respondents Nos. 5 and 6 ever since and they are continuing to enjoy the same without any payment. It appears that respondent No. 5 had paid to Bhatena a sum of Rs. 3,575 / - by way of compensation for 11 months when the licence was granted on October 12, 1971, and in addition he had deposited with Bhatena a sum of Rs. 5,000/-. It is not claimed by respondents Nos. 5 and 6 that they have paid any further amount by way of compensation for use and occupation. Since the legal heirs and representatives of Bhatena are not claiming any interest in the premises after the death of Bhatena, the compensation payable by respondents Nos. 5 and 6 as licensees should be paid to the appellants. Respondents Nos. 5 and 6 are liable to pay compensation Rs.325/- per month with, effect from October 12, 1971 and after adjusting the sum of Rs. 3,575/- paid to Bhatena, respondents Nos. 5 and 6 should pay the said amount of compensation to the appellants. In S.L.P. No. 16512/90, an interim order was passed by this Court on January 15, 1991 directing respondents Nos. 5 and 6 to pay a sum of Rs. 30,000/- in three equal instalments of Rs. 10,000/- each at an interval of two months and the first of such instalments had to be paid within two weeks from the date of the said order and the second after the interval of two months from such date and they were further directed to pay compensation at the rate of Rs. 325/- per month for the period commencing from January 1, 1991 within February 15, 1991 and will go on depositing the same thereafter every month within 15th of each succeeding month. In furtherance to the said order, it is directed that apart from the sum of Rs. 30,000 / - which is required to be paid in accordance with the said directions of this Court, the balance amount payable by respondents Nos. 5 and 6 towards compensation for the period October 12, 1971 to October 31, 1990 shall be paid in instalments of Rs. 10,000/- each at the interval of two months after the third instalment for the sum of Rs. 30,000/- has been paid. As regards compensation for the period subsequent to December 31, 1990, respondents Nos. 5 and 6 shall pay the same to the appellants as per the directions contained in the order passed by this Court on January 15, 1991.

21. The appeals are disposed of subject to the aforesaid directions with no orders as to costs.

Order accordingly.

</html