

Lilawati H. Hiranandani

Vs

Usha Tandon

Civil Appeal No. 2412 of 1992

(Kuldip Singh, Paripoornan JJ)

20.10.1995

JUDGMENT

PARIPOORNAN, J.

1. The original respondent in Ejectment Application No. 149/929/E of 1966 in the Court of Small Causes at Bombay - respondent in Writ Petition No. 1823 of 1983 (hereinafter referred to as "the original respondent"), is the appellant in this appeal. The original applicant in the said Ejectment Application - petitioner in Writ Petition No. 1823 of 1983 (hereinafter referred to as 'the original applicant'), is the respondent in this appeal. The matter arises in connection with the eviction of the original respondent from the premises, comprised in Flat No. 36, Block No. 30-C, 27-A, Mazgaon Terrace. One Shri Syed Abdul Hamid Kadri was the owner of the entire building. The original applicant was a tenant under Shri Kadri long before 1965. The property was mortgaged to a trust. Pursuant to some litigation, the property was put up for auction on 6-10-1965. Prior to this auction, on 14-8-1965, the tenants of the flat formed a society called Mazgaon Terrace Cooperative Housing Society Ltd. The entire building in question was purchased by the society. The original applicant became a member of the society on 26-9-1965. It is stated that the flat covered by the ejectment application was allotted to the original applicant.

2. The original applicant gave a licence over a portion of the flat in her possession to the original respondent. By notice dated 3-8-1966, the licence was terminated. On 29-11-1966, the ejectment application was filed under Section 41 of the Presidency Small Cause Courts Act, 1882 (hereinafter referred to as "the Act"). In the said proceedings, the original respondent claimed the benefit of Section 42-A - the right of tenancy. The Court repelled the said plea by order dated 17-8-1973. The appeal filed from the aforesaid order, was dismissed on 18-10-1977. Thereafter, the original respondent raised an objection under Section 43 of the Act, contending that the applicant is not entitled to file the application under Section 41 of the Act. By order dated 17-7-1978, the Court of Small Causes, Bombay rejected the said plea relying on its earlier order dated 17-8-1973 passed under Section 42-A of the Act. The original respondent filed Special Civil Application No. 2268 of 1978 before the Bombay High Court and assailed the orders passed under Section 42-A as well as under Section 43 of the Act. Masodkar, J., by judgment dated 6-10-1982 ordered a remit of the matter, for a fresh consideration. The learned Judge held that the plea of the original respondent under Section 43 of the Act should be considered afresh and in case of rejection of the said defence, it is open to the original respondent to challenge the orders made under Section 42-A of the Act. Thereafter, the trial court passed the order dated 24-1-1983 holding that the application filed under Section 41 of the Act by the applicant is not maintainable since the initial title of the applicant as a tenant has come to an end. The original applicant filed Writ Petition No. 1823 of 1983 before the High Court of Bombay and assailed the order of the trial court dated 21-4-1983. By the judgment

under appeal dated 28-11-1991, the learned Single Judge of the Bombay High Court set aside the judgment and order passed by the Small Cause Court dated 21-4-1983 and allowed the application filed by the original applicant. The original respondent after having obtained special leave in Special Leave Petition (Civil) No. 5509 of 1992, has filed this civil appeal.

3. We heard counsel, Mr Harish Salve, Senior Counsel appearing for the appellant, raised two contentions. They are : (i) the original applicant had given a licence to the original respondent while she was a tenant of Shri Kadri and when she became a tenant-member of the society, her old status came to an end, and so, she is disqualified under Section 43 of the Act for obtaining a decree from the Court, and (ii) by the judgment in Special Civil Application No. 2268 of 1978 dated 6-10-1982 the Court had directed that in case the plea of the original respondent under Section 43 of the Act fails, the challenge to the orders made under Section 42-A is open. In the judgment impugned in this appeal, the learned Single Judge was in error in stating that the challenge to the orders passed under Section 42-A cannot be entertained. On the other hand, counsel for the respondent submitted that the judgment passed by the learned Single Judge rejecting the plea made under Section 43 of the Act, is justified. It was further submitted that the plea made by the original applicant under Section 42-A of the Act has no substance.

4. In order to adjudicate the controversy raised in this case, it will be useful to bear in mind the relevant provisions of the Presidency Small Cause Courts Act of 1882 (Act 15 of 1882) :

"41. When any person has had possession of any immovable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rack-rent does not exceed two thousand rupees, as the tenant, or by permission, of another person, or of some person through whom such other person claims.

and such tenancy or permission has determined or been withdrawn,

and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses to deliver up such property in compliance with a request made to him in this behalf by such other person,

such other person (hereinafter called the applicant) may apply to the Small Cause Court for a summons against the occupant, calling upon him to show cause, on a day therein appointed, why he should not be compelled to deliver up the property.

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42-A. Procedure where occupant contests as a lawful tenant, etc. - (1) If in any application pending in the Small Cause Court immediately before the date of commencement of the Presidency Small Cause Courts (Maharashtra Amendment) Act, 1963, or made to it on or after such date, the occupant appears at the time appointed and claims that he is a tenant of the applicant within the meaning of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and in consequence whereof he is entitled to the protection of that Act, and if such claim is not admitted by the applicant, then notwithstanding anything contained in that Act, the question shall be decided by the small Cause Court as a preliminary issue.

(2) An appeal against the decision on the issue shall lie to a Bench of two Judges of the Small Cause Court.

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43. If the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall, if the Small Cause Court is satisfied that he is entitled to apply under Section 41, be entitled to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant on such day as the Court thinks fit to name in such order.

Explanation. - If the occupant proves that the tenancy was created or permission granted by virtue of a title which determined previous to the date of the application, he shall be deemed to have shown cause within the meaning of this section.

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47. Whenever on an application being made under Section 41 the occupant binds himself, with two sureties, in a bond for such amount as the Small Cause Court thinks reasonable, having regard to the value of the property and the probable costs of the suit next hereinafter mentioned, to institute without delay a suit in the High Court against the applicant for compensation for trespass and to pay all the costs of such suit in case he does not prosecute the same or in case judgment therein is given for the applicant, the Small Cause Court shall stay the proceedings on such application until such suit is disposed of.

If the occupant obtains a decree in any such suit against the applicant, such decree shall supersede the order (if any) made under Section 43.

Nothing contained in Section 22 shall apply to suits under this section."

5. There was some discussion as to whether the original applicant gave a declaration to the society regarding the surrender of the earlier tenancy in exchange for the conferment of (tenant) membership of the newly formed Cooperative Society. The learned Single Judge held that the evidence on this aspect is inconclusive. The matter was not pursued thereafter by both the parties. The question which arises for consideration is as to whether the application filed by the original applicant is maintainable when she became a tenant-member of the society. The learned Single Judge held that the tenancy of the original applicant has only changed colour by virtue of the society stepping into the shoes of the original landlord, Shri Kadri, that the original applicant did not cease to be a tenant, that there is no legal determination of the tenancy of the original applicant, that the original applicant has not sold or disposed of the premises but continued in possession of the same. It is only the ownership of the building that has changed and the original applicant tenant, became a part-owner, by the membership in the society in respect of the same premises and her tenancy had not been determined. The tenancy has not ended or ceased or terminated or extinguished. In this view of the matter, the learned Single Judge held that explanation to Section 43 is inapplicable to the instant case, and the plea of the original respondent stating that the title of the applicant has been determined, is without force. The learned Single Judge declined to go into the question whether the provisions of Section 42-A of the Act are applicable as in his opinion the matter was concluded by the earlier order.

6. We are of opinion that the original respondent (appellant herein) (occupant) has failed to show that the permission granted by virtue of a title was determined previous to the date of the

application. The appellant has failed to show cause within the meaning of Section 43 of the Act and the learned Single Judge was justified in holding so. The crucial words in the explanation to Section 43 of the Act to the effect that the "permission granted by virtue of a title which determined previous to the date of the application" predicate that the status of the grantor, (the original applicant) should have been terminated or should have come to an end or ceased or concluded or extinguished. In our opinion, it is not possible to say that the original applicant, admittedly a tenant of the owner, Shri Kadri, ceased to have tenancy right, when the building came to be owned by the society wherein the applicant became a part-owner. The title of the original applicant became 'enlarged' or augmented and was not determined.

7. The appellant's counsel placed considerable reliance on the decision of the Bombay High Court in *K.M. Motwani v. Albert Sequeira* [AIR 1960 Bom 18 : 60 Bom LR 1282] to contend that the title of the original applicant was determined when she became a part-owner of the society. In that case, the second respondent landlord let out the premises to one Robert Nicolas prior to 1947. On 1-12-1947 Nicolas, sublet the premises to the first respondent. In October 1948, the first respondent granted a licence to the appellant in the said appeal. The second respondent-landlord filed a suit for eviction against Nicolas which was decreed in 1950. The legal effect flowing from the said decree was that the tenancy granted to Nicolas was determined. It was terminated. By such termination, the sub-tenancy granted to the first respondent and the licence granted to the appellant also came to an end. The appellant-licensee obstructed when the second respondent-landlord initiated execution. On 13-9-1950, the appellant and second respondent-landlord came to an agreement wherein the appellant was recognised as a tenant. Thereafter, the first respondent sub-tenant filed an application under Section 41 of the Act against the appellant and obtained an order. The appellant filed a suit under Section 47 of the Act, stating that the order obtained by the first respondent under Section 41 of the Act resulted in trespass. The trial court dismissed the suit. The High court of Bombay allowed the appeal. The High Court found that the right of sub-tenant, the first respondent, came to an end when a decree was passed against Nicolas, the tenant. The title of the first respondent sub-tenant by which he gave the licence to the appellant was 'determined' as soon as the tenancy of Nicolas came to an end. The said decision is distinguishable on facts. We are of the view that there is no determination or extinguishment or termination of the tenancy rights of the original applicant in this case, as it happened in the decision reported in *K.M. Motwani* [AIR 1960 Bom 18 : 60 Bom LR 1282]. It is true that the Court also observed that if an application under Chapter VII can be maintained by a person not under an original title but under a different or subsequent title, then the Small Cause Court would have to go into the question of title and that is exactly what the Legislature wanted to prevent and it was clear that it was not contemplated by the Legislature that under Chapter VII of the Small Cause Courts Act the court should go into difficult questions of title. The said decision was rendered before the amendment inserted by Maharashtra Amendment Act (Act 41 of 1963) whereby Section 42-A was brought into force from 1-1-1964. Section 42-A of the Act mandates that if in an application (filed under Section 41) pending in the Small Cause Court, the occupant claims that he is a tenant of the applicant under the Rent Control Act and so entitled to the protection of that Act, and if such claim is not admitted by the applicant, the question shall be decided by the Small Cause Court as a preliminary issue. The decision is subject to an appeal to a Bench of two Judges of the Small Cause Court. After insertion of Section 42-A in Chapter VII, it is envisaged that complicated questions regarding title should be adjudicated by the Small Cause Court in certain cases. To a limited extent, the scheme of Chapter VII of the Act has been altered or changed. So, the broad observations in *K.M. Motwani* [AIR 1960 Bom 18 : 60 Bom LR 1282], regarding the scope and the intention of the legislature with respect to the scheme envisaged by Chapter VII of the Act may require a second look, in an appropriate case.

8. The second and only other contention raised by Mr Salve, Senior Counsel, was that the applicability of Section 42-A of the Act should have been considered by the learned Single Judge. It is true that the said plea was not considered. We informed counsel that since this matter is pending for nearly 30 years, we will ourselves consider the matter. The plea was that the appellant (the original respondent) is a tenant under the Rent Control Act and not a licensee and, so the matter requires investigation and adjudication. Our attention was invited to a letter written by the original respondent to the applicant dated 22-7-1958 appearing at p. 126 of the paperbook. The communication of the original respondent addressed to the applicant states thus :

"To,

Usha Tandon alias Mrs Usha Gopalan,

Dear Madam,

Re : Premises in 'Mazgaon Terrace' at Mazgaon.

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I hereby record that at my request and earnest entreaties you have been kind enough to me to permit me to occupy a part of your flat No. 30/36 in 'Mazgaon Terrace' situated at Mazgaon, which part consists of one hall, one bedroom and one storeroom as your licensee only with intent that no right or interest whatsoever in the said premises or any part thereof is created in my favour.

I hereby further record that I shall at any time whenever required by you and without any objection or hindrance whatsoever, vacate and give quiet and peaceful possession of the said premises to you, but in that event you will inform me at least a month before.

Yours faithfully"

9. The nomenclature or the label for the arrangement is unambiguous. It is only a 'licence'. The appellant sought permission of the original applicant to occupy a portion of the flat belonging to the original applicant. No right, or interest whatsoever in the said premises or any part thereof is created in favour of the original respondent. The appellant also undertook to vacate the building and to give quiet possession to the applicant at any time when required to do so. All that was stipulated was that the information should be given one month before it is so required. The document is clear. The eye need look no further. The Bombay Rent Control Act was in existence ever since 1947. The appellant (the original respondent) as well as the applicant were aware or should be deemed to be aware of the prevailing state of law. They chose to call the arrangement as a 'licence'. Permission was sought to occupy a part of the flat and it was given. In our opinion, the specific label or nomenclature of the arrangement and the contents of the communication, should conclude the matter. It is idle for the appellant to contend that she is entitled to the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as a tenant. We are of the view that the plea based on Section 42-A of the Act is without substance and we repel the same. Our above reasoning and conclusion are in accord with the bench decision of this Court in Swarn Singh v. Madan Singh [1995 Supp (1) SCC 306]. No other point was raised in the appeal. We affirm the judgment of the learned Single Judge dated 28-11-1991 and dismiss this appeal. However, there shall be no order as to costs in this appeal.