

(1999) 03 BOM CK 0108

Bombay High Court

Case No: Writ Petition No. 3531, 3532, 3533, 3534, 3535 and 3536 of 1990

Hiralal Savaichand Shah

APPELLANT

Vs

Shri Vile Parle Shwetambar and
others

RESPONDENT

Date of Decision: March 6, 1999

Acts Referred:

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 15, 5(4A)
- Constitution of India, 1950 - Article 226, 227
- Presidency Small Cause Courts Act, 1882 - Section 41

Citation: (1999) 2 ALLMR 304 : (1999) 4 BomCR 287

Hon'ble Judges: T.K. Chandra Shekhara Das, J

Bench: Single Bench

Advocate: N.V. Walawalkar, for the Appellant; G.S. Hegde and S.K. Chinchalkar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

T.K. Chandra Shekhara Das, J.

Out of the above petitioners, three petitioners filed separate declaratory suits before the Presidency Small Causes Court for a declaration that they are the tenants governed by provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter called as the Act).

2. Hiralal S. Shah filed R.A. Declaratory Suit No. 5399 of 1973, Fatehkumar Motichand Jhaveri filed R.A. Decl. Suit No. 5400 of 1973 and one Shri Jethalal B. Shah filed R.A. Decl. Suit No. 3727 of 1975. During the pendency of this suit Jethalal Shah died and his legal representatives Chancalben J. Shah and others continued the suit. After they filed the suit, the respondent Shri Vile Parle Shwetambar Murtipujak Jain Sangha and Charity Trust, along with its trustees filed Ejectment Applications bearing E.A. No. 185/E/1975, E.A. No. 186/E/75 and 188/E/75 before the suit Court.

The petitioner claimed the tenancy against the respondent in respect of Room No. 13, 14, 16, i.e. Shri Fatehkumar Motichand Jhavari claims Room No. 13, Hiralal Shah claims Room No. 14 and Jethalal Shah claims Room No. 16.

3. After conducting a joint trial of the suits and the applications, the Presidency Small Causes Court decreed the suit in favour of the petitioners, holding that they are the tenants in respect of rooms claimed by them respectively and in the Ejectment Applications, the preliminary objections raised by the petitioners were sustained u/s 41 of the Small Causes Court Act. Against this common judgment, six Appeals were filed by the respondent before the Appellate Court, they are Appeal No. 300/86, Appeal No. 245/86 and Appeal No. 299/86 challenging the decree passed by the trial Court, confirming the tenancy right on the petitioners. Other three Appeals, i.e. Appeal No. 292/86, Appeal No. 295/86 and Appeal No. 325/86 are the Appeals filed against sustainability of the preliminary objections raised by the petitioners herein i.e. the respondents. These Appeals were heard together by the lower Appellate Court. The lower Appellate Court dismissed the suit filed by the petitioners and over ruled the preliminary objections raised before the trial Court by the petitioners herein and the parties are directed to proceed with the Ejectment Applications. It is this common judgment of the Appellate Court that is impugned in all the above writ petitions.

4. I heard the learned Counsel for the petitioner Shri Walawalkar and Shri G.S. Hegde for the respondent with Shri Chinchalkar. The main contention of the respondent Trust before the trial Court was that the respondents were running a sanatorium (Aroghya Bhuvan) under the said Trustees and six people are entertained in the rooms available in Aroghya Bhuvan for convalescence. They are allowed to occupy the rooms for a short period on a consolidated charge of Rs. 40 to 45 per month. It was not the intention of the parties at the time of letting out the rooms to confer any tenancy right over these rooms. On the other hand, the contention of the petitioners before the Court below was that they are tenants, paying monthly rent to the trustees, the landlords. They are occupying these rooms from 1969 to 70 onwards, though originally they are the licensee in respect of the said rooms. But by virtue of section 15(A), which was brought into effect in 1973, they are to be treated as deemed tenants in respect of the premises which are under their occupation on the date of coming into force of the Amendment Act and they are not liable to be evicted otherwise than by the due process of law. In other words their contention is that since they are governed by the provisions of the Rent Act, no application u/s 41 of the Presidency Small Causes Court Act is maintainable.

5. I have gone through the pleadings of the parties and heard the learned Counsels for the petitioners and respondents appearing for the parties in detail. I have also examined the evidence on record. From this it is revealed that there is no serious dispute between the parties about the status of the petitioners, namely that they are the licensee in respect of the room. Both the courts below, particularly, the

Appellate Court proceeded on the basis that they are the licensee in respect of the room in question. The contention of the respondent is that the petitioners are not protected tenants by virtue of section 5(4-A) of the Act for the simple reason that the licensee who is occupying the premises in a Aroghya Bhuvan (Sanitorium) is exempted from the preview of the Act. For appreciating this contention, it is necessary to refer the term licensee which is defined under the Act, u/s 5(4-A), which reads as under:-

"Under section 5(4-A) of the Act, "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 license given for a license fee or charge; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Cooperative Societies Act, 1960; but does not include a paying guest, a member of a family residing together, a person in the service or employment of the licensor, or a person conducting a running business belonging to the licensor, (or a person having any accommodation for rendering or carrying on medical or para-medical services or activities in or near a nursing home, hospital or sanatorium) or a person having any accommodation in a hotel, lodging house, hostel, guest house, club nursing home, hospital, sanatorium, dharmashala, home for widows, orphans or like premises, marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provisions of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges license fee or charge for such premises of the employee or spouse not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or institution; and the expressions "license" Licensor" and "premises given on license" shall be construed accordingly;
(under line supplied)

6. This detailed and exhaustive definition of the licensee as given u/s 5(4)(A) of the Act, is brought about by the legislature for the purpose that an occupier of a hotel or hostel or guest house, or sanatorium for a temporary period for a particular purpose on payment of certain charges has to be excluded from the preview of the "licensee". Otherwise if a patient occupy any room in a hospital to undergo a treatment for fairly long time, can claim the fixity of tenure in respect of that room, which may create confusion and havoc in a society. A hotel owner will not be able to let out his room. A hospital authority cannot provide a room to their patients. A hostel authority cannot allow an inmate. Therefore all probable and possible

contingencies in respect of letting out rooms for a temporary purpose by the hotels, hospitals or sanatorium have been excluded by the legislature from the definition of "licensee". Therefore, in the light of the rival contentions raised in this case, the Court is called upon to see whether a particular building is used for a residential purpose to have the benefits of the licensee under the Rent Act or to occupy the building only as a temporary measure for a particular purpose.

7. In this context, therefore, it has become necessary that how the parties treated this building at a disputed point of time. If there are materials to show that the parties construe and consider the building as a sanatorium and occupied the rooms then, of course, they are not entitled for the benefit of a licensee as envisaged under the provisions of the Act. On the other hand, if the parties construed the building as a place of a residence for all the time and with that intention they occupied the rooms then definitely, it will come under the mis-chief of the word "licensee". Having drawn this battle line between the parties, we have to examine the materials before the Court. In the trial Court, the main contention of the petitioners was that they are Jains and they are occupying the suit, premises in the Jain Bhuvan, which is intended to be let out to the deserving members of the Jain community. They also admit that the respondent is also running an Aroghya Bhuvan which is also in the same compound. The contention of the petitioners is that when they were permitted to occupy the premises in the Jain Bhuvan, the applications that are required to be filled up and signed is in the same form used in the Aroghya Bhuvan and in that form of application, each condition as required and observed for occupation in Aroghya Bhuvan was printed and the respondent took the petitioner's signature on that form to make it appear that they were occupying the rooms in the Aroghya Bhuvan. It is also the case of the petitioner that originally, the so-called Sanatorium has only eight rooms, four on the ground floor and four in the first floor and subsequently another eight rooms were constructed as an extension of that Aroghya Bhuvan (Sanatorium) which consists of ground floor, first floor and second floor. According to the petitioners they are occupying the 3 rooms among the newly constructed rooms. According to them, though the building was constructed as an extension of the Aroghya Bhuvan those rooms were not treated as a part of the Aroghya Bhuvan but as only the Jain Bhuvan which is normally intended to be let out to the members of the Jain Community for residential purpose. In order to establish their case they have examined the erstwhile management trustee- Jagubhai Shah and his version was mainly accepted by the trial Court. He says that the Rooms Nos. 13, 14, and 16, occupied by the petitioners were part of the Jain Bhuvan and they were let out for their residence on a monthly rent. The petitioners also sought to examine the erstwhile Clerk of the Trust Shri Somchand Ishwarlal Dave, who mainly spoke about the applications form given by the respondents at the time of their occupation. The said witness said that the application form has some correction and that he has filed up form "J" in his own hand writing. He says that the word "J" originally written by him was erased and written "Aa" and the suggestion made to him that the

correction was made at the instance of the respondent to make it appear that the rooms occupied by the petitioners was a part of the sanatorium. The trial Court also took into account circumstances that the absence of any subsequent entry made in the record of the Charity Commissioner for using the subsequent room in the Aroghya Bhuvan, as the provision of the Charitable Trust Act any change in the property has to be correspondingly get entered in the record kept by the Charity Commissioner. This was the main circumstances which was taken into account by the trial Court for holding that the petitioners are the licensee under the Rent Act in respect of the Room Nos. 13, 14, and 16.

8. On the other hand the Appellate Court has not treated the application form, signed and given at the time of occupation by the petitioners was intended to create contract of tenancy. It is only the permission for occupants and the form relates to the occupancy of the rooms in the sanatorium. In this case it has come out in the evidence that there is other building which is called Jain Bhuvan where the persons belonging to the Jain Community were occupying it as tenants. The petitioner did not choose to examine any occupants in the Jain Bhuvan to show that while occupying the rooms they also made to sign this form as contended by the petitioners. Therefore, the lower Appellate Court has rightly observed that the form J which was signed and given by the petitioner at the time of their occupation of the rooms, cannot be treated as a document to create the tenancy as contemplated under the Act, In the context of the assertion made by the petitioners, it is necessary for them to establish before the Court that on the basis of the contract of tenancy they have started to occupying the rooms. Pointing out the discrepancy and correction made in the form will not be sufficient to discharge the burden on the petitioners.

9. I find another circumstances against the petitioners which are more glaring in this case. From the witness examined on behalf of the respondent, it has come out on the record that the petitioners were frequently changing the rooms during their stay. For example, Fatehkumar Jhavari was originally occupying the Room No. 7 which was booked in his name by the petitioner but subsequently he shifted to Room No. 12 on his further application. Again he shifted to Room No. 6 and ultimately the period for which the room was allotted was expired. Then he lastly shifted to Room No. 13 and continued there. The witness examined on behalf of the respondent has spoken that the rooms are being given to sick person for a particular period and on application further extension is given for them if there is no other pressure from the waiting list. So also Hiralal Shah, who was first allotted Room No. 14 for a particular period and on expiry of that period on further request he shifted to room No. 5 and after that on his own request he again was allotted to Room No. 14 and he continued there. Similar thing is happened in the case of Shri Jethalal also. First time he was occupying the room No. 6 in 1967 and in 1968 he shifted to Room No. 16 on his request. These circumstances of shifting the rooms from one to another is very strong indication to support the case of the respondent.

If the intention of the party was really to create the tenancy in respect of the rooms which they were originally occupying, there could not have any instance of shifting the rooms at their request. This evidence of the witness examined on behalf of the respondent was not found to be challenged very seriously by the petitioners. So also the rent payable by the petitioner was inclusive of water charge and electricity charges etc. Whereas the rent payable by the tenant occupied in the Jain Bhuvan is liable to pay water charges and electricity charges besides the rent. This is also another telling circumstance that indicates the intention of the parties not to create any license. Therefore, it is clear that the room was given only for a temporary purpose for a temporary period. Normally, people shifted the room of a hotel from one room to another for some other circumstances. The same practice has been followed here also.

Therefore, the lower Appellate Court's findings are to be held to be perverted, warranting in interference by this Court.

10. The learned Counsel for the respondent Shri Hegde also drawn my attention to the another circumstance, where the petitioners filed these petitions only because of the amendment brought about in the Act, as indicated above. The proximity of time between the amendment and of the Act of filing of the suit by the petitioners, will serve as another pointer to this circumstance. This circumstance very much indicates that the occupancy of the room by the petitioner is only as a license of a sanatorium. As I earlier pointed out, the petitioner was occupying the room on the application given by him in the prescribed form which is maintained and applied to the Sanatorium. There are regular tenants who occupy rooms in the Jain Bhuvan. What were the documents given by them at the time of their occupation would have been very valid evidence to establish the claim of the petitioners. That has not been attempted by the petitioners. Therefore, a public trust which is instituted for serving the poor, particularly sick Jains, in the absence of any strong mala fide allegation against the trustees, the trustee cannot be accused of manipulating the record or using the same form for the purpose of the regular tenants in the building. The allegation made against the trustee in this regard, cannot be believed in the facts and circumstances of this case. If the claim of the petitioner is accepted, a Public Trust cannot carry out its activities. The Aroghya Bhuvan is only meant for occupying the sick people in the Sanatorium for their taking rest and convalescence and if it is converted into a tenancy, then the very object of the Trust will get frustrated.

11. The learned Counsel for the petitioners Shri Walawalkar strongly argued and pointed out the circumstance in favour of the petitioners that Room Nos. 9 and 10 in the portion, which was constructed as an extension along with the rooms which are the subject matter of these suits, are not treated the rooms of the sanatorium. Those two rooms bearing numbers 9 and 10 are the regular tenanted rooms. Therefore, this circumstances will strongly indicate that the rooms of the subject matter of the suits also were to be treated as tenanted rooms and not as a part of

the sanatorium. I do not think this circumstance will be of any use to the petitioners. It is not the case of the respondent that entire rooms in the entire building are used for Aroghya Bhuvan or for Sanatorium. As the learned Counsel for the respondents Shri Hegde submits that the Rooms Nos. 9 and 10 and the Hall in the second floor is not used as a part of the Aroghya Bhuvan. This circumstances alone will not therefore, sufficient to discharge burden of the petitioners to prove that they have occupied the rooms as a licensee and not as an occupier of the sanatorium. As I discussed earlier, the circumstances revealed in this case proved against the petitioners and the lower Appellate Authority is justified in setting aside the findings of the trial Court. No illegality or infirmity could be pointed out. May be, certain discrepancies might have been committed by the lower Appellate Authority, in appreciating the evidence, but that does not go to the root of the matter, warranting interference at the hands of this Court in exercise of its power under Article 227 of the Constitution of India.

12. In the result the writ petitions are dismissed with no order as to costs. Rule in all the above writ petitions is discharged accordingly.

13. At this stage the learned Counsel for the petitioners has prayed for an extension of the interim stay, which was granted earlier for another 8 weeks. The request is granted. The interim stay already passed in this case will continue for another 8 weeks.

14. Petitions dismissed.