

(1986) 09 BOM CK 0036

**Bombay High Court****Case No:** Second Appeal No. 356 of 1986, converted from W.P. No. 2255 of 1986

Ratanlal Gulabji Bhati

APPELLANT

Vs

Himmatlal Hukumaji Parihar

RESPONDENT

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**Date of Decision:** Sept. 8, 1986**Acts Referred:**

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 19A, 28, 5(4A)

**Citation:** (1987) 1 BomCR 458**Hon'ble Judges:** Sharad Manohar, J**Bench:** Single Bench**Advocate:** N.S. Manudhane and J.C. Rajani, for the Appellant; M.A. Rane, for the Respondent**Final Decision:** Dismissed

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**Judgement**

Sharad Manohar, J.

By my earlier order dated 18th August, 1986. I had directed the appointment of Receiver in respect of the suit premises and the Receiver was directed to take possession of the suit premises from the defendant and to remain in possession of the same until further orders. There is no dispute that the order has been complied with, at least, substantially. There is some dispute as to whether the possession of all parts of the suit premises have been taken or not. The plaintiff's contention is that a portion of the premises still remains in possession of the defendant in spite of the order of appointment of Receiver passed by me. I will deal with that contention in this judgment a little later. At present, I am delivering the final judgment and I am passing this final order in the Second Appeal.

2. The facts relevant to the appeal have been already set out by me in my said earlier order dated 18th August, 1986 and I direct that the said order should form part of this judgment. I may also mention here that in fact the order was passed

after fully hearing not only Mr. Rane but also Mr. Rajani on all points raised by him in support of the appeal. I passed the said order before the judgment, because I had noticed the deceptive and somewhat fraudulent methods adopted by the defendant for the purpose of defeating the plaintiff's claim. The said conduct of the defendant gave a distinct impression that he was not a man who would allow execution proceedings to take place without further thwarting them by any means fear & foul, mostly foul. It was in the peculiar circumstance that I ordered the Receiver to be appointed for taking possession of the suit property so that the decree would not be defeated in the execution proceeding. After the order was complied with and the Receiver took possession (at least of the substantial portion of the suit premises) and at the time when I was about to deliver the said judgment Mr. Manudhane, the learned Counsel, applied to the Court for hearing him on behalf of the appellant/defendant. By way of courtesy to him, I allowed him to advance his arguments and all that I am required to do in this judgment is to deal with those arguments. I may repeat that this was only a concession given to the learned Counsel by way of courtesy.

3. Mr. N.S. Manudhane has urged three points in support of the Second Appeal, which are as follows :---

(i) that ordinary Court has no jurisdiction to entertain the plaintiff's instant suit, having regard to the provisions of section 28 of the Rent Act;

(ii) that the defendant is a protected licensee within the contemplation of section 15-A of the Rent Act; and

(iii) that no case is made out by the plaintiff in his pleadings of revocation of licence at the expiry of the 1st period of 11 months.

I may state at this stage itself that so far as the 3rd point is concerned, Mr. Manudhane need not have laboured on the said point, because I have not accepted and do not propose to accept the view taken by the District Court to the effect that immediately at the expiration of the 1st period of 11 months mentioned in the Agreement (Exh. 28), the licence granted by the plaintiff to the defendant came to an end ipso facto by the efflux of time.

I find no difficulty in accepting Mr. Manudhane's contention that the defendant continued to be a lawful licensee of the plaintiff even on 1-2-1973 when some licensees of certain categories got such protection under the Rent Act as was previously availed of by the tenants. Question, however, is as to whether the defendant falls in one of these categories of the licensees, who are given protection by the relevant amendment of the Rent Act. In my earlier order dated 18th August, 1986, I have observed, at the end of Para 11 thereof that a licensee who has taken any business in the premises for conducting is not a protected licensee within the contemplation of section 5(4-A) of the Rent Act. Mr. Rajani, who appeared at that time for the appellant-defendant was not in a position to satisfy this Court as to how

he could escape this legal position.

But Mr. Manudhane, who made submissions before me after the Receiver has taken possession, contends that the defendant does not fall in the excepted category of licensees contemplated by the definition of the word "licensees" in the said Act. I will, therefore, deal with this contention in the first instance.

4. The submission of Mr. Manudhane was that the expression---

"but does not include.....a person conducting a running business belonging to the licensor....."

Contemplates cases in which the conductor is only a Manager of the business, but is not in possession of the suit premises. He pointed out that the present defendant was admittedly put in possession of the suit premises and was in fact residing in a small portion of the suit premises. He was thus in occupation of the suit premises and was simultaneously conducting the business carried on in the suit premises. According to Mr. Manudhane, such a person is not a mere conductor of the business and, hence, is not excepted from the general category of licensee sought to be protected by the Rent Act by the relevant amendment.

I see no justification whatsoever for this contention. In the first place, what Mr. Manudhane, wants to urge before the Court in substance, is to read into the definition of the word "merely" before the word "conducting". He wants the Court to read the above mentioned expression as---

"a person merely conducting a running business belonging to the licensor....."

I do not see any reason to import this phraseology and requirement in the section when the legislature did not think it fit to do so.

In the 2nd place, the entire scheme of the defining provision militates against such a construction. Each of the persons who is sought to be protected or sought not to be protected as per the definition of "licensee" is one who is in actual possession of the suit premises. In fact what is protected is the possession of some categories of licensee. The possession of some other categories of licensees is not sought to be protected. If the person was a mere conductor, not in possession of the suit premises, the question of his being excepted from the category would not arise, because on Mr. Manudhane's own showing he would not be in possession. If a licensee is given the same right as is given to the tenant for protection of possession, it would be implicit that a person who is sought to be protected is in possession and when an exception is carved in the section, the person falling in the excepted category must also be in possession of the premises. The statutory contemplation is that possession of some licensee is protected and possession of some other categories of licensees is not protected. It is a well-known rule of interpretation that the words take colour and meaning from the adjacent words and expressions. Since the categories of licensees sought to be protected is of those

who are in possession, it must follow that the person who is conducting the business who is sought not to be protected is also in possession.

5. This brings me to the other points raised by Mr. Manudhane relating to the Civil Court's jurisdiction to entertain the instant suit. It must be stated here that the present suit is filed by the plaintiff on title for possession from a trespasser. If the defendant was only a licensee having no title to the suit premises and if his licence stood revoked validly, then a suit for possession on title is perfectly competent in the ordinary Civil Court, because it is not a dispute between a landlord and tenant. This position would have been there even in the absence of the provision of section 29-A of the Rent Act. But we find that section 29-A very much exists in the Rent Act and as per that said section a suit on title against a trespasser, who was previously a licensee, is perfectly competent.

6. Mr. Manudhane, however, relied upon the judgment of the Supreme Court in the case of Natraj Studios Private Ltd. v. Navrang Studios, reported in 83 Bom.L.R. page 204.

The Supreme Court was called upon in that case to construe the expression "premises" defined by section 5(8) of the Rent Act, with relation to the provisions of section 6 thereof. In that case, what had happened was that the licensor had made over possession of the suit premises as also of the furniture, fixtures and machinery therein and the question was as to whether the suit premises ceased to be "premises" merely because the licence was also in respect of the machinery and fixtures. What is to be noted about that case is that no running business as such was given to be defendant for conducting. Only the premises, fixtures and the machinery was given in possession of the defendant and the defendant was running his own business in those premises, probably with the help of the machinery and fixtures. It was in these circumstances that the Supreme Court held that merely because the machinery as well as the fixtures were given into possession of the licensee, along with the suit premises the premises did not cease to be governed by section 5(8) read with section 6 of the Rent Act.

Relying upon this authority, Mr. Manudhane contended that what is protected generally are the premises. But in the instant case, argues the learned Counsel, it is the "person" who is protected and not only the "premises". According to Mr. Manudhane, the defendant was such a protected "person." The premises were also governed by the Act and hence, it must be held that there is a complete protection given to the defendant by the Act.

I cannot accept the argument at all. To my mind, the above mentioned judgment of the Supreme Court has no application whatsoever to the facts of the case. In that case admittedly there was a running business given to the defendant for conducting. In the present case, more or less noticeably, what was given to the defendant was a business for conducting. No doubt he was inducted into the

possession of the suit premises, but that was because there was a business running in the suit premises and the defendant was to conduct that business. In fact it can be said in the instant case that the conducting of the business was the dominant object and the handing over of possession was, more or less, an incidental thing. In any event, the licence given to the defendant for residing in the premises was thoroughly incidental. I cannot accept the contention that the defendant is not a "person" who also in the categories excepted from the definition of the word "licensee" finding place in the defining section 5(4-A) The premises may be governed by section 6 of the Rent Act; but the plea that, therefore, the defendant is entitled to protection of Rent Act is a misconceived plea and has got to be rejected.

7. So far as the provisions of section 28 are concerned, the plea that the ordinary Civil Court has no jurisdiction can be negated having regard to section 29-A of the Act. But it must fall also on another ground independent of the provision of section 29-A of the Rent Act. It was not disputed even by Mr. Manudhane that so far as the question of jurisdiction is concerned, the court's jurisdiction has to be verified from the averments made in the plaint. This is the result of the well known doctrine of demurrer. A suit between a landlord and tenant for possession of the suit premises or for any other relief arising out of the Rent Act may be barred from the jurisdiction of the Civil Court. But if the plaint shows that the suit is not between a landlord and tenant and if the plaint further shows that the suit is not for any other relief arising out of the Rent Act the question of the application of section 28 itself does not arise.

8. That apart, there is yet another answer to Mr. Manudhane's plea. In the instant case, the Court which tried the suit u/s 28 is the self-same Court which tried the suit on title. Mr. Manudhane contended that the suit filed by a landlord against a tenant, which is governed by section 28 of the rent Act, is no doubt tried by the Civil Judge (J.D.), at Vasai who himself tries a suit by a owner of the property against the trespasser on title. But he contends that capacities of these two courts are different. In the first case, the Court is constituted under the Rent Act; in the other case the Court is one contemplated by the Civil Procedure Code. In the first case, the suit is provided by section 28 of the Rent Act; in the other case, the suit is one contemplated u/s 9 of the C.P.C. According to Mr. Manudhane, the plaintiff should have filed the suit as a rent suit and not as a general suit governed by section 9 of the C.P.C.

The distinction sought to be made by Mr. Manudhane is no doubt ingenious. But a little analysis of the question would give an answer to the same. Supposing the suit was to be dismissed because it is in the Court having no jurisdiction. Then, either the plaint would be returned for presentation in the proper Court, or the suit would be dismissed and the plaintiff would have to file another suit. In which Court, he would file it? In the self-same Court before the self-same Judge and for the self-same relief. The position would have been different if the suit was to be filed in the city of proper Bombay or, say, in the city such as Poona where there are Small Causes Court

established. A suit which can be entertained only by Small Causes Court u/s 28 of the Rent Act cannot be filed in a Civil Court and vice-versa. But when the same Court is entertaining both the suits, the contention that the Court has no jurisdiction to entertain the suit, because it should have been filed under the Rent Act is, to my mind, nothing but a distinction amounting to hair-splitting.

9. Mr. Manudhane also argued that when I decided the question as to whether the defendant falls in the category of excepted licensees or the protected licensees, I was deciding a claim or question arising out of the Rent Act and, according to Mr. Manudhane, the ordinary Civil Court has no jurisdiction to decide the same.

In my opinion, this reasoning is not quite correct. A Court can always decide a jurisdictional fact. If any authority is necessary for this purpose, the same is to be found in the self-same judgment of the Supreme Court in Natraj Studio's case, as the head-note of the said report rightly culls out the ratio of that judgment in this behalf. It states as follows;

"Exclusive Jurisdiction to entertain and try certain suits, to decide certain applications or to deal with certain claims or questions does not necessarily mean exclusive jurisdiction to decide jurisdictional facts also. Jurisdictional facts have necessarily to be decided by the Court where the jurisdictional question falls to be decided, and the question may fall for decision before the Court of exclusive jurisdiction or before the Court of ordinary jurisdiction."

10. The jurisdictional fact in the instant case is as to whether the defendant who was admittedly the plaintiff's licensee was falling in the protected category of licensee contemplated by section 5(4-A) of the Rent Act or whether he fell under the excepted category. When the suit is filed in the Civil Court, the Civil Court certainly has the jurisdiction to adjudicate upon the jurisdictional fact. This is precisely what I have done and upon the examination of the evidence relating to the jurisdictional fact. I have come to the conclusion that the defendant fell not in the protected category of licensee but in the excepted category.

The plea that the Civil Court has no jurisdiction to entertain the suits or the question arising out of the suit must, therefore, be rejected.

11. As mentioned at the time of the admission of the Appeal, this appeal was admitted by me having regard to certain contentions raised by the appellant/defendant. One of the contentions was that although the document (Exh. 28) showed that what was given to the defendant was only a licence, in reality this was transaction of sub-tenancy couched in the phraseology of license with a view to wriggle out of the provisions of the Rent Act. I may state that at the time of the hearing of the appeal this contention was given up and Mr. Manudhane specifically stated before the Court that he was not urging that plea before this Court at all.

In this view of the matter, my view that the intention of the parties while deciding whether the transaction is of lease or licence must be mutual intention and not the unilateral intention of landlord or tenant need not be further discussed in this judgment.

12. The Appeal, therefore, fails and the same is hereby dismissed.

13. In view of the fact that the possession of the suit premises is already with the Receiver, normally speaking all that would be required by me to do would be to direct the Receiver to hand over possession of the suit premises to the plaintiff/respondent, who has succeeded in obtaining a decree for that possession. However, some question has arisen as to whether the Receiver has recovered possession of the suit premises in entirety, as mentioned by the plaintiff in the plaint. Admittedly the Receiver has recovered possession of a substantial portion of the suit premises. An affidavit is, however, filed by the plaintiff/deGREE-holder that a small portion on the rear side of the suit premises continues to remain in occupation of the defendant and possession of the same has not been taken by the Receiver on account of certain misunderstanding. He wants me to resolve that question at this stage itself.

I am not inclined to do so at all. So far as the portion of the premises which has been taken possession of by the Receiver, I order that the Receiver shall hand over possession of the same to the plaintiff forthwith. However, so far as the disputed portion, of which possession is not taken by the Receiver, is concerned, I give liberty to the appellant to institute appropriate execution proceedings and if the Executing Court finds that as per the decree the plaintiff was entitled to recovery of possession of portion in addition to the one possession of which is recovered by the Receiver, the Executing Court will no doubt pass appropriate orders in that behalf. If such an application is made by the plaintiff/deGREE-holder by way of execution of the decree of the District Court which has, in law, merged in the decree of this Court, the Executing Court is hereby directed to resolve the said question within one month from the receipt of the application or from receipt of the writ of this Court, whichever date is later.

The appellant/defendant has also made an application to this Court referring to the articles in the shop, of which he took possession in pursuance of the Agreement (Exh. 28), as mentioned by the plaintiff in the list given in the plaint. According to him, there are certain other articles lying in the shop, which belong to the defendant exclusively and that he is entitled to possession of the same from the Receiver.

The Receiver is directed to verify from the plaint as to which of the articles as are at present in the suit shop are those which are mentioned in the list given in the plaint. If there are any articles in the shop other than those mentioned in the said list, the possession of the same shall be given by the Receiver to the defendant forthwith. The Receiver is directed to make a list of the articles which are to be handed over to

the defendant. He should give the possession of the same to the defendant forthwith. If, however, the defendant does not take possession of the same, the Receiver shall hand over possession of the same into custody of the trial Court and he shall hand over possession of the suit premises and the other articles, mentioned in the plaint, to the plaintiff/decreed-holder thereafter, but without any loss of time.

The plaintiff/decreed-holder is at liberty to withdraw the amount deposited by the defendant appellant in the trial Court by way of mesne profits.

The cross-objection filed by the plaintiff/respondent in this behalf is allowed.

The defendant's appeal is, however, dismissed. The defendant shall pay the costs of this appeal as well as of the cross-objection to the plaintiff/respondent.