(1983) 12 BOM CK 0050

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 2539 of 1979

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| Shantilal Walchand Kothari | | APPELLANT |
| | Vs | |
| Shantabai Purushotam Deshmukh and Others | | RESPONDENT |

Date of Decision: Dec. 7, 1983

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: AIR 1984 Bom 306

Hon'ble Judges: Jamdar, J

Bench: Single Bench

Advocate: A.S., S.A. Bhobde and T.T. Anthony, for the Appellant; J.N. Chnadurkar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. This is tenants petition challenging the appellate order in rent control proceedings commenced on an control application under Clause 13(3) of the C.P. and Berar Letting of Houses and Rent control Order, 1949 (hereinafter referred to as ''the Rent Control Order'') maintaining the order of the Rent Controller granting permission to respondent No. 1 landlady under Clauses 13 (3) (iii) of the Rent Control Order to terminate petitioners tenancy on the ground of subletting.

2. Respondent No.1 landlady filed an applicaiton under Clause 13(3) (ii) and (iii) of the Rent control Order for permission to terminate petitioner''s tenancy of the grounds that the petitioner was a habitual defaulter in payment of rent and that he unauthorised created sub-tenancy in favour or one Pandurang Gulabrao Deshmukh, since deceased, whose legal representatives are present respondents Nos. 2 to 5 .

The Rent Controller held that the petitioners was a habitual defaulter and that he inducted a sub-tenant without written permission of the landlady, and consequently granted permission on both the counts. In the appeal preferred by the petitioner, the Resident Deputy Collector with appellate powers set aside the finding of the Rent controller on the point of habitual default, but maintained the finding on the issue of creation of sub-tenancy. The appellate authority thus maintained the order of the Rent controller so far as it granted permission to respondents No.1 to terminate petitioners tenancy under Clause 13(3) (iii) of the Rent Controller Order. It is this order which is sought to be quashed in this petition.

3. Shri Bobde, learned advocate for the petitioner, contended that the petitioner cannot be evicted from the suit premises under Clauses 13(32) (iii) of the Rent Control Order, because the sub-tenancy was not created by him. According ito him, clause 13(3) (iii) postulates creation of sub-tenancy by the tenant who is sought to be evicted. Shri Chandurkar, learned advocate for respondent No.1 , made two-fold submission. Firstly, he contended that in fact the tenancy ius illegal, then the present tenant can be evicted though sub-tenancy might have been created by the earlier tenant.

4. Clause 13(1) of the Rent control Order lays down that no landlord shall, except with the previous written permission of the Controller give notice to a tenant determining the lease or determining the lease if the lease is expressed to be determinable atr his option; or determining the lease is determinable by efflux of the time limited thereby require of the tenant to vacate the house by process of law or otherwise if the tenant is willing to continue the lease on the same terms and conditions. Such permission can be granted on grounds enumerated in item Nos. (I) to (ix) of sub-clause (3) of Clause 13 of the Rent Control Order, if after hearing the parties the controller is satisfied that one of more if said grounds exist. Clause 13(3) (iii) this lays down that if after hearing the parties the controller is satisfied that the tenant has without the written permission of the landlord sublet the entire house or any portion thereof, the he shall grant the landlord permission to give notice to determine the lease as required by sub-cl.

5. the words "has sublet" appearing in the analogous clause of the Rajasthan Premises (control of Rent and Eviction ) Act, 1950, were interpreted by the Supreme Court in the case Goppulal Vs. Thakurji Shriji Shriji Dwarakadheeshji and Another, . In that case , the question that fell for consideration of their Lordships was whether a tenant could be evicted on the ground of creation of sub-tenancy but before the commencement of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. The question was answered in the affirmative on the following interpretation of the words "has sublet" :

"The present perfect tense contemplates a completed event connected in some way with the present time. The words take within their sweep any subletting which was made in the past and has continued up to the present itime. It does not matter that

he subletting was either before or after Act came into force. All such subletting are within the preview of clause (e)."

6. This decision was followed by Masodkar J. in Hajrat Pirane Chilla of Khwaja Trust, Akola Vs. The Manager, United Transport Motor Co. Ltd. and Others, , while interpreting clause 13(3) (III OF THE Rent Control Order. The learned Judge held that he world ''has sublet'' in Clause 13(3) (iii) of the C.P. and Berar Letting of Houses and Rent Control order indicate that even the subletting prior to coming into force of the Rent control Order was within the purview of Clauses 13(3) (iii). Shri Chandurkar sought to place reliance on these decisions in support of his submissions.

6A. The material question in this case, however, is not when the sub-tenancy was created . The question is who created thee sub-tenancy and whether the present tenant can be evicted on that ground. Admittedly , Pandurang Deshmukh was having his Panthela in the sublet portion since long before the petitioner was inducted as a tenant. Admittedly one Shanker Tukaram was running a hotel in the promises in question till the year 1952 and that he had allowed Pandurang to keep he his Panthela and was Shankar Tukaram, sold his hotel to one Jital Shivath, who was conducting a hotel in the premises in question till 1964. During that time also Pandurang continued to have this his Panthela in the sublet portion. Pandurang did not surrender possession of that portion either to Jital shivnath surrendered his tenancy to respondent No.1 after winding up his business . It is no body case that he petitioner purchased the hotel business as running concern along with good will and tenancy rights. Admittedly what he purchased from Jital Shivnath were the implements of tahat business. It is that would have been the position, then perhaps the petitioner could have been evicted under Clause 13(3) of the Rent Control Order. There is nothing t6o show that either Shanker Tukaram orJital Shivnath had obtained permission from the landlord for keeping Pandurang as a sun-tenant . Hence, respondent No.1 landlady could have evicted Jital Shivnath on the ground of creation of unauthorised sub-tenancy and if the petitioner would have purchased the running business and as an incidence ther of the tenancy rights would have been transferred to him, he also could have been evicted on the ground of creating unauthorised sub-tenancy . But , in the present case, the petitioner did not purchase the running business along with good will and tenancy rights. Admittedly , after Jital Shivnath surrendered his tenancy, petitioner was inducted by respondent No.1 asa a new tenant of the entire premises including the portion which was in possession of Pandurang as a sub-tenant. Two consequences would flow be a direct tenant of respondent No.1 or the petitioner would be deemed to have been inducted freshly by respondent No.1 with the sub-tenancy of Pandurang attorned to him by the landlady. No doubt, the petitioner was received rent from Pandurang and was paying rent of the entire premises to respondent No. 1 with the sub-tenancy of panduranga and was received rent from Pandurang and was paying of the entire premises to respondent No.1 But that does not mean that the sub-tenancy was created by thee petitioner. Even though under Clause 13(3) (iii) the question when

the sub-tenancy a was created is not relevant, who created the sub-tenancy is certainly a relevant consideration. The tenant can be evicted under Clases 13)3) (iii) only if the he creates tenancy of ifd the sub-tenancy is deemed to have been created by him. He will be deemed to have created the tenancy if thee he would have purchased the running business along with good will and tenancy in favour of the petitioner, it cannot be said that sub-tenancy was created by the petitioner. Permission, therfore, cannot be granted for terminating his tenancy under Clause 13(3) (iii) of the Rent Control Order.

7. Shri Chandurkar, learned advocated for the landlady , challenged the finding for the appellate authority on the question of habitual default and contended that even if permission cannot be granted under Clauses 13(3) (iii) of the Rent Control Order, it can still be granted in this petition under Clause 13(3) (II) of the Rent Control Order it can still be granted in this petition under Clause 13(3) (ii0 of the Rent Control Order,, and that it was not necessary for the landlady of to file a separate writ petition for challenging the appellate order on the issue about the petition being a habitual defautler. According to him, the finding of the appellate authority on this issue is clearly perverse and deserves to be set aside. In support of his contention that permission under Clauses 13(3) (ii) can be granted in this petition, Shri Chandurkar place reliance on the decision of the Division Bench of this Court in vithaldas V. mansukhlal 1980 Mah ZLj 612, in which on a reference by a single Judge the learned Judges held that in a petition filed by a party challenging the adverse order passed against him in appeal arising out of the order passed by the Rent Controller, the respondent in such petition can support the order passed by the Rent Controller even on findings which were pronounced against him. They also held that when the landlord seeks permission under the C.P. and Berar Letting of Houses and Rent Control Order for determination of the lease on more grounds than one as provided in clause 13(3) of the Order and if permission is granted to him on some grounds, negativing others, the order is wholly in favour of the landlord so far as the ultimate relief which he prayed for is concerned and he could not have appealed against the adverse finding simply by way of criticism of the judgement.

8. Shri Bobde, however, contended that as no writ petition was filed by respondent No.1 against the order of the appellate authority, rejecting permission under Cl. 13(3) (ii0, it would not now be open to respondent No.1 to reagitate that question in this writ petition which is directed only against the order granting permission under Clause 13(3) (iii) of the Rent Control Order. According to him to allow respondent No.1 to reagitate this question would be varying or extending to the detriment of the petitioner the relief which is already awarded which cannot be done in the absence of any petition by the landlady challenging that part of the order, by which there relief now claimed was rejected . In elaboration of this argument he pointed out that permission granted under item (vii) cannot be substituted by permission under item (vi) in the absence of any appropriate proceeding taken by the landlord for challenging that part of the order, negativing permission under item (vi).

According to him, this would be extending the original relief, in the sense that if the tenant is evicted in pursuance of the permission under Clause 13(3) (vii), he would have a right of re-entry with an obligation on the landlord to repair of re-construct the premises within a reasonable time, while no such right of reentry is available to the tenant when he is evicted in pursuance of the permission under Clause 13(3) (vi) is sought to be substituted by the permission under Clause 13(3) (ii), because in the former case there is an obligation on the landlord to use if he succeeds in evicting the tenant under Clause 13(3) (ii) in the ground that he is defaulter. According to Shri Bobde, these facets of the question were not considered by the learned Judges in Vithalda''s case 1980 Mah LJ 612. It is however , not necessary to consider this question in this petition, because in the present case there is no question fo extending the relief and the ratio of the decision wold still be applicable to the facts of the present case. There is no difference in the consequences tha would flow from eviction under Clauses 13(3) and eviction under Clause 13(3) (iii) . In both these case, tenant, iss evicted completely without any right of re-entry and without any obligation on the landlord of any kind.

9. It is, however, difficult to accept the submission that the finding of the appellate authority on the question of petitioner being a habitual defaulter is perverse. True it is tha during the period from March 1972 to March 1974 the petitioner did not pay rent every month and that on some occasions he paid rent for two months and on some occasions for 3 months. It is however, pertinent to note that the petitioner is occupying the premises as a tenant since e1-10-1964 and as stated by him the rent was being paid and accepted the inte same fashion since thee beginning . respondent No.1 did not file a scheduler about the earlier payments to negative this contention. There is nothing on record to show that respondent No.1 ever complained about irregular payments and called upon the petitioner to pay rent every month. It is clear that she accepted the rent without any demur. There was reason why she did not complaun. She was having a deposit of Rs. 700|- with her, which covered the rent for seven months. It is therefore, difficult to hold that the petitioner was a habitual defaulter in payment of rent. Hence there iis absolutely no justification fro I interfering with the finding of the appellate authority on his point.

10. In the result, petition is allowed , rule made absolute and the impugned order granting permission to respondent No.1 to terminate petitioner tenancy under Clause 13(3) (iii) of the Rent Control Order is quashed, No order as to costs.

11. Petitionallowed.