(2006) 02 BOM CK 0102

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 2574 of 2001

Mahavir Tea Company and Others		APPELLANT
	Vs	
Additional Collector and Others		RESPONDENT

Date of Decision: Feb. 1, 2006

Acts Referred:

- Constitution of India, 1950 - Article 226, 227

Citation: (2006) 3 ALLMR 168 : (2006) 4 BomCR 853 : (2006) 3 MhLj 210 : (2006) 2 MhLj 210

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: S.V. Purohit, for the Appellant; Anuradha Taiwade, A.G.P. for respondent No. 1 and S.C. Mehadia, for the Respondent

Judgement

B.P. Dharmadhikari, J.

By this writ petition under Articles 226 and 227 of the Constitution of India the petitioners have challenged the concurrent orders passed by the authorities under C.P. and Berar Letting of Premises And Rent Control Order, 1949, granting permission to present respondent No. 2 (through legal heirs) to terminate their tenancy under Clause 13(3)(iv), (v) and (vi) of said Order. Clause 13(3)(iv) deals with change of user, while Clause 13(3)(vi) permits landlord to terminate the tenancy on account of his bona fide need. Permission under Clause 13(3)(v) already stands rejected by both authorities to respondent and hence, said issue is not considered in this petition.

2. The respondent-landlord filed proceedings under Clauses 13(3)(iv), (v) and (vi) of Rent Control Order on 16-6-1988 against the present petitioners and stated that he is occupying about 550 sq. feet of house at mezzanine floor in the suit structure and his family consists of 12 members. He contended that said area is very small and therefore he needed the area on first floor i.e. about 950 sq. feet given on rent to

present petitioners for his own occupation. He further stated that the premises were let out to petitioners for using the same only for shop-cum-business purposes and in violation of this, the tenants have been using the premises for residence and as such there is violation of Clause 13(3)(iv). The present petitioners filed their written statement and they contended that as per agreement the premises can be used for residential purposes also and therefore permission under Clause 13(3)(iv) cannot be granted. In relation to bona fide need they stated that the need pleaded was false. The number of family members was denied, the area in possession of landlord was also denied and it was stated that the landlord inducted the tenants in the premises even during pendency of proceedings and therefore permission under Clause 13(3)(vi) cannot be granted. It appears that thereafter the respondent-landlord amended his application to add paragraphs 4-A and 4-B in his application. In paragraph No. 4-A he pointed out the total area of plot and the portion thereof which has fallen to his share and also the details about the tenant occupying the shop block on the ground floor. He also stated that on ground floor there is a small godown and office below the staircase which are being used by son of landlord. The area in possession of present petitioners was stated to be 920 sq. feet on the first floor and it was stated that there was one more tenant on that floor by name M/s Paras Bearing Company and area in their possession was only 90 sq. feet. It was stated that said area was unsuitable and hence, no proceedings were filed against that tenant. It was further stated that on second floor there are two rooms having wooden frame and Kavelu i.e. country tiles ceiling and those rooms were given on rent to M/s Modi Trading Company. After earlier tenant vacated, the said rooms were offered to present petitioners and they were requested to vacate first floor as it is suitable and adjacent to mezzanine floor. This offer was made through notice dated 22-11-1983 sent through Advocate and as the petitioners did not reply the said notice, ultimately the premises on second floor were let out to Modi Trading Company. This story was also denied by present petitioners. They contended that the tenant on first floor namely M/s Paras Bearing Company vacated the premises and they were let out thereafter to one M/s Zaveri Sales Corporation on higher rent.

3. It is in this background, parties led evidence before the Rent Controller. The respondent No. 2-landlord examined himself and his son Mohan Upadhya, while the present petitioners examined its Manager by name Sushil Kumar Hansraj Bothara, one architect by name Shri Nandkumar Asarkar and one employee of Nagpur Improvement Trust in order to demonstrate the total area in possession of the respondent-landlord. The learned Rent Controller by order dated 30-10-1998 granted permission under Clause 13(3)(iv) and (vi) to the respondent-landlord. The petitioners thereafter filed appeal under Clause 21 of Rent Control Order, 1949 and by order dated 30-4-2001 the Additional Collector, Nagpur was pleased to dismiss said appeal.

4. I have heard Advocate Shri S.V. Purohit for petitioners, Advocate Shri S. C. Mehadia for respondent No. 2. Learned A.G.P. appears for respondent No.

1-Additional Collector.

5. Advocate Shri Purohit has at the outset contended that in order to demonstrate the exact area in possession of respondent No. 2-landlord the petitioners examined architect and also witness from Nagpur Improvement Trust. The architect proved the map of said house and the same was also supported by witness from N.I.T., who stated that the map of construction as submitted by respondent No. 2 was not sanctioned. According to Advocate Shri Purohit the total area of mezzanine floor was shown to be much more than 550 sq. feet as claimed by respondent No. 2-landlord and this evidence of both the witnesses is not at all looked into or considered by either Rent Controller or the Appellate Authority. He further states that the exact area of ground floor portion in occupation of landlord is not disclosed in application and it was also not disclosed correctly in the evidence. He invites attention to the evidence as recorded in this respect and points out that the son of respondent No. 2 by name Mohan in cross-examination before the Rent Controller admitted that construction of mezzanine floor was about 950 sq. feet. He further states that even construction on ground floor was shown to be 950 sq. feet and out of it tenant was shown to be in possession of 390 sq. feet, and therefore balance portion on ground floor i.e. 560 sq. feet was admitted to be in possession of respondent No. 2-landlord. He argues that this position which has come on record has not been altered or shaken even in the evidence of Shri Sushil Kumar Bothra, Manager of petitioners. According to him when respondent No. 2 was satisfied with 920 sq. feet of area in possession of petitioners on first floor, the petitioners proved that he was actually using 950 sq. feet on mezzanine floor and 560 sq. feet on ground floor i.e. total 1510 sq. feet on both floors. He contends that if the contention of respondent No. 2 that he is occupying only 550 sq. feet on mezzanine floor is accepted to be correct, the said portion along with portion in occupation of present petitioners will be less than 1510 sq. feet. According to him, therefore, the petitioners successfully demonstrated before the Rent Controller that the need as pleaded was not genuine. He further argued that the landlord did not give necessary details in this respect before the Court below and only for that purpose the architect or the witness from planning authority namely N.I.T. were required to be examined.

6. Coming to the permission granted under Clause 13(3)(iv) he invites attention to the clause in agreement which permits boarding and therefore according to him the fact that premises were also being used for residence does not in any way entitled landlord to claim permission under Clause 13(3)(iv). He invites attention in this respect to the judgment of the Appellate Court to demonstrate how there is total non-application of mind.

7. He further states that all these grounds were raised in appeal under Clause 21 before the Appellate Authority and the Appellate Authority has not considered these grounds as raised and therefore there is failure to exercise jurisdiction under Clause

21 on its part. He invites attention to the judgment of this Court reported at 1975 Mh.L.J. 746 in between Janba Daulatrao Borkar v. Rajeshkumar Ramjiwan Agrawal to support his contention. He argues that as there is failure to exercise jurisdiction, the appellate order is unsustainable.

8. As against this, Advocate Shri S. C. Mehadia for legal heirs of respondent No. 2-landlord states that in the application as filed, the respondent No. 2 landlord disclosed that he is occupying 550 sq. feet of construction on mezzanine floor and the portion on ground floor is being used by his sons for their respective businesses. He further states that it has been proved on record that ground floor portion cannot be used for residence at all. The first floor which is located just above the mezzanine floor was therefore only suitable portion which could have been used by respondent No. 2 for satisfying his need. He argues that the other tenant on first floor has been occupying only 90 sq. feet of the portion and it was not sufficient to meet the needs of respondent No. 2. The 920 sq.feet portion in occupation of present petitioners was only suitable for said purpose and therefore, the proceedings were taken against petitioners. He further states that the portion on second floor is not a Pakka structure with slab and not adjacent and therefore it was not convenient and therefore has not been sought for by the respondent No. 2. He states that the petitioners were offered said portion when it was available and vacant. The petitioners chose not to accept that offer and continued with possession on first floor and therefore, the said vacant portion was given on rent to other tenant. He contends that thus, subsequent tenancy created cannot be used against the respondent No. 2-landlord. He further argues that from the evidence on record it has been demonstrated that the map prepared by architect Shri Asarkar is not correct and authenticate document which could have been relied upon either by Rent Controller or by Appellate Authority. He states that said map has been prepared behind the back of respondent No. 2 and only on the basis of surmises and it has got no legal sanctity. In relation to the evidence of witness from N.I.T., the contention is identical. According to him the position prevalent on spot has been proved by respondent No. 2 through his evidence, through evidence of his son Mohan and also in cross-examination of Manager of petitioner Shri Bothara. He, therefore, contends that the Rent Controller or Appellate Authority have not committed any error in not accepting evidence of Shri Asarkar and witness from N.I.T. According to him there is sufficient application of mind apparent in the decision of the appellate authority and the ruling on which reliance has been placed is therefore not relevant.

9. In relation to permission under Clause 13(3)(iv) he states that the entire evidence on record demonstrates that the premises were not being used for the purpose for which they were let out and they were only being used for residence. According to him the term in the agreement dated 29-4-1980 did not permit such user and therefore both the authorities were justified in granting permission even on that count. He further points out that the landlord with huge family which consisted of

about 12 members at the relevant time were occupying only 550 sq. feet and therefore claimed the premises in occupation of present petitioners. According to him permission granted therefore cannot be interfered with.

10. He also wanted to rely upon the submissions filed later on in this petition to show that number of members in his family has increased to 19 and the accommodation on the mezzanine floor is too short for family. Learned Counsel for petitioners however has taken objection to this submission by pointing out that there is no appropriate application moved in order to enable this Court to take the cognizance of such subsequent event.

11. The first question which arises for consideration is whether the respondent No. 2 landlord has proved that area in his possession on mezzanine floor is 550 sq. feet and therefore not sufficient for his occupation. To substantiate this respondent No. 2 landlord has himself entered the witness box and in his evidence he has stated that they are occupying 500 sq. feet and there are 14 members in his family. He has been cross-examined and in cross-examination he has stated that there are 3 to 4 rooms on ground floor with landlord and those rooms are small. He stated that he was not in a position to disclose their size. Thereafter he has stated that they are admeasuring 10 feet in width and 23 feet in length. He has further stated that premises of 90 sq. feet on first floor earlier let out to Zaveri Sales Corporation were not let out again and were kept vacant. But he has clarified that need was of 800 sq. feet, and said portion of 90 sq. feet was therefore not sufficient. His son Mohan has stated that about 920 sq. feet of area has been given on rent to present petitioners on first floor. In cross-examination he has stated that there are two rooms admeasuring 10 x 10 feet on ground floor and they are in possession of landlord. He has further stated that total area on ground floor is about 950 sq. feet and out of it above 390 sq. feet is with the tenant. He has thereafter stated that structure on mezzanine floor is also 950 sq. feet. Thus, this evidence of both landlord and his son does not clearly reveal the exact portion in possession and occupation of landlord. The exact area of mezzanine floor and the portion in their possession even on ground floor has not been clearly brought on record. In this light when the evidence of petitioner-tenant is looked into the petitioner-tenant has stated that on ground floor there are two shops in the front and three rooms behind these shops. He has stated that there are total five rooms on ground floor and then there is one godown and according to him there are total six rooms on ground floor. He has stated that two shop blocks are given on rent to Nutan Trading Company. He has further stated that the area of mezzanine floor is about 850 sq. feet. It is thereafter mentioned that terrace over the godown is lying vacant and it is about 300 sq. feet and this open terrace of 300 sq. feet is in possession of landlord. His cross-examination in this respect reveals that he has admitted that portion of about 400 sq. feet on ground floor is in possession of Nutan Trading Company and he has also stated that Nutan Trading Company has also got godown on ground floor. He has stated that the shop and godown on ground floor cannot be used for residence. In relation to the report

of architect placed on record, this witness has stated that the said report was prepared by architect in his office i.e. architect''s office. He has further stated that report has been prepared by architect on the request of petitioner and he has stated that he does not know whether architect has entered the house of respondent No. 2. He also admitted the registration certificate produced in the name of Upadhyay Auto Dealer and Rajastan Udyog. However, he stated that no business is being done at the places mentioned therein. He also states that the said registration certificate does not disclose the address of suit house. The architect has stated that on ground floor tenant has got 1130 sq. feet area and landlord has got 365 sq. feet area, the mezzanine floor is of 1816 sq. feet and the entire mezzanine floor is in occupation of respondent No. 2-landlord. He has stated that 850 sq. feet and 145 sq. feet on first floor is in possession of tenants on first floor and out of it 850 sq. feet is in possession of petitioners. On second floor total area available is stated to be 30 x 35 sq. feet and it is mentioned that it is excluding the area in possession of tenants. Said architect has stated that in the property landlord has got total 3516 sq. feet in his possession while tenants have got 2124 sq. feet in their possession. In cross-examination he has stated that the map A-7 accordingly prepared by him has been verified by him from N.I.T. He has further stated that he has taken measurement of premises only in occupation of petitioners by entering in it and he has not taken the measurements by same mode in relation to the portion in occupation of landlord. He has further stated that all measurements given by him are as per map drawn by him and the map submitted to N.I.T. as revised plan prepared by one Navin Joshi. In relation to area on mezzanine floor he has stated that it includes the area of terrace, lobby, staircase and area under the shop. He has further stated that he has not given specific measurement of area in square foot of lobby, terrace and area under the shop. He has denied that his report and the map are either false or incorrect. He has further denied that map prepared by him or map on record of N.I.T. and the actual building construction varies from each other. He also admitted that out of total plot and area only half i.e. about 175 sq. metres falls to the share of respondent No. 2 landlord and the construction above 175 sq. metres belongs to landlord. The evidence of witness Shri Suryabhan Sontakke, Assistant Civil Engineer from N.I.T. reveals that the plot was cleared for construction and total plot area is 348.386 sq. metres. As per revised plan submitted on 13-3-1995 the ground floor construction is 251.369 sq. metres, mezzanine floor is 182.322 sq. metres, first floor is 182.322 sq. metres and second floor is 99.982 sq. metres. He also produced said revised plan from the record of N.I.T. before the Rent Controller and stated that revised plan was rejected by N.I.T. because the construction effected by applicants therein was in excess of F.S.I. The revised plan reveals 103.81 sq. metres construction in excess. In cross-examination he has stated that he has factually inspected the premises and found that the construction is in excess. He has further stated that he has not put such remark on the file because the site was to be inspected by his superior.

12. In this background when the respondent No. 2-landlord approached the authority with specific case that area in his possession is only 550 sq. feet on mezzanine floor, the Rent Controller or the Appellate Authority ought to have looked into this entire evidence which has come on record to find out what is the correct area in occupation of respondent No. 2-landlord. Neither the Rent Controller nor the Appellate Authority have looked into these aspects of the matter. The evidence was led by parties and was available on record and its non-consideration therefore constitutes failure to exercise the jurisdiction. It was essential for them to comment upon propriety or otherwise of said evidence or its correctness or the errors therein. But that has not been done by any of the Authorities. I therefore, find that the Rent Controller as also the Appellate Authority have failed to exercise the jurisdiction available to them in this respect and consequently their orders are unsustainable. The Rent Controller has found that the landlord had given offer to respondent-tenant to occupy the portion on second floor and it proved his bona fides. However, again it is to be noted that said offer was given some times in the year 1983 and the application before the Rent Controller was filed in June, 1988. The fact that landlord was claiming additional area and factors having bearing upon such need or its extent are lost sight off by him. I, therefore, find that the order of Rent Controller suffers from non-application of mind.

13. The petitioners filed their appeal under Clause 21 and in said appeal they have raised several grounds and in those grounds they have also expressly mentioned the failure on part of Rent Controller to appreciate the evidence in this respect. The order of appellate authority, however, does not consider the entire evidence on record and after considering the total area of 550 sq. feet in possession of respondent No. 2 and the number of members in his family the order of Rent Controller granting permission has been maintained. It was obligatory for the appellate authority to consider the grounds raised in the light of evidence on record and to find out whether bona fide need of the landlord stood established before the Rent Controller. As has been held by this Court in case of Janba Daulatrao Borkar v. Rajeshkumar Ramjiwan Agrawal (supra) the appellate authority is final insofar the adjudication on facts is concerned. Here the landlord is in possession of some portion in same building and he wanted additional accommodation. No doubt the number of members in the family is large, but it has also come on record that he did not give the correct area of mezzanine floor in his use or also the correct area of ground floor portion in his use. Unless and until the correct area in use and occupation of landlord had been worked out by the Rent Controller or by Appellate Authority, the said authority could not have appreciated the need of landlord for additional accommodation. Rent Controller could have at least inspected the site. Thus, the application of mind in this respect qua the evidence on record was essential particularly in view of the admission about the area given by son of landlord and also evidence brought on record by tenants through architect and through witness of N.I.T. Thus, failure to consider these vital aspects has vitiated the

judgment of appellate authority and there is failure to exercise jurisdiction.

14. Insofar as permission granted under Clause 13(3)(iv) is concerned, the relevant clause in the rent note reads as under:

the tenant could at times provide boarding to his staff and members of its sister concerned coming to Nagpur.

15. The arguments advanced by learned Counsel for respondent No. 2 reveals that respondent No. 2 wanted to show that the premises are being used only for residence and not for the other purpose i.e. the shop-cum-business purpose. However, the perusal of evidence on record does not reveals any such attempt made in the evidence. Not only this the Rent Controller as also Appellate Authority have ignored this clause and have failed to note that as per said clause the petitioner tenant firm has been permitted to use the premises even for boarding of his staff and members of its sister concern coming to Nagpur. The clause envisages such boarding only "at times". It was therefore necessary for Rent Controller and Appellate Authority to record a finding that the premises are not being used for boarding only "at times", or as sought to be contended by learned Counsel for respondent No. 2 that they are being used "only for residence" and for no other purpose. In the absence of such finding the permission granted even on this count cannot be sustained. Learned Counsel for petitioners has invited attention of this Court to the dictionary meaning of word ''boarding" and it has been held to mean to furnish with meals or meals and lodging for pay or to place someone where means are provided, as in a boarding school, and the words boarder, boarding, boarding school, boarding house have been clarified accordingly. Thus, merely because the petitioners tenants are shown to be using the premises for residence, it cannot be held that para No. 9 of rent note has been violated. Respondent No. 2 landlord has to establish that the permission of boarding granted to his staff and members of its sister concern has been exceeded and the premises are being used not at times but regularly only for residence and the shop-cum business purpose for which the premises have been let out is discontinued. The error committed by Rent Controller as also appellate authority in not understanding the exact meaning of said term is apparent.

16. Thus, I find that the authorities below have not correctly appreciated facts available on record and there is therefore corresponding failure to exercise jurisdiction. The impugned order dated 30-4-2001 passed by respondent No. 1 Additional Collector and the order dated 30-10-1998 passed by Rent Controller, Nagpur are therefore quashed and set aside. The proceedings in Rent Control Case No. 849/A-71(2)/1988-89 are restored back to the file of Rent Controller excepting the case under Clause 13(3)(v). As the proceedings are very old the Rent Controller is directed to decide the same afresh as early as possible and in any case within a period of nine months from the date of communication of this order to it. The parties are at liberty to amend their respective pleas in order to point out

subsequent events, if relevant in this respect. Parties to appear before the Rent Controller on 20th February, 2006.

17. Rule made absolute in above terms. No costs.