Smt. Sulochana Ganpat Rege Vs Madan Dattatray Wadke

Court: Bombay High Court

Date of Decision: March 3, 1969

Acts Referred: Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 â€" Section 11, 12, 18, 20, 7
Constitution of India, 1950 â€" Article 227
Registration Act, 1908 â€" Section 17, 49
Transfer of Property Act, 1882 â€" Section 105

Citation: (1970) 72 BOMLR 351 : (1970) MhLj 852

Hon'ble Judges: Bal, J

Bench: Single Bench

Judgement

Bal, J.
The question involved in this petition is whether an agreement under which a landlord has obtained a loan from an intending tenant

for the construction of a residential building cannot be taken cognizance of by the Court and cannot be enforced on the ground that it does not

comply with all the requirements of Section 18(3) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred

to as the "Rent Act" or "the Act") including the requirement of registration.

2. The facts of the case about which there is no dispute are these :

Opponents Nos. 1 to 5 (hereinafter referred to as "the opponents") are joint owners of a house known as Wadke house situate at Mahim in the

City of Bombay. That house was built by their deceased father Dattatraya in the year 1959, While the house was under construction, Dattatraya

obtained a loan of Rs. 5,000 from the petitioner for financing the construction and agreed to let out one double room on the first floor including the

rear verandah and front gallery, to her. Out of this amount Rs. 2,000 were paid by the petitioner on April 2, 1959, and the balance of Rs. 3,000

was paid by her on April 6, 1959. For both these amounts Dattatraya passed receipts to the petitioner. In the second receipt it is stated that the

amount was to carry interest at 4% per annum and was to be repaid by deducting 50% from the rent, each month. In the receipts the amount is

described as "deposit" but there is no dispute between the parties that it was a "construction loan" as popularly called. The construction was

complete before July 1959 and the petitioner was put in possession of a tenement designated as Flat No. 2. The rent fixed was Rs. 55 per month

exclusive of water charges. It appears, Rs. 1.41 became subsequently payable as permitted increases on account of the State Education Cess and

the local education cess. From the commencement of the tenancy Dattatraya started adjusting half of the monthly rent towards the repayment of

the loan according to the agreement. He died some time in 1960 and after him his widow i.e. the mother of the opponents, went on making similar

adjustment. After her death in 1964 the present opponents also accepted half of the monthly rent as before, till December, 1965 but refused to

accept thereafter and the petitioner, therefore, started sending the rent by Postal Money Orders. Opponents accepted the Money Orders till April

1966 but in the meantime on March 4, 1966, they gave notice to the petitioner alleging inter alia that she was not ready and willing to pay the rent

and purporting to terminate her tenancy from the end of April 1966. They did not accept the rent for the month of May and for the subsequent

months. On December 16, 1966, they gave another notice to the petitioner purporting to be u/s 12(2) of the Rent Act, demanding alleged arrears

of rent from May 1966 and water charges.

3. On July 11, 1967, the opponents filed their suit for eviction and for recovery of alleged arrears of rent and water charges which has given rise to

the present petition. The only ground for eviction mentioned in the plaint was non-payment of rent and water charges for more than six months. The

petitioner filed her written statement contending that she had always been ready and willing to pay the rent and water charges and had actually sent

the amounts by money orders which the opponents refused to accept. She was, therefore, not in arrears of rent as alleged. She further contended

that the agreed rent was excessive and prayed that the standard rent be fixed.

4. The suit came up for what is known in the Small Causes Court as ''scrutiny'' on November 80, 1967, and on that day the Court passed an order

directing the petitioner to deposit Rs. 1,215.28 within 8 weeks towards rent or compensation without prejudice and thereafter to continue to

deposit in Court Rs, 56.41 per month as rent or compensation by 19th day of each succeeding month commencing from February, 1968 till the

disposal of the suit. The Court also directed that the amounts, if and when deposited, be paid to the opponents towards rent or compensation on

account and subject to adjustment on the basis of standard rent. The order was made without taking into account the agreement to adjust half the

monthly rent towards the repayment of the loan and hence on December 13, 1967, the petitioner made an application to the Court pointing this out

and praying that the order be modified by taking the agreement into account. According to her, on the basis of that agreement she would be

required to deposit only Rs. 414.30 and not Rs. 1,215.28.

5. Opponent No. 1 who filed his affidavit on behalf of the opponents in reply to the application of the petitioner, did not deny the agreement but

raised a legal contention that the opponents were not bound by that agreement as it was not in accordance with the provisions of Section 18 of the

Rent Act and the petitioner was, therefore, liable to pay the full amount of rent and permitted increases in spite of it. The contention thus raised by

the opponents found favour with the trial Court and on February 17, 1968, that Court rejected the petitioner"s application, holding that the

agreement alleged by the petitioner was not in accordance with the provisions of Section 18 of the Rent Act as it was not registered and that the

Court could not take any cognizance of such an agreement and enforce it.

6. The petitioner preferred a revision application to the Appellate Bench of the Court of Small Causes but the same came to be summarily

dismissed. The petitioner has therefore filed the present petition for challenging the orders of the trial Court and on her behalf her learned advocate

Mr. Tipnis has argued that the Courts below were wrong in not taking into consideration the admitted agreement between the parties, while

directing the petitioner to deposit the alleged arrears of rent and future rent or compensation. That is how the question stated in the beginning has

arisen for decision.

7. Learned Counsel for the opponents has raised two preliminary objections to the maintainability of this petition. He contends that the order of the

trial Court which the petitioner challenges is an interlocutory order and according to a well-established practice, this High Court does not entertain

petitions under Article 227 of the Constitution against such orders even if they are wrong. Secondly, he contends that the petitioner is challenging

only the order of the trial Court dated February 17, 1968, refusing to review its previous order directing her to deposit the full amount of rent. That

order therefore, became final and binding on the petitioner and cannot now be disturbed. No useful purpose will, therefore, be served by setting

aside the subsequent order even if the petitioner succeeds in her petition,

8. Now, it is true that this High Court does not ordinarily entertain a petition under Article 227 against an interlocutory order. That, however, is not

an absolute rule. The High Court can and does interfere even with interlocutory orders if the injustice or mischief likely to result from them cannot

be remedied later. Learned Counsel for the opponents does not dispute that the trial Court passed its order for deposit in exercise of its powers

u/s 11(4) of the Rent Act and non-compliance with it may result in a further order to the effect that the petitioner shall not be entitled to appear in

or defend the suit except with the leave of the Court. In a case like the present one, where the eviction is sought on the sole ground of non-

payment of rent, the trial Court would evidently not grant such leave to the petitioner unless there is substantial compliance with its order for

deposit. The difference between the amount ordered to be deposited by the trial Court and the amount which the petitioner would be liable to

deposit on the basis of the agreement, is a large one and her inability to comply with that order would inevitably lead to the suit for eviction being

decreed against her as an undefended suit. The injustice thus caused to her cannot be remedied afterwards. Again, even at the final hearing of the

suit the trial Court would proceed on the basis that no cognizance can be taken of the agreement in dispute and would pass a decree against the

petitioner for a much larger amount than may be legitimately due. It is, therefore, necessary to consider the legality of the impugned order at this

stage only.

9. Learned Counsel for the opponents is also not right in saying that the petitioner has not challenged the first order and hence it has become final.

No doubt that order was not specifically mentioned in the revision application before the Appellate Bench of the Court of Small Causes nor has it

been mentioned in this petition but the intention to challenge both the orders is clear throughout. In the revision application she had prayed that the

''orders'' passed by the trial Court may be set aside, altered or varied and in the present petition she has added a specific prayer that ""the trial

Court be directed to make a proper order of deposit after taking into consideration the receipts and the agreement between the parties."" Even

otherwise, if the petitioner succeeds in her application for review, the order sought to be reviewed would automatically stand set aside and

substituted by a fresh order on the basis of the agreement between the parties.

10. The preliminary objections raised by learned Counsel for the opponents must therefore be rejected.

11. Before turning to the contentions urged on merits and the specific provisions of Section 18 of the Rent Act on which they are based, it will be

convenient to consider certain relevant aspects of the scheme of that Act. As is well known, the Rent Act was enacted to prevent exploitation of

needy tenants by unscrupulous landlords by taking advantage of the acute scarcity of accommodation. It provides protection to the tenants against

exorbitant charges by the landlords and against eviction except on proof of certain specified circumstances. The protection against exorbitant

charges with which we are concerned in this case, is provided in two ways : (1) by making it unlawful to increase the rent above the standard rent

and permitted increases and (2) by making it a criminal offence for the landlord to receive any consideration in cash or kind other than the standard

rent and permitted increases for the grant, continuance or renewal of a lease, or for giving his consent to the transfer of a lease.

12. The prohibition against increase in rent is contained in section 7 which reads :

7. Except where the rent is liable to periodical increment by virtue of an agreement entered into before the first day of September 1940, it shall not

be lawful to claim or receive on account of rent for any premises any increase above the standard rent, unless the landlord was, before the coming

into operation of this Act, entitled to recover such increase under the provisions of the Bombay Rent Restriction Act, 1930, or the Bombay Rents,

Hotel Rates and Lodging House Rates (Control) Act, 1044 or is entitled to recover such increase under the provisions of this Act.

13. The effect of this section is to make it unlawful for a landlord to claim or receive "on account of rent" for any premises any increase above the

standard rent, unless it is covered by one of the exceptions specified in the section and is hence a permitted increase. Any amount actually paid on

account of increased rent could not, however, have been recovered by the tenant from the landlord without a statutory provision enabling him to

do so. The Legislature was evidently conscious of this difficulty and has, therefore, made the necessary provision by enacting Section 20 which

reads :

Any amount paid on account of rent after the date of the coming into operation of this Act shall, except in so far as payment thereof is in

accordance with the provisions of this Act, be recoverable by the tenant from the landlord to whom it was paid or on whose behalf it was received

or from his legal representatives at any time within a period of six months from the date of payment and may, without prejudice to any other

remedy for recovery, be deducted by such tenant from any rent payable by him to such landlord.

The effect of this section is three-fold. It (1) confers upon the tenant a new right to recover back from the landlord the amount of increased rent

received by him ; (2) gives him a special remedy for the recovery of that amount by deduction from future rent; and (3) provides a special period

of limitation (of six months) for the exercise of the new right whether by pursuing the special remedy or by adopting any other remedy available

under the general law.

14. Sections 7 and 20 taken together thus provide sufficient protection to the tenant against being subjected to payment of any amount "on account

of rent" in excess of the standard rent and permitted increases. They do not, however, provide any protection to him against charges other than

those on account of rent. That is left to be done by Section 18 and we shall therefore now turn to the provisions of that section.

15. Section 18 of the Act runs as follows:-

18. (J) If any landlord either himself or through any person acting or purporting to act on his behalf or if any person acting or purporting to act on

behalf of the landlord receives any fine, premium or other like sum or deposit or any consideration other than the standard rent or the permitted

increases, in respect of the grant, renewal or continuance of a lease of any premises, or for giving his consent to the transfer of a lease by sub-lease

or otherwise, such landlord or person shall, on conviction, be punished with imprisonment for a term which may extend to six months and shall also

be punished with fine which shall not be less than the amount of the fine, premium or sum or deposit or the value of the consideration received by

him, and further where the offence is committed by a landlord in respect of premises which were of his ownership on the date of the offence such

premises shall be liable to confiscation.

(2) Where any fine, premium or other like sum or deposit or any consideration referred to in Sub-section (1) is paid by any person, the amount or

value thereof shall be recoverable by him from the landlord to whom it was paid or on whose behalf it was received or from his legal representative

at any time within a period of six months from the date of payment and may, if such person is a tenant, without prejudice to any other remedy for

recovery, be deducted by him from any rent payable by him to such landlord.

(3) Nothing in this section shall apply to any payment made under any agreement entered into before the first day of September 1940 or to any

payment made by any person to a landlord by Way of a loan, for the purpose of financing the erection of the whole or part of a residential building

or a residential section of a building on the land held by him as an owner, a lessee or in any other capacity, entitling him to build on such land, under

an agreement which shall be in writing and shall, notwithstanding anything contained in the Indian Registration Act, 1908 be registered. Such

agreement shall inter alia include the following conditions, namely :-

(i) that the landlord is to let to such person the whole or part of the building when completed for the use of such person or any member of his

family; (ii) that the rate of interest on such loan shall not be less than four per cent, per annum; (m) that such loan shall be repayable by the landlord

within a period of ten years from the date of the execution of the agreement or within a period of six months from the date of the termination of the

tenancy by the landlord, whichever period expires earlier;

(iv) that the amount of the loan shall be a charge on the entire building and the entire interest of the landlord in the land en which such building is

erected :

Provided that if the loan has been advanced by more than one person, all such persons shall, notwithstanding anything contained in any law for the

time being in force, be entitled to a charge on the entire building and the entire interest of the landlord in such land rateably according to the amount

of the loan advanced by each of such persons;

(v) that the landlord shall use the amount of the loan for the purpose of erecting the whole or part, as the case may be, of the residential building

and for no other purpose; and

(vi) (a) that the erection of the building shall be completed within a period of two years from the date of the execution of the agreement or if the

agreements executed are more than one, from the date of the execution of the first of such agreements :

Provided that the said period of two years may be extended to a further period not exceeding one year with the sanction of the Collector;

(b) that if the erection of the building is not completed within the period of two years or within the extended period specified in the proviso to

Clause (""), the loan shall be repayable forthwith to the person advancing the same with interest at the rate of four per cent, per annum.

(4) If any landlord who has received a loan under an agreement in accordance with the provisions of Sub-section (3), contravenes, without any

reasonable excuse any of the conditions specified in the said Sub-section (3) such landlord shall, on conviction, be punished with imprisonment for

a term which may extend to six months or with fine, or with both.

Explanation I.-For the purposes of Sub-section (1)-

(a) except as provided in Sub-section (3) receipt of rent in advance for more than three months in respect of premises let for the purpose of

residence, or

(b) where any furniture or other article is sold by the landlord to the tenant either before or after the creation of tenancy of any premises, the excess

of the price received over the reasonable price of the furniture or article, shall be deemed to be a fine or premium or consideration.

Explanation II.-For the purposes of Sub-section (3), "member of the family" means in the case of an undivided Hindu family any member of such

family and in the case of any other family the husband, wife, son, daughter, father, mother, brother, sister or any other relative of the person

permanently residing and boarding with him.

16. What is argued by learned Counsel for the opponents is that even a payment by way of a loan by an intending tenant to a landlord is hit by

Sub-section (1) of this section and is not saved by Sub-section (3) unless all the requirements of that sub-section including the requirement of

registration of the agreement are satisfied. According to him, the payment even by way of a loan without complying with provisions of Section

18(3) of the Act being thus prohibited inasmuch as receipt thereof is made punishable, the whole transaction is illegal and the agreement relating to

it is void and unenforceable.

17. The argument is not well founded. It ignores the fact that the Rent Act has been enacted for the protection and benefit of the tenants. If Section

18 were to be construed as suggested by learned Counsel, it will benefit unscrupulous landlords who obtain loans from tenants in contravention of

its provisions and will penalise the tenants from whom the loans are obtained, thus defeating the object of the Act. I will presently show that there is

no warrant for construing the section in that manner.

18. The provisions of Section 18 consist of two distinct parts dealing with different subject matters. The first part comprises Sub-sections (1) and

(2) and Explanation I, while the second comprises Sub-sections (3) and (4) and Explanation II. Sub-section (1) makes it a criminal offence for the

landlord to receive any fine, premium or other like sum or deposit or any consideration other than the standard rent or permitted increases in

respect of the grant, renewal or continuance of a lease of any premises or for giving his consent to the transfer of a lease by sub-lease or otherwise

but does not visit the tenant making the payment with any penal consequences. On the contrary Section 18(2) gives him a right to recover back the

amount, paid by him, even if it is otherwise irrecoverable.

19. The terms "fine," "premium" and "deposit" are not defined in the Act and must therefore be taken to have been used in the sense in which they

are ordinarily used in legal parlance. The term "premium" occurs in Section 105 of the Transfer of Property Act which defines the term "lease" and

is used to mean the price paid or promised as consideration for the grant of a lease. It would therefore be legitimate to give it the same meaning in

the Rent Act. It is not difficult to see that any fine, premium, other "like" sum or the value of any consideration (in kind) other than the standard rent

or permitted increases contemplated in Section 18(1) obtained by the landlord from the tenant for the grant etc. of a lease, will not be recoverable

from him under the general law. A deposit will also not be recoverable during the continuance of the tenancy and in cases governed by the Rent

Act, the tenancy would ordinarily continue for an indefinite period. A statutory provision for the recovery of such amounts is therefore made in

Section 18(2). The provisions of Section 18)(2) are almost identical with those of Section 20 except that they apply to payments made otherwise

than on account of rent while the provisions of Section 20 apply, as already pointed out, to payments made on account of rent.

20. Explanation I to Section 18 is meant to provide against evasion of the provisions of Section 18(J) by the landlord by obtaining large amounts

from the tenant under the guise of advance rent or price of furniture etc.

21. A loan by its very nature is always repayable according to the terms of the agreement. There is no reason why a bona fide loan-transaction

between the tenant and the landlord should be prohibited by law. Care has, however, to be taken to see that the landlord does not exploit the

needy tenant by obtaining a loan on terms wholly beneficial to himself and inequitable to the tenant. The provisions of Sub-section (3) of Section 18

serve that purpose. In my view Sub-section (3) is not an exception to the provisions of Section 18(1) as argued by learned Counsel for the

opponents but it is in the nature of an explanation, the object being to avoid the provisions of Sub-section (1) being misinterpreted and wrongly

applied to bona fide loan transactions.

22. It is worthy of note that the portion of Sub-section (3) of Section 18 which deals with loans, was introduced in the Act by an amendment

effected in 1951 by Bombay Act 42 of 1951. The conditions laid down in Sub-section (3) which the landlord is required to observe, make it penal

for the landlord not to observe them but non-observance thereof does not affect the validity of the loan advanced under the agreement by the

intending tenant to the landlord. The absence of any express provisions making the loan recoverable, is a clear pointer to this. The provisions of

Sub-section (4) further indicate that Sub-section (3) is not by way of an exception and non-observance of the conditions laid down therein do not

bring the loan within the provisions of Sub-section (1). If it were not so there was no need of a separate provision like Sub-section (4) penalising

the landlord for non-observance of the conditions. The provisions of Sub-section (1) would have automatically become applicable. It is worthy of

note that Sub-clause (b) of Clause (vi) of Section 18(3) makes the loan repayable "forthwith," in case the landlord does not complete the building

within a period of 2 years or within the extended period, if any. It shows that the effect of the landlord"s failure to comply with the requirements of

that clause is only to make the loan repayable earlier than it would have been under the agreement between the parties. This is a clear indication of

the fact that Sub-section (3) deals with amounts which are recoverable under the ordinary law while Sub-section (1) deals with amounts which are

not recoverable in the absence of a specific statutory provision in that behalf. Again, the wording of Section 18(4) is significant. It speaks of a

landlord who "has received a loan." Thus the loan transaction is a fait accompli and what remains to be seen is whether the landlord has complied

with the obligations which are cast on him by the different clauses of Section 18(3) and is hence entitled to the benefit of the loan for the full period.

If he has not, all that follows as a consequence is that he is punishable for the breach and is not entitled to retain and use the amount according to

the terms of the agreement. It does not affect the validity of the loan or the right of the tenant to enforce the agreement.

23. All these considerations show that Section 18 of the Act does not prohibit advancing of loans to landlord by tenants or intending tenants but

only casts certain obligations on landlords who obtain such loans. It is not therefore possible to accept the contention urged on behalf of the

opponents that the agreement between the petitioner and Dattatraya in respect of the loan is a void one or that it cannot be taken cognizance of by

the Court and cannot be enforced. The trial Court was, therefore, clearly in error in making its order for deposit without taking into consideration

the admitted agreement between the parties.

24. I will now deal with another aspect of the argument urged on behalf of the opponents by their learned Counsel that the agreement being

unregistered, is inadmissible in evidence. One of the conditions, which Section 18(3) requires to be included in the agreement is contained in

Clause (iv) of it. It is to the effect that the amount of the loan shall be a charge on the entire building. As it is the contention of the learned Counsel

that the agreement between the parties is void as it does not include this condition, he does not naturally dispute that by its terms, the agreement

embodied in the receipts does not purport or operate to create a charge on the house which was then under construction. There is no dispute that

the agreement does not affect any immovable property and is not therefore compulsorily registerable u/s 17 of the Registration Act or under any of

the provisions of the Transfer of Property Act. No doubt Section 18(3) of the Rent Act casts a duty on the landlord to register such an agreement

but non-registration of it would not attract the provisions of Section 49 of the Registration Act which provides for the consequences which follow

from the non-registration of a document required to be registered either u/s 17 of the Registration Act or under any provision of the Transfer of

Property Act, 1882, only. Non-registration of a loan agreement, though it may amount to non-compliance by the landlord with the requirements of

Section 18(3) will not, therefore, make the document inadmissible in evidence.

25. The second argument urged by learned Counsel for the opponents on this point runs counter to his first argument. He says that though the

agreement by its terms does not create a charge on immovable property, it does constitute a charge by operation of law by virtue of Clause (iv) of

Sub-section (3) of Section 18. I do not think there is any merit in this contention. Clause (iv) of Section 18(3) contains one of the conditions which

are required to be included in an agreement relating to a loan taken by the landlord from an intending tenant for financing the construction of a

residential building. The relevant portion of Sub-section (3) which precedes the conditions laid down is : "such agreement shall inter alia include the

following conditions." On a plain reading, this shows that it is for the landlord to include such a condition in the agreement. But on his failure to do

so, the law does not imply that condition. If the Legislature intended that the condition mentioned in Clause (iv) was to be implied in every

agreement of the kind in question, nothing would have been easier than to say that "such agreement shall be deemed to include the following

conditions" instead of saying that it shall, inter alia, include the following condition. I cannot therefore accept the argument that by operation of law

the agreement in question creates a charge on the building wherein the suit premises are situate. That being so I need not refer to certain decisions

to which my attention was invited by learned Counsel for the opponents and which lay down that instruments creating charge on immovable

property by operation of law also require registration u/s 17(1)(b) of the Registration Act.

26. In view of the legal position discussed above, the order passed by the trial Court and confirmed in revision by the Appellate Court cannot be

upheld. The rule is accordingly made absolute, the impugned orders of the trial Court dated November 30, 1967, and February 17, 1968, are

quashed and set aside and that Court is directed to pass a fresh order after taking into consideration the admitted agreement between the parties.

The trial Court shall also pass such other consequential orders, if any, relating to restitution or adjustment of any amounts deposited by the

petitioner, towards future rent or compensation. The petitioner shall get her costs of this petition from opponents Nos. 1 to 5.