

(2005) 07 BOM CK 0056
In the Bombay High Court
Case No : Writ Petition No. 571 of 1990

Abbas Kasam Naddaf (since deceased through his heirs: Smt. Anwar Abbas Nadaf, Smt. Roshan Abbas Nadaf, Shri Tayab (Namab) Abbas Nadaf, Shri Riyaz Abbas Nadaf and Shri Nurmahamad Abbas Nadaf) APPELLANT

Vs

Sayyad Mohiddin Saheb Jamadar and Others RESPONDENT

Date of Decision : 26-07-2005

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Constitution of India, 1950 — Article 227
Transfer of Property Act, 1882 — Section 53A

Citation : (2005) 4 ALLMR 258 : (2005) 6 BomCR 881 : (2005) 4 MhLj 424

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : A.N. Mulla, for the Appellant; R.G. Ketkar and R.M. Pethe, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—The Petitioners-tenants, legal heirs of original defendant No. 1 have invoked Article 227 of the Constitution of India and sought to challenge the judgment and order passed by the Additional District Judge, Satara (for short "Appellate Court"), dated 21st November, 1989, in Regular Civil Appeal No. 165 of 1983 by which respondent Nos.1, 2 and 4 to 7 - original plaintiffs Nos.1 to 6 - landlords" Appeal was allowed and the judgment and decree dated 7th July, 1983, passed in Regular Civil Suit No. 270 of 1978 by the Civil Judge, Junior Division, Karad (for short "Trial Court"), was set aside and, in the result, landlords-respondents suit has been decreed Therefore, the present Writ Petition by the heirs of the original tenant - defendant No. 1 in the suit in question.

2. One Mohiddin, father of respondents, inducted the petitioners' father Abbas in the suit premises as a monthly tenant on 6th August, 1949. Sometime in the year 1955, Mohiddin, father of the respondents, filed Regular Civil Suit No. 68 of

1955 in the Court of Civil Judge, Junior Division, Karad, for the declaration and possession against the petitioners' father Abbas, one Gulam Kasam Bagwan and respondents herein. Petitioners' father resisted the said suit by his Written Statement and basically contended that respondents' father Mohiddin was the owner of the said premises. The respondents herein, who were the defendants in the said suit, also filed their Written Statement and supported the case of the owner of the suit premises i.e. original plaintiffs. On 23rd January, 1959, the said suit was decreed and the said Mohiddin, father of the respondents, was declared owner of the suit premises by adverse possession. He was also declared as sole and exclusive owner of the said premises. The respondents herein, who were defendants in the said suit, never challenged the said findings in favour of their father Mohiddin and in a way, waived, relinquished and/or gave up their rights, if any.

3. On 27th February, 1959, Mohiddin entered into an agreement of sale with Abbas, father of the petitioners herein. Mohiddin agreed to execute the sale deed as per the said agreement to sell (Exhibit-78). From the date of the said agreement dated 27th February, 1959, till 18th March, 1974, petitioners' father Abbas, stopped paying monthly rent as the said Mohiddin also stopped collecting the monthly rent. Their relations were cordial and, therefore, as alleged Abbas, the petitioners' father, orally requested Mohiddin on various occasions to execute the sale deed. In the year 1966, due to an earthquake, the suit premises was damaged and, therefore, petitioners' father Abbas had reconstructed the suit premises. Mohiddin never raised any objection to the same at the relevant time and/or immediately thereafter. Both the parties, therefore, acted on the basis of the said agreement dated 27th February, 1959.

4. On 19th March, 1974, Mohiddin served notice to Abbas, the father of petitioners, on two grounds -(a) arrears of rent and (b) objection to the permanent construction in the suit premises without prior permission. On 3rd April, 1974, Abbas, the father of the petitioners resisted the same by a reply. He denied the allegations and pointed out that in view of the said agreement, they are the owners of the premises. On 13th April, 1974, Abbas gave one more notice to Mohiddin and reiterated his right in the suit premises and expressed his willingness to purchase it.

5. On 10th November, 1977, Mohiddin, the father of the respondents died intestate, leaving behind the respondents, as his heirs and legal representatives. On 26th October, 1978, respondents - the sons and daughters of Mohiddin filed Regular Civil Suit No. 270 of 1978 against petitioners in the Court of Civil Judge, Junior Division, Karad (Trial Court) i.e. the sons and daughters of Abbas for possession on the ground of arrears of rent and unauthorised permanent construction. On 10th July, 1979, petitioners filed Written Statement and denied the allegations and raised various pleas. The evidence was led by the parties. On 7th July, 1983, the suit No. 270 of 1978 filed by the respondents was dismissed by the Trial Court, holding that respondents-plaintiffs failed to prove their title;

the suit property is in possession of the defendant No. 1 as a tenant; the defendants willful defaulters; the defendants-tenants had changed the nature of the suit premises. The suit was hit by res judicata being not within limitation; the suit was not maintainable in the present form; plaintiffs are not entitled to claim possession; plaintiffs are not entitled to claim past or future mesne profits. The learned Trial Court further held that respondent No. 1-defendant No. 1 proved that the deceased Mohiddin Jamadar agreed to sell the portion of the suit premises; defendant proved that his possession is protected under the provision of Section 53A of the Transfer of Property Act. Based on these issues, the suit of the plaintiffs was dismissed.

6. The respondents, therefore, preferred Regular Civil Appeal No. 165 of 1983 in the Court of Additional District Judge, Satara (Appellate Court). By the impugned judgment dated 21st November, 1989, the Appellate Court reversed the judgment and findings of the Trial Court and allowed the Appeal and decreed the plaintiffs' suit, by holding that the respondents-original plaintiffs proved that defendant No. 1 had withheld the payment of rent for a period exceeding six months and, thereby, became defaulter and further that the defendant No. 1 erected permanent structure in the suit premises, without obtaining the written consent of the landlord. The Appellate Court further held that the judgment and decree in Regular Civil Suit No. 68 of 1955 between Mohiddin and defendant No. 1 was not hit by res judicata; original defendant No. 1 is not entitled to protect his possession over the suit premises u/s 53A of the Transfer of Property Act, and that original defendant No. 1 failed to prove that he became the owner of the suit premises by an adverse possession. Therefore, the present Writ Petition by petitioners, being heirs of defendant No. 1-tenant.

7. Heard the learned counsel Mr. A.N. Mulla for petitioners, who relied on a catena of judgments in support of his submissions and submitted to maintain the order passed by the Trial Court. Those submissions are: The Agreement to sell dated 27th February, 1959, is binding on the parties as the petitioners are in possession of the premises as owners based upon the said Agreement. The part consideration was also paid by the petitioners. The parties have in fact acted upon the same. The respondent-landlords never claimed arrears of rent at any time except under the demand notice dated 19th March, 1974. The suit premises was repaired after an earthquake in the year 1966 and there was no objection of any kind by the landlord to the said repairs. The respondent-landlords never asserted their ownership rights in the earlier suits and, therefore, they are estopped from claiming ownership right now in the present suit. On the contrary, the petitioners-tenants have perfected their title by way of adverse possession. 2005 (1) M.L.J. 899 Tej Narain and Anr. v. Shanti Swaroop and Anr.. The suit, therefore, under the provisions of the Bombay Rent Act, as such, in the said form, was not maintainable and the question of title could be determined in this suit as the Court had no jurisdiction except an incidental question arising out of the relationship between landlord and tenant. Kalipada Chowdhury Vs. Union of India (UOI), 1998 (3) All M.R. 753, Purshottam Visindas Raheja Vs. Life

Insurance Corporation of India and Others, , Wilfred Lovette Vs. Ganesh, Wilfred Lovette v. Ganesh s/o Hemraj Karmakar, AIR 2001 S.C. 1 Shamim Akhtar v. Iqbal Ahmad and Anr., 2001 (2) M.L.J. 730 Shriram Dhondiba Kachi, since deceased through his heirs and legal representatives Vs. Shankar Khandu Jadhav, since deceased through his heirs and legal representatives and Others, Shriram Dhondiba Kachi (since deceased through LRs.) v. Shankar Khandu Jadhav (since deceased through LRs.) 2002 (5) M.L.J. 218 Pandi Bandu Wani (Since deceased through his Lrs.) and Ors. v. Sapadu Krishna Wani (since deceased through his LRs. and Ors., Rajendra Tiwary Vs. Basudeo Prasad and Another, , The petitioners are entitled to claim protection u/s 53A of the Transfer of Property Act being in possession of the property immediately after the agreement to sale dated 27th February, 1959 and they are still in possession of the same even though the period of limitation for bringing the suit for specific performance under an agreement to sale has expired. Mr. Mulla has also relied on Nathulal Vs. Phoolchand, , 2001 (1) M.L.J. 79 Balasaheb Manikrao Deshmukh and Anr. v. Rama Lingoji Warthil, Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others, , Sadashiv Chander Bhamgare Vs. Eknath Pandharinath Nangude, , Mahadeva and Others Vs. Tanabai, . The present suit is barred by res judicata. The respondents-landlords' Demand Notice was, therefore, not proper and valid. 1991 (1) M.L.J. 1 Vijaybai and Ors. v. Shriram Tukaram and Ors.

8. The learned counsel Mr. R.G. Ketkar appeared for the contesting respondents Nos.1 to 5 and supported the impugned judgment and its reasoning. He resisted the contentions as raised by the petitioners. He has made reference to 1994 M.L.J. 1145 Mahadeo Nathuji Patil v. Surjabai Khusalchand Lakkad and Ors. in respect of Section 53A of the Transfer of Property Act and contended that the statutory protection u/s 53A is not lost by lapse of time to file suit for specific performance if such persons satisfy the essential requirements therein. Those essential requirements are crystallized by the Apex Court in Shrimant Shamrao (supra). Those are :

- (1) there must be a contract to transfer for consideration any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract. He also relied on paragraph 11 of the Full Bench judgment in the case

of Mahadeo (supra) in reference to the above ingredients as laid down by the Supreme Court and contended that the petitioners in the present case failed to satisfy all the ingredients as referred above. He also relied on Dattatraya Krishna Jangam Vs. Jairam Ganesh Gore, and submitted that a plain reading of the Plaint as a whole is necessary to ascertain the nature of the suit and the relief, as prayed for. In the present case, the suit for recovery of rent and possession and, therefore, the words "relating to" cover the present suit or proceedings as it was in connection with the question of possession of the premises based on the relationship of landlord and tenant. Therefore, such incidental issue can be agitated and decided by the Court u/s 28 of the Bombay Rent Act. In support of his submissions, he further relied on paragraph 8 which is reproduced as under:

"8. Section 28 confers jurisdiction upon the special Court not only to decide questions referred to in the section, but also all matters which are incidental or ancillary to the determination of these questions, see Meharsingh Sethi v. Khurshed Nadirshaw Satarwala, 56 Bom.LR 540 and Importers and Manufacturers Ltd. Vs. Pheroze Framroze Taraporewala and Others, in which the Supreme Court observed:

"Once there is a suit between the landlord and a tenant relating to the recovery of rent or possession of the premises, the Small Cause Court acquires the jurisdiction not only to entertain that suit but also to deal with any claim or question arising out of the Act or any of its provisions which may properly be raised in such a suit."

It was held in this case that the Court of Small Causes has jurisdiction not only to decide the dispute between the plaintiff landlord and the tenant but also a question raised between the plaintiff and the sub-lessee."

9. After considering the rival contentions raised by the respective counsel and after going through the contents of the Plaint (Exh.8) in Regular Civil Suit No. 270 of 1978, I am of the view that the present suit is maintainable for the possession of the suit premises as the foundation of the suit is on the existing relationship of landlord and tenant between the parties. In view of the undisputed facts on the record, there is no doubt that till this date, based on the agreement to sale, dated 27th February, 1959, the petitioners - heirs of the original defendant No. 1, never took any steps to file appropriate proceedings and/or suit for specific performance to claim ownership of the premises in question based on the agreement to sale. It is also borne out from the record that except oral request, there was nothing on the record to suggest that the petitioners have, at any point of time, expressed their readiness and willingness to pay the balance payment to complete and/or to execute the sale deed of the premises in question based on the agreement to sale dated 27th February, 1959. There is also no dispute as such that in view of the said agreement as the petitioners have been in possession of the said premises, initially as tenants. Later on, as owners, they never paid any rent to the landlords. The respondents-landlords also never demanded the rent or arrears of rent in writing after the

agreement of 27th February, 1959. Both the parties acted, based upon the said agreement. The petitioners are in possession of the said premises till this date.

10. The respondents-landlords, therefore, as admittedly the ownership as required under the law for want of sale deed, has remained with the landlords, issued demand notice dated 19th March, 1973 and called upon the petitioners to pay the arrears of rent and intimated to vacate the premises also on the ground of unauthorised permanent construction. Abbas, the father of the petitioners, resisted the same by reply dated 3rd April, 1973 and denied the allegation and reiterated the ownership of the premises on the basis of the agreement in question and, therefore, also denied the liability of arrears of rent. He further asserted his ownership and possession of the premises as owners. Another notice was issued by Abbas dated 13th April, 1973, to Mohiddin and he reiterated his right in the suit premises and also expressed his willingness to buy the same. As recorded above, Mohiddin, father of the respondents, died intestate on 10th November, 1977, leaving behind the respondents as his heirs and legal representatives. The present suit was filed on 26th October, 1978, after the death of the said Mohiddin by his sons and daughters -respondents herein for possession on the grounds referred above. By Written Statement, the said Plaint was resisted on the above grounds by the petitioners. In view of the above facts and circumstances of the case, I am of the view that the suit, as filed for possession of the premises, was based on landlord-tenant relationship. Therefore, the suit, as such, was maintainable. The Court has jurisdiction to pass the appropriate order for possession and/or deal with the related aspects, if necessary, to decide the issue of recovery of rent or possession between the landlord and tenant in question. In absence of sale deed, based on the agreement of 1959, the petitioners at present cannot be said to acquire title or ownership of the property in question.

11. The Trial Court, in this background, in such suit of landlord-tenant, has jurisdiction to decide the incidental or connected issue arising out of the same as observed by the Full Bench of the Bombay High Court in Dattatraya (supra) and as observed by the Apex Court in Rajendra Tiwary (supra) as follows:

"A Court of Rent Control having limited jurisdiction to try suits on grounds specified in the special Act obviously does not have jurisdiction of the ordinary civil court and therefore cannot pass a decree for eviction of the defendant on a ground other than the one specified in the Act."

12. In the facts and circumstances of the case, merely because issue relating to Section 53A was agitated in the Written Statement by the petitioners, that itself cannot prevent the Court from adjudicating the issue relating to recovery of the possession of the premises in question between the parties. Therefore, the decision, as cited by the petitioner in Wilfred (supra) is distinguishable on facts and circumstances of the case. That was a case concerning the provisions of Provincial Small Causes Court Act, 1987.

13. In the present facts and circumstances of the case, the issues regarding ownership or title, res judicata, limitation, adverse possession, are not directly concerned with the suit for recovery of possession of the premises based on the landlord and tenant relationship between the parties in question. Those issues and findings by the Courts below, even if arrived at, would, in no way, affect the basic suit of recovery of possession by the landlords on the foundation of arrears of rent and permanent unauthorised structure, as contemplated under the Bombay Rent Act. Those issues are not material to decide the present controversy and, therefore, are kept open.

14. As contended, the basic ingredients of Section 53A of the Transfer of Property Acts, as referred above, have been complied with in the present matter by the petitioners-tenants as admittedly, part-considerations were paid immediately on the date of the agreement in question. The petitioners-tenants are in possession of the premises even before the agreement of 27th February, 1959. Therefore, since the date of the agreement, they are in possession of the premises. They have never paid the rent as tenants of the premises and throughout claimed to be the owners of the said premises. The respondents-landlords also never demanded the rent in writing except the demand notice in question. There is nothing on the record to suggest and prove that the petitioners-tenants expressed further willingness and readiness to make the balance payment and admittedly never took any steps to file suit for specific performance. In view of the Apex Courts' decisions and Full Bench decisions, as relied, the petitioners are definitely entitled to claim protection of the possession of the property in question. The petitioners, therefore, would be entitled to get protection in respect of the possession of the premises as contemplated u/s 53A of the Transfer of Property Act and as declared by the Apex Court and others as referred above. Therefore, in view of this also, issues relating to title or ownership, adverse possession, res judicata, based on the earlier suit, according to me, loses its importance.

15. The petitioners, according to the counsel appearing for the respondents-landlords, have never expressed or showed their willingness or readiness to purchase the property after the agreement dated 27th February, 1959. They never offered the balance money to perform their part of the contract. No steps were taken to file suit for specific performance by the respondents-landlords being the owners of the premises claim possession in the present form. It is clear that in the present suit it is only relationship of landlord-tenant and matter relates to recovery of the rent or possession is required to be dealt with, with connected aspects and no other issue. Therefore, accepting the rival contentions of both the parties, I am proceeding to deal with the matter based upon the landlord-tenant relationship between the parties.

16. In this background, now the question is whether the petitioners-tenants have committed default in not depositing the rent regularly till the date of the demand notice i.e. 19th March, 1974 and immediately within one month from the said

demand of rate. The purpose and object of the Bombay Rent Act and/or such laws relating to landlord and tenant cannot be overlooked while deciding such relationship between the parties. The Bombay Rent Act provides and contemplates and as the earlier suit no way affects their right to claim possession of the premises, being landlords. In this background, as those essential ingredients of Section 53A have not been complied with by the petitioners, therefore, they are not entitled to get protection even u/s 53A of the Transfer of Property Act. On this foundation, therefore, the present suit was filed by the respondents-landlords to that the tenant must be in arrears of rent for more than six months and always neglecting to pay the rent regularly. The tenant failed to deposit the rent within one month from the receipt of the demand notice. If necessary, the tenant should take steps to fix the standard rent or to object to exorbitant rent, if any. In the present case, admittedly, immediately after the receipt of the demand notice, the petitioners resisted the same and denied the arrears of rent and even, claimed for the possession of the premises in question on the foundation that pursuant to the agreement dated 27th February, 1959, they are the owners of the said premises. They were not liable to make the payment of rent as demanded for the first time after 15 years from the date of the agreement dated 27th February, 1959. This assertion by the petitioners has a definite foundation as, pursuant to the said agreement, the landlords admittedly received some consideration. The petitioners are enjoying the said possession even before the agreement in question till this date. There was no rent demanded earlier to the demand notice of the year 1974. The said demand was made only after the death of Mohiddin and only by the legal heirs and representatives of the original landlord. The said agreement was executed between Mohiddin and the original defendant i.e. the father of the petitioners. Apart from the permanent construction as made in the year 1966 by the petitioners as the building itself was damaged because of earthquake. The said construction remained unchallenged and unobjected till the demand notice of 1974. This itself suggests that there was no neglect or willful default or unwillingness on the part of the petitioners-tenants to make the payment of rent as alleged. If on the basis of the agreement in question tenants are claiming ownership and in this background if they are not depositing the rent as the same was never demanded by the landlords and with this clear understanding on the basis of the sale agreement dated 27th February, 1959, I am not accepting the view of the Appellate Court to the extent that the petitioners are defaulters having not made the payment of rent in spite of the demand notice in question. In my view, the petitioners-tenants, in the facts and circumstances of the case, cannot be said to be in arrears of rent and/or defaulters as contemplated under the provisions of the Bombay Rent Act.

17. The ground of permanent structure without permission has also no foundation in view of the above facts and circumstances of the case. The construction, as recorded, was made sometime in the year 1966. There was no written objection at any point of time. The construction was allowed by the

original landlord and at least in the absence of any evidence on the record, it is a case where the said construction might have been permitted by the late Shri Mohiddin as there was no objection in writing except for the first time by the legal representatives of the said Mohiddin. Therefore, it is difficult to accept the case of the landlords on the ground of unauthorised permanent structure. The Appellate Court, according to me was, therefore, wrong in granting the decree of possession on the said ground also.

18. In view of the above reasoning, a case is made out by the petitioners to interfere with the impugned judgment and order. Therefore, the judgment and order dated 21st November, 1989, passed by the Appellate Court i.e. Additional District Judge, Satara, is quashed and set aside. The suit of the plaintiff is dismissed.

19. The Writ Petition is allowed in terms of prayer clause (b). However, there shall be no order as to costs.