

(1990) 06 BOM CK 0007
In the Bombay High Court
Case No : S.A. No. 222 of 1988

Abdul Sattar Khan deceased by L.Rs.. Sayeeda Begum and others APPELLANT

Vs

Abdul Gani Khan RESPONDENT

Date of Decision : 26-06-1990

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : (1991) MhLj 183

Hon'ble Judges : A.A. Halbe, J

Bench : Single Bench

Advocate : A.R. Mahajan, for the Appellant; P.F. Patni, for the Respondent

Final Decision : Dismissed

Judgement

A.A. Halbe, J.—Three salient questions have been raised in this appeal on behalf of the appellants-defendants and they are that, firstly the Civil Court has no jurisdiction to decide the claim in the suit because that claim relates to eviction of the tenant from the house and plot, the same falls exclusively in the jurisdiction of the Rent Controller under Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954 (to be referred hereinafter as "Hyderabad Rent Act"), secondly that the so called notice u/s 106 of the Transfer of Property Act given by the landlord to the tenant is illegal and invalid and incapable of terminating the tenancy of the tenants and thirdly that the claim for mesne profits allowed by the first appellate Court is contrary to provisions of law inasmuch as the same was not claimed before the trial Court but for the first time in the first appeal.

2. In order to answer these questions it may not be out of place to traverse through the facts of the case of the landlord against the tenant. This appeal is filed by the tenant who has been aggrieved by the Judgment of the trial Court evicting him from the suit premises and the Judgment of the Appellate Court confirming his eviction.

3. In the suit No. 912 of 1984 the case of the plaintiff was that the plaintiff Abdul Gani Khan had purchased an open plot bearing House No. 4 4-45 situated at Moti Karanja, Aurangabad from one Aminabee wd/o Bashir Ahmed under the registered sale-deed dated 4th March. 1983. The description of this property is not disputed in between the parties except the fact that according to the present appellant-defendant the leasehold property comprised of two rooms constructed by him. The defendant had executed the rent note in favour of Shaikh Bashir in writing dated 9th February, 1963 in regard to the suit plot specifically agreeing that he would pay the rent of Rs. 8/- from month to month. However, it is alleged that the defendant-tenant did not pay the agreed rent since June. 1980. In order to recover arrears of rent the previous owner Aminabee widow of original owner Shaikh Bashir filed suit No. 315 of 1983 for recovery of rent of 29 months. In that suit, the defendant was made known about the sale transaction by Aminabee wd/o Shaikh Bashir in favour of the present landlord Abdul Gani Khan Nawaz Khan. Even after this sale it is alleged that the defendant-tenant did not pay the rent from March, 1983. The plaintiff, therefore, filed the present suit No. 912 of 1984 for recovery of the rent from the month commencing from 4th March. 1983 to 3rd October. 1984 comprising the period of 19 months. It is alleged that the defendant thus contravened the terms of the lease and was liable to be evicted. The defendant, after taking the open plot on lease constructed two rooms thereon for his personal occupation. On account of the default in payment of rent the plaintiff has filed suit for possession of the open plot and for recovery of the arrears of rent. The further prayer is that defendant should be directed to remove the superstructure constructed on the open plot and the possession of the open plot should be handed over to the plaintiff-landlord. Prior to filing the suit the plaintiff-landlord has given the requisite notice terminating the tenancy of the defendant and thus had complied with all the requirements entitling him to recover possession and the arrears of rent. The plaintiff further claimed compensatory costs of Rs. 500/-.

4. The defendant-tenant contested the suit by filing written statement of Exhibit 14 which has been amended vide Exhibit 36, contending that the suit was not tenable. The original defendant Sattar expired during the pendency of the suit and his legal representatives are brought on record. They have also adopted the same stand taken by defendant Abdul Sattar. The defendant, original tenant denied the arrears of rent but had admitted that the previous suit filed by Aminabee was decreed against him. Defendant Abdul Sattar further denied about the sale of the lease-hold property in favour of the present plaintiff. He admits to have received the notice dated 15th April, 1984. The defendant thereafter also admitted the ownership of the plaintiff and it is contended that the arrears of rent were sent by money orders which were refused by the landlord. The defendant-tenant denied to have committed the breach of the terms of the tenancy and thus denied the suit claim. According to the defendant-tenant the eviction proceedings should have been filed in the Court of Rent Controller under the Hyderabad Rent Act and that the defendants still continued to be the tenant

of the suit plot and rooms since the notice terminating his tenancy was not valid and binding on him. Regarding compensatory costs it has been contended that the claim thereof is totally unwarranted. Even the ownership of Aminabee was also disputed. By way of further pleadings it is contended that the defendant Abdul Sattar has taken the open plot with an intention to construct a house for residential purpose and Bashir, the husband of Aminabee had also the same intention. Because Bashir could not spend for constructing the room the defendant himself had constructed the house with the permission of Bashir. This permission was given after about six months of the lease dated 9th February, 1963. In that light of the matter the notice terminating the tenancy of only the open plot was not legal. On this contention it was prayed by the defendant that the suit deserved to be dismissed.

5. The trial Court after recording the evidence and perusing all the documents found that the tenancy of the defendant-tenant was validly terminated, that the defendant has contravened the terms of the lease by committing defaults in payment of rent and further as the open plot was let out to the defendant the Civil Court had jurisdiction to entertain the claim. In keeping with these findings the trial Court decreed the suit in favour of the respondent-plaintiff. In appeal No. 298 of 1987 the learned Appellate Judge also confirmed all these findings by holding that the Civil Court has jurisdiction to entertain the suit and that the notice was valid. The Appellate Court also entertained the claim for mesne profits which the landlord had preferred in appeal. Accordingly, the learned Appellate Judge dismissed the appeal and confirmed the Judgment and Decree passed by the trial Court and also allowed the claim for mesne profits.

6. In this appeal, as indicated above, the main contention which has been raised by the learned Advocate for the appellants is that what is leased out to defendant is not the open plot but the super-structure constructed thereon and as soon as this is found to be true the Civil Court ceases to have any jurisdiction under the Hyderabad Rent Act. This has indeed been opposed by the learned Advocate for the respondent on the ground "that what has demised by way of lease-hold property is the open plot and not the house.

7. The learned Advocate for the appellant has contended that the Special Civil Suit No. 315 of 1983 filed by Aminabee against the present appellant-tenant there was recovery of rent at the rate of Rs. 8/- p.m. for the house bearing No. 4 4-45 situated at Moti Karanja, Aurangabad. This would, according to him, clearly show that what is let out to the defendant is the house and not the open plot. He has also suggested that the same property has been sold by Aminabee to the present landlord and hence the claim for possession is in respect of the house and not in respect of the open plot. It is an undisputed position of law that if possession of the house is to be secured, the same can be done through the Court of Rent Controller, under the Hyderabad Rent Act. The learned Advocate for the respondent in this behalf has urged that although there is reference of a house in the above suit, that is a case of mistaken description of the suit plot. He

has on the other hand taken me through the various documents, the various pleadings and the depositions of the respective parties recorded in the above suit. In the first instance he has contended that the plaintiff has specifically pleaded that the open plot was let out to the defendants and that this plot has been described as house No. 4-4-45. That, however, did not convert the open plot into house. It is not disputed in between the parties that there are two rooms on the open plot. However, it must also be taken into consideration that all along the story of the defendant is that those rooms were constructed by him within six months of the lease-deed.

8. It is not disputed between the parties that the lease-deed alias rent note dated 9th February, 1963 at Exhibit 42 on record is in respect of lease-hold property between the tenant Abdul Sattar and the original landlord Bashir Khan, the husband of Aminabee. Now, if the recitals of this rent note are considered, they clearly show that the rent note was executed in respect of plot bearing above municipal house number. It is also stated that the rent that was agreed in between the parties was Rs. 8/- p.m.. however, condition is that the tenant was not to make any construction or carry on any repair on the plot. The rent was to be paid month to month and there was also condition that if the landlord required the possession of the plot the tenant was to vacate the same after getting one month prior knowledge or after issuing the notice. Now, on perusal of this deed (Exhibit 42) it would be patently clear that what has been leased out in favour of the tenant is an open plot and by no stretch of imagination any super-structure thereon. There is also a condition that the tenant was not to put up any super-structure and was likewise not to carry on any repairs on it.

9. The learned advocate for the respondent also drew my attention to the written statement filed by the tenant in Small Cause Suit No. 315 of 1983 which is found to be at Exhibit (18). This written statement has not been disputed by the defendant-tenant. Now on going through the averments in this written statement it is specifically stated by the tenant that Bashir Khan was the owner of the open plot bearing No. 4-4-45. Thus, only open plot was leased out to the defendant in February 1963. In view of this unequivocal admission in the written statement it cannot lie in the mouth of the defendant-tenant to say that the lease-hold property comprised of the open plot as well as the rooms constructed by him. Similarly, in the evidence of Hussain Khan, the son of Abdul Sattar, at Exhibit (47), there are clear cut admissions on behalf of the tenant that the plot was taken on rent but the same was taken for construction of house. There is also admission in following words:

"The say of the plaintiff that we took the open plot on rent is correct."

It is also admitted that the rooms were constructed by tenant Abdul Sattar after two to three months after the open plot was taken on lease. In the further cross-examination it is clearly stated that there was an open plot when it was taken on rent. The last clinching admission is that the two rooms constructed on the plot were owned by the tenant. Even the witness for the defendant Rashi Khan at

Exhibit 49 has admitted that what was given on lease initially was an open plot. With such clinching admissions on the part of the defendant-tenant, it cannot be pleaded by the appellant-tenant that the house was let out to the tenant. The learned Advocate for the respondent plaintiff has urged that when the demised property comprised of the open plot the jurisdiction to try the suit remained with the Civil Court. In that regard he has drawn my attention to 1986 Mah.L.R. 1166 in the case of Sakharam vs. Dattu through Legal Representatives and others. The learned Advocate for the appellants-defendants had tried to distinguish this ruling by stating that the open plot must remain as an open plot on the date of the lease as well as on the date on which the claim for eviction is preferred. In this case, admittedly, on the date of the notice there were two rooms constructed on the open plot and hence the ratio in this ruling would not be applicable to the facts of the present case. I am afraid that this argument cannot be countenanced in view of the clear observations of the Court that "When there is no super-structure on the land and the lease relates only to the open plot the remedy for possession is not under the Hyderabad Rent Act." It is also observed that "by way of additional circumstances that if there is no super-structure on the date of the termination of lease the presumption is that there is an open plot that is demised in favour of the tenant and in that light of the matter also the jurisdiction of the Civil Court is not ousted." The learned Advocate for the appellant has tried to club both these circumstances together and has urged that if both these circumstances did not exist, the eviction cannot be ordered by the Civil Court. This is indeed not true. On the other hand, if it is found that initially the open plot has been leased out. the lease is in respect of only the open plot and by no stretch of imagination lease of the super-structure. In that Ruling reference has also been made to various Rulings of the Supreme Court as well as the Madras High Court and the ratio in those rulings is that when the open plot is leased out the protection of the local Rent Act is not available to the tenant, the remedy is with the Civil Court and not with any other authority namely the Rent Controller.

10. The learned Advocate for the respondent has also relied on AIR 1989 SC 69 in the case of Prabhat Manufacturing Industrial Co-operative Society vs. Banwarilal. Relying on the same authority, the learned Advocate for the appellant-tenant has contended that the facts of this case are not identical with the facts of the case under reference. He has suggested that the open plot was leased out by the custodian of evacuee property and that the same was let out to some third party. However, the main question related to the protection available to a tenant under the Local Rent Control Act (in that case Delhi Rent Control Act, 1958). The Court observed that "under the definition of "premises" the open plot was not covered and hence no protection under the Delhi Rent Control Act, was available to the party." It would, thus, follow that when there is "open plot" the tenant cannot have resort to the Local Rent Act.

11. In section 2, sub-section (b) of the Hyderabad Rent Control Act, the house does not envisage the inclusion of open plot and it is therefore correctly urged by

the learned Advocate for the respondent that the jurisdiction of the Civil Court is available to the landlord plaintiff in this case. Both the Courts below have rightly observed that the Civil Court can decree the claim of the plaintiff-landlord.

12. It has been vehemently urged on behalf of the appellant-plaintiff that using word "house" the landlord has virtually estopped himself from contending otherwise. I am afraid that neither the doctrine of Estoppel nor the doctrine of Election is available to the appellant. In the first instance it is nowhere suggested by the appellant-defendant that the house constructed by him belonged to the landlord. He never represented to the landlord or his predecessor-in-title that the house formed the part of lease-hold property. On the other hand it has been his consistent stand that the two rooms are constructed by the tenant and not by the landlord. Merely because the suit property is described as house it cannot be said that the same becomes a house and that the recovery of possession is possible only through the Rent Controller. I, therefore, answer this question in the negative and hold that what was demised in favour of the tenant was an open plot and not the super-structure thereon and accordingly hold that the Civil Court has jurisdiction to try the claim.

13. It has been urged by the learned Advocate for the appellant that the notice u/s 106 of Transfer of Property Act the tenancy is terminated, in case of monthly tenancy, by 15 days" notice expiring with the end of one month of the tenancy. In this regard, the learned Advocate for the appellant has urged that if the notice given by the landlord is perused at Exhibit (39) it does not at all show that the tenancy is to expire with the end of the month of tenancy. The said notice has been given on 12th October, 1984, the same was received by the tenant on 13th October, 1984 whereas the tenancy is admittedly from 9th of each month and this exhibit (39) does not at all show that the tenancy was to expire by 8th of November 1984. This is clearly an illegal notice. To this the learned Advocate for the respondent has urged that this notice Exhibit (39) is an omnibus notice because it shows in the first instance that the tenant had agreed to vacate the demised premises after one month after the service of notice and that the suit has been filed on 13-11-1984. There was thus clear notice of 31 days. Similarly, it is alternatively provided that if the tenant thought that the rent note is not binding on him he was directed to vacate the demised premises after 15 days after the service of notice which would expire with the end of month. In view of this alternative notice it is suggested that the said notice is an omnibus and legal notice. Now, looking to the rent note it would be clear that it nowhere provides that the notice was to be a notice u/s 106 of the Transfer of Property Act. On the other hand there is a contract between the landlord and tenant that the landlord was to give one month notice by way of prior knowledge to the tenant. This term of lease would be a term of the contract which is not subject to section 106 of the Transfer of Property Act. In this behalf learned advocate cited ruling K. Nasir Basha and Another Vs. Turukkan Chatram Charities, , wherein it is laid down that "where the lease deed specifically stated that the lease should vacate the property whenever needed by the landlord on his giving 30 days" notice and the

notice given stated to terminate it by the end of 30 days of the receipt of notice, held that there was a contract to the contrary in relation to the provisions of section 106." In this case, it is specifically agreed in between the parties that one month's notice was to be given irrespective of the month of tenancy. I, therefore, feel that the notice Exhibit (39) is a valid notice and is capable of terminating the tenancy of the defendant.

14. On the question of mesne profits I feel that no longer discussion is warranted in view of the ratio laid down by the Supreme Court in Bhagwati Prasad Vs. Shri Chandramaul, . The Supreme Court observed that:

"Once it is held that the plaintiff is entitled to eject the defendant, it follows that from the date of the decree granting the relief of ejectment to the plaintiff, the defendant who remains in possession of the property despite the decree, must pay mesne profits or damages for use and occupation of the said property until it is delivered to the plaintiff."

The learned Appellate Judge has rightly observed that after the termination of the tenancy the tenant cannot be said to be in lawful possession of the property and his possession becomes possession of a trespasser and he is therefore liable to pay the mesne profits. I, therefore, feel that the appellant defendant fails on all counts. I, therefore, see no merit in this appeal and proceed to dismiss the same with costs.