

(2004) 06 BOM CK 0068
In the Bombay High Court
Case No : Second Appeal No. 191 of 1986

Brijlal Mohanlal Rathi and Others

APPELLANT

Vs

Dayalgir Doulatgir Giri

RESPONDENT

Date of Decision : 22-06-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 99
Transfer of Property Act, 1882 — Section 106

Citation : (2004) 4 MhLj 526

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : S.C. Mehadia, for the Appellant; B.N. Mohta, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—This is an appeal filed by the original plaintiffs whose suit was decreed by the learned Civil Judge, Jr. Dn. Mangrulpir. However, the decree was reversed by the first appellate Court and the aggrieved plaintiffs are the present appellants. The plaintiff No. 3 had died during the pendency of the Regular Civil Appeal. His heirs being already on record, they have filed the present appeal. The appellant No. 6 who was included in the array of the appellants later on, has purchased the suit property and has stepped into the shoes of the original plaintiffs.

2. When the appeal was called for hearing, the learned counsel for the respondent original defendant, Advocate Shri B. N. Mohta orally informed the Court that his client has informed him not to appear in the matter. In view that he could not be discharged at the last moment, his oral request for permitting his discharge, was refused.

3. The appeal was heard on 16-6-2004. On 17-6-2004, Advocate Shri B. N. Mohta has filed a pursis placing on record his inability to argue in view of specific instructions from his client on 4th October, 2002. In view of this, none has

caused appearance in his place, as well there is no proper prayer for discharge made well before the case reaches hearing. No cognizance of such pursis can be taken.

4. The second appeal was heard on merits.

5. The suit was initiated by the original plaintiffs Brijlal Mohanlal Rathi and others against Dayalgir Doulatgir Giri claiming possession on the basis of termination of lease of open plot and part thereof which portion, according to the plaintiffs, was encroached by the defendant. According to the plaintiffs, the lease was of open plot commencing from 1st April, 1976 for which rent note was executed by the defendant in his own handwriting on 13th February, 1976 and after obtaining open plot on lease on monthly rent of Rs. 60/-. According to the plaintiffs, after the lease was commenced, the defendant constructed temporary structure for running a hotel. The plaintiffs issued notice of termination of tenancy u/s 106 of the Transfer of Property Act, on 13-7-1978 served on the defendant on 14-7-1978, terminating the lease at the end of month and demanded possession on 1-8-1978 treating the defendant's possession thereafter to be unauthorized. On failure of the defendant to deliver the possession, plaintiffs filed the suit for possession of leased plot, encroached portion and mesne profit.

6. The suit was decreed directing delivery of possession of the suit property mentioned in para 1 of the plaint, recovery of arrears in the sum of Rs. 1740/- and proportionate costs with further inquiry under Order XX Rule 12(c) Civil Procedure Code. The aggrieved defendant filed Regular Civil Appeal which was registered as R.C.A. No. 426 of 1982 and has been heard, decided and is allowed by the 2nd Additional District Judge, Akola which judgment and decree is challenged in present second appeal.

7. The learned Additional District Judge formulated questions for determination as under:

"1. Whether the respondents properly terminated the lease of the appellant of the suit premises described in para 1(b) of the plaint?

2. Whether it is proved that the appellant made encroachment on the site of the respondents as described in para 1(b) of the plaint?"

8. The learned Appellate Judge held that admittedly, the suit property was Hindu undivided property and the notice issued by the plaintiff No. 1 singly was bad. The learned Appellate Judge also examined the legality of termination and consequent right of landlord to demand possession on three more aspects namely;

(i) Whether the notice u/s 106 of Transfer of Property Act was legal as the possession was demanded on 1st day of month?

(ii) Whether provisions of Rent Control Order were applicable?

(iii) Whether plaintiff's suit was bad and not maintainable on account of

misjoinder of causes of action i.e. leased plot and encroached portion?

The learned appellate Judge examined these questions without formulating points in that regard.

The learned appellate Court held against plaintiff on all these points and found that on these ground suit was liable to be dismissed by allowing the appeal.

The learned appellate Judge further observed that two different claims, one for leased out property and another for encroached portion, stood on different footings and these claims ought not to have been clubbed together in view of the provisions of Rule 4 of Order II Civil Procedure Code.

9. Notice :

Appellate Court found that clear 15 days" notice period was afforded to the tenant. However, the notice is held bad on the ground that the possession is demanded on the 1st day of month while last day of month the tenant is entitled to remain in possession. In fact, the contents of notice which are quoted by the appellate Court in paragraph 12 very clearly narrate that the tenant should deliver the possession on 1-8-1978. Admittedly, the tenancy is monthly and notice is issued on 13-7-1978 and received by the tenant on 14-7-1978. In no manner the tenancy was continued on and after 1st August, 1978 and, therefore, the tenant was not entitled to remain in possession till the end of month i.e. 31st August 1978. The finding of the learned appellate Judge that in spite of giving 15 days" notice to the defendant, as the notice contained a statement that the tenancy was terminated with effect from 1-8-1978 and possession was demanded on that date, plaintiffs" notice would be illegal, does not lead to correct interpretation of Section 106 of the Transfer of Property Act.

10. Grounds (a), (b), (c) and (e) have been considered to be substantial questions of law at the time of admission of appeal. Grounds (a) and (b) pertain to the status of the plaintiff No. 1 and capacity to terminate being Karta of Hindu Undivided Family and second question relates to legality of notice, while in Ground (c) is a question which relates to applicability of Rent Control Order and Ground (e) pertains to mis-joinder of causes.

11. Questions (a) and (b) are dealt together. The question as to the authority of the Karta of Hindu Undivided Family to issue notice of termination is clearly covered by the settled law. The finding that the notice is bad on this ground is not sustainable as the law on this point is well settled and any controversy on this point is no more open for debate as has been rightly argued by appellant placing reliance on reported judgments namely;

(i) Rahimtulla Abdul Rahiman Nakib Vs. Chandrakant Anant Moog and Others, (ii) Kanta Goel Vs. B.P. Pathak and Others, (iii) Sri Ram Pasricha Vs. Jagannath and Others, .

It would be wholly unnecessary to discuss this settled position of law once again.

It is very clear beyond any doubt that Karta of Hindu Undivided Family is competent to issue notice of termination of lease and, therefore, finding recorded by the first appellate Court as to the notice of termination being erroneous and termination of lease being erroneous, is, therefore, unsustainable and can be reversed purely by answering the question of law.

12. It is clear from facts concurrently adjudicated that lease was terminated at the end of month of tenancy and possession was rightly demanded on the day on which the tenancy ceased to exist and had the tenancy been not terminated, the month of tenancy would have commenced, no fault therefore can be found with notice, and the same is perfectly legal and in conformity with Section 106 of the Transfer of Property Act.

13. Applicability of Rent Control Order :

Learned appellate Judge found that though the premises were leased from 1-2-1976, the assessment list pertaining to the year 1968-69 shows that the defendant was occupying the structure standing thereon. The learned Appellate Judge held that the said occupation along with structure was from 1964. It shall be appropriate to refer to the observations and findings by quoting thereto from paragraph 13 of the judgment.

".....If we peruse the document assessment lists of the Municipal Committee (Ex. 19 and 20), then it will come to the notice that name of Jaishankar hotel of the appellant is shown as lessor of deceased Mohanlal. The assessment list (Ex. 19) pertains to year 1968-69. Therefore, what the appellant says that he is occupying suit premises along with the structure standing thereon since the year 1964, i.e. several years before the execution of the rent-note (Ex. 24), appears to be correct. When the respondents claimed exemption from the mandatory provision of the House Rent Control Order, the burden lies on them to establish that the suit property is exempted from the operation of the said order."

Having held that the tenant was occupying the suit property from 1964 and that it was a structure, the learned Appellate Judge held that the case would fall within the compass of House Rent Control Order.

14. The assessment list relied upon by the learned appellate Judge, pertains to the year 1968-69 while the learned Judge refers to the possession as to the structure with reference to 1964. The learned counsel for the appellant has challenged this finding on the ground of being perverse on the basis of pleadings and admissions of the defendants who, in specific terms, admitted that in the month of February 1976, the plaintiff No. 1 approached him and told him that the suit property fell to his share and therefore defendant should execute Rent Note in his favour and thereafter the defendant had raised a temporary construction. On the basis of this admitted position, the finding of appellate Court that the structure existed in 1964 itself, is wholly unsustainable being totally contrary to evidence on record rather unsupported by iota of evidence and hence it is perverse.

The finding of fact that the leased property was a structure reached by the learned appellate Court based on the admissions referred to above, which is not supported by evidence, is thus liable to be regarded as perverse. Further the finding of the appellate Court that the defendant would be entitled to protection of House Rent Control Order is based on the finding which was untenable being perverse and is liable to be reversed.

15. Mis-joinder of causes :

The suit was for possession of open land which was leased out and adjoining portion, which was encroached and source of encroachment is : the authorised entry as lessee of the defendant in the suit land. The defendant's encroachment was not that of a first hand intrusion or trespass by total stranger, but by a lessee who, by virtue of termination of lease, had turned to be in unauthorized possession. The objection as to misjoinder of causes as is seen, was not pressed and raised in the trial Court which has resulted in failure of the trial Court to frame any issue regarding misjoinder. The suit was filed in January, 1981, the written statement was filed on 26-6-1981 and the issues were framed on 16-11-1981, and now to non-suit the party on the ground of misjoinder of causes of action, sometimes in 1986 and now by virtue of this appeal in 2004 shall be wholly unjust. Upholding such plea now would not serve the cause of justice in any manner, moreover, when the merits of the case are not otherwise adversely affected, it would not be proper to non-suit a party on the ground of misjoinder of causes of action. Section 99 of CPC operates as a guard against setting aside a decree on any technicality when the merits of the case are not affected.

16. It is, therefore, held on all substantial questions of law that

- (a) The notice terminating the lease is legal and valid;
- (b) The Rent Control Order does not apply as open land was let out;
- (c) The suit cannot be dismissed on the ground of misjoinder of causes as the objection was not pressed, issued was not framed and decision on this question does not affect the merit of the case.

ORDER

17. Instant second appeal, therefore, succeeds as the questions of law are being answered in favour of the plaintiffs that the judgment and decree passed by the appellate Court is liable to be reversed and is accordingly set aside and the decree passed by the trial Court is restored with costs throughout.