

(2007) 05 BOM CK 0023

In the Bombay High Court

Case No : Writ Petition No. 4958 of 2005

Central Bank of India and Another

APPELLANT

Vs

Sagdeo Towers

RESPONDENT

Date of Decision : 04-05-2007

Acts Referred:

Constitution of India, 1950 — Article 227

Partnership Act, 1932 — Section 69, 69(2)

Transfer of Property Act, 1882 — Section 105, 106, 108, 111

Citation : AIR 2007 Bom 139 : (2007) 5 ALLMR 634 : (2008) 2 BomCR 452 :
(2007) 3 CivCC 768 : (2007) 4 MhLj 123 : (2007) 4 RCR(Civil) 360 : (2007) 2
RCR(Rent) 403

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : M.D. Samel, for the Appellant; P.V. Vaidya, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Chaudhari, J.—Rule returnable forthwith. Heard finally by consent of parties.

2. By the present petition, the petitioner has challenged the judgment and decree dated 26-2-2004, passed by the Additional Judge, Small Causes Court, Nagpur in Regular Civil Suit No. 254/2000, confirmed in Regular Civil Appeal No. 187/2004 on 20-7-2005 by the 11th Ad hoc Additional District Judge, Nagpur.

3. Looking to the nature of the judgment and decree, the present petition is treated as one under Article 227 of the Constitution of India.

4. **FACTS** :-- The respondent original plaintiff claiming to be a partnership firm filed a suit against the petitioners Central Bank of India for ejectment and possession in the Court of Additional Judge, Small Causes, Nagpur, which was registered as R.C.S. No. 254/2000. The respondent averred in the plaint that by registered sale deed dated 1-7-1998, it purchased the suit property in which the petitioners Bank is a tenant and, therefore on 14-10-1998 notice of attornment

was given to the petitioners Bank. Thereafter, on 7-7-2000 a notice u/s 106 of the Transfer of Property Act, 1882 was served on the petitioners/defendants, terminating lease of the petitioners and since the suit premises were not vacated, the suit in question was filed. The petitioners appeared in the trial Court and filed its written statement and raised objection to the maintainability of the suit on the ground that the respondent/plaintiff is not a registered partnership firm and as such by virtue of bar created u/s 69 of the Indian Partnership Act, 1932 the suit was not maintainable. Other adverse allegations in the plaint were denied. However, the suit was contested mainly on the said ground. The learned trial Court after hearing the suit, decreed the same and directed petitioners to hand over the vacant possession of the suit premises to the respondent/plaintiff and also decreed the suit for wrongful use and occupation. This decree for wrongful use and occupation has not been challenged since no arguments were advanced on the said part of the decree. The appeal that was carried by the petitioners before the District Judge was also dismissed, hence, this petition.

5. ARGUMENTS :-- Shri Samel, learned Counsel for petitioners submitted as under:

(i) That the suit as framed by the respondent/plaintiff was not maintainable and, therefore, he pressed into service his star point namely, that the respondent/plaintiff partnership firm not being registered, the bar of Section 69 of the Indian Partnership Act made the suit untenable and thus was liable to be dismissed.

(ii) The plaint averments did not indicate whether the respondent/plaintiff firm was registered or not and, therefore, it has to be presumed that the suit was filed by unregistered firm.

(iii) The respondent/plaintiff did not file written documents of contract and, therefore, the petitioner/defendant acquired the tenancy rights only under contract and, hence, the suit was liable to be dismissed.

(iv) Relying on Section 105 of the Transfer of Property Act, he argued that lease has been defined and the transfer of rights as contemplated in Section 105 can be made only by contract which was accordingly made in the case of the parties to the suit.

(v) The material on record in the form of Exh. 48 and Exh. 49 discloses that the object of the partnership firm respondent/plaintiff is to construct complexes which is nothing but business transaction and, therefore, the suit was barred. He, therefore, prayed for allowing the writ petition and dismissing the suit in entirety with costs throughout.

Shri Samel, learned Counsel relied upon the following decisions:

(1) Soorajmull Nagarmull v. Dalhousie Properties Ltd. and Ors. reported in 2007 (1) C.L.J. 99 and (2) Dwarkadas Hiralal Lakoti, deceased through legal heirs of the deceased Shivpyari Dwarkadas Lahoti and Ors. v. Kazimubarozeuddin s/o Muniniddin, died through LRs. Khaji Siddiqui Moideuddin and Ors. reported in 2007

(2) Mh.L.J. 827.

6. Per contra, Shri P.V. Vaidya, learned Counsel for respondent submitted as under:

(i) That the respondent/plaintiff purchased the suit property under a registered sale deed from its vendor and upon service of notice of attornment of tenancy, the petitioners/defendants became its tenant.

(ii) Upon termination of tenancy by the respondent/plaintiff by notice dated 7-7-2000 since the petitioner/defendant failed to vacate the premises, statutory notice u/s 106 was issued to the petitioners/defendants and this was an act of the respondent/plaintiff under a statutory provision.

(iii) The termination of lease made by respondent would fall u/s 108(q) and Section 111 of the Transfer of Property Act, which provides for modes of determination of lease and in particular Clause 111(h) thereof gives a statutory cause of action to the respondent/plaintiff.

(iv) There is no relationship or any contract between the plaintiff and defendants relating to its business of constructing the commercial complexes nor it is the business of the respondent/firm to lease out the properties.

Shri Vaidya, learned Counsel relied upon the following decisions:

(1) M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, , (2) Purushottam and Anr. v. Shivraj Fine Art Litho Works and Ors. reported in 2006 SCCL Com 903, and (3) M/s. Haldiram Bhujawala and Another Vs. M/s. Anand Kumar Deepak Kumar and Another, .

7. CONSIDERATION :-- Having heard the rival parties at length and having considered their submissions, there is no dispute that the respondent/plaintiff purchased the suit property by registered sale deed and as such became the landlord of the petitioners/tenants. The petitioners/tenants are not denying that it has become the tenants of respondent/plaintiff. The only ground in defence set up by the petitioners was that the suit was not maintainable and was hit by the provisions of Section 69 of the Indian Partnership Act which bars the suit. Now in the present case it is an admitted fact that no fresh agreement of lease was entered into between the parties nor the respondent/landlord entered into contract with the petitioners/tenants under any deed of lease, the learned Counsel for respondent argued that there is nothing on record i.e. any document of lease deed with the erstwhile landlord i.e. vendor of the respondent nor any such document is filed on record of the trial Court. At any rate, there is no contract of tenancy specifically entered into between the parties after the purchase of the property of the respondent/plaintiff. It appears from the Exh. 48 and 49 that the business of the respondent firm is to construct commercial complexes and sell them. There is absolutely nothing on record to show that the business of respondent firm is to lease out the properties constructed by it. There is nothing on record to show that during the course of such business, the

suit property was let out to the petitioner bank by the respondent/plaintiff which could take the shape of contract. In view of the above admitted facts and having regard to the provisions of Section 108(q) and 111(h) of the Transfer of Property Act which are quoted below,

108(q) On the determination of the lease, the lessee is bound to put the lessor into possession of the property.

111(h). On the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to other.

and, in the light of law pronounced by the Hon''ble Apex Court, the suit of respondent/unregistered firm was maintainable as the cause of action of respondent/plaintiff is based on the aforesaid statutory provisions of the Transfer of Property Act. The cause of action for filing the suit arose after issuance of notice dated 7-7-2000 and when pursuant to the said notice, the petitioners/defendants did not vacate the suit premises upon expiry of the period of notice i.e. on 1-8-2000 as stated in paragraph 10 of the plaint. Now this notice was issued u/s 106 of the Transfer of Property Act. In my opinion, therefore, the cause of action for the suit is based purely on the statutory obligation of the petitioners/defendants u/s 108(q) read with 111(h) of the Transfer of Property Act. The answer to the submissions made by Shri Samel, learned Counsel can best be given by quoting the following observations from the judgment in the case of Raptakos Brett and Co. Ltd. cited supra:

17. However, the aforesaid conclusion of ours cannot put an end to the controversy between the parties. The reason is obvious. The plaintiff in the clearest terms has based its cause of action also on the law of the land as found in para 2 of the plaint. So far as this part of the cause of action is concerned, it is a distinct cause of action apart from the cause of action emanating from the alleged breach of the covenant on the part of the defendant. So far as the law of the land is concerned, it is obviously the common law under which the erstwhile tenant on the expiry of the lease has to hand over vacant possession to the erstwhile landlord. But that apart, the said obligation on the part of the erstwhile tenant is statutorily recognised by Section 108(q) read with Section 111(a) of the Property Act. Section 111 Clause (a) reads as under;

111. A lease of immovable property, determines

(a) by efflux of the time limited thereby,

(b)-(h) * * *

In the present case, we are not concerned with any of the other clauses of Section 111. We confine the present decision only on the aforesaid mode of determination of lease of immovable property by the efflux of time. It is obvious, that such a lease gets determined by the efflux of time. The determination is automatic and does not depend upon any Act either on the part of the landlord or on the part of the tenant. When such automatic statutory determination of lease

takes place, Section 108(q) gets simultaneously attracted against the erstwhile lessee. Section 108 of the Property Act deals with rights and liabilities of lessors and lessees. The said section reads as under:

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:

(A) Rights and liabilities of the lessor

(a)-(c) x x x (B) Rights and liabilities of the lessee

(d)-(p) x x x (q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

It is, therefore, obvious that a statutory obligation is foisted on the lessee on the determination of the lease which earlier existed in his favour. Therefore, on a conjoint reading of Section 108(q) read with Section 111(a) of the Property Act, it becomes obvious that under the law, the erstwhile landlord is entitled to base his cause of action on the statutory obligation of the erstwhile lessee on determination of the lease to put the lessor in possession of the property.

24. ...On the facts of the present case it has to be held that there is no further locus poenitentiae given to the tenant to continue to remain in possession after the determination of the lease by the efflux of time on the basis of any such contrary express term in the lease. Consequently, it is the legal obligation flowing from Section 108(q) of the Act which would get squarely attracted on the facts of the present case and once the suit is also for enforcement of such a legal right under the law of the land available to the landlord, it cannot be said that the enforcement of such right arises out of any of the express terms of the contract which would in turn get visited by the bar of Section 69 Sub-section (2) of the Partnership Act. Consequently it has to be held that when para 2 of the plaint in addition made a reference to the right of the plaintiff to get possession under the law of the land, the plaintiff was seeking enforcement of its legal right to possession against the erstwhile lessee flowing from the provisions of Section 108(q) read with Section 111(a) of the Property Act which in turn also sought to enforce the corresponding statutory obligation of the defendant under the very same statutory provisions. So far as this part of the cause of action is concerned, it stands completely outside the sweep of Section 69 Sub-section (2) of the Partnership Act. The net result of this discussion is that the present suit can be said to be partly barred by Section 69 Sub-section (2) so far as it sought to enforce the obligation of the defendant under Clauses 14 and 17 of the contract of lease read with the relevant recitals in this connection as found in para 2 of the plaint. But it was partly not barred by Section 69 Sub-section (2) insofar as the plaintiff based a part of its cause of action also on the law of the land, namely, the Transfer of Property Act where under the plaintiff had sought to enforce its statutory right u/s 108(q) read with Section 111(a) of the Property

Act.

8. The following paragraphs from the judgment of Hon"ble Supreme Court in the case of Haldiram Bhujawala and another, cited supra, are also relevant;

22. In Raptakos Brett and Co. it was clarified that the contractual rights which are sought to be enforced by the plaintiff firm and which are barred u/s 69(2) are "rights arising out of the contract" and that it must be a contract entered into by the firm with the third party defendants. Majmudar, J. stated as follows: (SCC p. 19, para 9)

A mere look at the aforesaid provision shows that the suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party would be barred....

(emphasis supplied)

From the above passage it is firstly clear that a contract must be a contract by the plaintiff firm not with anybody else but with the third party defendant.

23. The further and additional but equally important aspect which has to be made clear is that the contract by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with the third party defendant but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff firm with such third party defendant.

24. ...The real crux of the question is that the legislature, when it used the words "arising out of a contract" in Section 69(2), it is referring to a contract entered into in course of business transactions by the unregistered plaintiff firm with its defendant customers and the idea is to protect those in commerce who deal with such a partnership firm in business. Such third parties who deal with the partners ought to be able to know what the names of the partners of the firm are before they deal with them in business.

9. The principles set out by the Hon"ble Supreme Court have been reiterated in paragraph 23 in the case of Purushottam and another, cited supra, which reads thus:

23. With respect, we find ourselves in complete agreement with the principles enunciated in Haldiram Bhujawala and Anr. (supra). Having regard to the purpose Section 69(2) seeks to achieve and the interest sought to be protected, the bar must apply to a suit for enforcement of right arising from a contract entered into by the unregistered firm with a third party in the course of business dealings with such third party. If the right sought to be enforced does not arise from a contract to which the unregistered firm is a party, or is not entered into in connection with the business of the unregistered firm with a third party, the bar of Section 69(2) will not apply.

10. In view of the above legal position, I find no difficulty in applying the above pronouncements made by the Hon"ble Supreme Court in the present case and to

hold that the suit was not barred u/s 69 of the Indian Partnership Act. The Courts below have taken a correct view of the matter and decreed the suit. I do not find any infirmity in the examination of legal position by the Courts below. There is no substance in the present writ petition. The same is dismissed with costs. Rule is discharged.

11. Learned Counsel for petitioners prays to suspend this judgment. Prayer is rejected. Learned Counsel for petitioners seeks ten weeks" time to vacate the premises. Time granted.