
(2009) 03 BOM CK 0142
In the Bombay High Court
Case No : Writ Petition No. 2458 of 1986

Dattatraya Dagdoba Dhole

APPELLANT

Vs

Shaikh Javed Husen Hajrat Saheb and Shaikh Hussain Hajrat Saheb

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 13(1), 21

Citation : (2009) 3 BomCR 88 : (2009) 111 BOMLR 1685 : (2009) 4 MhLj 560

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : V.S. Talkute, for the Appellant; S.R. Nargolkar and A.A. Kumbhakoni, for the Respondent

Final Decision : Allowed

Judgement

A.M. Khanwilkar, J.—This Writ Petition under Article 227 of the Constitution of India takes exception to the Judgment and decree passed by the IVth Additional District Judge, Pune dated January 7, 1986 in Civil Appeal No. 577/1985 which in turn confirms the Judgment and decree passed by the IIIrd Additional Small Causes Judge, Pune dated November 29, 1983 in Suit No. 2843/1980 dismissing the suit filed by the landlord for possession of the suit premises against the tenant on the ground of unlawful subletting.

2. Briefly stated the premises in question admeasure about 40 X 40 feet situated at Kasba Peth bearing House No. 1180 at Pune. According to Petitioner-landlord the said premises were let out to defendant No. 1 on monthly rent basis on condition that the same will not be unauthorizedly sublet. It is the case of the landlord that defendant No. 1 is the real brother of the plaintiff-landlord, however, there was dispute in the joint family property between the two brothers in 1965 and suit property had fallen to the share of the plaintiff. Defendant No. 2 has been impleaded in the suit being the father of defendant No. 1 who was

minor in 1971 and had taken the suit premises from the plaintiff for and on behalf of defendant No. 1 in the year 1971 by executing Kararnama Exhibit 19 dated 5-4-1971 at the monthly rent of Rs. 50/- per month. Defendant No. 1 had accepted the condition that he would not sublet the suit premises to anyone else. It is the case of the plaintiff that inspite of such stipulation defendant No. 1 had inducted defendant No. 3. The case of the plaintiff, therefore, is that defendant No. 1 unauthorizedly sublet the suit premises to defendant No. 3 without his consent and permission.

3. On the above allegation, the plaintiff instituted suit for possession essentially against defendant No. 1 tenant and defendant No. 3 sub-tenant who was unauthorizedly inducted in the suit premises by defendant No. 1. The trial Court after analysing the evidence on record found as of fact that it was not a case of unlawful subletting as such as it was transfer of a running business and tenancy rights in the suit premises to defendant No. 3 which was permissible in terms of notification dated 12-5-1948 issued by the State Government in exercise of powers under the provisions of the Rent Act. Consistent with the said opinion, the trial Court proceeded to dismiss the suit. The plaintiff-landlord carried the matter in appeal being Civil Appeal No. 577/1985. The Appellate Court reiterated the finding recorded by the trial Court and, therefore, dismissed the appeal and confirmed the decision of the trial Court. Against this concurrent decisions present Writ Petition under Article 227 has been filed by the landlord.

4. The argument canvassed before this Court is a pure question of law. The Petitioner contends that even if all the documents and evidence adduced by the defendant nos 1 & 3 were to be accepted as it is, that fell short of legal evidence to record a finding that defendant No. 1 had infact transferred his business alongwith stock-in-trade, goodwill and tenancy rights in the suit premises to defendant No. 3. This argument is canvassed in the context of the documentary evidence relied by the contesting defendants. They relied on sale deed Exhibit 94 dated 28-10-1980, a joint letter issued by defendants 1 & 3 Exhibit 83, receipt issued by the Sub-Registrar with regard to registration of Sale Deed Exhibit 80, extract of Index Register No. II at Exhibit 81, receipt regarding payment made to MSEB No. 76549 dated 14-11-1980 and Receipt No. 19634 for payment of transfer fee made in respect of Shop Act Licence, Original Shop Act Registration Form Exhibit 88 dated 7-4-1971, Original Shop Act Registration Form Deed in the name of defendant No. 3 dated 29-4-1981 Exhibit 89. According to plaintiff, even if above said documents including the contents thereof were duly proved, that was no legal evidence regarding the factum that infact stock-in-trade, goodwill and running business was transferred or assigned when the suit premises were sublet to defendant No. 3 by defendant No. 1, except the bare words of the said defendants.

5. The argument of the Respondents, on the other hand is that two Courts below have concurrently recorded finding of fact which cannot be overturned by this Court by reappreciating the same evidence on record and that the attempt of the

Petitioner is to persuade this Court to virtually reappreciate the evidence and record a different finding than the one recorded by the two Courts below. It was argued that the documents proved during the trial referred to by the two Courts below clearly establish the factum of transfer of a running business, along with stock-in-trade and goodwill therein. Besides, the witnesses examined on behalf of defendants have asserted that position which version is corroborated by the said documents.

6. There can be no difficulty in accepting the argument of the Petitioner that the factum of transfer or assignment incidental to the sale of business as an ongoing concern together with stock-in-trade and goodwill thereof and that the transfer or assignment is of entire interest of the transferor or assignor in such leasehold premises together with business and the stock-in-trade and goodwill thereof-is a matter to be established by the defendants being in the nature of defence to counter the allegation of unlawful subletting in a given case. In other words, the tenant and subtenant has to establish the fact that there was in fact a transfer or assignment incidental to the sale of business as an ongoing concern together with stock-in-trade and goodwill thereof and that it was of the entire interest of the transferor or assignor (tenant) in such leasehold premises together with the business and the stock-in-trade and goodwill thereof. That fact has to be proved not only by producing oral evidence but also to be corroborated by contemporaneous documentary evidence in that behalf. The question is whether defendant Nos. 1 & 3 have discharged this burden in the present case. For the time being, I shall leave aside the sale deed dated 28-10-1980 Exhibit 94. We shall examine whether there was any other evidence to substantiate the claim of the defendants 1 & 3. The receipt issued by the Sub-Registrar Exhibit 80 or for that matter the extract of Index Register No. II at Exhibit 81 will be of no avail. Those documents at best would indicate the factum of registration of sale deed Exhibit 94. Same logic would apply to receipts issued by the MSEB Bearing No. 765549 dated 14-11-1980 and the receipt regarding transfer of Shop Act Licence No. 19634 dated 15-10-1980 or the original Shop Act registration Form-D dated 7-4-1971 and original Shop Act Register Form-D in the name of defendant No. 3 dated 29-4-1981. None of these documents will establish the fact that it was a sale of business as an ongoing concern together with stock-in-trade and goodwill thereof. The fact that it was a transfer or assignment of an ongoing concern would require that day to day business activities were being carried out from the suit premises on and around the date of such transfer or assignment. For doing such regular business there was adequate stock-in-trade. The fact that such business was an ongoing business and, therefore, ongoing concern could be established by producing Books of Accounts of the firm or invoices, bills, orders or other such documents. In addition, besides the tenant and subtenant, examination of persons associated with such business would be necessary. Similarly, the fact that there was stock-in-trade for which it was an ongoing concern again is a fact which could have been established by the Books of Accounts, Stock Register etc. None of these documents have been produced by

the defendant No. 1 and defendant No. 3. Infact, during the cross-examination defendant No. 1 was pointedly asked whether he has taken liberty of producing any of such documents to which he had stated that he has not produced any documents to show that his business was a going concern in the suit premises (Paragraph 5 of the cross-examination). It is not necessary for me to analyse the other criticism regarding the oral evidence of defendant No. 1 and defendant No. 3 as was argued by the Counsel for the Petitioner. It is indisputable that even the fact that there was goodwill of the going concern is a matter which needs to be proved as a fact. See Commissioner of Income Tax/excess Profits Tax, Bombay City Vs. Shamsheer Printing, . In the said decision in Paragraph 5, the Apex Court has expounded that it is indisputable that goodwill will be a capital asset and that existence of goodwill is a question of fact. It is further observed that existence of goodwill cannot be assumed but has to be proved. In that, it does not follow that every business has a goodwill.

7. From the above, what follows is that none of the above said documents produced and relied by the Defendant, would substantiate the stand of the defendant No. 1 and defendant No. 3 that the transfer or assignment was of a going concern with the stock-in-trade and goodwill thereof.

8. To get over this argument, Counsel for the Respondent has placed emphasis on the Sale Deed dated 28-10-1980 Exhibit 94. As I have already mentioned earlier the efficacy of sale deed will have to be examined independently. Besides this document, the Respondents relies on the Shop Act Licence and the receipts issued by the MSEB to contend that the same would substantiate the stand of defendant Nos. 1 & 3 that it was a going concern together with the stock-in-trade and the goodwill thereof. This argument does not commend to me. For, neither the Shop Act Licence nor the MSEB receipts would establish the factum of existence of a going concern together with stock-in-trade and the goodwill thereof. Those documents at best would establish the fact that the electricity meter in respect of suit premises which stood in the name of defendant No. 1, stood transferred in the name of defendant No. 3. Similarly, Shop Act Licence on which emphasis is placed would merely establish that licence has been issued in favour of the named person to conduct the stated business in the suit premises. That per se does not establish the fact that the business was infact being conducted in the premises on regular basis at the relevant time much less as a going concern or that there was stock-in-trade lying in the suit premises and existence of goodwill of a going concern.

9. That leaves us with the only other document relied by the contesting defendants, namely, the sale deed dated 28-10-1980 Exhibit 94. Indeed, the two Courts below may be right in analysing the recitals of the sale deed. One of the term specified in the said sale deed is the declaration of the fact that it was a transfer of a going concern together with stock-in-trade and the goodwill therein. The question is whether this sale deed can be used as a legal evidence to prove the required facts as against the plaintiff who is not privy thereto? Counsel for

the Petitioner has rightly relied on the decision of the Privy Council in the case of *Shrinivasdas Bavri v. Meherbai and Ors.* AIR 1960 PC 5 It is well established position that recitals in the deeds can be used as evidence only as against parties thereto and their representatives. In other words, the recitals in the sale deed can be used as evidence within the meaning of Section 21 of the Evidence Act only against defendant No. 1 and defendant No. 3 interse who are parties thereto. The same cannot be used as evidence against the plaintiff-landlord who is not party thereto. In other words, the fact that contesting defendants have proved the fact of existence of the said sale deed or that it was duly registered including that they have proved the contents thereof does not take the matter any further. The question which still remains at large and open, is that, have the said defendants established the existence of the facts referred to in the sale deed that at the time of transfer it was a sale of business as a going concern together with stock-in-trade and the goodwill thereof? In so far as that fact is concerned, no evidence except the bare words of the defendants is forthcoming.

10. On this opinion, it necessarily follows that the defendants have failed to produce legal evidence to substantiate and corroborate the factum of transfer of a business as a going concern together with stock-in-trade and goodwill thereof. The argument of Respondents that defendant No. 1 as well as defendant No. 3 both have spoken about these facts and, therefore, the facts stated by them stood corroborated will have to be stated to be rejected. The oral evidence was required to be corroborated by contemporaneous documentary evidence which was within the special knowledge and control of the defendants. Having failed to produce any such documentary evidence other than referred to above which are of no relevance, even if two Courts below have concurrently found and have accepted the claim of the defendants, I have no hesitation in overturning the same on the finding that defendants have failed to substantiate the fact that the transfer was of business as a going concern together with stock-in-trade and the goodwill thereof. The evidence produced by them in the form of oral and documentary evidence fell short of substantiating the required facts.

11. A priori, it would necessarily follow that the case was not covered by the Notification dated 12-5-1948 or the excepted category specified therein. The concomitant of this finding is that it was a case of transfer which was hit by Section 13(1)(e) resulting in unlawful subletting.

12. Accordingly, this Petition ought to succeed. The impugned Judgment and decree will have to be set aside and instead the suit for possession decreed in favour of the plaintiff on the ground of unlawful subletting of the suit premises by defendant No. 1 (tenant) in favour No. 3 (unlawful subtenant).

13. Hence, this Petition is allowed. Rule is made absolute on the above terms with costs.