

(2014) 07 BOM CK 0311
In the Bombay High Court
Case No : Second Appeal No. 109 of 2005

Ibrahim Aga

APPELLANT

Vs

Prakash Janardan Naik Kumbhar-juvenkar

RESPONDENT

Date of Decision : 04-07-2014

Acts Referred:

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 3, 3(1)(c)

Citation : (2015) 1 ALLMR 144 : (2015) 4 BomCR 701 : (2015) 1 MhLj 832 : (2015) 2 RCR(Rent) 538

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Nitin Sardessai, Advocates for the Appellant; S.D. Lotlikar, Senior Advocate and C. Padgaonkar, Advocates for the Respondent

Judgement

F.M. Reis, J.—Heard Mr. N. Sardessai, learned counsel appearing for the appellants and Mr. S.D. Lotlikar, learned Senior Counsel appearing for the respondent. The above appeal came to be admitted by order dated 02.03.2006 on the following substantial questions of law.

"1. Whether the findings of the appellate Court that for deciding jurisdiction of the Civil Court to entertain the suit, pleadings of the parties are not material and that the Court can decide upon the jurisdiction in the absence of any pleadings, be said to be legal and valid in the eyes of law especially in view of the fact that the defendant/respondent's claim for ouster of Civil Court's jurisdiction was based on the alleged fact that the suit premises had completed much prior to the filing of the suit and this fact was not pleaded in the written statement?

2. Whether the Courts below were justified in permitting the defendant to lead evidence and further considered the same for the purpose of non-suiting the plaintiffs on the ground that the Civil Court lacks jurisdiction to try the suit when the evidence that was led was on a point, which was not pleaded in the written statement or was justified in permitting the defendant to lead the evidence as

rebuttal to the evidence placed on record by the plaintiffs without necessary details being included in the pleadings in the plaint?"

2. Mr. Sardessai, learned counsel appearing for the appellants in support of the above appeal has pointed out that somewhere on 30.07.1981, an agreement was entered between the appellants and the respondent in respect of the premises intended to be given on lease to the respondent for commercial purpose after the building construction was completed. The learned counsel further pointed out that it is the contention of the appellants who are the original owners of the premises that such building was completed in December, 1982. The learned counsel further pointed out that in support of their said contention the appellants have adduced evidence and examined the witnesses which discloses that the premises were completed in December, 1982. The learned counsel further pointed out that even the rent in respect of the disputed premises was paid by the respondent from the year 1983 which according to him also establish that the premises were occupied by the respondent only after the year 1982. The learned counsel further pointed out that during the course of examination of D W1 a document was produced by the respondent claiming to be an occupancy certificate in which it is stated that such occupancy certificate was issued in August, 1981. The learned counsel further pointed out that it is the case of the appellants that the said document was fabricated and the same was produced only in the year 2001 when no such reference was made either in the pleadings of the respondent nor such document was relied upon by the respondent in the list of documents produced by the respondent. To establish the said aspect, the appellants had also examined the Chief Officer who has inter-alia supported the contention of the appellants that the document was suspicious. The learned counsel has taken me through the judgment of the learned Lower Appellate Court and the learned Trial Judge to show that the Courts below have relied upon such occupancy certificate to come to the conclusion that the premises were completed in August, 1981 and as such the suit filed by the appellants for eviction before the Civil Court was not maintainable as the Civil Court had no jurisdiction to decide such suit. The learned counsel however points out that as the premises were new and the building was completed in December, 1982 the suit filed by the appellants in the year 01.07.1997 was within a period of 15 years when the premises were not protected under the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968. The learned counsel further pointed out that as the lease was terminated on account of efflux of time, the learned Judge was not justified to refuse the relief of eviction sought by the appellants from the disputed premises. The learned counsel further pointed out that even otherwise the occupancy certificate itself does not suggest that the building was completed and it is always open to the party to adduce evidence to show the date when the building was actually completed. The learned counsel as such submits that the appellants have brought cogent evidence on record to show that the building was completed in December, 1982 and as such the Courts below were not justified to dismiss the suit on the ground that the Civil Court

lacks jurisdiction to decide the suit. The learned counsel further pointed out that the respondent had not even pleaded in the written statement the allegation that the building was completed in August, 1981 nor specified any such date and as such it was not open to the respondent to adduce evidence which was not form part of the pleadings. The learned counsel as such points out that the substantial questions of law framed by this Court are to be answered in favour of the appellants and the impugned judgments passed by the Courts below be quashed and set aside.

3. On the other hand, Mr. S.D. Lotlikar, learned Senior Counsel appearing for the respondent has disputed the contention of the learned counsel appearing for the appellants. The learned Senior Counsel has submitted that both the Courts below upon appreciating the evidence on record have accepted that the occupancy certificate produced by the respondent as genuine and the building was completed in August, 1981. The learned Senior Counsel further pointed out that though an attempt was made by the appellants to dispute the authenticity of the said occupancy certificate nevertheless, the appellants have failed to succeed in their attempt and as such the findings of fact arrived at by the Courts below with regard to the genuineness of the said occupancy certificate cannot be interfered with by this Court in the present Second Appeal. The learned Senior Counsel further pointed out that even assuming that there is no reference in the written statement to the date or the fact as to when the building was completed nevertheless such evidence was in answer to the case put forward by the appellants which is permissible in law. The learned Senior Counsel further pointed out that merely because there is no reference to that effect in the pleadings by itself would not justify this Court to discard the said document produced by the respondent which conclusively establishes that the building was already completed in August, 1981. The learned Senior Counsel further pointed out that in any event on perusal of the plaint, the averments therein disclose that it is the case of the appellants that an incomplete building was given on lease to the respondent and as such according to him the fact as to when the building was completed is immaterial for the purpose of determining that the Civil Court had no jurisdiction to entertain the suit. The learned Senior Counsel thereafter has taken me through the records and proceedings in the suit especially the evidence of the officer examined in the suit who had clearly stated that the site is visited prior to grant of occupancy certificate. The learned Senior Counsel thereafter has taken me through the evidence of the Chief Officer examined by the appellants and pointed out that there is nothing stated therein which would even remotely suggest the genuineness of the occupancy certificate produced by the respondent is in doubt. The learned Senior Counsel further pointed out that considering that the Courts below have concurrently come to the conclusion that the building was completed in August, 1981 and consequently, the suit filed in the year 1997 for eviction of the tenant was not maintainable before the Civil Court as it lacks jurisdiction the Courts below were justified to pass the impugned judgments and consequently there is no case made out by the

appellants for any interference in the impugned judgments.

4. I have carefully considered the submissions of the learned counsel and I have also gone through the records. On perusal of the judgment of the learned Lower Appellate Court though the learned Judge has taken note of the various aspects of the matter in connection with the evidence adduced by the respective parties, the conclusion drawn by the learned Judge that the building was completed in August, 1981 is solely on the basis of the occupancy certificate produced by the respondent at Exhibit D.W. 1/U Colly. The pleadings of the respondent further discloses that the existence of such occupancy certificate was not pleaded in the written statement. Apart from that, the said document was not relied upon by the respondent in the list of the documents filed by the respondent, Though it was sought to be contended by Mr. S.D. Lotlikar, learned Senior Counsel appearing for the respondent that the genuineness of the said document cannot be gone into by this Court in the present Second Appeal, I find that as the Courts below have non-suited the appellants merely on the ground of the occupancy certificate, it would be appropriate to examine whether such occupancy certificate itself would be a conclusive piece of evidence to come to the conclusion that the building was completed in August, 1981 as contended by the respondent herein. On perusal of the judgment of the learned Lower Appellate Court especially at para 41 thereof, I find that the learned Lower Appellate Court has drawn such conclusion merely on the basis of such occupancy certificate. The fact as to whether an occupancy certificate is a conclusive proof of completion of the building came to be examined by this Court in the judgment reported in 1993(1) Mah LR 493 in the case of Shantaram Visso Vengurlekar v. Sertorio Grisololo Lobo and others. This Court has observed at para 15-A thus:

"15-A. As to the second question, it may be noticed that the Act of 1968 has left clause (c) of sub-section (1) of Section 3 of the Act vague. No explanation has been given in the Act to understand the meaning of "date of completion", nor the manner by which the date of completion has to be understood. This sort of provision is otherwise well-known to several Rent Control Acts. Acts of some States do provide explanation about the meaning of "date of completion".

The question that, therefore, arises is whether the date of completion in respect of a building is the date on which the occupancy certificate is granted by the concerned Municipal Council or the Village Panchayat or such other competent body. Obtaining an occupancy certificate by itself may not determine the controversy when the Act itself has not defined nor made any explanation as indicated earlier. Take for instance in our case, where parties have executed an Agreement of Lease on 4th August, 1980, stipulating that the lease has started as from 1st August, 1980, which means the building otherwise for occupation by the lessee was ready in all respects on 1st August, 1980. The occupancy certificate obtained from the Municipal Council is dated 20th October, 1981. Therefore, the occupancy certificate is irrelevant though for the purposes of dispute between some other parties the relevant date may be the date which is

specified in the occupancy certificate. I must again fairly concede that Mr. Lotlikar has indeed not urged before this Court that the date of completion of the building should be taken as the date reflected in the occupancy certificate. I have referred to this matter so as not to enlarge the controversy and parties are restricted to limited scope. The date mentioned in the occupancy certificate may also have a great amount of bearing. Take for instance in a dispute between the parties in respect of an old building which is reconstructed or repaired. There may be change of hands in the ownership of the building and the evidence of actual date of occupation may not be available.

Mr. Usgaonkar cited two authorities in support of some propositions. It is not necessary to go into much details and suffice to mention that in the decision of Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) , the Supreme Court observed that the Courts normally do not permit contracting out of the acts so there can be no contracting in. The eviction proceedings were instituted before the Rent Controller despite the bar of the expiry of the period stipulated for completion of the building and the suit was rejected by the Rent Controller. Subsequently, a suit was filed in Court. The question raised was whether the dismissal of the suit by the Rent Controller would attract the principle of estoppel of res judicata. The Supreme Court negated the contention and held that once the Controller had no jurisdiction to entertain the suit as it was still within the bar of the period of completion, the dismissal of the suit would neither attract estoppel nor res judicata and upheld the decretal of the suit instituted in the Court of the munsif. The principle that emanates is when the Court lacks initial jurisdiction, any order made can neither attract the principle of res judicata nor estoppel. The controversy in the decision of Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) , was slightly different. The lease deed in favour of the tenant recited that the building was erected in 1965 and eviction was sought in the year 1975. There was a ten year moratorium for entertaining the suit under the rent restrictive Act. The tenant resisted saying that the Act had application as the building had been completed more than 50 years ago. The evidence was sketchy in the matter and it appears there was a controversy whether the building had been reconstructed or repaired. The Supreme Court remanded the matter to the Appellate Authority. Having regard to the facts of that case, the Supreme Court observed that it will be for the landlord to prove the date because it is he who seeks the jurisdiction of the forum and the onus would always be on the landlord and not on a tenant, for that knowledge can only be imputed to a landlord."

(emphasis supplied).

5. Hence, on perusal of the observations by the learned Single Judge of this Court, the date of completion of the building mentioned in the occupancy certificate by itself is not conclusive proof as on the said date. In the present case, it is sought to be contended by the appellants that the building was completed in December, 1982 the occupancy certificate discloses that the

building was completed in December, 1982. As such, taking note of the findings of the learned Lower Appellate Court that the building was completed in August, 1981 merely on the basis of occupancy certificate by itself cannot be sustained. The Court would have to examine the evidence adduced by both the parties and consider whether the building was in fact completed in August, 1981 as contended by the respondent or not. It is also to be noted that in the context of the aforesaid substantial questions of law, both the parties had not specifically pleaded as to when the building was completed. But however, the appellants have filed the suit on the assumption that the Civil Court has jurisdiction. Such jurisdiction would flow only in cases in which the building was completed 15 years prior to the filing of the suit in terms of Section 3(1)(c) of the Rent Control Act. As the respondent was non suiting the appellants on the ground of jurisdiction, the Courts below would have to examine the contention of the respondent and ascertain as to when the building was completed to decide whether the Civil Court had jurisdiction to entertain the suit. In such circumstances, considering that the learned Lower Appellate Court has decided the issue with regard to jurisdiction merely on the basis of the date of the occupancy certificate, I find it appropriate to quash and set aside the judgment of the learned Lower Appellate Court and direct the learned Lower Appellate Court to decide an appeal preferred by the appellants afresh after hearing the parties in accordance with law.

6. The contention of Mr. Lotlikar, learned Senior Counsel appearing for the respondent that the date on which the building was completed would be immaterial as the lease itself was for a period of 16 years from the date of execution of the lease on 30.07.1981 would also have to be examined by the learned Lower Appellate Court on its own merits after hearing the appellants in accordance with law. All contentions of both the parties on merits are left open. In view of the above, I pass the following:

ORDER

"(i) The appeal is partly allowed.

(ii) The impugned judgment and decree passed by the learned Lower Appellate Court dated 25.04.2005 is quashed and set aside.

(iii) Regular Civil Appeal No. 200/04 is restored to the file of the learned Judge.

(iv) The learned Lower Appellate Court is directed to decide an appeal afresh in the light of the observations made herein above in accordance with law.

(v) All contentions of both the parties on merits are left open.

(vi) The parties are directed to appear before the learned Lower Appellate Court on 25.08.2014 at 10.00 a.m.

(vii) The appeal stands disposed of accordingly."