

(1983) 01 BOM CK 0042

In the Bombay High Court

Case No : Spl. Civil Application No. 2730 of 1978

Jayaprakash Shamsundar Mandare

APPELLANT

Vs

Laxminarayan Mulidhar Mundade and Others

RESPONDENT

Date of Decision : 14-01-1983

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15(1)

Citation : AIR 1983 Bom 364 : (1983) 1 BomCR 552(1) : (1983) 85 BOMLR 96 : (1983) MhLj 362

Hon'ble Judges : kanade, J;Jahagirdar, J

Bench : Division Bench

Advocate : C.D. Shenio and V.T. Choudhary, for the Appellant; M.A. Rane, for the Respondent

Judgement

Jahagirdar, J.—This petition under Art. 227 of the Constitution arises out of proceedings initiated by respondent Nos. 1 to 7 in this petition under the provisions of the Bombay Rent, Hotel and Lodging House Rates Rents, Hotel and Loading Houses Rates Control Act, hereinafter referred to as "the Bombay Rent Act,". They has filed a suit, being Regular Civil Suit No. 557 of 1973, in the Court of the Joint Civil Judge, Junior Division, at Jalgaon against the petitioner, who was defendants No. 2 in the suit, and one Madanlal Fakirchand Tiwari, who was defendants No. 1 in the suit. Madanlal Fakirchand Tiwari died after the decree of the trial Court and his heirs and legal representative are respondent Nos. 8 (a) to 8 (1) in this petition. for the sake of convenience, the said Madanlal Fakirchand Tiwari will be referred to as "defendants No. 1".

2. The suit had been filed for possession of a shop bearing No. 4 and situated in House No. 159 of Navipeth at Jlgano. The said shop, hereinafter referred to as "the suit premises", was tenanted by defendants No. 1. By a registered document, which is at Exhibit 77, dated 5th of Feb. 1973 defendants No. 1 assigned the business that was carried on in the suit premises of defendants No. 2 as an incident to that transfer he also assigned his tenancy rights in the suit

premises. By giving what can be briefly called a quire notice on 7th of May 1973 respondent Nos. 1 to 7, hereinafter called "the plaintiff", filed the aforesaid suit for possession of the suit premises on the ground that defendants No. 1 had unlawfully assigned his interest in the suit premises in contravention of S. 15 of the Bombay Rent Act, and was thus liable of eviction under S. 13(1)(e) of the Act.

3. Both the defendants resisted the suit by contending that the assignment dated 5th Feb. 1973 was saved by the notification issued by the State Government under the proviso sub-section (1) of S. 15 of the Bombay Rent Act. According to the defendants, defendant No. 1 has assigned the business carried on in the suit premises as a going concern and incidental to that assignment he has transferred his total interest in the suit premises to defendants No. 2. Therefore, neither defendants No. 1 nor defendants No. 2 was liable to be evicted from the suit premises.

4. The learned trial Judge by his judgment and order dated 17th Feb. 1976 held that there was an illegal assignment attracting a decree under the provisions of S. 13(1)(e) of the Bombay Rent Act. Accordingly he decreed the suit and passed certain consequential orders. This decree was confirmed by the learned District Judge of Jalgaon in an appeal being Civil Appeal No. 59 of 1976, preferred by the heirs of the original defendants No. 1 and defendants No. 2. This he did by his judgment and order dated 20th Sept. 1978. While confirming the decree of the Court of first instance, the learned District Judge concurred with the finding given by the that Court that on the date of the assignment there was no business at all in the suit premises and, therefore, defendants No. 1 could not have transferred any business as a going concern within the meaning of the notification issued by the State Government under the proviso to sub-sec (1) of S. 15. He held that the assignment was a colourable transaction and was in law not an assignment at all. What was in fact done was therefore an assignment of the tenancy right which was in contravention of S. 15.

5. Original defendants No. 2 has filed the present petition. This petition came up for final hearing before a learned single Judge of the Court who by his order dated 12th Oct. 1982 found that on the question of law involved in this petition "there is no authoritative pronouncement of this Court and the Supreme Court decision relied upon by Mr. Rane does not appear to have interpreted the terms of the notification". He therefore, though that "it will serve the ends of justice if this matter is decided by a Division Bench of this Court". That is how the petition has found its way before us. It may be added that the Supreme Court judgment relied single Judge is Rane before the learned single Judge is Shah & Co., v. State of Maharashtra, AIR 1967 SC 1877. We are referring to it later in their judgment.

6. We have already mentioned above the facts sufficient details. We must now turn to the point of law which is to be decided by us. As is well-known, transfer, of leasehold interest by the tenant is prohibited under the provision of the Bombay Rent Act except where there is a contract to the contrary. In particular, S. 15 of the Bombay Rent Act mentioned that notwithstanding anything contained in any

law, but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. The proviso to sub-section (1) S. 15, however, empowers the State Government to permit in any area the transfer of interest in the premises held under such leases or class of leases and to such extent as may be specified in the notification. In exercises of this power the State Government has issued a notification, being Notification No. 5975/33, Health and Local Government Department, dated 21st Sept. 1948, under which it has permitted in all areas in which part II of the Act operates, all transfer and assignments by lessees of their interest in the leasehold premises as and to the extent specified in the Schedule annexed to the said notification. Clause. (2) of the Schedule to the said notification permits "transfer to assignment incidental to the sale of a business as a going concern together with the stock-in-trade and the goodwill thereof, provided that the transfer or assignment is of the entire interest of the transferor or assignor in such leasehold premises together with the business and the stock-in-trade and goodwill thereof".

7. The question before us is whether on the findings of fact concurrently recorded by the two Court below, namely that on the date of assignment and indeed at least one year before the said date there was no stock-in-trade at all in the suit premises and that no transaction in the business which was originally carried on by the first defendants had taken place during that period a transfer of assignment as mentioned in Clause. (2) of the Schedule to the notification could not in law or in fact have taken place. Before deciding this question, it would be appropriate to briefly notice the finding given by the learned District Judge, who is the final Court of facts. The learned District Judge has noticed that the first defendants has in his defendants before the Court admitted that he wanted to sell the shop, as his business was stopped and further that no transaction had taken place in the year 1972. We have also seen the original Maroti deposition and we find that in it it has been mentioned that no account of the business was taken at the time of Diwali of the Year of 1972. Then there is the further admission that there was no transaction in his business from the Diwali of 1972 to 5th Feb. 1973, which is the date of assignment. From this it must be held to have been clearly established that for more than a year before the assignment, defendants No. 1 did not have any business going on in the suit premises. Was there, therefore, a business as a going concern together with the stock-in-trade and goodwill thereof which could have been assigned under Clause (2) of the schedule to the notification referred to above?

8. Mrs. Shenio, the learned Advocate appearing in support of the petitioner has contended that both the Court below have committed an error in holding that merely because transaction has not taken place for a year or so before the date of the assignment there was no business which was being carried on as a going concern. She contends that in any case the business was in regular course or with any amount of regularity were not being carried on. According to her, there

were certain assets in the suit premises. Those assets along with the goodwill of the business which had been carried on by the first defendant were assigned to the second defendant. Admittedly there is evidence to show, says Mrs. Shenoi, that at some time in the past the first defendant was carrying on business in cotton seed and cotton-seeds cakes. If this is so it could not be said that there was no business of the first defendant which could not have been assigned by him to the second defendant.

9. It is not possible to accept what is being suggested by Mrs. Shenio. Under Clause (2) of the Schedule of the notification, what is to be assigned is not a mere business in the abstract sense but a business as a going concern with the stock-in-trade and the goodwill thereof. On the admission of the first defendant himself which admission has been notification by the learned District Judge in para 9 of the standstill. In other words, there was no business at all. If there was a business it was not a business which was being carried on as a going concern as required under Clause (2) of the Schedule to the Government notification. Moreover, the first defendant has given further admission that no transaction had taken place in the year 1972. No transaction took place between the Diwali of 1972 and the business had come to a total standstill for more than a year state of affairs, it cannot be said that there was of the first defendant a business as a going concern.

10. Further, it has not been proved by the defendants that there was any stock-in-trade actually in the shop when the assignment took place on 5th Feb. 1973. It is true that it has been mentioned in Exhibit 77, namely the Deed of Assignment, that what was being transferred by the first defendant to the second defendant was the stock-in-trade and the furniture and fixture and the goodwill of the business. The details of the stock-in-trade and the details of the other things on the shop which were being sold under the deed were mentioned in a separate list and that list has not been produced by the defendants. One does not understand as to why the things which were sold by Exhibit 77 were not mentioned in that document itself. There is no evidence which could have been accepted by the court of facts to indicate that there was any stock-in-trade in the suit premises when the business was purportedly assigned by the first defendant to the second defendant.

11. Mrs. Shenoi made an attempt to draw a distinction between what she called a running business and a business as a going concern. It is not necessary to dwell at length upon this distinction. What we have to find out is whether there was a business as a going concern which could have been transferred or assigned by the first defendant to the second defendant. If the business is to be characterised as a going concern that business must be run at the time of the assignment. In other words, the business must be a live business, a going business where transaction take place from time to time though not with clockwork regularity. For a business to go on, there must be a stock-in-trade in the premises where that business is carried on. There is no evidence whatever to

indicate that there was any stock-in-trade in the suit premises. On the other hand if as the first defendant himself has admitted, for more than a year before the date of assignment no transaction has taken place at all in the suit premises and his business had come to a standstill, then one cannot resist the conclusion that there was no stock-in-trade at all in suit premises which could have been transferred as has been purportedly done under Exhibit 77.

12. One test of determining as to whether the business is a going concern is to find out whether the assignee after the assignment would be in a position to carry on the business which was being carried on in the suit premises by the assignor. If there was a stock-in-trade in the premises, business in would provided which is sought to be transferred, it would provide some indication that there was a business which was a going concern. Ultimately whether a business was a going concern or not is a question of fact. On the facts of this case, we have no manner of doubt on the evidence which has been led by the defendants in the Court below that there was no business as a going concern which could have been transferred by the first defendant to the second defendant.

13. In *Shah & Co., v. State of Maharashtra*, AIR 1967 SC 1877, S. 15(1) of the Bombay Rent Act and the notification issued by the Government pursuant to the power given by the proviso to the said Section were considered. In that case the petitioner before the Supreme Court, who were the tenants of a shop premises in Bombay, had challenged the order of requisition made by the Government under the Bombay Land Requisition Act 1948 on the ground that the assignment created vacancy of the shop premises. If any premises were vacant the Government had the power of the requisition the premises. It must be mentioned that before the Supreme Court the petitioner had gone by writ petition under Art. 32 of the Constitution and both question of facts and of law were decided by the Supreme Court. It was the contention of the petitioner before the Supreme Court that there was no vacancy and therefore the power of requisition under the Act of 1948 could not be exercised. On behalf of the respondent, nearly the State of Maharashtra, it had been contended that the assignment in favour of the petitioner was in effect and substance a transfer, not of the business of the assignors, but only of the tenancy right of the assignors. In support of this it had been mentioned on behalf of the respondent that the assignment was stated to be of the business of shoe-making whereas the petitioner who were the assignees were carrying on in those premises the business of imports and dealers in wines, provisions etc. It was also pointed out that the premises in question had become vacant because of the original lessees having cases to carry on business. The Supreme Court found from the various averment contained in the affidavit of the respondent and in view of some of the admission made in the petitioner itself and having regard to the object underlying Clause (2) of the Schedule of the notification that the assignment claimed by the petitioner must be regarded only as colourable device for really obtaining a transfer of tenancy right which is otherwise prohibited under S. 15 of the Rent Act. while so hold it was necessary accepted the by the Supreme Court that if the

original leases had causes to carry on any business in the suit premises, the assignment as contemplated by Clause (2) of the Schedule to the Government Notification could not in fact or in law take place.

14. Reliance was place by Mrs. Sheno on a judgment of the Calcutta High Court in Dulaldas Mullick and Others Vs. Ganesh Das Damani and Others, in support of her contention that if goodwill has been transferred for consideration then it must necessarily follow that the business, of which the goodwill formed a part, has also been transferred. In our opinion, the judgment of the Calcutta High Court in Dauladas's case does not indicate anything of the kind mentioned by Mrs. Shenio. There the narrow question for determination before the Court was whether the goodwill in that case included the right of the tenant to occupy the shop room. It was held that goodwill necessarily included the monthly tenancy right or whatever right of occupation the occupant had in his room.

15. Mrs. Sheno then suggested that the Rent Act being a beneficial piece of legislation it should be interpreted in such manner as would given protection to the tenant. In support of this proposition she relied upon some judgment which need not be cited because we agree with the proposition that a statute which is meant for the protection of the tenant must be so interpreted as to given protection to the tenants unless the language of the statute of apart of it clearly indicates otherwise. In the instate case, though it may be said that the Bombay Rent Act as a whole is meant for the protection of the tenants. S. 15 of the said Act is in fact meant to suppress a possible mischief by the tenant of transferring tenancies contrary to the provisions of the Act itself. We have already briefly summarised the provision of S. 15(1) of the Act which prohibits the assignment by a tenant of his interest in the premises leased to him. This embargo is, however, lifted in case of certain tenancies and to certain extent as mentioned in the notification issued by the State Government. The permitted transfers are in the nature of exception in the general rule contained in S. 15(1). The burden of proving that the transfer fell within this exception would naturally lie upon the person who wants to take benefit of the exception.

16. Mrs. Sheno made an oral application for an opportunity to lead additional evidence. Accordingly to her, if an opportunity is given to the second defendant, who is the petitioner before us to lead additional evidence it could be proved that there was a stock-in-trade in the suit premises and that that stock-in-trade was in fact transfers along with the other mentioned in the deed of assignment. We are unable to grant this prayer for the simple reason that in trial Court an opportunity to lead evidence was not denied to the second defendant who did not care to step into the witness box. The trial Court decreed the suit. it was the second defendant, along with the heirs of the first defendant, who went in appeal to the District Court. No grievance was made that no opportunity had been given to them to lead evidence in the trial Court. NO prayer was made before the appeal Court below for an opportunity to lead additional evidence. Apart from that no case is made out under I. XLE, R. 27 of the Civil P. C. even to persuade

this Court to ask for additional evidence. Law does not given a right a litigant to ask for an opportunity to lead evidence in the appeal Court. Both the Court below did not have any difficulty in proceeding with the suit and the appeal and passing the appropriate decree on the basis of the material which the parties placed before the Court after having been given all the opportunity in law available to them. Moreover, we are hearing a petition under Art. 227 of the Constitution of India. There is thus no question of permitting the petitioner-second defendant to lead additional evidence at this stage.

In the result, the petition must fail.

Rule is accordingly discharged with costs.

17. Rule discharged.