

(1990) 10 BOM CK 0001

In the Bombay High Court

Case No : Second Appeal No. 12 of 1989

Krishnanath Vassu Malwankar and Others

APPELLANT

Vs

Leopoldo Hilario Piednde Pereir Lopse Dalgado By L. Rs. Mrs.
Dulce Jose Marin Dalgaod and Others

RESPONDENT

Date of Decision : 29-10-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 106, 111, 117, 2

Citation : (1991) 93 BOMLR 289

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

H. Suresh, J.—This is a second appeal filed by the heirs and legal representatives of the original defendant as against a decree for possession against which the appeal also came to be dismissed.

2. The relevant facts are as follows:

The plaintiffs the respondents, are the owners of the suit property. The suit properties having therein the following trees, approximately, 900 islands of bamboos, 20 mango graphs (Grafts), 100 Bindees 40 tamarind and many other forest type trees which would fetch 1000 carts of firewood. The suit property was leased by the predecessors-in-title of the respondents to the defendant by a deed of lease dated January 9, 1944, for a period of three years ending on December 31. 1946. Thereafter every year the lease was renewed orally, but the defendant was required to pay a higher rent. This position continued till about 1967. Thereafter the respondents filed a suit for eviction against the defendant being suit No. 13 of 1968. That suit was decreed by a judgment, and order dated April 30, 1971. The decree was executed. But in the meanwhile, the defendant appealed against the said judgment. The said appeal was allowed and the decree of the trial Court was reversed. Against the said order the respondents preferred

a second appeal which also was dismissed by the then Judicial Commissioner on August 23, 1974. On an application made by the defendant for restoration of possession, the Court issued a warrant of possession and finally on December 16, 1974 the defendant was put in possession of the suit premises.

3. In the meanwhile by a notice dated October 24, 1974. the respondents purported to terminate the lease of the suit property with effect from December 31, 1974. Another notice dated December 12, 1974 was given to the defendant to remain present in the suit property on 1.1.1975 for the purpose of handing over possession of the suit property to the respondents. It is the case of the respondents that the defendant did not remain present and according to them they entered upon the suit property when they were interfered with by the defendant. They filed a suit bearing No. 5 of 1975. for an injunction which was not granted as prayed for. Apparently, that suit has been abandoned. In the meanwhile the respondents filed the present suit being suit No. 12 of 1976. They prayed for possession of the suit property.

4. The defendant filed his written statement. He contended that the alleged notice of termination of lease was bad in law and therefore, the suit was bad in law and was liable to be dismissed. Without prejudice he admitted the earlier proceedings. There is no controversy with regard to the notice and the subsequent events. The main contention of the defendant was that the suit was not maintainable inasmuch as there was no proper notice as required by the law and the notice dated October 24, 1974 or even the notice dated December 12, 1974 is not proper and valid notice, and it cannot be said that the lease stood terminated.

5. The trial Court passed a decree in favour of the respondents by a judgment and order dated June 29, 1985. Against the said judgment, the present petitioners who are the heirs and legal representatives of the deceased defendant filed an appeal being appeal No. 62 of 1985. The said appeal came to be dismissed by an order and judgment dated November 30, 1988. The present second appeal is against these two judgments.

6. Now, both the Courts relying on the judgments given by the learned Judicial Commissioner in the earlier proceedings (second appeal No. 6 of 1973) have held that after the expiry of the period of the deed of lease dated January 9, 1944, the tenancy was a yearly tenancy arising every year on 1st January and ending on 31st December of that year and that, therefore, the tenancy was terminable by efflux of time. In that context they have relied on the following observations made by the learned Judicial Commissioner: "Before parting with this case I must say in fairness to the plaintiffs; that the lease being from year to year, beginning on the 1st of January and ending on the 31st December of every year all that they have to do is to give to the defendant notice and they are resuming possession from the 1st January of 1975 and require the defendant to arrange to give possession of the suit land on that day to the plaintiffs who should remain present on the suit land for receiving the possession. If the defendant upon the

plaintiffs" giving such notice and being present on the 1st January for taking over possession from the defendant refuses to give possession of the suit land the plaintiffs are entitled to evict the defendant without further ado.

7. In fact, that is the basic question. What is the effect of the dismissal of the said earlier suit"? Did it revive the leased" If so. of what tenure? Is the lease a yearly lease terminable by the end of the year by efflux of time or is it a lease on year to year basis requiring six months" notice for termination" When the second appeal was admitted, the learned Judge treated the following four grounds as formulated by the appellants as substantial questions of law:

1. Whether once the Judicial Commissioner in his Judgment which had become final had decided that the lease was from year to year any party as regards the same property could plead to the contrary.

2. Whether once the Judicial Commissioner had held that a notice was required to be given to terminate the lease, it could be held that the lease had been terminated by efflux of time.

3. Whether the period of the notice required to be given in terms of the Judgment of the Judicial Commissioner could be interpreted contrary to the provisions of the Transfer of Property Act.

4. Whether the notice of six months in terms of Section 106 of the Transfer of Property Act was necessary once it was held by the Judicial Commissioner that the lease was from year to year.

8. However at the time of hearing of this appeal, Mr. Dessai sought to raise the following additional questions of law for which he made an application:

1. Whether the appellants are covered and protected under Decree No. 43525 dated 8.6.1961 and/or under the Goa. Daman and Diu Agricultural Tenancy Act, 1964.

2. Whether the notices dated 24.10.1974 and 12.12.1974 are valid in law.

Out of these two questions the second question is already covered by the questions formulated and accepted at the time of admission of the second appeal. As regards the other question raised by Mr. Dessai. Mr. Usgaonkar has objected to the same on the ground that they do not arise in the present case and in any event there is no foundation either in the pleadings or anywhere else to raise such a question at this stage. Since u/s 100 of the Civil Procedure Code. I cannot permit additional questions to be raised, excepting for recorded reasons. I have heard the advocates fairly at length on these questions also. As I will presently point out I am not inclined to grant the application for raising additional questions of law. But before I deal with this aspect of the matter let me first consider the questions formulated at the time of admission of this appeal.

9. In order to appreciate the rival contentions, it is necessary to set out the contents of the notice dated October 24, 1974:

Under instructions from and on behalf of my clients. 1) Mr. Leopoldo Hilario Piedade Pereira Lopes Dalgado. 2) Miss Ana Maria Lopen Dalgado, 3) Mr. Jono Jose Maria Lopes Dalgado and 4) Mr. Jose Agostinho Xavier Lopes Dalgado all from Verem of Reis-Magos. I have to write to you as follows:

1. You are tenant of the property known as "Valverde" situate at VEREM of Reis Magos bearing Land Registration No. 14177 at Book E 37 New and belonging to the said my clients;.
2. You were evicted from the said property in pursuance of the decree of the Court of the Civil Judge, Senior Division, at Panaji;
3. The decree of the said Court was set aside by the District Court of Goa. Daman and Diu, at Panaji and the Judicial Commissioner's Court confirmed the decree of the District Court;
4. As a matter of fact the possession of the property is with my clients;
5. The lease period was starting from 1st January and ending on 31st December.
6. By this notice your tenancy, if any, is hereby terminated with effect from 31st December 1974 with its legal consequences.

This is followed by another notice dated December 12, 1974, wherein the respondents have stated that in case the defendant happened to be in possession of the property, he was required to remain present at the said property on January 1, 1975, and hand over the peaceful possession of the same to any of the respondents. It also says that in case, the defendant failed to remain present, the respondents would enter into possession of the property. It is categorically stated that this information was given to the defendant in view of the termination of the lease with effect from December 31, 1974.

10. Mr. Dessai's main contention is that both these notices were bad in law. He submitted that the lease was initially for a period of three years ending on December 31, 1946. There was no clause for renewal. Thereafter, admittedly, the lease had continued and it could only be as provided u/s 106 of the Transfer of Property Act, 1882. It must, therefore be held that the lease shall be deemed to be a lease on year to year basis terminable by six months' notice expiring with the end of the year of the tenancy. He submitted that there is no such notice and the suit was liable to be dismissed on this ground alone. He further submitted that on the dismissal suit lease stood revived requiring six months' notice as provided u/s 106 of the Transfer of Property Act. He also submitted that on the date of the two notices, the appellant, defendant was not in possession at all as the respondents were in possession of the suit property at that time. He stated, after giving notice, the respondents consented to give possession to the appellant when the appellant had taken out warrant of possession in the restoration application made by them in the previous proceedings. He submitted that both the Courts acted on the observations made by the learned Judicial Commissioner, but it must be held that they were per se per incuriam. and

should be safely ignored.

11. Therefore, the first question is, what is the nature of the lease after the expiry of the period of the lease mentioned in the deed of lease dated January 9, 1944? Here Mr. Usgaonkar drew my attention to Article 1618 of the Portuguese Civil Court which says:

Where after the end of the lessee, the lease continues in the enjoyment of property, without objection, the contract is presumed as renewed in the cases of landed property for a period of one year and in the case of building property, for a period of one year or six months or lesser period according to the usage of land.

This was the law that was applicable on January 1, 1947. The lease continued on a year to year basis till December 31, 1967. That was the basis of the earlier suit. That is why the Learned Judicial Commissioner expressly stated as follows:

It is common ground that the lease was renewed from year to year after the expiry of the initial period of the lease. This renewal continued for over 20 years....

It is common ground that the lease was being renewed from year to year from the 1st January of every year and was ending on the 31st December of the same year. If the cause of action were to be the termination of the lease, by efflux of time it would arise on the 1st January of every year and all that the plaintiffs had to do was to take steps to take possession of the suit land on 1.1.1968.

This being the legal position, it is not open to the appellant to claim otherwise. Mr. Dessai stated that the Transfer of Property Act came into force in this State sometime in 1965 and, therefore, at least since then it should be said that the relations between the parties were governed by the Transfer of Property Act. But Section 106 comes into operation only in the absence of a local Law. This must be read with Section 2(c) of the Transfer of Property Act, which is as follows:

2. In the territories to which this Act extends for the time being the enactments specified in the Schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect-

(a) ...

(b) ...

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability:

Therefore, the Act does not abrogate any existing right or liability arising out of a legal relation constituted before this Act came into force, nor does it purport to constitute any new relationship in the place of the existing one. Thus, it must be necessarily held that lease as it existed upto December 31, 1967, was a lease renewable on a year to year basis, terminable by the end of each year.

12. This takes me to the next question; what is the effect of dismissal of the

earlier suit on August 23, 1974? Mr. Dessai cites the case of Makhan Lal Vs. Mst. Chandravati and Others, . The relevant observations are as follows:

The suit against Behari Lal having been dismissed by this Court, the notice u/s 106 of the T.P. Act cease to have effect. See: Halsbury's Laws of England, Third Edition, Volume 23, page 410, where the law has been stated thus: "if a landlord's application for possession fails, his notice determining the tenancy ceased to have effect." In Shakir Hussain Vs. Siraj Beg, it was held that if a suit against a tenant fails, the notice u/s 106 of the T.P. Act and no second suit can be maintained on the basis of the earlier notice. The learned Judge observed as follows:

It is not possible to accept the contention of the learned Counsel for the plaintiff-respondent that since the relationship of landlord and tenant had been put an end to by means of a notice dated 24.8.1964, the same cannot be restored even after the previous suit was dismissed by this Court on 6.3.1970. After the dismissal of that suit, the defendant was very much a tenant of this house in spite of the unsuccessful attempt made by the plaintiff to put an end to this relationship of landlord and tenant by means of the notice dated 24.8.1964. A fresh notice u/s 106 of the T.P. Act was clearly required before the second suit for ejectment could succeed....

If the earlier notice against Behari Lal had ceased to have any effect after the dismissal of the earlier suit, he was restored to the position of a contractual tenant and liable to ejectment only after termination of his tenancy by a fresh notice. That position will enure to the benefit of his heirs as well. They could not be treated as trespassers, and their ejectment could not be sought without terminating their tenancy by a valid notice.

On the basis of this, he submits that the lease stood revived as if there was no termination and that unless a proper notice is given as required u/s 106 the lease cannot be said to have been terminated at all.

13. In order to appreciate this contention it is necessary to look into the basis of the earlier suit. The earlier suit was filed on the basis that the cause of action had arisen on December 1, 1967, on breach of terms of the contract. It was stated in the said plaint that the cause of action arose on December 1, 1967, i.e. to say much before the expiry of the period of the lease ending on December 31, 1967. No notice was given before filing the suit and, therefore, it was not on the basis of termination of tenancy by efflux of time. It was on the basis of forfeiture or breach prior to the determination of the lease. Therefore, as Mr. Usgaonkar has rightly argued, the effect of the dismissal of the suit is that it nullifies the cause of action dated December 1, 1967. In other words, the relationship reverts back to December 1, 1967, as if there was no such breach or forfeiture and in that event the lease continues to be in force till the expiry of the period of the lease of that year, viz., till December 31, 1967. In the Allahabad case, the termination was by a notice and that, therefore, both the Courts stated that on

dismissal of the suit the said notice ceased to have any effect and that, therefore, the tenancy continued, which tenancy required termination by a notice without which no suit could have been filed.

14. What is the legal position after December 31, 1967? Mr. Dessai says that as from January 1, 1968, it could be said to be a case of lessee holding over and would automatically attract the application of Section 106 of the Transfer of Property Act. Mr. Usgaonkar says that there is no question of holding over as from January 1, 1968, inasmuch as the respondent has not assented to the lessee continuing in possession, nor is there any acceptance of rent. In fact, he submits that there was no jural relationship whatsoever between the parties after the expiry of the period of the lease ending on December 31, 1967. Mr. Usgaonkar is apparently right in his submissions. In this connection Mr. Usgaonkar draws my attention to Section 117 of the Transfer of Property Act to submit that the provisions of this Chapter (Chapter V) of the Act came into force in this State in so far as it relates to leases for agricultural purposes, by a Notification dated April 22, 1971. Therefore, as on January 1, 1968, the legal position was as it stood prior to December 31, 1967. But Mr. Dessai submits that in the plaint the respondent has stated that the notice dated October 24, 1974 was given, terminating the lease of the suit property with effect from December 31, 1974. He, therefore, submits that it is not open to the respondent to contend that the lease was not existing in 1974. Mr. Usgaonkar rebuts and says that the averments in the plaint must be read vis-a-vis with the contents of the notice, dated October 24, 1974.

15. Therefore, the question is what is the nature of this notice dated October 24, 1974? Is it a valid notice? Was it necessary to give such a notice? I have set out the contents of the notice in the foregoing paragraphs. The notice expressly says that the defendant was a tenant of the property and that he was evicted from the said property but the decree was set aside and the possession on the date of the notice was with the respondents. It says that the lease period was starting from 1st January and was ending on 31st December. By this notice the defendant's tenancy was sought to be terminated with effect from December 31, 1974. That is how by the other notice dated December 12, 1974, the respondents informed the defendant to remain present on site on January 1, 1975 for the purpose of handing over the possession of the suit premises to the respondents. Mr. Usgaonkar submitted that in fact no such notice was necessary, inasmuch as whatever be the tenancy the same would come to an end on December 31, 1974. He, therefore, submitted that this notice was given as a matter of abundant caution. This was given to put an end to the claim of jural relationship, if any. In any case, the lease was to expire on December 31, 1974 and u/s 111 of the Transfer of Property Act, no notice is required, if the lease is determined by efflux of time. In answer to Mr. Dessai's contention that the defendant was not in possession at the time the notice was given, Mr. Usgaonkar submitted that that should not make any difference inasmuch as they were put in possession on December 16, 1974 and they were in a position to comply with

the said notice by handing over the possession of the demised premises on the expiry of the lease i.e. on December 31, 1974.

16. It is in this sense the learned Judicial Commissioner made the observations when he dismissed the second appeal. That suit was on a cause of action which was on breach of terms of the contract. He observed that it was unfortunate that despite the fact that the plaintiffs had such a simple remedy, they unnecessarily filed such a suit alleging breach of terms of tenancy which they could not establish. That is how, he observed that the suit as framed was not for resumption of the property on the termination of the lease by efflux of time but for breach and in respect of which there was no notice for the purpose of termination and that, therefore, in the absence of any such notice, the suit was bound to fail.

17. In my view, therefore, there is no force in this second appeal and the questions framed at the time of admission of this second appeal will have to be answered as follows:

Question 1 : The lease being a yearly lease expiring at the end of each year, there could have been no question of anyone pleading to the contrary. In fact, I may make a note that this question would not arise inasmuch as nobody seems to have expressly pleaded that the tenancy was otherwise.

Question 2 : This question also has not been formulated properly inasmuch as there can be no question of giving any notice if the tenancy is to be terminated by efflux of time. It is only where the tenancy is to be determined before the expiry of the period of lease, then in such a case a notice is required.

Question 3 : This question also does not arise inasmuch as there is no question of interpreting any judgment contrary to the provisions of the Transfer of Property Act. The learned Judicial Commissioner having held that the tenancy expired by efflux of time, rightly observed that simple suit could have been filed on the expiry of the period of the lease and that there is no question of giving any notice.

Question 4 : No notice u/s 106 of the Transfer of Property Act is necessary inasmuch as the tenancy were to expire by the end of each year by efflux of time.

18. This takes me to the application which Mr. Dessai presented. His argument is that if one has regard for the deed of lease it can be said that it was an agricultural tenancy. On the basis of that he submitted that his clients are entitled to get protection under the Goa, Daman and Diu Agricultural Tenancy Act, 1964. In that context, he drew my attention to some of the provisions of the said Act and also to the fact that by the fifth amendment on the tillers' day such agricultural tenants have been given protection and there can be no question of eviction of such tenants from any property. Mr. Dessai submitted that if it can be held that the appellants are agricultural tenants by virtue of the said Act, 1964, they would be entitled to protection, if they were in possession of the property as

tenants on July 1, 1962, irrespective of the fact that the amendment came into force in 1976. He also submitted that there is a certain decree bearing No. 43525. Mr. Dessai submitted that since the appellants are entitled to protection under the said decree they cannot be evicted excepting as provided under the said decree.

19. I may mention that these contentions have not been taken up in the pleadings or in any of the proceedings in the lower Courts. Mr. Dessai, however, submitted that this being a question of law, he is entitled to raise the same even at the stage of the hearing of the second appeal. Mr. Dessai also submitted that if one has regard for the pleadings and the deed of lease it can be said that such a question arises and can be gone into in the second appeal.

20. Mr. Dessai initially took me at length through the provisions of the said Act, 1964 and particularly drew my attention to the definition given u/s 2(1A) which defines "agriculture". He submitted that that is an inclusive definition and it includes horticulture and raising of food crops, grass or garden produce. He then submitted that under Sub-section 7A "garden" has been defined meaning thereby the land used primarily for growing coconut trees, arecanut trees, cashewnut trees or mango trees and under Sub-section 7B "garden produce" means any produce from a garden. He also drew my attention to the case of Sivachidamba Ram Vs. Annamalai Mudaliar and Another, and also to the case of Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, . He submitted that the definition being an inclusive definition it must include every operation relating to cultivation of the land and it is in that sense, the suit land becomes an agricultural land, and the lease is for agricultural purpose. As against this, Mr. Usgaonkar submitted that there is no basis for contending at this stage that he is a tenant within the meaning of the said Act of 1964. In that connection he pointed out that the Act of 1964 was amended in 1976 and prior to this amendment the definition of agriculture was totally different. It has, in fact, u/s 2(1A) as it stood then, excluded the raising of produce from fruit bearing trees including coconut trees, arecanut trees, cashewnut trees and mango trees. So for the first time in 1976 the Act was amended to bring in grass or garden produce in the definition of agriculture. He, therefore, submitted that there is nothing to indicate that at the time of filing of the suit it could be said that the appellants could have had the benefit of the said Act. He also submitted that as far as cashewnut was concerned, there was another Act of 1971 giving protection to the cashewnut trees and arecanut trees being the Goa, Daman and Diu Protection of Rights of Tenants (Cashewnut and Arecanut Gardens) Act, 1971. This Act was a temporary Act but it governed the situation till it was replaced by the fifth amendment in the year 1976.

21. Mr. Usgaonkar submitted that by just referring to the plaint, particularly para 3 which relates to the number of trees that were existing in the suit property, it will not be possible for the Court to say that the tenancy was for agricultural purpose as defined in the Tenancy Act. It cannot be said that Bamboos can be

considered as covered under the said Act, bamboo being a kind of grass and grass came to be included for the first time in the year 1976. Mr. Usgaonkar also submitted that on all these things, proper pleadings should have been there so that the Court could have considered whether it was an agricultural tenancy within the meaning of the Act and whether the appellants would get protection under the said Act of 1964 or as per the amendment in the year 1976. Certainly, in a litigation which has been in fact pending from 1968, after a period of 22 years it is not open to the appellants to raise such contentions that too in a second appeal. I am inclined to agree with the submissions made by Mr. Usgaonkar and the appellants cannot be permitted to raise such questions when apparently such questions do not arise either in the pleadings or in any evidence in the whole litigation.

22. This takes me to the other contention as to whether the appellants could get the benefit of the decree bearing No. 43525. I have seen the said term of the said decree. It has no application to the deed of lease dated January 9, 1944. It pertains to mainly landed properties which are not for the productive purposes. Certainly, it cannot be said that the present lease is a lease not for productive purposes. Mr. Usgaonkar also has drawn my attention to a judgment in the case of G.M. Agarwal v. Alirna D'costa E. Pinto and Ors. 1989 (2) G L.T. 122, wherein this Bench of this High Court has categorically stated that the said decree applies not to buildings but to lands, not meant for production. Certainly it is not possible for me to say that the present lease is a lease in respect of the land not meant for production. Therefore, this question also does not arise and I am not inclined to grant the said application.

In the result, I pass the following order:

Appeal is dismissed with costs.

At this stage Mr. Dessai requests that the execution of the decree be stayed for a period of two months. Mr. Usgaonkar opposes.

Heard Advocates.

Execution of the decree is stayed for a period of two months, as prayed.