
(2018) 04 BOM CK 0070
In the Bombay High Court
Case No : Second Appeal No.79 of 2008

PANKAJ CHANDRASEN SHAH & ANOR.	APPELLANT
Vs	
GANESH SHRAWANJI ICHE & 3 ORS.	RESPONDENT

Date of Decision : 10-04-2018

Acts Referred:

Civil Procedure Code, 1908 — Section 100
Transfer of Property Act, 1882 — Section 106
Indian Registration Act, 1860 — Section 49

Citation : (2018) 04 BOM CK 0070

Hon'ble Judges : MANISH PITALE, J

Bench : Single Bench

Advocate : M.G. Sarda, P. M. Chandekar

Final Decision : Allowed

Judgement

1. By this appeal, the appellant (who is now represented by his legal representatives) has challenged the judgment and order dated 26/09/2007

passed by the Court of District Judge, Akola (appellate Court) in Regular Civil Appeal No.254 of 2000, whereby the appeal filed by respondent no.1

was allowed and decree granted by the Court of Joint Civil Judge, Senior Division, Akola (trial Court) in suit for possession passed in favour of the

appellant was set aside. The suit property in the present case is a shop situated in a building standing on Nazul Plot No.3/22, House No.303, Ward

No.41 at Akola. The appellant, being the owner of the suit shop claimed that it was given on rent to one Pramod Mahure, while it is claimed by

respondent no.1 that the suit shop was in fact given on rent to partnership firm M/s New Swatantra Optical of which respondent no.1 and said

Pramod Mahure were partners and that the said partnership firm was tenant in the suit shop. While the trial Court has held that the appellant had

indeed given the said suit shop on rent to Pramod Mahure, the appellate Court has disagreed and it has held that the suit shop was let out to the said partnership firm. It is on the basis of the difference in the findings rendered by the Courts below on the said issue that the trial Court had decreed the suit while the appellate Court has set aside the decree and dismissed the suit filed by the appellant.

2. It is the case of the appellant that an agreement dated 01/04/1991 (Exhibit 53) was executed between him and said Pramod Mahure styled as an agreement for execution of lease deed in respect of the suit shop. According to the appellant, on the basis of the said agreement, the suit shop was let out to said Pramod Mahure for a fixed rent of Rs. 500/ month, with the stipulation that the said tenant would pay taxes in respect of the suit shop. A deposit of Rs. 40,000/ was taken by the appellant and it was agreed that the suit shop was let out for a period of three years. In the said suit shop, business of opticals was started by M/s New Swatantra Optical, the partnership firm of which Pramod Mahure was a partner along with respondent no.1.

3. On 03/01/1993, the said Pramod Mahure died. The appellant received a notice dated 05/08/1993 sent by respondent no.1, wherein it was claimed that the said partnership firm was a tenant of the suit shop and that upon the death of said Pramod Mahure the aforesaid firm had come to an end and that respondent no.1 had become a tenant of the suit shop. The appellant sent a reply dated 07/08/1993 to the said notice, denying all the allegations made by respondent no.1 in the notice. The appellant also returned the cheques towards rent sent by respondent no.1. Thereafter, another notice dated 16/03/1994 was issued by respondent no.1 through his Advocate, which was received by the appellant along with a cheque of Rs. 6000/ month. The appellant sent reply to the said notice and returned the said cheque also. Thereafter, the appellant called upon respondent no.1 to vacate the suit shop, stating that the said respondent was in unauthorized occupation of the same. The appellant also claimed damages from respondent no.1 for such unauthorized occupation. As the respondent no.1 failed to vacate the suit premises, the appellant filed Special Civil Suit No.173 of 1994 before the trial Court against respondent no.1, who was arrayed as defendant no.4 and respondent nos. 2 to 4, were arrayed as

defendant nos. 1 to 3. Respondent nos. 2 to 4 were the widow and daughters of deceased Pramod Mahure. The appellant contended in the suit that

he had given the suit shop on rent only to Pramod Mahure and that there was no relationship of landlord-tenant between him and the said firm or

respondent no.1 and that respondent no.1 was in unauthorized occupation of the suit shop, which he was required to vacate.

4. The respondent nos.2 to 4 filed their written statement and admitted the contents of the plaint. They submitted that they had surrendered their

rights in respect of the tenancy in favour of the appellant and that the possession of respondent no.1 in the suit premises was unauthorized. The

respondent no.1 filed his written statement and opposed the contentions raised by the appellant in the suit. It was contended that the tenancy in the

suit shop was created in favour of the said firm, because the amount of Rs. 40,000/- was paid from a joint account of deceased Pramod Mahure

and respondent no.1 and further that cheques towards payment of monthly rent were issued from the account of the partnership firm. It was

contended that since the tenancy was created in favour of the firm, the suit for possession filed by the appellant was not maintainable without

permission of the Rent Controller and without issuance of notice of termination of tenancy under Section 106 of the Transfer of Property Act, 1882.

5. On the basis of the pleadings, evidence and material placed on record by the parties, on 18-04-1996, the trial Court passed its judgment and

order granting decree in favour of the appellant.

6. The trial Court held that the appellant had proved that he had leased out the suit shop to Pramod Mahure and that respondent no.1 had no concern

with the same, showing that he was a trespasser. It was further held that respondent no.1 had failed to prove that the suit shop was leased out to the

said firm. On this basis, the suit was decreed in favour of the appellant.

7. Aggrieved by the said decree, respondent no.1 filed Regular Civil Appeal No.254 of 2000 before the Appellate Court. By the impugned judgment

and order dated 26-09-2007, the appellate Court reversed the findings of the trial Court and dismissed the suit of the appellant. It was held that

respondent no.1 proved that the suit shop was let out to the aforesaid firm and that therefore, the appellant was not entitled to decree of possession.

It was held that the agreement for execution of lease deed at Exhibit-53 was not

acceptable as it was not proved in accordance with law. It was

held that when the appellant was available, evidence given by his son as Power of Attorney holder in respect of the agreement was not

acceptable and further that, since it was not a registered document, it could not be treated as lease deed and that it could not be relied upon as per

Section 49 of the Indian Registration Act, 1860. It was further held that there was sufficient evidence placed on record by respondent no.1 to prove

that the suit shop was let out to the aforesaid firm and that respondent no.1 could not be held to be trespasser.

8. Aggrieved by the same, the appellant filed the instant appeal. It was admitted by this Court by an order dated 21-04-2008, on the following

substantial question of law :—

“Whether the agreement of tenancy entered into between the parties can be treated as an agreement between landlord and an unregistered firm,

so as to hold that after expiry of the partner who had agreement with landlords, the said agreement enures to the benefits of other partners of the

firm?”

9. Shri M.G. Sarda, learned Counsel appearing on behalf of the appellant has contended that the appellate Court has committed a grave error in

allowing the appeal, setting aside the decree granted by the trial Court and in dismissing the suit for possession filed by the appellant. It is contended

that the appellate Court erred in holding that the agreement at Exhibit-53 could not be received in evidence because it was not a registered

document. The learned Counsel contended that the appellate Court committed an error in treating the said agreement at Exhibit-53 as a lease deed,

when it was nothing but an agreement to enter into a lease deed. The non-registration of the said agreement was not fatal to the cause espoused by

the appellant because, at worst, the terms of the said agreement could not have been looked into by the Court, but, it certainly could be used for

collateral purpose for ascertaining the nature of relationship between the appellant and said Pramod Mahure. It was further contended that merely

because the rent for the suit shop was paid from the account of the partnership firm, it could not have been held by the appellate Court that the said

firm was the tenant and not Pramod Mahure. It was further contended that the stand taken by respondent nos. 2 to 4 was also not appreciated in

the correct perspective by the appellate Court. In this context, emphasis was placed on Exhibit 97, being an application filed in Regular Civil Suit

No.440 of 1993, between respondent nos. 2 to 4 and respondent no.1, wherein it was clearly stated by respondent nos.2 to 4 that the shop wherein

the aforesaid business was being conducted by the partnership firm was taken on rent by Pramod Mahure from the appellant (landlord). It was

contended that the appreciation of the facts and law by the appellate Court was erroneous rendering its findings perverse. The learned Counsel

placed reliance on the judgments of the Hon'ble Supreme Court in the case of Hiralal Kapur vs Prabhu Choudhury, reported at AIR 1988 SC 852,

Park Street Properties Private Limited vs Dipak Kumar Singh and Another, reported at (2016) 9 SCC 268 and Full Bench judgments of this Court in

the case of Hemendra Rasiklal Ghia vs Subodh Mody, reported at 2008(6) Mh.L.J. 886.

10. On the other hand, Mrs P.M. Chandekar, learned Counsel appearing on behalf of respondent no.1, contended that the impugned judgment and

order passed by the appellate Court was fully justified and that no interference was necessary by this Court exercising jurisdiction under Section 100

of the Code of Civil Procedure, 1908. It was contended that when the appellant was available, evidence given by his Power of Attorney holder (son

of the appellant) was not proper and that he could not have deposed in respect of the facts pertaining to the case particularly regarding the agreement

at Exhibit 53. It was contended that such evidence of the Power of Attorney holder deserved to be completely ignored by the Court. It was further

contended that the unregistered agreement at Exhibit 53 was inadmissible in evidence to prove the relationship of tenancy with Pramod Mahure, as

claimed by the appellant. It was contended that such document could not have been taken in evidence and its contents were certainly not proved in

accordance with law. It was emphasized that from the beginning, the deposit of Rs.40,000/- was paid jointly by Pramod Mahure and respondent

no.1 and that the amounts towards monthly rent were paid from the account of the partnership firm. On this basis, it was contended that the

appellate Court had correctly reversed the findings of the trial Court, resulting in dismissal of the suit filed by the appellant. The learned Counsel

placed reliance on the judgments of the Hon'ble Supreme Court in the case of Janki Vashdeo Bhojwani and another vs Indusind Bank Ltd. and

others, reported at AIR 2005 SC 439, S. Kesari Hanuman Goud vs Anjum Jehan and others, reported at (2013) 12 SCC 64, Satish Chand Makhan

and others vs Govardhan Das Byas and others, reported at AIR 1984 SC 143 and judgment of this Court in the case of Sir Mohammed Yusuf and

another vs D. and another, reported at AIR 1968 Bombay 112.

11. Having heard the Counsel for the parties and upon perusal of the record, the substantial question of law framed by this Court needs to be

answered, which primarily concerns the issue as to whether the tenancy in the present case in respect of the suit shop was created between the

appellant and said Pramod Mahure or it was created between the appellant and the partnership firm M/s New Swatantra Optical. The Courts

below have taken divergent views on the said issue, resulting in the suit being decreed by the trial Court and the same being dismissed by the

appellate Court. The case of the appellant is primarily based on the aforesaid agreement dated 01/04/1991 (Exhibit 53) to claim that tenancy was

created between him and Pramod Mahure, while it is the case of respondent no.1 that the said document is concocted and a forged document, further

claiming that oral tenancy was created between the appellant and the aforesaid partnership firm. It is the case of the appellant that the said

agreement at Exhibit 53 is not a lease deed and that it is an agreement to enter into a lease deed. It is contended that therefore, it was not a

document that was compulsorily registrable. It was also claimed that even if registration was mandatory, non registration would not be fatal to the

case of the appellant because the Court could still look into the document for ascertaining the fact of tenancy and that in the absence of registration

it could be deemed that a monthly tenancy was created in favour of said Pramod Mahure.

12. The respondent no.1 has attacked the said document i.e agreement at Exhibit 53, on the ground that it was not proved in accordance with law

and that its non-registration was absolutely fatal to the case of the appellant, because the said document could not be taken into evidence. On this

basis, it was claimed that the Court was required to look into other evidence and material on record, which indicated that there was an oral tenancy

created between the appellant and the aforesaid partnership firm.

13. Therefore, it is necessary to analyze as to what would be the effect of

non-registration of the said document i.e. agreement at Exhibit 53. In this context, the law laid down by the Hon'ble Supreme Court in the case of Park Street (supra) reads as follows :

It is also a well-settled position of law that in the absence of a registered instrument, the Courts are not precluded from determining the factum

of tenancy from the other evidence on record as well as the conduct of the parties. A three Judge Bench of this Court in Anthony v. K.C. Intoop &

Sons ((2206) 6 SCC394, held as under (SCC pp 399 & 400 paras 12-13 & 16)

12.. A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price

paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can

be made expressly or by implication. Once there is such a transfer of right to enjoy the property, a lease stands created. What is mentioned in the

three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created The first paragraph has been

extracted above and it deals with the mode of creating the particular kinds of lease mentioned therein. The third paragraph can be read along with the

above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All

other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, dehors the instrument parties can create a lease as

envisaged in the second paragraph of section 107 which reads thus....

When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an

unregistered instrument came in to existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than

through such deed,

16. Taking a different view would be contrary to the reality when parties clearly intended to create a lease though the document which they executed

had not gone into the processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in

respect of the property became a reality. Non-registration of the document had caused only two consequences. One is that no lease exceeding one

year was created. Second is that the instrument became useless so far as

creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains unrebutted?? (emphasis supplied).

Thus, in the absence of registration of a document, what is deemed to be created is a month-to-month tenancy, the termination of which is governed

by Section 106 of the Act.??

14. The said position of law shows that although non-registration of the said agreement at Exhibit-53 could affect its validity, but the Court could

certainly look at it to arrive at a conclusion as to what had happened between the parties in respect of the suit shop. In the absence of registration of

said agreement at Exhibit-53, a monthly tenancy was deemed to have been created in favour of said Pramod Mahure.

15. As regards the objection raised on behalf of respondent no.1 that the Power of Attorney holder i.e. son of the appellant could not have deposed to

prove the said agreement at Exhibit-53, a perusal of the evidence of the said witness shows that he has deposed in respect of the said agreement on

the basis of his personal knowledge regarding the same. The said witness has stated that he was present when the terms of the said agreement were

being discussed and finalized. In this situation, it would not be appropriate to totally discard the evidence of the said witness, only on the ground that

his father (appellant) was available and that the witness was merely a Power of Attorney holder. In this context, the reliance placed by the Counsel

for respondent no.1 on the judgments of the Hon'ble Supreme Court in the case of Janki Bhojwani (supra) and S. Kesari Goud (supra), is misplaced.

16. On the question of proof of the said document i.e. agreement at Exhibit-53 a serious objection was raised on behalf of respondent no.1 claiming

that failure on the part of the appellant to examine at least one of the witnesses to the said document was fatal to his case. The evidence given by son

of the appellant, as his Power of Attorney holder, was not sufficient to prove the said document. In this regard, the evidence and material on record

shows that the Power of Attorney holder, being the son of the appellant, has deposed in respect of the aforesaid agreement at Exhibit-53 on the

basis of personal knowledge as he has stated that he was very much present when terms of letting out the suit shop were discussed by the

appellant and said Pramod Mahure. Therefore, the evidence of the said witness

cannot be discarded on the ground that when the appellant was available, his Power of Attorney holder could not have deposed in respect of the said agreement at Exhibit 53. Apart from this, the reasoning adopted by the appellate Court while discarding the said agreement at Exhibit 53, on the basis that the signatures of said Pramod Mahure were forged, does not appear to be sound. The said document could have been found fault with, only on the basis that it was not a registered document, but, in the light of the law regarding the extent to which the Court can look into an unregistered document like the agreement at Exhibit 53, it is clear that merely because the said document was unregistered, it could not have been completely disregarded by the Court. As stated above, the said document at least established the fact that a relationship had come into existence between the appellant and the said Pramod Mahure of landlord-tenant, although the said agreement could not have been looked into for the terms of the said agreement. As a result, it would have to be treated as monthly tenancy in respect of the suit shop. Even otherwise, the said agreement dated 01-04-1991 was exhibited at Exhibit 53 and at the time when it was admitted in evidence and marked as Exhibit, no objection was raised on behalf of respondent no.1 that it was an unregistered document and that it could not be marked as Exhibit at all. The said failure on the part of respondent no.1 to raise prompt and timely objection would amount to waiver of the necessity for insisting on formal proof of the document. This has been laid down by a Full Bench judgment of this Court in the case of Hemendra (supra), wherein it has been held as follows : 74. In the second category of the case, the objection should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object became fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is

not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility there and then, and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence.â??

17. It has been claimed by respondent no.1 that there was a oral tenancy that had come to existence between the appellant and the aforesaid partnership firm of which the said Pramod Mahure and the respondent no.1 were partners. In order to support the said assertion, respondent no.1 has heavily relied upon the fact that the deposit of the amount of Rs. 40,0000/Â for the said suit shop was paid from the joint account of Pramod Mahure and respondent no.1, as also the fact that cheques towards monthly rent were paid to the appellant from the account of the partnership firm. It is the contention of the learned Counsel appearing on behalf of respondent no.1 that these circumstances proved the fact that an oral tenancy had come into existence in favour of the said partnership firm.

18. In this regard, reliance placed by the learned Counsel appearing on behalf of the appellant on the judgment of the Hon'ble Supreme Court in the case of Hiralal (supra) is justified. In the said judgment, the Hon'ble Supreme Court has held as follows ;

â??7 We are inclined to agree with this submission of the landlord. The initial tenancy was only an oral tenancy. Nevertheless there were two witnesses who deposed that the original tenancy agreement was only between the petitioner and the respondent. At that time, admittedly, there was no question of Balkunj being the tenant in respect of any portion of the premises. All that the respondent says is that subsequently cheques were being issued in the name of Balkunj also and that this must be taken to lead to an inference that the petitioner had accepted Balkunj as its tenant. It

is very difficult to accept this argument. It is no doubt true that the rent has been paid by two cheques since November 1976 but the mere payment

of rent by two cheques, in the circumstances of this case, cannot mean that there were two tenancies. The landlord was entitled to a rent of Rs. 600

p.m. and so long as he got this amount, it was immaterial for him whether the amount was paid in a lumpsum or by one cheque or more than one

cheque and who the makers of the cheques were. It is not unusual to come across cases where a tenant pays rent not by a cheque drawn by himself

but by a cheque drawn by some other concern in which he has an interest such as a partnership concern, a limited company or other entity in which

he is interested. So, the mere fact that for some reasons the respondent chose not to issue a single cheque for the rent of Rs. 600/Â? but that he gave

two separate cheques, one for Rs. 250/Â? drawn by himself and one for Rs. 350/Â? drawn in the name of Balkunj cannot lead to an irresistible

conclusion that the tenancy was created in favour of Balkunj with the concurrence of the landlord. the letter dated 26Â11Â78 far from

â??clinchingâ? the respondent's claim, as held by the High Court, does not in our view improve the tenant's case at all. It only evidences the fact

that the landlord was receiving the cheques issued in the name of the trust in discharge of the respondent's obligation to pay the rent of Rs. 600

p.m. It is also true that, since the landlord was also occupying a part of the ground floor premises, he might have been aware that certain activities

of Balkunj were being carried on in the hall. But this can only mean that the landlord permitted the tenant to use a portion of the premises let out

for running the activities of the trust. even assuming that, standing by themselves these two facts might have been sufficient to draw any such

inference as is suggested, the two letters of 5Â8Â77 and 15Â1Â78 place the matter beyond all doubt. the landlord categorically asserted in these

letters that he does not recognize Balkunj as his tenant and that the respondent alone was his tenant. There was no reply to these letters for the

respondent. In these circumstances, there can be no doubt at all that the premises had been let out only to the respondent by the petitioner and that

Balkunj cannot be considered to be a tenant of the premises or any portion thereof.â??

19. Thus, it would be evident that merely because cheques towards rent were paid from the account of the partnership firm, it would not lead to the

conclusion that the said firm became the tenant of the appellant. The position of law laid down in the aforesaid judgment also answers the contention

raised on behalf of respondent no.1 that since the appellant was aware that business of partnership firm was being conducted from the suit shop, it

was the firm which was the tenant. No such conclusion could be drawn from the facts and circumstances of the case and therefore, the theory of

oral tenancy created in favour of the partnership firm raised on behalf of respondent no.1 is unsustainable and it is not supported by the evidence and

material on record.

20. The circumstances that point towards the fact that tenancy was indeed created only in the name of Pramod Mahure are; the aforesaid agreement

dated 01/04/1991 (Exhibit 53) shows that the tenancy was created in the name of Pramod Mahure individually, the respondent nos. 2 to 4

categorically took a stand that tenancy was in the name of Pramod Mahure and that they specifically stated in their written statement of having

surrendered their rights in respect of the tenancy, respondent no.1 failed to produce a single rent receipt in the name of the partnership firm, the

appellant promptly sent reply denying the claim made by respondent no.1 in his notice about tenancy being in favour of the partnership firm and the

appellant returned all the cheques towards rent sought to be deposited by respondent no.1 on the basis that the tenancy was created in favour of the

partnership firm. All these circumstances clearly indicated that the tenancy was created only in favour of Pramod Mahure and that the claims of

oral tenancy made by respondent no.1 in respect of the partnership firm, were wholly unsustainable. The findings rendered by the appellate Court

while reversing the decree granted by the trial Court, are found to be perverse and they are based on erroneous appreciation of the evidence and

material on record, as also the law applicable to the same.

21. Hence, the substantial question of law framed by this Court is answered against the respondent no.1 and in favour of the appellant. It is held that

the tenancy could not have been treated as created between the appellant (landlord) and the said firm. Consequently, respondent no.1 was not

entitled to claim that the tenancy enured to his benefit upon death of Pramod Mahure (partner in the said firm). As a result, the impugned judgment

and order of the appellate Court deserves to be set aside and the decree granted

by the trial Court deserves to be restored.

22. Accordingly, this appeal is allowed, the impugned judgment and order is set aside, the decree granted by the trial Court is restored and respondent

no.1 is directed to handover possession of the suit shop to the appellant (represented through his legal representatives), within a period of two

months. The other directions contained in the judgment and decree of the trial Court are maintained. There shall be no order as to costs.