

(1970) 09 BOM CK 0003
In the Bombay High Court
Case No : A.F.A.D. No. 245 of 1963

Pitamber Govinda Bhavsar

APPELLANT

Vs

Abdul Gafur Abdul Rajak and Others

RESPONDENT

Date of Decision : 24-09-1970

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 40
Limitation Act, 1908 — Article 144

Citation : AIR 1972 Bom 43 : (1971) 73 BOMLR 466 : (1971) ILR (Bom) 1486

Hon'ble Judges : Nain, J

Bench : Single Bench

Advocate : M.R. Kotval, for the Appellant; V.M. Limaye and V.G. Madbhavi, for heirs, for the Respondent

Judgement

1. This is an appeal by the original defendant No. 5 against the appellate judgment dated 31st December 1962 of the learned Assistant Judge, Jalgaon. Respondents 1-A to 1-D are the heirs and legal representatives of the original plaintiff. Respondent No. 4 is the heir and legal representative of the original defendant No. 3. Respondents Nos. 2, 3 and 5 are respectively the defendants Nos. 1, 2, and 4. They have not appeared.

2. On 8th May 1946 the plaintiff granted a lease of an area measuring 115 feet x 125 feet out of survey No. 284/1 in Pachora. District Jalgaon, to the defendants 1 and 2 for constructing a cinema house thereon by lease deed Ex. 54. On 31st December 1948 defendants 1 and 2 assigned their leasehold rights to defendant No. 3 who constructed a cinema house on the said land. He gave the cinema running it. On 22nd November 1956 the defendant No. 3 assigned the leasehold rights to defendants Nos. 4 and 5. It appears, the defendant No. 3 had not paid rent to the plaintiff. Therefore in 1955 the plaintiff filed against the defendant No. 3 a suit for recovery of arrears of rent. The defendant NO. 3 thereafter paid up the said arrears.

3. On 9th June 1958 the plaintiff filed against the defendants Nos. 1 to 3 the suit

from which the present appeal arises in the court of the learned Civil Judge. Junior Division, Chalisgaon, for recovery of possession of the suit land alleging that the lease Ex. 54 was invalid being in contravention of Section 40 of the Bombay Agricultural Debtor's Relief Act, 28 of 1947 (hereinafter referred to as to B. A. D. R. Act). The plaintiff contended that the defendants Nos. 1 to 3 were therefore in unauthorised or illegal possession of the suit property and were liable to handover possession to him.

4. The defendants took several contentions, including one that the lease was not void. They also contended that the suit was barred by the law of limitation.

5. Defendants Nos. 4 and 5 were added as party defendants on 24th February 1959. They raised the same contentions as raised by defendants Nos 1 to 3. They further contended that in any case so far as they were concerned, the suit was time barred.

6. The trial court decided the above issues against the defendants and decreed the suit. The defendants Nos. 3 and 5 appealed to the District Court at Jalgaon. In the said appeal the appellants took inter alia the same contentions that they had taken in the trial court. The learned Assistant Judge who heard the appeal dismissed the same with costs. Against the said decision, the defendant No. 5 alone has filed the present appeal.

7. The first contention taken before me by Mr. Kowtow on behalf of the appellant is that Section 40 of the B. A. D. R. Act was enacted for the benefit of the creditor and not for the benefit of the debtor. The plaintiff was not a "creditor" but was a "debtor". The plaintiff was therefore not entitled to avoid the lease in respect of the suit land. He further contended that in any case the lease was created by the plaintiff and he could not take advantage of his own wrong.

Section 40 of the B. A. D. R. Act read as under:--

"Not withstanding any law or contract no alienation of any property belonging to a debtor who is a party to any proceeding under this Act or an award registered under this Act, made by him before all his debts are discharged shall be valid, except with the previous sanction of the Court."

8. It is admitted by the parties that the plaintiff was on 8th May 1946 a debtor, that he was a party to a proceeding under the B. A. D. R. Act. and that all his debts were not discharged. It is also admitted that the lease was not created with the previous sanction of the Court. In such circumstances, Section 40 clearly lays down that the "alienation of any property" shall be invalid. The section does not say that such alienation shall be voidable at the instance of the creditor. If it had so said, there would have been substance in the contention of Mr. Kotwal. The section makes the alienation invalid, whether any one wished to avoid it or not. Whether the alienation is invalid or illegal, there is no question of taking advantage of one's wrong. This contention must therefore be rejected.

9. There is more substance in the next contention of the appellant. This contention is that the lease Ex. 54 is not an "alienation of any property" within the meaning of that expression in Section 40 of the B. A. D. R. Act. Unfortunately, the word "alienation" is not defined in the B. A. D. R. Act. Section 28, however, refers to fraudulent "alienations or encumbrances" on the debtor's property. The use of the two words in the said section indicates that an "in cumbrance" is not included in the word "alienation". On the other hand, Section 53 provides that a debtor shall not "hypothecate or sell the standing crops". The marginal note describes this hypothecation or sale by one word "alienation" of standing crops indicating that perhaps hypothecation would be covered by the word "alienation". Marginal notes to the sections are, however, not to be referred to for the purpose of construction, unless they have been inserted with the assent of the Legislature. We have no evidence that in the case of the B. A. D. R. Act, marginal notes have been inserted with the assent of the legislature. We therefore find that we do not derive much help from the B. A. D. R. Act itself in constructing whether a lease is an "alienation".

10. Section 105 of the Transfer of Property Act, 1882 provides that "a lease of immovable property is a transfer of as right to enjoy such property". It does not provide that a lease is a transfer of property. It merely provides that it is a transfer of a right to enjoy such property. Section 5 of the Transfer of Property Act defines "transfer of property" as meaning an act by which a living person conveys property. In a lease there is no conveyance of property. There is only a transfer of a right of enjoyment. The title remains in the lessor. We have therefore to see whether this transfer of right of enjoyment of property is an alienation.

11. The Concise Oxford Dictionary, 1961 Edition, states that in law the meaning of the word "alien" is "transfer of ownership of". The meaning of the word "alienate" is given as "transfer ownership of". The meaning of the word "alienation" is given as "transference of ownership". It would therefore appear that the ordinary literary meaning of the word "alienation" implies transfer of ownership, and not merely a transfer of a right of enjoyment.

12. Law Lexicon published by the Madras Law Journal Office states that the word "alienation" is generally applied to absolute conveyances of immovable property. To use the word "alienation" is as much to say as to make a thing another man's or to alter or put the possession of lands or other things from one man to another. "Alienation" imports an actual transfer of title.

13. In the case of Narayan Raghunath Kulkarni v. Krishnaji Govind Kulkarni AIR 1930 Bom 534 : 32 Bom LR 1249, the question was whether a devise by will was included in the word "alienate" in the Bombay Hereditary Offices Act, 1874. Patkar.J. observed as follows:

"The question therefore in the case is whether the word "alienate" excludes a devise by will. It is urged on behalf of the appellant that the word "alienate"

means to transfer by sale. It is conceded on behalf of the appellant that the watandar can make a gift of the watan property to a watandar of the same watan. If a watandar can alienate the property by gift inter vivos, he would presumably have the right to alienate by will in favour of a watandar of the same watan. The word "alienation:", according to Stroud's Judicial Dictionary, Vol. I, p. 65, means "to make a thing another man's". "Alienate", according to Wharton's Law Lexicon, means "to transfer property". Alienation would, therefore, include a devise by gift if the effect of it is to make the property another man's by means of a bequest."

14. The word "alienated" is defined by the Bombay Land Revenue Code, 1879, Section 2(2) as meaning "transferred wholly or partially to the ownership of any person." The definition of that word in Section 2 (2) of the Maharashtra Land Revenue Code, 1966 is the same. In these enactments the word "alienation" would be transfer of ownership to another person. Section 2 (15) of the B. A. D. R. Act provides that "words and expressions used in this Act but not defined have the meaning assigned to them in the Code of Civil Procedure, 1908 or the Bombay Land Revenue Code, 1879, as the case may be." The word "alienation" or any of its grammatical variations is not used in the Code of Civil Procedure. We must therefore turn to the definition of that word in the Bombay Land Revenue Code, 1879. IN the case of Haji Abdulla Haji Sumar Vs. The Secretary of State for India, the question whether a lease was an "alienation" within the meaning of that word in the Bombay Land Revenue Code arose before a Division Bench of this Court consisting of Chandavarkar and Hayward, JJ. In the judgment of Chandavakar, J. it is observed:--

"Therefore, there cannot be any doubt that this cowl is no more than a lease, that Government parted with their rights as lessors in favour of the grantee as a lessee, and imposed upon him certain conditions. None of those conditions brings the contract within the definition of the term "alienated" village, in Clause 19 of Section 3 of the Bombay Land Revenue Code".

15. The learned Assistant Judge observes in his judgment that a lease is a transfer of some interest which the lessor has in the property and such transfer is bound to affect the property and the creditors are bound to run the risk of reducing their security. He goes on to observed that the very purpose of Section 40 to keep the property of the debtor intact and available for the purpose of discharging the debts would be nullified, unless a lease was interpreted as an "alienation". I regret, I am unable to accept this reasoning. The learned Assistant Judge has strayed in the realm of speculation as to the intention of the Legislature. Lord Watson has said in the case of Salomon v. Salomon & Co. 1897 AC 22 that the

"intention of the Legislature is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of law or

Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by, reasonable and necessary implication".

If the Legislature had intended to include a lease or any other transfer in the word "alienation", nothing would have been simpler than to say so and to use the words "transfer, sale, mortgage or lease" or whatever the Legislature intended to prohibit. It is reasonable to suppose that the Legislature knew the literary meaning of the word "alienation", as also its meaning in the Bombay Land Revenue Code, 1879, the definitions in which were being made applicable by Section 2 (15) of the B. A. D. R. Act.

16. Mr. Limaye on behalf of the plaintiff made an attempt to argue that in Section 40 of the B. A. D. R. Act the word "alienation" was used synonymously with the word "transfer". In view however of what I have stated hereinabove. I cannot accept this contention. In my opinion "alienation" means transfer of ownership of property to another person. The word applies to absolute conveyances of immovable property and imports an actual transfer of title. It does not include a lease. The lease Ex. 54 therefore is not an "alienation" within the meaning of that word in Section 40 of the B. A. D. R. Act and is not invalid. The lease being valid the plaintiff is not entitled to possession on the footing that the defts. are trespassers. This suit must therefore fail.

17. The next contention of Mr. Kotwal on behalf of the appellant is that the suit of the plaintiff was time barred. The lease was granted on 8th May 1946. The suit was filed against the defendants 1 to 3 within time, but the present appellant was joined on 24th February 1959, beyond a period of 12 years from the date of the lease. The contention is that under Art. 144 of the Indian Limitation Act, 1908, the period of limitation for a suit for possession of immovable property is 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. Mr. Kotwal contended that where a lease is invalid the possession of the defendant is adverse from the start and a suit beyond a period of 12 years from the lease is time barred.

18. In view of my finding that the lease is not invalid, this contention as to limitation really does not survive. Both the trial court and the lower appellate court have, however, held that the suit was not time barred. I do not find that these findings of laws are correct on the basis that the lease was invalid. I shall, therefore, deal briefly with this point on the assumption that the lease was invalid. In the case of Alakhdeo Singh Vs. The Gaya District Board, , a Division Bench of the Patna High Court has held that where a person enters into possession of property by virtue of an instrument of lease which is void and inoperative, his possession is adverse to the true owner from the very beginning for the simple reason that the transfer conveyed him no title. When his possession was adverse to the true owner from the very beginning, the payment of rent will not make the possession lawful. It will only affect the nature of the interest that he was prescribing by virtue of his adverse possession. When a

person enters transaction and remains in possession for the full statutory period, the only question for determination is as to the nature of the interest that he has acquired by prescription. He cannot acquire by prescription a right higher than the right which the instrument of lease purported to convey to him. The transaction was admittedly a transaction of lease and therefore when he entered into possession under a void lease, he can acquire only the right of a lessee by prescription. In the case before me, originally defendants Nos. 1 and 2 entered into possession. They transferred their rights to defendant No. 3 who ultimately transferred them to defendants 4 and 5. It has been held in the case of *Pandappa Mahalingappa v. Shivalingappa Mureteppa* 47 Bom LR 962 : AIR 1946 Bom 193 that where the possession of one trespasser is a continuation of the trespass of the previous occupant through whom he claims, the adverse possession of the one can be tacked on to that of the other, and if the total period exceeds 12 years, that possession ripens into full ownership u/s 28 and Art. 144 of the first schedule to the Indian Limitation Act, 1908. In such a case, it is essential that one trespasser should derive his liability to be sued from the other. Now, if this position be correct, even according to the learned Assistant Judge the suit against the defendant No. 5 was beyond the period of limitation. He, however, thought that as the defendant No. 3 had paid rent in 1955, his possession was permissive upto that date. As I have stated hereinabove, the Patna High Court has taken a different view from the above and I think rightly. This payment will not save the period of limitation. In my opinion, the suit against the present appellant was time barred, if the lease was invalid. In view of the fact however that in my opinion the lease is valid and the plaintiff is not entitled to recover possession the question of limitation does not survive.

19. In the result, the appeal is allowed and the decree of the trial court as well as the lower appellate court are set aside. The suit of the plaintiff will stand dismissed. There will be no order as to costs.

20. Appeal allowed.