

(1986) 10 BOM CK 0001
In the Bombay High Court
Case No : F.A. No. 128 of 1976

Purushottam Rambhao Khandwekar since deceased by legal representatives Premlata Purushottam Khandwekar and others APPELLANT

Vs

Gangadhar Mansingrao Wagh since deceased by legal representatives Jaisingh Pandhari Wagh and others RESPONDENT

Date of Decision : 24-10-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 108, 108(h)

Citation : (1987) MhLj 41

Hon'ble Judges : M.S. Deshpande, J

Bench : Single Bench

Advocate : V.R. Manohar, for the Appellant; A.S. Bobde and A.M. Bapat for respondents no. 1(A) and 1(R), for the Respondent

Final Decision : Dismissed

Judgement

M.S. Deshpande, J.—This appeal by the original defendants Nos. 1 and 5 is directed against a decree for possession and mesne profits passed against them and the respondents Nos. 2 to 4 who were defendants Nos. 2 to 4 before the trial Court.

2. The property known as "Kailash Talkies" was owned by the plaintiff-Gangadhar and he entered into an agreement on 3rd October, 1946 to lease it out to the first-defendant Purushottam and one Dattatraya Jalgaonkar, since deceased. Dattatraya Jalgaonkar died leaving surviving him his widow Manorajesmbai and two sons Sudhir and Sharad who were defendants Nos. 3 and 4. Manorajesmbai died in July, 1972 leaving behind her the two sons and one daughter Asha alias Madhuri, the defendant No. 2. The site under the Kailash Talkies was open at the time of the Agreement. The material terms of the agreement were that - the lessee should construct a cinema theatre on the open site at the cost of Rs.

50,000/-, the rent should be Rs. 6,000/- per annum, out of which Rs. 1,200/- should be paid to the plaintiff and the balance should go towards the payment of the cost of the construction of the theatre. The period of lease was 25 years and at the termination of the lease, the lessees would remove the machinery, setting, equipments and other furnitures from the theatre within six months of the termination of the lease and hand over vacant possession of the building to the lessor. If for any reason beyond the control of the lessees the building could not be used for the purposes of the cinema talkies, the lessees would use the premises for such period over and above the period of lease; and the lessees would not remove the wiring of the cinema-hall at the termination of the lease but would remove the cabin wiring with the other specified fittings. Accordingly, a cinema theatre was constructed on this site and in respect of the amount Rs. 50, (XX) spent, Rs. 4,800/- per annum were adjusted in the rent. After the expiry of the lease on 3rd October, 1971, the plaintiff sent a notice on 26th November, 1971 to the first defendant. In reply to that notice, the latter contended that the theatre could not be used due to fire for 144 days between 9-11-1950 and 11-4-1951. On this basis, according to the plaintiff, the premises were to be vacated by 23rd May, 1972, but the possession was not handed over to the plaintiff. The plaintiff, therefore, sought possession and claimed damages for use and occupation at the rate of Rs. 3,000/- per month from 26-2-1972 to 30-11-1972 amounting to Rs. 27,000/-, in addition to Rs. 200/- as notice charges.

3. The only contesting defendants were the defendants Nos. 1 and 5, the present appellants, as the defendants Nos. 2 to 4 remained absent. According to defendants Nos. 1 and 5, though it was agreed that the first defendant would construct cinema-theatre at the cost of Rs. 50,000/- on the open site, as the plaintiff had no immediate funds for the construction, the first defendant advanced Rs. 50,000/- with interest at 8% per annum. In order to protect the interest of the plaintiff, it was agreed that any additional expenses on the construction should be made by the first defendant at his own risk and the actual cost of construction was a little over Rs. 70,000/-. Kailash Talkies started working from 17th November 1947, but the lease stood extended by 157 days, because the business had to be suspended on account of a fire from 9th November 1950 to 14th April 1951. It was urged that the first defendant became a tenant of the building after its completion and as Dattatraya Jalgaonkar died on 1st October, 1947, defendants Nos. 2 to 4 had no interest in the business. It was also urged that the management of the business was entrusted by the first defendant to the 5th defendant. It was also urged that by virtue of the provisions of the C.P. and Berar Letting of Houses and Rent Control Order, 1949 (for short, "the Rent Control Order"), the first defendant had acquired the status of a statutory tenant and his tenancy could not be determined, except in pursuance of its provisions. In support, it was urged that in Civil Suit No. 131 of 1972, which was filed by the plaintiff against the defendants in the Court of the 2nd Extra Joint Civil Judge (Junior Division), Nagpur, upon a construction of the lease-deed, that Court held

that the first defendant had advanced a loan of Rs. 50,000/- at 8% per annum payable in 25 annual installments and this finding operates as res judicata in the present suit.

4. The 5th defendant, who had filed a separate written statement, urged that he was in possession of the cinema building on behalf of a partnership firm constituted for running the business and the plaintiff had accepted rent from that firm of which he (defendant No. 5) was the managing partner. He also contended that without (he permission of the Rent Controller, the claim for possession could not be maintained.

5. The learned trial Judge negatived the objection raised by the defendants with regard to the Court-fee and the partnership which was alleged by the 5th-defendant. He held that since the lease was of an open site, it would not be governed by the provisions of the Rent Control Order and the plaintiff could claim possession without obtaining the permission of the Rent Controller. He found that the plaintiff was entitled to damages at Rs. 2,498/- per month from 7-9-1972 to 30-11-1972. amounting to Rs. 6,928./- and passed a decree as stated above.

6. In this appeal, only tow points were raised by Shri V. R. Manohar, the learned Counsel for the appellants, viz., that upon a construction of the terms of the lease-deed, the plaintiff had become the owner of the building with the help of amount of Rs. 50,000/- advanced by the first defendant and that thereafter the appellants became the tenants of the plaintiff in respect of the building and the provisions of the Rent Control Order would govern the lease. Secondly, he urged that the mesne profits awarded by the trial Court were disproportionately high and should be suitably reduced.

7. While considering the first point, it is necessary to consider the relevant pleadings. Para 1 of the plaint refers to the premises described in the map filed with the plaint and indicated by letters A B C D E F G H J L A. In para 2, it was mentioned that when on 3-10-1946 the plaintiff entered into the agreement with the lessees, the site underneath the Kailash Talkies was open and the terms were reduced to writing and the lease deed came to be registered. In para 1 of the written statement, the first defendant admitted the contents of paras 1 and 2 of the plaint, while in para 2. he stated that it was agreed that the first defendant should construct the cinema theatre at a cost of Rs. 50,000/- on the site and as the plaintiff had no immediate funds for the construction of that theatre on the site, the first defendant agreed to advance and did advance the sum of Rs. 50,000/- with interest at 8% per annum for constructing the cinema building. The first defendant's contention was that the plaintiff was to he protected should the amount of expenses exceed Rs, 50,000/-. and a sum little over Rs. 70.000- was paid by the first defendant for the construction of the cinema theatre. There is no dispute that the amount of Rs. 50,000/- was to be adjusted under the terms of the lease-deed towards the rent by paying only Rs. 12000/- per annum in cash, while the balance of Rs. 4800/- to be adjusted towards the expenses of construction. Evidently, this was with a view to compensate the defendants.

Upon the expiry of the lease, the building was to go to the plaintiff. The fact that Shri Belekar, Advocate, had drafted the lease-deed, and the agreement was expressed with meticulous care by scribing as many as 24 clauses in it by providing for minute details, would indicate that whatever was the intention of the parties it was fully expressed in the lease-deed.

8. A scrutiny of the lease-deed would show that the dominant intention was to lease out an open site for the construction of a cinema building and whatever structures existed upon the site at the time of the lease were to be demolished and were demolished. This position also is not in dispute. In addition to the terms regarding the description of the property, the rent to be paid and the manner in which the cost of construction should be adjusted towards the rent to which I have already referred, significantly clause No. 6 provided that the lessees shall continue to be the undisputed proprietors of the theatre during the period of the lease, being only bound to respect the terms of the lease. Shri Manohar for the appellant, however, referred to the building being insured for the sum of Rs. 50,000/- (clause 7), that the Municipal taxes should be paid by the lessees and the right of re-entry provided to the plaintiff upon default in payment of the Municipal taxes, for urging that though initially the expenditure was borne by the lessee, the building became the property of the plaintiff and the lease, in effect, was of the building after its completion. These are general clauses which are found to be in any agreement of lease and not much significance can be attached to them, considering that at the expiry of the lease, the building constructed by the lessees was to become the property of the lessor. The provision was clearly intended because of the right which the lessee has u/s 108(h) of the Transfer of Property Act. even after determination of the lease to remove at any time whilst he is in possession of the property leased out all things which he had attached to the earth, provided he leaves the property in the state in which he receives it. The payment of Rs. 50,000/- was intended to compensate the lessees for the structure they were to make over to the plaintiff at the expiry of the lease, that being a contract to the contrary as contemplated by section 108 of the Transfer of Property Act. Under clause (11). it was agreed that the lessees shall build a permanent structure for cinema purposes as per plan sanctioned by the Municipal Committee and no Kachocha structure shall be erected and in the latter event, the lessor had the right to terminate the lease. The expenses of repairs and maintenance were to be borne by the lessees.

9. Shri Manohar referred to clauses (14) and (16) under which the lessees were not to transfer or part with their interest in the lease and cinema theatre without the written permission of the lessor, and if they do so. the lessor was given an option to terminate the lease before the fixed period. He stressed the portion that the lessees may sub-let, if they can. without the permission of the lessor and urged that this indicated that the lessees were also the tenants of the building and not only of the open plot. Clause (16). however, explains when the lessees may sub-let without the permission of the lessor and runs thus : -

"That the lessees agree to use the site and premises for the cinema theatre and other allied purposes only, and not for the residential purposes with a view to earn rent. That the sub-letting of the premises for the allied purposes of the Pan Shop, Hotels, Bars, Cycle-Stand, etc., is allowed even without the permission of the lessor."

The sub-letting, which was contemplated without the permission of the landlord clearly was in respect of the part of the premises which was open and has no reference to the built portion. This clearly follows from the description of the premises in the opening portion of the lease-deed, viz.. the open site.

10. Reference was also made on behalf of the appellants to clauses i\\H)J 20) and (24) where the words, "transfer of control and possession of the buildings" have been used without referring to the transfer of ownership of the buildings. Clause (18) has reference to the undertaking of the lessor to take steps for causing the tenants and occupants of the buildings to vacate immediately and hand over the control and possession thereof the lessees. This is consistent with the lease of the open site alone and, admittedly, the structures were demolished in pursuance of this clause before the construction of the cinema building. Clause (20) has reference to the rent of the land and the premises being charged from the date of handing over control and possession of the land, buildings described in the Schedule by causing the tenant and occupants to vacate. This again has no reference to the building constructed by the lessees. Clause (24) is as follows : -

"That after the termination of the lease, the lessees shall be entitled to remove (i) the talkies equipment and machinery and (ii) the sitting equipments and other furniture of the theatre and transfer the control and possession of the cinema buildings free of cost, to the lessor within six months from the date of termination of the lease. The lessees agree not to remove the wiring of the cinema-hall on the termination of the lease and that the lessor will get it free of cost. The lessees shall however remove the cabin wiring with its fittings and ornamental shades used for illumination and ceiling fans of the theatre."

This clause has to be read harmoniously with clause (6) under which the lessees were to continue as undisputed proprietors of the theatre during the period of lease, being only bound to respect the terms of the lease. Shri Manohar urged that the use of the word "theatre" in clause (6) was deliberate and would indicate that what was intended was the theatre business and not the theatre building. There was no reason, however, to refer to the lessees being the proprietors of the theatre business, because evidently that was to be the business of the lessees alone and the lease has relevance only to the property leased out, viz., the site on which the theatre building stood, the terms of the lease clearly providing for the manner in which the theatre building at the expiry of the lease was to pass to the lessor. Since provision was clearly made in respect of the theatre-building passing to the lessor, there was no need to mention it in clause (24) which dealt with the subject of the fitting and fixtures.

11. All these terms of the lease show that there was no contract between the parties to the effect that after the theatre-building was constructed, its ownership would rest in the lessor and that it would be deemed to have been leased out to the lessees of the open plot. On the contrary, the inference is irresistible that during the period of the lease, the plaintiff was to be the owner and the lessor of the open site, while the lessees were to be the lessees of the open site, but owners of the structure constructed upon the open site which was to pass to the lessor at the expiry of the lease of the open plot.

12. In this context, it was contended on behalf of the appellants-defendants that in view of the finding in Civil Suit No. 131 of 1072 decided by the 2nd Extra Joint Civil Judge (.Junior Division), holding that the first defendant had advanced a loan of Rs..SO.(XX) - with interest at 8% per annum to the plaintiff, which was payable in 25 annual installments, there can be no doubt about the fact that the money for the construction came from the plaintiff and that he was the owner of the structure. It was urged that the finding about the advance of the loan operates as res judicata. The trial Court on (he text of section 11 of the CPC took the view that as the Court of the Civil Judge (Junior Division), which decided the suit, had no competence to entertain the subsequent suit which was cognisable by the Civil Judge (Senior Division) and as latter suit could not have been decided by the Court which decided the earlier suit, the finding on that issue would not operate as resjudicata. Shri Manohar, the learned counsel for the appellants, however, urged that the decision on the issue would operate as res judicata, in view of Explanation VIII to section 11 of the Code of Civil Procedure, which is as follows:-

"Expiation VII: An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

Shri Bobde, the learned Counsel for the respondent No. 1. on the other hand, contended that the expression "a Court of limited jurisdiction" had come to acquire a certain meaning and was understood in a particular sense before it was used in Explanalion-VIII to section II, and he referred to the observations of Mudholkar, J.. in H. V. Kamath vs. Syed Ahemad ILR 1954 Nag 200 who. while holding that Article 226 of the Constitution cannot be availed of by a petitioner where the tribunal docs not exist any longer and consequently no direction, order or writ can be made to it, observed that the Election Tribunal having been constituted for a limited purpose must be deemed to be tribunal of limited jurisdiction and thus amenable to the jurisdiction of this Court under Article 227 of the Constitution. However, there the expression was used only to illustrate what a tribunal of limited jurisdiction was. and there was nothing which would suggest that it would apply only to a special category of tribunals exclusive of the ordinary Civil Courts. Reliance was placed on a Division Bench decision of the

Calcutta High Court in Nabin Majhi Vs. Tela Majhi and Another, . The learned Judges there observed as follows : -

"The expression "a Court of limited jurisdiction" occurring in Explanation VIII means Courts other than the ordinary Civil Courts. These Courts are Revenue Courts. Land Acquisition Courts, Administrative Courts, Insolvency Courts. Guardianship Courts, Probate Courts, etc. These Courts are to try certain specific matters and in that sense they may be said to be Courts of limited jurisdiction. These Courts are also Courts of exclusive jurisdiction in respect of the matters they are to try. The decisions of such Courts operated as res judicata in subsequent suits not by virtue of section 11 but on the general principles of res judicata. By enacting Explanation VIII, the legislature brought the decisions of such Courts within the purview of section 11. In other words, it is not necessary now to apply the general principles of res judicata, but in view of Explanation VIII the decisions of the Courts of limited jurisdiction or exclusive jurisdiction will operate as res judicata in subsequent suits u/s 11. The general principles of res judicata would apply where the former proceeding is not a suit but section 11 would only apply where the two proceedings are suits."

13. From the statement of "Objects and Reasons" for the Bill which was subsequently enacted as Amending Act 104 of 1976 and by which the amendment was brought about- it is clear that the intention underlying the introduction of Explanation VIII was that the decisions of the Courts of limited jurisdiction should operate as res judicata in a subsequent suit although the Court of limited jurisdiction may not be competent to try such subsequent suit. Shri Bobde urged that Explanation VIII should not be so read as would wipe out the effect of the main section. But it is difficult to agree with him on this point, because unless something in Explanation VIII itself requires a restricted meaning to be given to the expression "a Court of limited jurisdiction", the words employed therein will have to be given their ordinary meaning and there is no warrant for reading such a restriction in Explanation VIII. According to Shri Bobde, the categories to which the text of section 11 will apply and Explanation VIII would apply are different, because the text of section 11 deals also with suits and requires for its operation that the Court deciding the earlier suit or the issue should be competent to try the subsequent suit, while the reference in Explanation VIII is only to an issue which is finally decided by a Court of limited jurisdiction, and not to a suit. The distinction sought to be made out overlooks that the limited jurisdiction may be by virtue of the special class of matters which the Court or Tribunal tries, or may be due to the limitation placed on its pecuniary jurisdiction, and there is nothing in the opening portion of Explanation VIII which would rule out its application to a suit.

14. All the three points raised by Shri Bobde, therefore, that giving a wider meaning to a Court of limited jurisdiction in Explanation VIII would result in effacement of the text of section 11; that the mention only of "issue" in Explanation VIII, while reference in the text of the section is to suit or issue; and

that "the Court of limited jurisdiction" must be limited to the Courts or Tribunals which exercise a special class of jurisdiction, cannot be accepted.

15. Shri Bobde referred to a decision of the Supreme Court in *Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi*, , where it was held that finding as to title by Small Causes Court does not operate as *res judicata* in a subsequent suit for determination of interest in immovable property, because a suit based on title to immovable property cannot be tried by Court of Small Causes. There, it was observed that a matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of *res judicata*, and a question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as *res judicata* in a subsequent suit in which the question of title is directly raised. The question of the applicability of Explanation VIII did not fall for consideration in that case, and the respondents can derive no support from it.

In *Promode Ranjan Banerjee Vs. Nirapada Mondal*, , which was decided by a learned Single Judge of Calcutta High Court, the earlier Division Bench decision in *Nabin Majhi Vs. Tela Majhi and Another*, was only followed.

16. It may be noted that a view different from the one taken by the learned Judges of the Calcutta High Court has been taken in *Puthen Veetil Nolliyodan Devoki Amma and Others Vs. Puthen Veetil Nolliyodan Kunhi Raman Nair and Others*, ; *Hari Singh vs. Smt. Sringar Kanwar* *Rajasthan Law Weekly* 1081, page 190; and *Kumarmoni Sa Vs. Himachal Sahu and Others*, .

17. The Division Bench of the Kerala High Court has pointed out that the correct mode of interpretation is to read the section in combination and harmony with Explanation VIII. and the object and purpose underlying the introduction of Explanation VIII was much wider, namely, to render the principle of *res judicata* fully effective so that issues heard and finally decided between the parties to an action by any Court competent to decide such issues should not be allowed to be reagitated by such parties or persons claiming through them in a subsequent litigation. In the Rajasthan case, the learned Judges took the view that the expression "a Court of limited jurisdiction" is wide enough to include a Court whose jurisdiction is subject to a limited pecuniary jurisdiction and it will not be right to interpret the said expression as connoting only a Court other than Civil Courts. The Division Bench of Orissa High Court, while expressing its agreement with the view taken by the Kerala High Court, added that the amendment is purported to avoid multiplicity of suits and if one person goes on adding some property and increasing the value of the property from time to time by instituting suits one after the other, he can deliberately avoid the decision which was against him to operate as *res judicata*. There should be an end to the matter and multiplicity of litigations should be avoided.

18. I am in respectful agreement with the wider interpretation put by the High Courts of Kerala, Rajasthan and Orissa, and I find that merely because in the

present case the Court of Civil Judge (Junior Division) could not have entertained the present suit, the finding recorded by it would not cease to operate as res judicata, in view of the introduction of Explanation VIII to section 11. Disagreeing with the trial Court, I am of the view that the finding, that the first defendant had advanced a loan to the plaintiff at 8% per annum as interest, recorded in the earlier suit, would operate as res judicata in the present suit.

19. The next point is what will be the effect of this finding in the present case. Merely because the amount of Rs. 50,000/- was advanced as a loan, the nature of the transaction between the parties would not change. The position would be that instead of paying the amount of Rs. 50,000/- as compensation at the expiry of the lease, that amount must be deemed to have been paid at the beginning and interest was charged on the amount which was advanced by the first-defendant. However, this loan was to be satisfied by a deduction in the rent agreed, but the rent that was paid was only in respect of the open site, and not for the building which was constructed. The property in the building was to pass to the plaintiff only on the expiry of the lease, and not earlier, in view of the other terms of the lease-deed to which I have already referred. The conclusion, in any event, would be that the defendants were the lessees only of the open site, and not of the structure, and therefore it was not necessary to obtain the permission of the Rent Controller for determining the lease of the defendants, because the provisions of the Rent Control Order apply only to the lease of a house and not to open site. The learned trial Judge was, therefore, right in holding that no protection could be claimed by the appellants by virtue of the provisions of the Rent Control Order. The trial Court was also right in its view that the plaintiff was entitled to a decree for possession.

20. With regard to the amount fixed as mesne profits, Shri Manohar urged that there was no evidence to justify the finding that the mesne profits would be Rs. 2,498/- per month, no rebate was given for the income tax that would have become payable, and in any event, the mesne profits should have been fixed on the basis of the rent being Rs. 500/- for the open plot and whatever might be the rental of the empty hall, and not on the basis that the premises were used for running a cinema hall.

21. On the basis of the returns of the collections for entertainment tax submitted by the appellants to the Collector, the gross receipts by way of sale of tickets in September, 1972 were Rs. 34,588.60, and for October, 1972, they were Rs. 31,190.60. By reducing the amount of tax and surcharge paid for the months of September, October and November, 1972, the amount would be between Rs. 16,778.20 and 18,560.97. Ambadas, who was the Manager of the Kailash Talkies, stated that the expenses on account of electricity were Rs. 600/- to Rs. 700/- per month; Rs. 4000/- per month were spent on the account and the wages payable to the employees; Rs. 500/- per month were required for carbon; Rs. 100/- per month were required for the maintenance of the machinery and there were other expenses also which had to be defrayed. The trial Court, on this

basis, calculated the net profits at Rs. 2,498/- per month. It must be noted that the appellants did not produce their account-books in support of the expenses which they had stated. On the other hand, Ambadas (D.W. 4) the Manager of the Kailash Talkies stated that he did not know what was the income tax paid. Purushattam Khandwekar (1-DW) stated that he had 1/3rd share in the profits of the cinema and that he got Rs. 6000/- to Rs. 7000/- per year as profit. No importance can be attached to the amount mentioned by him, because the account-books, though the appellants maintained them, were not produced. It was for the appellants and the persons in possession to state precisely what were the profits that they made from the business, and they kept back the material evidence on this point. No exception can be taken to the finding recorded by the trial Court in this respect and that finding is confirmed.

22. In the result, I see no merit in the appeal. It is dismissed with costs.

The appellants are granted time upto 15th January, 1987, to hand over possession in accordance with the directions given by the trial Court.