

(2000) 07 BOM CK 0112

In the Bombay High Court

Case No : Writ Petition No. 3564 of 1988

Ramesh Shankar Kale

APPELLANT

Vs

Madhav Bhimshankar Wadnere and Others

RESPONDENT

Date of Decision : 07-07-2000

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2001) 2 BOMLR 945

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : Mr. V.A. Thorat, for the Appellant; Mr. Ghaisas, for the Respondent

Judgement

R. M. S. Khandeparkar, J.—Heard Mr. Thorat for petitioner. None present on behalf of respondents though served. This petition arises from the judgment of the Lower Appellate Court dismissing the appeal filed against the order of the Trial Court dismissing the suit of the petitioner. The facts in brief relevant for the decision are that, one Shankar Kale was the tenant in occupation of the suit premises. The suit premises were purchased by the Respondent No. 3 herein on 4th September, 1968 and thereafter a suit bearing No. 170 of 1970 was filed on the ground of default in payment of rent and bonafide need of premises for personal occupation. It is to be noted that the suit was filed against the respondent No. 2 alone, who is the eldest son of the original tenant and the father of the petitioner and the respondent No. 2 and who expired on 26th January, 1968. The petitioner was not joined as party to the said suit by the respondent No. 1. It is also an undisputed fact that the suit premises were subsequently purchased in May, 1982 by the respondent No. 3. On 27th June, 1979, the respondent No. 1, decree holder in Civil Suit No. 170 of 1970 sought to execute the decree of eviction which was passed against the respondent No. 2 and thereupon the petitioner acquired the knowledge of the proceedings in Civil Suit No. 170 of 1970 and the decree passed therein. The petitioner thereupon filed Regular Civil Suit No. 487 of 1979 to declare himself as the tenant in

respect of the suit premises, being one of the legal heirs of the original tenant and to restrain the respondent Nos. 1 and 3 from executing the decree of eviction in relation to the suit premises. The suit was contested by the respondent No. 3 herein by filing written statement whereas the respondent Nos. 1 and 2 did not contest the proceedings. They did not even file written statement. Before the Trial Court, the petitioner examined himself. However, neither the defendants stepped in the witness box nor they examined any witness in support of the case pleaded by the respondent No. 3. The Trial Court, however, dismissed the suit and the appeal filed against the same was also dismissed by the Lower Appellate Court. It has been held by the Courts below that though all the legal heirs of the tenant are entitled to inherit right of tenancy in the suit premises, it is to be presumed that the respondent No. 2 being the eldest brother was the manager of the family and therefore the suit for eviction was validly filed against him alone and there was no need of the petitioner being joined as the party. The learned Advocate for the petitioner placing reliance upon the judgment of the Apex Court in the matter of *Textile Association (India) Bombay v. Balmohan Gopal Kurup and Anr.*, submitted that undisputedly there is a clear finding by the Trial Court that the petitioner has been residing in the suit premises and he had been so residing as a member of the family and that it is not in dispute that the father of the petitioner was the tenant in respect of the suit premises. Being so, the suit for eviction filed against the respondent No. 2 alone without joining the petitioner and the decree passed in such suit cannot be binding on the petitioner. The Courts below therefore, have clearly acted in arbitrary exercise of their jurisdiction while dismissing the suit. He further submitted that there was no evidence produced by any of the respondents to show that the respondent No. 2 is the manager of the family or that he was the karta of the joint family of which the petitioner was a member. In the absence of any such material placed on record, the findings arrived at by the Lower Appellate Court that the respondent No. 2 was the manager of the family is not only perverse but totally without any evidence in support thereto and therefore it clearly warrants interference by this Court in its writ jurisdiction under Article 227 of the Constitution of India.

2. The Apex Court in the case of *Textile Association (supra)* has clearly held that the widow and the children of the deceased tenant inherit the tenancy right and therefore any decree passed in such suit cannot be binding upon other legal heirs of the tenant. The relevant observation of the Apex Court in that regard is to be found in para 4 which reads thus :-

"... That being the position the ex-parte decree for eviction obtained against his mother and brother without impleading him in the suit has to be set aside. It is not sufficient as the Courts below have said that decree was not binding upon the respondent..."

3. It is well settled that the tenancy rights are hereditary and in the facts of the case in hand the Trial Court has clearly held that the petitioner was the member

of the family of the deceased tenant. As rightly submitted by the learned Advocate for the petitioner there is absolutely no evidence produced by the respondent and therefore there was no scope for the Lower Appellate Court to arrive at the finding that the respondent No. 2 was the manager of the family and therefore there was no need of the petitioner being joined as the party to the suit for eviction filed by the respondent No. 1. Once it is clear that the petitioner was entitled to inherit the tenancy rights from the original tenant and was member of the family of the original tenant and the materials on record disclosed the same and even the finding of the Trial Court was that the petitioner was residing in the house along with the original tenant, it was necessary for the respondent No. 2 to join the petitioner as the party to the Regular Civil Suit No. 170 of 1970 to obtain valid executable decree against the petitioner. Having not done so, the petitioner was Justified in seeking necessary relief of declaration and injunction against the respondent as regards the decree passed in such suit to which he was not party. Courts below having totally ignored this aspect and having dismissed the suit have clearly acted arbitrarily and have failed to exercise minimal requirement under the law and to apply correct law to the facts on record and thereby have rendered their judgments to be improper and contrary to the provisions of law and therefore not sustain-able.

4. At this stage Mr. Ghaisas, the learned Advocate appearing for respondent No. 3 appeared in Court and sought leave to make submissions in the matter. On leave being granted, he submitted that in the case in hand there was no dispute that the rent receipts were issued in favour of the respondent No. 2 alone and therefore there was no need of filing the suit against the petitioner or Joining the petitioner as party to the said Civil Suit No. 170 of 1970. The learned Advocate for the respondent No. 3 however was unable to point out any provisions in law which besides contending about exclusive tenancy rights in favour of the person in whose name the receipts are issued pursuant to the death of the original tenant. Merely because the person in whose name receipts are issued happened to be one of the legal heirs of the original tenant, the right of other heirs are not wiped off. In fact, the law in this regard is well established as already stated above i.e. upon death of the original tenant, tenancy rights are inherited by all the legal heirs. At the cost of repetition it can be stated that the Trial Court has found that the petitioner was residing with the original tenant and he is one of the legal representatives of the original tenant. Applying the test laid down by the Apex Court in the decision referred above, the petitioner was clearly a necessary and proper party to the suit and in the absence thereof, the decree passed in Civil Suit No. 170 of 1970 cannot be held to be binding upon the petitioner.

5. In the result, the petition succeeds. The impugned judgment of the Lower Appellate Court is hereby quashed and set aside. The matter is remanded to the Trial Court to pass an appropriate judgment and decree based on materials already on record but after considering the submissions by and on behalf of the parties to the suit. The Trial Court should endeavour to dispose of the matter

expeditiously and he in any case within three months from the date of receipt of the writ of this Court.

6. Rule is made absolute in the above terms. No orders as costs.