

(1938) 11 BOM CK 0029

In the Bombay High Court

Case No : Appeal from Order No. 84 of 1937

Sadashiv Govind Arekar

APPELLANT

Vs

Yeshvant Bhikaji Vilankar

RESPONDENT

Date of Decision : 23-11-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 35 Rule 5

Citation : AIR 1939 Bom 249 : (1939) 41 BOMLR 460

Hon'ble Judges : Lokur, J

Bench : Single Bench

Judgement

Lokur, J.—This appeal arises out of an interpleader suit filed by the plaintiff to have it decided whether defendant No. 1 or defendant No. 2 is entitled to recover the property in suit from him. According to the plaintiff, defendant No. 2 was the owner of the property and he had taken it on an oral kase from him on November 1, 1927, at a monthly rent. He says that he was paying the rent to defendant No. 2 all along ; but on July 23, 1935, was served with a notice by defendant No. 1 that he should! pay the rent to him. Defendant No. 2 also served him with a notice on July 11, 1935 asking him not to pay any rent to defendant No. 1 if demanded by him. In these circumstances the plaintiff filed this suit to have it decided as to who was entitled to the rent and the property. The trial Court held that such a suit was barred under Order XXXV, Rule 5, of the Civil Procedure Code, 1908, as defendant No. 1 did not make a claim to the land through defendant No. 2 who was admittedly the landlord of the plaintiff. The suit was, therefore, dismissed, but the lower appellate Court held that defendant No. 1 claimed the property through defendant No. 2 and the suit was, therefore, not barred by Order XXXV, Rule 5, of the Civil Procedure Code, 1908. The suit was, therefore, held maintainable and was remanded to the trial Court for disposal according to law.

2. Order XXXV, Rule 5, of the Civil Procedure Code, 1908, provides that an interpleader suit cannot be filed by a tenant against his landlord for the purpose

of compelling him to interplead with any persons other than persons making a claim through such landlord, and the crucial question to be decided in this appeal is, whether defendant No. 1 can be said to be making a claim through defendant No. 2 who is admitted by the plaintiff to be his landlord.

3. It has been held in *Cook v. The Earl of Rosslyn* (1869) 1 Giff 167 that a tenant cannot sustain a bill of interpleader against his landlord unless the title be affected by some act done by the landlord subsequently to the lease. The same principle is laid down in *Dungey v. Angove* (1794) 2 Ves. Jun. 304. The object of Order XXXV, Rule 5, of the Code of Civil Procedure, 1908, is to prevent a tenant from compelling his landlord to have his title determined as against a stranger, and it is not disputed that an interpleader suit is maintainable if the landlord, subsequent to the letting, does anything whereby his right to recover the rent is entangled. Defendant No. 1 in this case claims the title to the property in suit under a sale-deed passed by defendant No. 2 on May 27, 1926. After that sale-deed, defendant No. 2 leased the property to the plaintiff on November 1, 1927. It follows, therefore, that if the claim of defendant No. 1 be good, defendant No. 2 had: no right to lease the land to the plaintiff on November 1, 1927. It cannot, therefore, be said that defendant No. 1 is claiming through defendant No. 2, since he is challenging the very right of defendant No. 2 to let out the land to the plaintiff. There is, however, one circumstance which apparently seems to be in favour of the plaintiff. In the sale-deed executed by defendant No. 2 in favour of defendant No. 1, the property in suit was not included, but defendant No. 2 says that he wanted to transfer all his property to defendant No. 1, who is his sister's son, as benami, in order to screen it from his creditors. After passing the sale-deed, the plaintiff remained in possession of all the property by giving a rent-note or a make patra to defendant No. 1. Even in that rent-note the property in suit was not included. But subsequently on February 1, 1928, defendant No. 2 made a statement before the talati that the property in suit also was intended to be conveyed to defendant No. 1 and had been omitted in the sale-deed through oversight. So at his instance the property in suit also was entered in the name of defendant No. 1 in the Record of Rights (exhibit 25). It is argued from this that defendant No. 2 made such a statement before the talati subsequent to the lease in favour of the plaintiff and thereby his right to recover the rent became entangled. The statement of defendant No. 2 does not, however, mean that defendant No. 1's title was created on the date on which it was made. He merely admitted that the sale-deed passed by him prior to the lease was intended to include the property in suit. Defendant No. 1 also says the same thing and he claims title to the property from that date, viz., May 27, 1926, and not from the date of the statement. Hence, according to defendant No. 1, the subsequent lease by defendant No. 2 in favour of the plaintiff was unauthorized. He cannot, therefore, be regarded as claiming the property through defendant No. 2. The trial Court was, therefore, right in holding that so far as this suit is concerned defendant No. 1 claimed the property independently of defendant No. 2 and he contended that defendant No. 2 had no right to lease the property to the plaintiff.

The plaintiff cannot, therefore, call upon defendant No. 2 to litigate with defendant No. 1 and have his title cleared. The suit is, therefore, barred; under Order XXXV, Rule 5, of the Civil Procedure Code, 1908.

4. I set aside the order of the lower appellate Court and restore the decree passed by the trial Court. The appellant shall recover his costs in this Court and in the lower appellate Court from respondent No. 1.