
(1989) 12 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 4657 of 1988

Shankar Dagadu Bakade and Others

APPELLANT

Vs

Bajirao Balaji Darwatkar

RESPONDENT

Date of Decision : 13-12-1989

Acts Referred:

Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 —
Section 2, 22

Citation : (1990) 2 BomCR 38 : (1990) 92 BOMLR 160 : (1990) MhLj 412

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : T.N. Ingale and Ajit P. Shah, for the Appellant; Anil v. Anturkar and A. Ramakrishna, for the Respondent

Judgement

Sharad Manohar, J.

Why Rule was issued in the petition at all.

1. Rule in this petition was issued not because the Court found any mistake in the final order passed by the lower Court, but because the point raised by the petitioners was one which was likely to give rise to confusion and the provisions of section 22 read with section 2(e)(v) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, was likely to be mis-used or abused by the land trespassers having mischief in mind. In fact this position was made clear even while issuing notice to the respondent plaintiff.

When the Rule came up for final hearing Mr. Shah, the learned Advocate appearing for the petitioners, stated that there existed some binding judgment which had thrown light upon the interpretation of section 2(e)(v) of the said act. Several adjournments have been taken for production of the said judgment. But no such judgment has been produced till this date. The result is that this Court's view expressed even at the time of the front of the Rule, viz. that the said section 2(e)(v) has got to be construed Ejusdem Generis with the provisions

contained in Clauses (i) to (iv) of said section 2(e) has got to be adhered to. Once this legal position is appreciated, the entire objection raised by the petitioners, who are admittedly a bunch of rank trespassers on the land, vanished in the thin air.

Facts briefly stated.

2. The facts need to be stated just briefly :-

(a) The suit land is an open space of land on which the petitioner's have pitched their tents, on their own showing, illegally. It has been their own contention, may glamour, that they did not have a little of title to the land when they started occupying it. The respondent, who is the owner of the land has filed various suits in the Court of Small Causes for eviction of the petitioners with the contention that they were liable for eviction under the Rent Act. The circumstances in which these suits came to be filed by the respondent need not be stated here. All that needs to be stated here is that all the petitioners, who were the defendants in the earlier suits, raised a common plea viz. that they were not the plaintiff's tenants, that they had been in possession of the particular portions of the land in question adversely against the respondent and that they had acquired and perfected their title to the respective portions of the suit land by adverse possession. This plea was accepted by the Small Causes Court and the plaintiff's suits were dismissed by the Court. Naturally, therefore, the respondent filed the instant suit against all these petitioners, who have been, on their own showing, trespassers on the land, for possession of the land. The petitioners filed their Written Statements in the suit and contended that they had not recognised and do not recognise anybody's ownership in respect of the portion of the land in their occupation and that they had perfected their title by adverse possession.

(b) It appears that issues were framed. Point is that after 22-12-1983 when the instant suit was filed, a declaration came to be issued by the competent authority under the Slums Act stating that the area in which the suit land is situate was a slum. Taking advantage of this declaration, the present petitioners filed an application to the trial Court (Civil Judge, Senior Division, Pune) on 15-7-1987 for amendment of the Written Statement with a view to contend that the suit could not proceed in view of the provisions of section 22 of the Slums Act because the Court's jurisdiction to pass any decree of eviction was ousted by section 22(1)(a) of the Slums Act. By implication, prayer was made that the issue on that point should be raised as a preliminary issue and that the finding on the same should be recorded by the Court in the first instance.

(c) The plaintiff opposed this contention. But the lower Court accepted the defendants plea and decided to frame the issues and to treat it as preliminary issue. Cut the issue was sub-divided by the learned Judge into two issues. Issues Nos. 5(a) & 5(b), for reasons which are somewhat un-intelligible. From the judgment of the learned judge, it appears that issue No. 5(a) was :-

Issue No. 5(a) was :-

"Whether the suit is maintainable"

The two preliminary Issues

Issue No. 5(b) was :-

"Whether this Court has jurisdiction to try and dispose of the suit?"

(d) Plaintiff's argument relating to the preliminary Issues-

On behalf of the plaintiff a contention was raised that even though there was a declaration published by the Competent Authority as contemplated by section 22 of the Slums Act, an appeal has been filed by the respondent to the Tribunal under the Act and that the Tribunal has stayed the operation of the said declaration. The order passed by the Tribunal has been set out by the learned Judge in his judgment. The order runs as follows :-

ORDER

"Ad interim stay of further proceedings under sections 5, 9 and 11 to 15 of the Act is granted. Issue show cause notice returnable on 19-6-1984 to the respondent as to why stay may not be made absolute and as to why the delay may not be condoned."

(The mistake of repetition etc., is there in the order itself).

It was also urged on behalf of the plaintiff before the lower Court during the course of the hearing of the preliminary issue, that since there was an appeal preferred by the plaintiff to the Tribunal against the said declaration by the competent authority, the declaration had ceased to bear any finality and that since there was no final declaration as such, the jurisdiction of the Civil Court could not be said to have been ousted as per the provisions of section 22 of the Slums Act.

The defendant's plea relating to the preliminary issue.

(e) On behalf of the present petitioners, strong reliance was placed upon the provisions of section 2(e)(ii) of the Slums Act and it was contended that the petitioners were the owners of the suit lands and that, hence they were "occupiers" within the meaning of section 2(e)(ii) of the Act and that hence the suit court not proceed even though it had already commenced.

The first fallacy, the defendants' plea.

(f) The reasoning involves several fallacies. The learned Judge noted only one. He rightly pointed out that the defendants had not proved their ownership in respect of the suit land, nor was their ownership an admitted fact. So far as the title of the plaintiff respondent was concerned, there could be practically no challenge to the same, because it was matter of proof by unimpeachable

documentary evidence. The title pleaded by the petitioners was a title claimed to have been acquired by adverse possession. That adverse possession was pleaded against the very plaintiff, the present respondent. Implicit in this is the admission of the fact that but for the defendants adverse possession, the plaintiff's title could not be called in question at all.

(g) I may state here that this is the prima facie view regarding the plaintiff's title arrived at on the basis of what is called the doctrine of "demurrer". I do not mean to suggest that the present respondent will not be required to prove his title to the suit land by production of the necessary documents of title. The entire question whether the plaintiff will be required to prove the title independently or not, or, whether the title can be said to have been implicitly admitted by virtue of the various pleas in the written statement will have to be gone into by the trial Court. All that I mean to state here is that the invoking of sub-clause (ii) of Clause (e) of section 2 of the Slums Act was quite an error. What is contemplated by said Clause (ii) is the status of the person in possession which was an admitted or proven status. It is not a mere claim of ownership that is contemplated by said clause (ii). It must be an admitted or proven claim. This is what the learned Judge has held and, in my opinion, quite rightly.

(h) No other question appears to have been argued and no other plea has been set up on behalf of the present petitioners in the lower Court. The learned Judge rejected the plea that the present petitioners were the "occupiers" of the suit land as contemplated by said section 22 read with section 2(e)(ii) of the Slums Act. The issue was, therefore, decided by the learned Judge against the defendants (present petitioners).

In this Court reliance on section 2(e)(ii) given up. Reliance placed on section 2(e)(v).

3. In this petition Mr. Shah, the learned Advocate appearing for the petitioners gave up reliance on said sub-clause (ii) of Clause (e) of section 2. Instead, he placed strong reliance upon sub-clause (v) of said Clause (e) of section 2 of the Slums Act. For appreciation of his contention it is necessary to set out the operative part as well as the various clauses of said section 2(e). Section 2(e) runs as follows :-

"Section 2(e) :-

Occupier" includes,-

(i) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;

(ii) an owner in occupation of, or otherwise using his land or building;

(iii) a rent free tenant of any land or building ;

(iv) a licensee in occupation of any land or building, and

(v) any person who is liable to pay to the owner damages for the use and occupation of any land or building;"

Effect of the word "any person" in section 2(e)(v)

The submission of Mr. Shah was that the words "any person" employed by said Clause (e)(v) of section 2 was wide enough to take in its embrace even a trespasser, who was, as such, liable to pay damages to the true owner.

4. It appeared to me even at the time of grant of Rule that the contention was fallacious. This was so, because, in my opinion, said-clause (v) has to be construed *Ejusdem Generis* with the earlier 4 clauses. If this was the position, then there was no dispute, the petitioners would be out of Court and the petition could not be admitted at all.

But I saw that the question was of importance from the point of view of giving guidance to the lower courts and to the litigating public. This information could not have been made known to the litigating public and the trespassers, like the present petitioners, were likely to take undue advantage of this unsettled position. This was the only reason why I issued Rule in the petition.

The rule of *ejusdem generis* does get attracted.

5. As stated above, when the rule came up for hearing, Mr. Shah the learned Advocate for the petitioners made a statement that the question whether said sub-clause (v) of Clause (e) has to be construed *ejusdem generis* was no longer *res integra* and he wanted to produce a binding judgment of some Court in support of this contention. Several adjournment had been taken, but the judgment has not been produced before me at all. The result is that I have to decide the question on 1st principles.

In my opinion, unless one construes the said sub-clause (v) *ejusdem generis* with earlier clauses, the entire-classification & categorisation of the concept "occupier" becomes meaningless. If every person who is in occupation of the land whether as an owner or as a person having some right to occupy the land lawfully (such as tenant or mortgagee in person) or a rank trespasser, is covered by this definition "occupier", then the entire categorisation of these various kinds of occupiers contained in sub-clauses (i), (ii), (iii) & (iv) of said clause would be otiose and meaningless. All that would have been necessary for the legislature to state would be that any person in possession of the land is an occupier. This is what is contended by Mr. Shah. This is what it amounts to if you do not resort to the rule of *ejusdem generis*. Whenever a particularisation of the category is followed by generalised category, the generalisation has got to be restricted to the genus to which the earlier four species belonged. In the instant case, the earlier four species indicated by the earlier sub-clauses (i), (ii), (iii) & (iv) of said Clause (e) are the persons who came in possession of the land lawfully. None of them is in unlawful occupation. The persons contemplated by sub-clause (v) must also, therefore, to be expected to be in occupation legally.

It will be seen that the categories of persons in lawful occupation are not exhausted by the indications given by sub-clauses (i) to (v). As for instance, a mortgagee in possession is not contemplated by Clauses (i) to (iv). A mortgagee in possession or any other person in lawful occupation may become liable to pay damages to the owner by some something done by him on the land, which was not allowed by him to do on the land, although his occupation may not be illegal. Mortgagee in possession, for instance, may do something on the land, which the agreement of mortgage does not authorise him to do. In such a case he will be liable to pay damages to the mortgagors. Such a person be certainly included in said sub-clauses (v) and he would be deemed to be an "occupier". What is sought to be conveyed is that resort to the rule of interpretation viz. the rule of ejusdem generis makes the entire scheme of the definition "occupier" a logical & rational scheme. But if you accept Mr. Shah's contention that every person on the earth and under the sun in possession of the land (which is declared to be slum) is "occupier" ", then the reference to the earlier category becomes quite otiose, anomalous & meaningless.

In my opinion therefore, the rule of ejusdem generis does get attracted while considering the question of interpretation of said sub-clause (v). Construed in this way, it must mean that a trespasser is not contemplated by the definition of the word "occupier". It follows that section 22 of the Act also would have no application to the suit filed by an owner against a trespasser.

Doctrine of Demurrer expounded.

6. As regards the effect of section 2(e)(ii) which was relied upon in the lower Court reliance upon it was rightly given up by Mr. Shah. After all, this is the question of deciding at the threshold the question of jurisdiction and for this purpose the courts have got to be guided by the doctrine of demurrer. For deciding at the threshold any such question, the courts have to presume that the contents of the plaint are true & correct and the court's jurisdiction has to be determined on the basis of such assumption. This is the plain meaning of the doctrine of demurrer. If the defendant comes out with the plea that the courts jurisdiction is ousted, he has to satisfy the Court that even on the basis of the doctrine of demurrer the Court would have no jurisdiction. The plaint states that the defendants are trespassers. As per the rule of demurrer, therefore, the jurisdiction of the Court has to be ascertained by assuming that they are trespassers. Trespassers ab-intio cannot be occupiers within the meaning of the Act. The Courts have therefore jurisdiction to entertain the suit. If in the suit, the defendants prove that they are not trespassers because they have acquired title by adverse possession, the suit will be dismissed on merits not for want of jurisdiction.

7. In this view of the matter, it is un-necessary for one go into the question as to whether the filing of the appeal by the plaintiff to the Tribunal, against the declaration of slum gave rise to the position that the declaration ceases to have any finality.

8. The petition, therefore, fails.

The Rule earlier issued stands discharged.

The petitioners shall pay the costs of the petition to the respondent.