

(2008) 04 BOM CK 0136
In the Bombay High Court
Case No : Writ Petition No. 332 of 2007

Shri Dayanand Kundaikar	Vs	APPELLANT
Shri Damiao Vaz		RESPONDENT

Date of Decision : 24-04-2008

Acts Referred:

Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 — Section 34

Citation : (2008) 04 BOM CK 0136

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : Sudesh Usgaonkar, for the Appellant; S.D. Lotlikar with Mr. P. Lotlikar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Bobde, J.—This is a petition by the petitioner, challenging the concurrent findings recorded by both the Courts below that he is liable for eviction. Respondent No. 1 applied for eviction of the petitioner from the premises in question on the ground of personal requirement, non-payment of arrears of rent and nuisance to the respondent, and for damages on account of causing material impairment in the value of the suit premises. The petitioner filed his written statement and inter alia claimed that he is a licensee in respect of the suit premises right from the time of his grandfather and denied a landlord-tenant relationship and submitted, therefore, that the Rent Controller had no jurisdiction to decide the eviction proceedings. He denied the existence of a lease.

2. The Rent Controller, after considering the evidence and the submissions of the parties, directed eviction of the petitioner on the ground of non-payment of rent and bonafide requirement of the respondent and directed the petitioner to quit, vacate and deliver vacant possession of the suit premises to the respondent within 30 days. The petitioner carried an appeal before the Administrative Tribunal and the Administrative Tribunal has confirmed the order of the Rent

Controller by considering all the aspects, in detail. The Administrative Tribunal has upheld the findings that the respondent is the owner of the premises; the premises were given on rent by an oral lease in the year 1953 for a commercial purpose, that is, selling tea and beedies. That order of the Administrative Tribunal has been challenged in this writ petition.

3. Mr. Usgaonkar, learned Counsel for the petitioner submitted on behalf of the petitioner that Section 34 of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (hereinafter, referred to as "the Act") mandatorily requires a lease in writing. Section 34 of the Act reads as follows:

34. Execution of lease deed of a building -

Notwithstanding anything contained in clause (c) of sub-section (1) of section 3 or any other law for the time being in force a lease deed shall be executed between the landlord and the tenant whenever a building is let out after this Act comes into force.

According to the petitioner, the existence of a lease has not been proved. Therefore, no evidence could have been given of the relationship of landlord-tenant and, therefore, no order for eviction could have been made. This submission overlooks the fact that the Rent Controller has jurisdiction to order eviction where there is a relationship of a landlord and tenant. Such a relationship is established by payment and receipt of rent, inter alia. Section 2(j) defines "landlord" as follows :

2(j) "landlord" means a person who, for the time being, is receiving, or is entitled to receive, the rent of any building, whether on his own account or on account of, or on behalf of, or for the benefit of, any other person or as a trustee, guardian or receiver for any other person or who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant;

Section 2(p) defines "tenant" as any person by whom or on whose account or behalf the rent of any building is payable and reads as follows :

2(p) "tenant" means any person by whom or on whose account or behalf the rent of any building is, or but for special contract would be, payable and includes [in the event of his death the surviving spouse, or any son, or unmarried daughter or father or mother who had been living with him as a member of his family upto the date of his death and] a sub-tenant and also any person continuing in possession after the termination of his tenancy, but shall not include any person against whom any order or decree for eviction has been made.

3A. It is thus clear that the jurisdictional fact is existence of the relationship of landlord-tenant and not the existence of a lease in writing. Indeed a lease in writing is evidence of the relationship and merely one of the modes of proving that relationship. In this case, the existence of a lease, in writing, is not established, but the relationship of a landlord-tenant is established. It must be held that the Rent Controller has jurisdiction to adjudicate and pass a decree.

3B. Both the Authorities have concluded from the evidence that rent was paid though there were no rent receipts. In fact, the petitioner supports the case of the respondent that rent was not paid for the last 5 years after they claimed mundkarship before the Mamlatdar. The fact of payment of rent has been accepted by the two authorities below, concurrently.

4. Mr. Usgaonkar next submitted that the Rent Controller had no jurisdiction to decide the dispute between the parties, since the landlord had failed to prove the existence of a lease, in writing, vide Section 34 of the Act. According to the learned Counsel, in the absence of a lease in writing, the suit itself was not maintainable since this issue was governed not only by Section 34 of the Act, but also by Decree No. 43525 dated 7th March, 1961 of the Portuguese Legislature. Even prior that, according to the learned Counsel, the subject was governed by Decree No. 5.031 dated 2nd February, 1950, also of the Portuguese Legislature. Suffice it so say that both the Decrees i.e. 43525 and 5.031, similar to Section 34 of the Act, require that a lease shall be in writing. In the absence of a document in writing, such a lease can be recognized in a Court of justice by any other mode of proof when it is demonstrated that the fault is imputable to the landlord or to the lessee vide Decree No. 43525. The earlier Decree No. 5.031 enacts a bar to a suit on a lease which is not in writing, and where the title of lease is not exhibited i.e. produced in the Court. Thus, the learned Counsel for the petitioner relies, in particular, on Decree No. 5.031 of 2nd February, 1950 to contend that the suit is not tenable. The contention cannot be accepted in view of the fact that both the Portuguese Legislatures i.e. Decree No. 43525 of 7th March, 1961 and Decree No. 5.031 of 2nd February, 1950 were repealed by the Act vide Section 59, which reads as follows :

59. Repeals and savings. - (1) As from the date on which this Act is brought into force in any local area, the provisions of Decree No. 43525, dated the 7th March, 1961, and Legislative Diploma No. 1409, dated the 14th February, 1952 and the corresponding provisions of any other law for the time being in force shall stand repealed in that area.

(2) Notwithstanding the repeal of the laws by sub-section (1), all suits and other proceedings under a repealed law pending at the commencement of this Act before any court or authority shall be continued and disposed of in accordance with the provisions of the repealed law as if that law had continued in force and this Act had not been passed;

Provided that in any such suit or proceeding for the fixation of fair rent or for the eviction of a tenant from any building, the court or other authority shall have regard to the provisions of this Act;

Provided further that the provisions for appeal under the repealed law shall continue in force in respect of suits and proceedings disposed of thereunder.

Section 59 expressly repeals Decree No. 43525. The question is whether the bar of a suit which is based on a lease which is not in writing in Decree No. 5.031 is a

corresponding provision of any other law. It was, however, contended by the learned Counsel appearing for the petitioner that Decree No. 5.031 cannot be considered to be "corresponding provisions of any other law for the time being in force" and, therefore, the Decree No. 5.031 is liable to be treated as being in force. I see no reason why the Decree No. 5.031 cannot be considered to be a provision of any other law for the time being in force corresponding to Decree No. 43525. Decree No. 43525 essentially prescribes that a lease shall be made in writing with the signature of the landlord and tenant. Further that the lease can be recognized in a Court of justice in the absence of a document in writing in certain circumstances. In other words, Decree No. 43525 deals with mode of execution of a lease and its admissibility before a court of justice for the purpose of eviction. Decree No. 5.031 and in particular, Articles 1 and 10 deal with mandatory requirement of reducing a contract for urban leases, in writing, and provide for non-maintainability of a suit in a court where such a lease is not produced, the subject of the two decrees and their object and purpose are the same. It is, therefore, clear that Decree No. 5.031 is a provision of law corresponding to Decree No. 43.525 and both are repealed by virtue of Section 59 of the Act and Rules.

4A. Therefore, when the present proceedings were filed, there was no bar to seeking eviction though there was no lease in writing in view of the aforesaid repeal.

5. The learned Counsel, however, relied on a decision of this Court in Gangadhar Narsingdas Agrawal vs. Alina D"Costa E Pinto and Ors. Reported in 1989 (2) Goa Law Times (118). That was as case where this Court, inter alia, held that Decree No. 43.525 cannot be said to have been repealed because the provisions of Goa Act do not apply to premises which are not buildings and, therefore, the repealing provision of Section 59(1) would not cover the premises which are not buildings and premises like open plots will continue to be governed by Portuguese Decree No. 43525 even after October 1, 1969. That was as case for eviction of a tenant from an open plot of land. The controversy in that case, to my mind, has no relevance to the controversy in this case, as it is not governed thereby.

6. It was next contended by Shri Usgaonkar, the learned Counsel for the petitioner that the Rent Controller could not have exercised any jurisdiction since the premises in question is an open piece of land. This question of fact has been found to be without any foundation in evidence by the Tribunal and must, therefore, be rejected.

7. It was next contended by the learned Counsel for the petitioner that the premises in question was being used for commercial purpose and no decree for possession of such premises could have been obtained by the respondent u/s 23 of the Act, which only provides for recovery of possession of a residential building and a non-residential building only if it is used for the purpose of keeping a vehicle such as a garage. This submission is based on clause (b) of sub-Section

(1) of Section 23, which reads as follows:

23. Landlord's right to obtain possession. - (1) A landlord may, subject to the provisions of section 24, apply to the Controller for an order directing the tenant to put him in possession of the building -

(a)...

(b) in case it is a non-residential building which is used for the purpose of keeping a vehicle or adapted for such use, if the landlord requires it for his own or to the possession of which he is entitled in the city, town or village concerned which is own or to the possession of which he is entitled whether under this Act or otherwise:

It is not necessary to go into this contention since the decree has been granted mainly on the ground of arrears of rent which appears to be good in law in the facts of this case. However, even otherwise, it appears that clause (b) merely prescribes that a possession of a non-residential building which is used for the purpose of keeping a vehicle can be recovered by the landlord if he requires it for his own use. It must be noted that clause (b) contained an error in printing or an error in drafting which is difficult to reconcile. However, in any view of the matter, the section does not prohibit the recovery of commercial premises by a landlord, which is the contention of the learned Counsel for the petitioner.

Having regard to the circumstances of the case, there is no merit in the petition, which is hereby dismissed.