

(2011) 03 BOM CK 0169

In the Bombay High Court

Case No : Writ Petition No. 6697 of 2008

Shri Rajendra Murlidhar Gorawade

APPELLANT

Vs

Smt. Kai. Wanabai Mankoji Dhone Trust and Another

RESPONDENT

Date of Decision : 31-03-2011

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 5(11)

Citation : (2011) 3 ALLMR 760 : (2011) 4 BomCR 417 : (2011) 4 MhLj 374 :
(2011) 2 RCR(Rent) 521

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : Prasad S. Dani, for the Appellant; P.B. Shah, for the Respondent

Judgement

B.R. Gavai, J.—By way of present petition, the Petitioner challenges the concurrent orders dated 27th February 2008 in Miscellaneous Application No. 72 of 2006 thereby allowing the application on behalf of the Respondents, for removing obstruction made by the obstrucater, who is the Petitioner herein and the order dated 7th August 2008, thereby dismissing the appeal, filed by the present Petitioner. Facts in brief giving rise to the present petition are as under:

2. One Indubai was the original tenant of the Respondents. She was survived by the judgment-debtor Subadrabai. The Petitioner is the son of said Subadrabai. A suit for injunction and possession was filed by the Respondents-Plaintiffs. It was contended that initially a room admeasuring 10" x 35" was given to Indubai who was working as Chowkidar and that she was also looking after the maintenance of the property of the trust. It was contended that the said Indubai was paying rent of Rs. 25/-. It was further contended that after the demise of Indubai, her daughter Subadrabai became the tenant and she was also paying a rent of Rs. 25/-. It is alleged that, however, the Defendants i.e. the judgment debtor and the present Petitioner had demolished the room and made new construction wherein the present Petitioner was running business under the name and style of "Ganesh Shock Absorber". As such, a suit came to be filed for a decree of

mandatory injunction directing the Defendants (Petitioner herein) to demolish the structure and give possession of the suit premises. It is averred in the plaint that the Defendant No. 2 was not concerned with the suit premises. However, in order to avoid obstruction in possession, he was made party. The suit was resisted by both the Defendants. The learned Trial Court dismissed the suit. In the appeal preferred by the Respondents, the appeal was allowed and a decree for injunction and possession as prayed, came to be passed in Appeal No. 752 of 1993. The Petitioner contending that he was not served with the notice of the appeal and that the appeal was heard in his absence, filed a writ petition being Writ Petition No. 4898 of 2005. However, it appears that when the matter was heard by this Court on 12th September 2005, a statement was made on behalf of the Respondents-Plaintiffs seeking liberty to delete the present Petitioner, from the array of Respondents, in an appeal as well as from the array of Defendants in the plaint. This Court, therefore, permitted the Plaintiff to delete the present Petitioner, from the array of Respondents in an appeal and array of Defendants in the plaint before the trial court. In paragraph 2 of the said order, this Court observed thus:

2] In view of the fact that the Petitioner is no longer a party to the suit proceeding, decree passed against the Defendant No. 2, who is Petitioner, does not survive.

3. In the Regular Darkhast Proceedings No. 64 of 2005, an application came to be filed being Miscellaneous Application No. 72 of 2007 to the effect that when the court commissioner was executing a decree, the present Petitioner had put up an obstruction, and therefore, a relief was sought for removing the obstruction put forth by the present Petitioner. The said application is allowed. Being aggrieved thereby, the present Petitioner filed an appeal being Civil Application No. 234 of 2008. The same is also dismissed. Hence, the present petition.

4. Mr. Dani, the learned Counsel relying on the provisions of Section 5(11)(c)(i) of the Bombay Rent Act ("said Act" for short) submits that since the Petitioner was a joint tenant, the decree which is passed against the judgment-debtor would not bind the Petitioner. It is submitted that when the deceased Indubai had expired, the Petitioner along with his mother Subadrabai were residing in the suit premises, and therefore, in view of the provisions of Section 5(11)(c)(i) of the said Act, the Petitioner had also become the joint tenant, and therefore, the decree passed in his absence was not enforceable in law. The learned Counsel further submits that, as a matter of fact, this Court vide its Order in Writ Petition No. 4898 of 2005 has clearly held that the decree passed against the present Petitioner does not survive. It is submitted that the conduct of the Respondent-Plaintiff in deleting the present Petitioner from the array of Defendant, would disentitle them to get the decree executed against the present Petitioner.

5. The learned Counsel further relies on the judgment of the learned Single Judge of this Court in the case of Ramesh S. Kale v. Madhav B. Wadnere reported

in 2001 (Supp.) Bom. C.R. 321 and Sai Samrat Security Service and Others Vs. Rizvi Builders and Others, and the order of the Apex Court in the case of Textiles Association (India) Bom. Unit v. Balmohan Gopal Kurup and Anr. reported in 1991 (3) Bom.C.R. 639.

6. Mr. Shah, the learned Counsel appearing for Respondents, on the contrary, submits that the Petitioner in his cross-examination had specifically admitted that after the death of Indubai, by agreement, it was decided that Subadrabai would be the tenant and the rent was also paid by the said Subadrabai. He further submits that there is also an admission to the effect that the Petitioner was not paying the rent. It is, therefore, submitted that in view of this admitted position, the contention raised by the Petitioner is without any substance. The learned Counsel further relying on the judgment of the Apex Court in the case of Ashok Chintaman Juker and Ors. v. Kishore Pandurang Mantri and Anr. reported in (2001) 5 SCC submits that, assuming for a moment that the tenancy was the joint tenancy, since the decree was passed against the one of the joint tenants, it was binding against all the tenants, and therefore, there is no merit in the petition.

7. Though, the contention of the Petitioner regarding the Petitioner being the joint tenant is seriously disputed by the Respondent, I do not find it necessary to go into that aspect of the matter. Since for the reasons to follow, I am of the considered view, that even if it is held that the Petitioner was a joint tenant, still a decree passed against one of the tenants would bind the present Petitioner also.

8. No doubt that the reliance placed by the learned Counsel for the Petitioner on the order dated 12th September 2005 passed by this Court in Writ Petition No. 4898 of 2005 is well placed, inasmuch as this Court clearly holds that since the Petitioner is no longer party to the suit proceedings, decree passed against him does not survive. However, in my considered view, the said observation of the learned Judge will have to be read in the context of the matter, before the learned Judge. Since the statement made by the Plaintiffs that the Plaintiffs would delete the Respondent from the array of Respondents in an appeal and array of Defendants in the plaint, an observation in that context was made. However, the Respondents-Plaintiffs cannot be denied the benefit of a legal position as laid down by the Apex Court.

9. Insofar as the judgment of the learned Single Judge of this Court in Ramesh S. Kale's case (supra) is concerned, no doubt that the learned Counsel for the Petitioner is right in relying on the said judgment in support of the proposition that unless all the persons who have inherited the tenancy are made party to the suit, a decree would not be binding against them. However, it appears that the said judgment is delivered on 7th July 2000. The Apex Court in Ashok Chintaman Juker's case (supra) had an occasion to consider the provisions of Section 5(11) (c)(i) of the said Act and has held that a notice issued to one of the joint tenants or a suit filed by the one of the joint tenants would bind all the other joint tenants. The Apex Court decided the said matter on 9th May 2001. In that view

of the matter, the said judgment of the learned Single Judge of this Court which is prior to the judgment of the Apex Court, cited supra, will have to be held to be impliedly overruled.

10. Insofar as the judgment of the another learned Single Judge in the case of Sai Samrat Security Service (supra) is concerned, the issue which was concerned before the learned Single Judge was as to who are entitled to be the joint tenants, and therefore, the said judgment would not be applicable to the facts of the present case.

11. No doubt that the learned Counsel is also right in relying on the order of the Apex Court in the case of Textiles Association (India) Bom. Unit (supra). In the said case, the Apex Court has found that the notice issued to one of the joint tenants and the suit filed against one of the joint tenants, would not bind the other joint tenants. However, between an order passed by the Apex Court and a reasoned judgment interpreting the statutory provisions, this Court would be bound to follow the reasoned judgment which will have to be considered as a Ratio Decided. The Apex Court in the case of Ashok Chintaman Juker (supra), in identical facts, has observed thus:

Thus the tenancy being one, all the members of the family of the original tenant residing with him at the time of his death, succeeded to the tenancy together. In the circumstances the conclusion is inescapable that Smt Kishori Kesrinath Juker who was impleaded as a tenant in suit filed by the landlord represented all the tenants and the decree passed in the suit is binding on all the members of the family covered by the tenancy.

The position that follows is that the Appellants have no right to resist on the ground that the decree is not binding on them.

(Emphasize supplied)

12. I find that the facts in the present case are almost identical with the facts before the Apex Court, in the said case. In the present case also, it is not even a contention that there was any division of the premises after the demise of Subadrabai and that he was a separate tenant. On the contrary, it is emphasized by the Petitioner that the tenancy was a joint one. In that view of the matter and specifically in view of the admission of the Petitioner, that Subadrabai was paying the rent, I find that the contention of the Petitioner that the decree is not be binding on him is without any substance. As held by the Apex Court, once a decree is passed against one of the tenants, the decree is binding against all the other tenants. The learned Counsel for the Petitioner made an attempt to distinguish the judgment of the Apex Court in the case of Ashok Chintaman Juker (supra), contending that in the said case before the Apex Court, the joint tenant was not in possession of the suit premises. The perusal of the judgment of the Apex Court would clearly reveal that it was only one of the additional factors that has been considered by the Apex Court. However, there is a clear pronouncement of law, after interpreting Section 5(11)(c)(i) of the said Act, that

a decree against one of the joint tenants, binds all the members of the family covered by the tenancy. In view of the clear pronouncement of law to that effect, no perversity is noticed in the concurrent orders passed by the court below. Rejected.

13. However, in the facts and circumstances of the case, no order as to costs.

14. At this stage, the learned Counsel for the Petitioner requests for continuation of the ad-interim protection which was granted by this Court. Learned Counsel for the Respondent vehemently opposes the same. However, in the facts and circumstances, I am inclined to direct that the Petitioner shall not be evicted for a period of six months from today, in the event, the Petitioner files an undertaking to this Court that he shall deliver vacant possession of the suit premises to the Respondents-Plaintiffs on or before a period of six months from today and further that he shall not create any third party rights in the property. The said undertaking to be filed within four weeks from today.