

(2009) 02 BOM CK 0117

In the Bombay High Court

Case No : Writ Petition No. 4492 of 1992

Sidharam Ganpati Mulage and Others

APPELLANT

Vs

Bashir Elahibaksh Tamboli and Others

RESPONDENT

Date of Decision : 13-02-2009

Acts Referred:

Constitution of India, 1950 — Article 227

Transfer of Property Act, 1882 — Section 106, 108, 108(B), 114

Citation : (2009) 5 BomCR 410

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : G.S. Godbole, for the Appellant; P.M. Mengane, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This Writ Petition under Article 227 of the Constitution of India takes exception to the Judgment and Decree passed by the District Court of Solapur dated 28th August, 1992 in Civil Appeal No. 224 of 1986 allowing the Appeal preferred by the Respondents/landlords and decreeing the suit for possession with direction to the Petitioners to deliver possession of the suit premises to the Respondents on or before 31st October, 1992.

2. Briefly stated, the Respondents filed Suit being Regular Civil Suit No. 412 of 1980 in the Court of Solapur against the predecessor of the Petitioners Shri Ganpati Andappa Mulage, the original tenant-defendant for recovery of rent and possession of the suit property being one shop premises admeasuring 5" x 9" situated in Saraf Bazar in Solapur city on the ground of bonafide and reasonable requirement of the Plaintiffs for their personal use and occupation. The said suit however, was dismissed by the Trial Court on the finding that the Plaintiffs failed to establish that the suit premises were required by them for their own use and occupation and that greater hardship would be caused to the Petitioners/tenants, in the event of decree of conviction being passed.

3. As aforesaid, against the said decision, the Respondents/landlords carried the matter in appeal, which however, succeeded and decree of possession has been passed against the Petitioners/tenants in relation to the suit premises. The Appellate Court has reversed the finding recorded by the Trial Court on both the counts for the reasons recorded in the impugned Judgment.

4. Before I proceed to consider the main issue involved in the suit for possession, it would be apposite to deal with the issue which arises on account of subsequent development during the pendency of the present writ petition. It is common ground that on account of riot in the city, the suit premises were completely gutted due to fire on 11th October, 2002. In other words, the suit premises which were let out to the predecessor of the Petitioners are no more in existence. In this context, the preliminary point raised on behalf of the Respondents is that the right of the Petitioners/tenants to pursue the present remedy does not survive and the Petition should be dismissed on that count alone.

5. To buttress this argument, reliance has been placed on the decision of the Apex Court in the case of Vannattankandy Ibrayi v. Kunhabdulla Hajee (2001) 1 Scc 564. My attention is also invited to the another reported decision of our High Court in the case of Shivram Ladu Nitardekar Vs. Alex Fernandes and Others, and unreported decision dated 17th December, 2008 in W.P. No. 376 of 1994. However, according to the Petitioners/tenants, the fact that the suit premises have been completely destroyed due to fire does not extinguish tenancy as the lease of the suit premises- (which is a shop), was not only lease of the superstructure but also of the site. In such a case, the exposition of the Apex Court in the case of T. Lakshmi pathi and Others Vs. P. Nithyananda Reddy and Others, will have to be invoked to hold that the Petitioners' right to pursue the present remedy would still survive.

6. Before examining the above argument we shall advert to the stand of the respective party in the pleading. The Plaintiffs instituted suit for recovery of possession of the suit premises on the assertion that what was let out to the Defendant/tenant was "a shop premises" admeasuring 5" x 9" on monthly tenancy basis. In reply the Petitioner/tenant did not claim that the shop premises along with the site beneath the shop premises was also let out to him. Now, it is common ground that the suit premises is fully destroyed due to fire on 11th October, 2002. The Plaintiffs had no role in the said development.

7. Be that as it may, the Petitioners/tenants moved a formal application before this Court being Civil Application No. 356 of 2005 praying for liberty to repair/restore the suit premises which was gutted in fire. That prayer was granted by this Court on 22nd August, 2005. However, admittedly, the Petitioners have not availed of the said option so far. The photograph produced by the Respondents alongwith affidavit dated 2nd February, 2009 Exh.X collectively clearly reveals that whole of the suit premises is destroyed due to fire. The portion on which suit premises was standing and the structure has been razed to the ground, thereby becoming permanently unfit for the purpose for which it was let. As aforesaid, it

is not the case of the Petitioners that the landlord was directly or indirectly responsible for the violence committed by the mob resulting in fire on 11th October, 2002. It is also not the case of the Petitioners/tenants that there was any express agreement with the landlord that in such eventuality, the tenants would be entitled to reconstruct and restore the suit premises and whereupon the tenancy would enure on same terms or otherwise in respect of the reconstructed structure.

8. Indeed, the Petitioners have placed reliance on the decision of the Apex Court in *T. Lakshmipathi* (Supra). In this case, the Apex Court while considering the provisions of "Transfer of Property Act" took the view that the tenancy cannot be said to have been determined by attracting applicability of the doctrine of frustration, consequent upon demolishing of the tenanted premises. Instead, it went on to observe that a lease of a house or of a shop is a lease not only of the superstructure but also of its site. It is observed that it would be different if not only the structure but also the land beneath ceases to exist by an act of nature. It proceeded to hold on that basis that it is only where the entire tenancy premises(structure and site) are lost and destroyed the tenancy would cease to subsist. In paragraph-24, it is observed thus:

24. We are, therefore, of the opinion that in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist; more so when the building has been destroyed or demolished neither by the landlord nor by an act of nature but solely by the act of the tenant or the person claiming under him.

I am conscious of the fact that this opinion is rendered by the Apex Court in a matter where the decree for eviction was passed under the provisions of Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960. In other words, the rights and obligations of the parties were controlled by the provisions of State Rent Act. Nevertheless, as rightly argued by the Respondents, the Court has proceeded to examine the matter only in the context of the provisions of the "Transfer of Property Act" and not in the context of the efficacy of the provisions of the State Rent Act. That aspect however, has been dealt with specifically in the decision of the Apex Court in *Vannattankandy Ibrayi's case*(supra) in the context of provisions of Kerala Buildings (Lease and Rent Control) Act, 1965. In this case also, the shop was completely destroyed due to natural calamity(fire) and it was not pulled down by the landlord. However, the superstructure was reduced to a vacant land after the said calamity, as in the present case. Even in that case, it was not the case of the tenant that the shop alongwith the land beneath the shop was let out to the tenant. In this decision, in paragraph 20, the Apex Court after analysing the divergent views expressed by the different High Courts on the subject authoritatively held that there can be no doubt that if a building is governed by the State Rent Act, the tenant cannot claim benefit of the provisions

of Sections 106, 108 and 114 of the Transfer of Property Act. It went on to observe that due to destruction of the tenanted premises there is automatic determination of the tenancy. The Court in the same paragraph, went to examine the efficacy of Section 108(B)(e) and has held that it cannot be interpreted to mean that the tenant is entitled to squat on the open land in the hope that in future if any shop is constructed on the site where the old shop existed he would have right to occupy the newly-constructed premises on the strength of original contract of tenancy. It has held that the lease of a shop is the transfer of property for its enjoyment and on destruction of shop, the tenancy cannot continue. Inasmuch as, the tenancy of shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence. It has plainly held that when the shop is completely destroyed the tenancy right stands extinguished as the demise must have a subject-matter and if the same is no longer in existence, there is an end of tenancy for which reason Section 108(B)(e) of the Transfer of Property would have no application in relation to premises governed by the State Rent Act when it is completely destroyed by natural calamities. In paragraph-22 the Court analysed the provisions of the Kerala Rent Act. Notably, the scheme of that enactment is more or less comparable to the provisions of the Bombay Rent Act. In paragraph 23, the Court noted that the provisions of the State Rent Act clearly show that the State Rent Act is a self-contained Act and the rights and liabilities of the landlord and tenant are determined by the provisions contained therein and not by the provisions of the Transfer of Property Act or any other law. That the rights of a landlord under the general law are substantially curtailed by the State Rent Act as the Act is designed to confer benefit on tenants by providing accommodation and to protect them from unreasonable eviction. It has found that the protection given to the tenant in terms of the provisions in the State Rent Act is only in respect of the superstructure and upon destruction of the superstructure the tenants right therein is also extinguished. The Court has also added a word of caution that the situation would be different where a landlord himself pulls down a building governed by the State Rent Act. On careful analysis of this decision, it is noticed that the point in issue has been directly answered by the Apex Court on the premises that if a building is governed by the State Rent Act, the tenant cannot claim benefit of provisions of Section 106, 108 and 114 of the Transfer of Property Act. That is the statement of law, which is binding on this Court.

9. Counsel for the Petitioners was at pains to persuade me that in Vannattankandy Ibrayi's case, the Apex Court has amongst other overruled the decision of our High Court in the case of Hind Rubber Industries Pvt. Ltd. Vs. Tayebhai Mohammedbhai Bagasarwalla and Others, ; Whereas, in T. Lakshmipathi's case which is a decision subsequent in point of time, the Apex Court has followed the very same decision of our High Court as can be discerned from the observations in paragraph-24 of that Judgment. Significantly, the attention of Apex Court which was considering T. Lakshmipathi's case (supra) was not invited to the opinion in Vannattankandy Ibrayi's case, which was in

earlier point of time. However, this argument need not detain us for answering the point in issue. The question whether the benefit of provisions of Transfer of Property Act can be extended to premises governed by the State Rent Act is concerned, that is directly dealt with in the decision of the Apex Court in Vannattankandy Ibrayi's case. That is not the issue addressed in the subsequent decision in T. Lakkshmipathi's case, which is pressed into service by the Petitioners. However, the subsequent decision generally deals with the legal position emerging from the provisions of the Transfer of Property Act. Accordingly, I would proceed to answer the issue applying the principle stated by the Apex Court in the case of Vannattankandy Ibrayi and hold that since the suit premises were governed by the State Rent Act and since the same are no longer in existence having been destroyed in fire, tenancy of the Defendant in the suit premises stood extinguished. For that reason, the Petitioners are not entitled to pursue the present remedy. I am conscious of the fact that by way of interim direction this Court permitted the Petitioners to repair/restore the suit premises. However, admittedly, the Petitioners have not availed of the said direction. In any case, that was an interim arrangement to be observed by the parties subject to the outcome of the present Writ Petition. Accordingly, this Writ Petition should fail on the above reasoning.

10. Assuming that the tenancy of the defendant is continued even so the question is whether the finding of fact recorded by the Appellate Court on the issue of bonafide and reasonable requirement of the Plaintiffs and on comparative hardship can be said to be manifestly wrong, perverse and untenable. I shall now proceed to examine that aspect.

11. In the Suit for possession, the Respondents/Plaintiffs have averred that the suit premises have been purchased by the Plaintiffs so that it can be used by them for business purpose. The tenant challenged this claim of the Plaintiffs being malafide. The parties went for trial. In the examination-in-chief the Plaintiffs' witness Mohamadhusen Plaintiff No. 2 deposed that he had purchased the suit premises for doing business. He has stated that there are 14 members in his family and are doing pan business. They had no other source of income. They were unable to meet the expenses of their family from the existing pan business only. They require the suit premises for business. He has stated that all his brothers were unemployed and his son is also 12 years old. He has given the details of 14 members in his family consisting of himself, his wife, brothers, brothers' wife, his three sons and one daughter, five sons of his brother and one daughter. The Trial Court however, proceeded to non-suit the Plaintiffs essentially on the finding that the pleadings with regard to the ground of bonafide and reasonable requirement were not enough. The Trial Court found that in absence of specific pleadings no amount of evidence produced by the Plaintiffs would be of any avail. It has found that in the plaint the Plaintiffs have merely asserted that they required the suit premises reasonably and bonafide for their business. Such pleadings caused prejudice to the Defendant as he had no opportunity to know and meet the case of the Plaintiffs about their need being

bonafide and reasonable. The Trial Court also non-suited the Plaintiffs on the finding that from the evidence on record it would appear that it was mere desire of the Plaintiffs to have the suit premises and element of necessity was lacking. Significantly, except this observation, the Trial Court has not adverted to any part of the evidence adduced by the Plaintiffs to support their claim, which would support that finding. The later opinion of the Trial Court was without due consideration of all the materials on record and thus manifestly wrong. Indeed, the finding recorded by the Trial Court that in the plaint except stating that the Plaintiffs require the suit premises reasonably and bonafide for their business no other fact has been mentioned- will have to be accepted. The question is: whether the Plaintiffs could have been non-suited on the ground of lack of pleadings due to such averment. The Appellate Court has dealt with that aspect. The Appellate Court instead, found the pleadings were adequate to proceed especially keeping in mind the evidence adduced by the Plaintiffs and admissions of the defendants. On that basis the matter was examined by the Appellate Court to hold that the requirement of the Plaintiffs was bonafide and reasonable. The Appellate Court has appreciated the evidence of the Plaintiffs to arrive at the said conclusion. The Appellate Court has first noted that the Plaintiffs purchased the suit premises to support the pan business. Indeed, the specific business is not mentioned in paragraph-4 of the plaint, but generally the Plaintiffs have asserted that they wanted the suit premises to start their business. Besides, it has come in evidence that the only business in which the Plaintiffs' family was engaged was of pan business. That fact has been spoken about by the Plaintiffs' witness, which has gone unchallenged. No doubt, the Appellate Court has proceeded on the premises that the requirement of the premises for pan business was specifically mentioned in paragraph-4 of the plaint. However, some error here or there in the Judgment of the Appellate Court cannot be the basis to overturn the entire Judgment especially when there is enough material to support the ultimate conclusion, in exercise of writ jurisdiction under Article 227 of the Constitution of India. The fact remains that the Plaintiffs had asserted that the suit premises were purchased by them so that they can start their own business in that premises. The questions whether it is mere desire of the Plaintiffs without any element of need. As observed earlier, the Trial Court without adverting to the evidence proceeded to hold that the evidence on record reveals that it was a mere desire of the Plaintiffs and there was no element of necessity. This view of the Trial court is overturned by the Appellate Court on analysing the Plaintiffs' evidence. The view so taken is not only a possible view but the only view that ought to be taken on the basis of such evidence. The Appellate Court has rightly noted the relevant oral and documentary evidence to hold that it would go to show that no shop in the name of Mohamad or his sons was available to start a pan shop. Further, the Plaintiffs have asserted and established the fact that they had purchased the suit premises for running pan-supari business therein. Indeed, in the cross-examination the Defendants have suggested that the existing pan shop in City Survey No. 3317. But the witness has stated that the said premises were insufficient as both brothers were residing jointly and running

business of pan jointly. The Plaintiffs' witness has clearly stated that it is not true that shop opposite to his shop belongs to him. On analysis of the oral and documentary evidence on record, the finding reached by the Appellate Court is that no other shop was standing in the name of Mohamad Ilahibaksh Tamboli or his sons where they could run a pan shop. So far as that finding of fact is concerned, that is unexceptionable. On that finding it would necessarily follow that the claim of the Plaintiffs for possession of the suit premises was not only bonafide but also reasonable having regard to the size of the family of the Plaintiffs and their case that they were unable to meet the expenses of their family from the present income for which reason wanted to start the business in the suit premises, obviously to generate additional income. The Appellate Court has noted that the premises in possession of the landlord is admeasuring 5" x 9". Taking overall view of the matter, it is not a case of manifest error or any perverse view taken by the Appellate Court.

12. As aforesaid the view taken on analysis of the evidence and material on record is a possible view. The argument of the Petitioners that certain material facts have not been taken into account such as admission of the Plaintiffs that the Plaintiffs had CS No. 3317 in occupation and doing joint business with his brother and the premises on the first floor over the shop Mutkeri and the shop next to the suit premises which also admeasured 20ft/15ft. In my opinion, there is no substance in this grievance. The Appellate Court has found that the Plaintiffs have no other shop where Mohamed Ilahibaksh Tamboli and his sons could start a pan business. The evidence regarding availability of City Survey No. 3317 makes no difference as the Plaintiffs' case is that the said premises were insufficient for their family business of pan-supari and therefore, required the suit premises. The premises on the first floor over the shop of Mutkeri can be no substitute to a pan shop on the ground floor. Having regard to the nature of business of pan shop, it is inconceivable that the pan-supari shop on the first floor would fetch the same business as in the shop if it were to be on the ground floor. In any case, it is well established position that neither the Court nor the tenant can dictate to the landlord as to how he should tailor his requirement.

13. Taking over all view of the matter, as aforesaid no interference in exercise of writ jurisdiction against the finding of fact recorded by the Appellate Court which is the final fact finding Court, is warranted in the fact situation of the present case.

14. The next question is whether the Plaintiffs or the Defendants would suffer greater hardship. Even this aspect of the matter has been answered by the Appellate Court, keeping in mind the well established legal position and applying the same to the fact situation of the present case. In the suit as filed in paragraph-4(a), the Plaintiffs have asserted that the Defendants have another premises where they can carry on their business bearing CS No. 3015. The Trial Court has answered the said issue on the finding that the Defendant has no other premises in his occupation. The fact that the Defendant has no other premises in

his occupation cannot be the sole basis to answer the issue under consideration. The tenant has not only to plead but also to prove that inspite of his best efforts it was not possible for him to get any other premises in the same locality. No such case has been made out by the Defendant. The Trial Court proceeded on the basis that the Plaintiffs nowhere in the plaint assert that greater hardship will be caused to them in case of refusal of the decree. Whereas, the Appellate Court analysed not only pleadings, but also evidence on record and instead has taken the view that the original tenant Ganpati Mulage, after his death has left behind Sidharam Ganpati Mulage as his only son who is residing separately from him. The Appellate Court has then proceeded to hold that no hardship will be caused to the legal heirs of the deceased tenant who was residing separately from him. Even if the said reason by itself may not be enough, the question is whether the Defendant has pleaded and proved the fact that inspite of best efforts he was unable to find out another premises in the nearby locality. In absence of such a case made out by the Defendant, question of answering the issue of comparative hardship in favour of the Defendant does not arise.

15. Insofar as the opinion recorded by the Trial Court that there is no averment in the plaint that the Plaintiffs would suffer greater hardship, is misreading of the amended plaint. Reading the plaint as a whole it is obvious that the issue of comparative hardship ought to be examined in the context of the finding reached that the Plaintiffs have no other shop premises in the name of Mohamad Ilahibaksh Tamboli or his son to start a pan shop. It would necessarily follow that the comparative hardship would be caused to the Plaintiffs. The Plaintiffs cannot be told to acquire alternative premises available in the locality. It was for the tenant to take steps to find out alternative premises atleast immediately after institution of the suit, which relates back to year 1980. In the circumstances, the issue of comparative hardship though answered by the Appellate Court for different reasons will have to be upheld.

16. Accordingly, this Petition deserves to be dismissed being devoid of merits. Hence dismissed.

17. At this stage, Counsel for the Petitioners submits that the Petitioners may carry the matter in appeal before the Apex Court, for which reason the Respondents ought to maintain status quo as of today with regard to the site on which the suit premises was standing. Counsel for the Respondents submits that the Respondents have no intention to immediately start any construction on the said site. Nevertheless, the Respondents shall maintain status quo as of today of the said site, on which the suit premises were standing for a period of 12 weeks from today.