
(1958) 04 BOM CK 0005
In the Bombay High Court
Case No : Second Appeal No. 612 of 1954

Tilokchand Nathmal Agarwal	Vs	APPELLANT
Ganpatdas Bhagwandas Bairagi		RESPONDENT

Date of Decision : 09-04-1958

Acts Referred:

Central Provinces and Berar Regulation of Letting of Accommodation Act, 1946 — Section 27
Contract Act, 1872 — Section 23
Government of India Act, 1935 — Section 100, 100(1), 107(2)
Transfer of Property Act, 1882 — Section 108, 2

Citation : AIR 1959 Bom 98 : (1958) 60 BOMLR 1161 : (1958) ILR (Bom) 1412

Hon'ble Judges : J.R. Mudholkar, J

Bench : Single Bench

Advocate : G.L. Sanghi and G.J. Ghate, for the Appellant; M.R. Bobde and D.B. Padhye, for the Respondent

Judgement

1. This is a plaintiff's second appeal from the dismissal of his suit of the recovery of Rs. 1,577/- from the defendant.
2. It is common ground that the plaintiff who was a tenant of a block in the house situate in Nagpur in which he ran a shop for selling brasswares. After a time, the plaintiff was forced to close his business and therefore he inducted the defendant on the premises under an agreement the terms of which have been set out fully in the judgment of the lower appellate Court. It is not necessary to reproduce all those terms except one and that is that the defendant was to be liable to pay to the plaintiff a sum of Rs. 101/- per month by way of his share in the profits of the shop which the defendant was going to run in that block.
3. It is common ground that for the period in suit the defendant has not paid to the plaintiff any money in pursuance of this term and therefore the latter had to institute the suit out of which this second appeal arises.
4. It was contended on behalf of the defendant that the transaction in question

was in fact a sublease made by the plaintiff in contravention of Clause 12-A of the C.P. and Berar Letting of Houses and Rent Control Order. Therefore, according to him, the agreement between the parties was rendered void u/s 23 of the Contract Act and the plaintiff was not entitled to recover anything from him. He also contended that the owner of the house in which the block is situated was one Balgovind, that the plaintiff was a tenant not of Balgovind but of one Sheodas who claims to own the house and that as Sheodas has failed to establish his title against Balgovind the plaintiff could not get the status of a tenant and therefore could not in law create the relationship of a sub-lessor and sub-lessee between himself and the defendant.

5. The trial Court upheld the defendant's contention that the transaction was in contravention of Clause 12-A of the Rent Control Order and on that ground dismissed the plaintiff's suit. It however did not give any findings on other points raised by the defendant. The lower appellate Court affirmed the decision of the trial Court.

6. Clause 12-A of the Rent Control Order reads thus:

"No person being a tenant shall sub-let any portion of the accommodation under his occupation except in pursuance of a condition in the lease deed executed in favour of the tenant or with the written consent of the landlord."

Now, this clause is clearly in contravention of Section 108(j) of the Transfer of Property Act which reads thus :

"In the absence of a contract or local usage to the contrary, the lessor and the lessee of Immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:

Rights and Liabilities of the lessee.

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease."

The aforesaid clause attaches an implied term to the contract of sub-lease between a sub-lessor and a sub-lessee. The question is whether the Provincial Government which promulgated the C. P. and Berar Letting of Houses and Rent Control Order, 1949, could abrogate this implied term by making a rule, i.e. Clause 12-A.

7. Shri Bobde, who appears for the defendant said that this rule along with the other provisions contained in the Rent Control Order had been made by virtue of the power conferred by Section 2 of the Central Provinces and Berar Regulation of Letting of Accommodation Act, and particularly referred to clauses (a) and (b) thereof. It will therefore be useful to reproduce here the whole of Section 2.

"The State Government may, by general or special order which shall extend to such areas as the State Government may, by notification, direct, provide for regulating the letting and sub-letting of any accommodation or class of accommodation whether residential or non-residential, whether furnished or unfurnished and whether with or without board and in particular:

- (a) for controlling the rents for such accommodation either generally or when let to specified persons or classes of persons or in specified circumstances;
- (b) for preventing the eviction of tenants or sub-tenants from such accommodation in specified circumstances;
- (c) for requiring such accommodation to be let either generally, or to specified persons or classes of persons, or in specified circumstances; and
- (d) for collecting any information or statistics with a view to regulating any of the aforesaid matters."

It seems to me clear that a rule of this kind could not be made either under clause (a) or clause (b) of the aforesaid section. Perhaps it could be made under the general words "regulating the letting and sub-letting of any accommodation" occurring in the section itself. Whatever that may be, the point which arises for consideration now is somewhat different. It is that; the subject "Transfer of Property" falls in the concurrent List i.e. List III in Schedule 7 of the Government of India Act, 1935. Therefore, by virtue of Section 100 of the Act, the Central Legislature, and subject to the provisions of Sub-section (1) of Section 100 the Provincial Legislature, have power to make a law on this subject. Now, a law on this subject has already been made by the Central Legislature long ago. Where such is the position, the question arises as to whether the Provincial legislature could under the Government of India Act, 1935, make a law which is repugnant to the law made by the Central legislature. Now this matter is dealt with in Section 107 of the Act and the particular portion thereof which applies is Sub-section (2) which runs thus:

"(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal Law or on an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal legislature may at any time enact further legislation with respect to the same matter."

Then follows the proviso with which we are not concerned.

8. Now, in the instant case, the law, i.e. the C.P. and Berar Regulation of Letting of Accommodation Act, 1946, was reserved for the assent of the Governor-General and actually received the assent on 28-10-1946. If the Rent Control Act has itself contained any provision which is repugnant to the Transfer of Property

Act then by virtue of the fact that it had received the assent of the Governor-General, that repugnant provision would have held good or would have been operative in the old Central Provinces and Berar (which included the Vidarbha region of the Bombay State). A bare look at the Act would show that it does not contain any provision which is directly repugnant to Section 108(j) of the Transfer of Property Act. No doubt, Section 2 of C. P. and Berar Regulation of Letting of Accommodation Act does confer a power on the State Government to provide by general or special order for regulating the letting and sub-letting of any accommodation but it does not mean that the power conferred was intended to be exercised by the State Government in derogation of the provisions of the Transfer of Property Act. In other words, it does not mean that the power which is conferred on the State Government could be exercised by it by ignoring the provisions of the Transfer of Property Act. It must be presumed that when the Legislature enacted Section 2 it contemplated making by the Government of such an order as would be in conformity with the provisions of the Transfer of Property Act. Even if this view were not correct, it has to be borne in mind that this rule, i.e. Clause 12-A, which was framed by the State Government, cannot prevail over Section 108(j) of the Transfer of Property Act for the simple reason that the procedure adopted in bringing it into existence did not conform to the provisions of Section 107(2) of the Government of India Act, 1935. For these reasons, I hold that clause 12-A, in so far as it takes away from a tenant the right to give a sub-lease, is ultra vires and unconstitutional. That being the position, the ground on which the two Courts below have negated the plaintiff's claim disappears.

9. As regards the alternative defence taken by the defendant, it is sufficient to say that being a tenant it was not open to the defendant to set up the title of Balgovind or any other person. I would like to make it clear that it is not the defence of the defendant that subsequent to the creation of a tenancy in his favour i.e. sub-tenancy in his favour, his landlord, i.e. the tenant of Sheodas, had ceased to remain a tenant of the house.

10. In these circumstances, disagreeing with the two Courts below, I decree the plaintiff's claim. Since however I am allowing the appeal on a ground which was not urged by the plaintiff, I direct that the costs should be borne as incurred.

11. Appeal allowed.