

(2019) 11 BOM CK 0073

In the Bombay High Court

Case No : Civil Revision Application (St.) No. 9541 Of 2018

V. Jayaraman (Aiyar)

APPELLANT

Vs

Vithal Vishwanath Kale (Since Decd.) Thr LRs. Smt. Nalini
Vitthal Kale

RESPONDENT

Date of Decision : 25-11-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 115, Order 30 Rule 1, Order 14 Rule 2, Order 30 Rule 3, Order 30 Rule 4, Order 30 Rule 5, Order 30 Rule 10

Citation : (2019) 11 BOM CK 0073

Hon'ble Judges : Dama Seshadri Naidu, J

Bench : Single Bench

Advocate : Shriram S. Kulkarni, Vrushali U. Kabare, Y. B. Lengare

Final Decision : Dismissed

Judgement

Facts:

1. The applicant is the tenant, and the respondent the landlord. The landlord filed Civil Suit No. 616 of 2000 against two defendants: the father and the son. They both are chartered accountants by profession. Eventually, on 24.07.2009, the trial Court decreed the suit. Aggrieved, the original defendants 1 and 2, that is father and the son, filed a Civil Appeal No. 496 of 2009, before the District Court, Pune.

2. As the record reveals, pending the appeal, the first appellant-father died. Then, the son continued the litigation. On 23rd February 2018, the appeal was dismissed. Aggrieved, the second appellant-son filed this Civil Revision Application under Section 115 of Code of Civil Procedure.

Submissions:

Applicants:

3. In the above factual backdrop, Shri Shriram S. Kulkarni, the learned counsel

for the applicant, has submitted that the judgment impugned in the Civil Revision Application suffers from three fatal flaws. To elaborate, he has submitted that the actual tenant has been a partnership firm. Of this firm, the landlord has been fully aware because he attested to the deed of partnership between the 1st and 2nd defendants: father and son. In that context, he has drawn my attention to clause 7 of the partnership deed. It records that all the assets of the business were transferred to the partnership firm.

4. Shri Kulkarni further contends that once the partnership firm has come into existence and has become a tenant, the landlord cannot take the eviction proceedings against its partners alone. To support his contention, he has drawn my attention to Order 30 Rule 1 of CPC. In elaboration, he has also submitted that if the legislative mandate under Order 30 Rule 1 CPC were to be treated as permissive rather than mandatory, the rest of the provisions under Order 30, especially Rules 3, 4 and 5, becomes otiose. He argues that the suit has been bad for non-joinder of the necessary party: the partnership firm. So both the courts below ought to have dismissed the suit.

5. The second fatal flaw, as Shri Kulkarni stresses, is based on Order 14 Rule 2 of CPC. On 9th June 2004, the trial Court recast the issues. The first issue was whether the plaintiff has proved that the defendants are his tenants. But neither the trial Court nor the appellate Court addressed that issue. In this context, Shri Kulkarni argues that the legislative mandate of Order 14 Rule 2 is unmistakable: all issues framed ought to be addressed and answered. So he urges this Court to remand the matter for adjudication on that specific issue.

6. About the third fatal flaw, Shri Kulkarni contends that the building in question comprises four floors; to be explicit, it consists of Ground + 3 floors. The ground and the first floors were let out to the partnership firm. The remaining floors are enjoyed by the landlord. According to Shri Kulkarni, in the cross-examination, the plaintiff has admitted that the plaintiff's son has already had the business in the second and third floors. Then, the plaintiff's insistence for the ground and the first floor cannot be termed bona fide.

7. About the finding on the defendants' acquiring alternative properties, Shri Kulkarni maintains that the defendants may have acquired properties, but they were on their individual names. Here the tenant is the firm, and it has no other accommodation than what it now occupies.

8. When the Court pointed out the adjudicatory limitations under Section 115 of CPC, Shri Kulkarni has submitted that once the trial Court or the appellate Court decides a case with no material on record or ignores to consider the material on record, and refuses to render a finding on either count, it must be treated as a jurisdictional error, which requires reconsideration.

9. Shri Kulkarni has drawn my attention to para 11 of the trial Court's Judgment. According to him, the trial Court has accepted that not only the defendants but also the firm should be treated as the tenant. Therefore, Shri Kulkarni urges this

Court to hold that the findings are contrary to the trial Court's very own observation.

Respondents:

10. On the other hand, Shri Lengare, the learned counsel of the respondent-landlord, has submitted that both the courts below have concurrently held in the landlord's favour. As the impugned judgement answers the questions of fact, this court in its revisional jurisdiction may not interfere. He has also submitted that the partnership firm has never been a tenant; instead, it was initially the father and later the son, both chartered accountants.

11. Shri Lengare has also tried to counter the applicant's arguments on the question of issues. According to him, both the courts below have not only framed relevant issues but also on answered them in the right perspective. In the end, the learned counsel has elaborated on the landlord's bona fide requirement. At any rate, he has contended that it is a question of fact that allows no revisit.

12. Heard Shri Shriram S. Kulkarni, the learned counsel for the applicant, and Shri Lengare, the learned counsel for the respondent.

Discussion:

13. First, we should bear in mind that this is a revision against the concurrent findings, essentially, of facts: has the landlord established the necessary grounds for evicting the tenant? In this context, the tenant has raised three issues:

(1) Who is the tenant?

(2) Has the landlord established that he needed the property for his personal use?

(3) Have the courts below answered all the issues they have framed?

14. I reckon the first two are questions of fact and, thus, out of the jurisdictional bounds of this Court in this revision. The third one, perhaps, may have a semblance of a right to qualify itself as a question of law, if ever. Now, let us answer the above questions.

(1) Who is the tenant?

15. The applicant vigorously contends that it is the partnership firm comprising his father and him, both chartered accountants, that continued to be the tenant ever since it was formed. To justify that assertion, he points out that when the father and the son formed the partnership, the landlord attested it. Thus, he is aware of that fact. Besides, he continued to accept rent from the firm, yet the courts below have rejected this assertion, concurrently. So he asserts.

16. I have already noted that it is a question of fact. Despite that, I may briefly examine whether the tenant's assertion has any justification. First, the father took the property on lease; then there existed neither the son nor the firm. Later, it seems, the son came into profession. They did enter into a partnership and,

perhaps, that firm may have paid the rent. Here, the landlords sued both the father and the son but not the firm per se.

17. Indisputably, at the inception the father was the tenant. The tenancy was never terminated, for inducting a new tenant, be it the firm. The landlord's attesting the legal partnership only testifies that he witnessed the event of the father and the son forming a partnership. Nothing else and nothing more. The source of rent payment cannot be a determining factor of who the tenant is. The tenancy remaining unchanged, as is the case here; a third party paying the rent does not transfer the tenancy to the entity paying the rent.

18. Here, the partnership firm is not an independent legal entity. Besides, the landlord sued both the partners. Under Order 30, Rule 1 of CPC, any two or more persons claiming or being liable as partners and carrying on business may sue or be sued in the name of the firm of which those persons were partners when the cause of action accrued. An analogous provision is Rule 10 of the same Order. Rule 1 of Order 30 deals with the partnerships, where as Rule 10 deals with the proprietary concerns-that is, individuals with assumed, say, trade names, besides the Hindu joint families. But there is a distinction. A partnership firm can both sue and be sued on its name, but a proprietary concern cannot sue in its name; it must be the proprietor himself or herself. proprietrix is a needless gender variant, when proprietor can fit both the genders Of course, it can be sued as if it were a legal entity. Thus, a partnership firm can be a plaintiff or a defendant, but a proprietary concern can only be a defendant, not a plaintiff. Any defect in this regard is curable, though.

19. Through judicial interpretations, courts have often clarified that a firm is merely a compendious name for the partners constituting it. And it is not a juristic person. Then, Rule 1 or Order 30 only confers a privilege on the individuals constituting the firm to sue or be sued in the name of the firm.

C. K. Thakker's the Code of Civil Procedure (EBC, 1st Edn), after collating the case law on the topic, explains that a "suit filed by the plaintiff against a firm by impleading all or any of the members as defendants individually without naming the firm as one of the defendants is, therefore, not bad in law. Similarly, the members of a firm can institute a suit jointly."

20. Here, I reckon the father was the tenant, and his partnering with the son has not affected the tenancy. That said, the landlord first sued both the father and the son; then, when the father died pending the suit, the landlord continued the eviction proceedings against the son. Even if we assumed the firm was the tenant, the landlord sued both the partners without impeding the firm. And that is eminently sustainable. So the first question stands answered against the applicant.

(2) Has the landlord established that he needed the property for his personal use?

21. Indeed, bona fide requirement is a question of fact. The landlord wanted the

suit property for his son, who holds a diploma in Industrial Electronics. The appellate Court has found, after appreciating the evidence, that the son has gained requisite experience in his field. It has further held that the landlord has "experience in homeopathic medicines and got certificate in that regard from competent authority. Thus, requirement of the plaintiff is two-fold. As a prudent father, he intends to extend requisite support to his son to supervise business by engaging himself in social work. There is nothing amiss therein."

22. The tenant has argued that in the same building there is another vacant portion and that is sufficient for the landlord to carry on the "intended business." But the appellate Court has thoroughly examined that and other contentions and rejected them, supported by a plethora of precedents. So this issue needs no revisit.

(3) Have the courts below answered all the issues they have framed?

23. Order 14 of CPC governs the issues. Rule 1 says issues arise "when a material proposition of fact or law is affirmed by the one party and denied by the other." Then, it explains what the material propositions are: "Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence." And each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. True, issues are of two kinds: (a) issues of fact, (b) issues of law. Under sub-rule (6) of Rule 1, the court is not compelled to frame an issue on the plaintiff's particular plea if the "defendant at the first hearing of the suit makes no defence" about it.

24. For our purpose, Rule 2 of Order 14 assumes importance. This Rule mandates that the court must pronounce the judgment on all issues. And this Rule reads:

2. Court to pronounce judgment on all issues.-(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if the issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

25. Let us see what issues the trial Court has framed. The issues are these:

(1) Does plaintiff prove that he needs suit premises reasonably and bona fide?

(2) Who should suffer hardship if suit is dismissed or decreed?

(3) Is plaintiff entitled to get the decree of possession?

(4) What relief and order?

26. I reckon the trial Court has answered all the issues. On bona fide requirement, it has dwelt deep and returned a relevant finding. The second issue, to me, is collateral. Bona fide requirement is not a standalone issue; it must be looked in the backdrop of relative hardship, too. And that was what both the courts-the trial and the appellate Courts-did. And the third issue, too, depends on the first and second issues. In fact, it is an answer to those two. But one factor, as the tenant maintains, remains.

27. The tenant contends that the trial Court has admitted there is a partnership firm and that it has returned no finding on that count. Fallacious as that finding is, the trial Court has laid over emphasis on the landlord's admitting that the defendants did have a partnership and that he attested that deed, besides accepting the rent as well. First, the trial Court's judgment no longer exists before this Court, for it has merged with the appellate Court's. Yet let me see how the trial Court's accepting the existence of the partnership firm affects the case.

28. According to the trial Court, the landlord cannot deny that the second defendant, that is the son, has no interest in the tenancy. Nor can he ignore the partnership firm. In the answer to the first question- Who is the tenant?-I have set out how the tenant's plea frizzles out. Let us see how the appellate Court has dealt with it.

29. In fact, the appellate Court, too, referred to the landlord's so-called admission and observed, "Defendants subjected him to cross-examination; he has candidly admitted the partnership deed of defendants is signed by the plaintiff as a witness vide Exh. 54. May it be, the said firm was not let out the suit premises." Rightly so.

30. Thus, all the issues stand answered against the tenant. Before parting, however, I may deal with a couple of pleas the tenant advanced.

31. The tenant maintains that once the firm came into existence, its partners-the father and the son-transferred all their assets to it, in terms of Clause (7) of that partnership deed. And that transfer included even the leasehold rights. So nothing has remained with the individuals.

32. Sale is a unilateral transaction, but an agreement is always bilateral or multilateral. As the lease is bilateral, one of the parties may have transferred his right, but that does not affect the other party to the lease. To elaborate, I may observe, here the lessee claims to have transferred the leasehold right to the firm. Even if we accepted that the firm were a legal entity for this purpose, the lessee's transfer does not bind the lessor. Without the lessor's consent there can

be no transfer of tenancy.

And the lessor's attesting a document does not make him a party to the document, much less do the terms of the document bind him. Attestation is to the fact of execution not to the terms of execution.

33. The tenants, chartered accountants, acknowledged that they had acquired alternative properties. But they maintained, as their second plea, that the firm is the tenant and it has not acquired any property. The plea is not only impermissible but also immoral. Alas, law concerns itself with what is illegal and, thus, impermissible, but not with what is immoral.

34. I have already noted that the appellate Court has already held, as now affirmed by this Court, that the partnership firm is not the tenant. Besides, the partnership firm is not a legal entity to hold properties independent of its constituents. So this plea, too, must fail. And it has failed.

Conclusion:

So, looked from any perspective, the Civil Revision Application fails. It is dismissed with costs.