
(1996) 12 BOM CK 0009
In the Bombay High Court
Case No : First Appeal No. 68 of 1995

Vinayak Mahadeo Gangan	Vs	APPELLANT
Bhaskar Dattatraya Dongre and Others		RESPONDENT

Date of Decision : 05-12-1996

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 105B
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1997) 3 BomCR 277 : (1996) 98 BOMLR 652 : (1997) 2 MhLj 373

Hon'ble Judges : V.H. Bhairavia, J

Bench : Single Bench

Advocate : Rakesh Pandey and S.D. Mogre, for the Appellant; Sandip J. Ghogre, for the Respondent

Final Decision : Dismissed

Judgement

V.H. Bhairavia, J.—This appeal is directed against the judgment and decree dated 17th December, 1993 passed by the learned Judge, City Civil Court. Greater Bombay in S.C. Suit No. 1778 of 1972. The appellant is the original defendant.

2. The suit for declaration was filed by the respondents-plaintiffs for the possession of Shop No. 1547, admeasuring 10 x 15 ft. , situated at New Colony, North of K,D. Railway, Govandi, Bombay. It is the case of the plaintiffs that original plaintiff had purchased a stall No. 41 at Road No. 1, Lotus Colony, Govandi, Chembur from one Shri Vellapan for the consideration of Rs. 3,500/ by an agreement dated 13th March, 1967. It is also the case of the plaintiffs that before that said Vellapan had given stall No. 41 to the original plaintiff on Leave and Licence Agreement dated 23rd November, 1965 and he was in possession of stall No. 41 situated at Road No. 1 Lotus Colony, Govandi as a tenant of Vellapan for the period of 1965 to 1967 and in 1967, he purchased a Stall. It is the case of the plaintiffs that the plaintiff has given to the appellant-defendant the Stall for running the business of Tobacco and said premises acquired by the Municipal Corporation-respondent No. 2 for putting a slaughter house. The occupant of the

respective premises were offered alternate premises at New Colony, North of K.D. Railway, Govandi, Bombay in lieu of the said Stall No. 41. It is the case of the plaintiffs that the respondent No. 2 Bombay Municipal Corporation on survey found that the appellant-defendant who was found in possession of Stall No. 41, situated at Road No. 1, Lotus Colony, Govandi, Chembur, Bombay, he had been offered Shop No. 1547, admeasuring 10 x 15 ft. situated at New Colony, North of K.D. Railway, Govandi, Bombay in lieu of Stall No. 41 and accordingly, the name of the appellant came to be entered in the record and the name of the appellant-defendant has been shown as the occupant and the owner of the said-shop. It reveals from the record that respondent-plaintiff informed respondent No. 2 Bombay Municipal Corporation that he has terminated the leave and licence of the defendant and as he has purchased this premises from the original tenant Vellapan by written agreement, his name should be entered in the record of right. However, it appears in the record the name of the defendant is shown as the owner of the shop in dispute and the claim of the plaintiff has been ignored totally. Hence, the suit came to be filed. It further reveals that before the suit, a suit being Suit No. 708 of 1971 for eviction was also filed. However, it appears that, that suit became infructuous in view of the suit filed by the plaintiff. It reveals from the record that the defence of the defendant in the suit is of total denial but the defendant claims to be the owner of the suit shop by virtue of the alleged purchase from the Vellapan, the original tenant of the suit shop in the year 1965. There is no document produced by the defendant in support of his claim. After framing the issues and recording the evidence of the parties, the learned Judge has allowed the suit and passed the decree by his order dated 17th December, 1993. Hence, this appeal.

3. It has been contended by Mr. Pandey, learned Counsel appearing on behalf of the appellant that the learned Judge has relied on the documents Exhibits "B" and "C" which are not admissible in the evidence. It has been argued that the signature on Exhibit "B" i.e. the Agreement of Leave and Licence between the plaintiff and Vellapan is not proved. Further, the document of Sale Deed dated 13th March, 1967 (Exhibit, "C") is not a registered document, the learned Judge has wrongly allowed and exhibited the same in evidence. In support of his argument, he relied on certain authorities as under:-

Raghunath and Others Vs. Kedar Nath,

Dayal Singh v. Indar Singh AIR 1926 PC 94

Ni Nagappa Marbassappa Arleshwar v. Gyanji Pomaji, Marwadi AIR 1927 Bom 157

4. Further, it has been contended that pending the suit, the plaintiff has died and his son who has stepped into the witness box and deposed that he had no personal knowledge regarding the suit shop and his evidence is hearsay evidence. He submitted that hearsay evidence could not be relied as a conclusive evidence without any corroborative evidence. Further the learned Counsel contended that the suit was barred by limitation and barred by section 581 of the

B.M.C. Act as a statutory notice was not issued.

5. Having gone through the record and proceedings of this case, it is not possible to agree with the submission of the learned Counsel for the appellant. It is the case of the plaintiff that in 1965, Stall No. 41 was taken on leave and licence from one Vellapan and after some time, the plaintiff has given this stall to the appellant-defendant for conducting the business on behalf of the plaintiff himself. It is the case of the plaintiff that the defendant has given Rs. 450/- as security to the plaintiff and Rs. 50/- per month was fixed as compensation for the use of the suit shop. It reveals from the record that the leave and licence came to be terminated by the plaintiff by his notice dated September, 1968 and since then, it is alleged that the appellant-defendant is a trespasser in the suit premises. The appellant has no documentary evidence to show that he has obtained any licence of the shop or he has purchased the suit shop from Vellapan. As against this, the plaintiff has produced the agreement of leave and licence (Exhibit "B"), a deed of purchase dated 13th March, 1967, (Exhibit "C") and has also produced certain letters and correspondence taken place between the plaintiff and the B.M.C. right from 1968 informing and objecting that the possession of the suit shop may not be given to the appellant-defendant and it should not be transferred in his name in the B.M.C. record. The reply from defendant No. 2 B.M.C. received by the plaintiff. Further, it has been contended that the procedure was required to be followed u/s 105-B of the B.M.C. Act has not been followed. Therefore, the transfer of the suit shop in the name of the plaintiff is also illegal and bad. The procedure laid down u/s 105-B is as under :-

"105B. (1) Where the Commissioner is satisfied-

(a) that the person authorised to occupy and Corporation premises has, whether before or after the commencement of the Bombay Municipal Corporation (Amendment) Act, 1960,-

(i) not paid for a period of more than two months, (the rent, taxes, fees or compensation) lawfully due from him in respect of such premises; or

(ii) sub-let, * * * * * whole or any part of such premises; or

(iii) committed, or is committing, such acts of waste as are likely to diminish materially the value, or impair substantially the utility, of the premises ; or

(iv) otherwise acted in contravention of any of the terms, express or implied under which he is authorised to occupy such premises ;

(b) that any person is in unauthorised occupation of any Corporation premises;

(c) that any Corporation premises in the occupation of any person are required by the Corporation in the public interest. The Commissioner may notwithstanding anything contained in any law for the time being in force, by notice (served by post, or by affixing a copy of it on the outer door or some other conspicuous part of such premises, or in such other manner as may be provided for by

regulations), order that that person, as well as any other person who may be in occupation of the whole or any part of the premises shall vacate them within one month of the date of the service of the notice.

(2) Before an order under, sub-section (1) is made against any person, the Commissioner shall issue, in the manner hereinafter provided, a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made. The notice shall-

(a) specify the grounds on which the order of eviction is proposed to be made, and

(b) require all persons concerned, that is to say, all persons who are or may be in occupation of, or claim interest in, the Corporation premises, to show cause against the proposed order, on or before such date as is specified in the notice.

If such person makes an application to the Commissioner for the extension of the period specified in the notice, the Commissioner may grant the same on such terms as to payment and recovery of the amount claimed in the notice, as he deems fit.

Any written statement put in by any person and documents produced, in pursuance of the notice, shall be filed with the record of case, and such person shall be entitled to appear before the Commissioner by advocate, attorney or pleader.

The notice to be served under this sub-section shall be served in the manner provided for the service of a notice under sub-section (1); and thereupon, the notice shall be deemed to have been duly given to all persons concerned.

(3) If any person refuses or fails to comply with an order made under sub-section (1), the Commissioner may evict that person and any other person who use such force as may be necessary.

(4) The Commissioner may, after giving fourteen clear days" notice to the person from whom possession of the Corporation premises has been taken under sub-section (3) and after publishing such notice in the Official Gazette and in at least one newspaper circulating in the locality, remove or cause to be removed, or dispose of by public auction any property remaining on such premises. Such notice shall be served in the manner provided for the service of a notice under sub-section (1).

Provided that, where the Commissioner is unable to decide as to the person or persons to whom the balance of the amount is payable or as to the apportionment of the same, he shall refer such dispute to a Civil Court of competent jurisdiction, and the decision of the Court thereon shall be final.

(6) If a person, who has been ordered to vacate any premises under sub-Clause (i) or (iv) of clause (a) of sub-section (1), within one month of the date of service of the notice, or such longer time as the Commissioner may allow, pays

to the Commissioner the rent and taxes in arrears, or as the case may be, carried out or otherwise complies with the terms contravened by him to the satisfaction of the Commissioner, the Commissioner shall on such terms, if any (including the payment of any sum by way of damages or compensation for the contravention aforesaid), in lieu of evicting such person under sub-section (2), cancel his order made under sub-section (1) ; and thereupon such person shall continue to hold the premises on the same terms on which he held them immediately before such notice was served on him."

6. Admittedly, this procedure is not followed by the defendant No. 2 B.M.C. despite the several letters and notices issued by the plaintiff. The correspondence taken place between the plaintiff and the defendant No. 2 B.M.C. marked as Exhibit "F" collectively. In the letter dated 6-8-68 addressed to the Dy. Municipal Commissioner, Bombay, it has been mentioned therein in clear terms that the plaintiff has purchased Stall No. 41, situated at Lotus Colony from one Shri M. Vellapan who was originally running the said business for consideration. Further, the leave and licence of defendant No. 1 has been terminated by notice dated 29-1-69 and there is no reply to the said notice from the defendant. Further, notice under Certificate of posting dated 0-11-70 sic was issued by the advocate to the defendant No. 2 B.M.C. Despite the objection, the defendant No. 2 did not consider the objection of the plaintiff and without following due procedure u/s 105-B of the Act, transferred the suit shop in the name of the appellant-defendant which compelled him to file the suit. The document Exhibit "B" dated 13th March, 1967 pertaining to the Agreement of leave and licence is signed by Vellapan and the plaintiff. However, the signature of Vellapan could not be proved by the witness who has given evidence, as the plaintiff died pending the suit and his son P.W. 1 as a legal heir, stepped into the witness box. It appears that P.W. 1 has no personal knowledge regarding what was taken place between Vellapan and the plaintiff during the period 1965 to 1967. The learned Judge has taken a view that though the document Exhibit "C" was not a registered document, the signature has been proved and the contents of the document Exhibit "B" also proved by the oral evidence of P.W. 2 who is the brother of the deceased plaintiff. Even if the document Exhibit "C" is to be ignored, the circumstantial evidence proves the case of the plaintiff. The defendant has no documentary evidence to show his title except possessory title. He has no other document to prove his title that he is the owner and that he has purchased the suit shop from Vellapan and became the owner of the suit shop. The story of defence advanced by the defendant in his written statement and the oral evidence is found to be inconsistent. At one place, he says that he was the sub-tenant of Vellapan and in evidence, he says that he has purchased the suit shop from Vellapan. He has not produced any documentary evidence to that effect. In the absence of any documentary evidence, no title could be confirmed on mere oral evidence by the B.M.C.. The B.M.C. ought to have followed the procedure u/s 105-B and found out what is the right of the defendant-appellant. Procedure u/s 105-B is a mandatory and no right, title and interest could be

transferred in another's name without following the procedure. Admittedly, B.M.C. has not followed the procedure. Therefore, the learned Judge has rightly held that the transfer of suit shop in the name of the appellant is illegal. I am in full agreement with the finding and reasonings of the learned trial Judge. I do not find any substance in the appeal and it deserves to be dismissed and the judgment and decree passed by the trial Court deserves to be confirmed.

In the result, the appeal is dismissed with costs.