(2004) 01 BOM CK 0088

Bombay High Court

Case No: Writ Petition No. 4876 of 1990

Shobha Satyanarayan Birla		APPELLANT
	Vs	
Janabai Parshuram Pawar since deceased by her heirs Laxmabai Raghunath Pawar and Another		RESPONDENT

Date of Decision: Jan. 9, 2004

Acts Referred:

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 12(1), 12(3)
- Evidence Act, 1872 - Section 90

Citation: (2004) 2 ALLMR 751 : (2004) 3 BomCR 557 : (2004) 3 CivCC 69 : (2004) 2 MhLj 1082 : (2004) 3 RCR(Civil) 373 : (2004) 1 RCR(Rent) 709

Hon'ble Judges: D.Y. Chandrachud, J

Bench: Single Bench

Advocate: Prafulla Shah, for the Appellant; P.J. Shinde, for the Respondent

Final Decision: Dismissed

Judgement

D.Y. Chandrachud, J.

A suit for eviction was in the present case instituted in the Court of the Civil Judge, Junior Division, Phaltan on the ground of arrears of rent. The suit came to be decreed on 5th September, 1986. The decree has been reversed in appeal by the Additional District Judge, Satara on 20th March, 1990.

2. The only issue which arises in this proceeding and that has been urged before the Court is as to whether there is in fact a relationship of landlord and tenant between the parties. If such a relation does indeed exist, the decree for eviction has to be passed in the facts of this case on the ground of the non payment of rent. The suit has been instituted under the Rent Act and such a suit was therefore maintainable if, and only if, there exists a relationship of landlord and tenant. The suit, it must be emphasised, was not under the general law for the recovery of possession.

Therefore, the answer to the question as to whether the Additional District Judge was or was not correct in allowing an appeal against the decree for eviction turns on the question as to whether a relationship of landlord and tenant does in fact exist in this case.

3. This issue arises in circumstances which date back to 1925. The subject of the dispute is a residential house bearing house property No. 116, C.T.S. No. 8196 and C.T.S. No. 6219 of Shukrawar Peth, Phaltan. There is no dispute about the fact that the property originally belonged to a person by the name of Chunilal Marwadi. Chunilal Marwadi had four sons. Upon the death of Chunilal in or about 1949, the property was mutated in the names of his sons. By a Sale Deed dated 28th July, 1996, the property was conveyed by the heirs of Chunilal to the petitioner''s father Maniklal at and for a consideration of Rs. 1500/-. Maniklal in turn is stated to have sold the property to his daughter, the petitioner herein, at and for a consideration of Rs. 2000/- by a sale deed dated 21st June, 1979. The case of the petitioner is that Chunilal had leased out the property to Parvatibai. Parvatibai expired on 23rd September, 1968. According to the petitioner, during the life time of Parvatibai, the defendant was inducted as a sub-tenant and initially she did pay the monthly rent periodically to the petitioner''s father. The case of the petitioner is that after she purchased the property on 21-6-1979, the original defendant Janabai had agreed to pay a rent of Rs. 50 per month. Initially, the defendant did not pay the rent on account of financial difficulties and then stopped paying the rent. A notice was issued on 1-2-1983 to which there was a reply dated 7-2-1983 from the defendant. The suit came to be instituted on the ground of default in the payment of rent. A written statement was filed by the defendant denying the allegations contained in the plaint.

4. The Trial Judge held in favour of the petitioner, placing reliance on what allegedly was a rent note of 1925. The Trial Judge did note that neither the petitioner nor her father produced any documentary material to support the plea that the rent had been fixed at Rs. 50/- per month. No. receipt evidencing payment was produced. The bare word of the petitioner to the effect that the rent had been fixed at Rs. 50/- was accepted and on the basis of an alleged rent note of 1925, it was held that the defendant who was inducted by Parvatibai could have no better right to the premises. This judgment, as already noted earlier, has been reversed in appeal by the Additional District Judge. The Additional District Judge held that the dispute between the parties is not that between a landlord and tenant. At this stage, it may be noted that the contention of the original Defendant was that Parvatibai was a mistress of Chunilal Marwadi and the property had been gifted to her by Chunilal. The defendant further set up the case that Parvatibai had by her Will dated 6-1-1965 bequeathed the property to her. The Additional District Judge was of the view that the dispute between the parties relating to the title to the property could not be resolved by the Rent Court and a substantive suit before the regular Civil Court would have to be instituted.

5. The primary question which the Court must address itself to is as to whether there is in fact a relationship of landlord and tenant between the parties. The petitioner traces her title to the suit property through Chunilal Marwadi. Chunilal who, as already noted earlier, had four sons, executed a Sale Deed in favour of the petitioner''s father on 28-7-1976 and it is alleged that on 21-6-1979 the petitioner acquired title to the premises. The entire case of the petitioner rests upon a rent note alleged to have been executed in 1925. The rent note was marked in evidence as ''Exhibit 32''. Before the trial Court, Counsel appearing on behalf of the petitioner relied upon the provisions of Section 90 of the Evidence Act which raises a presumption as to documents which are 30 years old.

6. Section 90 of the Evidence Act enables the Court to draw a presumption where any document purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper. The section provides that in such a case, the Court may presume (i) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person''s handwriting; (ii) that the document was duly executed by the person by whom it purports to have been attested; and (iii) that the document was duly attested by the person by whom it purports to be attested. The presumption in Section 90 is of due execution and attestation of an old document. The presumption does not extend to the truth of the contents of the document. Before the Court may draw a presumption in respect of a document which purports to be or is proved to be thirty years old, the production must be from custody which the Court in the particular case considers proper. The explanation to Section 90 enunciates that documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be. No custody is improper if it is proved to have had a legitimate origin or if the circumstances of the particular case are such as to render such an origin probable. Whether a presumption should be drawn is a matter of judicial discretion to be exercised by the Court having regard to the facts and circumstances of the case. There is no mandate that the presumption must necessarily be drawn. The Evidence Act lays down in Section 4 that whenever it is provided by the Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

7. There is a considerable body of precedent in interpreting the provision of Section 90. In Trailokia Nath Nandi v. Shurno Chungoni, 1885 ILR 11 Cal. 539, Sir Richard Garth, C. J. observed that the rule laid down in Section 90 must be applied with Special care and caution in order to prevent an unscrupulous person from taking recourse to forgery. This decision was followed by a Division Bench of this Court in Rudragouda Venkangouda Patil v. Basabgouda Danappagouda Patil, (1938) 40 BLR 202. This Court noted that the presumption was based on the rule of expediency and unless the surrounding circumstances satisfied the Court that the documents were produced from proper custody, it would be unsound to admit them. The Court

noted that the provision read with its explanation mandates a satisfactory account of the origin of possession being given by the party relying upon the document. Mr. Justice K. S. Hegde (as the Learned Judge then was) speaking for a Division Bench of the Mysore High Court in Ravjappa v. Nilakantha Rao AIR 1962 Mys 53, held that Section 90 is worded in general terms, as it was designed to meet situations varying in character, where the passage of time might have obliterated proof of the genuineness of a disputed document. However, the importance of the exercise of the discretion of the Court was emphasised thus :

"A wrong exercise of the discretion under that provision is likely to strengthen the hands of the forger. It is not difficult to incorporate recitals in a document to show that it is over thirty years old. Hence before raising any presumption u/s 90, great deal of circumspection is necessary lest the balance should be titled in favour of an undeserving cause. The Courts ought to be careful to see that that provision is not made the forger''s paradise. Section 90 states that the Court may draw a presumption and not that it must draw a presumption.

The Court noted that in many cases, it would be most dangerous to draw the presumption that a document was genuine merely because it was thirty years old according to the recitals in the document and came from proper custody. Even before a presumption could be drawn it must be established satisfactorily that the document has been produced from proper custody and the satisfaction of the Court must be founded on the evidence on record. A party who asks the Court to draw a presumption u/s 9090 must prove by satisfactory evidence that the document was produced from proper custody. The factum of proper custody is not a matter of presumption but ought to be satisfactorily proved. The question of proper custody may be proved either by adducing evidence aliunde to show that the document was produced from proper custody or by showing that the person who produced it was the depository of the document in question. If the trial Court has failed to exercise its discretion on the basis of sound judicial procedure, it would indeed be the duty of the appellate Court to correct it. In Musamnat Shafiq-un-Nisa v. Raja Shaban Ali Khan, (1904) 6 BLR 750, the Privy Council held that if there were circumstances to doubt the genuineness of a document, the Court would be justified in declining to admit it in evidence without formal proof.

8. In the present case, absolutely no evidence was adduced on behalf of the petitioner to establish that the rent note of 1925 had been produced from proper custody. The mere tender of the document in evidence cannot be regarded as proof of proper custody. Ex-facie the judgment of the Trial Judge in the present case discloses no application of mind whatsoever to whether the document has been produced from proper custody nor indeed is there any consideration in the judgment of the trial Court of the question as to whether in the facts of this case, the presumption which Section 90 says may be drawn by the Court should in fact, be drawn. The approach of the trial Court was, therefore, clearly not sustainable with

reference to the provisions of Section 90 of the Evidence Act, 1872.

9. The alleged rent note has been executed not by the lessor Chunilal but by Parvatibai. There are several aspects of the document which merit notice. The first is the recital in the document that an amount of Rs. 16.50 was being paid to Parvatibai by Chunilal. There is absolutely no reason why any amount was being paid to Parvatibai if she was taking the premises on rent. The original document which is in the ''Modi'' script is a part of the record and proceedings. The document has been translated. Surprisingly in the translation itself, there appears to be an overwriting. Initially it appears in the translation that what has been stated is that Parvatibai was giving the premises on rent to Chunilal. This has been overwritten to read that Parvatibai was taking the premises on rent. The overwriting is quite clear to the naked eye.

10. Even if the document is read to mean that it was Parvatibai who was taking the premises on rent, the monthly rent reflected in the document is Rs. 0.50 or 50 paise. On the other hand, the petitioner came before the Court with a case that the rent which had been agreed upon and was liable to be paid by the defendant Janabai was Rs. 50 per month. The evidence which has been adduced in the course of the proceeding makes interesting reading. The petitioner deposed in the course of evidence that Parvatibai had sublet the property to the defendant and that the defendant used to pay rent to her father but after the purchase of the property by the petitioner, no rent was paid to her. In the course of the cross-examination, the petitioner, however, admitted that she had no evidence to show that the defendant is her tenant. The petitioner then admitted that she had no evidence to show that she had agreed to the rent of Rs. 50/-. The petitioner admitted that she has no evidence to support her statement that the defendant initially paid rent to her father. The petitioner''s father Maniklal also deposed in support of the case. According to him, the defendant had paid rent from 1976 to 1979 but admitted that there were no receipts. He admitted that he has no documentary evidence to establish the payment of rent. He further admitted that he had no evidence to show that the defendant was the tenant of the petitioner herein. He stated that he had no evidence as to whether the defendant had paid any rent.

11. On this state of the record, it is impossible to come to the conclusion that the existence of a landlord tenant relationship between the parties has been established. Undoubtedly, if this was to be a suit for possession under the general law of the land, a decree for possession would ensue in view of the fact that the petitioner has a valid title to the premises. The original defendant Janabai sought to set up a case to the effect that Chunilal had gifted the property to Parvatibai but the Gift Deed was not forthcoming. Though according to the defendant, Parvatibai had bequeathed the property to her in 1965, obviously the defendant could not get any title to the property unless Parvatibai herself had a valid title thereto. However, at the cost of repetition, it needs emphasis that in the present case, the suit was

instituted not under the general law for the recovery of possession but under a special Act, the Rent Act, for eviction on the ground of arrears of rent. The foundation of the suit was that there existed a relationship between the parties of landlord and tenant and that there was a default on the part of the defendant in the payment of rent. In the absence of a relationship of landlord tenant, the suit under the Rent Act must fail. Therefore, I am of the view that this writ petition under Article 227 must be dismissed.

12. The Additional District Judge in the course of his judgment has come to the conclusion that the appeal had to be allowed since there was a dispute as to title. On the basis of the record as it stands, it is not possible to concur with the view because the defendant had indeed not produced any documentary evidence to raise a dispute in regard to the title to the property. The alleged Gift Deed in favour of the defendant Parvatibai was not forthcoming. Unless the title of Parvatibai to the property is established, on which no reliable evidence at all is forthcoming, Janabai would not acquire a better title on the basis of an alleged Will of Parvatibai executed in 1965. Hence, the approach of the Additional District Judge, Satara, on this aspect was not quite correct. However, the dismissal of the suit by the Additional District Judge must be confirmed in this proceeding because for the reasons which have been already stated earlier, it is abundantly clear that the petitioner failed to establish that there existed a relationship of landlord and tenant. The petitioner would be at liberty to follow her remedies under the ordinary law of the land for the recovery of possession. In the circumstances, the petition deserves to be dismissed and is, accordingly, dismissed.