

(1967) 10 BOM CK 0020**Bombay High Court****Case No:** Special Civil Application No. 1306 of 1966

Josephy Santa Vincent

APPELLANT

Vs

Ambico Industries

RESPONDENT

Date of Decision: Oct. 13, 1967**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 115, 116
- Constitution of India, 1950 - Article 227
- Transfer of Property Act, 1882 - Section 108

Citation: (1968) MhLJ 532**Hon'ble Judges:** V.M. Tarkunde, J**Bench:** Single Bench**Advocate:** F.S. Nariman and V.R. Bhandare, for the Appellant; H.D. Banaji and R.Y. Rele, for the Respondent**Final Decision:** Allowed**Judgement**

V.M. Tarkunde, J.

This petition has been filed with a view to challenge the legality of a decree passed by a Judge of the Bombay Small Cause Court and confirmed by an Appellate Bench of that Court. The property in dispute consists of a godown at Ballard Estate in Bombay. The godown is a part of an extensive estate which belongs to the Bombay Port Trust and which has been leased by the Port Trust to the first respondents Messrs. Ambico Industries. The first respondents let out the godown to the second respondents Messrs. William Jacks and Company Limited. In January 1957 the petitioner Josephy Santa Vincent went into possession of the godown under an agreement with the second respondents. On August 1, 1959, the second respondents surrendered their tenancy to the first respondents. In April 1960, the first respondents filed a suit against the second respondents in the Bombay Small Cause Court for possession of the godown. The petitioner was not made a party to

that suit. An ex parte decree for possession was obtained in that suit by the first respondents in October, 1960. When the ex parte decree was sought to be executed an obstruction was offered by the petitioner but the obstruction was ordered to be removed by the Court. The petitioner then filed a suit in the same Court for a declaration that he was the lawful sub-tenant of the second respondents and had become the tenant of the first respondents u/s 14 of the Bombay Rent Act on the determination of the second Respondent's tenancy. After filing the suit, the petitioner obtained an order of interim stay against the execution of the ex parte decree. Due to some typing error in the stay order, however, the decree was executed and possession of the godown was obtained by the first respondents. Thereupon the petitioner got his plaint amended so as to add a prayer for restoration of possession of the godown.

2. The suit was dismissed by the trial Judge on two grounds. The learned trial Judge held, in the first place, that assuming the premises to have been sub-let by the second respondents to the petitioner in January, 1957, the sub-lease was not validated by sub-section (2) of section 15 of the Bombay Rent Act, that the premises cannot be held to have been lawfully sub-let to the petitioner, and that the petitioner cannot, therefore, be deemed to have become the tenant of the first respondents u/s 14 of the Act. The learned Judge observed in this connection that, as the property belonged to the Bombay Port Trust, the first respondents were the tenants of the godown, that the second respondents were the sub-tenants and that the petitioner could only claim to be the sub-tenant of a sub-tenant. Relying upon the decision in Balkrishna v. Said-anna (1), the learned trial Judge held that the petitioner, being the sub-tenant of a sub-tenant, cannot claim the protection of sub-section (2) of section 15. Secondly, the learned Judge held that the petitioner had failed to prove that the premises had been sub-let to him in January 1957 by the second respondents. The learned Judge was of the view that the petitioner was only a licensee with the right of storing goods in the premises

3. From this decree dismissing his suit the petitioner went in appeal to the Appellate Bench of the Bombay Small Cause Court, the appeal was summarily dismissed by the Appellate Bench. In its judgment the Appellate Bench proceeded on the assumption that the petitioner was a sub-tenant of the second respondents. Relying on the said decision in Balkrishna v. Saidanna 1963 Mh. L J 372 : 1962 65 Bom. L R 149, the Appellate Bench held that a sub-tenant's sub-tenant was not protected by the Kent Act and that the trial Court was, therefore, justified in dismissing the petitioner's suit. The Appellate Bench did not decide the question whether the petitioner was a tenant or a licensee of the second respondents.

4. In order to appreciate the arguments addressed before me by Mr. Nariman for the petitioner and Mr. Banaji for the first respondents, it would be useful to refer to sections 14 and 15 of the Rent Act. Section 14 provides in substance that where the interest of a tenant of any premises is determined for any reason, any sub-tenant to

whom the premises or any part thereof have been "lawfully sub-let" shall be deemed to have become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued. It follows that the petitioner can claim to have become the tenant of the first respondents on the determination of the tenancy of the second respondents if the premises had been lawfully sub-let to him by the second respondents. Now, section 15 prior to its amendment by Ordinance No. III of 1959 ran as follows:

Notwithstanding anything contained in any law, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in or any other manner his interest therein.

There was a proviso to this section with which we are not concerned. Section 15 was amended first by Bombay Ordinance No. III of 1959 which came into effect on May 21, 1959, and then by an Amending Act being Bombay Act No. XLIX of 1959. By the amendment the above provision of section 15 (with a slight modification) was numbered as sub-section (1) and the following was added as sub-section (2):

The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section, be deemed to have had no effect before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959 in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order of a Court, any such sub-lease, assignment or transfer or any such purported sub-lease, assignment or transfer in favour of any person who has entered into possession, despite the prohibition in sub-section (1), as a purported sub-lessee, assignee or transferee and has continued in possession at this commencement, of the said Ordinance, shall be deemed to be valid and effectual for all purposes, and any tenant who has sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of section 13.

The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the commencement of the Ordinance aforementioned.

5. In Balkrishna v. Saidanna 1963 Mh. L J 372 : (1962) 65 Bom. L R 149, referred to above, Mr. Justice Chandrachud had to decide the extent to which transfers which were invalid u/s 15, as it stood prior to the amendment, were validated by sub-section (2) which was added to that section. In the suit in that case, defendant No. 1 was the original tenant, defendant No. 1 had sub-let the premises to defendant No. 2, defendant No. 2 had sub-let the premises to defendant No. 3,

defendant No. 3 had sub-let the premises to defendant No. 5, and it was defendant No. 5 who claimed to be in lawful possession of the premises by virtue of sub-section (2) of section 15. The learned Judge held that defendant No. 5 could not claim the protection of that provision. The learned Judge observed (p. 151):

It seems to me difficult to take the view that the intention of the Legislature was not only to validate transfers and assignments by tenants but also to legalise every transfer and assignment effected by the sub-tenants or by transferees and assignees of sub-tenants. As I have stated earlier, the protection which is intended to be conferred by the Ordinance can be availed of only by persons who can be described as sub-lessees, assignees or transferees from the tenants....

If the word "transfer" be used to cover a sub-lease, an assignment or any other type of transfer of a leasehold interest, the decision of the learned Judge amounts to this, that sub-section (2) of section 15 affords protection to the transferee of a tenant and not to a transferee of the tenant's transferee.

6. The learned Judge's view with regard to the scope of sub-section (2) of section 15 was upheld by a Division Bench consisting of Mr. Justice Patel and Mr. Justice Thakker in N.M. Nayak Vs. Chhotalal Hari Ram and Others. In that case the tenant of certain premises had assigned his leasehold interest to a certain person and the latter on his part had assigned his interest in the premises to the petitioner. One of the questions before the Court was whether such assignee of an assignee of the leasehold interest was entitled to the protection of sub-section (2) of section 15. In holding that the petitioner was not entitled to the protection, the Division Bench observed (p. 559):

The Legislature whilst introducing sub-section (2) intended to validate the subletting, transfer and assignment by tenants and not further sub-letting or further derivative transfer or assignment by such sub-lessee a, transferees or assignees. In our opinion the protection intended to be conferred by the Ordinance can be availed of by only those persons who can be described as sub-lessees, assignees or transferees from the contractual tenant.

7. Mr. Nariman on behalf of the petitioner made it clear that he did not accept the above cases as having been rightly decided but he agreed that these decisions are binding on roe. Argument on both sides were advanced before me on that basis.

8. Mr. Nariman argued that, in holding the petitioner in the present case to be disentitled to the protection of sub-section (2) of section 15, the Courts below had overlooked the fact that the second respondents, who had sub-let the premises to the petitioner, were themselves the lawful sub-tenants of the premises- Mr. Nariman referred in this connection to clauses (a) and (b) of subsection (4) of section 4 of the Bombay Kent Act. Sub-section (1) of section 4 lays down that the Act shall not apply to any premises "belonging to the Government or a local authority" or apply as against the Government to any tenancy or other like relationship created

by a grant from the Government in respect of premises taken on lease or requisitioned by the Government; but that it shall apply in respect of premises let to the Government or a local authority. Clause (a) of sub-section (4) of section 4 provides that the expression "premises belonging to the Government or a local authority" in sub-section (1) shall not include a building erected on any land held by any person from the Government or a local authority under an agreement, lease or other grant, even though the building may belong to the Government or the local authority, as the case may be. Then clause (b) of sub-section (4) of section 4 lays down that "notwithstanding anything contained in section 15" the person who holds such a building under an agreement, lease or other grant from the Government or a local authority shall be entitled to create a sub-tenancy in respect of the building or any part thereof. Since the premises in the present case belong to the Bombay Port Trust, it follows from the above provisions that the first respondents, who hold the premises from the Port Trust, were not precluded by section 15, as it stood before the amendment, from sub-letting the premises to the second respondents. The second respondents were thus the lawful sub-tenants of the premises when they sub-let them to the petitioner. Mr. Nariman argued that the word "tenant" in section 15 includes a contractual sub-tenant (like the second respondents) whose sub-lease is valid under the Act. According to Mr. Nariman, although the petitioner is a sub-tenant's sub-tenant, he is in the position of a tenant's sub-tenant, and is entitled to the protection of sub-section (2) of section 15.

9. On behalf of the first respondents Mr. Banaji raised a preliminary objection to the effect that the argument advanced by Mr. Nariman cannot be entertained in this petition under Article 227 of the Constitution. On the merits Mr. Banaji argued that the second respondents were sub-tenants and not tenants as argued by Mr. Nariman and that the petitioner, claiming as he does from a Sub-tenant, is not protected by sub-section (2) of section 15 according to the rulings mentioned above.

10. On the preliminary objection Mr. Banaji argued that it was open to the petitioner to file a revision application u/s 115 of the CPC from the decrees passed by the Courts below and that the hearing of this petition under Article 227 of the Constitution must, therefore, be confined to such contentions as can be entertained by this Court in the exercise of its revisional jurisdiction. Since no error was committed by the Courts below in the exercise of their jurisdiction, this petition, according to Mr. Banaji, was not tenable. I do not find any merit in this preliminary objection. If a revision application were an adequate remedy in the present case, the petitioner would not have been entitled to invoke the jurisdiction of this Court under Article 227 of the Constitution. This petition has been filed because, according to the petitioner, the decrees passed by the Courts below are vitiated by an error of laves which is apparent on the face of the record, but which is not an error in the exercise of their jurisdiction. In *Dr. Chandrakant R. Joshi v. Sumant Ramdutt Desai* (1965) Special Civil Application No. 459 of 1965 decided by Tambe, Ag. C. J. and Abhyankar J., on December 14/15, 1965 (Unrep.), it was held that a party who is aggrieved by a

decree passed against him, and who claims that the decree is vitiated by an error of law apparent on the face of the record, can approach this Court under Article 227 of the Constitution, if the error is not capable of being corrected u/s 115 of the Civil Procedure Code. Moreover, the question must now be held to have been, concluded by the decision of the Supreme Court in Surendra Nath Bibra Vs. Stephen Court Ltd. . That was an appeal from the judgment of the Calcutta High Court in an application which had been filed in the High Court u/s 116 of the CPC as well as Article 227 of the Constitution. What was challenged before the High Court was a decree of the Court of Small Causes, Calcutta. The Supreme Court held that, since the application in the High Court had been filed under Article 227 of the Constitution as well as section 115 of the Civil Procedure Code, it was open to the High Court to correct an error of the Court below which was not an error in the exercise of that Court's jurisdiction. In the case before me the alleged error of law of the Courts below is apparent on the face of the record and the petition is, therefore, tenable under Article 227 of the Constitution.

11. Turning to the main question, namely, whether the petitioner is entitled to the protection of sub-section (2) of section 15 of the Rent Act, it appears to me, in the first place, that the question is not covered either by the decision of Mr. Justice Chandrachud in Balkrishna v. Saidanna 1963 Mh. L J 372 : (1962) 65 Bom. L R 149, or by the decision of Mr. Justice Patel and Mr. Justice Thakker in N.M. Nayak Vs. Chhotalal Hari Ram and Others . As mentioned above, it was held in those cases that section 15(2) protects a transferee of the leasehold interest from a tenant but not the transferee of a transferee. The Courts in those cases, however, had no occasion to consider the scope of the word "tenant" in sub-sections (1) and (2) of section 15. This was because in both the cases the persons who claimed the protection of sub-section (2) of section 15 had derived their interest in the premises in dispute from transferors who were themselves unlawful transferees u/s 15, as it stood before the amendment, and who could not claim to be tenants by virtue of that section. In the present case, the petitioner claims under the second respondents who were lawful sub-tenants of the premises in dispute and who, according to the petitioner, were in the same position as a tenant u/s 15 as it stood before the amendment. Now, a lawful sub-tenant like the second respondents, while he is a sub-tenant in relation to the owner of the premises, is also a tenant in relation to the head-tenant. The relations between the head-tenant and the sub-tenant are not different from the relations between a landlord and a tenant. Both the relations are governed by the provisions of the Rent Act. In matters such as fixation of rent or recovery of possession of the premises, the tenant in relation to the sub-tenant has the same rights and obligations as the landlord in relation to his tenant. More than one category of sub-tenants are lawful tenants under the Rent Act. One category consists of those sub-tenants who had derived their title under tenants before the commencement of the Rent Act. Another category is the one to which the present second respondents belonged; it consists of the sub-tenants of

those tenants who are the lessees of buildings belonging to Government or local authorities. The second respondents in this case were admittedly the tenants of the first respondents and the question is whether the second respondents were not covered by the word "tenant" which was used in section 15, as it stood before the amendment, and which has been used in sub-sections (1) and (2) of section 15 as it stands at present. The Courts in the cases referred to above were not required to deal with such a question.

12. In my view, there are sound and indeed compelling reasons for holding that the word "tenant" in section 15 includes a lawful sub-tenant. The meaning of the word "tenant" in section 15 was considered by the Supreme Court In Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, . A majority of the Court held that the tenant u/s 15 means a contractual tenant. With reference to sub-section (1) of section 15 Mr. Justice J. C. Shall, delivering the judgment of the majority, said (p. 425):

By clause (1) of section 15 all transfers and assignments of interest in the premises and sub-letting of promises, by tenants are subject to any contract to the contrary, made unlawful. The clause however saves contracts to the contrary and to be effective can operate only in favour of contractual tenants. A statutory tenant having no interest in the property, it was plainly unnecessary to prohibit transfer of what was ineffective. Nor can there be letting of the premises by a statutory tenant, for letting postulates a transfer of the right to enjoy property made for a certain time, express or implied, in consideration of price paid or promised, and a statutory tenant has merely a personal right to resist eviction. Section 16 (1) therefore applies only to contractual tenants.

After pointing out that sub-section (2) of section 15 is in terms an exception to sub-section (1), his Lordship went on to observe (p. 425):

The exception clause could manifestly not apply to statutory tenancies when the principal clause applied only to contractual tenancies. The effect of the clause is to validate alignments, transfers and sub-tenancies granted by contractual tenants, despite the prohibition contained in sub-section (1) or even in the contract of tenancy, and this validation is effective, notwithstanding any judgment, decree or order of a Court," Thus the[Block quote error] reason why, according to the Supreme Court, the word tenant in section 15 means only a contractual tenant is that a contractual tenant, in the absence of the prohibition contained in sub-section (1) of that section, is normally entitled to transfer his leasehold interest by sub-lease, assignment or otherwise, whereas a statutory tenant has no transferable right in the premises occupied by him. Now, a right to transfer the leasehold interest can, in the absence of the prohibition contained in sub-section (1) of section 15, be exercised not only by a contractual tenant but also by a contractual sub-tenant. This clear from the terms of clause (j) of section 108 of the Transfer of Property Act. That clause lays down that, in the absence of a contract or local usage to the contrary,

"the lessee may[Block quote error] transfer absolute 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.

Now, it is obvious that the Legislature, in enacting section 15 of the Bombay Rent Act, could not have intended that a contractual tenant should be prohibited from transferring his leasehold interest, but that a contractual sub-tenant should be at liberty to do so. It must, therefore, follow that the word tenant in section 15, both before and after its amendment, includes a contractual subtenant like the second respondents and that the petitioner as the sub-tenant of the second respondents can lawfully claim the protection of sub-section (2) of section 15.

13. It appears to me that the correctness of the above conclusion is borne out by another consideration. If I were to accept Mr. Banaji's argument and hold that the second respondents, being sub-tenants of the premises, were not tenants u/s 15 of the Act the petitioner would still be a lawful subtenant of the premises without being required to depend upon the protection of sub-section (2) of section 15. This is because, on the supposition that the second respondents were not tenants u/s 15, they were not subject to the prohibition contained in that section, and were entitled under the terms of clause (j) of section 108 of the Transfer of Property Act to grant a valid sub-lease to the petitioner. Thus, if the second respondents are held not to be tenants u/s 15, the result would be that the petitioner would be a lawful sub-tenant of the premises, without being required to rely on sub-section (2) of section 15 and can, therefore, claim to have become the tenant of the first respondents u/s 14 on the determination of the second respondents" tenancy.

14. I must accordingly hold that the word tenant in section 15 of the Bombay Rent Act means a contractual tenant as well as a contractual subtenant whose sub-lease is valid under the Act. It follows that sub-section (2) of section 15 protects a transferee, whether by way of a sub-lease, assignment or otherwise, of a contractual tenant as well as of a lawful contractual subtenant. The petitioner is, therefore, entitled to the protection of sub-section (2) of section 15, provided he was a sub-tenant and not merely a licensee of the second respondents.

15. As mentioned earlier, the Appellate Bench of the Small Cause Courts has given no finding on whether the learned trial Judge was right in his conclusion that the petitioner was a licensee and not a sub-tenant of the second respondents. Mr. Nariman urged that, since the Appellate Bench has not considered that question, I should myself consider and decide it. He argued that the relevant facts are hardly in dispute and that the legal position is now clear from the decisions of this Court in Aninha D"Costa Vs. Parvatibai M. Thakur, and Sohanlal Narayandas v. Laxmidas 1966 Mh. L. J. 649 = (1963) 68 Bom. L. R. 400. Mr. Nariman further pointed out that, despite a stay order obtained by the petitioner from the trial Court, he has lost possession of the premises on account of a typing error in the stay order, and Mr. Nariman therefore urged that the final decision of the suit should no longer be

delayed. I am of the view that, since some contested questions of fact are likely to be involved, the question whether the petitioner was a sub-tenant or licensee of the second respondents should be decided by the Appellate Bench of the Small Cause Court. It would, however, be appropriate under the circumstances of the case to give a direction to the Appellate Bench to dispose of the case at a very early date.

16. In the result the judgment and decree passed by the Appellate Bench of the Bombay Small Cause Court is set aside, the appeal before the Appellate Bench is restored, and the Appellate Bench is directed to dispose of the appeal after hearing the parties on the surviving question mentioned above. The Appellate Bench will dispose of the appeal, as far as possible, within two months of the receipt of this order.

17. The first respondents will pay the petitioner's costs of this petition. In assessing costs, advocate's fees will be allowed at Rs. 500.

18. For the first respondents Mr. Rele says that at present the premises in dispute are in the occupation of the first respondents as well as one F. Buharivala. By consent it is ordered that subject to the above statement of Mr. Rele the interim injunction granted by this Court on August 2, 1966, shall continue to be operative during the pendency of the appeal before the Appellate Bench of the Bombay Small Cause Court.