
Tejoomal Lakhmichand Vs M.J. Talegaonkar and Others

Suit No. 604 of 1974

Court: Bombay High Court

Date of Decision: Feb. 4, 1980

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 " Section 28, 5(11)#Civil Procedure Code, 1908 (CPC) " Order 23 Rule 1, 11#Companies Act, 1956 " Section 588#Limitation Act, 1963 " Article 65, 27#Transfer of Property Act, 1882 " Section 105, 5

Citation: AIR 1980 Bom 369

Hon'ble Judges: Bharucha, J

Bench: Single Bench

Advocate: P.L. Hain and I.M. Chagla, for the Appellant; Parsarampuria, Talegaonkar, M.C. Shah and Dave, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. In June 1950 the Plaintiffs purchased from its then landlords an immovable property with a building thereon situated at Hamam Street, Bombay.

At that time the Bombay Zionist Association was shown as a tenant in respect of a part of the second floor of the building (hereinafter called "the

said premises"). When the plaintiffs sent letters of attornment to the various tenants in the building, the letter of attornment addressed to the

Association was signed by its then Secretary. In March, 1964 the Plaintiffs terminated the tenancy of the Association and filed a suit against it in the

Court of Small Causes at Bombay for its eviction. In the written statement filed by the Association in that suit it was contended that the Association

was an unregistered association and that the suit as filed against it was not maintainable. The plaintiffs then sought an amendment of the plaint so as

to make the suit representative in character. The amendment was not allowed. The plaintiffs filed a revision application against the order disallowing

the amendment, which was dismissed. The plaintiffs withdrew that suit on 14th November, 1973.

2. The plaintiffs filed this suit on 23rd April, 1974. Defendant No. 1 herein is impleaded as representing himself and all other members of the

Association. Defendants Nos. 2 to 13 are parties who have been put in possession of portions of the premises by the Association, while retaining

for itself some portion thereof. It is contended in the plaint that, the Association being an unregistered body, no tenancy in law could have been

created in its favour and the purported tenancy recognised by the plaintiffs without knowledge of the real status of the Association is void and not

binding on the plaintiffs. In regard to the other defendants it is contended that, since they claim through the Association, they are trespassers in

respect of the particular portions of the premises in their occupation.

3. Upon the contentions raised in the written statements, issues have been framed which I proceed to consider.

4. The first plaintiff was examined and he deposed to the facts mentioned in the plaint. He identified the defendants in respect of their occupation of

particular portions of the premises. In cross-examination by counsel for defendant No. 1, the first plaintiff stated that he came to know that the

Association was an unregistered association in the course of the proceedings in the Small Cause Court. He said that after the Small Cause Court

suit had been withdrawn he had, in 1971, asked the Association to give him a list of the members of its committee but that he had not obtained that

list till 1973. He was asked why he had accepted rent from the members of the Jewish community after it came to his knowledge that the

Association was unregistered. He replied that he ""accepted compensation because the Association was occupying and using the premises and this

was not a charity house."" Defendant No. 1 led no evidence. The other defendants examined themselves to show what portions of the premises

were in their occupation and when they entered into such occupation. Upon this aspect there is no dispute.

5. It was contended by Mr. Parsarampuria, learned counsel for defendant No. 1, that this court had no jurisdiction to entertain and try the suit. Mr.

Parsarampuria's submission was, in his own words:--

In view of the association having been shown tenant admittedly in para 2 of the plaint and the plaintiff having accepted the attornment of the

Association as a tenant, whether the association is a legal tenant or not can be only decided by Small Cause Court u/s 28 of the Rent Act.

Mr. Parsarampuria relied upon various authorities in support of this submission which, in my view, have no application to the facts of this case; one,

namely, *Mehersingh Sethi v. Khurshed Satarawalla*, (1954) 56 Bombay LR 540 actually goes against him. The question of the ambit of Section 28

of the Bombay Rents, Hotel and Lodging House Rates Control Act was considered therein. A passage may be reproduced, it is as under:--

But the test to be applied when considering the Bombay Rents, Hotel and Lodging House Rates Control Act is entirely different. The question

there is:--What is the nature of the suit; what are the questions to be determined; and if the nature of the suit is that of a suit relating to the recovery

of rent or possession by landlord and tenant, or it relates to any question that arises under the Act, then u/s 28 there is an express prohibition

against Courts other than the named court trying the suit or determining that question. Therefore, applying that test to the matter before us what we

have to ask ourselves is, does this suit involve any question which can solely be determined by the special court?

That jurisdiction has to be decided upon the averments in the plaint, now needs no authority. The averment in the plaint in suit is that the members

of the Association were the plaintiffs licensees, that the licence had been terminated and that they had no right to continue to use and occupy the

premises. In so far as the other defendants are concerned, the plaint avers that they claim through the Association and that, therefore, they are

trespassers. Clearly then, upon the plaint, no question arises for decision that falls within the ambit of Section 28. Consequently, this court has

jurisdiction to entertain and try this suit,

6. It was contended by Mr. Parasrampuria that the suit was barred by res judicata because the plaintiffs had filed and withdrawn the suit against

the Association in the Small Cause Court. In that suit it had been averred, upon the basis of the plaintiffs' then knowledge, that the Association was

their tenant; in this suit it is averred that, the Association being unregistered it never acquired the character of a tenant and that the occupation by its

members had been as licensees, which licence had been terminated. The issues that arose for determination in the earlier suit are different from the

issues herein. This suit is not, therefore, barred by or upon the principles of res judicata.

7. This brings me to the real question that arises for determination in the suit, namely, can an unregistered association be a tenant? Mr. Dave,

learned counsel for defendants Nos. 2 to 5 and 7 to 13 relied upon the provisions of Section 5 of the Transfer of Property Act which states that

transfer of property means an act by which a living person conveys property to one or more living persons and provides that the words "Living

person" as used in that section include an association or body of individuals, whether incorporated or not. In Mr. Dave's submission, therefore, an

unregistered association can acquire a tenancy. Mr. Parasrampuria relied upon Section 588 of the Companies Act. That section falls within Part X

of the Companies Act which deals with the winding up of unregistered companies. u/s 582 an unregistered company includes an association which

consists of more than 7 persons. u/s 588 the court has power in winding up an unregistered company to direct that the immovable property

belonging to it or held by trustees on its behalf would vest in the Official Liquidator. In Mr. Parasrampuria's submission, it was clear from this that

an unregistered association could hold immovable property and could, therefore, be a tenant. Consequently, in the submission of Mr. Dave and

Mr. Parsarampuria, the Association was a tenant of the plaintiffs in respect of the premises.

8. Mr. Hain, On the other hand, canvassed a proposition which I believe is the correct one. Under the terms of Section 105 of the Transfer of

Property Act, a lease of immovable property is, to cull but the essentials, the transfer of a right to enjoy such property for a certain time in

consideration of a price paid or promised or of money or other thing of value to be rendered periodically or on specified occasions to the

transferor by the transferee, who accepts the transfer on such terms, Patently, a lease is a contract whereunder the transferee accepts certain

obligations. The transferee, or lessee or tenant, must, therefore, be one who is capable of contracting. An unregistered association is not a legal

entity and is not so capable. Mr. Hain relied upon a passage in Halsbury's Laws of England (Vol. 23, III Edn. p. 425, para 1017) wherein it is

stated that a lease cannot be granted to an association which, being unincorporated, has no legal entity. The paragraph goes on to state that a lease

cannot be granted to the members of an unincorporated association from time to time nor can a lease be granted to all the persons who, at the time

when it was executed, were members of the association where no one had himself undertaken, or authorised anyone on his behalf to undertake the

obligations imposed upon a lessee. The passage in Halsbury refers to the judgment in Jarrott v. Ackerley, (1915) 113 LT 317. The relevant

passage from the judgment of Eve, J. reads:--

I am certainly of opinion that the under-lease purports to be made to persons who have no legal status. It is made to a mere aggregate of

individuals. It is said that it was made to all the persons who, at the time when the under-lease was executed, were members of the society. No

one has himself undertaken, or authorised any one on his behalf to undertake, the obligations which are imposed upon: a lessee. It is contended

that where there is a body consisting of several hundred persons, who have given no authority to bind them, the execution of a lease by the lessor

operated to render each member of the body liable under the lease. There was no execution of the lease by any lessee, but yet all are to be bound

by the lessee's covenants. It is suggested that a lessee by executing a lease to several hundred lessees can bind each by all the obligations thereby

imposed. I think that such a contention is wholly untenable, and that there never was an under-lease at all. Then it is said that, at all events, there

was an agreement for an under-lease. Agreement involves consensus. Where is the consent of the then members of the society to any lease? Is it to

be inferred from the action of Dawson in executing the counterpart to the lease? He had no authority whatsoever to bind the members of the

society.

9. No evidence whatever was led on behalf of defendant No. 1, There is, therefore, no evidence on record to suggest that the tenancy was taken

in the name of some individual members for the Association, or on behalf of all the members of the Association at the time the tenancy was created

who undertook the lessee's obligations to the lessor, or on behalf of the members of the Association from time to time or that they undertook the

lessee's obligations. In para (illegible) of defendant No. 1's written statement, it is alleged that when the then Secretary of the Association signed

the letter of attornment, he did so for the benefit of the Association and its members; there is no evidence of this.

10. Consequently, it is clear that no valid tenancy was created in favour of the Association or its members; that they were using the premises

merely with the permission of the landlords; that that permission came to an end with the termination of the Association's purported tenancy; and

that the Association's members were thereafter trespassers in the premises liable to be evicted.

11. Mr. Parasrampuriah drew my attention to para 8 of the plaint where it has been stated that the members of the Association were occupying the

premises as licensees of the plaintiffs. It was Mr. Parasrampuriah's submission that this licence had not been terminated and the members of the

Association had become protected licensees. What is averred in para 8 of the plaint is that, since there was no valid tenancy in favour of the

Association, its members had been occupying the premises with the plaintiffs' permission. When, in 1964, the plaintiffs served on the Association

the notice terminating tenancy the plaintiffs terminated that permission. Consequently, Mr. Parasrampuriah's contention that the Association's

members are protected licensees in respect of the premises cannot be sustained.

12. Inasmuch as the other defendants' claim to remain in occupation of those portions which they use through the Association, they are, as much,

trespassers therein, liable to be evicted.

13. Mr. Dave, learned counsel for defendants NOS. 1 to 5 and 7 to 13, and defendant No. 6 appearing in person, however, contended that they

were entitled to use the particular portions of the premises in their occupation by reason of their adverse possession thereof for more than 12 years

prior to the filing of the suit. That they were in occupation of these portions for 12 years preceding the filing of the suit is not in dispute. The

question is : were they in such occupation adversely to the plaintiffs?

14. Under the provisions of Article 65 of the Schedule to the Limitation Act, the period of limitation for a suit for possession of immovable

property based on title is 12 years, and the time from which the period begins to run is from the time when the possession of the defendant

becomes adverse to the plaintiff. Section 27 of the Limitation Act provides that upon the determination of the period limited to a person to institute

a suit for possession of immovable property, his right to such property stands extinguished. In other words, whereas in other cases limitation

destroys the remedies of the plaintiff while keeping his right alive, in the case of immovable property limitation destroys both the remedy and the

right.

15. It was around 1978 that defendants Nos. 2 to 13 amended their written statements to plead adverse possession, and that in the alternative to

their original case that they occupied lawfully under the Association which was the tenant of the premises.

16. In The State Bank of Travancore Vs. Aravindan Kunju Panicker and Others, the test of adverse possession has been set out thus:--

A permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title

to the property to the knowledge of true owners for a period of twelve years or more.

17. There is in the instant case no evidence to show that defendants Nos. 2 to 13 asserted a hostile title to the portions of the premises in their

occupation or that they did so to the knowledge of the plaintiffs at any time prior to the granting of the amendments to their written statements in

1978,

18. Mr. Dave, however, relied upon several earlier judgments of which only one, a Supreme Court judgment may be referred to. That is the

judgment in Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, This was a case in which the then

Government of Bombay had granted to the predecessor of the Municipal Corporation of Bombay a grant to certain land. The land was sought to

be assessed by Government. It was held that the grant was invalid and that the possession of the Corporation was that of a person having no legal

title but nevertheless holding possession of the land under the colour of an invalid grant in perpetuity and free from rent; such possession, not being

referable to any legal title, was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor

in title of the Corporation took possession of it under the invalid grant. It will be noted, first, that the Corporation did not have to pay rent, and,

secondly, that the Court held that the Corporation's possession was prima facie adverse to the legal title of the Government.

19. In the instant case, it is in evidence that defendants Nos. 2 to 13 paid compensation regularly to the Association prior to the filing of the suit. In

their written statements these defendants have claimed that they were occupying the portions in their possession lawfully, through the Association,

which was the tenant of the premises; their claim of adverse possession is only in the alternative. It is quite clear that their possession of the portions

of the premises in their occupation was not adverse to the legal title of the owners of the building at least not until the amendments were allowed in

1978. Defendants Nos. 2 to 13 have not asserted a title adverse to that of the landlords for more than 12 years. The plaintiffs' right to the portions

of the premises in the occupation of defendants Nos. 2 to 13 and their remedy in that behalf have not been extinguished. The claim made by

defendants Nos. 2 to 13 to adverse possession does not succeed.

20. I answer the issues raised on behalf of the defendant No. 1 as under:--

Issue No. 1: In the negative, this court has jurisdiction.

Issue No. 2: In the negative; the suit is not barred. (No argument based on Order 23, Rule 1 of the CPC was advanced).

Issue No. 3: Not pressed.

Issue No. 4: In the affirmative; the defendants have no right, title or interest.

Issue No. 5: In the negative.

Issue No. 6: --do--

Issue No. 7: --do--

Issue No. 8: Not pressed.

Issue No. 9: In the affirmative,

Issue No. 10: Not pressed.

I answer the issues raised on behalf of the other defendants thus:--

Issue No. 1: In the affirmative.

Issues Nos. 2 & 3: Not pressed.

Issue No. 4 (1): In the negative.

(2) : Not pressed.

(3) : In the negative.

Issue No. 5 : Not pressed.

Issue No. 6 : Not pressed.

Issue No. 7 : Does not arise in view of the deposit with the Court Receiver.

21. There shall, accordingly, be a decree in favour of the plaintiffs and against the defendants in terms of prayers (a), (b) and (c) of the plaint. As

regards arrears, counsel for the plaintiffs, defendant No. 1 and defendants Nos. 2 to 5 and 7 to 13 and defendant No. 6 in person are agreed that

all amounts deposited with the Court Receiver be handed over to the plaintiffs against arrears of compensation and mesne profits up-to-date.

Decree also in terms of prayer (d) as against defendant No. 1.

22. The facts of this case are unusual. The Association has been in occupation of the premises for many years and till only a very few years back

both the landlords and the Association assumed that the Association was a tenant. In these circumstances, the proper order as to costs in this

proceeding is:--

No order as to costs.

23. Mr. Parasarampuria, for the reasons I have just outlined, submitted that defendant No. 1 should be given a long time to vacate. The submission

is justified. I direct that the decree for possession against the defendants shall not be executed till 1st March, 1981.

24. The Court Receiver is discharged without passing accounts. He shall hand over to the plaintiffs, after deduction of his costs, charges and

expenses, all sums lying with him to the credit of this suit towards their claim for arrears and mesne profits up-to-date. The Court Receiver is

directed to hand over possession of the portion of the premises of which he has taken possession to the parties from whom possession of each

individual portion was taken. The Court Receiver is directed to act On the certified copy of the minutes.

25. Suit decreed.