

M/s. Orient Distributors

Vs

Bank of India Ltd., and Others

Civil Appeal No. 1342(N) of 1969

(CJI Y. V. Chandrachud, V. D. Tulzapurkar JJ)

19.01.1979

JUDGMENT

TULZAPURKAR, J. -

1. This appeal by special leave directed against the judgment and order dated September 10, 1968 of the Madras High Court in Second Appeal No. 576 of 1966, raised a short question as to whether the appellants are entitled to insist upon the use of the disputed passage in the building (bearing No. 26, Errabalu Chetty Street) opening into Errabalu Chetty Street as an integral part of their lease in respect of the first floor portion of the building.
2. The aforesaid question arises in these circumstances. The entire premises (leccots buildings) situate at 26, Errabalu Chetty Street-an important commercial thoroughfare and main bazar for hardware and machinery in Madras-originally belonged to the Chrome Leather Company Pvt. Ltd. (respondent 2). On June 26, 1961 the second respondent sold the front portion of the premises inclusive of its entire frontage on Errabalu Chetty Street to Bank of India Ltd. (respondent 1) for a handsome price. The appellants a partnership firm carrying on business in various types of electrical machinery, have since April 1, 1959, rented a godown on the ground floor and a portion of the premises on the first floor of the building on the back side from the second respondent. The access to the godown was always from Vanniar Street, a side land and from the godown the appellants could come up to the staircase leading to their first floor premises. It, however, appears that by way of direct access to their tenement on the first floor the appellants were using a walled passage (10 ft. x 65 ft.) on the ground floor opening into Errabalu Chetty Street (hereinafter referred to as "the disputed passage"). Admittedly, this disputed passage formed part of that front portion of the building which was purchased by the first respondent from the second respondent and the sale deed in favour of the first respondent not only did not make reservation of any kind in respect of the said passage but expressly permitted the first respondent to raise structures in the portion of the property conveyed without led or hindrance by the second respondent. The first respondent decided to demolish the portion of the building purchased by them and construct a new one at an estimated cost of over 25 lakhs of rupees; this proposal involved the demolition and closure of the main entrance of the premises from Errabalu Chetty Street which gave access to the appellants and other tenants to their respective tenements on the rear side. The appellants objected to the closure of the main entrance and filed a suit for permanent injunction restraining the respondents from raising any wall or putting up other construction or causing any obstruction to their use and enjoyment of the disputed passage giving access to their tenement on the first floor. This relief of injunction was sought on two grounds - (a) that the use of the main entrance abutting Errabalu Chetty Street and the disputed passage giving access to their tenement on the first floor formed part of their demise and also constituted an essential element of contract of tenancy, and (b) that the use and enjoyment of

this passage was an amenity under the Madras Buildings (Lease and Rent Control) Act, 1960 enforceable against the second respondent or their successors in interest. The suit was resisted by the respondents on the ground that the main gate and the disputed passage did not form part of the demise, that the appellants had no right to insist upon the retention of the original passage opening into Errabalu Chetty Street and that they could only insist upon having an alternative access and the second respondent had since after the filing of the suit provided such alternative access from Vanniar Street to all their tenants including the appellants. The claim that the disputed passage was an amenity under the Madras Building (Lease and Rent Control) Act, 1960 was denied. The trial Court dismissed the suit. It held that the disputed passage was not the only means of access leading to the appellant's tenement on the first floor, and that it was neither a part of the demise nor constituted an essential element of the contract of tenancy. It was found in evidence that besides the disputed passage the appellants were using the entrance from Vanniar Street through their godown and further that during the pendency of the suit yet another passage had been provided for by the second respondents to all their tenants including the appellants. The claim to the disputed passage as an amenity under the Madras Buildings (Lease and Rent Control) Act was negatived. Against the dismissal of their suit the appellants preferred an appeal and the learned Additional Judge who heard the same decreed the appellants' suit after coming to the conclusion that the main gate and the disputed passage formed part of the demise and also constituted an essential element of the contract of tenancy. In the second appeal that was preferred by the Bank of India Ltd. The High Court reversed the finding of the lower appellate Court and restored the decree of the trial Court. In other words, the appellants' suit was dismissed.

3. Counsel for the appellants strenuously urged before us that the High Court in second appeal ought not to have interfered with a finding of fact that had been recorded by the lower appellate Court on appreciation of evidence. He pointed out that after all the plea of the appellants was that the disputed passage formed part of the demise or tenancy obtained by them from the second respondents in respect of the tenement on the first floor of the building and on the material on record the first appellate Court which was the final court on facts had come to the conclusion that the disputed passage was the subject-matter of the appellants' tenancy, a finding which should have been accepted as correct. Alternatively he urged that the High Court should have held that the user of the disputed passage was by way of an easement (of right of way) granted by the second respondent to all their tenants including the appellants and as such was enforceable against their successors in interest by an injunction. It is not possible to accept either of his contentions for reason which we shall presently indicate.

4. It is true that on the plea raised by the appellants a question did arise as to whether the use of the main gate abutting Errabalu Chetty Street and the disputed passage giving access to the appellants' tenement on the first floor formed part of the demise granted by the second respondent to them at the time of the creation of tenancy in 1959. But, admittedly, the tenancy had been created orally and there being no document pertaining thereto the question depended upon the inference to be drawn from the facts and surrounding circumstances obtaining at that time. In our view, therefore, the High Court was right in taking the view that the question was not purely a factual one but one relating to the propriety of the legal conclusion that could be drawn on the basis of proved facts. The lower appellate Court principally relied upon two facts which emerged from the documentary evidence on record consisting of the correspondence between the parties and business advertisements given by the appellants : (1) in the correspondence as well as in the advertisements given by them the appellants had been uniformly giving their address as 26, Errabalu Chetty Street and they had also put their signboard on the Errabalu Chetty Street frontage, and (2) at the commencement of their tenancy the disputed passage was the only passage in use giving access to their tenement on the first

floor. From these facts the lower appellate Court drew the inference that the disputed passage will have to be regarded as a part of the appellants' tenancy. The High Court, in our view, has rightly come to the conclusion that from these proved facts the inference drawn by the lower appellate Court could not legally arise. If the entire building bore the number 26, Errabalu Chetty Street in the Corporation records then it is obvious that all the tenants occupying different portions of the building including the appellants would be giving the same address, namely, 26 Errabalu Chetty Street in their correspondence or advertisements and therefore, mentioning of this address by the appellants in their correspondence and advertisements or their having hung a signboard on the Errabalu Chetty Street frontage would not support and inference that the passage was part of their tenancy; similarly since the passage was, as a matter of fact, being used in common by the then owner (respondent 2) as also by several tenants in order to reach their respective portions it would not be correct to infer that the passage formed the subject-matter of the tenancy of any particular tenant or of each one of the tenants. In this view of the matter the High Court, in our view, was right in observing that the effect of the aforesaid facts was only this that the appellants were entitled to have access to their tenement through the disputed passage, not as a part of or constituting the subject-matter of the demise but because the tenement must have an access. We agree with the High Court that the finding of the lower appellate Court on the basis of which it granted relief of injunction to the appellants could not be sustained.

5. After negating the appellants' case that the disputed passage formed the subject-matter of the appellants' demise, as also the case that it was an essential element in the contract of tenancy, the High Court went on to consider whether the appellants would be entitled to the use of the disputed passage as an easement of necessity, for admittedly, real property had been severed by the grant of a portion it by the second respondent to the first respondent. In this behalf two facts appear clear from the sale deed in favour of the first respondent; in the first place it did not make any reservation in respect of the passage in favour of the second respondent (the lessor of the appellants), and secondly, it expressly permitted the first respondent to raise structures in the property conveyed without let or hindrance by the second respondent. In such a case it is obvious that if there be no other access whatsoever to the portion of the building retained by the second to the retained portion through the disputed passage as an easement of necessity but on admitted facts the second respondent had provided to their tenants alternative access to their respective tenements through Vanniar Street. In view of this, the High Court rightly concluded that there was no question of the appellants having the use of the disputed passage as easement of necessity. The aspect that the alternative access is not as convenient or advantageous as the entrance from the Errabalu Chetty Street would be irrelevant.

6. As regards counsel's contention that the user of the disputed passage should be regarded as by way of an easement of a right of way granted to the appellants and other tenants by the second respondent, it must be stated that no such plea or case was made out by the appellants in any of the courts below. Moreover, there is no material on record from which such a grant of easement to all the tenants could be inferred. On the contrary from the fact that the disputed passage in question was being used in common by the previous owner (second respondent) as also by all the tenants of the building clearly suggests that what was granted by the second respondent to the appellants and all other tenants was a bare licence to use the passage with a view to have access to their respective tenements, without any interest being created in their favour over such common passage. The contention raised is, therefore, devoid of any substance.

7. The appeal is accordingly dismissed with costs.

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