

Arjun Khiamal Makhijani and Others

Vs

Jamnadas Tuliani and Others

Civil Appeal Nos. 2826 and 2827 of 1989

(Rangath Misra, M. N. Vankatachaliah JJ)

09.05.1989

JUDGMENT

1. Special leave granted.

2. Civil Appeal No. 2827 of 1989 (arising out of SLP No. 14890 of 1988) is by defendants 1, 2 and 5 who are some of the tenants of a residential premises consisting of two bedrooms in the first floor, a garage and a store-room in the ground floor on the Bhulabhai Desai Road, Bombay having approximately an area of 1300 sq. ft. Defendants 3 (since dead) and 4 were also tenants along with the aforesaid defendants in respect of the premises. Civil Appeal No. 2826 of 1989 (arising out of SLP No. 12298 of 1988) is by defendant 6 who was added at the instance of the landlord by order dated March 21, 1975, to the eviction proceeding when he laid claim to be a subtenant in respect of the garage with effect from April 1, 1967.

3. On April 8, 1967, the plaintiff-landlord issued notice to the tenants terminating the tenancy on the ground of default in the matter of payment of rent and change of user. The tenants did not reply to the notice and on June 18, 1967 the suit for eviction was filed on the two grounds stated in the notice. Subsequently when defendant 6 was added to the suit a further ground on the basis of unauthorised sub-letting was additionally raised. During the pendency of the proceeding for eviction defendant 6 filed a suit against defendants 1 to 5 on the basis that by agreement dated April 1, 1967 he had been included as sub-tenant in respect of the garage and applied for injunction restraining defendants 1 to 5 from dispossessing him. Since the landlord was not a party to the said suit, it is indeed unnecessary to advert to the chequered career of that litigation and another action which he too instituted.

4. The defendants 1 to 5 filed two written statements one on October 16, 1967, and again on March 29, 1975. On the first occasion they denied that they were defaulters, they also disputed the allegation of change of user. On the second occasion which was an event after defendant 6 was added to the case, they pleaded that defendant 6 had never been put into possession of any portion of the premises and that he was merely a friend of the son of defendant 1 and was carrying on business in a part of the garage in question for a short period and has no right nor was in possession by the time the allegation of sub-letting had been made. Defendant 6 alleged that there was no change of user of the premises as the garage and the store-room were being used for storing and workshop purpose only but he did not definitely indicate whether he was a sub-tenant.

5. The City Civil Court which was the original forum of the litigation decreed eviction as also the claim for arrears of rent and future mesne profits. He found that defendants 1 to 5 were not tenants and has failed to pay the arrears in spite of service of valid demand notice and had, therefore, made

themselves liable for eviction under Section 12 (3) (a) of the Bombay Rent Act. He negatived the plea of change of user but he accepted the stand of the landlord that a part of the premises had been sublet contrary to law. Two appeals had been taken against the original order - one by three of the tenants and the other by defendant 6. The Additional Chief Judge who heard the appeals by a common judgment dated June 9, 1987 dismissed both by upholding the two grounds found against the defendants by the trial Judge.

6. Two separate writ petitions under Article 227 of the Constitution were filed before the High Court against the common appellate judgment - one by defendants 1, 2 and 5 and the other by defendant 6. No attempt was made to bring the heirs of defendant 4 who had died during the pendency of the appeal on record and they were not impleaded in the proceeding before the High Court in the writ petition by the tenant, but in the tenant's writ petition, defendant 4 in spite of the fact that he was long dead was added as a respondent.

7. The High Court dealt with both the writ petitions together and by a somewhat unusually lengthy judgment dismissed both. These two civil appeals - one by defendants 1, 2 and 5 and the other by defendant 6 are directed against that common judgment of the High Court.

8. During the pendency of the writ petitions, the Bombay Rent Act was amended by Maharashtra Act 18 of 1987 and the amendments came into force with effect from October 1, 1987. Attempt was made by the defendants to rely upon three of the provisions of the Amending Act. By Section 11 of the Amending Act sub-section (3) of Section 12 of the Principal Act was substituted. The tenants claimed advantage of the amending provisions and pleaded that it had retrospective effect. Default in payment of rent if paid as envisaged in the new provision, therefore, could not any longer form the basis for claiming eviction. Reliance was also placed on Section 25 of the Amending Act which contained the savings clause and provided that a case would not be deemed to have been finally disposed of, if in relation to that suit or proceeding, any appeal or proceeding was pending. On behalf of the tenants it was contended that he was in possession on February 1, 1973 as a sub-tenant and became entitled to the benefit of amended Section 15 (2) of the Bombay Rent Act which came into force also with effect from October 1, 1987.

9. The High Court found that the tenants were not entitled to the benefit of the amendment to Section 12 (3) of the Act. It was found that defendant 6 was not a sub-tenant in possession on the relevant date and without expressing any view whether the appeal had abated, the High Court held :

In these circumstances, I would rather not like to decide the question whether the appeal in the lower court filed by the present petitioner had abated or not, particularly because this writ petition is being dismissed on merits. I assume that it had not abated. This, however, does not change the position that the eviction decree passed against the present petitioner, on account of the default on the part of defendant 1 to 5 in payment of rent, cannot be interfered with in this petition.

10. Coming to defendant 6's writ petition, the High Court held that defendant 6 was not in actual possession on February 1, 1973 which was necessary under Section 15 (2) of the Act and he at all came to possession with effect from October 24, 1974. The High Court found :

In the context of the provisions of the Rent Act, as it then stood, he had to plead and prove in the court that the position of sub-tenancy became lawful, because of the consent received by him or by defendants 1 to 5 for creation of sub-tenancy. The

avertment of consent by the landlord to such tenancy was, therefore, the most crucial prerequisite and if such a prerequisite is not pleaded in the written statement, the person claiming lawful sub-tenancy is out of court. Defendant 6 has not pleaded it; he should not have been allowed to lead any evidence etc. prove it, because he has not pleaded it.

11. The High Court noticed the change in the stand of defendant 6 before it and in the absence of positive plea of sub-tenancy did not permit defendant 6 to take advantage of the amendment. The High Court found that the appeal by defendant 6 against the eviction was not maintainable as he had not impleaded defendants 1 to 5 under whom he claimed sub-tenancy. It rejected the plea of defendant 6's counsel that defendant 6 wanted no relief against defendants 1 to 5 and hence they were not necessary parties. The High Court gave time to the tenants till July 21, 1989 to vacate subject to the undertaking by affidavit that no outsider would be inducted and possession shall be delivered on or before July 23, 1989.

12. So far as the tenants are concerned, the only material aspect is to consider whether the benefit of the amendment in Section 12 (3) is available to them. The amendment became operative from October 1, 1987 and the default related to a period beyond a score of years in the past. On the facts as appearing on the record, even if the amendment was retrospective the tenants were not entitled to the benefit not being strictly covered by what is envisaged in the amendment. The Bombay High Court has taken the view that the provision is not retrospective and special leave petitions against such judgments have been dismissed in this Court. It is represented that in some other cases special leave petitions have been entertained. We do not propose to examine that aspect of the matter here as in our view on facts the benefit is not available as the rent had not been paid on demand or on the first day of the hearing. On that simple score apart from anything else the tenants made themselves liable to be evicted. There are several other aspects which the High Court has dealt with for supporting the eviction and we do not intend to reiterate them.

13. So far as defendant 6 is concerned, the claimed possession on the basis of an agreement contained in a letter dated April 1, 1967 to which he and the son of defendant 1 were parties. The letter which is Ex. 14 stipulated that the agreement would come into force on April 1, 1967 and terminate on September 30, 1967. Paragraphs 6 and 7 thereof are relevant :

6. That we are entering into this temporary arrangement till we have known each other, and thereafter we will be entering into regular partnership amongst ourselves.

7. that we shall be using your garage temporarily till we find suitable arrangement. In lieu of using your garage you will be paid the compensation of Rs. 100 only per month.

14. The stipulations in the document do not create a sub-tenancy. The tenants were not parties to the arrangement and had pleaded that they were not aware of it. The said arrangement did not blind the tenants in the absence of their consent. The use of the term 'compensation' makes it clear that parties to the arrangement did not even intend to create a sub-tenancy. A sub-tenancy had not indeed been created in favour of defendant 6.

15. Creation of sub-tenancy without the landlord's consent was prohibited under the Act at the time defendant 6 claims to have got into the property. Defendant 6, as found by the High Court, was not in actual possession of the garage on February 1, 1973. That being so, the benefit of Section 15 (2)

of the Act, as amended, is not available to him. Defendant 6's claim to sub-tenancy, therefore, has not rightly been accepted.

16. It is appropriate to point out here that in the appeal filed by defendant 6 against the order of eviction he had not impleaded the other defendants. The High Court is right in its view that the appeal itself was defective and was not maintainable on that score. In the writ petition before the High Court, defendant 6 impleaded the tenants including the dead - defendant 4.

17. Both the appeals are devoid of merit and are dismissed. The respondents shall have their costs in the proceedings throughout.

18. The High Court has granted time till July 23, 1989 for delivery of vacant possession by the tenants to the landlord. We do not intend to interfere with that direction.

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