BOMBAY HIGH COURT

Vinayak Gopal Limaye

Vs

Laxman Kashinath Athavale

(Gajendragadkar and Gokhale, JJ.)

12.03.1956

JUDGMENT

Gajendragadkar, J.

1. These two civil revisional applications along with tour others have been ordered to be placed before a Division Bench because it appeared that they raised a common question of law under Section 6 Sub-section (1) of the Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947). In all these cases, one of the questions which arose for decision in the Courts below was whether the lease in question attracted the provisions of the Rent Act, and naturally the decision of this question depended on the construction of Section 6(1). Section 6 Sub-section (1) provides that, in areas specified in Schedule I, Part II of the Act shall apply to premises let for residence, education, business, trade or storage. If the lease in question can be regarded as falling within the purview of Section 6(1) then the provisions of Part II would apply. If, on the other hand, the lease does not fall within Section 6(1), the provisions of Part II would be inapplicable. All the leases in these cases can be broadly described as building leases, and the decisions under revision disclose a sharp difference of opinion on the question as to whether a building lease can attract the provisions of Section 6(1) or not. We were told that in some districts, and even in the Court of Small Causes at Bombay, there has been a divergence of judicial opinion on this point, and so the learned Advocates who appeared In the six civil revision applications before us attempted to argue the matter on general lines and suggested that we should lay down some general principles which would apply to leases which are sometimes described as building leases. In one set of cases it has been held that an open plot can never be let for residence because unless a building is constructed on the open plot the, purpose of residence can never be served, and so a building lease on this preliminary consideration would he excluded from the operation of Section 6(1) of the Act. On the other hand, some decisions have proceeded on the view that even an open plot can be let for residence if the terms of the lease clearly indicate that the object of the lessor and the lessee was that the plot should be used for a building which should ho let out to tenants

for their residence. There does not appear to he uniformity in the view taken in some of the unreported decisions of this Court; but no decision which binds us has been cited before us on this point and the question can, therefore, be decided by us on the" basis that it is res integra.

2. It is, however, necessary to emphasize at the outset that the question as to whether a particular lease falls within section 6(1) of the Act; or not would always be a question of fact. It would be possible to lay down certain general consideration which would govern the construction of section 6(1), But it would, be difficult, if not impossible and, we apprehend, it would be unwise to lay down any general principles which would apply to the construction of ail leases which can be described in a general way as building leases. A building lease is a lease by the lessor in respect of an open plot, and the lessee under such a lease is expected to build on the open plot. The building thus constructed by the lessee may be used either for residence or for education, business, trade or storage or any other purpose. In dealing with such leases, it would be necessary to remember the legal position regarding the rights of the lessor and the lessee. Section 108(h) of the Transfer of Property Act provides that, in the absence of a contract to the contrary, the lessee may, even after the determination of the lease, remove all things which he has attached to-the earth, which of course includes structures or buildings put up by him. In other words this section contemplates a dual ownership in such cases. The lessor is the owner of the open plot and the lessee who builds a structure on the open plot is the owner of the structure. It is because of the two distinct ownerships vesting in two different individuals of the plot and the building standing on the plot that the construction of section 6(1) of the Rent Act presents some difficulty.. In Narayan Das v. Jatindra Nath this dual ownership which is a special feature of the Indian law of property, has been expressly recognised by the Privy Council and this dual ownership in respect of the two constituents of the property must be borne in mind in dealing with the question of construing section 6(1) of the Act.

3. It is obvious that, before a lease can fall under Section 6(1) and can attract the provisions of Part II of the Act, it must be shown that the subject matter of the lease is "premises" within the meaning of the Act. Section 5 Sub-section (8) defines "premises" as meaning any land not being used for agricultural purposes and any building or part of a building let separately, including the accompaniments or appurtenances mentioned in Sub-clauses (i), (ii) and' (in) of clause (b). An open plot not used for agricultural purposes, therefore, clearly falls within the definition of "premises", and since the building lease is a respect of such an open plot it satisfies the first requirement of section 6(1). Section 6(1) further requires that the premises must have been let for residence, education, business, trade or storage. In other words, the purpose of the lease must be 'one of the five categories indicated in the Sub-section in deciding the question as to what is the purpose of a lease, it would be necessary to consider the lease as a whole and find out the main or dominant purpose for which the lease has been executed. Normally the purpose of the lease

can be determined from the terms of the docriment itself. If the instrument of tenancy specifically and clearly declares the purpose of the lease, there can be no difficulty in deciding whether the lease falls under section 6(1) or not. If the instrument of lease is silent as to the purpose, then it wonldf be permissible to allow evidence aliuade in repaid to the said purpose and the purpose can be determined in the light of such evidence. In such cases, it would be permissible and legitimate for the Court to look at evidence concerning the user of the premises by the tenant in order to determine the purpose of the lease. If the user of the premises by the tenant is otherwise not inconsistent with any of the terms of the lease, an inference about the purpose of the lease may reasonably be drawn from such user. It is, however, necessary that before such an inference -is drawn it must be shown that the user was known to the lessor and had been acquiesced in by him. The en-quity under Section 6(1) would naturally centre on the question as to the purpose, and once the purpose of the lease is determined, the question as to whether section 6(1) is attracted by the lease or not would be automatically resolved. This position appears to be well settled by judicial decisions, vide Dakshinamoorthy v. Thulja Bai, (FB) (B) and *Wolfe v. Hogan*[1]*,*

4. It is urged, however, that the provisions of Part II of the Act affect contractual rights between the lessor and the lessee, and so section 6(1) should he strictly construed in favour of the lessor. On the other hand, it is argued that the Act has been passed with a view to amend and consolidate the law relating to the control of rents and that its main purpose is to grant relief to the needy tenants against the profiteering instinct of the landlords and so its provisions should receive a beneficent construction at our hands. We are prepared to assume that the question as to whether a particular lease falls under Section 6(1) must be decided on a strict construction of Section 6(1) itself, though once it is held that a given lease falls under Section 6(1) the application of the other provisions of the Act in favour of the tenant may proceed on what is generally described as the rule of beneficent construction.

5. It is common ground that Section 6(1) refers to leases executed for five definite purposes. The argument, however, is that the purpose in question must not only be main and dominant, but must be immediate; and since it is impossible to let out an open plot for residence or education immediately a building lease can never fall under Section 6(1). It is obvious that, norm ally speaking, before an open plot can be used for residence or education, the construction of a structure is indispensible. The class, the category, or the quality of such structures would, of course, vary. A modest hut constructed of mud walls with a thatched roof may be used for residence in certain cases; and at the other end one may have modern buildings with well assorted flats furnished with all amenities used for residence. Can it be said that, because a structure of some kind is generally inevitable for human residence, an open plot can never he let for residence within the meaning of Section 6(1)? In our opinion, it is difficult to answer this question affirmatively. If an open plot is let by the lessor to the lessee and the purpose of the

lease is specifically stated to be that the lessee should build a structure on the plot and reside- in it, it would, we think, be impossible to hold that the purpose of the lease is not residence of the lessee. It would all be a question of fact in each case. Even so, we do not think that Section 6(1) can bear the narrow, literal and almost mechanical construction by which leases in respect of open plots can be excluded from Section 6(1) on the preliminary ground that by themselves they are incapable of being used for residence.

6. This narrow and literal construction of Section 6(1) would, in our opinion, lead to the unreasonable' and anomalous consequence that the provisions of Section 6(1) would, by and large, be inapplicable to leases of all open plots. What applies to residence would apply with equal force to education, business or trade. Perhaps open plots may be used for storage without any structure. If the Legislature has included open plots not used for agricultural purposes within the definition of "premises", and if Section 6(1) is intended to apply to premises as defined by the Act including open plots, any construction which virtually excludes open plots from the operation of Section 6(1) cannot in our opinion, be accepted. We do not propose to hold that all building leases in respect of open plots would fall under Section 6(1). All that we intend to hold is that, on a fair and reasonable construction of Section 6(1), a building lease in respect of an open plot cannot be excluded from Section 6(1) solely on the ground that an open plot cannot be used for residence unless it is built upon. We wish to emphasize that the material terms in the leases in regard to open plots would have to be construed in the first instance; the purpose for which the premises have been let under such leases would have to be determined; and if it appears on a consideration of relevant facts that the open plots have been let for any of the purposes mentioned in Section 6(1), it can and should he held that the said leases fall under Section 6(1) and the provisions of Part II would be applicable to them.

7. It is true that, if a building lease is held to fall under Section 6(1), it seems to lead to some unusual consequences; but that is the result of dual ownership which is recognised under the Indian law of property. In such a case, both the open plot and the building constructed on it would b(c) governed by the provisions of the Rent Act. The original lessor who lets the open plot and the lessee who takes the open plot for building purposes would be landlord and tenant inter se, whereas the builder would be the landlord qua the actual occupants to whom be has let the building or parts of the building. The open plot and the building constructed on it both separately and individually fall within the description of "premises" under Section 5(8), and the owners of both the premises can be said to have let their respective premises to their tenants for the purpose of residence, education, business, trade or storage, as the case may be. Where the doctrine of dual ownership is not recognised, the building would, on its completion, vest in the owner of the plot, and this apparent complication would not arise in regard to the lease either of the open plot or of the building constructed on it. But, in our opinion, the conclusion that 'be leases in respect of

both the open plot and the building fall under Section 6(1) cannot be said to be inconsistent either with the provisions of Section 6(1) or with the general law of leases which recognises dual ownership. If on a literal construction of Section 6(1) it is held that an open plot cannot be let for residence, it may perhaps lend to some unreasonable consequences. The lessor can terminate the lessee's rights for valid reasons, and if the rights of the lessee of the open plot are terminated, it would be open to him to remove the structure raised by him, and the exercise of this right by the lessee would immediately put in jeopardy all the protected rights of the occupants of the building who are the tenants of the said lessee. It cannot be disputed that, as soon as a building is constructed on an open plot and is let out for residence by its builder to his tenants, the rights and obligations between the parties are governed by the Rent Act. But the protection given to the tenants in respect of such a building would become illusory if the lessee of the open plot, on determination of his rights, is permitted to take away the structure. Prima facie it appears to be reasonable that, just as the building constructed by the lessee when let for residence, attracts the provisions of the Act, the open plot on which the building is erected for the purpose of letting- it out for residence according to the terms of the original lease should also be regarded as constituting premises let for residence. The right of residence is exercised both in regard to the building and with regard to the open plot on which the building stands. In a sense, the open plot and the building constructed on it are so inextricably joined together that it would be idle to contend that it is only the building which is used for residence and not the open plot. The premises which are let for residence to the actual occupants would, therefore, include, not only the building, hut also the land on which the building stands; and in that sense, when the open plot is let for the definite purpose that a building should be erected on it and it should be let for residence or any other purpose mentioned in Section 6(1), it would be reasonable to held that the open plot itself, is let for one of the said purposes.

8. In support of the literal construction of Section 6(1) of the Act, reliance has been placed on the decision of Edgley J. in *Prafulla Chandra Ghosh v. Shamsuddin*[2], In this case, Edgley J. was called upon to decide whether a lessee in respect of an open land was entitled to the protection of paragraphs 2 and 9 of the Calcutta House Rent Control Order, and he held that, where land is let out on lease and the lessee builds a house on it in terms of the lease, the lessee is not entitled to protection under the Rent Control Order against ejectment. This judgment cannot be of much assistance to us in construing the words used in Section 6(1) for the obvious reason that the word "premises" under our Act expressly includes an open plot not used for agricultural purposes, whereas paragraph 2 of the Calcutta Rent Control Order defined a house as meaning "any building or part of a building or hut let or to be let separately for residential or non-residential purposes". In other words, an open plot was outside the definition of the word "house" and so a lessee of an open plot naturally fell outside the provisions of para 9 of the Order.

9. It was suggested during the course of the hearing of these revisional applications that, if a building lease attracts the provisions of the Rent Act, the occupants of the building would have to be regarded as Sub-tenants within the meaning of Section 15, and their sub-tenancies would fall within the mischief of Section 15 of the Act. We are not impressed by this argument. Section 15 no doubt enjoins upon the tenant not to sub-let or transfer his rights. But the prohibition is in respect of the whole or any part of the premises let to the tenant; and when a builder lets out a building to his tenants, technically he is not leasing out the open plot which has been let to him by his lessor, but he is letting out the structure built by him. If it is permissible to draw a distinction between the open plot which is the subject-matter of the first lease and the building which is the subject-matter of the second lease, then Section 15 may not affect the rights of the actual occupants let in by the builder of the building. No doubt, this distinction may appear to be technical and notional; but, as I have already indicated, some of the unusual features which building leases of this kind disclose are the inevitable result of the doctrine of dual ownership recognised under the Indian Jaw.

10. In this connection, our attention has been invited to the decision of the Supreme Court in Bhatia Co-operative Society v. Patel, (E). This was a case of a building lease executed by the Bombay Port Trust to the lessee for erection of a building. Two agreements had been executed in this case. Pursuant to the first agreement, which was executed on or about the 15th of April 1908, the lessee erected a building on the plot let out to him, which came to be known as the New Sitaram Building. On the completion of the building, an indenture of lease was executed on the 19th of April 1916. On a construction of the material clauses in this latter indenture, the Supreme Court held that the structure which had been raised by the lessee vested in the Lessor Port Trust and in law became the property of the Port Trust. It has been urged before us that, in cases of building leases of this kind where not only the plot let out by the lessor hut the building constructed by the lessee vests m the original lessor, the occupants in the premises let in by the lessee would fall within the mischief of Section 15 of the Act. It would he noticed that tin's is a special type of case where the duality of ownership can have no play. By the terms of the agreement between the parties, ownership in the building as well as the open plot vests in the original lessor, and perhaps the question as to whether Section 15 would apply to the leases executed in favour of the occupants may have to he considered when it arises. But if it is held that the rights of occupants let in by the builder are hit by Section 15, it would not be difficult for the State Government to protect the tenants' rights by issuing an appropriate notification under the relevant provisions of Ss. 2 and 6 of the Act. Where, however, the doctrine of dual ownership is in operation, Section 15 may not be available against the actual occupants of the building. Section 6 of the Act empowers the State Government to issue notifications with the object of adding to the purposes mentioned in Section 6(1) and for the purpose of extending the

application of the Act to additional areas or withdrawing the application of the Act from certain areas. The same power can be exercised in respect of the categories of leases to which the Act should or should not apply. Indeed, it appears that a notification has been issued by the State Government in pursuance of these powers, by which the State Government has permitted in all areas in which Part IT of the Act extends all transfers and assignments by lessees of their interests in lease-hold premises as and to the extent specified in the schedule attached to the notification. Assignment of the whole interest to the lessees in a building plot, for instance has been allowed where the assignment does not contravene any restrictive conditions of the lease in that retard. Transfer or assignment on gift, sale or mortgage without possession has been allowed by lessees holding building sites under leases the unexpired period of which exceeds five years on the 12th of May 1948, provided such transfer is of the entire interest of the lessee in the building site together with the whole building standing thereon. It is unnecessary for us to consider the effect of these provisions. We are, however, referring to the provisions of this notification to emphasize the point that, in case it is held that the lessee who takes an open plot under a building lease cannot let his building to intending tenants, adequate steps can be taken by the Stale Government to avoid such an anomalous position by issuing a notification under powers conferred on them under Ss. 6 and 15 of the Act.

11. While we are dealing with the question of construing Section 6(1) of the Act, it would be useful to refer to a decision of this Court in *Ismail Dada Bhamani v. Bai Zuleikhabai*[3], One of the points which arose for decision before the Court of appeal in this case was whether the lease of an open plot attracted the provisions of Section 4(2) of the earlier Rent Act 16 of 1939. The term "premises" was defined by Section 4(2) of the said Act inter alia as including "any land Set separately for the purpose of being used principally for business or trade". It was common ground that, on the land which had been thus let to the tenant, a small structure had been raised by the tenant. In determining the purpose of the lease, the Court relied on Clause 7 of the lease, which directed the lessee "not to use the said demised premises for any purpose other than as timber shops or sheds for the storing of timber or for making furniture and as saw mills and for the purposes incidental thereto, provided nevertheless that nothing herein contained shall be deemed to prevent the lessee from occupying a part of the said demised premises as a dwelling house for himself and his family only". The covenant put in a double negative form by Clause 7 was construed by the Court as meaning that the lessee covenanted to the lessor to use the demised premises as timber shops or sheds for the storing of timber or for making furniture and as saw mills and for the purposes incidental thereto. The fact that the tenant was allowed to occupy a part of the premises did not affect the main and dominant purpose of the lease, which was "business or trade". Besides, the fact that the tenant in fact raised a small structure and perhaps had to raise it before using it for business or trade was not allowed to affect the decision

of the question as to whether the premises had been let principally for business or trade. This decision supports the conclusion that, in determining the purpose of the lease, an attempt must be made to find out the dominant or main purpose of the lease, and since the dominant or main purpose of the lease was found to be business or trade in this particular case, the lease of the open plot could not be excluded from Section 4(2) of the Act merely because for carrying on trade or business the tenant had to build a Structure on the plot. In other words, the contention that the open plot should.be immediately and without any further construction on it be used principally for business or trade was not accepted by Stone C.J. and Kania J. In our opinion, the ratio underlying the judgments of Stone C. J. and Kania J. supports our view that it would be unreasonable to exclude open plots from Section 6(1) solely on the ground that without a structure being raised on the plots they cannot, be used either for education or for residence.

12. As I have already pointed out, the question as to the application of Section 6(1) to any particular lease must always be determined in the light of the terms of the lease itself. General rules of construction would, no doubt, be relevant in construing Section 6(1) and the terms of the lease. But it would be unreasonable to lay down any general considerations which would apply to all leases alike. We would, therefore, now proceed to consider the terms of the leases in these two revisional applications.

13. The material facts in regard to' these leases are not in dispute. City survey No. 370/A of Narayan Peth in Poona City originally belonged to three persons. It was an undivided plot with some buildings thereon aud the three owners had leased out the plot and the buildings to Keshav Limaye, the son of the petitioner before us, on the 12th of May 1943 under a registered lease for a period of seven years on a rent of Rs. 1,098/- per year. The lessee Keshav assigned his interest in the lease to his father and the assignee thereafter executed three different rent-notes in favour of the three owners. The present proceedings arise from the application made by the assignee against two of the-lessors for fixing the standard rent payable by him in respect of the premises let to him. His applications have been dismissed by both the Courts below on the ground that the leases executed by him are building leases and they do not fall under Section 6(1) of the Act. On behalf of the petitioner, who is the assignee of the lessee's rights, it is urged before us by Mr. Tarkunde that the view taken by the Courts below about the character of the leases executed by his client is inconsistent with the material terms in the leases and would not be justified on a proper and reasonable construction of Section 6(1) of the Act. In deciding this question, it would be relevant and necessary to consider the terms of the original Irascs executed in favour of Keshav as well as the rent note executed by Kcshav's father Vinayak after Keshav assigned his lease-hold rights to Vinayak.

14. The lease executed in favor of Keshav by his lessors described the property demised as

consisting of an open space and buildings situated on a part of it. Under the document it was provided that the land had been taken by the tenant for erecting a temporary theatre thereon and for his own use. Clause (7), which contained this stipulation, expressly authorised the tenant to keep sub-tenants of his choice in the said land. The purpose of the lease was specifically stated to be to erect a new structure and so the lessee was authorised to demolish the old building, if necessary. Clause (9) gave the lessee the right to remove the structure raised by him at the end of the period stipulated in the lease. The other clauses of the lease imposed on the lessee the obligation to keep the buildings in repairs and to bear the taxes and other incidental expenses in regard to the buildings. The lease was for a period of seven, years and it commenced from the 1st of May 1943. It appears that the lessee Keshav demolished a part of the buildings, erected a cinema theatre and a three-storied building. Thereafter Keshav assigned his rights to his father Vinayak, and Vinayak in his turn executed rent-notes in favour of the three co-owners respectively. In these vent-notes it was stated that his assignor Keshav had contravened the terms of his own rent-note inasmuch as he had constructed, not a temporary theatre, but a pucca and permanent theatre. This breach might have involved the risk of forfeiture. The assignee, therefore, asked for and obtained relief against forfeiture and was allowed to execute a fresh rent-note in favour of each one of the three owners. The rent note is, therefore, in respect of the open plot and the buildings standing on it Tin's document refers to the fact that a theatre named Limaye Natya Chitra Mandir had been constructed on a part of the plot and' that the same had been given on rent for a cinema. . The other buildings standing on the plot had been let for residence to sub-tenants. The right to sub-let having been expressly granted to the original lessee Keshav, it was continued to the assignee of the lessee's rights. Even the document executed by the assignee gives him the right to build temporary or permanent buildings on the plot and it authorises him to remove the structures at the end of the period of the rent-note when ho would be called upon to give vacant possession of the plot. Each one of these rent-notes is for a period of twenty-five years.

15. Now, it seems to us that under both the documents the premises had clearly been let for the purpose of business and for residence. The object with which the tenant passed the rent-note and the landlord accepted it is unambiguously expressed in the rent-note itself. On a part of the open plot stood some buildings which were let out to tenants. The lessee was authorised to construct a cinema building and for that purpose he was given the tight to- pull down the structures which already stood on a part of the plot. The tenant was given the right to sub-let the building which he might construct and to let the theatre for the purpose of running a cinema house. The same terms are equally clearly and unambiguously reproduced in the rent-note executed by the assignee of the original lessee's rights. In our opinion, it is difficult, to resist the conclusion that the premises in the present case have been let for business and residence. There can be no doubt that running a

cinema house in which pictures would be exhibited is business or trade, and the other premises which are let out to occupants for residence must be obviously held to be 1st for residence. In considering the question as to whether running a cinema house is business or not, it may be relevant and useful to refer to the provisions of Section 10(C) of the Act. This section deals with the right of the landlord to increase the rent of premises referred to in column 1 of Sub-section (1). Item (6) in column 1 refers to "premises used for the purposes of a cinema". This obviously postulates that the purpose of a cinema is one of the purposes mentioned in Section 6(1), and so, if the tenant has executed a rent-note in respect of an open plot with the main object of building a cinema house and letting the cinema house for exhibiting pictures, it would be unreasonable to hold that the premises consisting of the open plot have not been let for business. We would therefore hold that the rent-notes in these cases are composite rent-notes executed substantially for business and not for residence. In coining to the conclusion that the open plot cannot be let for residence or business, the lower appellate Court was disposed to adopt the literal construction of Section 6(1) and he has held that the open plot has been let only for the purpose of construction and the purpose of construction is distinct and separate from the purpose of residence or business as contemplated by Section 6(1). It is no doubt possible to adopt such a construction of Section 6(1). But, on the whole, we are disposed to hold that a fairer and more reasonable construction should be adopted, and, as I have already pointed out, an open plot should not be excluded from Section 9(1) solely on the ground that it cannot be used for residence or education unless a structure is built on it. An attempt should be made to ascertain the purpose for which the open plot was let by the lessor to the lessee, and if it appears that it was let clearly for the purpose of residence, education, business, trade or storage, a lease in respect -of an open plot should be held to fall under Section 6(1), though in order to carry out the purpose of the lease it may be necessary that some structure should be built on the open plot.

16. We would, therefore, set aside the order passed by the Courts below and send the matters back to the learned Trial Judge for dealing with the applications made by the petitioner, for fixation of standard rent in accordance with Jaw.

17. Costs of these applications will be costs in the cause.

18. Order accordingly.

Cases Referred

1(1949) 2 KB 194 (C)
2ILR (1946) 2 Cal 320 (D)
346 Bom LU 244: (AIR 1944 Horn 181) (F)