

Vasudev Gopalkrishna Tamwekar vs The Board Of Liquidators Happyhome ... on 10 May, 1963

Equivalent citations: 1967 AIR 369, AIR 1967 SUPREME COURT 369, 1964 MAH LJ 410, 1964 (1) SCJ 353, 1964 3 SCR 964, 1966 BOM LR 205

Author: Bhuvneshwar P. Sinha

Bench: Bhuvneshwar P. Sinha, J.C. Shah, N. Rajagopala Ayyangar

PETITIONER:

VASUDEV GOPALKRISHNA TAMWEKAR

Vs.

RESPONDENT:

THE BOARD OF LIQUIDATORS HAPPYHOME CO-OPERATIVE HOUSING SOCI

DATE OF JUDGMENT:

10/05/1963

BENCH:

SINHA, BHUVNESHWAR P. (CJ)

BENCH:

SINHA, BHUVNESHWAR P. (CJ)

SHAH, J.C.

AYYANGAR, N. RAJAGOPALA

CITATION:

1967 AIR 369

CITATOR INFO :

RF 1981 SC 537 (20)

ACT:

Co-operation-Arbitration-House building society-Non-compliance with terms of the Agreement-Agreement whether executory contract or one creating Landlord and Tenant relationship-Jurisdiction of Arbitrators under Bombay Co-operative Societies Act (Bom. 7 of 1925), s.54-Bombay Rents, Hotel and Lodging House Rates Control Act, (Bom. 57 of 1947), s. 28.

HEADNOTE:

The respondent obtained a lease of land to be allotted to its members for building purposes and advanced loans for construction. The premium in respect of the land and the

loan advanced, together with interest, were repayable in monthly installments. Through the agency of the society, the appellant completed the construction and occupied the building. An agreement between the appellant and the society was duly registered which provided that the loan advanced to the appellant should be paid in 366 or smaller monthly installments, and after the entire amount of the loan had been repaid, the society would execute a sub-lease in respect of the plot in favour of the appellant. In the event of default in the payment of an installment, fixed in the agreement, the society had the right to determine the agreement, and thereupon any amount already paid would be forfeited to the society, and the member was to surrender the property and give vacant possession of the premises to the society. In view of the default in payment and persistent refusal of the appellant to comply with the terms of the agreement the society referred the dispute to the Registrar, Co-operative Societies, for decision by himself or his nominee. The Committee of Arbitrators, appointed by the Registrar, gave an award in favour of the society asking the appellant to deliver vacant possession of the plot and the house to the society and to pay compensation for unauthorised use and occupation of the premises and to pay costs of the arbitration proceedings. Against the aforesaid order, the appellant's revisional application was also dismissed by the Tribunal. The

965

award was certified and filed in the Bombay City Civil Court for execution. The appellant, thereupon, took out chamber summons for stay of the execution proceedings on the ground that the Award made by the Arbitrators was without jurisdiction for the reason that under the agreement between the society and the appellant a relationship of landlord and tenant was created and that under the Bombay Rent Control Act 57/47 the Court of Small Causes was vested with exclusive jurisdiction to decide claim for recovery of rent or possession. The learned judge made the summons absolute. On appeal by the society, the High Court set aside the order and directed the execution of the Award to proceed. On appeal by certificate this Court.

Held, (i) on a proper construction of the agreement as a whole, it was an executory contract and on the appellant fulfilling his obligations to the society, including the payment of the entire dues, the society would execute the sub-lease in his favour subject to the consent of the Government who held the first mortgage on the entire land. Until the sub-lease was executed no relationship of landlord and tenant subsisted between the parties. As the appellant failed to fulfill his part of the agreement, the law laid down in the Act, in order to realise the dues of the society, had to be put into operation. The Award was, therefore, a valid Award and there was absolutely no justification for the plea that the appellant was a tenant

governed by the provisions of the Rent Control Act.

(ii) in order that the jurisdiction of an arbitrator, appointed under the Bombay Co-operative Societies Act, be excluded, the proceedings before him must be between landlord and tenant, and relate to the recovery of rent or possession of any premises to which the provisions of Part II of the Act applied. The exclusion of the jurisdiction of courts other than those named in s. 28 of the Bombay Act 1947 arose only if the claim of the applicant or plaintiff was based on the allegation that between him and the respondent or the defendant there was a relationship of landlord and tenant and the relief sought was one that was referred to in that section.

Babulal Bhuramal v. Nandram Shivram A.I.R. 1958 S. C. 677, held inapplicable.

JUDGMENT :

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 578 of 1961.

Appeal from the judgment and decree dated March 12, 1959. of the Bombay High Court in First Appeal No. 685 of 1956.

W. S. Barlingay and A. G. Ratnaparkhi, for the appellant.

B.R. Naik, M. R. Krishna Pillai and K. R. Chaudhuri, for the respondent.

1963. May 10. The judgment of the Court was delivered by SINHA C. J.-This appeal on a certificate granted by the High Court of Judicature at Bombay is directed against the judgment and order of a Division Bench of that Court, dated March 12, 1959, reversing those of the judge of the Bombay Civil Court, passed in Chamber Summons, in Arbitration case No. A.B.N./C.H.O.-2310/88 of 1954-55.

It is necessary to state the following facts in order to bring out the points in controversy between the parties. The Happy Home Cooperative Housing Society Ltd -- hereinafter referred to as the Society was registered in February 1949. It obtained a lease of a piece of land measuring about 12 thousand sq. yards situate at Nehru Road, Vile Parle (East) Bombay. The Society divided this land into 17 plots to be allotted to each one of its members for building purposes. A member was under the obligation of payment of premium, annual rent of Re. 1/-, and other incidental charges and to construct a house on the plot. The Society advanced loans to the members to enable them to construct their houses. The premium in respect of the land and the loan advanced, as aforesaid, together with interest, was repayable in monthly installments. Accordingly, Plot. No. 10, measuring about 676 sq. yds. was allotted to the appellant, and other plots were similarly allotted to other members for constructing their respective houses. Through the agency of the Society, the appellant constructed a house on his plot. The construction was completed and the appellant occupied the building on or about May 1, 1951. The sum of Rs. 26,922/- odd was advanced by way of loan, to the appellant. An

agreement dated March 26, 1952 was entered into between the appellant and the Society in respect of the loan aforesaid, and the document was duly registered on May 27, 1952. The agreement between the appellant and the Society provided that the amount of loan aforesaid advanced to the appellant should be repaid in 366 or smaller monthly instalments and after the entire amount of the loan had been repaid, the Society would execute a sub-lease in respect of Plot No. 10 in favour of the appellant. It was further stipulated that in the event of default in the payment of an instalment, fixed in the agreement, the Society had the right to determine the agreement; and thereupon any amounts already paid would be forfeited to the Society and the member was to surrender the property and give vacant possession of the premises to the Society. It appears that no instalment was paid by the appellant with the result that on August 26, 1954, the Society gave notice to him, calling upon him to give vacant possession of the premises, but the appellant did not comply with the notice. In view of the persistent refusal of the appellant to comply with the terms of the agreement, the Society referred to dispute with the appellant under s. 54 of the Bombay Co-operative Societies Act (Bombay Act VII of 1925) which hereinafter will be referred to as the Act, to the Registrar for decision by himself or his nominee. The said dispute was heard and decided by a Committee of Arbitrators, appointed by the Registrar, Co operative Societies, consisting of three gentlemen. (1) a nominee of the Society as plaintiff, (2) nominee of the Appellant, as defendant, and (3) nominee of the Registrar, who was to be the Chair man. The said Committee of Arbitration, by majority, gave an award in favour of the Society to the effect that the appellant do deliver vacant possession of Plot, No. 10, alongwith the house, to the Society and pay Rs. 150/- per month as compensation for unauthorised use and occupation of the premises from October 1, 1954, to the date of the delivery of vacant possession. The appellant was also made liable for payment of costs of the arbitration proceedings. Thereupon the appellant made a revisional application to the Bombay Co-operative Tribunal, contending that the dispute between the Society and himself was essentially a dispute between landlord and tenant regarding the possession of the premises and the recovery of rent and that the only Court that had jurisdiction to decide such a controversy was the Small Causes Court in Greater Bombay, in view of s. 28 of the Bombay Rents, Hotel and Lodging House Rents Control Act (Bombay Act 57 of 1947). After hearing the parties, the Tribunal negatived the contention raised on behalf of the appellant and dismissed the revisional application. After the Award was certified under s. 59 of the Act, the Award was filed in the Bombay City Civil Court for execution. Thereupon the appellant took out a Chamber Summons against the Society for stay of the execution proceedings. The learned Judge who heard the Chamber Summons held that the Award made by the Arbitrators was without jurisdiction, in view of the provisions of s. 28 of the Rent Control Act. Accordingly, the summons was made absolute on October 16, 1956. From that order the Society came up in appeal to the High court. The High Court, on a consideration of the terms of the agreement aforesaid, of March 26, 1952, and after elaborate arguments raised by the parties as to the legal effect of that document came to the conclusion that it was only an agreement to lease, binding the Society to grant a sub-lease only after the appellant had fully paid all the instalments due, and fulfilled other conditions of the agreement, as stipulated between the parties. In that view of the matter, the High Court held that there was no relationship of landlord and tenant between the parties. In the result, the learned judges set aside the order under appeal before them, and directed that the execution of the Award be proceeded with in accordance with law, with costs to the Society in both the Courts. It is from this judgment and order that this appeal has been brought to this Court, on a certificate being granted by the High Court. The main question in controversy in this case is whether the

Award made under the Act, which became a decree of the Civil Court, under the certificate of the Registrar; under s. 59, was without jurisdiction, and, therefore, incapable of execution. The answer to this question depends upon the answer to the other question whether the appellant was a 'tenant' under the Society, by virtue of the agreement aforesaid of March 26, 1952. If it is held that the agreement aforesaid did not create the relationship of landlord and tenant, but that the appellant continued to be the debtor of the Society until all the outstanding amount advanced to him in respect of the plot and the structure had been liquidated, the Rent Control Act, and s. 28 thereof, will be out of the way of the parties. In that case, the proceedings before the Registrar, the Award of the Arbitrators and the execution proceedings taken out by the Society would all be adjudged to be valid and binding upon the parties.

It is noteworthy that though the determination of the appeal depends upon the terms of the agreement of March 26, 1952, it has not been included in the printed paper-book. We have, therefore, to depend upon the extensive quotations of the terms of the document as contained ;In the judgment under appeal. It is common ground that all the relevant terms of the document, beginning from the preamble to almost the end of it, have been quoted in different parts in the judgment of the High Court, and that these are sufficient to give us a complete idea of the terms of the agreement. The agreement has been described by the Society in the plaint filed before the Arbitrators as 'a lease' and the appellant has been described as a 'tenant', and if the case were to be decided on the so called admissions in the plaint, the conclusion could easily be arrived at that the relationship between the parties was that of landlord and tenant. But as pointed out by the High Court, if we refer to the terms of the agreement itself, it will be abundantly clear that on a proper construction of those terms, there was no executed lease between the parties, but that it was only an executory contract entitling the appellant to a sub-lease by the Society, which was itself a lessee, upon payment of all the dues of the Society in respect of premium, principal and interest, advanced towards the cost of construction of the premises and fulfillment of all other conditions contained in the agreement. It consists of 14 clauses, as the judgment of the High Court says. It further appears from the said judgment that the agreement starts by saying that it has been entered into between the Society of the one part, and the appellant, hereinafter called the 'tenant' of the other part. In Part II of the preamble it is stated that the 'tenant' has applied to the Society for Plot No. 10 and for permission to erect a dwelling house thereon and for a loan from the Society. The preamble also mentions the fact that the Society itself had taken a lease of the entire open piece of land, of which plot No. 10 was a part, for a term of 999 years from March 17, 1950, at the annual rent of Rs. 6,264/-. Part III of the preamble proceeds to say that the Society has already spent money on development of the land and laying out roads, etc., and that it had been agreed between the Society and the 'tenant' that the latter will pay a sum of Rs. 10,020/- in instalments for transfer of Plot No. 10, and that the society shall grant a loan to the 'tenant', not exceeding Rs. 16,980/- for erecting the structure on that plot, to be advanced in instalments and repayable in instalments, as hereinafter provided. Part V of the preamble is important in so far as it has stated, in clear terms, that whenever the 'tenant' shall have repaid to the Society all the outstanding dues, either in equated monthly instalments or in one lumpsum, at the option of the "tenant", the Society, with the consent of the Government as mortgagee, shall grant to the 'tenant', a sublease of the said Plot No. 10. free from all encumbrances for a term of 998 years commencing from Match 17, 1950. Then follow the clauses of the agreement. The first clause grants permission to the 'tenant' to enter upon the said plot for

erecting a dwelling house in accordance with the plan, elevation and estimates, previously approved in writing by the Society. Then clause 3 follows, which is substantially in the same terms as Part V of the preamble. It makes it absolutely clear that only upon payment of all the outstanding dues of the Society, in respect of premium for the plot and advance made for building the residential house, alongwith interest accrued thereon, the Society shall grant and the "tenant" shall accept a sub-lease of the said Plot No. 10. It maybe mentioned here that the mortgage in favour of the Government has reference to the advance by the Government of a large sum of money to the Society with a view to financing its building activities. For securing the payment of that lumpsum, the entire area of land was mortga- ged to the Government. Hence, it was necessary to obtain the previous consent of the Government as mortgagee to the execution of the sub-lease, contemplated by Part V of the preamble and clause 3 of the agreement. And then follow details of how the installments have to be paid. Clause 8 of the agreement provides that the proposed sub-lease shall be in the form now approved and signed by and on behalf of the parties, and when the said principal money and interest have been fully paid, the necessary document shall be executed by the Society. Further, clause 9 of the agreement provides that as from the date of the agreement, the 'tenant' shall punctually and regularly pay to the Society, without any deductions, firstly, a rent of one rupee per annum, if demanded, secondly a proportionate amount of rent payable to the superior landlord in respect of Plot No. 10, thirdly a proportionate amount of assessment rates and taxes paid by the Society in respect of Plot No. 10, fourthly, a sum equal to the amount spent by the Society for insuring the building with reference to Plot No. 10, and., lastly, such further sum as may from time to time be certified by the Society as the contribution by the occupier of Plot No. 10 towards the general expenses of management, maintenance and development costs, including expenses incurred on roads, sewers, drains and other amenities. Clause 10 provides for the penalty in the event of a default made by the 'tenant' in respect of any sums payable as aforesaid. It says that in the event of a default by the "tenant" the Society shall be entitled to serve notice in writing determining the agreement and thereupon all installments and other moneys paid by the "tenant" under the agreement shall be forfeited to the Society and shall become the absolute property of the Society. And what follows is most important. it says that upon the determination of the agreement, the 'tenant' shall forthwith surrender and give to the Society vacant possession of the said premises. Clause 11 makes reference to the fact that premises were mortgaged to the Governor of Bombay to secure the loan advanced to the Society by the Government of Bombay, and so long as the mortgage remains subsisting, the Governor of Bombay shall be a necessary party to any such sublease, to be hereinafter executed as aforesaid,, and no such sub-lease shall be valid unless and until the same shall be executed by the Registrar of Cooperative Societies on behalf of the Governor of Bombay. And lastly, clause 12 says that the "tenant" shall accept the title of the Society to grant the said sub-lease without any questions or making any requisitions or objections with regard to the title.

It was argued in the High Court though not in the Trial Court, that on the terms aforesaid of the agreement, a present demise of the land had been executed in favour of the appellant. This argument was thought of in the High Court. In the lower Court, the Appellant's counsel relied on s. 27-A of the Specific Relief Act, and it was submitted that the defendant was entitled to defend his possession even though no lease had been executed and registered, as required by law. The argument that the appellant had become the 'tenant' of the land in question under the Society was thought of because, in the agreement, he was referred to as the 'tenant'. In our opinion, the High

Court is entirely correct in taking the view that was a mere description, or misdescription, of the appellant and that, in law, the appellant could not claim that relationship of landlord and tenant had been created by virtue of the agreement, the terms of which have been referred to in some detail in order to bring out the weakness of the argument based upon the description of the appellant as 'tenant'.

It is well-settled that the real nature of a transaction has to be determined on a proper construction of the document as a whole and not upon any particular words used in the document. The agreement construed as a whole leaves no manner of doubt that it was an agreement between the appellant and the Society to grant a sub-lease of Plot No. 10 only after the appellant had fulfilled his part of the agreement, namely, had paid all the outstanding amounts due to the Society in respect of the premium on the plot, the amounts advanced for construction of the house and the interest accrued due until the entire amount had been liquidated. The sub-lease would have to be executed by the Registrar of the Co-operative Societies in token of the consent of the Government of Bombay, which was a condition precedent to the validity of the sub-lease. The agreement in question, therefore, evidences nothing more than an executory contract that on the appellant fulfilling his obligations to the Society, including the payment of the entire dues aforesaid, the Society would execute the sub-lease in his favour subject to the consent of Government of Bombay, who held the first mortgage on the entire land, including Plot No. 10. It would thus appear that the entire transaction was that practically a permanent lease had been taken by the Society in respect of the open area, which was sub-divided into a number of plots for building purposes. Those plots were to be allotted to the members of the Society in order to enable them to erect their own residential houses, on the terms that the Society would grant to the members such amounts by way of loan as would cover the premium on the plot allotted to them and further sum for building a house at a certain rate of interest. On the completion of the house, the members would occupy the premises and start paying in monthly instalments the dues of the Society towards principal and interest until the last instalment will have been paid and all the outstanding dues of the Society liquidated. Upon the happening of that event, the Society undertook to execute in favour of the members sub-leases in respect of their respective plots on which they had built their residential-houses. As the whole scheme of the Society was financed by the Government of Bombay, the Government was naturally a necessary party to the transaction. In the first instance, the whole plot was mortgaged to the Government and that mortgage was to subsist until the Government dues had been entirely liquidated. Therefore, it became necessary that the Registrar, as the agent of the Government, should be a necessary party to the execution of the sub-leases in favour of the members to whom the several plots had been allotted and the houses built on advance made by the Society out of the funds made available to it by the Government.

It has not been contested on behalf of the appellant that he did not pay any instalment in respect of the transaction in his favour. He had, therefore, not qualified for being granted a lease of Plot No. 10, which had been allotted to him, under the building scheme of the Society. Upon his default there was no option left to the Society but to determine the agreement and to call upon him to surrender vacant possession of the property. Hence, though he was characterised as a 'tenant' under the agreement, it really meant the 'proposed tenant'. It was merely descriptive of the appellant for the sake of convenience of expression. He would have become a tenant only if he had paid all the

dues, as aforesaid., of the Society and had taken a sub-lease duly executed and registered in accordance with the terms of the agreement, referred to above in detail. As he failed to do that, the laws laid down in the Act, in order to realise the dues of the Society, had to be put into operation. The Award was, therefore, a perfectly valid Award and there was absolutely no justification for the plea taken by the appellant that he was a tenant who was governed by the provisions of the Rent Control Act (Bombay Act 57 of 1947). But the appellant contended that whatever view we may take of the relation created by the document, by virtue of s. 28 of Bombay Act 57 of 1947 the Committee of arbitrators appointed under the Bombay Cooperative Societies Act 7 of 1925 had no jurisdiction to adjudicate upon the question whether the appellant was a tenant of the premises of the society, and reliance in that behalf was placed upon the judgment of this Court in Babulal Bhuramal v. Nandram Shivram (1). In considering that argument attention must first be invited to Section 28 of Bombay Act 57 of 1947, which in so far as it is material, provides :

"(1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction,

(a) in Greater Bombay, the Court of Small Causes, Bombay;

(aa) x x x x

(b) x x x x shall have jurisdiction to entertain and try any suit or proceeding between a landlord, and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of sub-section (2), no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question."

It was urged that as before the Committee of arbitrators the Society had claimed that the appellant was a tenant of the Society, and relief for possession of the premises was claimed on that footing', the arbitrators had no jurisdiction to grant relief for possession. But there is no warrant for the submission that the Society claimed before the arbitrators that (1) A.I.R. (1959) S.C. 677.

the appellant was a tenant and on that basis claimed relief for possession. The pleadings before the arbitrators are not included in the record, and on a reasonable reading of the award also no such inference can be raised. Before the Committee of arbitrators the Society had alleged that the appellant had made persistent defaults in repayment of the loan due by him and had claimed a declaration that the appellant had ceased to be a member of the Society, and an Order for delivery of vacant possession of the premises belonging to the Society. It was, it appears, not alleged that any relation of landlord and tenant had ever subsisted between the Society and the appellant, and the plea of the appellant that he was a tenant in respect of the premises in dispute could not affect the jurisdiction of the committee of arbitrators. No useful purpose will therefore be served by entering upon a discussion whether the provisions of s. 28 of Bombay Act 57 of 1947 override the provisions

of the Bombay Co-operative Societies Act 7 of 1925, as was suggested at the Bar.

Alternatively, it was contended that even if the Society claimed to obtain an order for possession on some footing other than the relationship of landlord and tenant, when the appellant raised the contention that he was a tenant and the relationship of landlord and tenant was put into issue, the Court of Small Causes, Bombay, alone was competent to decide that question. Section 298 of Bombay Act 57 of 1947 excludes the jurisdiction of all courts other than the Court of Small Causes to try any suit, proceeding or application between a landlord and a tenant and to deal with any claims 'or questions as are referred to in the section. Even if it be granted that an arbitrator appointed under the Bombay Co- operative Societies Act is a Court, on this question we do not deem it necessary to express any opinion in order that his jurisdiction be excluded the proceeding before him must be between landlord and tenant, and relating to the recovery of rent or possession of any premises to which the provisions of Part II of the Act apply. The exclusive jurisdiction of the Court of Small Causes arises only if the person invoking the jurisdiction of the Court alleges that the other party is a tenant or a landlord and the question is one which is referred to in s. 28. Where the person so invoking does not set up the claim that the other party is a tenant or a landlord the defendant is not entitled to displace the jurisdiction of the ordinary court by an allegation that he stands in that relation qua the other and on that ground the Court has no jurisdiction to try the suit or proceeding or an application. There is nothing in the judgment of this Court in Babulal Bhuramal'a Case (1), which supports the view that by merely setting up a Plea that he is a tenant in respect of the premises in dispute, the jurisdiction of the ordinary Courts to decide a suit, proceeding or application would be displaced. The facts which gave rise to the appeal decided by this Court in Babulal's case (1), may be noticed. The landlord filed in the Court of Small Causes a suit in ejectment against the tenant, after terminating the tenancy, and to that suit impleaded two persons who the landlord alleged had no right to be on the premises. The Court held that those two persons were not lawful sub-tenants and had no right to remain in the premises and passed a decree in ejectment against the three defendants. The three defendants then commenced an action in the Bombay City Court for a declaration that the first of them was a tenant of the landlord, and the other two were lawful sub-tenants and were entitled to the protection of Bombay Act 57 of 1947. The City Court held that it had jurisdiction to try the suit, but dismissed it on the merits. The High Court of Bombay confirmed the decree holding that the City Court had no jurisdiction to entertain the suit, but expressed no opinion on the merits. This Court affirmed the view of the High Court. The Court in that case was considering (1) A.1,R. (1958) S.C. 677.

the true effect of s. 28 of Bombay Act 57 of 1947 in the light of the averments made by the plaintiffs who alleged that they were tenants and the denial by the defendant landlord of the tenancy set up. The Court observed on p. 681 :

"The suit did not cease to be a suit between a landlord and a tenant merely because the defendants denied the claim of the plaintiffs. Whether the plaintiffs were the tenants would be a claim or question arising out of the Act or any of its provisions which had to be dealt with by the Court trying the suit. On a proper interpretation of the provisions of s. 28 one suit contemplated in that section is not only a suit between a landlord and a tenant in which that relationship is admitted but also a suit in which

it is claimed that the relationship of a landlord and a tenant within the meaning Of the Act subsists between the parties."

There is nothing in these observations to support the plea that the jurisdiction of the ordinary courts to try a suit or proceeding relating to recovery of possession of any premises to which Part 11 of the Act applies is displaced as, soon as the contesting party raises a plea about the relationship of a landlord and a tenant.

In the result the appeal fails and is hereby dismissed with costs.

Appeal dismissed.