

Supreme Court of India

Shantibai vs Dinkar Balkrishna Vaidya on 2 March, 1994

Equivalent citations: 1994 SCC (4) 85, JT 1994 (2) 187

Author: S Mohan

Bench: Mohan, S. (J)

PETITIONER:

SHANTIBAI

Vs.

RESPONDENT:

DINKAR BALKRISHNA VAIDYA

DATE OF JUDGMENT 02/03/1994

BENCH:

MOHAN, S. (J)

BENCH:

MOHAN, S. (J)

MUKHERJEE M.K. (J)

CITATION:

1994 SCC (4) 85 JT 1994 (2) 187

1994 SCALE (1) 836

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by S. MOHAN, J.- The short facts leading to this civil appeal are as under.

2. The suit property was originally owned by Trimbak Hari Awate. He executed a simple mortgage on April 28, 1947 to an extent of 11,000 square feet which represented the entire property for a sum of Rs 20,000 in favour of Dinkar S. Vaidya. On or about July 7, 1948, Awate executed a lease deed in favour of Shankar Godaji Gore. The purpose mentioned in the lease deed was residence and shops. Under the lease deed, the lessee was authorised to sub-lease. The period of lease was 25 years. The annual rent was Rs 1500 payable monthly at the rate of Rs 125. There was no prohibition from the assignment in the said lease.

3. On February 17, 1949, Shankar Godaji Gore, the lessee executed a registered sub-lease in respect of entire land in favour of two persons Sulochanabai Thakur and Krishnabai Sarde, original

defendants 2 and 3. The sub-lease was for a period of 99 years and 9 months. The monthly rent was fixed at Rs 50. Defendants 2 and 3 the sub-lessees constructed fourteen shops on a portion of the land, sublet to them. These shops were let out for rent to several persons. They in their turn assigned their interest to different persons. On November 7, 1949, an area of 4000 sq. ft. was sublet by defendants 2 and 3 in favour of Sardar Biwalkar on a rent of Rs 135 p.m. for a period of 67 years. On the same day of the lease, defendants 2 and 3 sold seven out of fourteen shops to Biwalkar. On December 6, 1952, defendants 2 and 3 assigned all their rights, title and interest in respect of the suit land in favour of Bayajabai Ganpat Gore, Sundarabai Babasaheb Gore and Yashodabai Balasaheb Gore, defendants 6, 7 and 8 respectively.

4. In 1952, Dinkar Balkrishna Vaidya, the mortgagee filed a suit being Special Civil Suit No. 89 of 1952 for enforcement of mortgage. In that suit, mortgagor Awate and defendants 1 to 4 were made party-defendants. That suit was decreed. In execution of the final decree in the auction, the mortgagee Dinkar Balkrishna Vaidya himself came to purchase the suit land measuring about 1000 sq. ft. The sale was confirmed on December 19, 1957. Symbolical possession was granted on March 2, 1960. It appears that during the pendency of the suit, mortgagee was declared a lunatic. Therefore, Nazir of the court was appointed as guardian and the property was taken possession of by the Nazir under the provisions of Court of Wards Act.

5. The Nazir filed Regular Civil Suit No. 1142 of 1965 in the Small Cause Court, Poona for recovery of possession and arrears of rent since his demand for rent from Shankar Godaji Gore was not complied with. Shankar Godaji Gore assigned his right, title and interest in the shop premises to defendants 19 and 20. Likewise, on August 27, 1963 defendant 5 assigned his right, title and interest in the shop in favour of defendant 21. Therefore, another ground of sub-letting was also added. That suit was decreed on November 27, 1968. Aggrieved by the said judgment, Civil Appeal Nos. 279, 354 and 265 of 1969 were preferred against the same. Civil Appeal Nos. 279 and 354 of 1969 came to be allowed while Civil Appeal No. 265 of 1969 was dismissed for non-prosecution. Thereupon, the first respondent moved the High Court under Article 227 of the Constitution of India. That was numbered as Special Civil Application No. 242 of 1973. By the impugned order dated July 15, 1980, that came to be allowed. Hence, the present civil appeal.

6. The learned counsel for the appellants Shri U.R. Lalit after taking us through the relevant provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Act') submits that the lease deed in favour of Shankar Godaji Gore specifically enabled him to sublet. Under the lease deed dated July 7, 1948, Awate the original owner permitted the lessee Shankar Godaji Gore to construct therein and give the said building or any portion thereof to any person on lease rent and he could take the income derived therefrom. Therefore, there was clear enablement to sub-lease.

7. Under the Transfer of Property Act, there is no bar for a lessee to sublease. In such a case that right or interest could be assigned in favour of third party. That was what was done by the lease-deed dated February 17, 1949. The sub-lessees constructed the building and let out a few and assigned their rights in favour of other defendants. If the sub-lessees continued in possession prior to May 21, 1959, they would be entitled to the statutory protection because prior to 1959, if there was

subletting, the landlord could not proceed to evict. Section 15 of the Act barring sub- leases came into force only by amendment Act 49 of 1959, that too, subject to the contract to the contrary. Here is a case of a contrary contract. Under these circumstances the ruling reported in *Sardar Tota Singh v. Gold Field Leather Works, Bombay*, would squarely apply. No eviction was possible under Section 13(1)(e) of the Act because it must be an unlawful subletting. Therefore, there is total protection both under 1959 Act and 1973 Act.

8. There is no warrant to hold that first defendant has unlawfully sublet. In any event, if defendants 2 and 3 are sub-tenants in accordance with Section 14 of the Act, unless special sub-tenancy is determined, no eviction is possible.

9. Mr S.K. Dholakia, learned counsel for the respondents 24, 26 and 27 supporting this argument submits that there is privity of contract between the original lessor and the occupant. The predecessor of the original lessor had authorised defendant 1 to build the superstructure. Defendant 1 had absolute right to transfer his interest and having transferred his right of construction to defendants 2 and 3, the construction was made by defendants 2 and 3 1 (1985) 1 SCC 414: (1985) 2 SCR 563 lawfully and binding on the original lessee as he had not made any contract to the contrary. The occupants were inducted lawfully as tenants of the superstructure before 1959 or 1973 and therefore are eligible to the protection available under Sections 14 and 15 of the Act. Even on equity, they are entitled to a decision in their favour. It has been noted by the High Court that some of the occupants are tailors, laundrymen etc. and their livelihood is dependant on these premises. The eviction will entail severe hardship.

10. Mr V.A. Bobde, learned counsel for the respondents submits, no doubt under the original lease dated July 7, 1948, a permission had been given to Gore to construct but he never constructed. He created a sub-lease in favour of defendants 2 and 3. It was the sub-lessees who had put up this building. In relation to the demised property there was no privity of contract between the original lessor and the contesting defendants. Defendants 2 and 3 constructed 14 shops and assigned their rights in favour of defendants 6, 7 and 8. How can these occupants claim the right as sub- tenancy? *Jai Singh Morarji v. Sovani P. Ltd.*<sup>2</sup> clearly lays down that no further sub-lease is possible. That would squarely apply to the facts of the present case. The reliance placed on *Tota Singh case*<sup>1</sup> is not correct. In any event, Section 14 does not take within it assignments and transfers.

11. The short question that arises for our consideration in this case is, whether the occupants, the present appellants who are the assignees from defendants 2 and 3 can claim the protection of the Act as sub-lessees.

12. The original lease deed dated July 7, 1948 between Awate and Gore states in clause 2 sub-clauses (1) and (3) as follows :

"2. (1) I have taken the said land on rent for the period of 25 years from the date July 7, 1948 and have taken the same in my possession this day.

2. (3) The land is vacant and I shall construct buildings therein as per my wishes and I shall give the said building or any portion thereof to any person on lease rent and I shall take the income derived therefrom."

13. Admittedly Gore did not put up any construction. However, reliance is placed on clause 2 sub-clause (3) extracted above to urge that he had a right of sub-lease because he could build and let it out in favour of any one he liked. In our considered opinion the permission to construct means nothing more than an emphasis of the manner of enjoyment of the property. Even then as stated above, Gore never constructed. He leased out the property in favour of defendants 2 and 3 by lease deed dated February 17, 1949. Under clause 2 sub-clause (D), it is stated as follows:

"The said land is vacant. We shall construct structures thereon as per our wishes and we shall give the said building or any portion thereof on sub-lease to any person and we shall take the income derived therefrom. 2 (1973) 1 SCC 197 (1973) 2 SCR 603 We shall obtain the permission required for the said construction. In case your signature or consent is required in that matter, you are to give the same."

14. These sub-lessees (defendants 2 and 3) assigned their rights in favour of defendants 16, 7 and 8 and others who are the appellants. How can they claim protection as sub-lessees? The important point to note here is that the original lessor (sic lessee) Gore, defendants 2 and 3 sub-lessees are no longer before us. They have not filed the appeal. In these circumstances, the principle applicable to this case is as stated in Jai Singh Morarji case<sup>2</sup> that a sub-tenant cannot create further sub-tenancy. Therefore, we are totally unable to see any scope for application of Section 15 of the Act. The parties are afforded liberty to contract out of the section. Even then it is only a sub-tenant who could claim protection. If in law, they are not sub-tenants of the original lessor, this-section is totally inapplicable.

15. Again for the application of Section 14, there must be a lawful subtenancy. That is not so here. The occupants were not lawfully inducted into possession as sub-tenants either prior to 1959 or 1973. Therefore, we are unable to accept the contention urged by Mr U.R. Lalit and Mr S.K. Dholakia, learned counsel. Hence, that section is also inapplicable.

16. Weighing the equitable considerations, the civil appeal was adjourned for effecting a compromise. But the parties have not done so. Therefore, we are unable to grant any relief on that score. The civil appeal will stand dismissed. However, there shall be no order as to costs.