

Shabbir Mohammad Sayed vs Noor Jehan Mushter Shaikh on 2 August, 2022

Author: K.M. Joseph

Bench: Hrishikesh Roy, K.M. Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. _____ OF 2022
(Arising out of SLP (C) Nos.32161-32162 OF 2018)

SHABBIR MOHAMMAD SAYED

...APPELLANT(S)

Versus

MRS. NOOR JEHAN MUSHTER
SHAIKH & ORS.

...RESPONDENTS(S)

JUDGMENT

K.M. JOSEPH, J.

1. Leave granted.

2. By the impugned order, the High Court in a revision petition filed by the appellant has upheld the order passed by the Appellate Bench of the Court of Small Causes at Bombay which in turn affirmed the order passed in Execution Application No.386/2016 that is Order dated 16.11.2016, rejecting the application filed by the appellant under Order XXI Rule 97 of the Code of Civil Procedure. The application for recall has been rejected by the order which is also impugned. The first respondent filed a civil suit against respondent Nos.2-4. Respondent Nos.2-4 are, in other words, defendants 1, 2 and 3 in the suit. The claim of the first respondent in the suit was that defendant Nos. 1 and 2 were tenants of the property in question who were ready to transfer their tenancy rights on the agreed consideration of Rs. 85,000/- which was paid to them by the first respondent. The parties are referred to by their status in the Trial Court. The matter was being delayed on the basis of the property being illegally sublet to two persons. The plaintiff is alleged to have contacted the landlord namely defendant No.3. The 3rd defendant transferred tenancy rights by rent receipt dated 01.12.2006. Possession was not handed over. PW2, the 3rd defendant, was examined where he admitted the letters dated 03.1.2004 and 19.05.2007. The Trial Court dismissed the suit by Judgment dated 09.04.2013. The plaintiff appealed the judgment by filing Appeal No.23 of 2013. The Appellate Court decreed the suit. Following are the terms of the decree:

1. Appeal is allowed with costs.

2. The Judgment and decree dated 09.04.2013 is set aside and following order is substituted.

i) The suit is partly decreed with costs.

ii) It is declared that the plaintiff is tenant in respect of the suit premises being Room No.3, Ground Floor, 98/A, Visheshwar Bhuvan @ Rajkotwala Compound, Pipe Road, Kurla (West), Mumbai 400 070.

iii) Defendant No.3/landlord/co-owner is directed to hand over possession of the suit premises to the plaintiff within a month and directed to issue rent receipt regularly to the plaintiff after accepting the monthly rent.

iv) The relief sought vide prayer clause (b) is rejected.

3. The plaintiff levied execution by filing Execution Application No.386 of 2016.

4. It is the case of the appellant that the tenant who was actually in possession of the property assigned his rights in favour of the appellant by an agreement dated 24th January 2014. The appellant claims ignorance of the litigation.

5. In other words, one Akhtar Habibullah Shaikh claiming to be the lawful tenant of the premises transferred his rights in favour of the appellant upon receiving of 'total cost and consideration' of Rs.9,40,000. What is more important is the 3rd defendant (landlord) by agreement of the same date i.e. 24th January 2014 assigned leasehold right in favour of the appellant. The appellant came by possession of the premises. When he came to know of the decree obtained by the plaintiff and it being put to execution, he filed application purporting to be under Order 21 Rule 97 of the Code of Civil Procedure. It was this application which was dismissed by the Execution Court, the Appellate Court and the High Court.

6. We heard Shri Gauraj Shah along with Mr. Udayaditya Banerjee, learned counsel on behalf of the appellant and Shri Sandeep Sudhakar Deshmukh, learned counsel on behalf of the plaintiff.

7. Learned counsel for the appellant would contend that none of the grounds arrayed against the appellant will hold good in law. It is pointed out that the appellant has been non-suited on the following grounds.

8. The assignment of lease in favour of the appellant by the person claiming to be the lessee was unlawful, the lease being contrary to Section 26 of the Maharashtra Rent Control Tenancy Act 1999 (hereinafter referred as "the Act"). Secondly, it has been found that the assignment purporting to be made by the 3rd defendant landlord in favour of the appellant could not be acted upon as the assignment was not registered. It was thirdly found that the transactions relied on by the appellant

were afflicted by the bar of Section 52 of the Transfer of Property Act. It was during the pendency of the appeal filed by the plaintiff which appeal was later allowed that the assignments relied on by the appellant came to be made. Learned counsel would elaborate and contend as follows:

As far as Section 26 of the Act is concerned, the prohibition therein would not apply if there is a contract to the contrary. He would rely upon the Judgment of a full bench of the Bombay High Court and contend that in the light of the law laid down therein the bar of Section 26 would not apply. The next contention is that in Maharashtra, Section 52 has been amended. The substance of the amendment is that if the party wishes to avail the benefit of the doctrine of lis pendens, he must give a notice which must be registered in the manner provided. The plaintiff has no case that such a notice was given and registered. This would mean that Section 52 would not apply. Still further even Order 21 Rule 102 of the Code of Civil Procedure has been omitted in the State of Bombay. Therefore, the assignment in favour of the appellant will not be afflicted with the Bar under Section 52 or Order 21 Rule 102, runs the argument.

As far as the 3rd finding against the appellant goes, namely, the fact that the lease deeds were not registered, it is pointed out that the lease deeds were actually monthly in nature. At any rate even if lease extends for a period of more than one year, the appellant stands shielded by virtue of the provisions of Section 55 of the Act. He would contend that though a review petition was filed bringing to the notice of the High Court, the aspects relating to Section 26 and the provisions of Section 55, the High Court has dismissed the review petition as well. He would point out that when a person who is not a party to the suit or in the execution proceeding is in possession and has independent rights and is sought to be dispossessed, under the law as laid down by this Court, he is entitled to have his right investigated and adjudicated in the manner provided in Order 21 Rules 98 and 101. He would point out that actually the decree obtained by the plaintiff is collusive in nature. The 3rd defendant came to be examined by the plaintiff as her witness namely PW2. The same 3rd defendant came to execute the agreement on 24th January 2014 in favour of the appellant.

9. Per contra learned counsel for the plaintiff supported the impugned Judgment. He would point out that there is no bona fides in the claim of the appellant. According to the plaintiff, appellant has neither any right nor even possession of the property.

10. We have already noticed the facts. Originally the Trial Court dismissed the suit filed by the plaintiff. It is after she filed the appeal and during the pendency of the appeal that the two transactions relied upon by the appellant allegedly came to be entered into. The transactions are said to be entered into on 24.01.2014.

11. We must first consider whether the said transactions dated 24.01.2014 said to have been entered into by the tenant Shri Habibullah is hit by the bar of Section 26 of the Act. This we do, proceeding on the basis that it is proved.

Section 26 of the Act reads as follows:

“26: In absence of contract tenant not to sub-let or transfer or to give on licence Notwithstanding anything contained in any law for the time being in force, but subject to any contract to the contrary, it shall not be lawful for any tenant to sub-let or give on licence the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein:

Provided that, the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases any premises or class of premises other than those let for business, trade or storage to such extent as may be specified in the notification.” Section 26 begins with a non-obstante clause and purports to provide for the position despite whatever is contained in any law for the time being in force. In this regard, it must be noticed that the Transfer of Property Act, 1882, in Section 108 (B)(j) provides that in the absence of a contract to the contrary:

“(j) The lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease; Nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee;”

12. Thus, the law giver has provided that, notwithstanding, the aforesaid provision it will not be lawful for a tenant to sublet or to give on license the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. This in turn is, however, made subject to any contract to the contrary. In other words, while under the general law, subject to there being no contract to the contrary, a tenant can assign, sublease or mortgage his rights as lessee, on the other hand, in regard to a tenancy governed by the Act, the ordinary rule is that a tenant cannot sublet, give on licence or assign or transfer in any other manner. This is made subject to a contract to the contrary. The assignment relied upon by the appellant namely by alleged lessee on 24.01.2014 would be illegal on the face of it unless a contract to the contrary is established. It is in this regard that learned counsel for the appellant would draw support from the action of the admitted landlord namely, the defendant no.3 who has purported to enter into the assignment in favour of the appellant on the very same day. In this regard, our attention is drawn to the Judgment of the full bench of the Bombay High Court. Therein speaking on behalf of a Full Bench in 2004 (2) Maharashtra Law Journal 305 R.M. Lodha,J as His lordship then was, inter alia, dealing with Section 26 held as follows:

“15. The said section 26 does not absolutely prohibit or totally forbid the tenant the tenant as meant by section 7(15) - to sublet or give on licence or assign or transfer in any other manner whole or any part of the premises let to him since it is subject to the contract to the contrary with the landlord. In other words, the landlord is always

at liberty to permit the tenant to sublet or give on licence or assign or transfer in any other manner whole or any part of the premises let to him. The contract contrary to the prohibition provided in section 26 can be at any time at the time the premises are let out to the tenant or any time thereafter, even after the tenant has sublet or given on licence or assigned or transferred his interest in the premises let out to him. The landlord can always ratify the action of the tenant in subletting or giving on licence or assigning or transferring in any other manner his interest in the premises let to him. Thus, section 26 of the Act of 1999 cannot be held to contain the absolute bar against the tenant of the non-residential premises nor the transfer in contravention of section 26 is absolutely void that is void against the whole world but may be void against the landlord furnishing him the ground to get a decree for ejectment.”

13. The next aspect which is canvassed by the appellant is about the inapplicability of Section 52 of the Transfer of Property Act as an absolute bar or rather the effect of lis pendens as obtaining in Bombay. It is pointed out that Section 52 has a modified application in the area in which the premises in question is situated. In regard to this area by virtue of Bombay Amendment Act, 1939 (Act XIV of 1939), being enacted, Section 52 reads as follows:

“52. (1) During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, if a notice of the pendency of such suit or proceeding is registered under Section 18 of the Indian Registration Act, 1908, the property after the notice is so registered cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

(2) Every notice of pendency of a suit or proceeding referred to in sub-section (1) shall contain the following particular, namely: -

(a) the name and address of the owner of immovable property or other person whose right to the immovable property is in question;

(b) the description of the immovable property the right to which is in question;

(c) the Court in which the suit or proceeding is pending;

(d) the nature and title of the suit or proceeding; and

(e) the date on which the suit or proceeding was instituted.

Explanation.--For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceedings in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

Adverting to the said provision, a division bench of the High Court of Bombay has held as follows interalia in the Judgment reported in (2016) Vol.6 Bombay CR 262:

"58. Section 2 of the Bombay Amendment Act XIV of 1939 provides that the Amendment Act shall apply to properties situated wholly or partly in the City of Bombay (now Mumbai) from the date of notification in the official gazette (which has been issued) and provides for similar notification extending applicability of the Amending Act to other areas to be issued (which is not shown to have been issued). Thus, the amended provisions apply to properties in Mumbai and the unamended section applies to rest of the State." (Emphasis supplied)

14. It is the case of the appellant that the premises in dispute is located within the scope of the amended law. In view of the same, it is contended that the bar of Section 52 will not apply. When questioned as to whether the appellant had a case that the plaintiff had not given a notice and got it registered under Section 52, the answer is that the plaintiff does not have a case of having given any notice. It is actually a question of fact whether the premises is located in the area covered by the Amendment to Section 52. It is further a question of fact as to whether a notice was given.

15. As regards the lease not being registered, the contention of the appellant is premised on Section 55 of the Tenancy Act. In other words, it is contended that Section 55(2) of the Act clearly places the responsibility of getting the lease registered on the landlord. The failure of the landlord to get the lease registered would entitle the tenant to establish the tenancy with the document even if it is not registered.

Section 55 of the Act reads as follows:

"55. Tenancy agreement to be compulsorily registered.

(1) Notwithstanding anything contained in this Act or any other law for the time being in force, any agreement for leave and license or letting of any premises, entered into between the landlord and the tenant or the licensee, as the case may, after the commencement of this Act, shall be in writing and shall be registered under the Registration Act, 1908.

(2) The responsibility of getting such agreement registered shall be on the landlord and in the absence of the written registered agreement, the contention of the tenant about the terms and conditions subject to which a premises have been given to him by the landlord on leave and license or have been let to him, shall prevail, unless proved otherwise.

(3) Any landlord who contravenes the provisions of this section shall, on conviction, be punished with imprisonment which may extend to three - - months or with fine not exceeding rupees five thousand or with both.”

16. The appellant has not raised any contention based on the amended Section 52 before the Execution Court.

Even in the appeal before the Appellate Court, the appellant has not contended that a Notice was required under Section 52, as applicable. Before the High Court in the Revision, it is not seen expressly contended. It is in the recall application that an effort is made in this direction. The amended provisions of Section 52 of the Transfer of Property Act are inapplicable for the whole of Maharashtra, as found by the High Court itself in the decision relied upon by the appellant, it is applicable to certain area. The applicability of the amended provisions of Section 52, thus, became a question of fact.

17. As far as the alleged assignment by the so-called tenant in favour of the appellant is concerned, it is prohibited under Section 26. There is no express contract to the contrary to rescue the appellant. The full bench of the High Court of Bombay in the decision relied upon by the appellant was actually dealing with the question whether the interest of the tenant could be attached and sold. No doubt, it has also held that there could be ratification by the landlord even after the transfer by the tenant.

18. In the Indian Contract Act, 1872, Chapter X deals with Agency. In Chapter X, Sections 196 to 200 provide for ratification. Apparently, the Sections embody general principles relating to ratification and we can safely apply the principles embodied in the Sections essentially dealing with relationship between a Principal and his Agent.

19. As to what is ratification, has been articulated in Section 196. It reads as under:

“196. Right of person as to acts done for him without his authority Effect of ratification. - Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.”

20. In the work “The Indian Contract Act and Specific Relief Acts” by Pollock and Mulla (14th Edition), the learned authors have stated thus:

“Ratification An act which, at the time it was entered into or done by an agent, lacked the authority, express or implied, of a principal, may, by the subsequent conduct of

the principal, become ratified by him under certain circumstances, and made as effectively his own as if he had previously authorised it. Ratification can be express or implied from conduct, and it will be held adopted throughout.

XXX XXX XXX Ratification differs from consent. Consent is an express or implied agreement to waive the right to avoid an act, and precedes the transaction. Ratification is subsequent in point of time to the transaction which is voidable. Where acquiescence is made when the act to be ratified is in progress, it is consent; where it is done after the act is completed, it is ratification.” (Emphasis supplied)

21. We may notice Section 198 of the Contract Act. It reads as under:

“198. Knowledge requisite for valid ratification “No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.”

22. Pollock and Mulla, in their work “The Indian Contract Act and Specific Relief Acts” have further stated thus:

“Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies: i.e. the person ratifying should be conscious that the act beyond the authority of the agent had been done, and after notice of that fact, he consciously, by an overt act, agreed to be bound by it or by acquiescence in the situation arising thereafter, allowed the business to continue.

xxx xxx xxx”

23. Therefore, the core principle of ratification is one by which a person approves of the act of another knowing about the act.

24. Thus, an assignment by the tenant can be ratified by the landlord. In this case however there is no ratification in the alleged agreement executed by the 3rd defendant landlord. He does not even refer to the alleged agreement executed by the tenant in favour of the appellant. Ratification is an act which presupposes knowledge of the act of the person whose act is sought to be ratified. A perusal of the alleged agreement executed by the landlord would reveal that it makes no reference to the alleged agreement executed by the tenant in favour of the appellant. The third defendant had proceeded to allegedly execute the agreement purporting to create interest in his own right.

Therefore, we are of the view that even proceeding on the basis of the principle laid down by the full bench of the High Court of Bombay, in the facts of this case, there is no ratification. Sans any ratification and in the absence of any contract to the contrary within the meaning of Section 26, the alleged transfer by the ‘lawful tenant’ cannot pass muster.

25. As far as the case based on the alleged Tenancy Agreement dated 24.01.2014 between the third respondent and the appellant, we may notice certain features. As already noticed, agreement by the so-called tenant in favour of the appellant was also executed on the same day. In the Agreement executed by the tenant on 24.01.2014, the tenant states that he is the lawful tenant and that he is staying in the said premises and the tenancy is created in consideration of Rs.9,40,000/- being paid. In Clause (3) of the Agreement, the tenant has purported to hand over vacant possession of the premises to the appellant. In fact, it is stated that the assignment will be “forever”. In the alleged tenancy agreement between the third respondent and the appellant executed allegedly on the same day it is recited that the premises is in the actual physical possession of the landlord and on a consideration of Rs.175/- per month, tenancy was created in his favour. The case of the appellant which is based essentially on the appellant having paid Rs.9,40,000/- to the ‘lawful’ tenant having found to be untenable being illegal as violative of Section 26 of the Act is in direct conflict with the case set up by the appellant regarding the tenancy with the third respondent. We have already found that the case of the landlord having ratified the tenancy of the appellant with the tenant cannot stand scrutiny of the Court. The acceptance of the case by the appellant involves harmonizing of an irreconcilable contradiction as regards the principal recital, namely, the case as to the emanation of possession. If the case of the appellant is accepted it is the tenant who was in possession and who handed it over having received a sum of Rs.9,40,000/- which is essentially the case set up in the Execution Court. Noticing no doubt, that the documents have not yet been proved and taking the documents on their face value, yet the conclusion is inevitable that the case set up by the appellant on the basis that the landlord was in possession is in the teeth of agreement of the same day with the tenant who claims that he was in possession and it does not appeal to us as anything but incongruous to say the least. In fact, in his application, before the Execution Court the specific case set up by the appellant is that he was put in possession by the alleged lawful monthly tenant. The case set up by the appellant based on the tenancy agreement by the landlord cannot be acted upon.

26. The matter can be looked at from a different perspective as well. The appellant lays store by a tenancy or assignment by the ‘lawful tenant’ on 24.01.2014. This involves the assumption that the tenancy in favour of the lawful tenant was intact. If so, how can the landlord create a tenancy in favour of the appellant without extinguishing the existing tenancy with the ‘lawful tenant’? The case of the appellant defies both logic and is legally untenable. It becomes unnecessary to even explore the argument of the appellant that the suit being collusive, the courts query as to the impact of the transfer in favour of the appellant being later in point of time must stand overwhelmed would stand answered.

27. We would therefore think that the appellant has not made out a case for interfering with the impugned judgments. The appeals are dismissed. No order as to costs.

.....J. [K.M. JOSEPH]J. [HRISHIKESH ROY] NEW DELHI DATED; AUGUST 02, 2022