

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5786 OF 2014

Rajendra s/o Parivant Jadhav,
Age 35 years, Occ. Business,
R/o. Khadkat, Tq. Ashti, District Beed.

...Petitioner

versus

Ajinath s/o Kisan Kharat
Age 65 years, Occ. Agriculture,
R/o. Khadkat, Tq. Ashti,
District Beed.

...Respondent

.....
Mr. V.A. Dhakne, Advocate for petitioner
Ms. Vanita H. Sangole h/f Mr. A.M. Kulkarni, Advocate for respondent
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment : 24.02.2015**

**Date of pronouncing
the Judgment : 03.03.2015**

JUDGMENT:-

1. Rule. Rule made returnable forthwith. By consent of the parties, heard finally.

2. The petitioner is original plaintiff, instituted R.C.S. No. 93 of 2013 for the relief for perpetual injunction against the respondent

sole before the learned C.J.J.D. Ashti. The petitioner has also filed an application for issuance of order of temporary injunction at Exh.5 in the said suit. The learned Judge of the Trial court allowed the said application for temporary injunction at Exh.5 and thereby restrained the respondent from interfering into the peaceful possession of the petitioner over the suit land. Being aggrieved by the said order, the respondent had filed Misc. Civil Appeal No. 80 of 2013 before the learned District Judge, Beed. The learned District Judge-2, Beed by its impugned judgment and order dated 30.4.2014 in Misc. Civil Appeal No. 80 of 2013 allowed the appeal and set aside the order passed below Exh.5 in Regular Civil Suit No. 93 of 2013 dated 7.8.2013. The learned District Judge has dismissed the application Exh.5. Hence, this writ petition.

3. The petitioner claims to be in possession of suit land admeasuring 40 Are on the basis of lease deed for a period of 99 years on yearly basis executed on 8.8.2009 by the respondent. According to the petitioner, he has paid lump-sum amount to the defendant for the entire period. The petitioner claims that the defendant handed over the possession of the suit land to him on the basis of lease deed executed on 8.8.2009.

4. According to the respondent, the suit land was purchased by

him and his brothers, being members of joint family. The respondent has denied of handing over possession of the suit land to the petitioner on the basis of so called lease deed. The respondent contends that the lease deed is not registered document and the Court is disabled from using it as an instrument. The respondent has however, admitted execution of lease deed in favour of the petitioner. According to him, lease deed was executed under pressure of his son and wife and that remained as nominal document. The respondent on the other hand, asserted his possession over the suit land.

5. The learned counsel for the petitioner submits that though the document is unregistered document, the same could have been used for collateral purposes and possession of the petitioner over suit land should have been protected by the court below. The learned counsel further submits that the respondent has admitted execution of lease deed in question and recognizes right of the petitioner. Learned counsel further submits that though unregistered lease deed is void as yearly lease, it can be deemed to be a monthly lease and even the plaintiff's possession over the suit land can be protected otherwise. The learned counsel for the petitioner in order to substantiate his submissions, placed reliance on the following judgments:-

I) Anthony vs. K.C. Ittoop and Sons and others, reported in AIR 2000 SC 3523

II) Mohd. Shakil Mohd. Yunus vs. Chandrabhli Ramai Gupta (D) through L. Rs. Reported in 2014 (5) Mh.L.J. 206,

III) Baban Anantrao Naik vs. Sau. Pramila Uttamrao Yenare & Anr. reported in 2011 (6) All MR 15

IV) Rame Gowda (Dead) By L.Rs. vs. M. Varadappa Naidu (Dead) By L.Rs. And Anr, reported in (2004) 1 SCC 769.

6. On the other hand, the learned counsel for the respondent submits that lease from year to year requires registration and in absence of registration, the document cannot be used as a piece of evidence in proof of term of lease. Learned counsel also submits that the Court is disabled from using the contents of the lease deed even for collateral purposes.

7. The consequences of non registration of lease agreement for a term of exceeding one year can be examined in the light of provisions of Section 107 of Transfer of Property Act, 1882. Section 107 of Transfer of Property Act, reads as under:-

“107. Leases how made - A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

[All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.]

[Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.”

8. It is thus clear that the lease of immovable property from year to year or for any term exceeding one year can be made only by registered instrument, and such instrument is required to be compulsorily registered by virtue of Section 107 r.w. Section 17(1) (d) and 49 of the Registration Act, 1908. Section 49 of Registration Act reads as under:-

“49. Effect of non-registration of documents required to be registered.—No document required by section 17 [or by any provision of the Transfer of Property Act, 1882) to be registered shall— ”

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument.

9. It is well settled that such unregistered document will not create, declare, assign, limit or extinguish any right, title or interest in or to the immovable property mentioned in the document. However, the judicial pronouncements further emphasis that such document can be looked into for collateral purposes.

10. In the case of Anthony vs. K.C. Ittoop and Sons and others, (supra) in para 12 and 13 of the judgment, the Hon'ble Apex Court has made following observations:-

“12. But the above finding does not exhaust the scope of the issue whether appellant is a lessee of the building. A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, dehors the instrument parties can create a lease as envisaged in the second paragraph of Section 107 which reads thus:

“All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.”

13. When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.”

The Hon'ble Apex Court while concluding the issue, in para 16 has made the following observations:-

“16. Taking a different view would be contrary to the reality when parties clearly intended to create a lease though the document which they executed had not gone into the processes of registration. That lacuna had affected the validity of the document, but what had happened between the parties in respect of the property became a reality. Non registration of the document had caused only two consequences. One is that no lease exceeding one year was created. Second is that the instrument became useless so far as creation of the lease is concerned. Nonetheless the presumption that a lease not exceeding one year stood created by conduct of parties remains un-rebutted.”

11. In Mohd. Shakil Mohd. Yunus (supra), this Court (Nagpur Bench) by referring Anthony's case (supra) held that unregistered lease deed can be considered for collateral purpose like nature and character of possession of party and whether lease was for residential purpose or not.

12. In the case in hand, the respondent had admitted the execution of lease deed though under pressure and claimed to be a nominal document. Even the son of respondent viz. Satish Ajinath Kharat has filed an affidavit before this Court admitting therein, unequivocally, that on 8.8.2009 the possession of the suit land was handed over to the petitioner on the basis of the aforesaid lease

deed. The petitioner has also produced some record i.e. certificate of registration of eating house, which he runs in the suit land, under the name and style as "Raj Hotel". It is clear that the parties clearly intended to create a lease though that document had not gone into process of registration and therefore, what had happened between the parties in respect of property became reality. The another consequence of non registration of document is, to draw a presumption, that a lease not exceeding one year stood created by conduct of the parties, which remains unrebutted.

13. In the case of Baban Anantrao Naik (supra), this Court in para 8 of the judgment has expressed a view, as under:-

"8. At the time of determination of an application for temporary injunction, the factum of possession would only be the relevant factor. Whether the possession is lawful possession or not would not be the subject matter of enquiry. Whether the amount of consideration has been paid or not, whether the plaintiff was ready and willing to perform his part of contract or not, would all be the issues which can be decided only after the parties adduce evidence. It would be premature at this stage to give findings on the said issues."

14. It thus appears from the impugned order that the learned District Judge has recorded finding on the issue which can be

decided only after the parties adduce evidence. Further more, in the case of Rame Gowda (Dead) By L.Rs. (Supra), the Hon'ble Apex Court has taken a view that even trespasser in settled possession is entitled for injunction.

15. In the light of the above discussion, the impugned order is quashed and set aside and the order passed by the learned Judge of the trial court below Exh.5 in Regular Civil Suit No. 93 of 2013 stands restored. The learned Judge of the trial court shall decide the suit as early as possible and preferably within a period of **one year** from today.

16. Rule is made absolute in the above terms. Writ petition is disposed of accordingly with no order as to costs.

(V. K. JADHAV, J.)

rlj/