

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.638 OF 2014

Shri Narendra Harilal Jethwa
Age: 54, Occupation: Business,
Address: 26, Vijay Nagar Colony,
New Adgoan Naka, Agra Road,
Panchavati, Nashik

... Appellant

Vs

1) Shir Bholadasji Mandir
Shir Panchamukhi Hanuman Mandir
Shir Satanarayan Mandir
Shri Murli Manohar Mandir
Narsingwadid and Others
Properties Trust "Public Trust
Registration No.A-634, Nashik
Office-4210, Shir Bholadasji Mandir,
Opposite Kalaram Temple, East Door,
Panchavati, Nasik-3
Through its sole Trustee-
Mr. Kishor Gururamlakhandasji,
Shrivaishnav
Age: Major, Occupation: Agriculture

2) Sandip Narsinhabhai Parmar
Age: Major, Occupation: Business
Address: Municipal House No.4609,
Opp: Katya Maruti Police Chowky,

Chowky, Old Adgaon Naka,
Old Mumbai Agra Road, Panchavati,
Nasik-3

3) Smt. Hemkuverben Harilal Jethwa
Age:82 Occupation: Housewife
Address: 25, Vijay Nagar Colony,
New Adgoan Naka, Agra Road,
Panchavati, Nasik

4) Shri Pravin Harilal Jethwa
Age-60, Occupation: Business
Address: 27, Vijay Nagar Colony,
New Adgoan Naka, Agra Road,
Panchavati, Nasik

5) Shri Mukund Harilal Jethwa
Age:25, Occupation: Business
Address: 25, Vijay Nagar Colony,
New Adgoan Naka, Agra Road,
Panchavati, Nasik

6)Sau. Meera Purushttam Rathod
Age: 62 Occupation: Housewife
Address: 25, Vijay Nagar Colony,
New Adgoan Naka, Agra Road,
Panchavati, Nasik

7) Sau. Geeta Hemant Vegad
Age: 48, Occupation: Housewife
Address: New Ram Mandir, Virar,
Mumbai

8) Sau. Kokila Bhupendra Solanki
Age: 47, Occupation: Housewife,
R/o. Uday Nagar, Raichu,
Karnatak

... Respondents

...

Mr. Vishal Sharad Tambat for the Appellant.
Mr. Milind M. Sathaye for the Respondents.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : APRIL 18, 2019
PRONOUNCED ON: MAY 3, 2019

Judgment :

Aggrieved by the judgment and decree dated 4th January, 2014 in Civil Appeal No.74 of 2008 passed by the District Judge-2, Nashik at Nashik, defendant in Regular Civil Suit No.132 of 2002 has preferred this appeal.

2 I shall refer the parties as per their nomenclature in the suit.

3 Facts in brief are as under:

Appellant/defendant was inducted as tenant vide registered lease-deed dated 21st December, 1970 in the land bearing Survey No.182, 182-A, C.T.S.No.5923 to 5951 admeasuring 2086.04 sq.mtrs. ('**Suit Property**' for short). The lease was of open land and

the lessee was permitted to raise construction with a rider that upon expiry of lease period, he shall remove construction at his own cost. Lease period was for 30 years, which came to end on 31st December, 2000. That since, the lessee-defendant did not hand over possession of the suit property, he was served with notice dated 7th September, 2001 and called upon to hand over possession of the suit property. Since the defendant did not hand over possession, the suit was filed on 20th February, 2002.

4 Before I proceed to narrate facts of the case, it may be stated that the Maharashtra Rent Control Act, 1999 ('Act' for short) came into force on 31st March, 2000. Notice demanding vacant possession of the suit property was served in September, 2001 whereas lease came to end on 31st December, 2000.

5 Defendant raised a preliminary issue of jurisdiction in as much as according to him provisions of the Maharashtra Rent Control Act, 1999 were applicable to the facts of the case and this suit could not have been instituted in the ordinary jurisdiction. In view of this preliminary objection, the learned Judge framed

preliminary issues thus;

“Whether Court has jurisdiction to entertain and try the present suit ?”

6 The learned Trial Court after going through the lease-deed held that lease was of open plot and it was not a building lease. Preliminary issue thus has been answered against the defendant whereby it was held that Court has jurisdiction to try and decide the suit. Defendant did not challenge this order and as such, submitted to the jurisdiction of the Court.

7 In the light of facts of the case as stated here-in-above, the question is whether the suit was maintainable in the form as it was filed or whether provisions of Maharashtra Rent Control Act are applicable to the facts of the case.

8 The Maharashtra Rent Control Act, 1999 (hereinafter called the '**Said Act**' for short) came into force on 31st March, 2000. Subject suit was filed on 20th February, 2002, i.e. after the Maharashtra Rent Control Act came into force. Section 7, Sub-section 9 of the Act defines, the expression, 'Premises', as any building or

part of a building let or given on licence separately [other than a farm building] including - (i) the gardens, grounds and garages and out-houses, if any, appurtenant to such building or part of a building, (ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof, but does not include a room or other accommodation in a hotel or lodging house.

9 In the case at hand, lease was of open plot for a period of 30 years and it was not building lease. Clause (2) of the lease deed provides annual rent Rs.400/- for the open space leased out and clause (4) of it, permitted lessee, to raise the construction and to sub-let it. Admittedly, the suit property has not been let out but the construction has been raised where the defendant is running hotel. Clause 4 of the lease-deed, however, obliges lessee to remove construction on expiry of lease period and hand over open plot to the plaintiff.

10 The two questions are, therefore, required to be answered;

(i) Whether suit property is the 'Premises' within the meaning of Section 7(9) of the Maharashtra Rent Control Act, 1999 and

(ii) Whether the suit instituted in the ordinary jurisdiction of the Civil Court was maintainable OR whether the suit property was subject to the provisions of Maharashtra Rent Control Act, 1999.

11 Indisputedly, lease was for open plot and the lessee-defendant was permitted to make construction. Clause 4 of the lease-deed, however, obliges lessee-defendant, to remove the construction, on the expiry of the lease period. Lessee failed to comply with the notice dated 7th September, 2001 issued by the plaintiff whereby he was called upon to hand over vacant possession of the suit property. This notice was issued after the Maharashtra Rent Control Act came into force and the suit was instituted on 20th February, 2002.

12 In view of the facts aforesaid, it is submitted by the learned counsel for the appellant, that the date on which the suit was instituted, i.e., in February, 2002 would be a date relevant for ascertaining the applicability of the Rent Control Act and not the date of letting. It is contended that the lease was for conducting business, which is one of the purposes contemplated under Section 2(1) of the said Act. It is argued that on the date of institution the suit, suit plot was not open plot, but plot with construction which was used for running hotel business and, therefore, it is the 'Premises' within the meaning of Section 7(9) of the Act and, thus, suit proceedings were not governed by the provisions of Transfer of Property Act, 1882.

13 In **Govindram Bros. Pvt. Ltd. And Ors. v. Alexander Benedict Joseph Pereira** 1995(1) Mh.L.J. 115, facts were; that an open plot of agricultural land was leased out on 18th November, 1950. The lease was to commence from 1949 for a period of 20 years ending on 31st March, 1969. Under the lease-deed, the lessees were permitted to construct buildings on

the said plot of land for carrying on the business of cinema studio. The lessees constructed buildings on the plot of land and started a film studio. On expiry of the lease period on 31st March, 1969, the lessors filed suit in the City Civil Court at Bombay for recovery of possession contending that lease was not for any of the purposes mentioned in Section 6(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. On the other hand, defendants contended that as the suit was one between a landlord and his tenant, the City Civil Court had no jurisdiction to try the same.

. The learned Judge thus,

“Held, that the point of time at which the requirement of section 5(8) of the Act which defines 'premises' should be satisfied would be the point of time at which either the protection given under the Act is sought to be asserted or a right conferred by it, is sought to be enforced. The building in dispute which was admittedly constructed on the land legally on obtaining lease of the open land was 'premises' within the meaning of section 5(8) and was let out for trade and business within the meaning of section 6(1) of the Act on the date of institution of the suit. The date of the lease or the date on which non-agricultural permission was granted by the Collector cannot be of any consequence for determining as to whether the 'premises' were covered by section 5(8) of the Act. The relevant date for

ascertaining the applicability of the Rent Act was the date on which the suit was filed and not the date of letting. The lease was for the purpose of business, which is one of the purposes of section 6(1) of the Act. The suit premises were thus governed by the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act. The suit therefore filed on expiration of lease-deed in the City Civil Court was not maintainable in view of provisions of Section 28 of the Act."

14 Facts of the case at hand are somewhat similar but are not the same. As per Clause 4 of the lease-deed in question, defendant was required to remove construction on the expiry of the lease period and hand over possession of the suit property in the state in which it was received. The subject clause 4 reads as under:

“सदरचे जागेवर मी आमचे खर्चांनी बांधकाम करणेचे आहे व ते बांधकाम कराराची मुदत संपताच आमचे खर्चाने काढून घेऊन जागा पूर्वावत तुमच्या ताब्यात देवू. ”

Such a clause as it appears was not there in the lease-deed in the cited case. In terms of the clause aforesaid, the defendant was under the contractual obligation to hand over vacant possession of the plot in the same state. Section 108 of the Transfer of Property Act, 1882 defines 'Rights and liabilities of lessor and lessee'. It provides, in the absence of a contract to the contrary, the lessor and the lessee of

immovable property, as against one another, respectively, possess the rights and are subject to the liabilities which are mentioned in rules next following or such of them as are applicable to the property leased. Rule (h) reads as under;

“(h) The lessee may [even after the determination of the lease] remove, at any time [whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth; provided he leaves the property in the state in which he received it;”

(emphasis supplied)

15 Thus, it is to be understood that on the determination of the lease, subject to contract to the contrary, the lessee is under statutory obligation to hand over the property to the lessor in the state in which he received it. In the case at hand, lease was of the open plot and the lessee was under obligation to handover possession of the suit property in the state in which he received it. It is under these circumstances that though the defendant-lessee was permitted to raise construction on the suit property and but, since he did not remove it, which was his contractual and statutory obligation, it cannot be held that the suit property assumes the character of the 'Premises' in terms of Section 7(9) of the Act. As the

lessee neglected to remove the construction in defiance of clause (4) of the lease-deed and though the construction was standing on the suit property, which was used for hotel business on the date of institution of suit, the lessee/appellant cannot seek protection of the Rent Control Act, 1988.

16 Which is the material date for ascertaining, whether the suit property is 'Premises' for the purpose of Section 6 of the Bombay Rent Control Act, i.e. whether the date of letting or the date on which right conferred by the said Act is sought to be exercised, was the question before the Constitution Bench of the Apex Court in the case of **Nalanikant Ramadas Gujjar v. Tulasibai (Dead) by Lrs. And Others AIR 1997 SC 404.**

. In the case of **Mst. Subhadra v. Narsaji Chenaji Marwadi AIR 1966 Supreme Court 806**, it was held that material date for ascertaining whether the plot is 'Premises' for the purpose of Section 6 is the date of letting and not the date on which application for fixation of standard rent was made by the tenant or the landlord.

. However, in the case of **Vasudev Dhanjibhai Modi v.**

Rajabhai Abdul Rehman and Ors. AIR 1970 SC 1475, the Apex Court held that, *'whether the provisions of Bombay Rent Control Act shall be applicable or not, the crucial date for ascertaining the nature of the use of the land in question shall be the date when the rights under the aforesaid Act are to be exercised.'*

. The Constitution Bench has agreed with the views expressed in the case of **Vasudev Modi (Supra)** and therefore, material date for ascertaining whether suit property is 'Premises' is the date on which right conferred by the Act is sought to be exercised.

17 Mr. Sathaye the learned counsel for the appellant has relied upon following two judgments of this Court:

(1) **Dasrao Ramrao Bokil v. Ganpat Valhoba Ghisadi**
2012(1) ALL MR 241

(2) **Radhakisan Ramnath Malpani v. Rajesh Dattatray Mahajan and Ors. 2013(4) ALL MR 548.**

So far as the first citation is concerned, the suit property was subject to Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954

wherein the learned Single Judge of this Court upon taking into consideration preamble of the said Act and the definition of 'House' has held that *'if open plot is let and thereafter Tenant makes any construction over it, still lease would be construed to be of open land.'*

18 In the next judgment, lease was for 61 years commencing from 1st January, 1943 and determination of lease by efflux of time after lapse of 61 years was with effect from 31st December, 2003. Regular Civil Suit was instituted for eviction and possession in June, 1997 under Section 111(a) of the Transfer of Property Act, 1882 on the ground of breach of terms and conditions of the lease agreement. The suit was filed without permission of Rent Controller under the provisions of Clause 13(i)(a) of the Rent Control Order, which was then in force. Though suit was not maintainable for want of permission, it was not dismissed but it remained pending till Maharashtra Rent Control Act was brought into force on 31st March, 2000 by repealing earlier Rent Control Legislation, which was prevailing. Plaintiff filed an application for amendment on 20th June, 2005, introducing new ground for determination of lease by efflux of

time. Application was allowed by Trial Court. In facts and circumstances of case, effect of amendment was that it was suit instituted on 20th June, 2005 for eviction and possession of suit property on the basis of cause of action which arose on 31st December, 2003. On the date of expiry of the lease period, i.e. on 31st December, 2003, the Rent Control Legislations were not in force as the same was repealed by provisions of Section 58(1)(b) of Maharashtra Rent Control Act, 1999 with effect from 31st March, 2000. In the given set of facts, the learned Judge has held thus;

“It is not in dispute that the leases in respect of open land are not governed by the provisions of the Maharashtra Rent Control Act. Hence, the only remedy available was to file a suit invoking the ordinary jurisdiction of a Civil Court for eviction of tenant and for possession under the general law of the Transfer of Property Act, and neither the provisions of the Rent Control Legislations, nor the provisions of the Maharashtra Rent Control Act were applicable, as the lease in question was for the open land.”

19 Thus, taking into consideration facts of the case and the law laid down by the Apex Court as well as by this Court in aforesaid two cases and for the reasons stated here-in-above, suit property was not “Premises” within the meaning of Section 7(9) of the Maharashtra Rent Control Act, 1999 and, therefore, suit for eviction filed under the general law of the Transfer of Property Act, 1882 was maintainable and as such, provisions of the Maharashtra Rent Control Act were not applicable as the lease in question was for open plot. Questions are answered accordingly.

20 Thus for the reasons stated here-in-above, appeal is dismissed and disposed of accordingly.

(SANDEEP K. SHINDE, J.)