

Ramesh Kumar Jhamb and Another Vs. Official Assignee, High Court, Bombay and Others

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Court : Mumbai

Decided On : Mar-04-1993

Reported in : AIR1993Bom374; 1993(3)BomCR461

Judge : M.L. Pendse and; S.H. Kapadia, JJ.

Acts : [Towns Insolvency Act, 1909](#) - Sections 55; [Transfer of Property Act, 1882](#) - Sections 111; Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Sections 28

Appeal No. : Appeal No. 456 of 1991

Appellant : Ramesh Kumar Jhamb and Another

Respondent : Official Assignee, High Court, Bombay and Others

Advocate for Def. : N.R. Bathena Official Assignee and ;S.H. Doctor and ;R.H. Mirza, Advs. i/b.; Doctor & Co.

Advocate for Pet/Ap. : R.A. Kapadia and ;D.D. Madon and ;S.M. Fdia, Advs. i/b ;Uma Fadia

Judgement :

ORDER

Pendse, J.

1. This is an appeal preferred to challenge Order dated September 4, 1990, passed by learned Insolvency Judge on report dated March 15, 1989, made by the Official Assignee in Insolvency Petition No. 80 of 1984. By the impugned Order, the learned Judge declared that the appellants are not lawful and bona fide tenants/occupants of ownership flat bearing No. 9 in Block B situated at Triveni Co-operative Housing Society Limited, 32nd Road, Bandra, Bombay, and which flat belonged to respondent No. 4-Insolvent. The Order further authorises the Official Assignee to secure vacant possession of the fiat from the occupants and, if necessary, with police assistance, and by breaking open the locks and thereafter to sell the Insolvent's right, title and interest in the flat by public auction. The appellants were also directed to pay to the Official Assignee, damages from November 20, 1984, till handing over vacant possession at the rate of Rs. 300/- per month. The learned Judge also directed the appellants to pay a sum of Rs. 2,500/- as costs to respondent No. 5, a creditor, at whose behest the report was initiated by the Official Assignee. The facts which gave rise to passing of this Order are as follows.

2. M/s. Sunshine Electric Company, a registered partnership firm, which is respondent No. 2 and its two partners respondents Nos. 3 and 4 were adjudicated Insolvents by Order dated November 20, 1984. The petition for adjudication was filed by the creditor on November 6, 1984. One of the property of the Insolvent No. 4 was the flat in a Housing Cooperative Society and it is a claim of the appellants that they are in occupation of the flat as monthly tenants from year 1979 and were protected by the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The appellants claim that on December 28, 1983, an agreement was reached with respondent No. 4 for sale of fiat in favour of the appellants. In pursuance of the agreement, the shares held by respondent No. 4 in the Housing Society were transferred in favour of the appellants. It is not in dispute that by transfer of shares, the title to the flat vests in the appellants.

After respondent No. 4 was adjudicated Insolvent by Order dated November 20, 1984, on June 1, 1988, the Official Assignee made a report to the Insolvency

Court for a declaration that the transaction of sale between appellants and respondent No. 4 should be set aside and declared as void against the Official Assignee in accordance with provisions of Sec. 55 of the Presidency [Towns Insolvency Act, 1909](#). The Official Assignee also sought authorisation to take vacant possession of the flat from the appellants. The Insolvency Court considered the report and the objection of the appellants that prior to the sale, the appellants were in occupation as leases and were entitled to continue their possession. The Insolvency Court by Order dated October 4, 1988, set aside the sale in favour of the appellants and declared the transaction of transfer as void against the Official Assignee. The Insolvency Court held that question as to whether the appellants are entitled to remain in occupation as leases will be examined after the Official Assignee submits a fresh report. The decision of the Insolvency Court was challenged before Division Bench of this Court, but the appellants were unsuccessful. The proceedings were carried further to the Supreme Court by the appellants, but the appellants were unable to secure special leave. The Supreme Court, while rejecting the application, observed: 'It is clarified that the question left open for decision by the learned Judge will be decided without treating the opinion expressed by him as conclusive and on such evidence, as permissible, according to law.'

3. The Official Assignee made fresh report on March 15, 1989, to the learned Insolvency Judge. The Official Assignee, by this report sought a declaration that the appellants are not lawful and bona fide tenants/occupants of the flat and the Official Assignee should be authorised to take vacant possession and the appellants should be directed to pay damages to the Official Assignee for wrongful occupation. The appellants lodged objection to this report and the hearing of the report was adjourned for recording evidence. Subsequently, the learned Judge held that it was wholly unnecessary to record evidence as the only evidence offered on behalf of the appellants was to indicate possession of the appellants of the disputed flat. The mere possession of the flat, fell the learned Judge could not establish relationship of landlord and tenant. The Insolvency Judge held that even assuming that the appellants were leases prior to the date of sale, the lease stand terminated in accordance with provisions of Section 111(d) of Transfer of Property Act and consequently, the appellants cannot claim protection to remain in

occupation after the sale is declared as void against Official Assignee. The learned Judge further held that the Insolvency Court has got ample jurisdiction to determine question of existence of tenancy protected by Rent Act in spite of provisions of Section 28 of the Rent Act. In view of the finding that appellants are not entitled to remain in occupation after the sale is declared as void against Official Assignee, the learned Judge directed the appellants to hand over possession to the Official Assignee and pay Rs. 300/- as damages from the date of the sale till handing over possession. The Order of the learned single Judge is under challenge.

4. Mr. Madon, learned counsel appearing on behalf of the appellants submitted that the issue as to whether relationship of landlord and tenant existed between respondent No. 4 and appellants prior to the date of the sale cannot be determined by Civil Court in view of the provisions of Section 28 of the Rent Act. It was contended that Section 28 creates an exclusive Court for determination of questions between the landlord and tenant and it was not open for the Insolvency Court to by pass that jurisdiction and conclude that Insolvency Court can determine the issue of tenancy. Mr. Madon submitted that the finding that the lease stands terminated in view of Section 111(d) of Transfer of Property Act is not correct and even assuming that the lease stands terminated, still the lease would stand revived as soon as the sale transaction is declared as void against the Official Assignee. Mr. Doctor, learned counsel appearing on behalf of respondent No. 5-creditor and Official Assignee, on the other hand, submitted that the base hold rights, even assuming if any were existing prior to the date of sale, automatically stand extinguished in view of the doctrine of 'merger' and such rights cannot be revived merely because the sale transaction is declared as void against Official Assignee under Section 55 of the Insolvency Act. The submission urged on behalf of the Official Assignee and creditor, in our judgment, is correct and deserves acceptance.

5. The principal question which falls for determination is whether the base hold rights, even assuming to be in existence in favour of the appellants from respondent No. 4-Insolvent prior to the date of sale, stand extinguished and if so, whether such right can be revived after declaration that the sale was void against

the Official Assignee. While examining this question, it is assumed in favour of the appellants that the flat was occupied by the appellants prior to December 28, 1983, as leases and such base hold rights were protected by provisions of Rent Control Act. Section 111(d) of Transfer of Property Act inter alia provides that lease of immoveable property stands determined in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right. The doctrine of merger is attracted when a leasehold and reversion coincide. The leasehold is a lesser estate and it is carved out of the estate of the owner which is reversion. The lesser estate is merged i.e. sunk or drowned and the lease determines or extinguishes for it sinks into the reversion. Thus, if the lessee purchases the lessor's interest, the lease is extinguished as the same person cannot at the same time be both landlord and tenant. The doctrine of merger is based on the principle of fusion of two conflicting interests which cannot be held by one person at the same time. In view of the doctrine of merger, it is obvious that the leasehold rights in favour of the appellants in respect of the flat stand extinguished by operation of law as well as by act of parties on respondent No. 4-Insolvent, transferring the title to the flat in favour of the appellants.

6. Mr. Madon submitted that even if the leasehold rights stand extinguished by sale of flat by respondent No. 4 in favour of the appellants, the said leasehold rights would automatically stand revived once the transfer is declared as void against the Official Assignee in accordance with provisions of Section 55 of the Presidency Town Insolvency Act. It is not possible to accede to the submission of the learned counsel, Section 55 inter alia provides that any transfer of property, not being a transfer made in favour of a purchaser in good faith and for valuable consideration shall, if the transferor is adjudicated Insolvent within two years after the deed of transfer, be void against Official Assignee Mr. Madon had to concede that the transfer in favour of the appellants could not be considered as in good faith and for valuable consideration in view of the earlier Order of the Insolvency Court and which was confirmed right upto the Supreme Court. The Insolvency Court declared the transfer void against Official Assignee in accordance with Section 55 of the Insolvency Act and that Order has become final. Mr. Madon submits that once the transfer was declared as void all the rights which appellants

were holding in the flat prior to the date of transfer should automatically stand revived. It is impossible to accede to the submission for more than one reason. In the first instance once the lease-hold right stands extinguished then the same can never be revived by operation of law because the lease-hold right is the creation by act of parties and there is no provision under the Transfer of Property Act providing for revival of such extinguished right. Secondly, the transfer by respondent No. 4 in favour of the appellants was not void ab initio, but was valid and legal till it was declared as void against Official Assignee under Section 55 of the Insolvency Act. In other words, during the interregnum i.e. from the date of transfer till the transfer was declared as void the transferee i.e. appellants enjoyed absolute right, title and interest in respect of the transferred property. Thirdly, the transfer which is declared as void under Section 55 of the Insolvency Act is only against Official Assignee and not against the transferor. In other words, the transfer is voidable only at the behest of the Official Assignee. It was possible and open for the appellants to have transferred the flat prior to the declaration under Section 55 of the Insolvency Act and that clearly establishes that the appellants enjoyed all rights of title holders in the flat from the date of transfer till the date of declaration. As mentioned hereinabove, it is not open for a person to claim absolute right, title and interest in the property as well as the limited right of a lessee at the same time. In these circumstances, in our judgment, the contention of the appellants that the leasehold rights stand revived is without any merit and was very rightly turned down by the learned single Judge.

7. In view of the finding that the appellants cannot claim protection to remain in occupation as leases of respondent No. 4, the question as to whether the appellants were at all in occupation of the flat prior to the date of the transfer as leases is not required to be investigated. There is considerable merit in the submission of Mr. Madon that in case the question arises as to whether the appellants were at all leases prior to the date of the transfer, then the question will have to be determined only by Court of exclusive jurisdiction created under Section 28 of the Bombay Rent Act and it is not permissible to determine that question by the Insolvency Court. Section 28 inter alia provides that notwithstanding anything contained in any law, the suit shall have to be instituted in the Court of exclusive jurisdiction to entertain and try any question between a

landlord and a tenant. It is not necessary, in the present case, to examine this aspect in more detail. In these circumstances, the impugned order passed by the Insolvency Court is in accordance with law and is not required to be disturbed.

8. Mr. Madon submitted that the trial Judge was in error in awarding penal costs of Rs. 2,500/- in favour of the respondent No. 5 creditor. The learned counsel is right in his contention that the amount determined by the trial Judge is on the higher side. In our judgment, the costs should be fixed at Rs. 750/-. Save and except this modification, the Appeal must fail.

9. Accordingly, Appeal fails and is dismissed save and except the award of amount of cost in favour of respondent No. 5 is reduced to Rs. 750/-. In the circumstances of the case, there will be no order as to costs of the appeal.

Order accordingly.