

Sheroo Minoo Engineer Vs. Minoo Jehangir Engineer

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SooperKanoon Citation : sooperkanoon.com/360792

Court : Mumbai

Decided On : Mar-06-1987

Reported in : (1987)89BOMLR139

Judge : M.H. Kania, C.J. and Sujata Manohar, J.

Appeal No. : O.S. Appeal No. 75 of 1979 in Suit No. 793 of 1968

Appellant : Sheroo Minoo Engineer

Respondent : Minoo Jehangir Engineer

Disposition : Appeal dismissed

Judgement :

Sujata Manohar, J.

1. The present appeal is in respect of judgment and decree of the learned trial judge in a suit which is filed by the respondent (hereinafter referred to as the plaintiff) against the appellant (hereinafter referred to as the defendant) with regard to tenancy rights of a flat being Flat No. 89 at building 'Devchhaya' situate at Tardeo, Bombay - 34. The plaintiff and the defendant were husband and wife and the flat at 'Devchhaya' was their matrimonial home.

2. Sometime in December 1960 they had got engaged. After the engagement they were on the look out for a flat where they could set up their matrimonial home.

They selected the above flat through an estate agent and obtained a lease of the flat. Accordingly under an agreement of lease dated February 1, 1961 the then owner of the said flat granted a lease of the said flat in the name of the plaintiff-husband. The rent of the said flat was approximately Rs. 150 per month. The initial deposit of 3 months' rent amounting to Rs. 450 as also a sum of Rs. 450 being rent from February 1961 to April 1961 was paid by the husband.

3. The parties got married on June 4, 1961. Thereafter they set up their matrimonial home in the said flat. The marriage was short-lived. It seems that on account of matrimonial problems the husband went to reside with his parents in April 1962. The wife joined him there. According to the husband, he had put an additional padlock on the flat at that time. The wife, however, left the house of her parents-in-law sometime in May 1962 and started residing in the said flat. According to the husband, she broke open the padlock to enter the flat. The wife denies this. Anyway, the husband also thereafter stayed at the flat for some days and then left. He is since residing with his parents. Since May 1962 the defendant-wife resides in the said flat. Since then she is paying the rent of the flat.

4. Thereafter matrimonial proceedings took place between the parties before the Parsi Chief Matrimonial Court at Bombay. By its decree dated April 3, 1968 the marriage between the parties was dissolved. On April 3, 1968 the parties arrived at certain consent terms with regard to the said flat. In the consent terms the wife is described as the plaintiff while the husband is described as the defendant. The said consent terms are as follows:

1. It is hereby agreed between the parties that the question of the ownership of the Flat No. 89, situate at Dev Chhaya shall be decided by the proper Court to which either party may choose to resort.

2. It is hereby agreed between the parties that pending the final determination of the ownership of the said flat by the said Court the Plaintiff to the Counterclaim (hereinafter called the Plaintiff) will continue to be in possession of the said flat and will continue to pay the rent and other charges thereof to the landlords.

3. Pending the final determination of the question of the Ownership of the said flat, the Plaintiff undertakes not to keep any sub-tenants, paying guests, boarders etc. or do any other act in any other manner prejudicial to the interests of the Defendant to the Counterclaim (hereinafter called the Defendant) which may jeopardise the right title or interest of the Defendant. There are two blind boys in the flat and they will leave by the 1st of May 1968.

4. The Defendant agrees and undertakes to pay Rs. 200/- (Rupees two hundred) per month to the Plaintiff by way of Alimony pending the determination of the ownership of the flat by the said Court.

5. In the event of the said Court holding that the Plaintiff is the owner of the said flat, the liability of the Defendant to pay the said sum of Rs. 200/- (Rupees two hundred) per month shall cease. In the event of the said Court holding that the Defendant is the owner of the said flat, the Plaintiff will be at liberty to apply to the Honourable Court for variation of the said Order of Alimony on the ground of changed circumstances.

6. The Defendant hereby agrees and undertakes to return to the Plaintiff all her clothes and other belongings lying with him.

7. It is hereby agreed between the parties that the furniture lying at Dev Chhaya flat belongs to the Plaintiff.

8. The Defendant has already paid Rs. 350/- to the Plaintiff as security for costs as per the Order of the Hon'ble Court. This amount will be appropriated towards the order of costs in suit and counterclaim made by the Hon'ble Court to-day. The Defendant has to pay nothing more.

9. Liberty to apply.

5. Thus under the consent terms it was agreed between the parties that the question of ownership of the said flat shall be decided by the appropriate Court. Pending this determination, the wife was allowed to remain in possession of the said flat and she had to pay the rent of the said flat. Under Clause 5 of the consent terms the parties have arrived at an arrangement as to what is to happen

depending upon the finding given by the appropriate court on the question of ownership of the said flat. The parties have agreed that if the wife is found to be the owner of the flat, then the husband's liability to pay her an alimony of Rs. 200 p.m. shall cease. On the other hand, if the husband is found to be the owner of the said flat, the wife will be entitled to apply before the Parsi Chief Matrimonial Court for a variation of the order of alimony on the ground of changed circumstances. In view of the consent terms the wife has continued to reside in the said flat since 1968 and is paying the rent.

6. Although the consent terms are about the ownership of the said flat, the parties were clearly referring to the leasehold interest in the said flat and not the ownership of the said flat because both the sides were fully aware that there was only a tenancy in their favour in respect of the said flat. In fact the consent terms also provide for payment of rent in respect of the said flat.

7. Pursuant to these consent terms, the plaintiff-husband filed the present suit on November 27, 1968. In the suit he has prayed for a declaration that he is the sole and absolute owner of the tenancy rights in the said flat. He has also asked for a declaration that the defendant's use and occupation of the said flat constitutes a trespass and the defendant is a trespasser in respect thereof. He has further prayed that the defendant be ordered and directed forthwith to remove herself, and her belongings from the said flat and to hand over to the plaintiff vacant and peaceful possession of the said flat. He has also prayed for other consequential reliefs.

8. The defendant in her turn has pleaded that she alone is entitled to the tenancy rights of the said flat since, according to her, she had paid the deposit as well as rents in respect of the said flat. Although she has not stated in her written statement that the tenancy was taken merely in the name of her husband as a benamidar, that appears to be her plea because she claims to be the real owner of tenancy rights in respect of the said flat although the tenancy stands in the name of her husband.

9. She also contends that the husband is estopped from claiming exclusive possession of the flat since it was their matrimonial home. Learned Counsel for the

defendant-wife has also argued before us that the wife has a beneficial interest in the flat since it was her matrimonial home. And in any event, irrespective of title, she is entitled to stay there.

10. The consent terms dated April 3, 1968, however, do not contemplate both parties having an interest in the said flat by virtue of its being the matrimonial home of the parties. The consent terms proceed on the basis that the tenancy belongs either to the husband or to the wife. And the dispute regarding the right to tenancy is to be resolved in a civil court. This is quite clear from Clause 5 of the consent terms which provides for what is to happen if one or the other party succeeds in establishing his or her claim to the tenancy rights in the said flat in a civil suit. The present suit is the outcome of these consent terms. The pleadings in the suit also reflect the above stand of the parties. The husband claims the tenancy on the basis of the agreement of lease and the rent receipts. The wife claims tenancy on the ground that in fact she has paid the deposit and rents.

11. In view of the consent terms and the stand taken by the parties in the pleadings, we do not have to examine the question as to whether the defendant-wife has a right, irrespective of her claim to tenancy, to reside in the flat even after the decree of divorce because the flat was the matrimonial home of the parties. In a given case, it may be possible for a divorced wife to claim a beneficial interest in her matrimonial home, especially if she has contributed directly or indirectly to the acquisition or maintenance of that matrimonial home or even otherwise. But we are not called upon to decide that question. In our view, it is also doubtful whether a wife who remains in possession of the matrimonial home after divorce can be considered as a trespasser in respect of the matrimonial home. But in the present case, the parties have crystallised their claims to the flat by agreement in the form of consent terms. Hence we are not called upon to decide this question on the facts and circumstances of the present case.

12. Mr. G.J. Desai, learned advocate for the defendant as well as Mr. I.M. Chagla, learned advocate for the plaintiff cited before us a number of English authorities laying down the rights of spouses to a matrimonial home. These cases before the Court of Appeal and the House of Lords were decided prior to the enactment of

specific legislation in U.K. on the rights of spouses to their matrimonial home. The cases cited were: *Rimmer v. Rimmer* (1952) 2 All. E.R. 863 *Hazell v. Hazell* (1972) 1 All. E.R. 923 *Pettitt v. Pettit* (1970) A.C. 777 *National Provincial Bank Ltd. v. Ainsworth* (1965) 2 All. E.R. 472 *Williams & Glyn's Bank Ltd. v. Boland* (1980) 2 All. E.R. 408 Annual Review of All. E.R. 182 which contains the decision *Bristol & West Building Society v. Henning* (1985) Annual Review of All 182 : : (1985) 2 All. E.R. 606. Mr. G.J. Desai also cited two Indian cases in support of his contention that although Indian law does not recognise the distinction between legal and equitable ownership of immoveable properties, these equitable rights are embodied in certain provisions of the Indian Trusts Act. He cited *Bai Dosabai v. Mathurdas Govinddas* : [1980]3SCR762 and *Vedamani Palavva v. Ummini Nadar Kochukrishnan* air [1974] Ker 11. The English cases which were cited by both the sides were cases under Section 17 of the Married Women's Property Act, 1882. They deal with a situation-which is a common situation-where husband and wife do not have any specific agreement with respect to their rights in the matrimonial home. The court was required to exercise its powers under Section 17 of the said Act and pass appropriate orders in relation to the matrimonial home. We are not dealing with those cases because where there is an express agreement between husband and wife in relation to the matrimonial home, that agreement obviously governs the rights of the parties to the matrimonial home. In the present case, the consent terms embody such an agreement. The agreement provides that the civil court will decide the dispute as to title to the tenancy rights of the said flat. Depending on the party in whose favour the decision is given, certain consequences will follow as set out in the consent terms. And pending such determination the wife will be entitled to reside in the flat. The consent terms do not proceed on the footing that the flat is the matrimonial home. Under the consent terms the flat is to be given to the person who is entitled to the tenancy rights of the flat. We are, therefore, not deciding the question of a wife's beneficial interest in the matrimonial home. We are merely deciding the question of legal title to the tenancy rights of the said flat. We may also point out that the flat admeasures only about 600 sq.ft. It is a one-bedroom flat. Both sides agree that it cannot be divided by metes and bounds. Tenancy rights in the flat also cannot be sold or legally transferred for consideration by virtue of the provisions of the Bombay Rents,

Hotel & Lodging House Rates (Control) Act, 1947. Hence this is not a case where matrimonial home or proceeds therefrom can be divided between husband and wife. Nor do the parties desire that it should be so divided (vide consent terms).

13. Both the parties in their respective pleadings stated that a certain amount was paid to the landlord of the said flat as a cash consideration for obtaining tenancy of the said flat. This cash consideration was in addition to the rent of the said premises. Acceptance by the landlord of such a cash consideration is not permissible under the provision of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947.

14. The plaintiff has pleaded that he was informed by the estate agent through whom he obtained lease of the said flat, that the landlord wanted a sum of Rs. 10,000 as premium before granting lease of the said flat. Since the plaintiff earned only about Rs. 400 p.m. he told the defendant that he was not in a position to pay the entire sum of Rs. 10,000/-. The defendant thereupon agreed to obtain a loan from her father in favour of the plaintiff of Rs. 5,000/- which the plaintiff could repay to her father in easy instalments. It is the case of the plaintiff that on this assurance he paid to the estate agent a sum of Rs. 5,000 in April or May 1961 along with a sum of Rs. 450 being rent of the said flat for 3 months from February to April 1961 and an additional amount of Rs. 450/- being deposit of 3 month's rent. He further contends that in May 1961 or thereabouts he was informed by the defendant that she had paid the further sum of Rs. 5,000/- to the agent after borrowing it from her father. A few days thereafter the agent brought the deed of lease in favour of the plaintiff, which is dated February 1, 1961, rent receipt for Rs. 450/- in the name of the plaintiff and the deposit receipt in the name of the plaintiff. In the plaint the plaintiff has further stated that after the marriage he repaid to the defendant's father two instalments of Rs. 300/- each in July and August 1961 in the belief that a loan of Rs. 5,000/- had been advanced to him by the defendant's father. He however, came to know in September 1961 that in fact only a total sum of Rs. 6,000/- had been paid as premium to the landlord. He thereafter refused to pay any further instalment to his father-in-law and asked the defendant to pay the balance amount of Rs. 400/- to her father.

15. As against these contentions of the plaintiff in the plaint, the defendant has pleaded in her written statement that she was looking for a suitable flat where the parties could set up their matrimonial home and sometime in January 1961 she came to know that the said flat was available but the landlord wanted a cash payment of Rs. 8,000/- before granting a lease of the said flat. According to her, the plaintiff expressed his inability to make any cash payment in view of his financial situation. The defendant says that she was also earning about Rs. 400/- p.m. by giving tuitions. She has stated in her written statement that she took Rs. 6,000/- from her father and she also had Rs. 2,000/- which was a wedding gift from her maternal uncle. She paid both these amounts to the landlord in order to secure the lease of the said flat. It is her case that apart from this cash payment she had throughout paid rent of the said flat, although in her written statement she has stated that her husband paid Rs. 450/- as rent for 3 months. She also admits that the husband repaid two instalments of Rs. 300/- each to her father.

16. Neither party has led any evidence in respect of any cash consideration alleged to have been paid to the landlord. Since it was the case of the defendant that she had paid this amount, which must be considered as a reasonably large amount looking to the financial condition of the parties, for obtaining the lease, it was important for her to lead evidence on this point. Such evidence coupled with payment of rent by her, could have supported her case that the tenancy rights belonged to her.

17. Similarly the plaintiff had pleaded payment of cash consideration of Rs. 5,000 by him and a loan of Rs. 1,000 by his father-in-law to him. This was also an important piece of evidence in his favour. Unfortunately we do not have any evidence on this point at all from either side. In fact, the evidence led in this case is somewhat scrappy and unsatisfactory. We have referred to the pleadings because Mr. Desai strongly relied upon the statement made by the plaintiff in his cross-examination to the effect that the statements made by the plaintiff in the plaint are correct. Assuming that the plaintiff affirms what he has stated in his plaint, it does not in any manner further the case of the defendant. The plaintiff has stated that he paid a sum of Rs. 5,000 and he was told by the defendant that a further sum of Rs. 5,000 had been given to him as a loan by the father of the

defendant and paid over to the landlord to enable the plaintiff to obtain the said lease. The admitted fact that 2 instalments of Rs. 300 were paid by the plaintiff to the defendant's father would also go to show that whatever may have been the advance given by the defendant's (father, it was by way of a loan only to the plaintiff and it was not an amount which the defendant paid on her own. The plaint therefore does not in any manner help the defendant to establish her right over the tenancy of the said flat.

18. In this connection it is contended by Mr. Desai that the learned trial judge disallowed evidence in connection with the cash consideration said to have been paid by the parties at the time of entering into' an agreement of lease. We do not find anything on record which would show that the evidence in connection with this cash payment was sought to be led but was disallowed by the learned trial judge. Mr. Desai drew our attention to the draft issues which were framed by him and handed over to the learned trial judge. These draft issues were 15 in all. Several draft issues were deleted by the learned trial judge. These included issues on payment of premium. There are also other issues which have been deleted by the learned trial judge and he has consolidated these issues into 7 issues. In our view, issues 4 and 5 as framed by the learned trial judge are wide enough to cover all questions pertaining to¹ consideration for obtaining the tenancy rights, whether flowing from the plaintiff or from the defendant. This would be a material factor for establishing the right of either party to the said flat. It is not necessary that there should be a specific issue framed in respect of each and every fact which is in dispute. Issues have to be framed in order to determine which are the points in dispute between the parties and it is not possible to infer from the manner in which issues have been framed by the learned trial judge that he expressly excluded any evidence on the question of cash consideration.

19. It was contended by Mr. Desai that these issues were not allowed to be raised because under the provisions of Section 18 of the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947 receipt of such cash consideration by the landlord is illegal. Under Section 18 of the said Act if a landlord either himself or through any person acting on his behalf, receives any premium or any consideration other than the standard rent or the permitted increases in respect of

the grant of a lease, such landlord becomes liable to certain penal consequences and he commits an offence. Under Sub-section (2) of Section 1818 however, the tenant who is compelled to make such payment (looking to scarcity of accommodation in the City of Bombay) is entitled to recover this amount from the landlord within a period of six months from the date of payment, inter alia, by deducting this amount from any rent payable by him to such landlord. This provision shows that it is the landlord who commits an offence if he takes any premium for granting a lease. The tenant who pays premium on the other hand is entitled to certain reliefs under the provisions of Section 18. The payment of this amount by the tenant does not constitute an illegal set qua the tenant. It is illegal for the landlord to receive such an amount. The learned trial judge, in the course of his judgment, in another context has pointed out this position. In our view, there is nothing on record which would show that this evidence was excluded by the learned trial judge.

20. The evidence shows that the lease deed is in favour of the husband. The initial deposit of 3 months' rent is admittedly paid by the husband. The rent receipts are in the husband's name. In the evidence the plaintiff-husband has stated that he paid the rent first to the builder who was the landlord and then to the Society when the building was transferred to the Society. He has, however, stated that on and from 1962 to 1968 his wife has paid the rent to the society. In this connection it is important to remember that the parties set up and stayed in their matrimonial home only from June 1961 to May 1962 or thereabouts. From May 1962 the wife alone is residing in the said flat. From May 1962 till the dissolution of marriage she has been paying the rent of the said flat. The Hon. Secretary of the Co-operative Society which now owns the building where the flat is situated, has stated in his evidence that the Society has been accepting rent from the wife on behalf of the husband. He, however, became the Secretary only in 1973. Hence he cannot say who actually paid the rent prior to 1973.

21. The defendant wife in her evidence has stated that she paid the deposit and rent in respect of the said flat. In order to explain why the tenancy was taken in the name of the husband, she has, for the first time in her evidence, stated that the husband wanted the tenancy in his name because otherwise he would be

humiliated. This explanation has come for the first time in her examination-in-chief. Although there has been acrimonious correspondence between the parties over a period of time, the wife has not alleged anywhere that the tenancy was obtained in the name of the husband to save his ego. Even in her written statement she has not given this explanation. In these circumstances, in our view, the learned trial judge has rightly felt that much reliance cannot be placed on this evidence of the defendant-wife. If the wife had really paid the cash consideration and rent as alleged by her, there is no reason why she did not obtain the tenancy in her name. If the intention was that both should contribute the premium and rent, tenancy could have been obtained in the names of both. But such is not the case.

22. The lease deed is in favour of the husband. The rent receipts also stand in the name of the husband. There is no satisfactory evidence which would go to show that the wife made any contribution for the purpose of obtaining tenancy of this flat. If she had procured any amount from her father it was only by way of a loan to the husband. In these circumstances we do not see how we can come to a conclusion that the tenancy, although it was taken in the name of the husband, in fact belonged to the wife.

23. In any case since the lease deed is in favour of the husband, the onus is on the wife to dislodge the husband's claim to tenancy. She has to establish the circumstances under which she claims to be entitled to tenancy rights. She has merely made a bare statement in her examination-in-chief that she paid the deposit and all rents. The husband has conceded that she has paid rent from 1962 to 1968. But during this period the parties were living separately and the wife alone was using the said premises. This circumstance cannot, therefore, establish that the tenancy rights really belonged to the wife.

24. Looking to the circumstances of the present case and the documents produced, in our view, the learned trial judge has rightly come to a conclusion that the tenancy rights belong to the husband.

25. Mr. Desai relied upon certain questions which he asked the plaintiff in cross-examination, based upon a letter dated January 7, 1963 which was written by the attorneys of the plaintiff to the defendant. He strongly relied upon the statement

made in that letter to the effect that when the parties took the said flat on lease, both the sides had agreed that the wife would continue to give tuitions and would contribute towards payment of rent of the said flat. According to the husband, although these statements are in the letter written on his behalf, they are not correct. In this letter he has also stated that he was not in a position to pay the rent of Rs. 150, which statement also, according to the plaintiff, is not a correct statement. These contradictions by themselves cannot carry the matter any further. In the absence of any evidence to show that the wife continued to give tuitions, that she earned some amounts during the subsistence of marriage, when the parties were residing together that is to say, between 1961 and 1962 and contributed towards the rent of the flat, a mere agreement to contribute cannot confer any rights. There is no specific evidence to show that the wife contributed to the payment of rent when the parties were living together, although there is a general statement made by the wife that she paid all rents. Secondly, if Mr. Desai relies on some sentences in this letter, he cannot ignore other parts of this letter where it is stated that the wife ceased to give tuitions after the marriage and in any event she did not contribute any amount towards rent or household expenses but gave her entire income to her mother instead, on the ground that her parents had incurred expenses for the marriage. This letter of January 7, 1963, therefore, does not further the case of the wife.

26. In the premises, tenancy rights belong to the husband and not the wife.

27. It is next contended by the defendant that this Court has no jurisdiction to entertain the suit by virtue of Section 28 of the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947. Under Section 28 of the said Act, inter alia, all claims or questions arising out of the said Act must be referred to the Court of Small Causes at Bombay and no other court shall have jurisdiction to entertain any suit to deal with such claim. In the present case, the suit filed by the plaintiff is on the ground of trespass. In order to decide whether the wife is entitled to stay in the suit flat or is a trespasser, it has become necessary to examine whether the tenancy rights belong to the husband or to the wife. There is no question involved in the present dispute which requires consideration of any provision of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947. We agree with the

reasoning of the learned trial judge that this Court does have jurisdiction to entertain and try the suit, and the provisions of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 are not in any manner invoked in the present dispute.

28. We, therefore, hold that by virtue of the lease deed and the rent receipts given in favour of the husband and the circumstances set out above, the tenancy rights of the said flat belong to the husband. The wife does not have any right to the tenancy of the said flat. By virtue of his title the respondent-husband is entitled to possession of the said flat. For reasons set out earlier, we have not gone into the question whether the wife had any beneficial interest in the said flat by reason of its being the matrimonial home of the parties, particularly in view of the consent terms which were arrived at between the parties in respect of the said flat at the time of dissolution of their marriage.

29. In the light of these consent terms, however, if under Clause 5 of these consent terms, the wife now applies to the Parsi Chief Matrimonial Court for a variation of the order of alimony, the Parsi Chief Matrimonial Court will not be precluded, by virtue of our judgment, from allowing, if necessary, the wife to retain possession of the said flat or make any other order in respect of the said flat in order to ensure payment of any enhanced alimony by the husband to the wife if it has jurisdiction to do so.

30. The appeal is, therefore, dismissed. In the circumstances of the case, there will be no order as to costs.

31. Decree for possession not to be executed for a period of 6 months from today to enable the appellant to approach the Parsi Chief Matrimonial Court, if she so desires.