

Sashagiri Vs. Belgaum District Co-operative Bank Ltd.

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Court : Karnataka

Decided On : Apr-18-1995

Reported in : ILR1995KAR1423; 1995(4)KarLJ403

Judge : G.C. Bharuka, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 105

Appeal No. : R.S.A. No. 146 of 1988

Appellant : Sashagiri

Respondent : Belgaum District Co-operative Bank Ltd.

Advocate for Def. : S.K. Joshi, Adv.

Advocate for Pet/Ap. : T.S Ramachandra, Adv.

Disposition : Appeal dismissed

Judgement :

Bharuka, J.

1. The unsuccessful plaintiff who has lost in both the Courts below has preferred this Second Appeal.

2. Plaintiff-appellant had filed the present suit for possession of the suit property on the basis of an Agreement Exhibit P-1 claiming the same to be a lease evidencing the present demise.

3. Admittedly, the suit property was originally owned by the Motor Owner's Insurance Company Limited. The said Insurance Company had entered into a registered Agreement dated 22.2.1968 (Exhibit P-1) stipulating the present demise of the suit property in favour of the plaintiff. But before the plaintiff could take possession of the property, in terms of the said Agreement, the suit property was sold to the defendant under a registered sale deed. It is also an admitted fact that at the time of execution of the Agreement Exhibit P-1 the suit property was under the tenancy of one M/s Maben who had been evicted from the same in an eviction proceeding and the defendant came in possession thereof in April 1978. Keeping in view the recitals and stipulations in the document Exhibit P-1 both the Courts below have held that the document is in the nature of an 'agreement to lease' and not a lease creating a present demise in favour of the plaintiff entitling him to obtain possession as claimed.

4. This Appeal was admitted for considering the question as to whether the document Exhibit P-1 creates a lease or is an agreement to lease.

5. For proper appreciation of the question involved herein, it is necessary to refer to the relevant recitals in the document and the covenants entered into between the parties. The second paragraph of the Document Exhibit P-1 reads as under :

'WHEREAS THE LESSOR, as the full and exclusive owner of the entire Site bearing City Survey Nos. 2771(1), 2771(2), 2771 (a), 2772(a), 2772(c), 2772(d), 2773(a) and 2773(d) measuring about 18 1/2 guntas in area and of the whole building therein now under construction and to be hereafter completed by the Lessor by the side of the Poona-Bangalore Road, is possessed of and absolutely entitled to the same....'

In the first part of Clause (1) of the covenants it is stated thus :

'That in consideration of payment of Rs. 20,001/- (Rupees Twenty Thousand and One only) by the Lessee to the Lessor by way of advance free of interest to enable the Lessor to make the necessary alterations and additions in the said building now under construction so as to suit the convenience of the Lessee by providing therein Kitchen, Chimney, bathrooms, lavatories, urinals and water storage tank and electric installation for the use of the Lessee as required by him, which sum of Rs. 20,001/-(Rupees Twenty Thousand and One) (the receipt of which by a crossed cheque for Rs. 20,001/- No. 011644 dated 27th December 1967 and drawn on Canara Banking Corporation Limited, Hubli, in Lessor's favour, the Lessor hereby acknowledges) is repayable by the Lessor to the Lessee as mentioned hereinbelow without interest, and in consideration of the rent hereinafter reserved and of the covenants on the part of the Lessee for the purpose of carrying on his Restaurant business and other allied business therein. All that portion of the Ground Floor in the Ground Floor in the Lessor's said building, together with all the open site in front thereof adjoining the Poona-Bangalore Road, hereinafter called the 'Demised . Premises'....'

Sub-clause (ii) of Clause (2) of the covenants reads as under:

'The Lessee shall take possession of the Demised Premises on the 1st of JULY 1968 or on any earlier date of which the Lessor shall give the Lessee 7 days' previous notice provided that the Lessor has obtained completion certificate from the Belgaum Municipality in respect of the Lessor's said building now under construction and further provided that the Lessor is in a position to give the Lessee vacant possession of the whole of the Demised Premises on that date, it being understood between the Lessor and the Lessee that the fixed term of ten years lease commences on the date of Lessee's taking over possession as provided in this clause.'

6. From the aforesaid recitals and the covenants between the parties, it is clear that the possession over the property was to be handed over to the plaintiff after construction of the building with necessary alterations and additions as agreed to between the parties and referred to in Clause (1). The said clause also speaks of the present demise in favour of the plaintiff. The question is whether despite use of

the words 'present demise', the instrument can be construed as merely executory being in the nature of 'agreement to lease' and not 'lease'.

7. In the case of TOLARAM RELUMAL AND ANR. v. THE STATE OF BOMBAY : [1955]1SCR158 while dealing with the question as to whether an instrument is a lease or an agreement to lease, their Lordships of the Supreme Court have held thus :

'An instrument is usually construed as a lease if it contains words of present demise. It is construed as an executory agreement, notwithstanding that it contains words of present demise, where certain things have to be done by the lessor before the lease is granted, such as the completion or repair or improvement of the premises, or by the lessee, such as the obtaining of sureties.'

8. Keeping in view the attendant facts of the present case and the law laid down by the Supreme Court in the case of Tolram Relumal¹ (supra), the mere words of present demise set out in the Document Exhibit P-1 are not decisive for holding it to be a lease because in fact the demise is dependant on the completion of the building in accordance with the requirement of the plaintiff which was under construction on the date of the execution of the said document. Therefore, the contract entered into between the parties under Exhibit) P-1 has to be held as a mere executory contract and not one which has created the demise in praesenti.

9. So far as the Decision of the Supreme Court in the case of H.V. RAJAN v. C.N. GOPAL AND ORS. : AIR 1975 SC261 , cited on behalf of the plaintiff is concerned, it does not have much bearing on the present facts of the case because in that case the demise was not dependant on completion of the building. Similar is the situation with the case of THE STATE OF MAHARASHTRA AND ORS. v. ATUR INDIA PVT. LTD : [1994]1SCR881 .

10. Accordingly, I am constrained to hold that the Courts below have correctly taken the view that the Exhibit P-1 is merely an agreement to lease and not lease. As such, plaintiff is not entitled to the relief claimed.

11. Thus the Appeal fails. Parties to bear their own costs,

