

SalauddIn Vs. Bommegowda

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Court : Karnataka

Decided On : Jun-27-1985

Judge : Kulkarni, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 108

Appeal No. : M.F.A. No. 800 of 1985

Appellant : Salauddin

Respondent : Bommegowda

Advocate for Def. : V. Tarakaram, Adv.

Advocate for Pet/Ap. : W.K. Joshi, Adv. for M. Raghavendrachar, Adv.

Judgement :

Kulkarni, J.

1.This is a defendant's appeal against the Order dated 15-3-1985 passed by the VII Additional City Civil Judge, Bangalore, in O.S. No. 267 of 1985 making the temporary injunction absolute.

2. The parties have been referred to with reference to their position in the Trial Court.

3. The property in question originally belonged to one Dhanalakshmi Ammal. She had leased out the building in question to one Mahadevan who was running the business of manufacturing vermicelli in the suit premises. The defendant purchased the running of vermicelli business from Mahadevan. Thereafter, a lease deed was entered into between the defendant and Dhanalakshmi Ammal as per the lease deed dated 19-11-1976.

4. The present plaintiff purchased the property from Dhanalakshmi Ammal on 19-1-1984. After the plaintiff purchased the property, the trouble started between the parties. According to the defendant, as the plaintiff started interfering with his possession, he filed OS. No. 3813 of 1984 for permanent injunction restraining the plaintiff from interfering with his possession of the building and obtained temporary injunction on 9-11-1984. The plaintiff thereafter, tiled the present suit.

5. It appears that the plaintiff started to put up construction on the top or terrace of the suit building which was only a ground floor. According to the plaintiff, as he had been threatened with eviction from the premises occupied by him as a tenant and as the defendant denied to deliver possession to him (the plaintiff), he started putting up the first floor on the top or terrace of the building and the defendant started interfering with his putting up of the story on the top of the building leased to him. There-fore, the plaintiff filed O.S 267 of 1985 on 21st January 1985 for a permanent injunction restraining the defendant from interfering with his putting up first floor on the top of the building. He obtained a temporary injunction. Thereafter the defendant filed an application under Order 39 Rule 4 C.P.G. to vacate the order of interim injunction granted in favour of the plaintiff. The Court below on appreciation of the material placed before it and after hearing the advocates for both parties, made the temporary injunction granted in favour of the plaintiff absolute and dismissed the application filed by the defendant under Section 39 Rule 4 C.P.C Hence this appeal by the defendant.

6. Sri Joshi, Learned Counsel appearing for the appellant/ defendant contended that the word ' building' defined in the Rent Control Act includes the roof of the premises. He drew my attention to Section 3 of the Karnataka Rent Control Act which reads thus :-

(a) 'building' means any building or hut or part of a building or hut other than a farm house, let or to be let separately for residential or non-residential purposes and includes-

(i) the garden, grounds and out-houses, if any appurtenant to such building hut or part of such building or hut and or to be let along with such building or hut or part of building or hut ;

(ii) any furniture supplied by the landlord for the use in which building or hut or part of a building or hut ;

(iii) 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.

He also relied on the Bombay Rent Act by Dalal. At page 86, it has been stated by the author Dalal as -

'Separately means distinctly from the rest of the building. The expression 'let separately ' is applicable to a part of a building and not to the whole building.

The premises should be demised in such a way that the tenant has the exclusive use, possession and enjoyment thereof. Where, therefore, in a chawl in Bombay, rooms are let as separate tenements and privies and washing places are used in common by the tenants, the rooms could be said to have been let separately and the privies, passages and washing places which are used in common cannot be said to have been let separately, but the tenants of the rooms are given leave and licence to use them and hence common privies, washing places and passages, common bath room, lift, forecourt and yard would not be included within the meaning of the words 'premises let separately.'

The view of the Trial Court that the demised portion does not include the roofing, appears to have no substance, as there cannot be a building without a roof. Can anybody reside or do some business in a building without roof . There-fore, the view of the Trial Court that roof is not included in the definition 'building' appears to be prima facie wrong. The Court below has over-looked the distinction between

roof and terrace. The terrace is the top portion of the roof.

7. But the question is whether the landlord who has the demised building, has or has not got a right to put up the firststorey on the terrace of the building demised to the tenant.

8. Section 108 of the Transfer of Property Act deals with the Rights and Liabilities of lessor and lessee. Rights of the lessor are mentioned in Section 108(a) (b) and (c) :

(a) .The lessor is bound to disclose to the lessee any material defect in the property, with reference in its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover.

(b) The lessor is bound, on the lessee's request to put him in possession of the property.

(c) The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption.

9. Learned author Mulla has stated in the Transfer of Property Act, Sixth Edition, at page 693 as follows :

'Interference with the lessee's use of the premises for the particular purpose for which they were taken is a breach. So, in a case already referred to, when the premises were let for drying timber, the lessor could not use the adjoining land so to block the access of air. But interference which does not make the premises less useful generally, but only less useful for some purpose, unknown to the lessor at the time of letting, is not a breach of the covenant. In *Robinson - vs - Kilvert* (1889) 41 Ch; D 88 and *Harmer -v.- Jumbil (Nigeria) Tin Areas Ltd.* (1921) 1 Ch. 200 : (1920) All. E.R. Re. 113, the lessor let the upper part of the building for a paper warehouse and then installed a heating apparatus in the cellar. This did not interfere with the lessee's comfort or make the house unfit for storing paper generally, but it did affect a particular class of delicate paper that the lessee stored. This was not a breach of the covenant, for the lawful enjoyment or the

house as a paper warehouse was not interfered with, and if the lessee required special protection he should have bargain-ed for it

10. It is undisputed that the defendant is the tenant of the petition premises and is manufacturing vermicelli in the premises. It is undisputed that he has been manufacturing vermicelli inside the four walls of the demised building. The object of the lease is only to manufacture vermicelli. Thus, putting up of the first floor on the terrace of the demised building will not be an interference with the lessee's business or will not make the demised building unfit for manufacturing vermicelli.

11. Learned Counsel Sri Joshi urged that drying process of vermicelli was a part of manufacturing vermicelli. It is a matter of commonsense that nobody would eat wet vermicelli and it will have to be dried. But it is undisputed that there is open space between the front portion having Madras terrace and another building with tiled roof behind it. Vermicelli which is manufactured by the defendant can very well be dried in that open space which is open to the sky.

12. According to the defendant, the portion demised to him also includes tiled portion. If that is so, he can make use of that portion for drying the vermicelli. According to defendant, he has been manufacturing vermicelli by using maida weighing two quintals per day. It is not as if he is manufacturing vermicelli by truck loads or wagon loads. If he has been manufacturing vermicelli by using two quintals of maida per day, the open space in between the tiled roof building and Madras Terraced portion would be more than sufficient. Putting up of the 1st floor on the terrace of the Madras terraced ground floor would not in any way interfere With the quiet enjoyment of his leasehold right.

13. Sri Joshi referred me to Halsbury's Laws of England, Fourth Edition, Vol. 27, Landlord and Tenant Leasehold Enfranchisement or Extension at Paras 265 and 266, in support of his contention that right of re-entry has not been reserved by the landlord. Merely because the landlord has not reserved the right of reentry in the present case, it does not mean that he has no right to put up the first floor. He may not have the right of re-entry into the building demised. But his right to put up firststory on the terrace of the building cannot be defeated only on the ground that he has not reserved the right of reentry.

14. In Kelly -v.- Bettershell and Another¹ it has been stated thus -

(i) 'The user of the lower part of the house was merely an interference with the plaintiff's convenience, amenity or privacy and was not of such a serious nature as to frustrate the use of the premises for the purpose for which they were demised : and, therefore, the fact that the incorporation of the premises in a hotel did not amount to a derogation from the grant made to the plaintiff.

(ii) in any event, the question whether particular circumstances amounted to a derogation from the grant as distinct from a mere interference of amenities was a question of fact, and there was evidence on which the country Court Judge could decide in favour of the defendants.'

15. In Owen -v.- Gadd and Others it has been held that the test is whether interference complained amounts to interference with the quiet enjoyment of the building demised. If interference does not affect the object of the lease for which it is taken, then it cannot be said to be an interference with the quiet enjoyment of the building. In the present case, the building has been taken on lease for manufacturing vermicelli and he is even now manufacturing vermicelli and drying them inside the building. Therefore, the putting up of the first story on the terrace of the building will not in any way interfere with the defendant's business of manufacturing vermicelli.

16 It is admitted that the stair-case for the building in question is outside the building. Therefore, putting up of first story on the terrace of the building can be done without interference with the business of manufacturing vermicelli which is being done by the defendant even now.

17. It is undisputed that the plaintiff has practically put up walls of the first floor on the terrace of the roof and only thing that is required to complete the first floor, is the putting up of the roof over it. When the construction of the 1st floor by the plaintiff has reached such a stage, the balance of convenience also would be in favour of the plaintiff. The plaintiff has already obtained requisite plan and the licence from the Corporation to put up the first floor. According to plaintiff, he has borrowed a sum of Rs. 48,000/- from the Society. He has collected materials for

the said purpose of constructing the 1st floor and stored them. Practically the putting up of the walls on the terrace of the roof had been completed.

18. Learned Counsel Sri Joshi submitted that the defendant had filed O.S. No. 3813 of 1984 for permanent injunction restraining the defendant (the plaintiff in this suit) from interfering with his possession of the building in question and temporary injunction has been granted in that suit. According to him, the grant of injunction in O.S. 3813 of 1984 barred the present suit.

19. The subject matter of the suit in O.S. 3813 of 1984 was only regarding interference with the possession of the building i.e., the ground floor. The subject matter of the suit in question is defendant's interference with plaintiff putting up of 1st story on the terrace of the roof. Therefore the grant of injunction in O S 3813 of 1984 does not come in the way of the present suit in O.S. 267 of 1985.

20 . As already noticed above, the construction of first floor on the terrace of the roof of the demised building will not in any way interfere with the manufacturing process of the vermicelli by the defendant. Therefore, the defendant would not even be remotely put to any inconvenience by putting up of first story on the terrace of the roof There-fore under these circumstances, the order passed by the Court below making the injunction absolute needs no interference. Therefore the Appeal is dismissed. No costs in this Appeal.

21 . At this stage, Learned Counsel Sri Joshi for the defendant submitted that his client would take the matter to the Supreme Court and that the operation of this order be stayed for two months. Learned Counsel for the plaintiff submitted that there is no provision for an Appeal against the order passed by a Single Judge and thus the question of staying the operation of this order does not arise at all.

22. I find there is ample force in the contention raised by the Counsel for the plaintiff. Therefore, the request of the Learned Counsel for the defendant for stay of operation of this order is rejected.