Bhaiya Punjalal Bhagwanddin

Vs

Dave Bhagwatprasad Prabhuprasad

Civil Appeal No. 209 of 1962

(J. L. Kapur, K. C. Das Gupta, Raghuvar Dayal JJ)

04.05.1962

JUDGMENT

RAGHUBAR DAYAL, J. -

This appeal, by special leave, is against the judgment and decree of the High Court of Gujarat.

The appellant was a tenant of certain residential premises situate at Anand, and belonging to the respondents-landlords. Under a contract between the parties, he held them at Rs. 75/- per mensem according to Indian Calendar. In 1951 the appellant applied for fixation of standard rent. On March 31, 1954, the standard rent was fixed at Rs. 25/- per mensem. The appellant did not pay the arrears of rent from July 27, 1949, to July 5, 1954. On October 16, 1954, the landlords gave him notice to quit the premises stating therein that rent for over six months was in arrears and that he was to quit on the last day of the month of tenancy which was Kartak Vad 30 of Samvat Year 2011. The appellant neither paid the arrears of rent nor vacated the premises. On December 16, 1954, the respondents filed the suit for ejectment basing their claim for ejectment on the provisions of s. 12(3)(a) of the Bombay Rents, Hotel and Lodging House rates Control Act, 1947 (Bom. LVII of 1947), hereinafter called the Act.

Within two months of the institution of the suit, the appellant deposited an amount of Rs. 1,075/- in Court, towards arrears of rent and, with the permission of the Court, the respondents withdrew a sum of Rs. 900/- which was the amount due for arrears up to that time. The Trial Court decreed the suit for ejectment together with arrears of rent for three years and costs. An appeal against the decree for ejectment was dismissed by the appellate Court. The revision to the High Court was also unsuccessful, and, it is against the order in revision that this appeal has been preferred.

Four points were urged before the High Court : (1) That the month of tenancy was not by the Indian Calendar, but was by the British Calendar and that the Courts below had ignored evidence in that regard. (2) Assuming that the month of tenancy was by the Indian Calendar according to the lease, it would be deemed to be by the British Calendar in view of the provision of s. 27 of the Act. (3) As the arrears of rent had been paid within two months of the institution of the suit, the appellant be deemed to be ready and willing to pay the rent and that therefore the landlord was not entitled to recover possession of the premises. (4) It is discretionary with the Court to pass a decree for ejectment in a case under s. 12(3)(a) of the Act, as the expression used in that sub-clause is 'the Court may pass a decree for eviction in any such suit for recovery of possession.'

The High Court held that the findings of the Courts below that the month of tenancy was by the Indian Calendar was based on a consideration of the evidence on the record and therefore was

binding. It also held that it could not be deemed to be by the British Calendar in view of s. 27 of the Act which provided that the rent would be recovered according to the British Calendar, notwithstanding anything contained in any contract and did not provide for the tenancy to be by the month according to the British Calendar even if the tenancy under the Contract was by a different Calendar. The High Court also held that the tenant's depositing arrears of rent within two months of the institution of the suit would not justify holding that the tenant was ready and willing to pay the amount of standard rent and that therefore the landlord was not entitled to recover possession of the premises in view of sub-s. (1) of s. 12 of the Act. Lastly, the High Court held that the Court is bond to pass a decree for ejectment under s. 12(3)(a) if it be proved that the rent was payable by the month, that it had been in arrears for a period of six months and that the tenant failed to make payment of the arrears until the expiration of the period of one month after the service of notice referred to in sub-s. (2) of that section. As a result, the revision was dismissed.

Two points have been urged for the appellant in this Court. One is that the month of the tenancy was to be by the British Calendar in view of s. 27 of the Act and r. 4 framed thereunder, and that there could be no forfeiture of the tenancy when the arrears of rent had been paid within two months of the institution of the suit.

The significance of the first question is that if the appellant's tenancy was to be by the month of the British Calendar, notice to quit was a bad notice as it did not comply with the requirements of s. 106 of the Transfer of Property Act and that therefore there had been no determination of the tenancy which is a condition precedent for the landlord being entitled to possession and, consequently, for instituting a suit for ejectment on any ground whatsoever, including the ground of rent being in arrears.

The first point to determine, therefore, is whether it is a condition precedent for the institution of a suit by a landlord for the recovery of possession from a tenant who has been in arrears of rent that there had been first a determination of the contractual tenancy. If it is not a condition precedent; it will not be necessary to determine whether the month of the tenancy continued to be according to the Indian Calendar according to the contract, or had been according to the British Calendar in view of s. 27 of the Act, when a tenancy is created under a contract between the landlord and the tenant, that contract must hold good and continue to be in force till, according to law or according to the terms of contract, it comes to an end. Section III of the Transfer of Property Act states the various circumstances in which a lease of immovable property determines. Clause (h) provides for the determination of the lease on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. There is nothing in the act which would give a right to the landlord to determine the tenancy and thereby to get the right to evict the tenant and recover possession. This Act was enacted for the purpose of controlling the rents and repair of certain premises and of evictions due to the tendency of landlords to take advantage of the extreme scarcity of premises compared to the demand for them. The Act intended therefore to restrict the rights which the landlords possessed either for charging excessive rents or for evicting tenants. A tenant stood in no need of protection against eviction by the landlord so long as he had the necessary protection under the terms of the contract between him and the landlord. He could not be evicted till his tenancy was determined according to law and therefore there was no necessity for providing any further protection in the Act against his eviction so long as his tenancy continued to exist under the contract.

Sub-section (1) of s. 12 of the Act provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and wiling to pay, the amount of

the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the Act. It creates a restriction on the landlord's right to the recovery of possession. When the landlord will have such a right is not provided by it. Ordinarily, the landlord will have a right to recover possession from the tenant when the tenancy had determined. The provisions of this section therefore will operate against the landlord after the determination of the tenancy by any of the modes referred to in s. III of the Transfer of property Act. What this section of the Act provides is that even after the determination of the tenancy, a landlord will not be entitled to recover possession, though a right to recover possession gets vested in him, so long as the tenant complies with what he is required to do by this section. It is this extra protection given by this section which will be useful to the tenant after his tenancy has determined. The section does not create a new right in the landlord to evict the tenant when the tenant does not pay his rent. It does not say so, and therefore, it is clear that a landlord's right to evict the tenant for default in payment of rent will arise only after the tenancy is determined and the continued possession of the tenant is not account of the contractual terms but on account of the statutory right conferred on him to continue in possession so long as he complies with what sub-s. 1 requires of him. The landlord is restricted from evicting the tenant till the tenant does not do what he is required to do for peaceful possession under sub-s. (1) of s. 12. We are therefore of opinion that where a tenant is in possession under a lease from the landlord, he is not to be evicted for a clause which would give rise to a suit for recovery of possession under s. 12 if his tenancy has not been determined already. It follows that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him it is necessary for the landlord to serve him with a notice determining his tenancy and also serve him with a notice under sub-s. (2) of s. 12 of the Act.

In this connection reference may be made to what was stated in Dr. K. A. Dhairyawan v. J. R. Thakur [(1959) S.C.R. 799.]. In that case, the landlord granted a lease of a parcel of land to the lessees for a certain period. The lessee was to construct a building on that land. On the termination of the lease, the lessees were to surrender and yield up the demised premises including the building to the lessors. After the expiry of the period of the lease, the lessor sued for a declaration that they were entitled to the building and were entitled to claim possession of the same. The lessees pleaded that they were also lessees of the building and were protected from eviction therefrom by the provisions of the Bombay Rents, Hotel and lodging House Control Act, 1947, and that the covenant for delivering possession of that building could not be enforced as the lease in respect of the land could not be terminated on account of the protection given by the Act. It was held that under the lease there was a demise only of the land and not of the building, and, consequently, the provisions of the Act did not apply to the contract of delivery of possession of the building. It was contended that even in such a case, possession of the building could not be given until the lease had been determined, which in law, could not be determined so long as the respondents could not be evicted from the demised land of which they were tenants within the meaning of the Act. This contention was repelled. It was said at p. 808 :

> "This contention in without force as the provisions of the Act do not provide for the continuation of a lease beyond the specified period stated therein. All that the Act does is to give to the person who continues to remain in possession of the land, although the period of the lease had come to an end, the status of a statutory tenant. That is to say, although the lease had come to an end but the lessee continued to remain in possession without the consent of the lessor, he would nonetheless be a tenant of the land and could not be evicted save as provided by the Act."

This means that the provisions of the Act did not affect the terms of the lease according to which the

lease came to an end after the expiry of the period for which it was given. The lessee's possession after the expiry of the lease was by virtue of the provisions of the Act and not by virtue of the extension of the period of the lease. It is a necessary consequence of this view that the restriction on the landlord's right to recover possession under s. 12 of the Act operates after he has determined the tenancy and that till then the rights between the parties with respect to eviction would be governed by the Ordinary law.

It was said in Ragbubir Narayan Lotlikar v. Fernandez [(1952) 54 Bom. L.R. 505, 511.].

(Bom. Rents, Hotel and Lodging House Rates Control Act (Bom. Act LVII of 1947) : "In our opinion, s. 28 applies only to those suits between a landlord and a tenant where a landlord has become entitled to possession or recovery of the premises demised. Under the Transfer of Property Act a landlord becomes entitled to possession when there is a determination of tenancy. A tenancy can be determined in any of the modes laid down in s. III; and once the tenancy is determined, under s. 108(q) the lessee is bound to put the lessor into possession of the property. It is, therefore, only on the determination of the lease or the tenancy that the landlord becomes entitled to the possession of the property, and when he has so becomes entitled to possession, if he files a suit for a decree for possession, then s. 28 applies and such a suit can only be filed in the Small Causes Court."

Again it was said at the same page :

> "Section 12 postulates the fact that landlord is entitled to recovery of possession and he is only entitled to possession under the provisions of the Transfer of Property Act. It is only when he so becomes entitled that the Legislature steps in and prevents the enforcement of his right by the protection which it gives to the tenant. No question of the application of s. 12 can arise if a landlord is not entitled to possession at all."

A similar view was expressed in Karsandas v. Karsanji [A.I.R. (1953) Sau. 113, 118.] It was said :

> "... that a tenancy must be duly determined either by a notice to quit or by efflux of time or under one or the other of the clauses of s. III, T.P. Act before a landlord can one to evict his tenant on any of the grounds contained in the clauses of s. 13(1) of the Bombay Rent Act as applied to Saurashtra. Therefore a notice determining the tenancy and calling upon the tenant to quit was in this case a necessary prerequisite to the institution of the suit."

The cases reported as Rai Brij Raj Krishna v. S. K. Shaw and Brothers [(1951) S.C.R. 145, 150.] and Shri Hem Chand v. Shrimati Sham Devi [I.L.R. (1955) Punj. 36.] are distinguishable. In the former case, s. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, (III of 1947) came for interpretation by this Court and, in that connection it was said :

> "Section 11 beings with the words 'Notwithstanding anything contained in any agreement or law to the contrary', and hence any attempt to import the provisions relating to the law of transfer of property for the interpretation of the section would seem to be out of place. Section 11 is a self-contained section, and it is wholly unnecessary to go outside the Act for determining whether a tenant is liable to be evicted or not, and under what conditions he can be evicted. It clearly provides that a tenant is not liable to be evicted except on certain conditions, and one of the

> conditions laid down for the eviction of a month to month tenant is non-payment of rent."

In the present case, s. 12 of the Act is differently worded and cannot therefore be said to be a complete Code in itself. There is nothing in it which overrides the provisions of the Transfer of Property Act.

Shri Hem Chand's Case [I.L.R. (1955) Punj 36.] dealt with the provisions of s. 13(i) of the Delhi and Ajmer Merwara Rent Control Act XXXVIII of 1952. This section provided that no decree or order for the recovery of possession of any promises shall be passed by any court in favour of the landlord against a tenant, notwithstanding anything to the contrary contained in any other law or any contract. It was held that the Rent Control Act provided the procedure for obtaining the relief of ejectment and that being so the provisions of s. 106 of the Transfer of property Act had no relevance, in considering an application for ejectment made under that Act. There is nothing in the Act corresponding to the provisions of s. 13(1) of the Delhi Ajmer Merwara Act. It is unnecessary for us to consider whether Shri Hem Chand's case [I.L.R. (1955) Punj.] was rightly decided or not.

In Meghji Lakhamahi and Brothers v. Furniture Workshop [(1954) A.C. 80, 90.] the Privy Council dealt with an application for possession under s. 16 of the Increase of rent (Restriction) Ordinance, No. 23 of 1949 (Kenya) whose relevant portion is :

> "(1) No order for the recovery of possession of any premises to which this Ordinance applies, or for the ejectment of a tenant therefrom, shall be made unless... (k) the landlord requires possession of the premises to enables the reconstruction or rebuilding thereof to be carried out..."

It was said :

> "In the present case the only question is whether section 16(i)(k) is so framed as to envisage or make provision for such an order.
>
> An application for possession under section 16 presupposes that the contractual tenancy of the demised premises has been determined. It is not possible to determine it as to part and keep it in being as to the remainder. In the present case the tenancy of the entire demised premises had been determined."

The right to possession is to be distinguished from the right to recover possession. The right to possession arises when the tenancy is determined. The right to recover possession follows the right to possession, and arises when the person in possession does not make over possession as he is bound to do under law, and there arises a necessity to recover possession through Court. The cause of action for going to Court to recover possession arises on the refusal of the person in possession, with no right to possess, to deliver possession. In this context, it is clear that the provisions of s. 12 deal with the stage of the recovery of possession and not with the stages prior to it and that they come into play only when the tenancy is determined and a right to possession has come in existence. Of course, if there is not contractual tenancy and a person is deemed to be a tenant only on account of a statute giving him right to remain in possession, the right to possession arises on the person in possession acting in a manner which, according to the statute, gives the landlord right to recover possession, and no question for the determination of the tenancy arises, as really speaking, there was no tenancy in the ordinary sense of that expression. It is for the sake of convenience that the right to

possession, by virtue of the provisions of a statute, has been referred to a statutory tenancy.

In Ebner v. Lascelles [(1928) 2 K.B. 486, 497.]. It was said, dealing with the provisions of Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. 5, c. 17) :

> "It has been truly said that the main rights conceded to a tenant under these Acts are, first a right to hold over or 'status of irremovability,' and, next, a right not to have his rent unduly raised. The right to hold over is a right that comes into existence after the expiration of the contractual tenancy. During the contractual tenancy the tenant, being in possession under the protection of his contract, has no need of the protection of the Act to enable him to retain possession, but during that tenancy the Act protects him in regard to rent by providing that, notwithstanding any other agreements which he may make with his landlord to rent, he is not to be charged a higher rent than the law allows, and if he is charged a higher rent than that he can have it reduced. The right to hold over after the termination of the contractual tenancy, and the right to protection during the contractual tenancy are two rights which must be kept distinct from each other."

It may be mentioned that s. 5 of the aforesaid Act of 1920 provided that no order or judgment for the recovery of possession of any dwelling house to which the Act applied or for the ejectment of a tenant therefrom would be made or given unless the case fell within one of the clauses mentioned in sub. s. (1).

We are therefore of opinion that so along as the contractual tenancy continues, a landlord cannot sue for the recovery of possession even if s. 12 of the Act does not bar the institution of such a suit, and that in order to take advantage of this provision of the Act he must first determine the tenancy in accordance with the provisions of the Transfer of Property Act.

It is now necessary to determine whether a notice served on the appellant to quit the tenancy on October 16, 1954, the last date of the month according to the Hindu Calendar, as October 16 happened to be Kartik Vad 30 of S.Y. 2011, the tenancy having commenced from Kartik Sud 1 of S.Y. 1963. It is not disputed that originally the tenancy was according to the Hindu Calendar. The contention for the appellant is that this month to month tenancy, according to the Hindu Calendar, was converted to a similar tenancy according to the British Calendar in view of the provisions of s. 27 of the Act and r. 4 of the Rules framed under the Act.

Section 27 of the Act reads :

> "(1) Notwithstanding anything contained in any law for the time being in force or any contract, custom or local usage to the contrary, rent payable by the month or year or portion of a year shall be recovered according to the British Calendar.
>
> (2) The State Government may prescribe the manner in which rent recoverable according to any other calendar before the coming into operation of this Act shall be calculated and charged in terms of the British Calendar."

Rule 4 of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, hereinafter called the Rules, reads :

> "Calculation of rent according to British Calendar. - If, before the Act comes into

> force, the rent in respect of any premises was chargeable according to a calendar other than the British Calendar, the landlord shall recover from the tenant rent for the broken period of the month, year or portion of the year immediately preceding the date on which the Act comes into force, proportionate amount according to the aforesaid Calendar month, year or portion of the year at which the rent was then chargeable. After such date the landlord shall recover rent according to the British Calendar. The rent chargeable per month according to the British Calendar shall not exceed the rent which was chargeable per month according to the other calendar followed immediately before such date."

There is nothing in the aforesaid rule or the section about the conversion of the month of the tenancy from the month according to the Hindu calendar to the month according to the British Calendar. They only provide for the recoverability of the rent according to the British Calendar. Since the enforcement of the Act on February 13, 1948, the monthly rent would be for the month according to the British Calendar. The monthly rent could be recovered after the expiry of a month from that date or the rent for the period from the 13th February to the end of the month could be recovered at the monthly rate and thereafter after the expiry of each Calendar month. There is nothing in the section or the rule in regard to the date from which the month for recovery of rent should commence. This provision was made probably, as a corollary to the statute providing for standard rents. Standard rents necessitate standard months. There are a number of calendars in use in this country. The Hindus themselves use several calendars. The Muslims use a different one. Some calendars are used for particular purposes. It appears to be for the sake of uniformity and standardisation that a common calendar was to govern the period of the month of the tenancy and the date for the recovery of the rent. Rule 4 provided a procedure for adjustment of the recovery of the rent according to a calendar other than the British Calendar, and further provided that the rent chargeable per month, according to the British Calendar, would not exceed the rent which was chargeable per month according to the other calendar followed immediately before that date. In the absence of any specific provision in the Act with respect to any alteration to be made in the period of the month of the tenancy, it cannot be held merely on the basis of as alteration in the period for the recovery of rent that the monthly period of tenancy had also been changed. The tenancy can be from month to month and the recoverability of the rent may not be from month to month and may, under the contract, be based on any period say, a quarter or half year or a year. There is nothing in law to make the month for the period of recovering rent synchronize with the period of the month of the tenancy. The tenancy must start on a particular date, and, consequently, its month would be the month from that date, according to the calendar followed. The month of tenancy according to that calendar are settled by contract from the commencement of the tenancy. The tenancy under a lease for a certain period starts from a certain date, be it according to the British Calendar or any other Calendar. The period of lease and consequently the tenancy, comes to an end at the expiry of that period according to the calendar followed by the parties in fixing the commencement of the tenancy. A lease, even according to the British Calendar, can start from any intermediate date of the calendar month. There is nothing in s. 27 to indicate that the month of the tenancy to such a lease will start from the first of a regular month. Section 27 simply states that the rent would be recovered according to the British Calendar without fixing the first date of the month as the date from which the month, for the purposes of the recovery of the rent, would be counted. It follows that the month of the tenancy which commences on the 14th of a month, would be from the 14th to the 13th of the next month, according to the British Calendar. The rent would be recoverable with respect to this period of a month. No interference with any such term of the contract has been made by any provision of the Act and therefore we hold that the provisions of s. 27 of the Act and r. 4 of the

Rules, do not in any way convert the month of the tenancy according to the Indian Calendar to the month of the British Calendar.

The High Court said in the judgment that Mr. Parghi, who was appearing for the appellant, was unable to cite any decision in support of the contention raised by him. Our attention, however, has been drawn to two cases decided by the Bombay High Court. They are Civil Revision Applications Nos. 247 of 1956 and 1583 of 1960 decided by Dixit and Tendolkar, JJ and Patwardhan J., on February 22, 1957, and August 16, 1961, respectively. The latter decision had to follow the earlier one. In the earlier case, the notice to quit required the tenant to give possession on May 1, 1953. The tenancy had commenced according to the Hindu Calendar. The notice was given according to the British Calendar. The High Court held the notice to be valid, agreeing with the contention that the effect of the provisions of s. 27 of the Act was to make the tenancy which was originally according to the Hindu Calendar, a tenancy according to the British Calendar. The ratio of the decision, in the words of the learned Judges, is :

> "Now rent is payable for occupation by the defendant and therefore, the tenancy must be deemed to be one according to the British Calendar from the first of the month to the end of the month..... Here is a local law which by section 27 makes the tenancy as one according to the British Calendar".

We are of opinion that this view is wrong. We, therefore, hold that the notice to quit issued to the appellant was therefore a valid notice as held by the Court below and determined the tenancy of the appellant.

The second contention that, the appellant's having paid the arrears of rent within 2 months of the institution of the suit, there would be no forfeiture of the tenancy has no force in view of the provisions of s. 12 of the Act. Sub-section (2) permits the landlord to institute a suit for the eviction of a tenant on the ground of non-payment of rent after the expiration of one month from the service of the notice demanding the arrears of rent, and cl. (a) of sub-s. (3) empowers the Court to pass a decree in case the rent had been payable by the month, there was no dispute about the amount of standard rent, the arrears of rent had been for a period of six months and the tenant had neglected to make the payment within a month of the service of the notice of demand. The tenant's paying the arrears of rent after the institution of the suit therefore does not affect his liability to eviction and the Court's power to pass a decree for eviction. It is true that the expression used in cl. (a) of sub-s. (3) is 'the Court may pass a decree for eviction in any such suit for recovery of possession', but this does not mean as contended for the appellant, that the Court has discretion to pass or not to pass a decree for eviction in case the other conditions mentioned in that clause are satisfied. The landlord became entitled to recover possession when the tenant failed to pay rent and this right in him is not taken away by any other provision in the Act. The Court is therefore bound in law to pass the decree when the requirements of sub-s. (2) of s. 12 are satisfied. This is also clear from a comparison of the language used in cl. (a) with the language used in cl. (b) of sub-s. (3) which deals with a suit for eviction which does not come within cl. (a) and provides that no decree for eviction shall be passed in such a suit if on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent then due and thereafter continues to pay or tender in Court regularly such rent till the suit is finally decided and also pays costs of the suit as directed by the Court. It is clear that where the legislature intended to give some benefit to the tenant on account of the payment of the arrears during the pendency of the suit, it made a specific provision. In the circumstances, we are of opinion that the Court has no discretion and has to pass a decree for eviction if the other conditions of sub-s. (2) of s. 12 of the Act are satisfied.

The result therefore is that this appeal fails, and is accordingly dismissed with costs.

Appeal dismissed.

</html