Chunilal Vithaldas

Vs

Mohanlal Motilal Patel

Civil Appeal No. 427 of 1964.

(K.N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

15.04.1965

JUDGMENT

SHAH, J.-

Respondent in this appeal is the owner of a building used as a cinematograph theatre. By a registered deed dated December 23, 1960, the appellant obtained a lease of the theatre at a monthly rental of Rs. 1,801/-. The appellant applied under s. 11 of the Saurashtra Rent Control Act 22 of 1951 hereinafter called 'the Act' - for an order fixing the standard to be paid under the lease was "excessive, exorbitant and improper" and that the standard rent of the theatre, having regard to its situation and size and the amenities provided therein, could not exceed Rs. 350/- per mensem. The respondent by his written-statement submitted that the rent stipulated under the lease was reasonable.

The Court of First Instance fixed the standard rent of the whole theatre at Rs. 1,030/12/- being the one-twelfth of the gross return of 6% on the cost of construction of the theatre and the cost of furniture installed therein. But the learned Judge held that the respondent had not delivered to the appellant possession of the basement and of a part of the building which was intended to be used for a restaurant, and on that account reduced the standard rent payable by the appellant by Rs. 220/-.

Against the order of the Civil Judge, the respondent preferred an appeal under s. 28(1) of the Act to the District Court, Gohilwad, and the appellant preferred cross-objections to the order appealed from. The District Court agreed with the Trial Court that the cost of construction of the building and cost of the furniture was Rs. 2,06,150/-, and held that standard rent should be fixed on the basis of a return of 7% of the cost of the building and furniture, and on that footing computed the standard rent at Rs. 1,200/- per mensem. The District Court further held that possession of the space reserved for a restaurant was delivered to the appellant and since about June 1952 it was in the appellant's occupation. It was however common ground between the parties that possession of the cellar was not delivered by the respondent to the appellant. It was the case of the respondent that the cellar was not included in the premises let out. It was the case of the appellant that it was so included. On the view that the cellar was not included in the tenancy, the District Court directed that standard rent of the premises in the occupation of the appellant be fixed at Rs. 1,150/- per mensem.

Against the order of the District Court, second appeal No. 552 of 1959 preferred by the appellant to the High Court of Judicature at Bombay was by order dated March 30, 1959 dismissed under O. 41, r. 11(1) of the Code of Civil Procedure. The respondent also preferred an appeal to the High Court. For reasons which we are unable to ascertain this appeal was not made ready for hearing before the Bombay High Court, and on reorganisation of the State of Bombay that appeal was transferred to

the High Court of Gujarat and we were informed at the Bar that the appeal is now pending before that High Court.

Against the order of the Bombay High Court dismissing his appeal, the appellant has appealed to this Court.

It is somewhat unfortunate that the appeal filed by the respondent has been admitted to the file and is to be heard on the merits, while the appeal filed by the appellant was summarily dismissed. Counsel for the appellant submitted that we should set aside the order of the High Court of Bombay, since a second appeal under s. 28 of the Act lay to the High Court on a question of fact as well as law, and as there was "voluminous evidence" on the record which had to be considered in determining the appropriate standard rent, the High Court of Bombay committed a grave error in summarily dismissing the appeal. We are unable to agree with that plea.

Section 28(1) of the Act provides :

> "Notwithstanding anything contained in any law, but subject to the provisions of the Provisional Small Cause Court Act, as adapted and applied to the State of Saurashtra, an appeal shall lie from a decree or order made by a Civil Judge or a Munsiff exercising jurisdiction under section 27 to the District Court and a second appeal to the High Court."

It was said that the expression "second appeal" in s. 28(1) of the Act means an appeal from an appellate decree, but restrictions imposed by s. 100 of the Code of Civil Procedure upon the power of the High Court are not attracted to a "second appeal" under s. 28 of the Act. Ordinarily, says counsel for the appellant, an appellate Court is competent to examine the correctness of the decision appealed from on the ground that the decision is erroneous in point of law or fact, and in the absence of any express provision to the contrary, restrictions imposed on the power of the High Court under one statute cannot be imported merely because of similarity of nomenclature, when exercising jurisdiction under another statute unless those restrictions are imposed by express enactment or necessary intendment. It was said that the State of Saurashtra has not imposed restrictions upon the power of the High Court in dealing with a second appeal under s. 28 of the Act, and the High Court was competent and was indeed bound to entertain all objections to the correctness of the judgment appealed from.

It is true that in the body of s. 100 of the Code of Civil Procedure the Legislature has not used the expression "second appeal". That expression however occurs in the marginal note of s. 100 and in the text of ss. 101, 102 & 103. Section 101 is enacted to make explicit what is clearly implied in s. 100 Code of Civil Procedure : s. 102 prohibits second appeals from decrees in certain classes of suits; and s. 103 confers power upon the High Court to determine questions of fact in certain conditions. It is clear therefore that the expression "second appeal" in the Code means an appeal to a High Court from the decision in a civil suit or proceeding of a first appellate Court subordinate to the High Court.

Section 27 of the Act does not confer any special jurisdiction upon the courts described therein, for the Act creates no new rights; it only seeks to regulate the rights and obligations of landlords and tenants in respect of certain classes of tenancies in urban areas. The disputes directed to be deal with under the Act are essentially disputes of a civil nature : and the courts invested with power under s. 27 of the Act have to adjudicate upon the disputed rights in the light of the special provisions and

not by the Transfer of Property Act and the Contract Act. The Act has again merely declared that second appeal will lie to the High Court against decrees or orders passed by the courts exercising jurisdiction under s. 27, but thereby the essential character of a second appeal under the Code is not altered. The procedure in the trial of suit, applications and proceedings under the Act is the procedure prescribed by the Code of Civil Procedure, except where it is otherwise - provided expressly or by clear implication. It is true that certain orders contemplated to be made under the Act determining rights and obligations of the parties are made appealable under s. 28, though such orders are not appealable under the Code, but that is not a ground for holding that the Legislature intended to confer upon litigants a right of second appeal unhampered by the restrictions imposed by s. 100 of the Code.

In Doshibai Khanna v. Sandhi Suleman Gulmamad [6 Guj. L.R. 342] a single Judge of the Gujarat High Court, following an unreported judgment of that Court in Nagardas Harichand v. Modi Mohanlal [S.A. No. 381 of 1960 decided on Septr. 21, 1954] observed that in a second appeal under the Act correctness of the decision of the District Court on questions of fact was liable to be canvassed in the High Court. For reasons already mentioned, we are unable to agree with the view that in a second appeal under s. 28 of the Act, questions which may not be raised in an appeal under s. 100 of the Code of Civil Procedure may be raised.

It is true that in Union of India v. Mohindra Supply Company [[1962] 3 S.C.R. 397] this Court held that by providing in s. 39(2) of the Arbitration Act, 1940, that "no second appeal shall lie from an order passed in appeal under this section", it was intended to prohibit an appeal under the Letters Patent. But the Court reached that conclusion because of the scheme of the Arbitration Act. The Legislature having prohibited a second appeal under the Arbitration Act, obviously the limits of the power which the Court could exercise if such an appeal were entertained could not fall to be determined in that case.

Section 11 of the Act does not contemplate that the decision of the Court determining standard rent shall be incorporated into a decree of the Court, and by s. 28 of the Act a second appeal lies to the High Court against an order determining standard rent. The orders which determine on the merits, rights and obligations of the parties arising out of the relation of landlord and tenant, may have serious consequences, and the Legislature had conferred a right of appeal to the party aggrieved by those orders. But the right of appeal on that account is not released from the restrictions which are attracted by its very nature. We are of the view that a second appeal under s. 28 of the Act may be entertained by the High Court within the limits prescribed by s. 100 of the Code of Civil Procedure, and it is not open to the parties to demand reappraisal of the evidence by the High Court on the ground that the District Court has erred in its view of the evidence. The High Court of Bombay was apparently of the view that no question of law arose in the appeal, and it was competent to dismiss the appeal under O. 41, r. 11(1) of the Code.

It was then urged that the judgment of the Distt. Court proceed upon mis-conception of the evidence on the record, and on that account a second appeal would lie within the limits prescribed by s. 100 of the Code of Civil Procedure. It was said that in computing the cost of construction, the appellate Court had taken into consideration several items of expenditure which may not property enter into the cost of construction. According to the books of account of the respondent the total cost incurred by the respondent was Rs. 2,11,790/5/-. This amount included the cost of transport, miscellaneous items, pan Bidi, tips, distribution of sweets, and Puja totalling Rs. 8,855/15/2. The trial Judge was of the view that certain miscellaneous items were not allowable in the computation of the total cost of the building and he held that an amount of Rs. 5,640/5/- should be disallowed and with that view the

appellate Court agreed. We do not think that the Courts below committed any error of law or misconceived the evidence in holding that only Rs. 5,640/5/- be disallowed out of the total cost of construction on the ground that they could not reasonably enter the computation.

It was then said that the Courts below committed an error in taking into consideration the whole price paid by the respondent for the land and building purchased by him. The appellant had purchased for Rs. 30,701/- as area of land together with houses thereon and had demolished the houses and had erected the theatre in respect of which this dispute has arisen. The houses had, it appears, been let out and rent was being received by the owner. It was urged by the appellant that the rent should be capitalised and the value of the land determined by deducting from the price paid by the respondent such capitalised value of the structure. But that would be a wholly faulty method of valuation. Rent received from a structure, is determined not merely by the nature of the structure and the accommodation provided thereby, but also by the situation and the amenities provided by the land on which the structure stands. A building when let out forms a composite unit with the land on which it stands, and the rent received from the building cannot be wholly attributed to the building. The respondent purchased the property with a view to pull down the houses thereon and to put up a building adapted for use as a cinematograph theatre. It is true that some rent was recovered from the tenants before the structures were pulled down. But since the respondent purchased the land and the buildings for putting up a new building thereon, he may reasonably be regarded as having paid for the property purchased the value of the land and of the debris of the superstructures. The debris which by sale fetched Rs. 9,171/3/- has been given credit for in arriving at the total cost of the theatre.

It is also worthy of note that one Masataram, a consulting architect, estimated the cost of the structure to be Rs. 2,35,777/1/2 at the rates prevailing in 1950. He stated that the prices prevailing in 1954 when he gave evidence were a little lower than the prices prevailing in 1950, "though in respect of certain items the prices may have gone up". The Trial Court and the District Court regarded his evidence as reliable, but having regard to the fact that in constructing the theatre the respondent had used some second-hand material, the Courts below held that the cost of the structure was truly shown by the accounts of the respondent, and that conclusion must be accepted.

It is then urged that ordinarily in towns like Bombay, Ahmedabad and Poona standard rent is determined as equivalent to one-twelfth of the gross return on the sum invested by the landlord at the rate of 8.66% on the cost of the building, and at the rate of 6% on the value of the land, and since the gross rate includes municipal taxes which vary between 25% to 33.33% of the letting value standard rent is considered as reasonable if it fetched to the landlord 4 1/2% per annum on the value of the land and 5 1/2% on the cost of building. It is true that in the city of Bhavnagar no municipal taxes and rates were, at the material time, charged by the Municipality, and therefore some adjustment would have to be made in ascertaining the percentage of gross return on the investment in determining standard rent. It is common ground that charges for water supply are made by the Municipality. There is however no evidence on the record to show as to what the rates for water supplied by the Municipality were. It was faintly suggested by counsel for the appellant that the water charges are payable by the tenant, but there is nothing to support that contention. The appellate Court has, on a consideration of the evidence, come to the conclusion that an overall rate of 7% on the investment for the building and land may be regarded in the town of Bhavnagar as an adequate return to the landlord. What rate of return in respect of the landed property may be regarded as reasonable in determining the standard rent under s. 11 of the Act depends upon certain variable factors. Normal expected yield from immovable property in the locality, return from alternative investments, municipal and other charges, the use to which the property is to be put, its

condition, repairs it needs to keep it in tenantable condition and a host of other related circumstances must enter into the determination. On a review of the reasons given, it cannot be said that the District Court committed any error of principle in coming to the conclusion the 7% gross return on the cost of construction should be regarded as an adequate return from the property in the town of Bhavnagar which is utilised for a cinematograph theatre.

Two other questions remain to be considered. Eventhough it was not pleaded in the petition filed by the appellant that possession of a part of the building let out was not delivered, the appellant was permitted, without objection, to raise that question at the trial. It was the case of the appellant that possession of the cellar and the space reserved for a restaurant were not delivered to him, and on that account appropriate deduction should be made from the standard rent. The respondent conceded that possession of the cellar was not given to the appellant, but his case was that he did not deliver the cellar because it was not included in the premises demised in favour of the appellant. Unfortunately the lease has not been printed in the paper book and the parties have not chosen to produce for our perusal a copy of the lease. We have not thought it necessary to hold up the proceeding in this Court in view of the ultimate order we propose to make in this appeal. The trial Court was of the view that having regard to the carpet area of the cellar Rs. 100/- per mensem should be deducted from the standard rent of the entire building. The District Court without giving any reasons observed that fair standard rent for the cellar would be Rs. 50/- per mensem. In our view the Court was not right in reducing the proportionate rent of the cellar from Rs. 100/- to Rs. 50/-. The question whether the cellar was let out to the appellant under the terms of the lease will be determined by the High Court of Gujarat before which the appeal filed by the respondent is pending. We have for the purpose of this appeal held, agreeing with the Distt. Court, that the standard rent of the entire building is Rs. 1,200/- per mensem. If the cellar is not included in the tenancy, Rs. 100/- will have to be deducted and the standard rent will be Rs. 1,100/- per mensem.

The other matter in dispute relates to the space intended to be used for a restaurant. The respondent contended that possession of that room was delivered to the appellant : the appellant denied that it was so delivered. It is common ground that it was part of the premises leased. Enquiry into the question whether by reason of default on the part of the landlord in delivering possession of a part of the premises let out under the lease any loss was occasioned to the tenant and to what relief the tenant is entitled on that account is foreign to the determination of standard rent. We therefore decline to enter into the question whether possession of the space intended for use as restaurant was delivered by the respondent to the appellant. The decision of the Courts below on that part of the case is vacated.

We accordingly modify the order passed by the District Court and declare that the standard rent of the whole building including the space for the restaurant and the cellar is Rs. 1,200/- per mensem. We further declare that if the cellar is not included in the tenancy, standard rent of the premises let out will be Rs. 1,100/- per mensem. The appellant has substantially failed in this appeal. He will pay 7/8th of cost of the respondent in this appeal.

Appeal dismissed and decree modified.

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