

M/S. Laxmi & Co.

Vs

Dr. Anant R. Deshpande and Another

Civil Appeal No. 1036 of 1967

(CJI J. M. Shelat, D. G. Palekar, S. N. Dwivedi JJ)

(A. N. Ray, I. D. Dua JJ)

12.09.1972

JUDGMENT

RAY, J. -

1. This is an appeal by special leave from the judgment, dated March 1, 1967 of Naik, J., of the High Court at Bombay allowing Civil Revision Application under Section 115 of the Code of Civil Procedure filed by the respondent Dr. Deshpande.

2. The principal question which falls for consideration in this appeal is the construction of Section 42-A of the Presidency Small Causes Court Act, 1882 (referred to as the 1882 Act) incorporated by Maharashtra Amendment Act, 1963. The section is set out hereunder :

"42-A. Procedure where occupant contests as a lawful tenant, etc. -

(1) If in any application pending in the Small Causes Court immediately before the date of the commencement of the Presidency Small Causes Courts (Maharashtra Amendment) Act, 1963 (Mah XLI of 1963) or made to it on or after such date, the occupant appears as at the time appointed within the meaning of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom LVII of 1947) and in consequence whereof he is entitled to the protection of that Act, and if such claim is not admitted by the applicant, then notwithstanding anything contained in that Act, the question shall be decided by the Small Causes Court as a preliminary issue.

(2) An appeal against the decision on this issue shall lie to a bench of Two Judges of the Small Causes Court.

(3) Every appeal under sub-section (2) shall be made within thirty days from the date of the decision appealed against :

Provided that, in computing the period of limitation prescribed by this sub-section the provisions contained in Sections 4, 5 and 12 of the Indian Limitation Act, 1908 (IX of 1908) as far as may be, apply.

(4) No further appeal shall lie against any decision in appeal under sub-section (2)".

3. Two questions arise for decision in this appeal. First, whether the word 'appears' occurring in

Section 42-A means appearance of the party in person or through someone at the date of the hearing. Secondly, whether the Small Causes Court is required to frame an issue as to whether the occupant is a tenant within the meaning of the Bombay Act of 1947 and is entitled to protection of that Act, and decide it as a preliminary issue, whether or not the contesting party appears before the Court at the date of the hearing.

4. The appellant is a firm owing lease hold rights in an immovable property known as "Lokmanya Department Stores" situate at Dadar in August, 1960. The previous owner of that lease-hold property was Department Service Stores. The respondent Deshpande is a medical practitioner. He has come to occupy under what is described as a "leave and licence" agreement, dated November 1, 1952 a portion of the ground floor of the annexe to that property on payment of Rs. 250/- per month or 2% of the gross income of the clinic whichever was higher. The agreement was with the previous lease-holder Departmental Service Stores for a period of five years with an option of renewal for a further term of five years.

5. The appellant filed an ejectment application on July 23, 1964, against the respondent Deshpande under Chapter VII of the 1882 Act in the Court of Small Causes at Bombay. A summons was issued to Deshpande. The summons was returnable on August 22, 1964, calling upon him to show cause why he should not be compelled to deliver up the ground floor of the annexe in his occupation. The respondent Deshpande caused his appearance filed through his Advocate. The ejectment application was postponed for hearing on September 22, 1964. It was again adjourned to November 17, 1964 to enable the respondent Deshpande to file his defence. He filed his defence. The ejectment application was adjourned to December 3, 1964 for scrutiny. After scrutiny the matter was transferred to what is described in the Bombay Small Causes Courts as non-priority warned list. In September, 1966 the ejectment application appeared on the monthly board. On October 10, 1966 the matter was placed before Court in Court Room No. 12 in the Court of Small Causes at Bombay for the purpose of giving a fixed date for hearing. Advocates on behalf of both the parties were present in the Court on October 10, 1966 when the date for hearing was fixed for November 23, 1966. On November 23, 1966 the matter was called out for hearing. No one on behalf of the respondent Deshpande was present in Court. The matter was passed over and was again called out in the afternoon. No one on behalf of the respondent Deshpande was present. The matter was called out for third time at about 4.30 p.m. Neither the respondent Deshpande nor his Advocate was present on any of the occasions when the application was called out. The application was heard ex parte. Evidence was led on behalf of the appellant. The Small Causes Court passed an ex parte decree on November 23, 1966 in favour of the appellant directing the respondent Deshpande to deliver possession of the premises.

6. The appellant in the month of January, 1967 made an application for execution of the decree. Possession was delivered up to the appellant by the bailiff.

7. The appellant thereafter agreed to let out the premises to the second respondent V. B. Gandhi.

8. On January 14, 1967 the appellant was served with an ex parte order passed by the Small Causes Court, Bombay on respondent Deshpande's application for setting aside the ex parte decree restraining the appellant from executing the ex parte decree, dated November 23, 1966. In view of the fact that the appellant had already obtained possession through the bailiff the respondent Deshpande requested the appellant to allow the respondent Deshpande to use the ground floor for his professional work between certain stated hours. The appellant allowed the arrangement as a temporary one and without prejudice to the rights and contentions of the parties.

9. In the application, dated January 14, 1967, for setting aside the ex parte decree the respondent Deshpande alleged that he was ill on November 23, 1966 and could not attend the Court and he did not know that an ex parte decree was passed on that day. The respondent Deshpande affirmed his second affidavit on January 15, 1967 that his prior statement that he was ill on November 23, 1966 was incorrect. In the second affidavit respondent Deshpande said that after October 10, 1966 when the date was fixed for hearing the ejection application the respondent Deshpande's Advocate had misplaced his brief and that the matter had escaped the attention of his Advocate and accordingly no one remain present in Court on November 23, 1966. The Small Causes Court said that the respondent Deshpande had made a false affidavit on January 14, 1967 with a view to obtaining an ex parte injunction order and the Small Causes Court vacated the interim injunction and refused on February 6, 1967 to set aside the ex parte decree, dated November 23, 1966.

10. The respondent Deshpande thereafter moved the High Court under Section 115 of the Code of Civil Procedure. The respondent Deshpande contended that Small Cases Court acted without jurisdiction in passing an ex parte decree without framing and determining the preliminary issue as to whether the respondent Deshpande was a tenant in respect of the premises. It was particularly contended that framing of such an issue and its determination was obligatory on the Small Causes Court even in an ex parte matter by reason of provisions contained in Section 42-A of the 1882 Act.

11. The respondent Deshpande also made a Civil Revision Application under Section 115 of the Code of Civil Procedure against the order, dated February 6, 1967, refusing to set aside the ex parte decree, dated November 23, 1966.

12. Both the applications were heard by the learned Single Judge of the High Court of Bombay, who arrived at these conclusions. It was the duty of the Trial Court even when the occupant did not appear before the Court to frame an issue as to whether the occupant was or was not the tenant of the premises and protected by the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (referred to as the 1947 Act) and to decide the same as a preliminary issue on the next date of hearing. After framing the preliminary issue the Court would adjourned that matter for the hearing of the preliminary issue. The Trial Court had not framed any preliminary issue, had not recorded a finding on that issue, but proceeded straightway set aside the ex parte decree and sent it back to the Small Causes Court with a direction that the preliminary issue be framed as contemplated under Section 42-A of the 1882 Act and to give opportunity to the parties to lead evidence. No order was passed on the other application for setting aside the ex parte decree.

13. Counsel for the appellant contended as follows. The provisions contained in Section 42-A of the 1882 Act indicated that the occupant against whom proceedings under Chapter VII of the 1882 Act for recovery of possession were commenced was required to appear at the date of hearing and the claim the protection of the Act and only if the claim was not admitted by the applicant asking for possession than the question was to be decided by the Court as a preliminary issue. The appellant placed accent on appearance of the occupant on the date of hearing in Court in view of the provisions indicating that the decision on a preliminary issue was required only where there was a contest between the parties at the date of hearing and the occupant claimed protection of the 1947 Act and such protection was denied by the applicant asking for possession. The defence of the respondent Deshpande that "he was the lawful tenant of the said premises" did not amount to any pleading that he was a tenant within the meaning of the 1947 Act and in consequence thereof he was entitled to protection of that Act.

14. Counsel for the respondent Deshpande on the other hand raised these contentions. The defence

that he was a lawful tenant of the premises entitled him to protection under the 1947 Act. The defence was sufficient for framing of the preliminary issue. The provisions of the Code of Civil Procedure were attracted. Under Order 15, Rule 3 of the Code the Court has to postpone the further hearing the suit for production of further evidence or argument as the case might be. Therefore, the Trial Court was bound in law to postpone the case after the framing of the preliminary issue. Emphasis was placed on the provisions of Section 42-A of the 1882 Act which used the words "preliminary issue" and provided for an appeal against the decision on the preliminary issue. The right of appeal was therefore denied by not framing the issue and the respondent was denied the right of agitating the question of tenancy within the meaning of the 1947 Act.

15. The provisions in Section 42-A of the 1882 Act which were introduced by the Maharashtra Amendment Act, 1963, indicate a special procedure where the occupant contests as a tenant within the meaning of the 1947 Act. The proceedings under Chapter VII of the 1882 Act relate to recovery of possession of immovable property. Under Section 41 of the Act summons is issued against the occupant calling upon him to show cause on a date therein appointed why he should not be compelled to deliver the property. Section 41 is attracted where tenancy has been determined and the tenant refuses to deliver the property. The summons issued under Section 41 is served in the manner provided by the Code of Civil Procedure for the service of summons. Section 43 deals with order for possession. If the occupant does not appeal and show cause the applicant becomes entitled to an order for possession. If the occupant proves that the tenancy was created on permission granted by virtue of a title, which determined previous to the date of the application, he shall be deemed to have shown cause. Section 43 also speaks of the occupant appearing and showing cause. The filing of defence is not equated with appearance. The Court appoints a date for appearance of parties for the hearing. Unless there is appearance and a contest arises the Court will proceed ex parte.

16. It is manifest that Section 42-A which was introduced by the Maharashtra Amendment provides a special procedure where the occupant claims tenancy of the applicant within the meaning of the 1947 Act. The occupant is to claim the tenancy of the applicant within the meaning of the 1947 Act and that in consequence he is entitled to protection of the Act. If such claim of the occupant is not admitted by the applicant asking for possession then the question shall be decided by the Small Causes Court as a preliminary issue. The words of importance to denote the time when the question as to whether the occupant is entitled to the protection of the 1947 Act are "then notwithstanding anything contained in that Act". The word "then" is prefaced by the preceding steps. First, the occupant is to appear at the time appointed; second, he is to claim that he is a tenant of the applicant within the meaning of the 1947 Act; thirdly, he is to claim that in consequence he is entitled to the protection of that Act; fourthly, that the claim of the occupant is not admitted by the applicant asking for possession.

17. It is correct that the pleadings will have an important bearing on the question as to whether the occupant contests the right of the applicant to possession. That contest has to be based on his tenancy within the meaning of the 1947 Act. In the present case, the occupant respondent Deshpande stated in his defence that he was a lawful tenant. The words "lawful tenant" by themselves do not expand as to how the occupant is a lawful tenant. Section 42-A speaks of tenancy within the meaning of the 1947 Act and protection under that Act. One has to claim the benefit and protection of the Act. The claim of protection under the Act will become an issue at the hearing of the case. The word "appearance" cannot be equated with the filing of the written statement. After pleading are complete the Court appoints a date for hearing. It is at the hearing that the occupant will assert his tenancy and claim protection against eviction. It is then that the Court will enquire whether an issue is to be

struck between the of the The applicant on the one hand and the occupant on the other by reason of denial by the applicant of the occupant's claim. It is, therefore, clear from the provisions of the statute that the word "appear" in Section 42-A of the 1882 Act means appearance at the date of the hearing.

18. The High Court was wrong in the conclusion that it was obligatory on the Trial Court to frame a preliminary issue on the appointed day irrespective of the appearance of the occupant.

19. The High Court noticed that the two Maharashtra Amendments to the Act, namely, Sections 42-A and 49 indicate that only a decision on the claim of an occupant to be a tenant within the meaning of the 1947 Act, can be the subject-matter of an appeal and Section 49 of the Act bars a suit on the basis of title as a tenant within the meaning of the 1947 Act. The High Court found that the question of tenancy within the scope of Section 42-A of the 1882 Act was to be decided once for all in the proceedings under Chapter VII of the Small Causes Courts Act, because a suit was barred.

20. Under Section 49 of the 1882 Act as it stood prior to the Maharashtra Amendment recovery of the possession of any immovable property under Chapter VII was not a bar to the filing of a suit in the High Court as to the title of the occupant. The Maharashtra Amendment to Section 49 has placed a bar against such suit because the occupant is given the opportunity under Section 42-A of the 1882 Act to contest the claim of the applicant to possession by pleading, proving tenancy within the 1947 Act and claiming the consequential protection under the provisions of the Act. The conclusion of the High Court that the bar of a suit under Section 49 is a cogent reason for concluding that the Small Causes Court shall always try as a preliminary issue the claim of the occupant as a tenant within the meaning of the 1947 Act irrespective of his appearance is neither supported by the scheme of the Act nor by the scope and purport of Section 42-A of the Act. An occupant who claims tenancy within the meaning of the 1947 Act is given the opportunity to prefer the claim and to have a decision on that question as a preliminary issue. The occupant has to appear at the date of the hearing to prefer such a claim. Section 42-A does not indicate that the Court will have to frame an issue. All that section says is that it has to decide the question as a preliminary issue. The Act does not indicate that there will be a preliminary hearing and a final hearing thereafter. The Act does not say that there will be a preliminary decree or a final decree. The words "preliminary issue" are intended to lend meaning to the provisions of the Act that before the applicant can obtain an order for possession that preliminary issue which is raised on contest between the applicant and the occupant shall be decided. If the occupant does not take benefit of Section 42-A of the 1882 Act by appearing and contesting the applicant's rights the occupant loses his rights.

21. Counsel for the respondent Deshpande submitted that this Court should take notice of subsequent events. An application was filed for relying upon certain documents for that purpose. The respondent's contention was that on November 19, 1968 the respondent possession to the original landlord Ashar and others and thereafter the original landlords creates a new and independent tenancy in favour of the respondent. It was, therefore, said that the appellant had no right to prosecute the application for possession which gave rise to the present appeal.

22. The respondent Deshpande relied on these facts in the affidavit. By lease, dated July 5, 1948, Pratap Singh Karsandas Ashar and Bai Ratnabai Gordhandas leased the property to M/s. Departmental Service Stores Limited for a period of 10 years commencing June 1, 1946 to May 31, 1956. The lease contained an option for renewal for a further term of 10 years from 1956. The Departmental Service Stores mortgaged its rights, title and interests, for the remaining period of

lease on August 13, 1951 to Dr. Mansukhlal Jagjivandas Shah, Dhirajlal Jagjivandas Shah and Kantilal Jagjivandas Shah. The Departmental Service Stores made default in payment of the mortgaged money. The mortgagees, namely, the Shahs took possession of the mortgaged property. The property was auctioned on December 9, 1953. Ramniklal & Co., a partnership firm, purchased the right, title and interest of the mortgagees and obtained possession of the property. On April 6, 1954 the property was conveyed by the mortgagees to the auction purchaser. The original lessees namely, the Departmental Service Stores in 1954 filed a suit in the Bombay High Court against the mortgagees and the auction purchaser for setting aside the auction sale. On August 2, 1960 by consent of the parties an order was passed for reconveyance of the property to the original lessees the Departmental Service Stores. On November 21, 1961 the auction purchaser conveyed the property to the appellant.

23. On December 24, 1965 Ashar and others filed a suit against the Departmental Service Stores, the mortgagees, namely, the Shah the auction purchaser and the appellant for possession of the property. The suit filed by Ashar and others is still pending in the Small Causes Court in Bombay. In the year 1965 about 18 merchants occupying various shops in the premises filed suits in the Court of Small Causes for declaration that they are lawful sub-tenants. These suits were filed against the appellant and Ashar and others. In 1966 the appellant filed about 52 short cause suits restraining the merchants from entering into the shops. In 1967 Ashar and others the original landlords gave notice to the Departmental Service Stores that the term of lease had expired and that the ejectment suit filed in the year 1965 was pending and without prejudice to "accrued rights" served notice under Section 12(2) of the 1947 Act on the ground of arrears of statutory rent and property taxes. Ultimately, Ashar and others filed a suit in 1968 against the appellant on the ground of arrears of statutory rent and property taxes from October 1, 1966 to June 30, 1967. An ex parte decree was passed on March 21, 1968. An application for setting aside the ex parte decree was filed by the Departmental Service Stores. On September 7, 1968 a consent order was passed to the effect that on the Departmental Stores depositing in Court Rs. 28,000 by November 6, 1968 the ex parte decree was to be set aside and notice for new trial was discharged. The Departmental Stores failed to deposit the amount. The notice was discharged and the ex parte decree was valid and operative on and after November 7, 1968. Most of the occupants in the lease property surrendered possession in pursuance of the warrant of possession. It is in this context of events that the respondent Deshpande says that on November 19, 1968 he surrendered possession to Ashar and other original landlords and there was a new tenancy.

24. The appellant on the other land in his affidavit alleged these facts. M/s. Ramniklal & Co. were declared the highest bidder, at the auction sale on December 9, 1953. The auction purchaser was accepted as a lessee by the lessors Ashar and others. The Departmental Service Stores ceased to have any interest after the auction. The auction purchaser became tenant of the property. Ramniklal & Co. carried on the business of Departmental Stores in the premises. Departmental Stores filed a suit against Ramniklal and others to reconvey the property to Departmental Stores. A consent decree was passed that Ramniklal & Co. would convey the business along with tenancy rights to Departmental Service Stores Ltd. or their nominee. The appellant purchased the rights under the consent terms on August 25, 1960. In the suit filed in the year 1965 by Ashar and other against inter alia the appellant, the lessors obtained an ex parte injunction preventing the appellant from withholding the entry of the licensees of the appellant. The term of the licensee was to expire on December 31, 1965. Ashar and others and the licensees of the appellant are in collusion. In the suits filed by the appellant against the licensees in the City Civil Court to prevent the entry of licensees to the property on the ground that the period of licence had expired by efflux of time, the Court did not grant any interim injunction against the licensees but directed that the licensees should deposit in

Court the monthly compensation. Thereafter some of the licensees of the appellant filed declaratory suits that they were the tenants. The Small Cause Court passed an order restraining the appellant from withholding the entry of the licensee otherwise than by course of law.

25. Ashar and others in their suit filed in 1965 obtained an injunction restraining the appellant from withdrawing the amount lying deposited by the licensees in the City Civil Court.

26. The appellant continued to pay rent to the lessor up to the month of September, 1966. The lessor thereafter declined to accept rent from the appellant. The lessor filed a suit against the Departmental Service Stores Ltd. only for non-payment of rent. An ex parte decree was obtained by Ashar and others on March 21, 1968. The appellant was kept in the dark. An application for setting aside the ex parte decree was made by one Gangnaik as a Director of Departmental Stores Ltd. A consent order was made. The ex parte decree would be set aside on Departmental Service Stores Ltd. paying Rs. 28,000 within one month. Gangnaik is not the Directors of the Departmental Service Stores Ltd. The Departmental Service Stores Ltd. had no interest in the property. The appellant was neither a party to the suit nor to the consent order. The consent order does not represent the consent of the appellant. A warrant of possession was executed on November 19, 1968 in collusion with the respondent and licensees. The appellant lodged a complaint at the Dadar Police Station. The appellant filed an application under Order 21, Rule 100 of the Code of Civil Procedure in the Court of the Small Causes at Bombay. The application was dismissed. The appellant preferred a revision application against the order. That revision application is pending. The appellant also filed a suit in the Bombay Small Causes Court under Order 21, Rule 103 of the Code of Civil Procedure. The suit is numbered 61/414/1971. The suit was filed on November 23, 1970. The suit is pending.

27. It is true that the Court can take notice of subsequent events. These cases are where the court finds that because of altered circumstances like devolution of interest it is necessary to shorten litigation. Where the original relief has become inappropriate by subsequent events, the Court can take notice of such changes. If the court finds that the judgment of the Court cannot be carried into effect because of change of circumstances the Court takes notice of the same. If the Court finds that the matter is no longer in controversy the court also takes notice of such event. If the property which is the subject-matter of suit is no longer available the court will take notice of such event. The court takes notice of subsequent events to shorten litigation, to preserve rights to both the parties and to subserve the ends of justice. Judged by these principles it is manifest that in the present case suits are pending. On the one hand the appellant has challenged the decree obtained by Ashar and others as also the warrant of execution. On the other hand, the suit instituted by Ashar and other against inter alia the appellant in 1965 for possession is pending. This Court cannot say with exactitude that any final decision has been reached on the respective and rival rights and claims of the appellant and the respondent. It is, therefore, neither desirable nor practicable to take notice of any fact on the rival versions of the parties as to subsequent events.

28. For the reasons indicated the appeal is allowed and the judgment of the High Court is set aside.

29. The High Court in view of the conclusion on Section 42-A of the 1882 Act set aside the decree and chose not to deal separately with the other application for setting aside the ex parte decree.

30. The High Court will now deal with the application for setting aside the ex parte decree. The parties will pay and bear their own costs, in this appeal.

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