Smt. Vidya Vati

Vs

Shri Devi Das

Civil Appeal No. 501 of 1976

(P. N. Shinghal, P. N. Bhagawati, A. C. Gupta JJ)

25.11.1976

JUDGMENT

BHAGWATI, J.

1. This is an unfortunate litigation where a widow has been kept out of her monies for over six years by reason of wrong application of law by the courts. Much of the travail of the widow could have been avoided if the courts had taken a commonsense view of the law instead of adopting a rather technical and unimaginative approach. The facts giving rise to this litigation are few and may be briefly stated as follows.

2. The respondent is the owner of a residential quarter bearing no. 1/20 situate at Old Rajendra Nagar, New Delhi. He wanted a loan for the purpose of repaying an earlier debt and he, therefore, approached the appellant and as a result of negotiation between them, an agreement dated September 27, 1967 was entered into between the parties. This agreement recited that a sum of Rs. 7500 was lent and advanced by the appellant to the respondent and it provided that in lieu of interest on this amount of Rs. 7500, the respondent would give to the appellant a portion of his residential quarter (hereinafter referred to as the premises) for temporary residence. The agreement went on to say, and we are setting out the precise terms of the agreement since they are material for the decision of the controversy between the parties :

> On the expiry of two years as stated above the second party shall give one month's notice in writing to the first party for the said room. . . . . If after the expiry of two years fixed period, the first party wants to pay the amount he shall give one month's notice in writing to the second party. When the first party repays the above stated loan to the second party, then the second party shall vacate the room etc. Under temporary residence and give it to the first party. . . . . If the first party pays the amount of Rs. 7500 and the second party does not give possession of the room etc. under her use, then the second party shall be liable to pay Rs. 110 per month as damages. If the first party does not pay the amount of Rs. 7500 to the second party on the expiry of the two years' period, the first party will not be entitled to recover damages of Rs. 110 per month from the second party and the second party shall be entitled to take legal proceedings against the first party. . . and also if the first party pays the amount of Rs. 7500 and the second party does not give possession, the first party shall be entitled to take the legal proceedings regarding vacation of the room etc. under the use of the second party.

Pursuant to the agreement, the respondent handed over possession of the premises to the appellant

and the appellant started occupying the same against interest on the loan of Rs. 7500 advanced by her to the respondent.

3. The period of the agreement expired on September 27, 1969 and according to the terms of the agreement, the respondent could thereafter repay the loan of Rs. 7500 to the appellant and claim back possession of the premises from her. The case of the respondent was that he addressed a notice dated August 26, 1969 to the appellant and tendered a sum of Rs. 7500 to her in repayment of the loan, but the appellant refused to accept the same. The respondent also addressed another notice dated May 4, 1970 to the appellant but this notice also had no effect on her. The respondent thereupon filed suit 123 of 1973 in the court of Sub-Judge, First Class, Delhi seeking to recover possession of the premises from the appellant. The appellant did not appear to contest the suit and it was decreed ex parte by a judgment dated May 22, 1973. The learned Sub-Judge passed a decree for possession of the premises in favour of the respondent but added the following rider :

> The plaintiff is ordered to tender the amount of Rs. 7500 to the defendant within a period of 30 days from today in cash. If the defendant refuses to accept the money, it should be deposited in the court with notice to the defendant within the aforesaid period.

Now, it appears that prior to the filing of this suit by the respondent, the appellant had filed a suit against the respondent for recovery of the loan of Rs. 7500 advanced by her to the respondent. The respondent had filed his defence to the suit and various grounds were taken by him, one of which was that the claim was barred by limitation. This suit was pending on May 22, 1973 when the ex parte decree was passed against the appellant.

4. The respondent had obviously no desire - and perhaps not even capacity - to repay the loan of Rs. 7500 to the appellant and he, therefore, preferred an application for review under Order XLVII, Rule 1 of the Code of Civil Procedure seeking deletion of the direction given by the learned Sub-Judge requiring him to deposit the sum of Rs. 7500. The respondent contended that since the appellant has already filed a suit against him for recovery of the amount of Rs. 7500 and he was resisting the suit inter alia on the ground of limitation, it was not competent to the learned Sub-Judge to give such a direction for deposit of the amount of Rs. 7500 and the giving of such direction was clearly an error of law apparent on the face of the record. The respondent also claimed review on the ground of discovery of new and important matter in the shape of suit 123 of 1973 filed by the appellant against him. The learned Sub-Judge, by a judgment dated August 3, 1973 allowed the review application and held that the direction for depositing the amount of Rs. 7500 in court should be deleted from the ex parte decree passed against the appellant. The result was that the respondent become entitled to recover possession of the premises from the appellant without paying to the appellant or depositing in court the amount of Rs. 7500 in repayment of the loan.

5. Now, unfortunately this order allowing the review application was made by the learned Sub-Judge without issuing notice to the appellant. That was obviously bad and, therefore, on the application of the appellant, the learned Sub-Judge had to set aside the order and rehear the review application. The same order was, however, once again made by the learned Sub-Judge after hearing the appellant and the direction requiring the respondent to deposit the sum of Rs. 7500 in court was deleted on the ground that such direction nullified the effect of the ex parte decree for possession and forced the respondent to admit the claim of the appellant for repayment of the sum of Rs. 7500, which, according to the respondent, was timebarred.

6. The appellant being aggrieved by the order allowing the review application, preferred a revision application to the High Court of Delhi under Section 115 of the Code of Civil Procedure. Mr. Justice Avadh Behari, who heard the revision application, took the view that the order allowing the review application was appealable and hence the revision application was not competent, but on the alternative view that the revision application lay before the High Court, he proceeded to consider whether the review had been rightly granted and held that the respondent having brought a simple suit for possession, the learned Sub-Judge had no jurisdiction to impose a condition requiring him to deposit the sum of Rs. 7500, particularly when the appellant's suit for recovery of the same was pending in that very court and that under the terms of the agreement, all that he was required to do was to tender the sum of Rs. 7500 and since that was done by him and the appellant had refused to accept the same, he was entitled to a decree for possession. The learned Judge accordingly dismissed the revision application. That led to the filing of the present appeal with special leave obtained from this Court.

7. When the hearing of the appeal commenced, a contention of a preliminary nature was advanced on behalf of the respondent and it was that since the order of the learned Sub-Judge impugned in revision before the High Court was an order allowing the review application, it was appealable under Order XLIII, Rule 1, clause (a) of the Code of Civil Procedure and hence no revision was competent to the High Court under Section 115 of the Code of Civil Procedure and the High Court was right in rejection the revision application. Now, there can be no doubt that under Section 115 of the Code of Civil Procedure a revision application can lie before the High Court from an order by a subordinate court only if no appeal lies from that order to the High Court. The words of limitation used in Section 115 are "in which no appeal lies thereto" and these words clearly mean that no appeal must lie to the High Court from the order sought to be revised, because an appeal is a much larger remedy than a revision application and if an appeal lies, that would afford sufficient relief and there would be no reason or justification for invoking the revisional jurisdiction. The question, therefore, here is whether an appeal against the order made by the learned Sub-Judge allowing the review application lay to the High Court. If it did, the revision application would be clearly incompetent. Now Order XLIII, Rule 1, clause (a) undoubtedly provides an appeal against an order allowing a review application, but the order allowing the review application in the present case was made by the learned Sub-Judge, and hence an appeal against it lay to the District Court and not to the High Court, and, obviously, since no appeal lay against the order of the learned Sub-Judge to the High Court, the revision application could not be rejected as incompetent. The preliminary contention must, in the circumstances, be decided against the respondent.

8. That takes us to the merits of the appeal and the question which arises for consideration on merits is whether the direction requiring the respondent to deposit the sum of Rs. 7500 in court as a condition of recovery of possession of the premises from the appellant was erroneous in law so as to justify its deletion on review. The determination of this question turns on the true interpretation of the agreement between the parties. If we turn to the agreement it is clear that loan of Rs. 7500 was advanced by the appellant to the respondent for a period of two years and in lieu of interest on the amount of the loan, the respondent handed over the possession of the premises to the appellant and the appellant was entitled to occupy the same free of rent. We have already set out the relevant portion of the agreement and it appears clearly from those provisions that the respondent was not entitled to repay the amount of the loan and demand recovery of possession of the premises from the appellant before the expiry of the period of two years. It was only on the expiration of the period of two years that the respondent was entitled to repay the amount of the loan and if he wanted to do so, he was required to give one month's notice in writing to the appellant and on such repayment, the appellant was bound to hand over vacant possession of the premises to him. If, despite the

repayment of the amount of the loan by the respondent, the appellant failed to hand over vacant possession of the premises to the respondent, she was liable to pay damages at the rate of Rs. 110 per month. But if for any reason the respondent failed to repay the amount of the loan on the expiry of the period of two years, he could not claim to recover any damages from the appellant. Clearly the obligation of the appellant to hand over vacant possession of the premises to the respondent was concurrent with the obligation of the respondent to repay the amount of loan to the appellant and the respondent could not claim possession of the premises from the appellant without making repayment of the amount of the loan. If the respondent tendered a sum of Rs. 7500 to the appellant in repayment of the amount of the loan and yet the appellant refused to accept the same, the appellant might incur liability to pay to the respondent damages for wrongful use and occupation of the premises, but the respondent could not say that he was exonerated from the obligation to repay the amount of the loan and was entitled to recover possession of the premises without making repayment of the amount of the loan. The respondent could seek to recover possession of the premises from the appellant only on condition of making repayment of the amount of the loan, because the two obligation were mutual and concurrent and were required to be simultaneously performed and one could not get delinked from the other by reason of any refusal on the part of the appellant to accept the tender of Rs. 7500 from the respondent. We may in this connection refer to the following passage from the judgment in Dixon v. Clark [(1847) 16 LJ CP 237 : 136 ER 919] when it said :

> In action of debt and assumpsit, the principle of the plea of tender, in our apprehension is, that the defendant has been always ready (toujoure prist) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performance, by refusing to receive it. And, as in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (incore prist) but must be accompanied by a profort in curiam of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with incore prist and profort in curiam) yet he will answer the action, in the sense that he will recover judgment for his costs of defence against the plaintiff in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute as answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar.

This decision has been quoted with approval in Leake on Contracts, 8th Ed. at page 663 and it establishes beyond disputation that merely because the plaintiff or the defendant has tendered the amount due and payable by him and such tender has been wrongly refused by the order party, it does not absolve the first named party from its obligation to make payment of the amount and where the obligation to make payment of the amount is concurrent with the obligation to hand over possession, the claim for recovery of possession must be accompanied by payment or deposit of the amount. The respondent was, therefore, clearly bound to pay or deposit the amount of loan as a condition of recovery of possession of the premises from the appellant.

9. We may point out that in fact, in the present case, there was no valid tender of the sum of Rs. 7500 by the respondent to the appellant. The case of the respondent was that the tendered the sum of Rs. 7500 in cash to the appellant on August 26, 1969 but the appellant refused to accept the sum. Now, we will assume for the purpose of argument that this case of the respondent is factually correct and that he did tender the sum of Rs. 7500 in cash to the appellant on August 26, 1969, but this was

obviously not a valid tender, because under the terms of the agreement the respondent could repay the amount of the loan to the appellant only on the expiry of the period of two years and the date of the agreement being September 27, 1967, the period of two years expired on September 26, 1969. The respondent could not validly tender the sum of Rs. 7500 to the appellant in repayment of the amount of the loan until September 27, 1969 and the tender made by him on August 26, 1969 was clearly invalid. It may be noted that it was not the case of the respondent that he made any fresh tender to the appellant on or after September 27, 1969 and hence the conclusion must inevitably follow that the respondent did not at any time make a valid tender to the appellant of the sum of Rs. 7500. Now, if the respondent did not at any time validly tender payment of the sum of Rs. 7500 to the appellant, the appellant obviously did not become liable to hand over possession of the premises to the respondent and a fortiori no claim for damages for wrongful use and occupation of the premises could be sustained by the respondent against the appellant. It was pointed out to us on behalf of the respondent that he had already filed suits against the appellant for damages or compensation for wrongful use and occupation of the premises and one of the suits, namely, suit 800 of 1975 had been decreed by the Sub-Judge, First Class and Civil Appeal 9 of 1975 preferred by the appellant against it had been dismissed by the Additional District Judge, Delhi on the basis that the respondent had made a valid tender of the sum of Rs. 7500 to the appellant and since the appellant had refused to accept the same, she was in wrongful use and occupation of the premises from the date of the tender and was, therefore, liable to pay compensation to the respondent from that date. This is true, but it cannot preclude us from laying down what we think to be correct legal position on a proper interpretation of the agreement between the parties. Moreover, this decision is under appeal before the High Court. But, apart from that, we do not think this decision is correct, because, on the view we have taken, the respondent was not entitled to tender the sum of Rs. 7500 to the appellant before September 27, 1969 and even if a tender was made by him on August 26, 1969 as alleged by him, the appellant was entitled to refuse to accept the same and she did not become liable to hand over vacant possession of the premises to the respondent or to pay compensation to the respondent in respect of her occupation of the premises. It is only if the respondent made a valid tender of the sum of Rs. 7500 to the appellant on or after September 27, 1969 that the appellant would be liable to hand over vacant possession of the premises to the respondent and since that did not happen in the present case, there was no obligation on the appellant to deliver possession of the premises to the respondent. The respondent was not entitled to claim possession of the premises from the appellant unless he paid or deposited the sum of Rs. 7500 in court in repayment of the amount of the loan. The High Court as well as the learned Sub-Judge were, therefore, in error in allowing the review application and ordering that the direction requiring the respondent to pay to the appellant or to deposit in court a sum of Rs. 7500 in repayment of the amount of the loan should be elected. It was a correct and valid direction and it was rightly introduced in the original ex parte decree passed by the learned Sub-Judge.

10. We accordingly allow the appeal, set aside the order allowing the review application passed by the learned Sub-Judge as also the order of the High Court rejecting the revision application. The original ex parte decree for possession together with the direction requiring the respondent to pay or deposit the sum of Rs. 7500 in court will stand, but since possession of the premises has already been taken over by the respondent in pursuance of the ex parte decree for possession, we direct that the respondent do pay to the appellant the sum of Rs. 7500 together with interest thereon at the rate of 9 per cent per annum from the date when possession of the premises was taken by the respondent up to the date of payment. The respondent will pay to the appellant costs of the appeal as also costs of the review application before the Sub-Judge and the revision application before the High Court.

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