

Jamnadas Dharamdas

Vs

Dr. J. Joseph Farreira and Another

Civil Appeal No. 531 of 1970

(Syed M. Fazal Ali, A. C. Gupta, P. S. Kailasam JJ)

07.05.1980

JUDGMENT

KAILASAM, J. –

1. This appeal is by the defendant-tenant by certificate granted by the High Court of Judicature at Bombay against its judgment dated January 21, 1969 in Special Civil Application No. 1596 of 1965 granting a decree directing that the defendant shall vacate and deliver peaceful possession not only of the land demised to him under the lease in the suit but also of the three buildings which have been constructed on the demised land.

2. By a lease deed dated December 14, 1948 the plaintiff gave to the defendant on lease two plots Nos. 12 and 13 situated at Sitladevi Temple Road, Mahim for a period of 15 years commencing from December 1, 1948 at the yearly rent of Rs. 10,200 payable in equal quarterly instalments of Rs. 2,550 in advance. The lease deed provided that the defendant was at liberty to erect building and structures on the two plots of land. The defendant agreed to pay and discharge all taxes and outgoings imposed on the above two plots as also on the buildings to be erected by the defendant. On the expiration of the term of 15 years or sooner termination of the lease the defendant agreed to deliver back the possession of the two plots to the plaintiff 'free of all buildings, erections and structures and leveled and put in good order and condition to the satisfaction of the plaintiff'. Clause IV of the lease provided for determination and forfeiture of the lease in the event of the rents having been allowed to be in arrears for more than 30 days or upon breach of conditions of the lease. The forfeiture clause also provided that upon forfeiture the plaintiff would be entitled to re-enter upon not only the two plots of land but also the structures standing thereon.

3. The defendant defaulted not only in payment of rent but also in payment of taxes due in respect of lands and buildings which he erected. The plaintiff filed a suit in 1951 for ejection. The defendant filed an application for the fixation of standard rent and the standard rent was fixed at Rs. 435 per month from September 1, 1950. A compromise was entered into between the parties in the suit on March 5, 1954 by which the parties agreed on a rent of Rs. 435 per month from September 1950 to February 1954.

4. An appeal against the fixation of standard rent of Rs. 435 per mensem was disposed of on June 28, 1955 whereby standard rent was fixed at Rs. 620 per month from September 1, 1950. The defendant again defaulted in payment of rent and taxes. The arrears of rent amounted to Rs. 11,472.30 and taxes to the extent of Rs. 1,12,053.60 for the period ending September 30, 1960. The plaintiff by a notice determined and forfeited the lease and called upon the defendant to deliver possession of the lands along with structures thereupon. The notice also specified that the notice was

not only a notice of forfeiture but also notice under Section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the 'Bombay Rent Act'). On December 1, 1961 as the defendant failed to pay the arrears of rent and the taxes, the plaintiff filed the present suit and prayed for a decree for ejection against the defendant in respect of two plots of land and also the buildings and structures standing thereon, and claimed arrears of rent of Rs. 11, 472.30 and mesne profits at the rate of Rs. 620 per month. The defendant filed written statement and denied the allegations made in the plaint. The defendant in order to get the benefit of the provisions of Section 12(3)(b) of the Bombay Rents Act applied for time for making deposit of arrears of rent. The application was taken on June 20, 1962 and further time was granted to enable the defendant to make the deposits. Time was extended on several occasions and finally on August 6, 1962, the defendant informed the court that he was not in a position to make any deposit at all.

5. After the issues were framed and the suit was taken up for trial, the defendant once again applied for relief under Section 12(3)(b) of the Act and prayed that he may be allowed to deposit the arrears of rent and cost. The deposit was accepted by the court after making an endorsement, "accept without prejudice". Subsequently, on November 11, 1964, the trial Court passed a decree for ejection in respect of plots (and the buildings) in favour of the plaintiff. A decree was granted regarding arrears of rent and for mesne profits.

6. Both the plaintiff and the defendant preferred appeals and the Bench of two Judges of the Court of Small Causes by a common judgment disposed of both the appeals on April 4, 1965. The appellate Court held that it had no jurisdiction to give a decree for ejection in respect of the two buildings constructed on plot No. 12 by the defendant. It held that Cause IV of the lease which permitted forfeiture was in the nature of penalty and the defendant was entitled to be relieved from the liability to deliver possession of the buildings constructed by him upon forfeiture by the plaintiff. It also found that the defendant was entitled to be relieved from the penalty of forfeiture of the lease under Section 114 and 114-A of the Transfer of Property Act. It rejected the plea of the defendant that he was always ready and willing to pay all arrears of rents and found that because of repeated defaults the defendant was not entitled for relief from ejection under Section 12(3)(b) of the Bombay Rent Act. The plaintiff filed a revision petition against the order of the appellate Court declining to direct possession of the two buildings and the defendant/tenant filed an appeal against the order of the appellate Court directing ejection of the defendant from the two plots of lands mentioned in the plaint. The High Court disposed of both the revisions by the plaintiff and the appeal by the defendant by a common judgment whereby it allowed the revisions filed by the plaintiff and dismissed the appeal of the defendant and decreed the suit of the plaintiff directing the defendant to deliver peaceful possession of the land demised to him and also buildings which have been constructed by the defendant on the demised lands. It also confirmed the decree regarding arrears of rents and mesne profits.

7. On behalf of the defendant it was submitted that the court's jurisdiction is limited only to adjudicate on leased premises under the Bombay Rent Act and therefore it had no jurisdiction to try the suit regarding possession of the structures put upon the leased lands. It was pleaded that a relief regarding the superstructures will not be one under the provisions of the Bombay Rent Act. It was contended that as the suit is for a composite relief namely for the possession of the leased land for the superstructures, it is beyond the jurisdiction of the court and the suit as a whole should have been dismissed. It was submitted that in any event as Clause IV in the lease deed is in nature of penalty providing for the forfeiture of the structure which did not form part of the lease, the decree for possession of the structures is not maintainable. In any event it was submitted that there could be no forfeiture of the structures on the ground that the municipal taxes were not paid and that the term

as to payment of arrears of taxes cannot be considered as a clause in the lease deed and the defendant should be relieved against the penal clause. Lastly, it was submitted that the courts below were wrong in not granting relief under Section 12(3)(b) of the Bombay Rent Act.

8. Before considering the several contentions raised by the learned counsel for the appellant it will be useful to refer to the relevant clauses of the lease deed and the relief prayed for in the plaint. The lease deed dated December 14, 1948 executed by the plaintiff in favour of the defendant was a lease of two plots of land, plots Nos. 12 and 13 situated at Sitladevi Temple Road, Mahim for a period of 15 years at a yearly rent of Rs. 10,200 payable in equal quarterly instalments of Rs. 2,550 in advance. Subsequently standard rent was fixed by the trial Court at Rs. 435 which was raised by the appellate Court to Rs. 620 per mensem. The lease permitted the defendant to erect buildings and structures in the two plots of land. The buildings were erected in only plot No. 12 and not in plot No. 13 which remains unbuilt and vacant. The defendant agreed to pay and discharge all taxes and outgoings imposed on the above two plots as also on the buildings to be erected by the defendant. The defendant also undertook to deliver possession of the two plots to the plaintiff "free of all buildings, erections and structures" on the expiration of the lease. Clause IV empowered the lessor to terminate the lease and provided that the lessor will be at liberty to re-enter not only upon the two plots of the lands but also on the structures standings thereon. In the plaint it was stated that as the defendant had failed to pay rents and taxes and committed breach of conditions the plaintiff forfeited the lease and called upon the defendant to pay arrears of rent and taxes. The suit was based not only on the forfeiture of the lease but also for possession of the leased plots under Section 12 of the Bombay Rents Act. In paragraph 9 of the plaint it is alleged :

The plaintiff says that in the event of the defendant contending that he has become a statutory tenant of the said land, after the tenancy had been duly and validly terminated, the plaintiff would submit that the defendant had failed and neglected to pay the arrears of standard rent amounting to Rs. 11,472.30 up to August 31, 1961 and dose not observe and perform Condition 11(b) of his lease, and so he is not entitled to the protection of the Bombay Rent Control Act.

9. In paragraphs 10 and 11 of the plaint, it is alleged that the provisions of the Bombay Rent Act 47 of 1947 apply to the said land and the court has jurisdiction to entertain and try the suit. The relief asked for by the plaintiff in paragraph 13(a) is that the defendant may be directed to hand over peaceful possession of the lands to the plaintiff together with the buildings and structures standing thereon. Thus it would be seen that the plaint is based on the terms of the lease deed after forfeiting the lease and for the possession of the leased lands according to the terms of the Bombay Rent Act.

10. The main defence which was raised by the tenant in the courts below as well as before us is that suit is not triable under Section 28 of the Bombay Rent Act and in any event relief regarding possession of the structures would be beyond the scope of the relief contemplated in the Bombay Rent Act. Section 28 of the Bombay Rent Act ran as follows :

28. (1) Notwithstanding anything contained in any law and notwithstanding that by reasons of the amount of the claim or for any reason, the suit or proceedings would not, but for this provision, be within its jurisdiction in Greater Bombay, the Court of Small Causes, Bombay,

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shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this part apply and decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and subject to the provisions of sub-section (2), no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question.

The section confers jurisdiction on the Court of Small Causes, Bombay to entertain and try any suit or proceedings between a landlord and tenant relating to recovery of rents or possession of any premises to which any of the provisions of this part apply. The jurisdiction thus conferred enables the court to try any suit between the landlord and the tenant relating to recovery of possession of the premises. It is admitted that the premises is the two plots of land only and not the superstructure. The plea of the plaintiff is that the relief for recovery of possession of the plot which is the subject-matter of the lease, would also include a relief relating to the superstructure as being related to relief to recovery of possession of the leased premises namely the plots and land. The submission on behalf of the plaintiff is that as the jurisdiction of civil courts has been specially excluded, and the matters relating to possession of the leased premises, it would imply that not only relief of the possession of the leased lands but also matters relating to it would be beyond the jurisdiction of other courts and therefore the plaintiff has no other option than to file the suit for relief as to the structures being only ancillary and incidental to the relief of possession of the leased lands. Before we proceed to consider this plea, we might note that Mr. Soli J. Sorabjee, learned counsel for the plaintiff submitted that though it might be open to him to contend that the reliefs relating to the structures based on the terms of the contract would also be decisive on an application made under the Act as being related to the recovery of the possession of the leased premises, he would content himself with the plea that the relief as to structures is so closely and inextricably related to possession of the land that no effective relief of possession of the leased lands could be given without giving relief in respect of the structures. Relief as to structures also should inevitably follow. If this submission is accepted it would be unnecessary for us to consider the other limb of the argument on behalf of the appellants that the relief claimed as a result of the forfeiture is not enforceable by a court administering Bombay Rent Act or that the plaintiff cannot enforce terms of forfeiture which did not relate to leased plots or that the defendant would be entitled to relief against forfeiture under Sections 114 and 114-A of the Transfer of Property Act.

11. All the courts below have found that the defendant is not entitled to any relief under Section 12(3)(b) of the Act and that so far as the leased plots are concerned, the plaintiff is entitled to possession under the Bombay Rent Act. After filing of the suit it is seen that the defendant asked for time for payment of arrears of rents and the matter came up before the court on June 28, July 5 and August 6, 1962. On the last date the appellant's advocate informed the court that the appellant was not in a position to pay the arrears. It was only two years later on September 18, 1964 that the defendant obtained court's permission to deposit balance of arrears Rs. 12,800 and deposited the amount under protest by the plaintiff. The trial Court after considering all the facts found that there was intentional default and wilful neglect in payment of rent. The conduct of the defendant showed that he was wilfully not ready and willing to pay the rent. It again found that the payment of arrears was not made diligently and the defendant had flouted the orders of the court to deposit the arrears of rent and the discretion cannot be exercised in his favour when he persisted in not paying the taxes for about 12 or 13 years and was constantly in arrears of rent for about 14 months at the time of the notice. The appellate Court also came to the same conclusion holding that it is not a case where discretion of the court under Section 12(3)(b) should be exercised in favour of the tenant. The High Court also confirmed the findings of the courts below that the defendant was not entitled to relief

under Section 12(3)(b) of the Act. On the facts we are also in agreement with the findings of the three courts below that the persistent default of the defendant of various occasions and his clear statement that he was not in a position to pay the arrears, would exclude any relief under Section 12(3)(b).

12. In a recent decision of this Court reported in *Ganpat Ladha v. Sashikant Vishnu Shinde* ((1978) 3 SCR 198 : (1978) 2 SCC 573 : AIR 1978 SC 955), it has been held that when the tenant does not fulfil the conditions as required under Section 12(3)(b), he could not claim protection under Section 12(3)(b). This Court observed that it is difficult to see how judicial discretion exercisable in favour of the tenant can be found under Section 12(3)(b) even where conditions laid down by it were not satisfied. This Court overruled the decision of the case of Bombay High Court in *Kalidas v. Bhavan Bhagwandas* (60 Bom LR 1359). The conditions specified in Section 12(3)(b) will have to be strictly observed by the tenant if he wants to avail himself of the benefits provided under the section.

13. On the facts therefore we find that the plaintiff is entitled to a decree for possession of the two plots under the provisions of the Bombay Rent Act. As plot No. 13 has not been built upon and is vacant there could be no difficulty in confirming the decree for possession in favour of the plaintiff regarding plot No. 13.

14. In *Importers and Manufacturers Ltd. v. Pheroze Framroze Taraporewalai* (1953 SCR 226 : AIR 1953 SC 73 : 1953 SCJ 82), this Court held that the claim for compensation was merely an incidental claim for possession under the Act :

Section 28 had conferred jurisdiction on the Court of Small Causes not only to entertain and try any suit on proceeding between a landlord and tenant for recovery of rent or possession but also to deal with any claim or question arising out of this Act or any of its provisions and Section 28 was thus wide enough to cover the question raised as between the plaintiff and the sub-lessee.

It will be seen that the plea that a suit against a sub-lessee is not within the jurisdiction of the Small Causes Court, was negatived by this Court and it was held that section was wide enough to cover the questions raised between the plaintiff and the sub-lessee.

15. *Babulal Bhuramal v. Nandram Shivram* (1959 SCR 367 : AIR 1958 SC 677 : 1958 SCJ 880) related to sub-lessee of the premises. The suit was filed for ejection of the tenant and the sub-tenant in the Court of Small Causes. The tenant and the sub-tenants later filed a suit before the Bombay City Civil Court for declaration that the lessee was a tenant and was protected from eviction by the provisions of the Bombay Rent Act and that as B and C were lawful sub-tenants, they were also entitled to possession. This Court agreed with the view taken by the High Court that Section 28 of the Act barred the City Civil Court from entertaining the suit filed by the lessees and sub-lessees as Section 28 conferred the right on the Court of Small Causes to entertain a suit between a landlord and a tenant in respect of a claim which arose out of the Act or any of its provisions. Thus it prohibits a suit from being entertained by the City Civil Court at the instance of the tenant.

16. In *Raizada Topandas v. Gorakhram Gokalchand* ((1964) 3 SCR 214 : AIR 1964 SC 1348 : (1964) 2 SCJ 814), it was held that if a suit is framed by landlord or tenant and relief asked for is in the nature of claim which arises out of Act or any of the provisions then only and not otherwise will

it be covered by Section 28 and as there were no such claim the City Civil Court has jurisdiction to entertain the suit. The plaintiff in the case proceeded on the footing that during the period of agreement the appellants were mere licensees and after the expiry of the agreement they were trespassers. As the plaint in terms negated the relationship of the landlord and tenant, it was held that the Rent Court had no jurisdiction. This decision cannot be of any help to the appellant.

17. In *Sushila Kashinath Dhonde v. Harilal Govindji Bhogani* ((1970) 2 SCR 950 : (1969) 3 SCC 223 : AIR 1971 SC 1495), this Court held that it is not necessary that there should be relationship of landlord and tenant in respect of all the matters covered by Section 28(l) of the Act so as to give jurisdiction to the Court of Small Causes. It further held that in respect of other matters dealt with sub-section, it is not necessary that the relationship of landlord and tenant should exist between the parties before the court. The court repelled the contention that a charge created by the deed executed between the parties did not give rise to any claims or questions arising out of the Bombay Rent Act or its provisions and held that nature of reliefs to be granted to the plaintiff are all claims or questions arising out of the Act and can be dealt with only by the special court constituted under Section 28 of the Act. No doubt, the deed of charge furnished a cause of action, but its legality, validity and binding nature and other incidental matters connected therewith are all question arising out of the Act and the plea on behalf of the appellants that the rights of the plaintiff did not flow from the Act or any of its provision but from the contract, could not be accepted.

18. The decisions referred to above will show that that the plaintiff/landlord of the land is entitled to claim the relief for possession of his land and in effect the decree for possession of the land would mean that the land should be delivered to him without the structures. Apart from the relief under the lease deed, the plaintiff is entitled to succeed as he has established that there was default of payment under the provisions of the Bombay Rent Act. The jurisdiction of the Small Causes Court to grant an effective decree for possession of the land cannot be denied. Equally untenable is the contention of the respondent that as the plaintiff has sought two reliefs one under the Bombay Rent Act and another under the Contract, the entire plaint must be rejected. As we have already observed so far as the relief of possession of the premises, i.e. the land, is concerned, it is exclusively within the jurisdiction of the Small Causes Court. In asking for the relief for possession of the land, the plaintiff is entitled to incidental and consequential reliefs such as for taking possession of the plot without the structures. The prayer in the plaint asking for possession of the land including the structures would not take the suit out of the competence of the Small Causes Court. In this view it is not necessary for us to go into the question as to whether the terms in the contract regarding the forfeiture can be enforced by the Small Causes Court. It is sufficient for the purpose of this suit to told that the plaintiff is entitled to seek for possession of the land which is the premises in the suit, and in getting possession of the land, he is entitled to ask for possession of the land without any superstructures. In this connection reference may be made to the nature of the relief which the plaintiff is entitled to. In *Ramchandra Raghunath Shirgaonkar v. Vishnu Balaji Hindalekar* (AIR 1920 Bom 87 : 22 Bom LR 948 : 58 IC 323), it was held that the ordinary rule of law is that the tenant must give up vacant possession of the land demised at the end of the term and that if he builds on the land of the tenancy he builds at his own risk. At the end of the term he can take away his building but if he leaves it there, it becomes the landlord's property. The court further held that the tenant who had been in possession of land for a large number of years and built a costly and substantial house on the land of the tenancy with the knowledge of the landlord, is entitled to some compensation.

19. In *Khimjee Thakarsee v. Pioneer Fibre Co. Ltd.* (AIR 1941 Bom 337 : 43 Bom LR 576 : 197 IC 253), it was held that after the determination of the lease, lessees were required to deliver over

possession of the demised premises to the lessor and the lessees were entitled to remove the structures which they might have erected during the continuance of the tenancy. The lessees, however, failed to remove the structures on the date of the determination of the tenancy and on the next date the premises were occupied by other lessees. It was held that the lessees could remove the structures on and not after determination of the tenancy and having failed to remove the same on the determination of the tenancy they lost not only their right to remove the structures after the determination of the tenancy but also all right, title and interest in those structures.

20. In *K. Arumugham Naicker v. Tiruvalluva Nainar Temple by its Trustee* (AIR 1954 Mad 985 : (1954) 2 MLJ 282 : 67 MLW 489), it was held that where a court directs by a decree or order vacant possession of land, that decree could be made effective by directing its own officers to remove the superstructures in the property and deliver vacant possession of the properties to the decree-holder. It is unnecessary to have any specific power in that behalf. The power to remove the superstructures is an incidental, necessary and ancillary power to the power to deliver possession of the property.

21. We are satisfied that the Small Causes Court had jurisdiction to entertain the suit of the plaintiff not only for possession of the land which is the premises under the Act but also for other reliefs to make the decree for possession effective. In this connection the plaintiff is entitled to ask for relief regarding the superstructures. This incidental or ancillary relief would not take out the suit beyond the jurisdiction of the Small Causes Court. The plea that the composite relief had been asked for and that the entire plaint ought to be rejected is also unsustainable. In the result, we agree with the contentions of the plaintiff that in asking for relief as to possession of the land, he is entitled to ask for the demolition of the structures and for grant of vacant possession of the plots. So far as the plot No. 13 is concerned, there is no difficulty. The plot is not built upon and is vacant and therefore we have no hesitation in confirming the decree for possession so far as the plot No. 13 is concerned.

22. Plot No. 12 has been built upon. There are about three storeys consisting of about 72 flats, shops with carpet area of 13,000 square feet and the cost of building with superstructures in 1949 was about Rs. 6,00,000. We may in this connection note that from the date of the decree passed by the High Court on October 23, 1969, the defendant has not paid arrears of rents or the taxes due on the buildings. He is in law bound to pay the arrears of rent and the municipal charges which he has undertaken to pay.

23. On a consideration of the facts of the case, we feel that there are no grounds for interfering with the decree passed by the High Court for possession not only of the vacant plot but also of the superstructure and mesne profits and arrears of rent. The law provides for the tenant to remove the superstructure on the termination of the tenancy. If it is not thus removed the tenant loses all his rights to the superstructure and the landlord becomes entitled to it. But in a case where there is a substantial building, it is only reasonable that the court should explore the possibility of payment of some compensation to the tenant who had put up this structure. But in this connection we are reminded that for several years neither the arrears of rent nor the taxes amounting to several lacs of rupees had been paid by the tenant. Not only the tenant but several persons who have put up flats at their own costs may press their claim for compensation and it will be difficult to determine as to who are entitled to compensation and the proportion of the compensation to which they will be entitled to. We enquired of the parties at the conclusion of the arguments if it was possible to come to some arrangement regarding the superstructure but to our regret the parties informed us that they could not arrive at any settlement. In the circumstances, we have no alternative except to confirm the judgment and decree passed by the High Court. We, therefore, dismiss the appeal, but in the special circumstances of this case we make no order as to costs in this Court.

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