

# **BOMBAY HIGH COURT**

Khimjee Thakarsee

Vs.

The Pioneer Fibre Co. Ltd

O.C.J. Suit No. 1063 of 1939

(Blackwell, J.)

03.12.1940

## **JUDGMENT**

### **Blackwell, J.**

1. This is a summons taken out by the applicants for an order that the attachment levied by the plaintiff on the property at Fergusson Road, Lower Parel, by the warrant of attachment dated September 13, 1939, be raised. This summons was adjourned into Court for taking evidence. In view, however, of the arguments of counsel, and in particular of what has been conceded by counsel for the plaintiff, evidence has not become necessary. The matter has been greatly shortened by the concessions made by the learned' counsel for the plaintiff.

2. The defendants became the tenants of the applicants. The terms upon, which they became the tenants of the applicants are set out in the correspondence annexed to the affidavit of N.M. Bhagalia dated March 6, 1940. That correspondence amounting to an agreement to lease ought to have been registered by reason of the definition of a lease in Section 2(3) of the Indian Registration Act and Section 17(2) (d). It was not registered. Notwithstanding registration by virtue of the proviso to Section 49 of the Indian Registration Act these letters may be looked at as evidence of any collateral transaction not required to be affected by a registered instrument. Mr. M.V. Desai for the plaintiff has conceded that these letters can be looked at in connection with the present application.

3. Mr. Desai conceded by reason of the terms contained in these letters that the term began from September 1, 1931, and ended on August 31, 1939. Having regard to the allegation in Mr. Bhagalia's affidavit and the affidavit sworn by Manharlal Dwarkadas Mehta on March 6, 1940, Mr. Desai conceded that the term of the defendants ended on August 31, 1939, that they went out, and that the Star Trading Co. became the lessees of the applicants and went into possession under a lease on September 1, 1939.

4. The attachment levied by the plaintiff was not levied till September 13, 1939. It was on a piece or parcel of land situate at Fergusson Road, Lower Parel, by admeasurement seven hundred and sixteen yards and seven-eighths of another square yard or thereabouts with all the tenements, buildings, outhouses, godowns and watchman's shed thereon. The present summons relates to four structures alleged by the plaintiff to have been erected by the defendants on that parcel of land. The applicants contend that structures 1, 3 and 4 were not even standing on the portion of the applicants' land described in the warrant of attachment, and that No. 2 was the only structure standing on that portion. They also contend that structures 1 and 3 were not erected by the defendants. These contentions are disputed by the plaintiff. It has, however, not become necessary to go into any question of evidence relating to this dispute because this matter falls to be determined on a point of law.

5. Clause 12 of the letter of July 27, 1931, which letter became One of the terms between the parties, requires the lessees to deliver over possession of the demised premises at the determination of the tenancy in the same good condition as it was at the time the lessees entered into possession subject to wear and tear. Clause 15, which also became one of the terms, provides as follows:--

On the determination of the tenancy the lessees shall be entitled to remove the structure or shed which they might have erected during the continuance of the tenancy,

6. Mr. Desai contended that this is a contract between the parties such as is contemplated by Section 108 of the Transfer of Property Act.

7. Section 108 of the Transfer of Property Act provides that in the absence of a contract, or local usage to the contrary, the lessee may even after the determination of the lease remove at any time whilst he is in possession of the property leased, but not afterwards, all things which he has attached to the earth: see Section 108(B)(k). As will be seen from Sir Dinshah Mulla's commentary on the Transfer of Property Act, 2nd edn., at page 609, this sub-section has been amended by the insertion of the words "even after the determination of the lease" to settle a conflict of decisions referred to in *Angammal v. Aslmi Sahib*<sup>1</sup> as to whether a lessee is entitled to an allowance of a reasonable time after; the determination of the lease for the removal of his fixture. A further amendment "whilst he is in possession of the property leased but not afterwards" fixes definitely the time during which the right may be exercised. As Sir Dinshah Mulla points out the amendment introduces no new principle, but limits and defines the tenant's right to remove as one to be exercised during the term and negatives any right to remove when the tenant is not in possession. If he once quits possession Sir Dinshah Mulla says that he may not return, and the fixtures become the property of the lessors. In this connection reference may usefully be made to *Govindaprasad Shaha v. Charusheela Dasee*<sup>2</sup>

8. In my opinion Clause (15) does amount to a contract between the parties which excludes the provisions of Section 108 of the Transfer of Property Act. I have to construe Clause (15) and determine the rights of the defendants and the lessors in the light of it. Having regard to Clause (12) of the terms which makes it obligatory upon the lessees to deliver over possession at the determination of the tenancy, I am of opinion that the defendants were given no right to remain in possession after the determination of the tenancy. Clause 15 gives the lessees the right to remove the structures or sheds on the determination of the tenancy. It is important to observe that the words are "on the

<sup>1</sup>(1913) I.L.R. 38 Mad. 710

<sup>2</sup>(1933) I.L.R. 60 Cal. 1042

determination of the tenancy," and not "after the determination of the tenancy". Having regard to the obligation to deliver over possession at the determination of the tenancy, I am of opinion that if the lessees wished to remove the structures they were obliged to make provision for their removal by severing them from the soil, or by taking any steps which might be necessary so that they could remove them on the determination of the tenancy. They did not do so and in my view they lost all their rights to remove the structures, or to demand possession of them from the lessors.

9. Even if I am wrong in my construction of Clause (15) and the lessees had, by virtue of Clause (15) or otherwise, the right to remove the structures after the determination of the tenancy and after they had gone out of possession, as they did, on August 31, 1939, I think that they would only have had the right to remove the structures within a reasonable time of the determination of the tenancy. That I fix at forty-eight hours. They did not remove those structures within that period and even on this view of the matter, I am of opinion that] they had lost any right they might have had, if this should be the proper construction of Clause (15), long before September 13 arrived, the date upon' which the plaintiff attached the right title and interest of the defendants.

10. Mr. Desai contended that even if the defendants had lost their right to remove the structures, the property in the structures still remained in the defendants and they were entitled to demand possession of them or compensation for them. I am unable to agree with this contention. If the defendants chose to leave these structures on the property of the lessors and chose not to remove them within the time allowed by the contract, or by law in that behalf, then in my opinion the defendants lost all right title and interest in those structures. They could not, in my view, have claimed to enter upon the premises with a view to remove them; they could not have sought to compel the lessors to remove them and hand them over, and the result is that it became the right of the lessors to do what they liked, with those structures, to destroy them, or leave them, there as they chose.

11. Accordingly I am of opinion that the applicants are entitled to have this attachment raised. I direct it to be raised accordingly, and I direct the plaintiff to pay to the applicants the costs of this summons. The costs of the matter in Chambers being 135, I fix the costs of this matter including

those costs at ₹ 750

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