

BOMBAY HIGH COURT

Namdeo Lokman Lodhi

Vs.

Narmadabai Keshoodeo

Second Appeal No. 557 of 1945, in Appeal No. 175 of 1943

(Chagla, C.J. and Gajendragadkar, J.)

23.06.1949

JUDGMENT

Chagla, C.J.

1. This is an appeal from a judgment of the learned Judge, Small Cause Court of Poona, exercising appellate powers, confirming a decree for ejectment passed by the learned Extra Joint Subordinate Judge at Poona. The ejectment was sought by the landlord on the ground of non-payment of rent, and the main point that has been urged before us by Mr. Abhyankar and Mr. Kotwal is that inasmuch as so notice was given by the landlord determining the lease on the ground of non-payment of rent, there was no forfeiture and there was no right on the part of the landlord to re-enter the demised premises.

2. Now, the law with regard to forfeiture is contained in Section 111(g) of the Transfer of Property Act, and a forfeiture results and a lease is determined in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, or in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, or the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and prior to the amendment of this sub-section by Act XX [20] of 1929 this sub-section further provided "and in any of these cases the lessor or his transferee does some act showing his intention to deter, mine the lease." By Act xx (20) of 1929 this sub-section was amended and the amended sub-section now reads : "and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease." Therefore, as the law stands today, a notice given by the landlord is a condition precedent to forfeiture and the right of re entry. But Act, XX (20) of 1929, by Section 63, restricted the operation of this amendment and the restriction was that this amendment was not to affect the terms or incidents of any transfer of property made or effected before 1st April 1930. Now, when we turn to the lease in this case, which was executed before the Transfer of Property Act came into force in 1882, one of the terms of that lease was that the landlord was given the right to re-enter on the tenant failing to pay the rent agreed upon. Therefore, it is clear that if this amendment was to be made applicable to the lease which was entered into long prior to 1st April 1930 it would undoubtedly affect the terms and incidents of the contract between the landlord

and the tenant, because by the amendment the right of the landlord would be considerably curtailed. Instead of being able to re-enter as soon as there was a default in payment of rent, he could only re-enter provided he gave a notice expressing his intention to determine the lease, and, therefore, in our opinion it is clear that Section 63 of Act XX (20) of 1929 does not make the amendment retrospective and restricts its operation to transactions that took place after 1st April 1930.

3. But in this case as the lease was entered into prior to 1882, we have also got to consider Section 2, Transfer of Property Act. That section provides that "nothing herein contained shall be deemed to affect" (now I am citing the relevant sub-clause) "any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability." Therefore, any right that the landlord had, or any relief to which he became entitled in respect of such right, could not be affected by the coming into force of this Act if that right had been acquired prior to the coming into operation of this Act, or he had been entitled to the relief in respect of such right prior to the coming into operation of this Act. Therefore, apart from Act XX (20) of 1929, by Section 2 the provisions of the Transfer of Property Act do not apply to transactions which were in force prior to the coming into operation of the Act if those provisions were likely to affect any rights or liabilities-or any relief in respect of such rights. This position is not seriously disputed by Mr. Abhyankar or Mr. Kotwal. But what is strongly urged before us is that the recent amendment to Section 111(g), Transfer of Property Act, embodies a principle of justice, equity and good conscience, and not with standing Section 2 of the Act, we must apply that principle and give relief to the tenant. As a broad proposition it is undoubtedly true to say that the Privy Council has emphasised the fact that the Courts in India must apply principles of justice, equity and good conscience to transactions which come up before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to those transactions, and if we were satisfied that the particular principle to which the Legislature has now given effect by amending Section 111(g) did in fact represent a principle of justice, equity and good conscience, we would undoubtedly give effect to that principle, although by Section 2, Transfer of Property Act was not made applicable and although by the amending Act the Legislature itself did not, think fit to make the amendment retrospective. The principle to which I was just referring has been enunciated by the Privy Council, first, in *Maharaja of jeypore v. Rukmani Pattamahadevi*¹, There the Privy Council was considering a case of forfeiture on the ground of disclaimer of title and the transaction there was prior to the coming into operation of the Transfer of Property Act, and their Lordships' attention was expressly directed to Section 2, Transfer of Property Act, and in the judgment which was delivered by Lord Phillimore their Lordships said that the statutory provision with regard to forfeiture which ultimately was embodied in Section 111 was not retrospective (and they referred to Section 2) and therefore did not govern the case before them. But, they added, it was in substance the placing in a statutory form of the rule of law which had been already adopted by the Courts in India. and their Lordships went on to say (p. 598) :

"They are directed by the several charters to proceed where the law is silent, un accordance with justice, equity, and good conscience, and the rules of English law as to forfeiture of tenancy may be held and have been held to be consonant with these principles and to be applicable to India."

¹42 Mad 589 : (AIR 1919 PC 1)

Again the Privy Council in *Aditya Prasad v. Ram Ratan Lal*², were considering a case of redemption of a mortgage to which the Transfer of Property Act did not apply and they applied the statutory provisions of the Transfer of Property Act on the ground that those provisions represented principles of justice, equity and good conscience and they expressly say that the principles of justice, equity and good conscience for the particular purpose they were considering were identical with the provisions of the Transfer of Property Act. But it is a very far cry from this principle enunciated by the Privy Council to say that every amendment made to the Transfer of Property Act must necessarily embody the principles of justice, equity and good conscience. If we were to accept this extreme proposition, the result would be that Section 2, Transfer of Property Act would become a dead letter, and what is more, we would be driven to this extraordinary situation that although the Legislature might expressly legislate that a certain provision shall not be retrospective, we in our wisdom would have to say that notwithstanding the intention of the Legislature we would make it retrospective because we thought it was a principle of justice, equity and good conscience. Mr. Kotwal says that the amendment was passed by the Indian Legislature in view of the peculiar conditions prevailing in India and in order to obviate hardship to the illiterate and poor peasantry of the land. If that were so, it is difficult to understand why the Legislature in terms made this salutary provision applicable only to transactions subsequent to 1st April 1930. Therefore, let us consider whether this particular provision with regard to a notice to be given before a forfeiture ensues when a tenant makes a default in payment of rent is a provision based upon principles of justice, equity and good conscience.

4. This amendment, in a sense, followed upon the passing of the Law of Property Act of 1925 in England, and when one turns to that Act, which introduces by Section 146 the provision with regard to the giving of notice before a right of reentry accrues to the landlord, Sub-Section (11) of that section expressly excludes cases of re-entry or forfeiture relating to non-payment of rent. Therefore, even today in England it is not necessary in cases of non-payment of rent for a landlord to give notice before a forfeiture results and the right to re-enter accrues to the landlord. Our principles of justice, equity and good conscience which we administer in Courts of law are almost wholly based upon principles of English law. We have been administering justice on the lines of English Courts and our view of equity and good conscience and justice is wholly determined by what the English Courts and the English Legislature have thought with regard to these matters. Therefore, if we find that even today in England it is not considered a matter of justice, equity or good conscience that a landlord should give notice before there can be forfeiture for non-payment of rent, it would indeed be very strange if we should hold that because the Indian Legislature has chosen to amend Section 111(g) by introducing a provision which does not find a place in English law, that that provision was based upon principles of justice, equity and good conscience. The short answer to Mr. Abhyankar's and Mr. Kotwal's arguments is that it is erroneous to suppose that every provision in the Transfer of Property Act and every amendment effected is necessarily based upon principles of justice, equity and good conscience. There are many procedural and technical matters which have nothing whatever to do with the well accepted principles of justice, equity and good conscience. and it may well be that the Legislature in India thought that a particular procedure and a particular technicality should be observed with regard to forfeiture for non-payment of rent, different from what was followed and understood in England by English Courts of law.

²57 IA 173 : (AIR 1930 PC 176)

5. Our attention has also been drawn to a judgment of a Divisional Court consisting of myself and my brother Shah where we applied the principle of giving notice in case of forfeiture resulting from a disclaimer of title to a case to which the Transfer of Property Act did not apply, and we applied it on the grounds of justice, equity and good conscience, and Mr. Abhyankar argues that if we did that in that case there is no reason why we should not do the same in the case of forfeiture on the ground of non-payment of rent. Now, the distinction between that case and this is obvious. As I have already pointed out the English Law of Property Act of 1925 did introduce a provision with regard to notice in the case of forfeiture for disclaimer of title; it did not do so in the case of non-payment of rent, and therefore, if in that case we applied the principle of the amendment as far as forfeiture for disclaimer of title was concerned, we were applying a principle which the English Legislature had also accepted as a proper principle and it was possible to say that that was based on principles of justice, equity and good conscience. But when we now have to consider the question of notice in a case of non-payment of rent and when we are faced with this position that the law in England is that a forfeiture results without a notice being given, we cannot possibly extend the decision which we have given to apply to a case which is not covered by the amendment passed in England by the Law of Property Act of 1925. Therefore, in our opinion the decision of the Divisional Bench is clearly distinguishable and it does not bind us, nor does it compel us to extend the principle of that decision.

6. In our opinion, therefore, the suit was maintainable without notice having been given. There was a forfeiture and the plaintiff was entitled to eject his tenant. (The rest of the judgment is not material for purposes of reporting and is therefore omitted.)

Appeal dismissed, Rule discharged.