

# **BOMBAY HIGH COURT**

Gurupadappa Shivlingappa

Vs.

Akbar Sayad Sudan Kadri

Second Appeal No. 1309 of 1948, in Appeal No. 76 of 1948

(Shah, J.)

18.08.1949

## **JUDGMENT**

### **Shah, J.**

1. The plaintiff filed a suit, being suit No. 272 of 1946, in the Court of the Joint Civil Judge, Junior Division, Belgaum, seeking to obtain possession of certain premises from the defendant on the allegation that the defendant was a tenant and that the tenancy was duly terminated by notice.
2. The defendant resisted the claim on the ground that he was an annual tenant and the tenancy was not duly terminated. During the pendency of the suit, the parties arrived at a compromise, the terms of which are as follows :

"(1) The defendant admits that he is the monthly tenant of the plaintiff. The defendant do deliver up possession of the suit property to the plaintiff before 31st January 1948.

(2) The defendant has paid the rent up to the end of March 1947 to the plaintiff. The defendant do forthwith pay the amount of rent remaining due up to this day and he do pay to the plaintiff rent of each month up to 31st January 1948, in advance on the first day of each of the several months."

This decree was passed on 11th June 1947, and the relations between the parties at that time were governed by Bombay Act VII (7) of 1944. The period provided by the decree having expired on 31st January 1948, and the defendant having failed to vacate, the plaintiff filed darkhast No. 25 of 1948 in the Court of the Civil Judge, Senior Division, at Balgaum, seeking to obtain possession of the premises by execution of the decree in suit No. 272 of 1946. The defendant contended that he was entitled to the protection given by Bombay Act LVII (57) of 1947, which had been passed in the meanwhile and which was made applicable as from 13th February 1948.

The learned trial Judge rejected the contention of the defendant and directed warrant under Order 21, Rule 35, to issue. An appeal was preferred to the District Court at Belgaum, and the learned District Judge, who heard the appeal, reversed the order of the learned trial Judge and passed an order that the darkhast should stand dismissed. The plaintiff - decree-holder comes to this Court in second appeal.

3. It is contended by Mr. Lokur on behalf of the plaintiff-appellant that the learned District Judge was wrong in coming to the conclusion that Bombay Act LVII (57) of 1947 applied to execution proceedings. Mr. Lokur refers to Section 50 of that Act, as it stood before its amendment which provided that all suits and proceedings other than execution proceedings and appeals which were pending in any Court between a landlord and tenant relating to the recovery or fixation of rent or possession of any premises, if they were pending at the date on which the Act came into operation, should be transferred to the Court constituted under Act LVII (57) of 1947, and thereupon all the provisions of the Act and the rules made there under were to apply to all such suits and proceedings.

4. Now, so far as the present darkhast is concerned, it has been filed on 16th February 1948, and was consequently a darkhast which was not pending at the date when the new Act came into operation. It is irrelevant therefore to consider what the effect of Section 50 of the new Act is. It is true that ordinarily a Court must execute the decree according to its terms except in those cases where there is a statutory limitation upon the right to execute by reason, however, of the provisions of Section 12 of Act LVII (57) of 1947 a tenant is not liable to be evicted if he is ready and willing to pay the rent accruing due to the full extent allowable by law. A conflict therefore arises between the direction of the decree and the protection granted by the statute to the tenant. That conflict would have to be resolved by reference to two main considerations : (1) Is a person against whom a decree is passed in ejectment on the ground that his tenancy was terminated and that he was not entitled to the protection of the statute but is in possession a 'tenant' within the meaning of the Act, LVII [57] of 1947, (2). If he is a tenant, can he insist upon remaining in possession notwithstanding the direction of a competent Court to the contrary. Now, if a decree is passed in ejectment against the defendant after the termination of his tenancy, he cannot claim to be a tenant and he would have no right to claim the protection of the statute contrary to the directions of the decree. When, however, there is, as in the present case, a consent decree which creates a fresh contractual relation of landlord and tenant, the defendant gets the rights and privileges of a tenant under Act LVII [57] of 1947, and unless the protection of the statute is properly and validly withdrawn, he would not be liable to deliver possession in spite of the terms of the decree. The term of the consent decree which requires a tenant to deliver possession on the assumption that he will not claim or that he will not be entitled to claim the benefit of the statute is not "lawful" within the meaning of Order 23, Rule 3. Civil P.C., and the executing Court is not bound to execute that part of the decree contrary to the terms of the statute. Under the terms of the consent decree in the present case it is clear that when the defendant was allowed to continue in possession of the premises as a tenant of the plaintiff, a tenancy for a fixed period was created, and it was to expire on 31st January 1948. On the expiry of the contractual tenancy, the rights of

the defendant to claim the benefit of Bombay Act LVII [57] of 1947 did not come to an end, because the expression 'tenant' as defined in Section 6, clause (1), means any person remaining after the termination of the lease in possession with or without the consent of the landlord of the premises leased to such person or his predecessor who has derived title before coming into operation of this Act. The contractual tenancy of the defendant, which had been terminated before suit No. 272 of 1946 was filed, was revived by reason of the consent decree passed on 11th June 1947. The defendant thus became a contractual tenant of the plaintiff, and he would be entitled to claim the benefit of Section 12(1) of the Act. There is nothing on the record of this case to indicate that the plaintiff's case falls within the scope of Section 13 of Bombay Act LVU (57) of 1947; and if the defendant is entitled to the benefit of Section 12, Clause (1), then clearly the present application is liable to be dismissed.

5. Mr. Lokur has, however, contended that once a decree has been passed whether by consent or otherwise the defendant is not entitled to claim the benefit of the provisions of Bombay Act LVH (57) of 1947. According to Mr. Lokur, the decree must be executed as it stands. In my view, an executing Court is not always bound to execute a consent decree according to its terms. In the case of consent decrees, it has been recognized that there is jurisdiction in the executing Court to refuse in certain cases to execute the decree as it stands. Consent decrees which involve penal clauses are a well recognized class of cases in which the executing Court has jurisdiction to refuse to direct execution according to the terms of the decree. A statutory provision may, either expressly or by implication, prevent execution of a decree according to its terms; and the executing Court would have no jurisdiction to execute such a decree according to its directions. This is a decree passed with the consent of the parties which created a contractual relation between the plaintiff and the defendant, and I see nothing in the terms of Section 12 of Bombay Act LVII [57] of 1947 which prohibits a tenant whose rights arise under a consent decree from obtaining the benefit of that Act.

6. In my view, the learned appellate Judge was right in holding that the provisions of Section 12, clause (1) of Bombay Act LVII [57] of 1947, applied and that the defendant was entitled to the benefit of those provisions. The appeal, therefore, will be dismissed with costs.  
Appeal dismissed.