

BOMBAY HIGH COURT

Shankarlal Ramratan Shet

Vs

Pandharinath Vishnu Phatak

(Bhagwati and Chainani, JJ.)

22 .01.1951

JUDGMENT

Bhagwati, J.

1. This is a second appeal from the decision of the learned Asst. Judge, Jalgaon, allowing the appeal against the decision of the learned Joint Civil Judge, Junior Division, at Jalgaon.

2. The pltf. is the owner of a house bearing City Survey No. 1991 which consisted of business premises. A lease for a period of about five years expiring on 4-11-1945, was granted by the pltf. to the deft. The deft. however, continued in possession of the suit premises even after the expiration of the period of the lease. A two-thirds portion of the suit premises had been requisitioned by the Govt. & a one-third portion was in the possession of the deft. On 18-6-1946, the pltf. filed a suit for possession of the suit premises consisting of one-third of the house in the actual possession of the deft. basing his claim for possession on the ground that he required the suit premises for his own use & occupation. This claim of the pltf. was resisted by the deft. who contended that the pltf. did not require the premises for his own use & occupation. The trial Ct. held that the Bombay Act LVII [57] of 1947 which came into operation from 13-2-1948 applied but that the suit premises were not required by the pltf. reasonably & bona fide for his own use & occupation & therefore dismissed the pltf's. suit on 19-4-1948. The pltf. filed an appeal from this decision of the learned trial Judge. The lower appellate Ct. came to the conclusion that the Bombay Act VII [7] of 1944 was applicable, that the same did not apply to business premises & that therefore the deft. was not entitled to the protection of the Act. Under the circumstances the lower appellate Ct. does not appear to have considered the question whether the pltf. required the suit premises reasonably & bona fide for his own use & occupation & proceeding on the basis that the deft. was not entitled to the protection of the Bombay Act VII [7] of 1944 decreed the pltf's. claim & ordered the deft. to hand over possession of the suit premises to the pltf. This second appeal was filed by the deft. from that decision of the lower appellate Ct.

3. Before we proceed to deal with the main question that has been canvassed before us in this appeal we might as well dispose of two minor points which were urged before us by Mr. R. B. Kotwal for the applt. viz. (1) whether the Govt. which had requisitioned two-thirds of the suit premises were necessary parties to the suit & (2) whether a suit could lie for possession only of a one-third part of the salt property which had been the subject-matter of the original lease.

4. In regard to the first point, it is obvious that there is no privity of estate established between the pltf. & the Govt. by reason of the requisition of the two-thirds part of the suit premises. The effect of an order of requisition is that so far as the tenant is concerned the tenancy rights in respect of the part of the premises which are the subject-matter of the requisition order vest in the Govt. That does not mean that the Govt. become sub-tenants of the original tenant or are brought into direct relationship with the landlord as landlord & tenant. If the former were the true position, even then it would not be necessary to implead the sub-tenant as a party-deft. to the suit which the landlord files for eviction of the tenant. If the latter were the true position, the landlord not seeking to evict the Govt. from the portion of the premises in their use & occupation under the terms of the requisition order, there would be absolutely no necessity of making the Govt. party defts. to this suit.

5. In regard to the second point, it may be observed that the right which the landlord has on the termination of the lease is to have delivery of the possession, given over by the tenant to him & that is the right which the landlord seeks to exercise when he files a suit for ejectment against the tenant on the termination of the tenancy. It may be that the tenant for certain reasons is not in a position to hand over possession of the whole of the property which has been let out to him, but that does not mean that the landlord would not be entitled to obtain possession from the tenant of such portion of the property let out to him as the tenant is in a position to give. In this case by reason of the paramount rights acquired by the Govt. over the two-thirds of the suit property by requisitioning the tenancy rights in connection therewith, it may be that the landlord may not be able during the currency of the requisition order to obtain vacant possession of the two-thirds of the property, the subject-matter of the requisition order. That, however, would not preclude the landlord from maintaining a suit for possession of the one-third of the suit property which is actually in the possession & occupation of the deft. ; & it would be no answer for the deft. to say that if the possession of the whole of the suit property cannot be obtained by the landlord he, though he is in actual possession & occupation of the one-third of the suit property & is in a position to deliver vacant possession to the landlord, should not be called upon to do so. We, therefore, negative both these contentions which have been urged on behalf of the applt.

6. The main question therefore which survives for our determination is as to whether the parties here were governed by Bombay Act LVII [57] of 1947 which came into operation on 13-2-1948,

or by the Bombay Act VII [7] of 1944 as it was held by the lower appellate Ct. The determination of this question turns upon the construction of Section 50 Bombay Act LVII [57] of 1947 & the proviso thereto. The main part of Section 60 enacts that the Bombay Rent Restriction Act, 1939, & the Bombay Rents, Hotel Bates & Lodging House Bates (Control) Act, 1944, are hereby repealed. Stopping here for a moment, it is clear that from the time that this Act LVII [57] of 1947 came into operation, i.e. 13-2-1948, these two Acts of 1939 & 1944, being respectively Bombay Act XVI [16] of 1939 & Bombay Act VII [7] of 1944, were repealed. If nothing more was said, we would have Section 7, General Clauses Act I [1] of 1904, coming into play & Saving the legal proceedings or remedies in respect of any right, privilege, obligation or liability acquired, accrued or incurred under, the repealed enactments. All suits therefore which were pending & which were governed by the provisions of these respective Acts which were repealed would be saved & the rights & the obligations of the parties thereunder would be governed by the relevant provisions of the repealed Acts. The Legislature, however, in the enactment of Bombay Act LVII [57] of 1947 was enacting certain provisions for the benefit of the tenants which conferred larger benefits on them than were in fact conferred by the earlier Acts which were repealed, & it therefore thought it advisable that in regard to pending suits also in which decrees were not passed the provisions of Bombay Act LVII [57] of 1947 should be made applicable. It was with that intention that the proviso to Section 50 was enacted in the manner it was done & it was provided that "all suits & proceedings between a landlord & tenant relating to recovery or fixing of rent or possession of any premises to which the provisions of Part II apply which are pending in any Ct. shall be transferred to & continued before the Cts. which would have jurisdiction to try such suits or proceedings under the Act & thereupon all the provisions of the Act & the rules made thereunder shall apply to all such suits & proceedings."

It is necessary at the outset to turn to the definition of a "tenant" contained in Section 3 (11) of this Act which lays down that the tenant includes any person remaining after the determination of the lease in possession with or without the assent of the landlord of the premises leased to such person& also to Section 6 of the Act which lays down to what premises the provisions of Part II of the Act apply. Section 6 (1) of the Act says that in the areas specified in Schedule I, Part II shall apply to premises let for residence, education, business, trade, or storage If regard be had to these provisions of the Act just mentioned, it follows that suits which were pending in any Ct. at the date of the coming into operation of this Act, Bombay Act LVII [57] of 1947, & which fall in the category of suits & proceedings between landlord & tenant relating to recovery or fixing of rent or possession of any premises to which the provisions of Part II apply were to be transferred to & continued before the Cts. which would have jurisdiction to try such suits or proceedings under the Act & all the provisions of the Act & the rules made thereunder would apply to all such suits & proceedings. It may be remembered that the Bombay Act VII [7] of

1944 did not apply to business premises but only applied to residential premises therein mentioned. This proviso, however, made the Bombay Act LVII [57] of 1947 applicable to all suits which had been pending at the time when it came into operation & which were in regard to premises inclusive of business premises, & this enlarged the scope of the benefit which was enjoyed by the tenants under the repealed Act, Bombay Act VII [7] of 1944, by conferring the benefit of the provisions of the Bombay Act LVII [57] of 1947 on such tenants also who would otherwise have not been entitled to the same if the provisions of the Bombay Act VII [7] of 1944 only continued to be applicable. This proviso therefore in effect enacted a substantive provision in favour of the tenants & was not merely a proviso to the main part of Section 50. It is a normal rule of interpretation of a proviso that its proper function:

"is to except & deal with a case which would otherwise fall within the general language of the main enactment, & its effect is confined to that case. Where the language of the main enactment is clear & unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms."

Vide *M. & S. M. Railway Co. Ltd. v. Bezwada Municipality*. This is no doubt the normal rule of construction as to the effect of a proviso, but if the proviso in clear & explicit terms enacts a substantive provision of this type, it cannot necessarily be controlled by the language of the main enactment. As we have observed above, the purpose of the enactment of this proviso in the terms in which it is couched was to confer larger benefits on the tenants of the nature available in the provisions of the Bombay Act LVII [57] of 1947, & if that was so, the main provisions of Section 60 which was merely a repealing section would not fetter or limit or control the explicit or specific provisions contained in the proviso & the proviso to Section 60 could not be legitimately read as confined only to those cases which fell within the purview of the repealed Acts, Bombay Act XVI [16] of 1939 & Bombay Act VII [7] of 1944. We are fortified in this conclusion of ours by a judgment of the learned Chief Justice in *Shivaraj Rupchand Shedji v. Abdul Ajij*, Civ. Rev. Appn. No. 319 of 1950, D/-28-11-1950 where a similar point arose for the decision of the learned Chief Justice & he came to the same conclusion as we have reached above. The result therefore is that Bombay Act LVII [57] of 1947 applied to the suit which was filed by the pltf. against the deft. herein & which was pending in the Ct. on 13-2-1948, when that Act came into operation. If that was so, the conclusion which was reached by the lower appellate Ct. viz. that Bombay Act VII [7] of 1944 applied, was wrong, & the learned trial Judge was right which he held that the Bombay Act LVII [57] of 1947 applied to the present case.

7. The difficulty, however, which confronts us on the record is that though the learned trial Judge recorded his finding that the premises were not required reasonably & bona fide by the pltf. for

his own use & occupation the lower appellate Ct. did not apply its mind to this aspect of the case & did not record its finding thereon, with the result that we have not got before us any finding recorded by the lower appellate Ct. in regard to this issue. In the absence of that finding we would not be justified in passing any order one way or the other in regard to the pltf's. claim against the deft. The only reasonable thing under the circumstances would be to set aside the decree which has been passed by the lower appellate Ct. & to remand the matter to the lower appellate Ct. with a direction that will go into the evidence which has been regarded in the trial Ct. in regard to this issue & record its finding on the issue whether the pltf. requires the suit premises reasonably & bona fide for his own occupation. As a subsidiary issue to this main issue the lower appellate Ct. will also record its finding on the question whether under Section 13 (2), Bombay Act LVII [57] of 1947 it is satisfied that having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it & will dispose of the appeal in accordance with its findings on the above issues.

8. Mr. Dharap for the resp. urged upon us that when we were remanding this matter to the lower appellate Ct. we should also direct the lower appellate Ct. to go into one further issue, whether within the meaning of Section 13 (1) (b), Bombay Act LVII [57] of 1947 the deft. had without the pltf's. consent in writing erected on the premises any permanent structure. He drew our attention to the appln. which the pltf. had made in the trial Ct. being Ex. 61 where he had stated that the deft. had constructed without the pltf's. written consent permanent structures, on the premises in suit such as fixing in earth a compression machine & electric fittings of a petrol pump. In Ex. 62 which was a reply to this appln. the deft. had denied that he had erected any permanent structure on the premises, his contention being that fixing in earth of a compression machine & electric fittings of a petrol pump is in no manner the erection of a permanent structure on the premises. Mr. Dharap drew our attention to the reply which the deft. had given to the notices which had been given by the pltf. to eject him & where he had stated as one of the grounds why he should not be called upon to vacate & deliver over vacant possession of the premises that he had erected a permanent structure on the premises & he relied upon this statement of the deft. as an admission showing that the deft. had in fact erected on the premises a permanent structure without the pltf's. consent given in writing. We would have been inclined to accept this argument of Mr. Dharap if we thought that there was any substance in the contention of the pltf. in this behalf. We are, however, of the opinion that the mere fixing in earth of a compression machine & electric fittings of a petrol pump, though they may be fixtures, are certainly not permanent structures erected on the premises, & even though an inquiry in this behalf might entail the remanding of an issue in this behalf by the lower appellate Ct. to the trial Ct. involving considerable time & therefore delay in the matter of the ejectment of the deft. if ever the pltf. was

entitled to eject him & might benefit the deft. who is the tenant, we do not think that such an order can be legitimately made by us having regard to the facts of the case as indicated above. No ends of justice would be served by making such an order & we therefore decline to do so.

9. The result, therefore, is that the appeal will be allowed, the decree passed by the lower appellate Ct. will be set aside & the matter will be sent back to the lower appellate Ct. with a direction that the lower appellate Ct. do record its findings on the two issues which we have mentioned above & dispose of the appeal in accordance with law having regard to those findings. The resp. will of course pay the costs of this appeal.

10. In regard to the Civil Appln. No. 913 of 1950, the parties are relegated to the positions which they enjoyed in the lower appellate Ct. There is therefore no justification for continuing the stay any longer. The stay will, therefore, be removed, the rule will be discharged & each party will bear & pay its own costs of this appln.