

# **BOMBAY HIGH COURT**

Raghubir Narayan Lotlikar

Vs

G.A. Fernandes

(Chagla, C.J. Bhagwati, J.)

28.02.1952

## **JUDGMENT**

### **Chagla, C.J.**

(1) This is an appeal from a judgment of Mr. Justice Shah by which he held that this Court had no jurisdiction to try a suit for specific performance.

(2) The suit came to be filed under the following circumstances. In June 1947 the plaintiffs purchased a certain property. The defendants were residing in different portions of the property as tenants, and on July 15, 1947, the plaintiffs gave a notice to quit to some of the defendants. They followed up the notice to quit by instituting ejectment proceedings in the Small Causes Court. Then an agreement was arrived at between the landlords and the tenants on October 23, 1947, and the agreement in substance was this that the tenants should give all reasonable facilities to the landlords for the purpose of remodelling and repairing the floors of the said property according to the plan sanctioned by the Municipality. It was also agreed that the landlords would not seek to eject any of the tenants on the ground that the premises were required for the purpose of remodelling and repairing. It was further agreed that after the floors had been remodelled, accommodation would be granted to the landlords and the tenants as fixed by the agreement, and the effect of the carrying out of the agreement would be that the tenants would have to give up the premises which they occupied and would be given other premises in substitution of those premises. Pursuant to this agreement, the landlords carried out the remodelling and repairing work and spent a fairly large amount. When the plaintiffs called upon the defendants to carry out the agreement and to hand over possession of the premises in their possession and to take in place of those premises others in substitution agreed upon, the defendants refused to carry out the agreement. Thereupon the plaintiffs filed the present suit, and the reliefs they claimed were that the defendants may be ordered and decreed specifically to perform the agreement dated October 23, 1947. They also asked for a mandatory injunction upon the defendants to vacate the premises in their respective occupation and to occupy the portions

allotted to them under the terms of the agreement, and they further claimed in addition to or in substitution of the reliefs for the specific performance and injunction a decree by way of damages in the sum of Rs. 1,25,000.

(3) Now, the question that arises for determination is whether the suit, as far as prayers (a) and (b) are concerned, is maintainable in this Court. We agree with the view taken by the learned Judge that as far as the prayer for mandatory injunction is concerned, it is not well conceived. It is difficult to understand how there could be a mandatory injunction upon the defendants to accept the premises which they had agreed to take in substitution of their own premises. What the draftsman meant, as the learned Judge pointed out, is to aver that the plaintiffs were ready and willing to carry out their part of the agreement. Their part of the agreement was to give to the defendants premises in substitution of the premises occupied by them, and the plaintiffs could only maintain a suit for specific performance provided they showed their readiness and willingness to carry out their part of the agreement. Therefore, the draftsman instead of averring readiness and willingness has substituted in the plaint a mandatory injunction in the form to which reference has been made.

(4) Now, the view taken by the learned Judge is that in substance it is not a suit for specific performance at all. He takes the view that this is a suit for possession, and it is only by means of ingenious drafting that the real nature of the suit has been concealed and it has been given the appearance of a suit for specific performance. Therefore, the learned Judge has taken the view that the suit to the extent that it is a suit for possession is barred by Section 28 of the Rent Restriction Act.

(5) Now, turning to Section 28, we have had an occasion to point out in -- '*Govindram Salamatrai v. Dharampal*'<sup>1</sup>, that it is not every suit for possession which is triable by the Small Causes Court and in respect of which the jurisdiction of the High Court has been ousted. It is only suits between a landlord and a tenant relating to the recovery of rent or possession of any premises to which the provisions of Part II apply. Now, the question is whether the present suit is a suit between a landlord and a tenant relating to the recovery of possession of premises. In our opinion. Section 28 applies only to those suits between a landlord and a tenant where a landlord has become entitled to possession or recovery of the premises demised. Under the Transfer of Property Act a landlord becomes entitled to possession when there is a determination of tenancy. A tenancy can be determined in any of the modes laid down in Section 111, and once the tenancy is determined, under Section 108(q) the lessee is bound to put the lessor into possession of the property. It is, therefore, only on the determination of the lease or the tenancy that the landlord becomes entitled to the possession of the property, and when he has so become entitled to possession, if he files a suit for a decree for possession, then Section 28 applies and such a suit

can only be filed in the Small Causes Court.

(6) Now, the learned Judge points out that in this suit the relationship between the landlords and the tenants is not disputed and he takes the view that the suit substantially being for possession and also the suit being in respect of the premises to which Part II applies, all the three conditions laid down in Section 28 are satisfied. But, with respect to the learned Judge, what he has overlooked is the very important fact that the plaintiff does not proceed on the basis that the plaintiffs have become entitled to possession of the property. The plaintiffs are asking for specific performance of an agreement, and it is only if specific performance is granted by the Court that they would become entitled to possession of the property. Under Section 28 where the landlord files a suit for possession, the relationship of landlord and tenant is terminated. No contractual tenancy is subsisting and the tenant has become a trespasser and the plaintiff asks for possession and for compensation for the period of the occupation by his erstwhile tenant. When we turn to the nature of the present suit, the tenancy is not terminated. The plaintiffs still recognise the defendants as their tenants. All that they say is that by reason of the particular agreement they have a right to recover possession. But that right will only accrue to them when the Court grants specific performance.

(7) Now, it has been argued both by Mr. Bhabha and Mr. Pandia that this view of the matter would deprive the defendants of their right to plead the protection under the Rent Act, and our attention has been drawn to Sections 12 and 13 of the Rent Restriction Act. Under Section 12 the right of the landlord to recover possession has been taken away provided the tenant pays the rent and 'Observes and performs the conditions of the tenancy, and the landlord can only recover possession provided he satisfies one of the conditions laid down in Section 13 and the argument on the side of the defendants is that so long as the defendants are tenants and so long as they are willing to pay the rent and perform the conditions of the tenancy, the plaintiffs cannot recover possession at all; and the further contention is that under Section 28 the questions as to whether the tenant is entitled to the protection of the Rent Act under Section 12 or whether the landlord is entitled to possession under Section 13 are questions which can only be determined by the Small Causes Court. Section 12 postulates the fact that a landlord is entitled to recovery of possession and he is only entitled to possession under the provisions of the Transfer of Property Act. It is only when he so becomes entitled that the Legislature steps in and prevents the enforcement of his right by the protection which it gives to the tenant. No question of the application of Section 12 can arise if a landlord is not entitled to possession at all. The fallacy underlying the argument on the side of the defendants is that in this suit they presume that the plaintiffs are entitled to possession. They are definitely not. Specific relief is a discretionary relief and it is open to the Court either to give the plaintiffs possession which is a specific relief they claim or to give them damages in substitution of the specific relief. When a landlord files a suit for ejectment, he is

entitled to the relief for possession. The Court has no discretion. Either the Court grants him possession or dismisses the suit. But in the present suit it is entirely left to the discretion of the Court as to whether it should give the plaintiffs the main relief which they seek in the suit, Therefore, in our opinion, Section 12 and Section 13 have no application to a suit like the one that the plaintiffs have filed. It would be perfectly open to the Court when it considers the question as to whether possession should be granted to the plaintiffs or not to consider the policy of the Legislature which today is "protection of tenants". But no direct issue would arise before it either under Section 12 or Section 13. A glance at the issues which the learned Judge has framed clearly shows that the main issues to be tried in the suit are:\

(8) There is one further consideration which has led us to the conclusion that, with great respect, the learned Judge below is in error. The learned Judge has held that this Court has jurisdiction to try the issue as to damages which the plaintiffs seek, although it has no jurisdiction to try the issue as to the specific performance of the agreement. Now, it is difficult to understand how if the Court has no jurisdiction to decide as to whether the plaintiffs are entitled to specific performance of the agreement or not, it has jurisdiction to award the subsidiary relief, viz. the relief of damages.

(9) Mr. Bhabha has drawn our attention to the fact that notice to quit was given by the plaintiffs and the notice to quit is referred to in the agreement dated October 23, 1947. Now, when one looks at the plaint, there is clear averment that the notice to quit was withdrawn by the plaintiffs relying upon the undertaking given by the tenants. It is true that under the agreement provision was made that the ejectment proceedings were to be withdrawn after the tenants occupied the respective flats allotted to them. But there was nothing to prevent the landlords from withdrawing the ejectment notice or even from waiving the ejectment notice. Having done so, the plaintiffs treated the defendants as their tenants and in the suit they have definitely not relied upon the determination of the tenancy on the ground of the notice to quit. Therefore the only part that the notice to quit in the plaint plays is a part of 'res gestae' which sets out the history which ultimately led to the plaintiffs' allegation that the defendants committed a breach of the agreement. Therefore, in our opinion, this Court has jurisdiction to try a suit for specific performance even though the result of granting the specific performance may be that a landlord obtains possession from his tenants. In our opinion, this is not a suit to which Section 28 applies. Section 28 only applies to those suits where the landlord becomes entitled to possession by reason of the determination of the lease on any one of the grounds, stated in Section 111 of the Transfer of Property Act.

(10) The order, therefore, of the learned Judge will be set aside and the suit will be sent back to the Court for disposal according to law. In deciding the suit it would be for the Court to consider

whether it should grant the discretionary relief to the plaintiffs or merely give damages which they have asked for in the alternative. The respondents will pay the costs of the appeal as well as of the hearing of the issues in the Court below.

(11) Liberty to the appellants' attorneys to withdraw the sum of Rs. 500 deposited for security for costs.

(12) Suit remanded.

Cases Referred.

153 Bom LR 386