

BOMBAY HIGH COURT

Sakinabai

Vs.

Salebhai Hasanali

Civil Revn. Appln. No. 963 of 1963

(K.K. Desai and Palekar, JJ.)

21.02.1963. 15.03.1965

JUDGMENT

K.K. Desai , J.

1. Civil Procedure Code, 1908 and to bring on the record of the ejectment application the names of the above petitioners as Defendants 1 to 8 as legal representatives of the licensee.
2. The petitioners in this revisional application contend that the Court of Small Causes ought not to have made the order³. In this connection, the Petitioners rely upon the decision of a single Judge, of the High Court at Madras in the case of Ranganatham Pillai v. Govindarajulu Naidu, 1950-2 Mad LJ 280. In the above case, a landlord had filed an ejectment application under Section 41 of the Presidency Small Cause Courts Act against two Defendants. The Defendant 1 to whom the license had been granted (licensee) died pending the hearing of the ejectment application. The applicant applied to the trial Court for having the 2nd Defendant brought on record as legal representative of Defendant 1 in the ejectment application. The trial Court granted that application. In the revisional petition before the High Court of Madras, on behalf of the 2nd Defendant, it was contended that "the cause of action contemplated by Section 41 of the Presidency Small Cause Courts Act, where a licensee happens to be the person against whom a proceeding is sought to be taken in the first instance is something which necessarily expires with the death of the licensee". The contention urged was that with the death of the 1st Defendant there was no proceeding to be continued against the 2nd Defendant as "holding under or by assignment from" the 1st Defendant within the language of Section 41 of the Act. The contention was accepted by the Court. In that connection, the Court disapproved of the observation made by the High Court of Calcutta in the case of Hirendra Bhusan v. Purnachandra, (1948) 52 Cal WN 843 at p. 848. The Court referred to the decision of the High Court of Madras in the case of Chinnan v. Ranjithammal, ILR 54 Mad 554 . It is necessary to point out that the first part of the observations in the case of ILR 54 Mad 554 quoted in the case of 1950-2 Mad LJ 280 relates to

the position of a licensee whose licensor sells away the immovable property in question. It is observed that upon transfer and sale of the property the licensee ceases to have any rights altogether and the licence stands revoked upon transfer and sale of the property. The Court further observed : "A license is not annexed to the property in respect of which it is enjoyed nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents (Section 56). Accordingly in their occupation of the plot and especially so since the death of Poonjolai, the defendants have been mere trespassers.....We need not look further for authority than to Vadapalli Narasimham v. Dronamaraju Seetharamamurthi, (1908) ILR 31 Mad 163, for the proposition that the representatives of a tenant on sufferance are mere trespassers, since they cannot be regarded as succeeding to any interest in the tenancy; and what is true of a tenant on sufferance would seem to be true also of a licensee." Now, in connection with the above observations of the High Court of Madras in the case of ILR 54 Mad 554 we respectfully agree that a license is not annexed to the property, nor is it transferable or heritable. We further agree that a tenant on sufferance is a mere trespasser and what is true of a tenant on sufferance would seem to be true also of a licensee. The total result of the above position is that upon revocation of a license the licensee ceases to have any lawful right to enter upon and/or to continue in occupation of the property in question. The character of his possession and occupation subsequent to the valid revocation of the license is that of a trespasser.

4. In this very connection and in connection with the contents of Section 41 of the Act, in the case of (1948) 52 Cal WN 843 the Calcutta High Court, inter alia, observed :

"According to Section 41, 'occupant' comprises, a 'tenant or occupier or any person holding under or by assignment from him', and the first paragraph of the section suggests that by 'occupier' is meant a person occupying the property by permission of the applicant or any person through whom the applicant claims, that is to say, a licensee. The effect of the section, generally stated, therefore, is that the landlord may demand possession from a tenant or a licensee or a person holding under by assignment from such tenant or licensee, as the case may be, and if the demand be not complied with, he may apply for summons against the person who failed to deliver possession on such demand". Raghava Rao J., in deciding the case of 1950-2 Mad LJ 280 dissented from the views expressed by the High Court of Calcutta as quoted above. As we will presently point out, it appears to us that the construction of Section 41 of the Act as decided by the High Court of Calcutta in the manner mentioned above is correct. With respect, we do not agree with Raghava Rao J. that the opinion expressed by the High Court of Calcutta is erroneous.

5. Now, in this connection, we will first refer to the relevant provisions in Section 41 of the Act which run as follows :-

"41. Summons against person occupying property without leave. When any person has had possession of any immovable property x x x x x as the tenant, or by permission, of another person, or of some person through whom such other person claims, and such tenancy or permission has determined or been withdrawn, and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses to deliver up such property in compliance with a request made to him in this behalf by such order person, such other person (hereinafter called the applicant) may apply to the Small Cause Court .

x x x x x " .

Apparently, the provisions in Section 41 provide for a summary application for ejectment of parties who by consent may have been enjoying rights of occupation of properties. These parties have been mentioned in the section as (i) tenants, (ii) occupants by permission of another person and (iii) occupants to whom permission may have been granted by the parties who had permission. Against all such parties, ejectment proceedings are liable to be instituted under Section 41. The only condition for institution of such application is that the tenancy or permission must be determined or must have been withdrawn. According to the licensor, the original licensee Damji Lavji Damani was given a license to be on the premises mentioned in the application. His license had been revoked by the licensor prior to the institution of the ejectment application. The obvious result of that revocation was as already discussed above that the licensee was from the date of revocation of the license a trespasser in occupation of the premises mentioned in the application. He thereafter had no right whatsoever according to the licensor to continue to occupy the premises. The question is as to how the proceedings by way of ejectment application were affected by reason of licensee's death on May 31, 1962. Now, in this connection the provisions which became applicable were the provisions in Order 22, Rules 1 and 4 of the Code of Civil Procedure. The relevant parts of these rules provide :

"1. The death of a x x x defendant shall not cause the suit to abate if the right to sue survives."

"4. (1) Where x x x x a sole defendant or sole surviving defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit, x x x x x".

6. In connection with the question of the right to sue surviving upon death of a person, the relevant statutory provisions are contained in Sections 305 and 306 of the Indian Succession Act. These sections provide as follows :

"305. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

306. All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory." The maxim of law in this connection is action personalis moritur cum persona (the right of personal action dies with the person). The converse of this has been accepted as correct by all Courts throughout. The converse is that property rights in favor of and or against any person continue to exist in favor of or against legal representatives of a deceased party-litigant. It is for this reason that one finds the above provisions in the Code of Civil Procedure and the Indian Succession Act. The question in connection with bringing legal representatives on record (in the language of Section 306 of the Indian Succession Act) would be :-

"Whether the cause and or the suit relates to defamation, assault, as defined in the Indian Penal Code, or it relates to other personal injuries not causing the death of the party and whether it is such as after the death of the party the relief sought could not be enjoyed or granting it would be nugatory." In this connection, reference may be made to the provisions in the Fatal Accidents Act and similar statutes. In our view, it is not possible for us to form the opinion that the ejectment application proceedings against persons mentioned in Section 41 of the Presidency Small Cause Courts Act are proceedings not relating to property rights and/or recovery of properties. These are not proceedings relating to personal causes of action. These proceedings do not die with the death of a party to the proceedings whether he may be applicant and/or opponent. On the contrary these being proceedings for recovery of properties and for enforcing rights to properties, are such as could always be continued against legal representatives of a deceased party to the proceedings.

7. Having regard to the above discussion, with respect, we are unable to accept as correct the ratio of the decision in the case of 1950-2 Mad LJ 280 mentioned above. We respectfully disagree with the observation in that case that the ejectment proceedings under Section 41 of the Presidency Small Cause Courts Act are something which necessarily expire with the death of the licensee. In our view, these are proceedings which are liable to be continued upon death of the Opponent in the proceedings against his legal representatives.

8. In this connection, it is necessary to mention that by the written statement filed by the licensee, it was, inter alia, contended that he was not a licensee as alleged in the application. In fact, he was a sub-tenant. Having regard to his position as a sub-tenant, he also contended that by the

notice mentioned in the application the Applicant was not entitled to terminate his rights as a sub-tenant. He had acquired rights of a tenant. He was not liable to be ejected from the premises. Now, these were contentions relating to exercise and enforcement of proprietary rights on behalf of the licensee. It is difficult to see how the legal representatives of the licensee are not entitled to adopt these contentions and if they are right how they are liable to be ejected in the ejectment application proceedings. We have referred to the above contentions made in the written statement only because these go to show that contentions of various kinds relating to proprietary rights would generally arise in ejectment applications filed under Section 41 of the Act. In connection with the licensor's contention that the licensee had become a trespasser having regard to revocation of his license and the contentions of the licensee of the nature mentioned above, it is clear that the proceedings were and are liable to be continued upon death of the licensee against his legal representatives.

9. In the result, the revisional application is dismissed. Rule discharged with costs.

Petition dismissed.