
(1915) 08 MAD CK 0079
In the Madras High Court

Appayya Shetty, Manager, Tile Factory APPELLANT
Vs
P.M. Mahammade Beari and Others RESPONDENT

Date of Decision : 10-08-1915

Acts Referred:

Citation : 30 Ind. Cas. 596

Hon'ble Judges : Seshagiri Aiyar, J; Napier, J

Bench : Division Bench

Judgement

Seshagiri Aiyar, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. As the question is one of considerable importance and as the decisions bearing on it are not consistent with each other, I think it desirable to state my views on the subject shortly.

2. The lease to defendants Nos. 1 and 2 is a permanent one. The plaintiff says that the produce was set apart for a religious service. I take it that the grantor was only anxious that he should be paid the rent. He gave up rights of possession, etc., when he granted this permanent lease. The original grantees paid the rent regularly for 16 years. It was after the transfer of their interests to the 3rd defendant in 1907 that default was made. There were three years' arrears of rent when the suit was brought. The document in question provides for the payment of the first year's rent with that of the second year. If rent remained unpaid even then, the lessees were liable to be evicted. The question is whether, under the circumstance above set forth, the defaulting lessees are entitled to be relieved from forfeiture. There is no statutory provision for forfeiture on non-payment of rent regarding agricultural leases. It is open to Courts to look at legislative provisions regarding the liability of other lessees and tenants as embodying the principles of equity, justice and good conscience. I cannot accede to the proposition that such a guidance should be sought only from English decisions and not from statutory provisions in this country.

3. Let us first see how the Legislature has treated tenants under the Estates Land Act. Chapter VI of the Act deals exhaustively with the remedies open to the

landholder. He can sue for the rent or distrain. The proceedings to be taken on distraint are hemmed in with strict conditions. The landholder has to exhaust all available sources before he sells the defaulter's interest in the holding. The distress will have to be withdrawn, if the arrears are deposited or security given for their payment. Even after the commencement of the sale, the tenant is given a locus poenitentiae to save his property. It is thus clear that the Legislature has provided very salutary restrictions against turning out a tenant from his fields. As regards other lessees, the Transfer of Property Act lays down that the forfeiture clause must be express. Section 114 provides for relief from the forfeiture incurred even after the institution of the suit. The Indian Statute Law, therefore, distinctly leans against forfeiture for non-payment of rent. I may also refer to Section 71 of the Contract Act, which has abolished the distinction between penalty and liquidated damages and has enacted a general rule affording relief to the defaulting party under certain limitations. "Now, turning to the English Law, the course of decisions leaves no room for doubt that Courts have striven against evicting tenants from their holdings. The case of *Peachy v. Duke of Somerset* 1 Strange 8 Wh. & T.L.C. 255 to which our attention was drawn by Mr. Sitarama Row and which was followed in the earlier decisions of this Court, enunciates the proposition that where the intention of the parties is only to enforce punctual payment, the forfeiture clause will be relieved against, In *Bowser v. Colby* 1 Hare 109 the tenant applying to redeem a forfeited lease was not required to pay the rent and costs into Court before being decreed possession. All the cases have been reviewed in *Peachy v. Duke of Somerset* 8 Wh. T.L.C. 255 and the result of the authorities is stated to be that the proviso for re-entry on non-payment of rent is regarded in equity as merely a security for the rent and that relief will be given on payment of the arrears and of the expenses incurred. In England, there can be relief after suit is brought and before judgment. There is a further indulgence given even after judgment, provided the costs of the suit are paid in addition. The period within which this latter remedy is available is now restricted to six months after judgment (15 & 16 Victoria, Chapter 76, Section 210). Belief after decree may not be granted in India, as the effect of it will be to enable the executing Court to vary the decree. The decision in *Nagappa v. Venkat Rao* 24 M.L. 265 proceeded on the footing that the compromise decree was only evidence of the contract between the parties and that the Court was not varying the decree in such cases. *Balambhat Ravjibhat Joshi v. Vinayak Ganpatrao Patwardhan* 10 Ind. Cas. 13 Bom. L.R. 154 is to the same effect.

4. The rule to be deduced from an examination of legislative provisions and authorities bearing on the subject is that prima facie the clause for re-entry on non-payment of rent is intended only as security for the payment of the rent. Therefore, Courts should relieve against this clause, if the arrears and expenses are paid and if the parties can be placed in status quo ante. In *Kilmer v. British Columbia Orchard Lands Ltd.* (1913) A.C. 319 it was pointed out that Courts should not encourage the enforcement of the strict letter of the contract which contains a penal provision. The payment of the money being the principal aim of

the contract, the proviso is designed to hold out a threat relating to its fulfilment. As has been concisely put in Story's Equity Jurisprudence, Section 1316: In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorise gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort." In no country is there a greater need for the application of this beneficent statement of the law than in India; and if it is true that we are administering both equity and law in our Courts, there must be an endeavour on our part to soften the rigour of the law and to mete out substantial justice, unless our hands are tied by the Legislature.

5. It is this view of the functions of a Court that inclines me to hesitate to follow some of the decisions of this Court to which I shall presently refer. In *Naraina Naik v. Vasudeva Bhatta* 15 M.L.J. 208 it was broadly laid down that if a contract provides for days of grace where rent is not paid in time, Courts should not relieve against forfeiture. *Narayana Kamti v. Handu Shetty* 15 M.L.J. 210 is to the same effect. The learned Judges seem to suggest that the English decisions are distinguishable, inasmuch as ordinarily days of grace are not provided in lease-deeds executed in England. Our attention has been drawn by Mr. Sitarama Row to the forms of lease-deeds printed in Woodfall on Landlord and Tenant which give days of grace (see page 1069). Apart from this, I fail to see on what principle the insertion of such a clause should be held to disentitle the tenant from equitable relief. The observations of that great jurist, Story, J., are particularly applicable to such carefully designed provisions. I think the true principle is that which *Ramakrishna Mallay v. Baburaya* 17 Ind. Cas. 947 enunciates. Each case must be judged by itself. The delay, the conduct of the parties, the difficulties to which the landholder had been put should be weighed against the tenant. A number of circumstances may be mentioned which would induce Courts to condone the faults of the tenant. A hard and fast rule that a contract providing for days of grace ought to be enforced strictly is not calculated to advance justice. *Ramakrishna Miday v. Baburaya* 17 Ind. Cas. 947 : 23 M.L.J. 715 has been followed by *Sadasiva Aiyar and Tyabji, JJ., in Vidyapuma Thirtha Swamiar v. Rangappayya* 21 Ind. Cas. 405 : 25 M.L.J. 486 : (1913) M.W.N. 901. In Second Appeal No. 256 of 1912, the same learned Judges relieved against non-payment of six years' arrears. The earlier decisions of this Court are all favourable to the tenants. *Kottal Uppi v. Edavalath Thathan Nambudri* 6 M.H.C.R. 258 and *Subbaraya Kamli v. Krishna Kamti* 6 M.k 159. In *Timmarsa Puranik v.*

Badiya 2 B.H.C. 66 the rule of Peachy v. Duke of Somerset 1 Strange 447 was applied.

6. In the present case, the pleadings and the findings do not show that the defendants have forfeited their claim to equitable relief by any conduct on their part.

7. I would, therefore, reverse the decrees of the Courts below and direct that if the defendant does not pay the arrears of rent due up to November 1914 with interest thereon at 12 per cent, per annum as well as the costs of the plaintiff in all the three Courts within four months from the date of this decree, they shall deliver up possession of the property and this second appeal will stand dismissed with costs. If the payment is made, they shall be put in possession of the suit property, if the plaintiff has already taken possession, with mesne profits to be determined in execution.

Napier, J.

8. The only question that arises in this appeal is whether the 3rd defendant, the assignee from defendants Nos. 1 and 2 of the lease under the mulgani karar, is entitled to be relieved against forfeiture for non-payment of rent. The rent is one year in arrears and the karar, Exhibit A, allowed a period of one year before the operation of the forfeiture clause. On behalf of the plaintiff it is conceded that the forfeiture clause can be relieved against, but it is contended that where there are days of grace, the rule does not apply. On behalf of the defendants it is contended that the alleged rule that after the days of grace the clause must be enforced is not supported by authority. In *Narayana Kamti v. Handu Shetty* 15 M.L.J. 210 and in *Naraina Naik v. Vasudeva Bhatla* 15 M.L.J. 208 Judges of this Court undoubtedly laid down, the strict rule; but in the earliest case of this Court, *Kottal Uppi v. Edavalath Thathan Nambudri* 6 M.H.C.R. 258 the principle is stated to be thus: that where the intention of the parties was that the forfeiture clause should be a penalty for the purpose of securing rent, should always be relieved against." It is true that in this case there were days of grace, but I fail to see how what was intended as a benefit to the lessee can be made use of to deprive the Court of its power to grant relief.

9. The latest case is *Ramakrishna Mullay v. Baburaya* 17 Ind. Cas. 947. There the late Chief Justice and Mr. Justice Sankaran Nair laid down that relief must depend upon the facts of the particular case. They distinguish the case of *Narayana Kamti v. Handu Shetty* 15 M.L.J. 210 on the ground that in that case a long period was allowed, some eight months, and there was no stipulation that the tenant should in default lose the value of his improvements; and rely on the doctrine laid down in the case of *Kottal Uppi v. Edavalath Thathan Nambudri* 6 M.H.C.R. 258 and on *Mahalakshmi Amma v. Lakshmi* 12 Ind. Cas. 456 : (1912) M.W.N. 385 a case in which a period of grace was allowed and in spite of that, the clause was relieved against. I quite agree that the question must to a certain extent depend upon the facts of each particular case, but I think that it is

necessary to decide whether the existence of days of grace is a bar as held in the two cases quoted above.

10. It is sought to apply the provisions of the Transfer of Property Act as laying down the principle which should guide the Court, although admittedly those sections do not apply to agricultural leases; and this contention has found favour with some Judges of this Court. With all respect and deference to the contrary view held by my learned brother I regret I cannot agree with this view. I entirely accept the proposition that where the Statute embodies equities with respect to certain classes of transactions with which it is dealing, it is reasonable to found equities with regard to other classes of transactions on the principles there enunciated; but where the Statute specifically excludes one transaction of the same class as that "which is being dealt with from its purview, we cannot apply the same doctrine. We do not know why the Legislature exempted agricultural leases from the purview of the Transfer of Property Act lease sections. It might be that the Legislature thought that the provisions for forfeiture of rent embodied in those sections were not suitable to agricultural leases. It is not open to us to investigate the reasons for the exclusion and we cannot, therefore, presume that some other cause operated on the mind of the Legislature. If we are to apply any equity in relieving against forfeiture, we must, in my view, seek for it outside the Transfer of Property Act; and the proper course is to ascertain the practice in England and apply it, subject to such modifications that seem proper in view of the conditions in this country. This was the course adopted by this Court in the case in *Kottal Upin v. Edavalath Thathan Numbudri* 6 M.H.C.R. 258. There reliance is placed on *Peachy v. Duke of Somerset* 1 Strange 447 : 93 E.R. 626 The language of the Lord Chancellor is as follows: The true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money and the Court gives him all that he expected or desired." This is treated as the leading case in *White and Tudor*, Volume II. where the learned editor points out that even where the penalty of the bond is to secure a collateral object, the Court will grant relief *Vide Sloman v. Walter* 1 Bro. C.C. 418 quoted on page 264 and states as the result of the examination of the authorities that from a very early period equity would, at any indefinite time after a tenant had incurred forfeiture, and been ejected for non-payment of rent at a particular time, under the stipulation in his lease, relieve him upon his paying to the lessor the rent accrued due, interest, and costs, upon this principle that as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when it was originally due." The principle was restated by the Lord Chancellor in *Sanders v. Pope* 12 Ves. 282 with an explanation at page 289 as to the origin of the covenant which is as follows: The obvious intention of the clause is to secure the payment of the rent; that the landlord may not be put to his action of debt, coming from time to time against an insolvent estate; but may be enabled to recover possession of the premises. In that case equity is in the constant course of relieving the tenant, paying the

rent and ill expenses, and placing his landlord in exactly the same situation. In a later case *Mill v. Barclay* 18 Ves. 56 the Lord Chancellor distinguishes the case of forfeiture re arising out of a covenant to repair, on the ground that in some cases it might not be possible to put the landlord in exactly the same position by ordering the tenant to make the necessary repairs. The doctrine is stated in Story's Equity Jurisprudence as founded on the theory that the right of entry is deemed to be intended to be a mere security for the payment of rent, and in paragraph 1316, the learned Editor states as follows: In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer enormous loss, wholly disproportionate to the injury to the other party." It seems to me that we should apply these principles in India and I find nothing in the cases and nothing in the principles on which they are founded to support the view that the insertion of days of grace in a lease will oust the jurisdiction of the Court to relieve. The origin of the covenant and its purpose are enunciated in the above cases. We have to apply it to the present case. This is a permanent lease, a lease very common on the west coast of India, one by which the lessor deprives himself of any possibility of increase of rent for all time. He has reserved nothing to himself but his muli right. The leaseholder has a permanent and alienable right in the property, a position infinitely stronger than that of the agricultural lessee in England for a term of 7, 14 or 21 years. In relieving against the forfeiture we can, therefore, give to the jenmi all that he expected or desired," in the words of the Lord Chancellor in *Peachy v. Duke of Somerset* 8 Wh. & T.L.C. 255 i.e., the rent reserved and in my opinion we should be very slow to refuse to do this in these circumstances. Neither the fact that there were days of grace nor that the rent is 6 years in arrears should operate to prevent the application of the doctrine. I recognize that this would lead to a systematic refusal to pay rents until after a suit to enforce the forfeiture clause; but I think that the injury is exaggerated. Such a practice will bring its own punishments for it would lead to the discontinuance of the permanent leases by mulganidars and compel them to grant mulgani chits for short terms only as is done in many cases, I would add that legislative authority was given to this doctrine of relief in 4 Geo. Ch. 28, and its extent curtailed by the Common Law of Procedure Act of 1652, Section 210. I do not think it necessary, however, to refer to the specific provisions of the Act as I would prefer to base my judgment on the principles enunciated by the Courts of Chancery apart from the Act.