
(2011) 09 CAL CK 0075
In the Calcutta High Court
Case No : C.O. No. 16 of 2005

Bishnu Priya Pharmacy

APPELLANT

Vs

Subhas Sadan Trust

RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 7, 151

Contract Act, 1872 — Section 46

Transfer of Property Act, 1882 — Section 105, 106, 108, 108(B), 114

Citation : (2012) 1 CALLT 402

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Bidyut Banerjee and Shila Sarkar, for the Appellant; Amal Krishna Saha and Sankar Biswas, for the Respondent

Judgement

Harish Tandon, J.—This revisional application is directed against an order No. 11 dated December 10, 2004 passed by the learned Civil Judge (Junior Division) 1st Court, Barasat in title suit No. 314 of 2004 by which an injunction order as well as an order appointing the Advocate Commissioner for holding the local inspection are recalled.

2. Before dealing with the legal point which emerges in this revisional application, some brief facts are required to be narrated. The Plaintiff/Petitioner claims to be a tenant in respect of the shop room on the ground floor at holding No. 22, ward No. 9 within the Barasat Municipality at a monthly rental of Rs. 65/-, which was subsequently enhanced to Rs. 150/-, payable according to the English calendar. It is alleged that the opposite party, being the landlord, is trying to oust the Petitioner from the shop room by demolishing the entire structure standing on the said premises. On the basis of such allegation, the present suit being title suit No. 314 of 2004 is filed by the Plaintiff/Petitioner. The court passed ad interim order of injunction on an application for temporary injunction filed in the said suit. In the said suit, an application under Order 39 Rule 7 of the CPC was also filed for appointment of an Advocate Commissioner to hold the

inspection with regard to the nature of occupation of the Petitioner which was also allowed.

3. Before the inspection could be held, it is alleged by the Plaintiff/Petitioner that the entire structure, a part whereof was held by the Petitioner as tenant, is demolished by the Municipal Corporation. Thereafter, two applications u/s 151 of the Code were filed by the Plaintiff/Petitioner praying for (i) recalling an order by which an application under Order 39 Rule 7 of the Code was allowed on the plea that the premises has already been demolished and (ii) restoration of possession as the Plaintiff/Petitioner has been dispossessed on demolition of the structure during the subsistence of an ad interim order of injunction. The Trial Court allowed the first application by which a prayer for recalling of an order allowing an application under Order 39 Rule 7 of the Court was passed but rejected the other application and consequently vacated the ad interim order due to the demolition of the structure at the instance of the Municipal Corporation. The Petitioner has assailed such part of an order by which the application for restoration of possession was rejected in this revisional application.

4. An interesting point has been taken by the Defendant/opposite party that upon demolition of the structure, the tenancy extinguishes and/or ceases and/or comes to an end. Since a point of law is agitated in this revisional application an opportunity was given to the parties to address the said point.

5. Mr. Banerjee, learned Senior Advocate appearing for the Petitioner submits that Section 108(B)(e) of the Transfer of Property Act provides that in the event of destruction of the property by act of God, the tenancy does not come to an end unless the lessee elects. He further submits that it is only if the destruction of property is caused by the lessee himself then in such event in spite of the exercise of the election the tenancy shall not subsist. He strenuously argued that leases of immovable property is dealt in Chapter 5 of the Transfer of Property Act wherein Section 105 defines the lease being a creature of contract but Section 108 deals with the rights and liabilities of the lessors and lessees. According to him, the provisions under the Transfer of Property Act excepting the agricultural land covered under Entry 6 of List III in the 7th schedule to the Constitution which is under the concurrent list and as such provisions which does not covered under the State Rent Act squarely applies and relies upon 7 Judges Bench judgement of the Apex Court in case of V. Dhanapal Chettiar Vs. Yesodai Ammal, .

6. He further argues that the premises is defined under the West Bengal Premises Tenancy Act 1956 (which is now repealed by the West Bengal Premises tenancy Act 1997) includes within not only the building or a part of building or a structure or a part of structure but the ground within it and thus upon destruction of the property unless the tenants elects u/s 108(B)(e) of the Transfer of Property Act, the tenancy subsists and placed reliance upon the Division Bench judgment of the Apex Court in case of T. Lakshmipathi and Others Vs. P. Nithyananda Reddy and Others, . Lastly, it is argued that recently the Single Bench of this Court in case of Sandhya Das (Khan) and Ors. v. Manik

Banik and Ors. reported in 2011 (2) CLJ 9 (CAL) on identical facts have vacated the injunction order with the condition that in the event of the landlord constructs the structure within the area which was occupied by the tenant shall not be let out to the third party.

7. Per contra, Mr. Amal Krishna Saha, learned Advocate appearing for the Defendant/opposite party submits that where the state has legislated the Rent Act the provision contained under Transfer of Property Act does not apply. He further submits that the destruction of a property by act of God, the tenancy of a part of building extinguishes and/or comes to an end as the said tenancy does not include the land and placed reliance upon the Division Bench judgment of the apex court in case of Vannattankandy Ibrayi v. Kunhabdulla Hajee reported in (2001) 1 SCC 564 and a Division Bench judgment of this Court in case of West Bengal Khadi and Village Industries Board v. Sagore Banerjee and Ors. reported in 2003 (1) ICC 991 (Cal).

8. The power to legislate the tenancy law relating to immovable property are included in Entry 6 Schedule III of the Constitution under the concurrent list. Thus, both the central as well as the state can legislate the tenancy and/or immovable property other than the agrarian law. Thus, in case of repugnancy, the provision of the State Legislature shall prevail.

9. Does it thus mean that the provision contained under the Central Legislation in absence of repugnancy ceases to apply and/or operate the field. The tenancy is not only a creature of contract but something which is attached to the land too. Section 108(B)(e) of the Transfer of Property Act deals with the eventuality of destruction of the property by act of God subject to the election of the lessee who treats the lease as subsisting. There is no such provision in the West Bengal Premises Tenancy Act, 1956 or the subsequent legislation i.e West Bengal Premises Tenancy Act 1997 similar to the provision contained u/s 108(B)(e) of the Transfer of Property Act. There is no provision repugnant to it also in the state legislation. Whereas the State Legislation provides that the tenant cannot be evicted unless the ground enumerated therein are proved before the Civil Court.

10. One of the ground for eviction under the State Rent Act is building and rebuilding which requires the demolition of the building but the court shall pass a decree with the condition attached to it that upon reconstruction, the landlord shall rehabilitate and/or restore the tenant in the newly constructed building. To such aspect there is no dispute that in the event the landlord demolishes the structure, it is an obligation cast upon him to restore back the possession to the tenant in the event of reconstruction but where the property is demolished and/or destructed without the intervention of landlord and tenant whether the tenancy still subsists or extinguishes. The point which boils down now to be considered is whether the property which is destroyed by a statutory authority on account of the building being in dangerous and ruinous condition can be equated with the property destroyed by act of God.

11. It would be profitable to quote Section 108(B)(e) of the Transfer of Property Act which reads thus:

if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void; provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision.

12. The premises is defined giving the same meaning under the West Bengal Premises Tenancy Act 1956 which is repealed by the West Bengal Premises Tenancy Act 1997 which reads thus:

(e) "premises" means any building or part of a building or any hut or part of a hut let separately, and includes "

(i) the gardens, grounds and out-houses, if any, appertaining thereto and

(ii) any furniture supplied by the landlord, or any fittings or fixtures affixed, for the use of the tenant in such building or part of building or hut or part of a hut,

but does not include a room in a hotel or a lodging house.

13. From the definition of the premises as enshrined under the West Bengal Premises Tenancy Act means a building and/or a part of the building including the gardens, grounds and outhouses if any, appertaining thereto. Thus what is primarily let out is a building or part of building along with the gardens, grounds and outhouses or anything appertaining thereto. Thus the dominant intention of the legislature is that the building or a part of the building is let out which includes a ground or a garden appertaining thereto. But the converse is not true as the same would be outside the purview of the West Bengal Premises Tenancy Act.

14. Mr. Banerjee put much stress upon the meaning of the word "building" as assigned in the Oxford English Dictionary:

that which is built; a structure, edifice: now a structure of the nature of a house built where it is to stand.

15. The Constitutional Bench in case of D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala and Another, while interpreting the word "building" as find place in Entry 49 of List II of the 7th Schedule for the purpose of levy or tax on the lands and building held that the structure cannot be erected without the ground on it is to stand and includes the fabric of which it is composed. The point for consideration before the Constitutional Bench was in relation to the competence of the state legislature to enact the law relating to the tax on the capital value of the assets of an individual or the company should fall within the scope of Entry 86 of List I of the 7th Schedule or under Entry 49 of List II of the 7th Schedule of the Constitution. In such perspective it was held that the expression "building"

means the structure erected on the ground where it stands and includes its wall and other fabric of which it is composed. The said Constitutional Bench judgment is considered by the two-judges Bench of the Supreme Court in case of T. Lakshmipathi and Ors. (supra) where an identical point was raised about the subsistence of the tenancy in respect of a building or part thereof upon destruction by act of God. The Supreme Court was poised with the matter relating to Andhra Pradesh Building (Lease, Rent and Eviction) Control Act, 1960 where the definition of premises as has been assigned to the State Act means not only the building or part thereof but includes the land too. Thus the definition of the premises manifests that it is not confined to the building or a part thereof but includes land on which it is erected. In such perspective it is held that upon destruction of the building the tenancy does not extinguish but survive as it includes the land as well which has not been destroyed. The said Bench did not take into consideration the earlier Coordinate Bench decision rendered in case of Vannattankandy Ibrayi (supra) where it has been held by the Coordinate Bench that if the building is governed by the State Rent Act the tenant cannot claim a benefit of the provision of Section 106, 108 and 114 of the Transfer of Property Act. The Coordinate Bench further observed that the tenancy rights stand extinguished upon destruction of the premises which is no longer in existence and that would end the tenancy. The earlier Coordinate Bench in case of Vannattankandy Ibrayi (supra) was considering the similar and identical point in relation to the Kerala Building (Lease and Rent) Control Act, 1965 where the definition of the building is in pari materia with the definition of the premises under the West Bengal Premises Tenancy Act. Thus the judgment which deals the matter under the legislation which is pari materia with the other legislation shall have a binding effect on the subordinate courts.

16. It is settled law that the court should not place reliance on a decision without discussing as to how the factual situation fits in with the fact situation of the decision on which the reliance is placed. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. (See Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another, Sumtibai and Others Vs. Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) Thru Smt. Mankanwar Chordia (Dead) and Others, Deepak Bajaj v. State of Maharashtra reported in (2008) 16 SCC 14).

17. The Division Bench of this Court in case of West Bengal Khadi and Village Industries Board (supra) was considering the question whether the tenancy subsists upon the destruction of the premises by act of God and it is held that the tenancy comes to an end upon the destruction of the premises in these words:

5.4. It is to be seen whether upon such reconstruction, the lessee or the tenant has a right to claim possession on the ground that he, having not opted to avoid the lease in terms of Section 108(e) of the Transfer of Property Act, is continuing

as tenant and becomes entitled to possession. Such a question cropped up before this Court in *Mahadeo Prosad Shaw Vs. Calcutta Dyeing and Cleaning Co.*, The learned Judge (P. Chatterjee, J) had discussed the law in threadbare and had considered the decisions holding the field. In fact, English decision, though may be a guiding factor, but has no binding effect. Admittedly, there is difference in the matter of application of the doctrine of frustration in England and in India. In the said decision, it was held that the doctrine of frustration in respect of a lease is applicable in terms of Section 108(e) of the Transfer of Property Act to the exclusion of Section 46 of the Contract Act. Upon such frustration of the lease, it is the lessee, who can avoid the same only at his option, otherwise the lease continues. But the right to exercise option by a tenant cannot exist in respect of a non-existing property when the tenant had no right on the land underneath. He cannot be put into possession of a structure non-existent, he having no right on the land. The courts in India while considering the impact of Section 108(e) of the Transfer of Property Act and had deviated from the principle laid down in *Simper v. Coombs* (1948) 1 All ER 306 to the extent that the principle has some exception and it does not apply in all cases. Woodfall, in *Law of Landlord and Tenant*, 28th Edition, Vol. I Para-1-2056, page 928, observed, "a demise must have a subject matter, either corporeal or incorporeal. If the subject matter is destroyed entirely, it is submitted that the lease comes automatically to an end, for there is no longer any demise. The mere destruction of a building on land is not total destruction of the subject matter of a lease of the land and building so demise continues". The concept of continuance on destruction is based on the principle laid down in *Corporation of the City of Victoria v. Bishop of Vancouver Island* AIR 1921 PC 240 at p 243. In the said decision, it was laid down that the word "building" in ordinary language comprises not only the fabric of the building but the land upon which it stands. The Kerala High Court in *Thomas Vs. Moram Mar Baselious Ougen I, Catholics Metropolitan, Malankara*, and *Dr. V. Sidharthan Vs. Pattiori Ramadasan*, had taken the same view.

5.5. Considering all these decisions in *Vennattankandy Ibrayi v. Kunhabdulla Hajee*, 2001 (1) SCC 562. Speaking for the court, V.N. Khare, J observed that where a building is governed by a State Rent Act, the tenant cannot claim benefit of the provisions of Section 106, 108 and 114 of the Transfer of Property Act. In a case falling u/s 108(e) of the Transfer of Property Act does not mean that the tenant would be entitled to squat on the land after the structure is destroyed if he does not exercise option to avoid the lease. Section 108(e) of the Transfer of Property Act has no application in respect of premises governed by State Rent Act when such structure is completely destroyed by natural calamity.

5.6. In the present case, the demise was gutted in fire. The demise of the Plaintiffs/Respondents was wholly destroyed and became unfit for the purpose for which it was let. The lessee had no interest either in the site or in the land. The interest was confined only to the portion of the building in the third floor since gutted in fire. Therefore, the tenancy stands extinguished.

18. The ratio as laid down in the above reports applies to a case where the premises or building has been destroyed by act of God. Does this mean that the property which is demolished by municipal authorities in exercise of statutory provisions deserve the same treatment as in case of destruction of property by act of God.

19. The act of God has been defined by Cockburn CJ in *Nugent v. Smith* (1876) 1 CPD 423 as that it must be such a direct and violent and sudden, and irresistible act of nature as could not by any amount of ability have been foreseen, or a foreseen, could not by any amount of human care and skill have been resisted.

20. However, Coleridge CJ in *Queen v. Commissioners of Sewers of Essex* (1885) 14 QBD 561 stated that the expression "act of God" itself being confined to events which cannot be foreseen, or which if they can be foreseen cannot be guarded against, points to events which are prima facie likely to be of very unusual occurrence.

21. The Division Bench of the Orissa High Court while construing the expression "act of God" in case of *Muralidhar Sahu and Another Vs. Chairman-cum-Managing Director, Grid Corpn. of Orissa Ltd. and Another*, held:

11. The expression "act of God" signifies the operations of natural force free from human intervention, such as lightning. It may be thought to include such unexpected occurrences of nature as severe gales, snowstorms, hurricanes, cyclones and tidal-bores and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse, unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing at. For instance, where by experience of a number of years, the railway administration knows that in a particular area during a particular season there have been heavy down-pours of rain and consequent extraordinary floods causing damage to their track, they cannot take the plea, that they were due to act of God because it is within their competence to take such steps as would prevent damage. Lord Westbury defined act of God (*dawnum fatals* in Scotch Law) as an occurrence which no human foresight can provide against and of which human prudence is not bound to recognise the possibility. This appears to be the nearest approach to the true meaning of act of God. Lord Westbury's definition was approved by Lord Deudia and Shaw in the House of Lords in *Brenock Corporation v. Galedesion Dy*. Similarly, Lord Blendaburgh spoke of it as "an irresistible and unsearchable providence nullifying all human effort". That principle has no application to the case at hand.

The term "act of God" (*vis major*) is used in English law to mean some act or convulsion of nature, so extraordinary that it could not be foreseen; or if foreseen could not be guarded against, for example, an extraordinary high tide, a tempest of rare violence, and the like. "In the biblical sense of term, everything

almost is said to be the act of God; but in a mercantile sense, it means an extraordinary circumstance which could not be foreseen and which could not be guarded against". (Per Eshor M.R. in 55 LJ QB 548).

22. In case of Patel Roadways Limited Vs. Birla Yamaha Limited, , the Supreme Court observed that the act of God is such an extraordinary occurrence due to natural causes which is not the result of any human intervention and which could not be avoided by any amount of foresight and care.

23. The act of God is such which no human prudence could expect and realize the possibility, the apex court in case of The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, held:

9. The expression "act of God" signifies the operation of natural forces free from human intervention, such as lightning, storm etc. It may include such unexpected occurrences of nature as severe gale, snowstorms, hurricanes, cyclones, tidal waves and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing. For instance, where by experience of a number of years, preventive action can be taken, Lord Westbury defined the act of God (*damnum fatale* in Scotch Laws) as an occurrence which no human foresight can provide against and of which human prudence is not bound to recognize the possibility. This appears to be the nearest approach to the true meaning of an act of God. Lord Blancaburgh spoke of it as "an irresistible and unsearchable providence nullifying our human effort.

24. The act of God therefore is such an act which is beyond the absolute foresightness of the human being and its possibility cannot be averted.

25. The building which has due to lack of proper maintenance and care reaches the stage of being declared dangerous and not fit for human habitation cannot be equated with the expression act of God. It is a reciprocal obligation of the landlord and the tenant to keep the premises in human habitation and any act by which the said premises is rendered inhabitable, the landlord cannot take a shelter of extinction and/or secession of the tenancy upon destruction of the property by the statutory authority in exercise of statutory provision by which they governed.

26. The legislature was also conscious of the eventuality where the building has been damaged and/or deteriorated either because of wear and tear or due to lack of proper maintenance and incorporated a ground of building and rebuilding for eviction of the tenant but have safeguarded the interest of the tenant by incorporating the imperative condition to restore the tenant to a newly constructed building.

27. Thus the inescapable proposition is that upon the destruction of the property by act of God, the tenancy comes to an end and/or extinguishes but if the same is destroyed and/or demolished by the statutory authority after having declared the said property being danger for human habitation, the tenancy does not come to an end as the said act involves the human intervention.

28. Admittedly the structure or building has been demolished and this Court cannot pass any order of injunction or the restoration of the possession on the barren land. This Court feels that the methodology adopted by the other Single Bench in case of Sandhya Das (Khan) (supra) should be adhered to and/or applied. This Court therefore finds that there cannot be any order of injunction due to demolition and/or destruction of the property but in the event the landlord i.e the opposite party raised a building or makes any construction on the land then he shall not let out and/or sell and/or encumber the covered area in the newly constructed structure which was occupied by the tenant.

29. The revisional application is disposed of with the above observations.

30. However, in the peculiar facts and circumstances as stated above, there shall be no order as to costs.

31. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.