

(1960) 09 BOM CK 0014

In the Bombay High Court

Case No : Appeal No. 1297 of 1959 with Civil Application No. 2862 of 1959

Manikchand Sarupchand Shah and Another

APPELLANT

Vs

Gangadhar Shankar Shete and Another

RESPONDENT

Date of Decision : 15-09-1960

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28, 28, 5(11), 5(3)

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35(1), 144

Transfer of Property Act, 1882 — Section 111, 41, 52

Citation : AIR 1961 Bom 288 : (1961) 63 BOMLR 163

Hon'ble Judges : Gokhale, J

Bench : Single Bench

Advocate : Y.S. Chitale, for H.R. Gokhale, for the Appellant; G.S. Gupte (Jr.), for the Respondent

Judgement

1. This is a Second Appeal against an order passed in favour of respondent No. 1 Gangadhar awarding him actual Possession of a house bearing C. S. No. 120 in Vetral Peth, Poona City, from the appellants as well as respondent No. 2. This house originally belonged to respondent No. 1 Gangadhar. On 18th March 1925 the house was mortgaged with one Punamchand, but the equity of redemption came to be sold and purchased by one Laxminarayan on 11th June 1928. On 12th July 1929. Laxminarayan sold the equity of redemption to the mortgagee Punamchand who thus claimed to have become owner of the House. On 22nd July 1935, Punamchand sold the house to one Dhanraj Hajarimal, and on 18th November 1941 Dhanraj sold it to Kesarichand Lalvani, respondent No. 2 in this appeal. It appears, however, that though the equity of redemption was sold as early as 1928, the possession of the house continued with Gangadhar, the original owner, and that is why Kesarichand Lalvani filed Regular Civil Suit No. 1602 of 1947 against Gangadhar and others for possession of the house. On 13th March, 1951 the Suit was decreed against Gangadhar, and in execution of the decree obtained by Kesarichand, Darkhast No. 1287 of 1950 was filed. On

19th November 1951 respondent No, 2 Kesari-chand took possession of the house. It appears that formerly in that house there were tenants of Gangadhar, but Kesarichand was successful in evicting those tenants and put the present appellants in possession of the suit house as tenants on 1st April 1952. In the meanwhile, an appeal had been preferred by Gangadhar from the decree of the trial Court passed on 13th March 1951, and that appeal came to be dismissed on 27th March 1952. There was a Second Appeal filed by Gangadhar, being Second Appeal No. 1170 of 1953, to this Court, and it was decided on 28th March 1936. That appeal was allowed on the ground that the suit was barred by limitation and Kesarichand's suit came to be dismissed. That is why Gangadhar applied to the trial Court for restitution by filing Miscellaneous Application No. 458 of 1956, and in this restitution application he made Kesarichand opponent No. 1 and the present appellants as opponents Nos. 2 and 6. Other opponents were also impleaded, but it is not necessary for the purpose of this appeal to make any reference to them. In this application for restitution, so far as the present appellants are concerned, Gangadhar claimed actual possession. Opponent No. 1 Kesarichand made certain contentions about improvements effected by him; but so far as this appeal is concerned, we need not consider that contention. Opponent No. 2 Manikchand, who is appellant No. 1 in this appeal stated that he was not in possession of the suit property either as owner or tenant, but alleged that his full brother Chandulal Sarupchand was a tenant. This Chandulal Sarupchand was original opponent No. 6 and is present appellant No. 2. His principal defence was that he had taken the premises at a monthly rent of Rs. 13 from Kesarichand and that as he was a tenant on the suit premises, the Court had no jurisdiction to grant actual possession by virtue of the provisions of the Bombay Rent Act. His contention was that Gangadhar would be, at the most, entitled to symbolical possession.

2. The trial Court came to the conclusion that it had jurisdiction to entertain the application and that Gangadhar was entitled to Khas possession as against Kesarichand as well as the present appellants. It also came to the conclusion that so far as opponents Nos. 2 and 6 were concerned, they had no rights as against the applicant Gangadhar. It is not necessary for the purpose of this appeal to deal with the trial Court's findings on the other issues in the application. In accordance with these findings, the learned trial Judge directed issue of warrant of possession against opponents Nos. 1, 2 and 6 under Order 21, Rule 35(1) of the Civil Procedure Code.

3. Against that order there was an appeal, and the learned Extra Assistant Judge, Poona, upheld the findings of the trial Court and dismissed the appeal. It is against this decision that the present Second Appeal has been filed.

4. Mr. Y. S. Chitale, learned advocate appearing on behalf of the appellants, who has elaborately argued this appeal, has contended in the first instance that the lower Courts have acted in excess of their powers u/s 144 of the Civil Procedure Code. He points out that appeal before Gangadhar was evicted in execution of

the trial Court's decree obtained by Kesarichand in Regular Civil Suit No. 1602 of 1947. Gangadhar had no Khas possession but there were tenants in the suit house; and this, it is contended, being the admitted Position, Gangadhar would not be entitled to be placed in a position better than what he formerly occupied. Section 144 of the CPC provides :

"Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

The argument of Mr. Chitale is that the restitution contemplated under this section is to the extent that it would be possible for the trial Court to do; but it cannot mean that the court can place Gangadhar actually in a better position than what he occupied before he was evicted. All that he is, therefore, entitled to, according to Mr. Chitale, is symbolical possession and he would have to accept the appellants as his tenants.

5. In support of his argument, Mr. Chitale relied on *Zamindar of Sannokhemedi v. Susi Imala Patta Mahadevi* AIR 1940 Mad 850, where the expression "place the parties in the Position which they would have occupied but for such a decree" in Section 144 of the CPC was construed by Mr. Justice Wadsworth. It may be mentioned that the case was referred to this learned Judge on a difference of opinion between two other Judges of the Madras High Court, and it is the observations of Mr. Justice Wadsworth that are relied upon by Mr. Chitale. According to that learned Judge, there are three possible ways of interpreting the words "place the parties in the position which they would have occupied but for such a decree". They might mean, in the first instance, that the parties are to be put in the position they would have occupied had the right decree been passed instead of the wrong decree; or, secondly, they may mean that the parties are to be put in the position they would have occupied had no decree at all been passed; or, thirdly, the words may mean simply that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed; and Mr. Justice Wadsworth was of the view that the last interpretation was the correct one. According to him, there was nothing in the words of Section 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution any better position than that he occupied at the time when the wrong decree was passed and this is what has to be inferred if he has to be put in the position which he would have occupied had the right decree been Passed. The correct procedure u/s 144, according to him, \ was to take the position as it stood immediately before the wrong decree, to find out what would be the position of the ultimately successful party as on that date

having regard to the fact that the proceedings terminated and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof. In that case, plaintiff who had made the application u/s 144 of the CPC had sued to recover the estate of one Chinnakimedi, alleging that he was the son of the last holder of the estate Brojo Kishore Deo. The suit was decreed in favour of the plaintiff by the trial Court in so far as possession of the estate and certain moveable properties was concerned; but the plaintiff's claim for mesne profits both before and after the suit till the date of delivery was disallowed. The defendant appealed to the High Court against the decree awarding possession to the plaintiff, while the plaintiff also appealed against the decree disallowing mesne profits. Pending the disposal of the two appeals, a receiver was appointed and he took possession of the estate. The High Court decided the defendant's appeal in his favour and dismissed plaintiff's suit with costs in both the Courts, with the result that plaintiff's appeal for mesne profits was also dismissed with costs. Plaintiff applied for leave to appeal to the Privy Council against both these decrees and pending the disposal of his appeal he prayed that the receiver who had been appointed might be continued until the appeal to the Privy Council was disposed of. It appears that in the High Court, pending the appeals, the defendant who had died and whose widow had been brought on record as his legal representative was required to give security and that security having been furnished, the receiver had handed over possession of the estate, with the small balance of cash then in his hands and with all the records pertaining to the estate, to the defendant's legal representative. The plaintiff was successful in his appeal before the Privy Council, which set aside the decree of the High Court, restoring the decree of the trial Court. It would appear, however, that plaintiff did not pursue his appeal to the Privy Council regarding the dismissal of his claim for mesne profits. The plaintiff executed the decree of the trial Court which was restored by the Privy Council and got possession of the estate in execution proceeding. Plaintiff thereafter filed an application for restitution claiming inter alia an order to restore one lakh of rupees or such sum as the Court might find due from the defendant on account of the moneys drawn by her as allowances from the estate funds. On these facts two of the learned Judges were of the view that plaintiff should be given a decree for restitution from the defendant's legal representative on the ground that the profits accruing to the defendant's legal representative would not be recoverable as future mesne profits claimed in the suit, but by way of restitution owing to the wrongful decree, and that there was no bar to the plaintiff's claim by reason of his failure to get a decree for future mesne profits before the trial Court. It would, therefore, be seen that in that case the majority opinion was that even though the plaintiff had failed in respect of his claim for mesne profits the Court granting restitution would have jurisdiction to grant the plaintiff's application for such, mesne profits as flowed directly from the appellate decree which was reversed. In the present case, Kesarichand actually got Khas possession of the property by evicting the tenants of Gangadhar and this he was able to get by reason of the decree which came to

be reversed and the actual possession which he obtained having flowed from such a decree must enure for the benefit of the true owner, viz., Gangadliar, in whose favour the decree went in Second Appeal No. 1170 of 1953. The mere fact that when Gangadhar lost possession in execution of the trial Court's decree and at that time his own tenants were in occupation of the property would not deprive him of his right to get actual possession of the house which had been obtained by Kesarichand by evicting Gangadhar's tenants.

6. But then Mr. Chitale contends that no actual possession could be obtained against the opponent because they had become tenants of the suit premises by virtue of the provisions of the Bombay Rent Act. Mr. Chitale argues that the appellants would not be bound by the decree passed in the second appeal, to which they were not parties and, therefore, cannot be evicted under these restitution proceedings. In my view, these contentions are misconceived. Mr. Chitale relies, in support of his argument, on some of the provisions of the Bombay Rent Act. Under sub-section (3) of Section 5, "landlord" means any person who is, for the time being, receiving, or entitled to receive, rent in respect of any premises; and Mr. Chitale says that Kesarichand was entitled to receive rent in respect of the suit house not only from the prior tenants of Gangadhar but also from the opponents who were his tenants in the suit house. Under Sub-section (11) of Section 5 of the Bombay Rent Act "tenant" means any person by whom or on whose account rent is payable for any premises; and Mr. Chitale contends that the present appellants were persons from whom rent was payable in respect of the house in their occupation. There is no dispute that so far as opponent No. 2 appellant No. 1 Manickchand is concerned, he had disclaimed that he was a tenant. Therefore, obviously Mr Chitale's argument can only apply, if at all, to appellant No. 2 Chandulal Sarupchand, who claims to be a tenant of the suit house. It has to be remembered that in the written statement filed by Chandulal (Exhibit 40), he had not contended that he had become a tenant of Gangadhar as a consequence of the decision in Second Appeal No. 1170 of 1953, but his contention was that he was the tenant of the house. All that he stated in paragraph 8 of his written statement (Exhibit 40) is that he had taken on lease the suit house, without having any information about the property, at a monthly rental of Rs. 13/-, that the applicant Gangadhar would have no right to recover possession of the property from him and that he would pay rent to the proper person as ordered by the Court. In paragraph 4 of the written statement he stated that actual possession could not be recovered from him because he was a tenant. This allegation, in my opinion, is not an allegation that he had become a tenant of Gangadhar. Mr. Chitale's argument is that when Kesarichand obtained possession of the house and evicted the prior tenants, his possession was not that of a trespasser, but his possession was lawful possession and, therefore, Kesarichand became a landlord under the-Bombay Rent Act, In support of his contention, Mr. Chitale has relied on Surendra Lal Chowdhury and Others Vs. Sultan Ahmed and Others, , where it was held that a person who obtains possession of Immovable property under and by virtue of orders passed in

execution Proceedings, based upon what at the time was a valid decree, but has subsequently been set aside on appeal, can in no sense be regarded as a trespasser during such period. For that period he is liable to his opponent, the real owner, for compensation or damages and not for mesne profits in the strict sense of the expression. But since the reversal of the decree in his favour when it becomes his duty to vacate and hand over possession he becomes a trespasser and remains liable for mesne profits in such sense so long as he continues in possession. Mr. Chitale has also relied on another case decided by the Patna High Court, Bhulan Prasad Singh and Another Vs. Rup Narain Singh and Others, , where a similar view was taken, viz., that a person who obtains possession in execution of a decree of High Court can in no sense be regarded as in wrongful possession even though that decree may later on be reserved by the Privy Council.

7. The question, however, is whether the present appellant No. 2, original opponent No. 6, who was put into possession by Kesarichand, can become a tenant of Gangadhar. To answer that question, reference will have to be made to section 52 of the Transfer of Property Act. It is not disputed and cannot be disputed that it is only after Kesarichand obtained actual possession of the house in execution of the trial Court's decree in Regular Civil Suit No. 1602 of 1947 that Gangadhar's tenants were evicted and the present appellant NO. 2 was put in as a tenant. u/s 52 of the Transfer of Property Act, in so far as it is material,

"During the pendency in any Court of any suit or proceeding which is not collusive and in which any right to Immovable property is directly and specifically in question, the Property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

It is not the contention of appellant No. 2 Chandu-lal that the suit between Kesarichand and Gangadhar was a collusive suit. It is, however, contended fiat Kesarichand having lawfully placed appellant No. 2 in Possession as a tenant, the provisions of the Bombay Rent Act would come to the aid of the appellant. But u/ s 52 of the Transfer of Property Act Kesarichand would be incompetent to Create a tenancy in favour of appellant No. 2 so as to affect the rights of Gangadhar in respect of the decree or order which may be made in the suit, so that the right of the present appellant No. 2 Chandulal must always be subject to -any decree or order which may be passed in the suit between Kesarichand and Gangndbar. As I have already indicated, in Second Appeal No. 1170 of 1953 Kesarichand's suit was dismissed, and the rights of appellant No. 2 would always be subject to any order that may be made in the suit or any proceedings in the suit; and in my view the present order passed in restitution proceedings would be cohered by Section 52 of the Transfer of Property Act. A tenant put into possession pendente lite is, there- fore, liable to be removed in restitution proceedings : Rohini Singh v. Hodding ILR 21 Cal 340. There is nothing in the provisions of the Bombay Rent

Act which would enable the tenant Chandu-lal to assert his rights overriding the Provisions of section 52 of the Transfer of Property Act.

8. In *Ramdas Popat Patil Vs. Fakira Pandu Patil and Others*, , it was held that any lease which is created by a mortgagor pending a suit which was filed by the mortgagee, would not be binding upon the mortgagee, or any person who has subsequently purchased the interest of the mortgagee along with that of the mortgagor in the property in suit, and the lessee will have to take subject to the result of the suit. It was further observed that any leases which are created and which are affected by the doctrine of *lis per dens* embodied in section 52 of the Transfer of Property Act, 1882, do not enable the lessee to exercise any rights created in his favour by the Bombay Tenancy and Agricultural Lands Act, 1948. In another case reported in the same volume, *Narayan Laxman Ayarkar and Others Vs. Vishnu Waman Dhawale and Another*, , the facts were these: A suit was filed by one Narayan and another against one Vishnu and another claiming possession of certain lands given in Inam to a temple. The suit was decreed and in execution of the decree possession was obtained by the plaintiffs. An appeal was filed by the defendants, but the District Court confirmed the decree. During the pendency of the appeal, plaintiffs leased out the lands to strangers, Defendants appealed to the High Court and a consent decree was passed in this Court. That decree provided that the defendants were entitled to recover and retain possession and enjoy the income of the lands. Defendants filed an application u/s 144 of the Civil Procedure Code, in which they claimed an order for restitution of possession of the lands from the plaintiffs as well as their lessees, and it was contended by the lessees that they were entitled to protection under the Bombay Tenancy Act and an order for actual possession could not be passed against them. The trial Court upheld that conten-[ion, but the District Court reversed that decision and ordered actual possession even against the lessees; and it was held in Second Appeal by a Division Bench of this Court that the lessees being transferees of the lands during the pendency of the appeal before the District Court were affected by the rule of *lis pendens* enunciated in section 52 of the Transfer of Property Act and they were, therefore, not entitled to set up their right against the claim of the defendants. This case, in my opinion, is on all fours with the facts of the present case. It is true that both in the earlier decision in *Ramdas Popat Patil Vs. Fakira Pandu Patil and Others*, as well as *Narayan Laxman Ayarkar and Others Vs. Vishnu Waman Dhawale and Another*, , the lessees were claiming protection under the provisions of the Bombay Tenancy Act. But that principle in my view would also apply to cases falling under the Bombay Rent Act.

9. Mr. Gupta (Junior), learned advocate appearing on behalf of the respondent No. 1, also invited my attention to a third case also reported in the same volume, *Bhanshali Kushalchand Ramji and Another Vs. Sha Shamji Jivraj and Others*, where it was held that u/s 111(c) of the Transfer of Property Act, 1882, when the interest of the mortgagee came to an end on redemption, the lease executed by him in favour of others would also be determined, and that protection u/s 12 of

the Bombay Rent Act would not be available to such lessees as no relationship of landlord and tenant was established between them and the mortgagors who would therefore be entitled to actual possession.

10. In my view, the provisions of section 52 of the Transfer of Property Act would be a complete answer to the contention raised on behalf of the appellants that they have become tenants under the Bombay Rent Act and are not liable to be evicted by the Court by virtue of any order in an application for restitution u/s 144 of the Civil Procedure Code.

11. But then Mr. Chitale contends that his clients having raised a plea that they were tenants of the suit house, the Civil Court had no jurisdiction to decide that question, and that could only be determined by the Court invested with such jurisdiction u/s 28 of the Bombay Rent Act. In support of his contention Mr. Chitale has relied on a Supreme Court case, *Babulal Bhuramal and Another Vs. Nandram Shivram and Others*, but he has frankly conceded, and in my view rightly, that in view of the decision of this court in *Jaswantlal Jagji-vandas and Co. v. "Western Co., India"*, 61 Bom LR 1087 and *Gorakhram Gokalchand v. Raizada Topan-das* 62 Bom LR 123, that contention would not be open to him. Respondent No. 1, the applicant, having claimed possession from the appellants, the mere fact that the appellants assert that they are the tenants of the suit house and are willing to pay rent to any proper person as decided by the Court would not oust the jurisdiction of the Civil Court to grant restitution u/s 144 of the Civil Procedure Code.

12. Mr. Chitale has finally argued that his debits would be protected u/s 41 of the Transfer of Property Act because, according to him, Kesarichand was an ostensible owner during the period that he obtained a decree in his favour in Regular Civil Suit No. 1602 of 1947, which was confirmed by the District Court and which only came to be reversed in Second Appeal No. 1170 of 1953 which was decided on 28th March 1956. Mr. Chitale has also pointed out that during this period, Kesarichand was able to evict the prior tenants of Gangadhar and, therefore, so far as the appellants are concerned, they would be entitled to protection u/s 41 of the Transfer of Property Act. In the first instance, the appellants being transferees pendente lite cannot take advantage of section 41. Secondly, in no sense can Kesarichand be described as an ostensible owner with the consent express or implied, of Gangadhar. The appellants, therefore, would not be entitled to protection u/s 41 of the Transfer of Property Act, on the ground that they have entered into possession as tenants bona fide without being aware of the rights of Gangadhar. I may point out that though such a contention appears to have been raised in paragraph 3 of the written statement by opponent No. 6 Chandulal (Exhibit 40) there was no issue on that point, nor does it appear that that contention was pressed in the lower Court.

13. The result is that all the contentions raised on behalf of the appellants fail and the appeal will have to be dismissed with costs. The rule in the Civil Application No. 2862 of 1959 will also be discharged with costs.

14. Appeal dismissed.