
(1972) 02 RAJ CK 0007
In the Rajasthan High Court
Case No : Civil Special Appeal No. 4 of 1870

Maratha Mandir Ltd.

APPELLANT

Vs

Official Liquidator, Golcha Properties (P) Ltd., Attached to
Rajasthan High Court

RESPONDENT

Date of Decision : 11-02-1972

Acts Referred:

COMPANIES ACT, 1956 — Section 391, 446
Contract Act, 1872 — Section 29
Transfer of Property Act, 1882 — Section 111, 53A

Citation : (1972) RLW 217 : (1972) WLN 70

Hon'ble Judges : Jagat Narayan, C.J.;B.P. Beri, J

Bench : Division Bench

Judgement

Jagat Narayan, C.J.—This is a special appeal against an order of the learned Company Judge refusing to grant leave u/s 446 of the Companies Act to continue a pending suit.

2. The appellants M/s. Maratha Mandir Ltd. a company registered under the Indian Companies Act. having their office at Bombay, are the owners of a property situated at Bombay part of which was given on lease to M/s. Golcha Properties (P) Ltd. under an agreement dated 31-10-55. Thereafter disputes arose between the parties and in 1958 Messrs. Golcha Properties (P) Ltd. filed a suit in the High Court of Bombay in which a consent decree was passed on 25th February 1959. The terms of the compromise are contained in consent decree Ex. B. Under this consent decree the appellants agreed to grant a lease of the premises specified therein for a term of 20 years commencing from 16th October 1958 on a monthly rent of Rs. 5,500/- payable in advance on or before the 10th day of each month. All the terms of the lease are contained in the consent decree. We reproduce Clause 26 of the consent decree as there is a dispute between the parties about the interpretation of this clause:

The lease shall contain the usual provision for forfeiture and reentry. In the event

of difference of opinion between the parties as regards the clause it will also be determined by arbitration hereinafter provided

M/s. Golcha Properties (P) Ltd. (hereinafter referred to as "the Company",) made defaults in payment of rent and municipal taxes which were payable by it. Ultimately on 11-4-66 the appellants instituted a suit against the Company for recovery of arrears of rent and for eviction under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Control Act") in the court of the Small Cause Court, at Bombay which has exclusive jurisdiction to try such suits. They claimed a sum of Rs. 55,000/- as arrears of rent from 16-2-1965 to 15-12 1965 & a sum of Rs. 55,252,94 as arrears of taxes. The company filed a written statement on 17-8 66, which is Ex. 2. Para 3 of the written statement runs as follows:

With further reference to paragraphs 1 to 9 of the plaint, the defendants say that the plaintiffs have failed and neglected to carry out their obligations under the said High Court decree and inspite of repeated demands have failed and neglected to execute the 20 years lease in favour of the defendants. The defendants submit that in view of the defaults and until the plaintiffs obey the said High Court decree and execute the said 20 years lease the plaintiffs are not entitled to maintain this suit or to seek to enforce against the defendants any right in respect of the said premises. On the other hand, the defendants have at all times material to this suit (being already in possession) have continued in possession of the said premises in part performance of the said consent terms and the said High Court decree and have also done acts in furtherance thereof and have performed and/or are willing to perform the defendants" part of the obligations thereunder. On this ground also the defendants submit that the plaintiffs are not entitled to maintain this suit.

In para 5 it was stated-

...The defendants say that they have spent about Rs. 20,00,000/. in the construction of the building and structures constituting the said premises and notwithstanding the defendants" strict legal rights in the matter, the defendants have paid the rent at the rate of Rs. 5,500/- per month and have also paid the amounts of Municipal taxes on the basis of the apportionment made by the plaintiffs.

In para 7 it was stated-

...The defendants say that the true facts are that the monthly rent of Rs. 5, 600/- is highly excessive and exorbitant and the municipal taxes in respect of the said premises may also thereby get inflated. The defendants having spent about rupees 20,00,000/- as aforesaid for the construction of the premises and having regard to the provisions of Bombay Rent Act as also to all the circumstances of the case the monthly standard rent of the said premises and the municipal taxes should be much less than Rs. 5,500/- and the amounts of the municipal taxes claimed. The defendants have bonafide disputed the rent and the amount of the

municipal taxes and by reason of this dispute the full payments in the said excessive and exorbitant amounts have not been made, but the defendants submit that on the taking of accounts of the amounts paid by them to the plaintiffs over and above the standard rent and the proper municipal taxes, a large sum will be found due and repayable by the plaintiffs to the defendants.

In para 12 it was stated--

...The defendants say that it is the plaintiffs who have committed breach in failing to execute the said 20 years lease and that the defendants are entitled to execute the said decree and have the said 20 years lease granted by the plaintiffs to the defendants. The defendants intend to take execution proceedings against the plaintiffs in the High Court under the said decree. Moreover the defendants have carried out and/ or have been and are willing to carry out all their obligations under the said consent terms and said High Court decree. The defendants thus submit in the alternative and without prejudice that they are entitled to be treated as lessees of the said premises under the 20 years lease from 16th October 1958 and are entitled not only to the benefit and enjoyment of the said premises but are also entitled to the enforcement of all the terms which were to be incorporated in the said lease as if the same had been duly executed. The defendants further submit on this alternative basis also that they are entitled to relief against forfeiture, if any, as the tenants of the plaintiffs in respect of the said premises under a 20 years lease in accordance with the said High Court decree.

A winding up application against the Company was filed in the court of the learned Company Judge on 4-7-66. A provisional liquidator was appointed on 5-12-67 and a winding up order was made on 10-5-68. After the winding up order the Official Liquidator took possession over all the properties of the Company. The appellants filed the present application u/s 446 of Companies Act 1956 on 12-7-69. This application was opposed by the Official Liquidator and was rejected by the learned Company Judge on 19-11-69.

3. The learned Company Judge found that the plaint does not disclose a cause of action and there is no chance of the suit of the appellants succeeding at the trial. The suit has been filed for the recovery of-(1) Arrears of rent, mesne profits and municipal taxes, and (2) possession of the premises, So far as relief (1) is concerned all the arrears of rent mesne profits, taxes, etc. were deposited in the court by the Company under an order and future rent is also being deposited there. The learned Counsel for the Company gave an undertaking before the learned Company Judge that rent and municipal taxes will be paid in time in future at the full contractual rate. In view of this the learned Company Judge was of the opinion that there was no point in continuing the suit for the grant of this relief.

4. As for relief (2) the learned Company Judge was of the opinion that on the basis of admitted facts as disclosed by the plaint and the documents

accompanying it Section 53A of the Transfer of Property Act was attracted and the suit of the appellants was bound to fail.

5. The findings of the learned Company Judge on the above points have been challenged before us. It has also been contended that where a suit is pending either leave should be granted or the suit should be transferred by the Company Court to its own file. Section 446 of the Companies Act runs as follows:

446. Suits stayed on winding up order.-(I)When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made u/s 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960,

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force be transferred to and disposed of by that Court.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

6. Sub-section (1) corresponds to Section 171 of the Companies Act 1913 and Section 231 of the English Companies Act, 1948 It is settled law both in England and in India that the grant of leave to continue a pending suit is not a mere formality. The Court has to examine the facts of each case in deciding whether or not leave should be granted, Where the claim or part of it is such that the suit must necessarily fail, leave to continue the suit in respect of the untenable claim has to be refused

7. In this connection we may refer to the decision of a Division Bench of the Bombay High Court in Maneklal Mansukhbai Vs. The Saraspur Manufacturing

Company Ltd., Leave was sought to continue a pending suit in which two claims were put forward namely (1) to obtain specific performance of an agreement to that mortgage by sale and (2) to enforce a money demand involving a money decree. It was found that the claim with regard to specific performance of the agreement to mortgage was bound to fail. Leave was refused to continue the suit with regard to this claim. Leave was granted to continue the suit with regard to the money claim. Marten C.J. with whom Kemp J. agreed passed the following order:

That being so, the situation is this that we think the suit ought to go on qua the money demand but be limited entirely to that claim. As to that, we have power to impose terms u/s 171, and, accordingly, the terms we impose on granting this concession is that the applicant do first elect whether he will amend his plaint in the suit by confining the relief claimed to a mere money demand and by abandoning all claims on the basis of his being a secured creditor, or entitled to become one by specific performance or otherwise. We will give him a month in which to make his election. If he elects to take that course, then the present application will be dismissed. There will be liberty to apply.

The applicant was further asked to give an undertaking not to enforce against the company without the leave of Court any judgment obtained; the object in giving leave being merely to facilitate the ascertainment of the rights of the claimant in the most convenient mode.

8. It is therefore not correct to say that if leave to continue the suit is refused then the Court must necessarily transfer it to its own file.

9. We shall now examine whether leave should be granted to continue the suit or a part of it or the whole or a part should be transferred to the court of the learned Company Judge for trial or leave should be refused altogether.

10. On behalf of the appellants it is firstly contended that Section 53A of the Transfer of Property Act is not attracted as all the terms of the lease cannot be ascertained from the consent decree, the parties having left the provision for forfeiture & re-entry to be settled at a future date under Clause 26 of the consent decree. We have reproduced Clause 26 of the agreement above-It lays down that the lease shall contain the usual provision for forfeiture and re-entry. This however cannot be said to make the agreement vague. In *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*, the contract was entered into subject to the "usual force majeure clause." It was observed by their Lordships of the Supreme Court-

The addition of the word "usual" refers to something which is invariably to be found in contracts of a particular type. Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of Courts is to give a meaning, if possible....

Applying these tests to the present case and in the light of the provisions of

Section 29 of the Indian Contract Act, it is clear that the clause impugned is capable of being made certain and definite by proof that between the parties or in the trade or in dealings with parties in British East Africa, there was invariably included a force majeure clause of a particular kind.

In our opinion, the contract was not void for vagueness or uncertainty by reason of the reference in the terms stated, to the force majeure clause.

Whether the agreement for the lease stipulates for usual covenants or not the law implies that usual covenants shall be inserted. The question what are usual covenants is one of fact, depending on the character of the property to be demised and the practice of conveyancers in the locality with regard to it.

11. What is the usual provision for forfeiture and re-entry in leases of this nature is thus ascertainable. It will however be ascertained by taking evidence in case there is a disagreement between the parties about it.

12. In Hill and Redman's Law of Landlord and Tenant, Fourteenth Edition, the law as to "usual covenants" is stated thus in para 75 at page 139:

Usual covenants.-An agreement for a lease should specify the covenants and provisions which are to be inserted in the lease; if it does not do so, the parties can require the insertion in the lease of the usual and proper covenants and provisions, whether or not it is agreed that the lease shall contain such covenants and provisions. What they are is in each case a question of fact to be decided upon an examination of the leading books of precedents, or upon the evidence of conveyancers and others familiar with the practice generally, or with the practice in the particular district, or on the particular estate, having regard to the nature of the property, the place where it is situated, and the purpose for which the premises are intended to be used. The covenants and provisions which may be regarded as usual in all cases are: covenants by the lessee to pay rent; to pay taxes, except such as are ultimately charged by statute on the landlord; to keep and deliver up the premises in repair; and to allow the landlord to enter and view the state of repairs; and a proviso for re-entry on non-payment of rent. Custom and particular circumstances may render other covenants proper, but they cannot be considered "usual" in the legal sense. Thus, in an agreement for a lease to contain "all covenant usual and ordinary in forming leases," the local custom in respect of such leases may be regarded. In leases of public-houses, where the brewers have their own form of lease, "usual covenants" would mean those always inserted in leases by the particular brewer.

In Woodfall's Landlord and Tenant, Twenty-seventh Edition, Volume I, para 427 at page 181 it is stated-

In Davidson's Precedents in Conveyancing it is said that the result of the authorities is that the only covenants which the lessor can insist on as "usual covenants" are covenants to pay rent and taxes, except such as are expressly payable by the landlord, and to keep and deliver up the premises in repair and to

allow the lessor to enter and view the state of repair, with a proviso for re-entry on breach of the covenant to pay rent; and that the only covenant by the lessor which the lessee can insist on is the usual qualified covenant for quiet enjoyment. This statement of what are usual covenants has received judicial approval.

It will thus be seen that a provision for forfeiture and re-entry on breach of the covenant to pay rent is incorporated in all leases in England.

13. In Bindra's Treatise on Conveyancing, Third Edition, Volume III, the following model forfeiture clause appears in a form for agreement to let a shop at page 1233:

The lessee shall further covenant that he shall be liable to forfeit all rights and interest under the lease in case of breach of his covenant regarding assignment or subletting of the premises of payment of rent, taxes and other charges on due date, or regarding the alteration of the premises in which case the lessor shall be entitled to resume possession of the premises.

It seems therefore that there is no force in the contention of the appellants that all the terms of the lease cannot be ascertained from the consent decree.

14. Next it was argued on behalf of the appellants that even if the usual provision for forfeiture and re-entry mentioned in Clause 26 of the consent decree is ascertainable it will have to be ascertained and it must contain a provision for forfeiture and re-entry for non-payment of rent for a certain period which would be less than 10 months. Further that this provision which is ascertainable must be treated as an express provision. The reply on behalf of the Company is that as the provision with regard to forfeiture and re-entry is yet to be ascertained it cannot be regarded as an express provision. This in our opinion is a matter which requires serious consideration at the hands of the court trying the suit. It cannot be said that there is no force in the contention, put forward on behalf of the appellants on this point.

15. The learned Company Judge was of the opinion that the "usual provision for forfeiture and re-entry" referred to in Clause 26 is that contained in Section 111(g) of the Transfer of Property Act. Clause (g) runs as follows:

111. A lease of Immovable property determines-

...

(g) by forfeiture; that is to say: (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease:

He was further of the opinion that there is no express condition proving that on breach thereof the lessor may re-enter, nor does the lease provide that the lessor may re-enter on the lessee being adjudicated an insolvent, nor did the lessee renounce its character as such by setting up a title in a third person or by claiming title in itself. So the learned Judge concluded that there could not possibly be any forfeiture in the present case. As we have pointed out above the court trying the suit may come to a finding that one of the usual provisions for forfeiture&re-entry is that on default of payment of rent for a certain number of months the lessor becomes entitled to evict the lessee. It is true that in case of a dispute between the parties about the number of months for which rent fails in arrears before the tenancy is forfeited the matter will have to be referred to arbitration. But after so referring the matter the arbitrators may come to the finding that the number of months is 10 or less than 10 in which case the appellants might become entitled to evict the Company.

16. The next contention on behalf of the appellants is that Section 53A is not applicable in the present case as the Company had neither performed nor was willing to perform its part of the contract namely to pay the monthly rent and taxes on the due date. The stand taken by the Company in the written statement was that it was only willing to pay the standard rent as may be determined by the Court. It was also stated that the circumstances in which arrears of rent etc. were deposited by the Company will have to be proved from the record of the suit pending in the Small Cause Court, Bombay, to show that rent etc. was deposited under an order of the Court under compulsion and not voluntarily. The contention on behalf of the Company on the other hand is that as the contractual rent was deposited in Court including all arrears and an undertaking has been given to pay the contractual rent when due along with taxes punctually the Company will be deemed to be willing to perform its part of the contract. This in our opinion is a matter which requires some consideration and it cannot be said that the contention of the appellants in this behalf is wholly without force and is bound to fall if the suit is tried.

17. We are accordingly of the opinion that this is a case which is fit to be tried either by the Company Judge or by the Judge, Small Cause Court, Bombay. Leave cannot be refused without transferring the case to the file of the Company Judge.

18. In the matter of In the matter of: Subhodhaya Publications Ltd., Sachidananda Rao, it was held that cases in which the company is the sole defendant, should, as a general rule be tried by the Company Judge, unless the question at issue is one which cannot be properly determined in the winding up. In the present suit it might be necessary to appoint arbitrators to find out what the usual provision for forfeiture and re-entry in a lease like the present one is in Bombay. Conveyancers and other witnesses from Bombay may have to be examined. As these witnesses will be from Bombay the arbitrators will so have to be from Bombay so that they may conveniently examine the witnesses. It will

therefore be very convenient that the present suit is tried by the Small Cause Court, Bombay.

19. We accordingly hold that in this case leave to continue the suit in the Small Cause Court, Bombay, should be granted u/s 446(1) of the Companies Act, 1956. Before however we grant this leave the appellants should file an undertaking in this Court that they shall not execute the decree, if one is passed in their favour, without the further leave of the Company Court at Jodhpur. One month's time is granted for furnishing the undertaking, It shall be in writing and shall be executed by a person duly authorised in that behalf by a resolution of the appellants-company namely M/s. Maratha Mandir Ltd.