
(1991) 07 BOM CK 0004

In the Bombay High Court

Case No : First Appeal No's. 95 and 96 of 1980

Suman Parmananddas Mundhada and Others

APPELLANT

Vs

Saroj Screens Private Ltd. and Others

RESPONDENT

Date of Decision : 25-07-1991

Acts Referred:

Specific Relief Act, 1963 — Section 16

Citation : (1992) 94 BOMLR 829

Hon'ble Judges : W.M. Sambre, J;H.D. Patel, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

H.D. Patel, J.

1. The aforesaid two appeals arise from the judgment delivered by the Joint Civil Judge, Senior Division, Nagpur, on 28th day of April, 1980 in Special Civil Suit No. 96 of 1974 decreeing the plaintiffs claim by calling upon the original defendant Nos. 1(a) to 1(d) to execute a deed of assignment in favour of the original plaintiff upon their depositing Rs. 79,000/- within two months and assigning all their legal rights in the suit plot in favour of the original plaintiff. Upon execution of such assignment deed the original defendant No. 2 was directed by the decree to execute the lease deed for a period of 30 years on revised ground rent of Rs. 4,000/- per year commencing from 17th March 1974 in conformity with the conditions noted in the original lease-deed (Exh. 120). Appeal No. 95 of 1980 is filed by original defendant Nos. 1(a) to 1(d), whereas Appeal No. 96 of 1980 was filed by original defendant No. 2. Since both the appeals arise from a common judgment they are being heard and disposed of also jointly by this judgment. The facts alleged in the plaint are as follows:

2. The plaintiff-Saroj Screens Private Ltd. is a Private Limited Company having its registered office at Amravati. Shankarlal Laxminarayan Rathi is the Managing Director of the said Company. It is in this capacity the plaint is signed and

verified by him. The then Municipal Committee, Nagpur, had given a lease of plot No. 5 in the Patwardhan Ground Layout for a period of 30 years commencing from 17.3.1944 to the defendant No. 3 Seth Gopaldas Mohta vide indenture of lease dated 28.10.1944. The defendant No. 2 is the successor of the then Municipality of Nagpur. According to the plaintiff, the lease was in perpetuity renewable every 30 years.

3. The defendant No. 3 constructed a plinth on the aforesaid plot, hereinafter referred to as "the suit plot". Thereafter the defendant No. 3 leased out the suit plot to the plaintiff vide lease deed dated 10th September, 1947. As an initial deposit, a sum of Rs. 5,000/- was given by the plaintiff in terms of the said deed, which amount was either to be refunded on the expiry of the period of original lease, referred in the plaint as Head Lease, or to be adjusted towards rent of the last year of lease. The plaintiff was put in possession of the plot and they are in possession even today. A cinema house was constructed thereon. Rent was paid thereafter by the plaintiff. It was alleged in the plaint that the plaintiff had an option under the lease-deed to purchase all the rights of the defendant No. 3 which he acquired under the Head Lease with defendant No. 2 including the renewal of the lease and the right of the defendant No. 3 over the plinth and this was to be done during last year of the thirty years' lease of defendant No. 2 on payment of Rs. 90,000/- when he had agreed to execute a deed of assignment or other assurance transferring all his rights in that property and establishing a private of estate between the plaintiff and defendant No. 2.

4. Subsequently the defendant No. 3 and defendant No. 4 represented to the plaintiff that in a family partition the property in question was allotted to the defendant No. 4. Later the defendant No. 4 executed a deed of assignment in favour of the defendant No. 1 Parmanand Mundhada vide deed of assignment dated 12th August, 1960. Upon this transfer he accepted the rights of the plaintiff under indenture of lease dated 10th September, 1947 including the deposit amount of Rs. 5,000/-. The plaintiff had acknowledged the defendant No. 1 as his lessor and had paid rent till end of March, 1975. The deed of assignment in favour of the defendant No. 1 also came to be registered with defendant No. 2.

5. By letter dated 15th January, 1973 the plaintiffs informed the defendant No. 1 that they are ready and willing to pay Rs. 90,000/- any time and acquire the rights of defendant No. 1 under the lease dated 28th October, 1944 including the right of renewal together with all rights over the plinth originally constructed by the defendant No. 3. The plaintiff is also alleged to have pointed out that the defendant No. 1 must apply for renewal of the lease on rent which was fair and equitable. The willingness of the defendant No. 1 to execute the assignment deed was also sought by the plaintiff. Though reply was sought within 10 days, the defendant No. 1 remained silent. The aforesaid letter was also addressed to the defendant Nos. 3 and 4, but they failed to respond because they had no interest left in the lease. The plaintiff then alleged that by the letter dated 15.2.1974 the defendant No. 1 was requested to let the plaintiff know whether he had applied

to the defendant No. 2 for renewal of the lease and what was its result. It is further alleged in the plaint that the defendant No. 1 was also informed that the plaintiff has been ready and willing to perform his part of the contract stipulated in indenture of lease dated 10th September, 1947. A reply was sought within 10 days. Instead of sending a reply, the defendant No. 1 simply informed that an application for renewal has been made on 6th March, 1974.

6. By another letter dated 15th January, 1973 the plaintiff had also informed that defendant No. 2 that under the indenture of lease dated 10th September, 1947 they had an option to acquire rights of the defendant No. 3 and his successor-in-interest defendant No. 1 on payment of Rs. 90,000/- during last year of period of lease. The defendant No. 2 was also requested to revise the rent, fair and equitable, for next 30 years or more.

7. In response to the application made by defendant No. 1 for renewal of the lease, it is alleged in the plaint, the defendant No. 2 revised the ground rent of Rs. 13,120/- by its resolution dated 29th October, 1975. The increase in rent was ten times the rent that was originally fixed.... The defendant No. 1 finding that the increase in rent was not fair and equitable filed appeal before the Commissioner, Vidarbha Region, Nagpur.

8. It is further alleged in the plaint that the defendant No. 2 should have arrived at fair and equitable rent either by agreement or by arbitration or by decision in the Court of law. Since the plaintiff is entitled to claim succession to rights in lease of the defendant No. 1, they contended that the revised ground rent fixed unilaterally was not binding upon them. The plaintiff even disputed the right of defendant No. 2 to fix the rent unilaterally and consequently the jurisdiction of the Commissioner to do so. The plaintiff hence, claimed the Civil Court had jurisdiction to revise and determine the ground rent, which is fair and equitable for the next period of 30 years.

9. Amongst other reliefs the plaintiff claimed that the defendant No. 1 do obtain from the defendant No. 2 renewal of the original lease granted under indenture of lease dated 28th October, 1944 on rent which is fair and equitable. The plaintiff then claimed that after they deposit Rs. 79,000/- in Court, the defendant No. 1 should execute in favour of plaintiff a deed of transfer of all the rights in a renewed lease granted to him by defendant No. 2.

10. The defendant No. 1 Parmanand contested the claim by raising various pleas in the written statement. Unfortunately he died during the pendency of the suit. His legal representatives are brought on record. They are the present appellants. They adopted the written statement already filed by the deceased Parmanand. Though it was admitted that the plaintiff is the Private Limited Company, the fact that Shankarlal Rathi is its Managing Director and he was competent to file the suit was denied. The grant of lease for 30 years in respect of the suit plot by the defendant No. 2 in favour of defendant No. 3 was admitted. The grant of sub-lease upto expiry of lease granted by the defendant No. 2 was not disputed, but

that the sub-lease was to continue thereafter was denied. Amongst various other defences, the defendant No. 1 denied that the plaintiff was ever ready and willing to perform his part of the contract as stipulated in Clause 5 of the indenture dated 10th September, 1947. No interest in the lease of defendant No. 3 was acquired by the plaintiff. The defendant No. 1 even denied the existence of privity of estate between the plaintiff and defendant No. 2. The partition in the family of defendant No. 3 and allotment of the plot to the share of the defendant No. 4 was admitted. It was the defendant No. 4 who assigned her interest in the said plot in favour of the defendant No. 1 Parmanand vide deed dated 12th August, 1960. Receipt of letter dated 15.2.1974 which was a reminder to earlier letter dated 15th January, 1973 was admitted by defendant No. 1, but no reply was sent because the plaintiff could not have exercised his right given under the indenture dated 10th September, 1947 and also it did not contain the readiness or willingness to perform his part of the contract strictly in accordance with the agreement. The plaintiff had no right to claim any relief against the defendant No. 2. The right of the plaintiff to claim specific performance was also denied. The ultimate prayer was to dismiss the suit with costs.

11. The defendant No. 2 contested the claim of the plaintiff chiefly on the ground that they had no locus to claim any relief, much less the renewal of lease against them. No intimation about sub-lease was given by the plaintiff to them. In the absence of consent of plaintiff the sub-lease created by defendant No. 3 was not binding on them. The suit be hence dismissed with costs.

12. The defendant No. 3 also filed his written statement admitting the lease of the suit plot and also sub-letting the same to the plaintiff as per terms and conditions mentioned in the indenture dated 10th September, 1947. Subsequently the suit plot was allotted to the share of his wife Gangabai, defendant No. 4, in a family partition between them. He even admitted that the very plot was then assigned to the defendant No. 1 Parmanand. Therefore, no cause of action arose against him and he should be discharged.

13. With these pleadings the parties led oral and documentary evidence. The learned trial Judge held that the plaintiff had acquired the rights in the suit plot on payment of Rs. 90,000/-. The Court also held that the plaintiff was ever ready and willing to perform his part of the contract under indenture dated 10th September, 1947. It also held that the defendant No. 2 was bound to renew the lease in favour of the plaintiff on rent of Rs. 4,000/- per year thus establishing that the sub-lease executed by defendant No. 3 in favour of plaintiff was binding upon the defendant No. 2. The suit as framed was held to be tenable and decreed the plaintiffs suit. The relief granted was, however, modified than what was claimed by the plaintiff.

14. The learned Court directed the appellants to execute at the cost of the plaintiff the assignment deed in their favour on payment of Rs. 79,000/- (Rs. 11,000/- having been already received by the appellants) in Court, within two months assigning all the rights in the suit plot. After assignment deed is

executed the defendant No. 2 was directed to execute the lease deed for a period of 30 years on revised ground rent of Rs. 4,000/- per year commencing from 17th March, 1974 according to original conditions contained in the lease deed dated 28th October, 1944. The appellants as well as defendant No. 2 filed separate appeals impugning the various findings against each of them.

15. Though various points arise for determination in the two appeals, the appellants in Appeal No. 95 of 1980 raised amongst others a substantial point which would generally cover the relevant issues decided by the Court below. That point is, whether the plaintiffs were ready and willing to perform their part of the contract strictly in accordance with the relevant conditions contained in indenture of lease dated 10th September, 1947?

16. In Clause 8 of the indenture of lease dated 28th October, 1944 (Exh. 120) it is provided that the lessor will have an option to retake the structure at the end of the term of 30 years, which is the period from which the lease of the suit plot was granted by paying the market price of the structure or to renew the lease on revised ground rent which is fair and equitable for a term of 30 years or more. Though the options were with the lessor, namely the defendant No. 2, the exercise of the option to retake the structure must be done prior to the expiry of the lease and not thereafter. If this option is not exercised by the defendant No. 2 within stipulated time, the said defendant has no other alternative, but to renew the lease. Undoubtedly if that is not done, the lessee will always have the right to get the lease renewed.

17. As between the plaintiff and defendant No. 1 and defendant No. 3 the execution of indenture of lease (Exh. 96) dated 10th September, 1947 is by the defendant No. 3 in favour of the plaintiff is an admitted position. The material Clause No. 5 over which the dispute revolves is reproduced below:

(5). The lessees shall have the option to pay to the lessor a sum of Rs. 90,000/- (Rupees ninety thousand only) at any time during the first five years of the lease and to purchase all the rights of the lessor under the said Head-lease from the Municipal Committee, Nagpur, together with his rights over the plinth and the materials, and on this amount being paid as per this condition, the lessor shall be bound to execute the necessary assignment or other assurance in favour of the lessees at the cost and expenses of the lessees. The lessees shall have also the option to acquire the said interest from the lessor at any time on payment of the same price, namely, Rs. 90,000/- only during the last year before the expiry of the lease by efflux of time.

By this clause the plaintiff is given a choice to purchase all the rights of the defendant No. 3 the lessor, which have been acquired by him under the lease deed dated 28th October, 1944 (Exh. 120) together with his rights over the plinth constructed thereon. This right could be exercised either within first five years of the lease or during the last year before expiry of the lease by efflux of time. The said period of the lease was from 17th March, 1944 to 16th March,

1974. Admittedly the plaintiff did not exercise his option to purchase the rights during first five years of the lease. The plaintiff is alleged to have exercised his option during the last year of the lease. The last year of the lease would be from 17th March, 1973 to 16th March, 1974.

18. It is a settled law that in a suit for specific performance of an agreement the plaintiff has not only to aver that he is ready and willing to perform his part of the contract from the date of the contract to the time of hearing the suit, but he has also to prove the same if that averment is controverted. Failure to make such an averment and to prove it would bring with it the inevitable dismissal of the suit. Explanation to Section 16(c) further lays down that the plaintiff should aver and prove his readiness and willingness to perform the contract according to its true construction. The emphasis is on the words "according to its true construction". In other words, true meaning of the agreement is to be adhered to. There is no scope for the plaintiff to go beyond what is contained in the agreement while showing his readiness and willingness. The readiness and willingness are also required to be judged on true and faithful construction of the agreement. Again that readiness and willingness must be in relation to the real agreement between the parties. In *Rahat Jan v. Haji Mohammad Usman* (deceased by L.Rs. and Ors. AIR 1983 All. 343 which followed the decision in *Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan*, it is held that in case it transpires that the real agreement is not what the plaintiff alleges and the willingness or readiness which the plaintiff displayed was not in relation to the agreement, the plaintiff would be clearly within the mischief of the doctrine of readiness or willingness to perform the contract and he will not be entitled to any relief. In the light of the discussion aforesaid, we proceed to decide the point involved in these appeals.

19. On 15th January, 1974 the plaintiff sent a letter to defendant Nos. 1, 3 and 4, which is at Exh. 98. The material paras in that letter are as follows:

3. By an indenture dated 10.9.1947 you, Dewan Bahadur Seth Gopaldas Mohta, assigned your lease-hold rights to us on the terms and conditions set out in that indenture.

4. Under this indenture we have the option to purchase all your rights under the said lease with the Municipal Committee including the option of renewal together with your right over the plinth, and that you, as our Lessor, shall be bound to execute the necessary assignment on other assurance in favour of us at any time on payment of Rs. 90,000/- only during the last year before the expiry of lease of the Corporation by efflux of time.

6. Under these circumstances, it is your duty to apply to the Corporation of the City of Nagpur for renewal of the lease on fair and equitable rent for a period of thirty years or more. We, therefore, request you all the three to kindly take immediate steps in this matter and inform us of having done so. We are willing for a renewal of the lease for more than 30 years.

7. We are ready and willing to pay Rs. 90,000/- at any time and acquire all your rights under the lease with the Municipal Corporation including the right of renewal together with all your rights over plinth.

The letter (Exh. 98) Is sent much before the commencement of the last year of the lease. The plaintiff could not have exercised the option earlier than what is stipulated under the indenture (Exh. 96). Apart from the fact that the letter (Exh. 98) is sent much earlier than the scheduled time, Clause 6 thereof calls upon the addressees being their duty to apply to the Corporation of the City of Nagpur, the defendant No. 2, for renewal of the lease on fair and equitable rent for a period of 30 years or more. The letter also contains a request to take steps in that direction. Certainly, getting the lease renewed was never a condition agreed upon by the defendant No. 40 This successors-in-interest Probably the plaintiff lost sight of the fact that under the original lease (Exh. 120) the defendant No. 2 had two options open, namely, either to retake the structure or to renew the lease. For exercise of the option there was enough time left for the Corporation, the defendant No. 2, to act. Calling upon the defendants to whom Exh. 98 was served was not the term or condition of Clause 5 of the contract (Exh. 96).

20. To this letter (Exh. 98) a reminder was sent on 15th February, 1974 after a gap of one year. That letter is Exh.99. That letter is addressed to defendant No. 1 Parmanand by the counsel of the plaintiff. It makes an interesting reading. It is hence extracted as a whole. It reads as under:

Dear Sir,

Under instructions of my clients M/s. Saroj Screens Pvt. Ltd. I have to invite our attention to their registered letter dated 15.1.1973 received by you on 19.1.1973. My client has not received any reply so far.

2. Please let me know whether you have applied to the Municipal Corporation, Nagpur, for renewal of the lease or whether you want to apply for renewal of the lease. If you have applied, what is the result of your application.

3. My client has been ever ready and willing to perform his part of the contract under the indenture dated 10.9.1947 with Diwan Bahadur Seth Gopaldas Mohta, by which you are bound.

4. Please note that if you do not send any satisfactory reply within ten days of the receipt of this letter, my client will take it that you do not want to get the lease dated 28 10.1944 renewed and to perform your part of the contract and thereby you have committed breach thereof. In that event my client will be free to take such steps as he may be advised and in the event of litigation you will be held liable for costs and consequences. Please take notice.

Yours faithfully, Advocate, Counsel for M/s. Saroj Screens Pvt. Ltd.

The letter is self-explanatory. It clearly calls upon the defendant No. 1 to get the lease renewed and on failure to perform that part of contract it would result in

breach of the contract on his part. Therefore, the readiness or willingness on the part of the plaintiff was made subject to renewal of the lease which condition was never agreed upon. This is more glaring when we peruse the relief claimed in the plaint. In prayer Clause (a) the plaintiff claimed a decree that the defendant No. 1 do obtain from the defendant No. 2 a renewed lease of the original (Exh. 120) on rent which is fair and equitable, and in Clause (aa) the relief claimed was that on deposit of Rs. 79,000/- in Court the defendant No. 1 do execute in favour of the plaintiff a deed of transfer of all rights in the renewed lease granted to him by the defendant No. 2. The pleadings and the evidence are restricted to the allegations made in the two letters Exh. 98 and Exh. 99 only.

21. Therefore, no doubt is left in our mind that the plaintiff came forward seeking implementation of a different contract than the one agreed between the parties. Apparently the plaintiff had no desire to pay the amount of Rs. 90,000/- till such time the lease is renewed. There was neither readiness nor willingness on the part of the plaintiff to implement the contract in its true sense and as contemplated by Clause 5 thereof. In the circumstances, there is no escape from the conclusion that the plaintiff was not ready and willing to perform his part of the contract. We hence answer the point at issue in the negative. The learned Court below had completely misdirected itself in coming to a contrary conclusion not warranted by the facts on record.

22. Though several other points have been raised on behalf of the appellants in either of the appeals, it is not necessary to deal with them since the point decided above seals the fate of the suit, which must be dismissed.

23. In the result, the appeals are allowed. The judgment and decree of the Trial Court are set aside. The suit filed by the plaintiff is bad in law and stands dismissed. The respondent Saroj Screens Private Limited shall bear the costs of the two appellants through out and bear its own.