

(1970) 03 DEL CK 0029

In the Delhi High Court

Case No : Second Appeal No. 16D of 1963

Tamil Ahmed Taban and Others

APPELLANT

Vs

Khair-ul-Nisa and Others

RESPONDENT

Date of Decision : 16-03-1970

Acts Referred:

Citation : (1970) 6 DLT 268

Hon'ble Judges : P.S. Safeer, J; Narain Andley, J

Bench : Division Bench

Advocate : D.D. Chawla and Y. Dayal, for the Appellant;

Judgement

P.S. Safeer, J.

(1) This judgment will dispose of S.AO. No 1 -D and 17-D of 1966 in which common questions have been raised. The appellants are tenants against whom two separate proceedings were instituted for their ejectment on the ground of subletting or parting with possession of the premises without the written consent of the landlord .

(2) An application dated 5th June, 1961 was made to the Rent Controller, Delhi, under Order 26, rule 9 and Order 39, rule 7 read with section 151 of the CPC praying that a local commissioner be appointed to go to the spot and report as to who was in occupation of the premise .The order dated 12th June, 1961 by which Mr. P Bose, Advocate, was appointed as local commissioner was passed ex- parte and is in the following terms:

"I appoint Shri P. Bose. Advocate, as a local commissioner to go to the spot and report as to who is in occupation of the premises in question. His fee is fixed at Rs. 30."

(3) The eviction petitions in both the cases were dismissed by the Additional Rent Controller by his orders dated 23rd January, 1961 but the appeals filed against his orders were accepted by the Rent Control Tribunal and the reversal was

based upon the reports (Exhibits A I and A2) which the local commissioner had submitted after visiting the premises and which were proved by him during the course of his examination as Aw 1

(4) The appellants raise two contentions. The first is that the provisions contained in the Delhi Rent Control Act, 1958 (hereinafter referred to as "the Act") do not confer any authority on the Rent Controller to appoint any local commissioner under the provisions of the Code. The second is that even if the provisions of the Code were available to the Rent Controller to appoint a local commissioner then While making such an appointment in terms of rule 9 of Order 26 he was bound by the provisions contained in rule 18 of the same Order. It is argued that the provisions of rule 18 are mandatory and unless they are complied with the report of the local commissioner cannot be evidence in the case As a part of the same argument it is urged that even if the order appointing the local commissioner was valid, he could not have acted beyond the scope of the express directions contained in the order and could not have stated anything in his report apart from indicating the person or persons who were in occupation of the premises It is emphasised that all the matters contained in Exhibits A1 and A2 are not admissible in evidence and cannot be relied upon as such. Rule of Order 26 of the Code says : - 9 In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

if the local Commissioner is compliantly appointed under rule 9 then in terms of rule 10 his report and the evidence taken by him (but not the evidence without the report)shall be evidence in the case. The Court can examine the local Commissioner and. with the permission of the Court, the parties can also examine; him in respect of any matter stated in the report. Then rule 18 provides :-

"18 (1)Where a commission is issued under this Order the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders. (2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence."

This provision requires the Court to direct the parties to appear, before the local commissioner so that they may participate in the proceeding before him. The local Commissioner can proceed *ex parte* in case the parties or any one of them does not appear before him after the service of the notice given under sub rule (1).

(5) The appellants have relied upon *Latchan v. Ram Krishana, Sn Mander v.*

Schindra Chandra, Vanamaorthi Pillai Veerabhadra Pillai v. A vyampenumal Pillai Bhagavathy Pillai" an " Seetharamappa v. Appaiah in support of the contention that in case of non-compliance with the mandatory provisions of rule 18 the appointment of the local commissioner is without jurisdiction and the report resulting from his inspection cannot be read as evidence. We hold the same view. in the cases before us no notice was given by the Court as required by rule 18(1) nor even by the local commissioner appointed In the circumstances, the Reports Exhibits A 1 and A2 cannot, without anything more be evidence in the case by the force of rule 10(2).

(6) To meet this argument, the respondent relies upon the provisions of rule 7 of Order 39 of the Code which was also invoked in the said applications. The appellants reply is that rule 8 of Order 39 also requires an notice before the making of an application either under rule 6 or rule 7 and, Therefore, unless such notice is given no order can be made under any of these rules. Unlike rule 18 of Order 26, rule 8 of Order 29 does not cast any obligation upon the Court to give any notice of an order under rule 6 or 7 of Order 39. Rule 8 of Order 39 merely directs the party making the application to give a notice to the opponent before making it. It is directory in its language. there is nothing in this rule to persuade us to hold that the Court is precluded from making an ex- parte order under rule 6 or Rule 7 of Order 39 including an order for inspection of the property which may be the subject matter of a suit in terms of clause (a) of rule 7(1). This view finds support from a Division Bench decision of the Bombay High Court in Buta Ram v. Dattu where the ex-parte appointment, of a Commissioner was upheld. Then, the learned counsel for the appellants contended that the Act is a special statute which enumerates the powers of the Controller and the procedure to be adopted by him while exercising those powers and wherever any provision is made therein the action to be performed must be in strict compliance with its terms. It was urged that the Privy Council had laid down in Nozir Ahmed's" case that where power is given to do a thing in a certain way then it must be done in that way or not at all. Reliance is placed on section 36 which enumerates the powers of the Controller and on section 37 which prescribes the procedure to be followed by him. Reference was also made to rule 23 of the Delhi Rent Control Rules, 1959 framed in exercise of powers conferred by section 56 of the Act. These provisions are in these terms :

"36. Power of Controller (1) The Controller may- (a) transfer any proceeding pending before him for disposal to any additional Controller, or (b) withdraw any proceeding pending before any additional Controller and dispose it of himself or transfer the proceeding for disposal to any other additional Controller. (2) The Controller shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely (a) summoning and enforcing the attendance of any person and examining him on oath ; (b) requiring the discovery and production of documents. (c) issuing commission for the examination of witnesses. (d) any other matter which may be prescribed; and any proceeding before the Controller

shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (4.) of 1860), and the Controller shall be deemed to be a civil court within the meaning of section 480 and section 482 of the Code of Criminal Procedure, 1898 (5 of 1898). (2) For the purposes of holding any inquiry or discharging any duty under the Act, the Controller may - (a) after giving not less than twenty four hours' notice in writing, enter and inspect or authorise any officer subordinate to him to enter and inspect any premises at any time between sunrise and sunset ; or (b) by written order require any person to produce for his inspection all such accounts, books or other documents relevant to the inquiry at such time and such place as may be specified in the order (4) The controller may, if he thinks fit, appoint one or more persons having special knowledge of the matter under consideration as an assessor or to advise him in the proceeding before him."

"37 Procedure "to be followed by Controller.-(1) No order which prejudicially affects any person shall be made by the Controller under this Act without giving him a reasonable opportunity of showing cause against the order proposed to be made until his objections, if any, and any evidence may produce in support of the same have been considered by the Controller. (2) Subject to any rules that may be made under this Act, the Controller shall while holding an enquiry in any proceeding before him, follow as far as may be the practice and procedure of a court of small causes including the recording of evidence. (3) In all proceedings before him, the Controller shall consider the question of costs and award such costs to or against any party as the Controller considers reasonable."

RULE23. " CPC to be generally followed . In deciding any question relating to the procedure not specially provided by the Act and these rules, the Controller and the Rent Control Tribunal shall, as far as possible be guided by the provisions contained in the Code of Civil Procedure, 1908."

The center corporation is that section 36(2)(c) and section 36(3)(a) of the Act which provide for the issue of commissions and inspection of property respectively by the Controller exclude the applicability of the provisions of the Code. It is urged that the Legislature has conferred certain powers on the Controller and no more and that the Controller having been authorised to exercise the powers of a civil court under the CPC only in respect of the matters enumerated in these sections and such other matters as may be prescribed by virtue of clause (d) of section 36(2) of the Act, no other power can be exercised by the Controller under the Code. As to the provisions of sub section (3) of section 36, it is contended that while clause (c) of sub-section(2) limited the powers of the Controller as exercisable by a Civil Court under the Code to the issuing of commissions for the examination of witnesses, the power of inspection as provided for in rule 9 of Order 26 and rule 7 of Order 39 was eliminated by restricting the manner and method of inspection to the terms of clause (a) of sub-section (3) of section 36 of the Act. It is further argued that sub-section (1) of section 37 of the Act excludes ex-parte orders as it emphasises that no order

which may prejudicially affect any person can be made by the Controller under the Act without giving a reasonable opportunity of showing cause against the proposed order and until the objections, if any, and any evidence which may be produced in support had been considered. Therefore, it is submitted that the order appointing the local commissioner whose reports are the subject of controversy could not have been made without giving a reasonable opportunity to the appellants to raise their objections and adduce evidence. We are unable to agree with these contentions.

(7) Section 37(1) will be attracted only in case of orders which may prejudicially affect any person. The ex-parte appointment of a local commissioner for ascertaining as to who is in occupation of the premises cannot by any stretch of imagination be said to be an order prejudicially affecting any of the parties. Such an order is passed for discovering the truth which may or may not be in favor of either of the parties. Sub-section (1) of section 37 of the Act contemplates an order which may affect substantial rights of the parties and for that purpose provides for an opportunity for raising objections and producing evidence. It cannot be said that an order appointing a local commissioner for inspecting the premises in order to report as to who is in occupation would require as a condition precedent that parties be allowed to produce evidence in respect of any objections that may be made. Interlocutory orders which do not by themselves affect the rights of the parties are not contemplated by subsection (1) of section 37.

(8) Turning to sub-section (2) of section 37 the learned counsel for the appellants correctly submitted that while holding an inquiry in any proceeding the Controller could avail of the provisions which were applicable to the practice and procedure before a Court of Small Causes. This submission is supported by the cases reported as *Pokar Mat v. Prem Nath* and *Central Bank of India v. Gokal Chand*. In the latter case, the Court was dealing with the scope of section 38 of the Act when in the course of its judgment it said : -

"If full effect is given to the provisions of section 37(3), it must be taken as if the procedural provisions of the CPC as applicable to a Court of Small Causes are written with pen and ink in the Delhi Rent Control Act, 1958."

The counsel, however, contended that the foregoing observations must be read in the light of the further observation that :-

"It must therefore, be held that subject to any rules that may be made under the Delhi Rent Control Act and such provisions of the Code of Civil Procedure, as relate to the practice and procedure of a Court of Small Causes, stand incorporated in the Delhi Rent Control Act and any order made under any such provisions would be an order made "under this Act" within the meaning of section 38 of the said Act."

(9) Reference was made to the said rule 23 which provides that the Controller could seek guidance or aid for the provisions contained in the Code only where

there was no specific provision in the Act itself in respect of a certain matter and it was urged that since there is a specific provision in section 36(3)(a) of the Act for inspection the provisions of the Code were not available to a Controller by reason of rule 23. The Central Bank of India³ case reported in 1966 Dlt 262 went up to the Supreme Court and in the course of its judgment reported in 1967 Dlt 19, the Supreme Court said :-

"UNDER section 36 and 37(2) the Controller may pass interlocutory orders in a pending proceeding. u/s 36 he may pass orders for the summoning of witnesses: the issue of commissions for examination of Witnesses, discovery, production and inspection of documents and inspection of premises. By section 37(2), he is required to follow as far as may be the practice and procedure of a Court of Small causes and following such practice and procedure he may pass other interlocutory orders."

The Supreme Court Therefore, accepted the view taken by the High Court that the Controller under the Act has available to him all those provision of the Code which are available to a Court of Small Causes. We are of the view that the provisions of Orders 26 and 39 of the Code are available to the Controller. These provisions though generally known as provisions relating to practice and procedure include also the "power to make the orders contemplated thereby. "Power" and practice and procedure" are often interchangeable terms a has been held in Harish Chandra v. Triloki Singh

(10) Section 36(3)(a) gives a limited power to the Controller to inspect the premises by himself or through a subordinate officer after giving 24 hours notice. That power cannot be equated with the power to appoint a local commissioner for immediate spot inspection under Orders 26 and 39 of the Code. If inspection is to be carried out by the Controller or his subordinate under, section 36(3)(a) of the Act then it must be done in the manner laid down in there -section. But if inspection is to be carried out through a Commissioner, then the provisions of Orders 26 and 39 of the Code will apply- The two powers are apparently different That being so, the rule of law hid down in Ramkarandas Bhagwandas would not help the appellants The Supreme Court held that the provisions of section 151 could not be resorted to in the face, of the specific provisions of rule 4 of Order 37 which gave express power to the Court to set aside a decree passed under the provisions of that orde.

(11) The next contention relates to the value and admissibility of the two reports. As held by us these reports (Exhibits A 1 and A 2) cannot be evidence in the case under Order 26, rule 10 (2) of the Code by reason of the noncompliance with the provisions of Order 26, rule 18 (1). It is, Therefore, contended by the appellants, that the reports can be used, at best, u/s 157 of the Evidence Act to corroborate the statement made by the commissioner as a witness in Court It is further contended that since the commissioner has merely proved the reports without making a statement in Court about the matters contained therein, there is nothing which the reports corroborate and they are,

Therefore, valueless as evidence In our opinion, section 157 of the Evidence Act does not bear that interpretation.

(12) The reports are documents which have been produced as primary evidence and the proof by the commissioner of their execution proves their contents u/s 61 of the Evidence Act. The Commissioner appointed had to inspect the property and collect the information as required by the order of the Controller which we have held is a valid order under clause (e) of Rule 7 of Order 39. He inspected the property and collected the information and recorded it in his reports. Then he was examined not under Order 26, rule 10 (2) of the Code but as an ordinary witness and proved the two reports as having been made by him. No question was put to him in cross-examination challenging the truthfulness of the contents of the reports.

(13) In *Kheru Ram v. Hans Raj* there is an observation that where a local commissioner is examined as a witness in Court and the parties have the opportunity to test the veracity of his report by cross-examining him then his report can be relied upon. Reference may also be made to the case *Maroli Achuthan v. Kunhi- pathumma* which is to the effect that even when there is a breach of order 26, rule 18 of the Code. the report may be relied upon after examining the commissioner not is a report forming the basis of an investigation contemplated by Order 26 rule 9 but as corroborating the evidence of inspection conducted by the Commissioner. We have, Therefore, no hesitation in holding that the reports have value and are admissible in evidence even u/s 157 of the Evidence Act,

(14) The only question which remains to be seen is as to which of the statements in the reports Exhibits A 1 and A 2 can be relied upon The Commissioner was appointed only to inspect the premises and ascertain the persons who were in possession of the premises. To that extent only, the reports stand proved. The other statements relating to subletting and the time of subletting made in the reports, being beyond the scope of the order, cannot be relied upon as having been duly proved merely on the basis of the reports. The Tribunal has erred in relying merely on the reports for his conclusion that there was unauthorised subletting after the coming into force of the Act. He has not relied upon any other evidence. Since the Tribunal is the final fact-finding authority, these appeals will have to be remanded.

(15) In the result, we set aside the orders of the Tribunal in both the appeals. The cases are remanded back to the Tribunal for re-appraisal of the evidence to determine, in the light of this judgment, whether the respondent has proved unauthorised subletting There will be no order as to Costs in the appeals or as to this reference.