

(1949) 01 BOM CK 0009
In the Bombay High Court
Case No : O.C.J. Suit No. 1766 of 1947

Tarabai Jivanlal Parekh

APPELLANT

Vs

Lala Padamchand

RESPONDENT

Date of Decision : 27-01-1949

Acts Referred:

Contract Act, 1872 — Section 56
Defence of India Rules, 1939 — Rule 75
Transfer of Property Act, 1882 — Section 111

Citation : AIR 1950 Bom 89

Hon'ble Judges : Coyajee, J

Bench : Single Bench

Advocate : M.M. Desai and Purshottam Tricumdas, for the Appellant; M.S. Vakil and M.L. Maneksha, for the Respondent

Final Decision : Dismissed

Judgement

Coyajee, J.—The plaintiff has filed this suit for declaration that the defendant has no right to obtain possession of a certain flat from Government and for an order against the defendant to hand over possession of the flat, being flat No. 13, to the plaintiff. It appears that the defendant is described as the person who was a monthly tenant of flat No. 13 in a building known as Jivan Vihar which was requisitioned by Government on 8th August 1944. The possession of the flat was taken from the defendant, who claims to be the tenant, on 5th May 1945. The Government derequisitioned the flat on 27th May 1947. On the order of derequisition being passed, the Government gave possession of the flat to the party from whom the Government had taken possession at the date of the requisition, namely, the defendant.

2. In short, the plaintiff's case is that at the date when the requisition order was served both on the plaintiff and the defendant, the defendant's tenancy of the flat came to an end.

3. The facts of the case are not in dispute, and the only question before the

Court is to answer the following issue, namely,

"Whether on the Government requisitioning the flat in the occupation of the defendant, the relationship of landlord and tenant, namely, the plaintiff and the defendant, terminated?"

The orders as regards requisitioning were served both on the plaintiff as the landlord and on the defendant as the tenant. It is pointed out by counsel appearing on behalf of the plaintiff that the orders clearly indicate that any compensation for such requisition, if any, is to be paid to the landlord, the plaintiff, and that the defendant was evicted by being summarily asked to hand over the premises in suit to Government.

4. For the purpose of decision of this issue, it is necessary to refer to certain provisions of the Defence of India Act, as well as to Ordinance XIX [19] of 1946, and to Act XVII [17] of 1947, and certain relevant sections of the Transfer of Property Act.

5. The order made for requisitioning was made under Rule 75 (a), Defence of India Rules. Rule 75 (a) talks of the power of the Government to make order in writing, requisitioning any property, movable or immovable. Then Sub-rule (2) of the rule says that where the Government had requisitioned any property under Sub-rule (1), the Government may use or deal with it as may appear to it expedient, and may acquire it. It is clear that under Sub-rule (3), on the notice of acquisition being served, on the very day on which the notice is served, the property vests in the Government. This is on the same lines as the notification under the Land Acquisition Act, whereby the property passes from the owner to the Government and vests in the Government. This power to acquire requisitioned property is again referred to in Section 19 (a), Defence of India Act, which is in similar terms as the rule I have referred to above. u/s 19 (b) the condition of derequisitioning is set out. By Section 19 (b), the Government, on derequisitioning premises, is to hold an enquiry, or cause an enquiry to be made, and thereafter specify by order in writing the person to whom possession of the property shall be given. Under Sub-section (2) of Section 19 (b), however, the delivery of the possession of the property discharges all liabilities of the Government in respect of the property, but the Sub-section says that that shall not prejudice any rights in respect of the property which any other person may be entitled by due process of law to enforce against the person to whom possession of the property is given.

6. Thereafter, Ordinance XIX [19] of 1946 was passed to provide for the continuance of the requisitioning of premises, notwithstanding the expiration of the Defence of India Act, 1939. The provisions thereunder as regards release from requisition are in identical terms as set out by me above. The Ordinance was repealed by Section 10 of Act (XVII [17] of 1947), which was an Act passed for the purpose of providing certain emergency powers in relation to requisitioned land. Section 4 of the Act refers to release from requisition. Under Sub-section

(2), delivery of the possession of the requisitioned land discharges the Government of the liability in respect of such delivery, but also provides that that shall not prejudice any rights in respect of the land which any other person may be entitled in law to enforce against the person to whom possession of the land is delivered.

7. Before discussing this narrow issue which has been raised, I may refer to the fact that the compilation which has been exhibited by consent indicates that the defendant was throughout in communication with the Government asking them to release the requisitioned premises which he badly needed for his own purpose as a tenant. Moreover, it is to be borne in mind that although the requisitioning order was passed on 8th August 1944, possession was not taken by Government until 5th May 1945, during which period the defendant continued in possession of the premises. It has been argued on behalf of the plaintiff that on the requisition order being served on the defendant, the tenancy came to an end, it being a monthly tenancy, on the principle that there was an implied surrender by operation of law of the premises by the defendant, and therefore the tenancy terminated on the date on which the order for requisition was made by the Government.

8. For the purpose of considering this point, it is necessary to refer to certain sections of the Transfer of Property Act. Section 105, T. P. Act defines what a lease is, namely,

"A transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised,"

Section 106, refers to the duration of certain leases, and in the second part says that a lease of an immovable property for any purpose other than that set out in the first part of the section shall be deemed to be a lease from month to month, terminable, on the part either of the lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy. What is a monthly tenancy under the Transfer of Property Act has been considered in the case of *The Utility Articles Manufacturing Company Vs. The Raja Bahadur Motilal Bombay Mills Ltd.*, . On this point, Beaumont C. J. at p. 563, considered the question, what is a monthly tenancy. He said that the nature of a periodical tenancy, whether yearly or monthly or weekly, has been considered in the case of *Queen's Club Gardens Estate, Ltd. v. Bignell* (1924) 1 K. B. 117: 93 L. J. K. B. 107, where the position was clearly explained, and where it was pointed out that a characteristic of periodical tenancy is that as each period commences, it is not a new tenancy : but really an accretion to the old tenancy. The learned Chief Justice thereafter set out the position as regards monthly tenancy, and he said that the tenancy is not a new tenancy at each subsequent period, but the old tenancy continues, and continues until notice to quit is given. Thereafter, the learned Chief Justice said that that being the nature of periodical tenancy, the question arose whether in such a tenancy, time is limited by a lease? He thereafter observed (p. 563):

"It seems to me that one cannot say that the lease limits the time; the time is limited by the notice to quit. Until the notice to quit is given, the tenancy continues from month to month."

9. In these circumstances, the next question is, how is the termination of a lease contemplated under the Transfer of Property Act, and that is provided for u/s 111, which says that a lease of immovable property determines in the manner set out therein, and the only head under which the plaintiff's attempt to bring termination of this tenancy is under Sub-section (f) of Section 111, viz., implied surrender. It is contended on behalf of the plaintiff that there was an implied surrender on the date on which the order for requisition was made, because the Government took over on behalf of the plaintiff from the defendant, and the defendant handed over possession to the Government on behalf of the plaintiff. The point had to be put in that manner, viz., that the relinquishment of possession operates as an implied surrender. This is so only where there has been an yielding up by the lessee plus an acceptance of possession by the lessor. To my mind, this is a mutual act between the landlord and the tenant. In my opinion there is in fact no mutuality in the present instance, because the Government did not merely serve the order of requisition on the tenant, but served an order of requisition on the landlord, so that they took possession of the premises both from the tenant and from the landlord. Moreover, this position to my mind is further forcibly brought out by the fact that the requisition order under the Defence of India Act is, in all circumstances, a temporary order, and must come to an end within six months after the termination of the war, unless extended by Government under a special Ordinance or under a Specific Act of Legislature. Moreover, this position is emphasised by the fact that between the date of the order of requisition and 5th May 1945, the defendant remained in possession of the flat, and continued to pay the rent to the plaintiff. It is true as argued by Mr. Purshottam on behalf of the plaintiff that on requisition there is no accretion of the period of tenancy from month to month, but that does not mean that the substratum of the tenancy is gone. The tenancy which was vested in the tenant is, in my opinion, not divested on a temporary order of requisition being served on him by the Government. The question, therefore, is, the estate which vests in the tenant, and which in certain cases is a heritable interest, is, or is not destroyed ?

10. For the purpose of arguing this point, Mr. Purshottam on behalf of the plaintiff argued very forcibly that inasmuch as the performance between the landlord and the tenant became impossible, the substratum of the transaction disappeared, and that the contract or the monthly lease came to an end on the requisitioning of the premises, and that therefore, there was frustration of the adventure between the parties. For that purpose the plaintiff does not only rely on the order for requisition, but indicates in the plaint that there was requisition by Government, and Government took-over possession as well. It is clear to my mind that surrender consists, as set out in Halsbury's Laws of England, vol. XX, para, 301, in the yielding up of the term by tenant to landlord, viz., to him who

has the immediate estate in reversion in order that the term may, by mutual agreement, merge in the reversion. Thereafter, it is set out that hence the parties to the surrender must be the owner of the term and the owner of the immediate reversion expectant on the term. There must be, therefore, a delivery of the possession by the tenant to the landlord and the acceptance by the landlord of possession to effect a surrender by operation of law. In my opinion, it is clear that there was no surrender by the tenant to the plaintiff at any stage.

11. The question, however, remains whether the term came to an end by what is called frustration. Mr. Vakil on behalf of the defendant referred me to two cases on this point. The first is *Whitehall Court, Ltd, v. Ettlinger* (1920) 1 K. B. 680 : 89 L. J. K B 126. In that case two flats in a certain block of buildings were let to a tenant under two leases for a term of three years from 1915, the tenant covenanting to pay the rent reserved by the leases. In 1917, the military authorities acting under the Defence of the Realm Regulations requisitioned the flats and took immediate possession. The military authorities were still in possession of the flats when the two leases expired in 1918, and the landlord brought an action for rent due against the tenant after the military authorities had taken possession. It was held that the defendant had not been evicted by title paramount so as to suspend the tenancy, and further that the tenancy had not been determined by the requisitioning of the flats, because the doctrine of the termination of a contract by reason of the frustration of the adventure did not apply to the case of a contract which created an estate by demise, and that therefore the landlords were entitled to recover the rent from the tenant. I may make it clear that Mr. Purshottam has said that the plaintiff does not contend that the defendant in this case was evicted by title paramount so as to suspend tenancy, but contends that the second proposition as regards the termination by frustration as set out in this judgment does not hold good. Lord Reading C. J., delivered a very illuminating judgment and, after referring to the question of title paramount which is not necessary to be considered here dealt with the other question, namely, whether there had been a termination of the whole tenancy by reason of the requisition of the flats. It was argued in that case that looking at all the circumstances and treating the case as one would, of ordinary contract, it ought to be held that the tenancy did come to an end. But the learned Chief Justice thereafter quoted the judgment of Lush J. as follows (p. 686) :

"It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement."

The learned Chief Justice thereupon remarked that he saw no reason why the chattel interest which was vested in the tenant by virtue of the two leases was affected merely because he was personally prevented from residing in the flats. The agreements contained in the leases are not only contracts, they also create

an estate by demise for a term of years. This judgment is further supported by the decision in *Matthey v. Curling*, (1922) 2 A. C. 180 : 91 L. J. K. B. 593. In that case, during the currency of a lease of a house and land, the military authorities, acting under the Defence of the Realm Regulations, took possession of the demised premises and continued in occupation, thereof until after the expiry of the term. In that case also, it was held that the lessee had not been evicted by title paramount, and was liable for the rent; and that the temporary occupation by the military authorities did not excuse him from performance of the repairing covenants. Here also it was argued as the foremost ground, namely, that the defendant contended that the action of the military authorities in taking possession of the premises operated to put an end to the lease altogether, and it was argued again that taking of such possession amounted either to an eviction by title paramount, or operated as, what is known as frustration of adventure. In the trial Court *Bailhache J.* relied upon the judgment in *Whitehall Court, Ltd. v. Ettlinger* (1920) 1 K. B. 680: 89 L. J. K. B. 126 and followed that. After dealing with the question of eviction by title paramount, *Banks L. J.* at p. 185 referred to the argument based upon the doctrine of frustration. He held there were several reasons for not holding that doctrine applicable. The learned Law Lord held that in the circumstances considered by him, the doctrine of frustration cannot apply where there is a lease. *Mr. Purshottam* has argued that these two cases are distinguishable, because in both these cases there was a lease for a fixed term, whereas in the present instance it is a monthly tenancy. In my view, there is no basic distinction, because, whether it is a term for a fixed period, or whether the term is a term which can be determined by notice to quit, the estate vests in the lessee, and therefore the question must always remain whether the order for requisition which is a temporary order, extinguishes such an estate, and in my opinion, the proposition is merely to be stated to see the result that such a temporary order cannot affect the estate vested in the lessee.

12. *Mr. Purshottam* has also referred me to the decision of the House of Lords in the case of *Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust Ltd.* (1945) A. c. 221: 1945 (1) ALL E. R. 252 and he has relied upon the judgment of *Viscount Simon L. C.* as casting a doubt upon the validity of the decisions I have already referred to above. It was held in that case that the doctrine of frustration may in certain circumstances apply to a lease. This was the opinion given by two Law Lords, *Viscount Simon* and *Lord Wright*, while *Lord Russell* and *Lord Goddard* both opined that the doctrine of frustration can never apply to put an end to a lease, and they discussed the case of *Matthey v. Curling* (1922) 2 A. c. 180: 91 L. J. K. B. 593 referred to above. Perusing the judgment, the Lord Chancellor, at p. 228, defined what was meant by frustration, and held that where it did arise, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition. Then the Lord Chancellor went on to discuss instances, and held that even where the lease is of the site, it seems to be not inconceivable that the site might cease to exist. He comes to the conclusion that there might be instances where the

abstract proposition that a lease can never be determined by events equivalent to frustration, is not an absolute one because events may be contemplated, for instance, earthquake or similar instances where there may be frustration. For that purpose he relied upon the observations of Lord Atkin in his dissenting judgment in the case of *Matthey v Curling* 1922 (2) A. C. 180: 91 L. J. K. B. 593. Thereafter, considering the circumstances of the case, they held the circumstances were not sufficient to strike at the root of the arrangement between the parties, and did not in any event amount to frustration. Lord Russell of Killowen, on the other hand, held that on the broader-question the doctrine of frustration can never apply so as to put an end to a lease and the respective liabilities of landlord and tenant thereunder. He held that the lease creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate none the less. He referred to the observation of Lush J. in *London and Northern Estates Co. v. Schlesinger* 1916 (1) K.B. 20: 85 L.J.K.B. 369, to the effect that there was no reason for saying that because the order of requisition disqualified the tenant from personally residing in the flat, it affected the chattel interest which was vested in him by virtue of the agreement. Lush J. observed that even after an order of requisition such interest continues and observed. "In my opinion it continues to vest in him still". This doctrine was approved in *Whitehall Court v Ettlinger* (1920) 1 K. B. 680 : 89 L. J. k. B. 126, Lord Russell observed as follows (p. 234):

"I know of no power in Court to declare a lease to be at an end except upon finding that some event has occurred on the happening of which the lease terminates by reason of some express provision contained in the document. In such a case the term ends not because the Court exercises a power to terminate it, because in the events which have happened the lease operated only as a demise for the shorter period. The lease must of necessity continue. Some of the obligations thereunder may from time to time, from various circumstances, become difficult, or Impossible of performance by one or other of the parties, but, in my opinion it cannot have applied to it the doctrine of frustration. The rent will continue to be payable in accordance with the terms of the document."

13. In this case cited by Mr. Purshottam, there is no indication that the House of Lords differed from the two English judgments I have referred to above. Out of the four, two Law Lords merely opined that there may be circumstances in which the doctrine of frustration may be resorted to for the purpose of holding that a lease or tenancy be terminated. That was an abstract proposition argued and considered by the House.

14. Mr Purshottam has cited one further judgment, and that is a very short judgment of Asquith J. in the case of *Cramp v. Henry Hughes and Son, Ltd* : (1944) W. N. 181 and relied upon the observation of the learned Judge to the effect (p. 182):

"The Air Ministry did have legal possession of the part of the works in question, as the terms of the requisition notice showed on and from 9th May 1940. It was

difficult to see what legal consequences a requisition could have except the vesting of legal possession in the requisitioning authority forthwith."

The question in that case has no bearing on the question before me, because the action there was an action for damages for wrongfully, in collusion with the authorities, acquiring the premises, and the only question the learned Judge there was considering was whether in fact legal possession was taken by the Air Ministry, and if possession was taken, then, according to him, there was vesting of legal possession in the requisitioning authority from that time. That does not affect the question raised in this suit.

15. I may refer to one further judgment for the purpose of elucidating this point, and that is the judgment of Chief Justice Latham of Australia, in the case of *The Minister of State for the Army v. Delziel* 68 Com. L. R, 261. The question there was whether the authorities having taken up the property for an indefinite period into their exclusive possession, constituted an acquisition of the property so as to terminate the rights of the weekly tenant who had been holding as a tenant from the Bank of New South Wales, and whether the estate of Delziel as a weekly tenant came to an end. The learned Chief Justice observed that in the circumstances the Commonwealth could not have acquired the land unless it had become the owner of the land or had some interest in the land. The fact that the Commonwealth was in possession of the land as a result of the action under the Regulations does not show that the Commonwealth had become owner of the land or of any estate in the land. The rights acquired by the Commonwealth were not, according to the learned Chief Justice, proprietary rights or that which can be owned in respect of the land, in other words, an estate, nor have the Ministers on behalf of the Commonwealth acquired any chattel interest in the land. The learned Chief Justice observed :

"The Bank of New South Wales is still the owner of the land and Delziel is still the tenant under the weekly tenancy. No other tenancy has been created, and there has been no assignment of Delziel's tenancy. The Commonwealth is in my opinion in the position of the licensee with rights as stated in the Regulations." This judgment forcibly illustrates the position of a party against whom a requisition order is made in the circumstances set out in this suit. His rights are unaffected, and a party continues to be in possession of those rights unless they are determined by the law of the land or by the term on which the tenancy is based. As observed by me above, this was a requisitioning order, which is essentially of a temporary nature, and the Government had no vested interest in the tenancy as such. In these circumstances, in my opinion, the only answer to the issue that can be made is in the negative, and I hold that the requisitioning of the flat in the occupation of the defendant did not affect the relationship of landlord and tenant, and that the defendant does continue to be a monthly tenant of the plaintiff.

16. In these circumstances, I make the order that the suit do stand dismissed with cost.