Dr. K. A. DHAIRYAWAN AND OTHERS

v.

J. R. THAKUR AND OTHERS

1958

April 28.

(B. P. SINHA, JAFER IMAM and J. L. KAPUR JJ.)

Rent Control—Lease of land for fixed period—Lessee constructing building on land—Covenant for delivery of possession of building to lessor on expiry of term of lease—Statute protecting lessee from eviction—If applies to covenant—Whether statute extends period of lease—Bombay Rents, Hotel and Lodging House Control Act, 1947.

The lessors granted a lease of a parcel of land to the lessees for 21 years at a rent of Rs. 50 per month. Under the terms of the lease the lessees were to construct a double storeyed building on the land at a cost of not less than Rs. 10,000. The construction had to be to the satisfaction of the lessors' engineers, and the building had to be insured for at least Rs. 12,000 in the joint names of the lessors and the lessees with an insurance firm approved by the lessors. In case of damage or destruction the building was to be repaired out of the money received from the insurance company. On the termination of the lease either at the end of 21 years or earlier, the lessees were to surrender and yield up the demised premises including the building with its fixtures and appurtenances to the lessors without any compensation for the same. After the expiry of the 21 years the lessors filed a suit for a declaration that they were entitled to the building, and were entitled to claim possession of the same and to recover the rents and profits thereof. The lessees pleaded that they were also lessees of the building and were protected from eviction therefrom by the provisions of the Bombay Rents, Hotel and Lodging House Control Act, 1947 and that the covenant for delivery of possession of the building could not be enforced as the lease in respect of the land could not be terminated on account of the protection given by the Act.

Held, that upon a proper construction of the lease there was a demise only of the land and not of the building and consequently the provisions of the Act did not apply to the contract for delivery of possession of the building. The ownership in the building was with the lessees and in which the lessors had no right while the lease subsisted. There was no absolute rule of law in India that whatever was affixed or built on the soil became part of it, and was subject to the same rights of property as the soil itself.

Narayan Das Khettry v. *Jatindra Nath Roy Chowdhury,* (1926) 54 I.A. 218 and *Vallabhdas Narranji* v. *Development Officer, Bandra* (1928) 56 I.A. 259 followed.

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Held, further, that the provisions of the Act did not provide for a continuation of the lease beyond the specified period stated therein. The Act merely gave to the lessee who continued in possession even after the expiry of the period of the lease the status of a statutory tenant and protected him from eviction.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 192 of 1954.

Appeal from the judgment and decree dated August 29, 1952, of the Bombay High Court in Appeal No. 79 of 1952, arising out of the judgment and decree dated June 27, 1952, of the said High Court exercising its Ordinary Original Civil Jurisdiction in Suit No. 2325 of 1948.

A. V. Viswanatha Sastri and *Naunit Lal*, for the appellants.

L. K. Jha, *Rameshwar Nath*, *S. N. Andley* and *P. L. Vohra*, for the respondents.

1958. April 28. The Judgment of the Court was delivered by

Imam J.

IMAM J.—The appellants, as trustees, of the Mankeshwar Temple Trust had filed suit No. 2325 of 1948 in the High Court of Bombay in its Ordinary Original Civil Jurisdiction, for a declaration that they were entitled to the building in suit and were entitled to claim possession of the same and to recover the rents and profits thereof. The appellants further prayed that the defendants may be ordered and decreed to obtain a letter of attornment from the tenants of the said property attorning to the appellants, that the first defendant may be ordered to render accounts of the rents received by him from the tenants of the said property from May 23, 1948, and that pending the hearing of the suit a Receiver may be appointed of the property in suit. The appellants had obtained leave of the High Court under O. II, r. 2 of the Civil Procedure Code reserving to them liberty to file a separate suit with respect to the land on which the building was situated. The learned Judge who heard the suit decreed it in part in favour of the appellants. He also passed an order of injunction restraining the

defendants 1, 2 and 5, their agents and servants, from interfering with the exercise of the right of the appellants in obtaining possession of the building or otherwise effectuating their possession consistently with the provisions of law. He further directed the first defendant to account for the rents recovered by him from and after May 23, 1948, till the date of the decree. He refused to grant the prayer that the defendants be directed to obtain letters of attornment from the tenants of the building in favour of the appellants. Against this decision the defendants appealed and a Division Bench of the High Court allowed the appeal, reversed the decision of the trial Judge and dismissed the suit with costs.

On May 23, 1927, Krishnarao Ganpatrao and Shamrao Ganpatrao, as trustees of the Mankeshwar Temple, executed a registered lease, Exbt. A, in favour of Moreshwar Kasinath and Radhabai, wife of Ramkrishna Bhai Thakore, whereby they demised a parcel of land specified in the Schedule to the document. The lease was for twenty-one years. The area of land was about 213·66 square yards and the rent reserved was Rs. 50 per month. Under the terms of the lease the lessee had to construct within six months from the date of the lease a double storeyed building consisting of shops on the ground floor and residential rooms on the upper floor. The cost of construction was to be not less than Rs. 10,000. The construction had to be to the satisfaction of the lessors' engineers. There were certain restrictive covenants in the lease. The building had to be insured for at least Rs. 12,000 in the joint names of the lessors and the lessees with an insurance firm approved by the lessors. If the building was damaged or destroyed it had to be repaired or restored by the use of the insurance money received from the insurance company. On the termination of the lease either at the end of twenty-one years or earlier, the lessees were to surrender and yield up the demised premises including the building with its fixtures and appurtenances to the lessors without any compensation for the same. On May 14, 1948, shortly before the lease was to expire, the appellants who were

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then the trustees of the temple gave notice to the respondents to deliver possession of the demised premises and the building on the expiry of the lease, that is to say, on May 22, 1948. On May 19, 1948, the respondents replied that they were entitled to the benefits of the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as the Act, and that the appellants were not to interfere with their possession. All that they could get was the rent under the lease from the respondents. On July 23, 1948, the appellants gave the respondents notice to quit the building only as in their opinion the Act did not apply to it. On July 27, 1948, the respondents, replied asserting that the Act did apply to it. The appellants, accordingly, filed the present suit in the High Court on September 1, 1948.

The period of the lease under Exbt. A having expired and the respondents having been given notice to quit, they were bound to vacate the demised premises unless they were protected by the provisions of the Act. Land used for non-agricultural purposes is "premises" under the Act. Although the period of the lease had expired the respondents continued to remain in possession without the assent of the lessors. Under the Act they would, therefore, be tenants of the land within the meaning of that expression as defined in the Act. There can be no question that so far as the land demised by the lease is concerned the respondents could not be evicted so long as they complied with the provisions of the Act and the lessors, as landlords, were unable to resort to any of the provisions of s. 13 of the Act to evict the respondents from the land. Indeed, the appellants did not claim in the plaint that they were entitled to evict the respondents from the demised land. The plaint, as drafted, confined the reliefs claimed by the appellants only to the building constructed on the land.

The substantial question in issue in this appeal is whether on a proper construction of the lease, Exbt. A, it can be held that not only the land but also the building to be constructed on it had been demised under it. Other questions had also been raised in the

course of arguments. It was argued on behalf of the respondents that the appellants could not get possession of the building until the lease had been determined. The lease could not be determined as under the law they could not be compelled to give up possession of the land demised under the lease as they were tenants of the land within the meaning of the Act. A further submission made was that even if the lease did not purport to demise the building which was to be constructed on the land demised under that document, the appellants were not entitled to get a declaration to the effect that they were entitled to the rents and profits from the building which had been let out to several persons by the respondents and the respondents could not be restrained from interfering with the collection of the rents and profits from the building by the appellants so long as the respondents were in possession of the land demised. It was also urged that the suit must at any rate fail on the ground that defendant No. 4 having died before the institution of the suit and her name being struck off from the category of defendants and her legal heirs and representatives not having been brought on to the record the suit was bad on account of non-joinder of necessary parties.

A perusal of the Schedule to the lease shows that what was demised thereunder was a parcel of land of an area of about 213 square yards with New Survey No. 1/2600 cadestral survey No. 96. The Schedule leaves no room for doubt as to what was demised. Under the terms of the lease the rent payable for this land was Rs. 50 per month. The terms of the lease show that the land was demised for the purpose of constructing a building thereon by the lessees. Clause 1 of the lease may be quoted as the respondents have strongly relied upon this clause in support of their contention that what was demised under the lease was not only the land but also the building to be erected thereon. This clause runs as follows:

"In consideration of the Expenses to be incurred by the Lessees in and about the erection and completion of the building hereinafter mentioned and the rents hereinafter reserved and the Lessee's covenants

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hereinafter contained the Lessors do hereby demise UNTO the Lessees ALL that piece or parcel of land situated at Supari Baug Road, more particularly described in the Schedule hereto and delineated in the plan thereof hereto annexed and marked "A" and therein bounded by a red line TO HOLD the premises unto the LESSEES for the term of 21 (twenty-one) years to be computed from the date of these presents yielding and paying therefor on the 10th day of each and every Calendar month the first of such payments to be made on 10th of June next, upon the terms and subject to the covenants and conditions hereafter contained:—"

Another clause upon which reliance had been placed was cl. 6 which provides for the building to be erected to be insured in the joint names of the lessors and the lessees with an insurance company approved by the lessors. It was pointed out that the building was to be handed over to the lessors at the end of the lease without compensation to the lessees.

We have examined the various clauses of the lease and find that in none of them has it been positively stated that the building to be erected on the demised land would be in the ownership of the lessors and that the building would be deemed to have been leased to the lessees along with the demised land. Under the law there was no impediment in the way of the parties to have had a clause, in a positive form, to that effect. In the absence of such a clause the various clauses of the lease, as they exist, will have to be construed in order to ascertain whether on a proper construction thereof it can be said that there had also been a demise of the building. The Schedule to the lease, as already stated, specifically mentions that the land had been demised and there is no mention therein that the building when constructed thereon would also form part of the demised property. In 1927 when the lease was executed the Act was not in existence and it may reasonably be said that none of the parties had ever in contemplation that the Act or anything akin thereto would become law in the future affecting the rights of the parties under the lease. The various clauses of the

lease are consistent with the ownership in the building being with the lessees in which the lessors had no right while the lease subsisted. In the case of *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury* (1) the Privy Council approved the observations of Sir Barnes Peacock in the case of *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee* (2) to the following effect: "We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself." In the case of *Vallabhdas Naranji* v. *Development Officer, Bandra* (3) the Privy Council once again referred to Sir Barnes Peacock's observation as stated above. The Privy Council also quoted the following observation of Couch, C. J., in the case of *Narayan* v. *Bholagir* (4): "..... We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, viz., that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to remove the materials."

Normally, under s. 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and buildings erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the same condition as he found it. The ownership, therefore, of the building in this case was not with the lessors but was with the lessees. Under s. 108 of the Transfer of Property Act there was nothing to prevent the lessees contracting to hand over any building or structure erected on the land by them to the lessors without receiving any compensation. In other words, although under s. 108 the lessees had the right to remove the building, by the contract they had agreed to hand over the same to the lessors without the right to receive compensation at the end of

(1) (1926) 54 I. A. 218.
(2) 6 Suth. W. R. 228.
(3) (1928) 56 I.A. 259.
(4) 6 Bom. H.C. (A.C. J.) 80.

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the lease, the matter being entirely one of contract between the parties. Such a contract, however, did not transfer the ownership in the building to the lessors while the lease subsisted.

The various clauses of the lease in the present case make a clear distinction between the demised premises and the building by using the words "demised premises including the building to be erected thereon". It was, however, urged on behalf of the respondents that cl. 1 of the lease indicated that what was demised by the lease was not only the land but also the building to be constructed thereon, because the opening words of cl. 1 make it clear that in consideration of the expenses to be incurred by the lessees in erection and completion of the building and the rent reserved the lessors demised to the lessees the land mentioned in the Schedule. The important words in this clause were "to hold the premises" and not to hold the demised premises. The word "premises" covered both the land and the building to be erected thereon. The intention of the parties was that the premises would be held at a moderate rent of Rs. 50 per month as the lessees were going to incur the expenses of erecting the building, maintaining it in proper repair and paying all taxes in connection therewith. In the course of 21 years the lessees would have not only received back the money invested by them in the erection of the building but would have also enjoyed a large margin of profit. Under cl. 5, at the end of the lease, the premises held by the lessees, would be handed over to the lessors that is to say, the land and the building erected on it without the lessors paying any compensation for the building. Under cl. 6 the building was to be insured in the joint names of the lessors and the lessees. In cl. 9 of the lease the expression "the said demised premises" appears and this clause guaranteed to the lessees enjoyment of peaceful possession of the premises. This clause came after all the clauses referring to the building to be erected on the land. If cls. 1, 5, 6 and 9 were read together and properly construed, it would appear that the intention of the parties was that not only the land demised but also the

building which was to be constructed on it was the subject of the lease, as that was the only purpose for which the land was given on lease. These clauses do not necessarily lead to the conclusion suggested. If the ownership in the building was intended to be with the lessors, there was no occasion for providing that the lessees would get no compensation when the building was handed over. This provision rather suggests that the ownership in the building was with the lessees. On behalf of the respondents much reliance was placed on the decision of this Court in the case of *Bhatia Co-operative Housing Society Ltd.* v. *D. C. Patel* (1). Many of the terms of the lease in the case cited were similar to the terms to be found in the lease in the present case. There was, however, cl. 18 of the lease in the case referred to, which expressly stated that immediately after the completion of the building within the time specified in cl. 7, the lessors of the land would grant to the lessees a lease of the land with the building thereon for a term of 999 years from the date of the auction at a yearly rent calculated in accordance with the accepted bid for the plot. There could be no question, as a matter of interpretation, in the case cited, that a lease would be granted not only of the land but also of the building on it for a term of 999 years from the date of the auction. There is no such clause in the lease in the present case. The decision upon which reliance had been placed does not support the case of the respondents, because in the present case none of the clauses of the lease even remotely suggest that on the completion of the building on the land demised the lease in favour of the lessees would be both of the land and the building erected thereon.

On behalf of the appellants, on the other hand, it was submitted that what was demised was actually the land and the expression " to hold the premises " in cl. 1 meant nothing more than to hold the demised premises. The ownership in the building to be constructed did not pass on to the lessors under the lease. During the subsistence of the lease the ownership of

(1) [1953] S.C.R. 185.

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the building remained with the lessees. The lessees contracted to hand over the building without compensation at the end of the lease and in consideration for this the lessees were being demised the land at a small rental of Rs. 50 per month. We have examined the various clauses of the lease and are satisfied that not one of them, if properly construed, indicates that there was any contract between the parties to the effect that the building to be erected on the land would be in the ownership of the lessors and that the same would be deemed to have been demised to the lessees along with the land.

It was next urged that even if there had been no demise of the building to be erected on the land possession of it could not be given to the appellants until the lease had been determined, which in law, could not be determined so long as the respondents could not be evicted from the demised land of which they were tenants within the meaning of the Act. This contention is without force as the provisions of the Act do not provide for the continuation of a lease beyond the specified period stated therein. All that the Act does is to give to the person who continues to remain in possession of the land, although the period of the lease had come to an end, the status of a statutory tenant. That is to say, although the lease had come to an end but the lessee continued to remain in possession without the consent of the lessor, he would none the less be a tenant of the land and could not be evicted save as provided by the Act.

It was then submitted that the appellants could not get the declaration to the effect that they were entitled to the rents and profits from the building which had been let out to several persons by the respondents because they could not realise the same without entering upon the land on which the building had been constructed. The appellants could not enter upon the land for the purpose of collecting the rents without the consent of the respondents as the latter were the tenants of the land. They could only enter upon the land as provided for by the Act. The declaration which the appellants seek, however, does not ask for a

declaration that they are entitled to enter upon the land. All that it seeks is that they are entitled to the rents and profits of the building which had been let out to several persons by the respondents. The appellants merely seek a declaration of their right to collect the rents and profits from the building. As to how they collect the same was their concern. There seems, therefore, to be no valid objection in law to granting the relief sought by the appellants.

The original lessees were Moreshwar Kashinath and Radhabai, wife of Ramakrishna Bhai Thakore. Apparently, these persons were dead and the suit was filed against defendants 1 to 3 as heirs and legal representatives of Radhabai and defendants 4 and 5 as heirs and legal representatives of Moreshwar Kashinath Thakore. After the suit was filed it was discovered that defendant No. 4 could not be served with a copy of the plaint as she had died before the institution of the suit. Her name was accordingly struck off as a defendant in the suit. It was conceded on behalf of the defendants at the trial that the suit filed against the defendants on a cause of action could not be dismissed merely because of the non-joinder of the legal representatives of defendant No. 4 who was already dead at the institution of the suit. In appeal, the learned Judges were of the opinion that it was not necessary to decide this question because, in their opinion, the suit was bound to fail on other grounds. Whatever other consequences may arise on account of the failure of the appellants to implead the heirs and legal representatives of defendant No. 4, it was conceded on behalf of the respondents at the trial that the suit could not be dismissed merely because of this. It would have been better if the heirs and legal representatives of defendant No. 4 had been brought on to the record as defendants. It seems to us, however, that the suit cannot be dismissed merely on this ground because the nature of the declaration which the appellants sought could be granted even in the absence of the heirs and representatives of defendant No. 4 being on the record. Though the plaintiffs impleaded 5 persons as defendants in the suit, the plaintiffs claimed a decree against the first defendant

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only in respect of the rents received by him from the tenants in the building in question. There is no claim against the other defendants for accounts in respect of the usufruct of the property. The correspondence disclosed in the suit, which passed between the plaintiffs and the first defendant, showed that it was only he who was in effective control of the building. The suit was contested only by the first three defendants who appear to be brothers and who claim to have continued in possession of the building after the crucial date, i. e., May 22, 1948. It is they who claimed protection under the Act. Defendants 4 and 5, who were purported to be sued as representatives of one of the joint lessees, do not appear to have taken any interest in the building. After the suit, defendant No. 5 has remained *ex parte* throughout. After the decree of the trial court, it is only the first three defendants who preferred an appeal to the High Court. From all these considerations, it appears that the 4th defendant or her heirs or legal representatives were not necessary parties to the suit. The Court could, therefore, proceed with the suit in their absence.

The appeal, accordingly, is allowed with costs throughout and the decision of the High Court in appeal is set aside. The appellants are entitled to a declaration that the building constructed on the land demised under the lease, Ext. A, belongs to the Mankeshwar Temple Trust and the said trust is entitled to recover all the rents and profits from the same and the respondents have no right, title and interest therein since the expiration of the said lease. The first respondent is directed to render an account of the rents received by him from the tenants of the building from 23-5-48 and to pay to the appellants the amount found due, after accounting, with interest at 6% per annum from 23-5-48 until payment. There will be an order of injunction restraining the respondents, their agents and servants from interfering with the collection of rents and profits by the appellants from the tenants of the aforesaid building.

Appeal allowed.