

# OSMAN FAKIR MOHAMMED DIVECHA

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v.

## ALI AKBAR JAVED SADAKYA & ANR.

August 28, 1969

[J. M. SHELAT, C. A. VAIDIALINGAM AND I. D. DUA, JJ.]

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*Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (57 of 1947)—Part II, Sections 6(1), 18(1)—Premises let for construction of "buildings of every description howsoever"—If premises let for purposes in s. 6(1)—Applicability of s. 18.*

Certain non-agricultural lands in Bombay suburban district were let out to the appellants by their owner. By an indenture of lease the owner demised the lands to the respondents. The lease deed empowered the lessees to construct upon the lands "buildings of every description howsoever". It prohibited the lessees from mortgaging, assigning or creating any charge on the lands or on the buildings that they may choose to erect thereon, but provided that the lessees could take construction loans from prospective tenants of such buildings. There was a further stipulation that the lessees should pay the lessor a certain sum as advance for the observance and performance of the covenants of the deed and the amount was to be deducted from the rent payable. The respondents filed suits under s. 13(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, for eviction of the appellant and for recovery of possession of the lands. The appellant resisted the suits on the ground that part of the consideration payable under the lease was prohibited under s. 18(1) of the Act, that the lease was, therefore, illegal and void and could not be the basis for the respondents' right to recover possession under s. 13(1). The lower courts rejected this contention.

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On the question whether the lease attracted section 18(1) of the Act,

**HELD :** Section 18(1) had no application. [121 A—B]

Part II of the Act, which contains s. 18, applies only to premises "let for" the purposes mentioned in s. 6(1) namely, "residence, education, business, trade or storage." It is the purpose of the lease and not any future choice of a lessee which determines the application of Part II. That is the clear and obvious meaning of the words "let for" in s. 6(1). [121 A—B, D; 122 B]

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In the present case the purpose for which the lands were demised clearly was for constructing "buildings of any description howsoever" and not for constructing buildings for "residence, education, business, trade or storage" within the meaning of s. 6(1). Because s. 18(3) permits construction loans in respect of residential buildings only and the lease deed provided for taking of construction loans, it does not follow that the purpose of the lease was for erecting residential buildings. The provision for taking construction loans is in the lease deed only as an exception to the covenant against the lessee mortgaging, charging or assigning the demised land or the buildings which may be erected thereon and not for laying down the purpose for which the land was demised. Although the expression "buildings of any description howsoever" may include buildings for

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A residence the lessees may choose not to put up any structure for any of the purposes mentioned in s. 6(1). [122 C—G]

*Mrs. Dossibai Jeejeebhoy v. Khemchand Gorumal*, [1962] 3 S.C.R. 921, explained.

B *Civil Appellate Jurisdiction* : Civil Appeal No. 1649 of 1967, of 1967.

Appeal by special leave from the judgment and decree dated September 22, 23, 1967 of the Bombay High Court in Special Civil Application No. 2293 of 1966.

C *H. R. Gokhale, Janendra Lal, and B. R. Agarwala*, for the appellant.

*S. T. Desai, A. G. Parikh, and P. C. Bhartari*, for the respondents.

The Judgment of the Court was delivered by

D **Shelat, J.** In or about 1951, certain portions of plots Nos. 254 and 255, situate at Bandra in Greater Bombay, were let out to the appellant by their owner, Louis Fernandes. The appellant thereafter constructed on those portions certain structures wherein he has since been residing and carrying on business. By an Indenture of Lease dated December 5, 1958 the said Louis Fernandes demised the whole of the said plots in favour of the respondents for a period of 99 years commencing from December 1, 1958 on a monthly rent of Rs. 401 and on the terms and conditions contained in the said Indenture. Cl. 2(c) of the said Indenture provided that the lessees thereby covenanted with the lessor "not to assign, mortgage or charge the demised premises or the building or buildings or any structures to be hereafter erected without first obtaining the consent of the lessor and such consent shall not be refused by the lessor if it is *bona fide*." The said sub-clause, however, permitted the lessee to take construction loans from prospective tenants of a building he may erect on the said demised land and to execute in favour of such tenant or tenants agreement or agreements in form prescribed by the Rent Control Act. No such form, we were informed, has been provided by the Act. Cl. 4 provided that on or before the execution of the said Indenture the lessee should advance to the lessor a sum of Rs. 10,000/- "for the observance and performance of the covenants and stipulations on the part of the lessees hereinbefore contained and which amount shall be a charge on the said land and premises hereunder mentioned and the lessor shall allow the lessees to deduct every month a sum of Rs. 100/- (Rupees one hundred) out of the rent payable by the lessees to the lessor and

credit the same towards the liquidation of this deposit amount till the whole of this deposit amount is fully paid of". Cl. 8 empowered the lessees "at all times and from time to time hereafter to construct and erect upon any part of the land hereby demised buildings of every description howsoever but subject to the rules and regulations of the Municipality and Government.....".

The respondents thereafter filed two suits in the Small Causes Court at Bombay for eviction of the appellant and for possession of the said portions of the said two plots relying on s. 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 57 of 1947 (hereinafter referred to as the Act) which entitles a landlord to recover possession of the premises let out to a tenant where the premises are land and such land is reasonably and *bona fide* required by the landlord for the erection of a new building. The appellant resisted the suits *inter alia* on the ground (which is the only ground which now survives in this appeal) that part of the consideration payable under the said lease was prohibited under s. 18 of the Act, that the lease was, therefore, illegal and void and could not be the basis for the respondents' right to recover possession under s. 13(1).

The Trial Court, as also the Appellate Bench of the Small Causes Court, negatived this contention on 3 grounds; (1) that the said lease did not fall within the scope of Part II of the Act which contains s. 18, (2) that assuming that it did, the advance payment of Rs.10,000 did not fall within the mischief of s. 18(1), and (3) that even assuming that the lease fell within Part II of the Act and further assuming that the said Rs. 10,000/- were within the mischief of s. 18(1) the provisions of s. 18(1) affected the lessor but did not make the lease invalid. Aggrieved by this decision the appellant went to the High Court by way of a writ petition under Art. 227 of the Constitution. The High Court dismissed the writ petition agreeing with the Appellate Bench on the first and the second grounds, but leaving the third ground undetermined as in its opinion it was unnecessary to decide it in the view it took on the first and the second grounds. Hence this appeal by special leave.

Mr. Gokhale raised the very same contention which the appellant raised unsuccessfully in the Small Causes Court and the High Court. The question, therefore, for determination is, whether the said lease falls within the scope of Part II of the Act, for, if it does not, obviously it would not attract the provisions of s. 18(1) which is contained in that Part.

The leased premises being land, admittedly not used for agricultural purposes and being situated in the Bombay Suburban District, are clearly premises under s. 5(8) of the Act. But so far as Part II is concerned, s. 6(1) provides that this Part shall apply

A only to premises "let for residence, education, business, trade or storage". As the lease was not for any of the purposes set out in s. 6(1), Part II of the Act, and therefore, s. 18(1) would obviously have no operation.

B In *Mrs. Dossibai N. B. Jeejeebhoy v. Khemchand Gorumal & Ors.*<sup>(1)</sup> the appellant had taken on lease, as in the present case, an open land and the question was whether, when such land is being leased not to be used for the purpose of residence in its condition of open land but to be used for the purpose of residence after putting up structures thereon, the letting of land can be said to be letting for residence. The leases there mentioned that the lessee will construct buildings suitable for residential, business, industrial or office purposes. It was held that the leases fell under s. 6(1), and therefore, were within the ambit of Part II of the Act, and consequently, the Small Causes Court at Bombay, as the Rent Court under the Act, and not the ordinary civil court, had jurisdiction to try a suit for possession. Thus, the question whether Part II of the Act applies to particular premises or not depends on the purpose for which such premises are leased.

E In the present case no difficulty arises, for, cl. 8 of the lease in clear terms provides that the lessees were to be at liberty at all times and from time to time to construct and erect upon any part of the demised land buildings of every description howsoever. Though the lease was in respect of open land except to the extent thereof on which the appellant had built structures, the purpose for which it was demised clearly was for constructing buildings of any description howsoever and not for constructing buildings for residence, education, business, trade or storage. The land thus demised, though premises within the meaning of s. 5(8), was not premises "let for residence, education, business, trade or storage" within the meaning of s. 6(1), and therefore, s. 18(1) would not apply as was the case in *Mrs. Dossibai N. B. Jeejeebhoy v. Khemchand Gorumal & Ors.*<sup>(1)</sup> where the open land was let out for the purpose of putting up structures for residence.

G Mr. Gokhale's contention, however, was that s. 6(1) would apply because the expression "building of every description howsoever" would include buildings for residence, and therefore, the lessees were at liberty under cl. (8) of the lease to construct residential buildings also. That may be so, but then the lessees may choose not to put up any structure for any of the purposes set out in s. 6(1) in which case if Mr. Gokhale were to be right Part II would still apply. That cannot possibly be the meaning of s. 6(1). Properly construed, s. 6(1) must mean that in order that Part II

(1) [1962] 3 S.C.R. 921.

may apply the premises in question must be let out for the purposes of residence etc. and then only the leased premises would be subject to and governed by the provisions of Part II. The application of that part cannot have been intended to depend upon what a lessee may do or may not do. It is the purpose of the lease and not only future choice of a lessee which determines the application of Part II. That is the clear and obvious meaning of the words "let for" in s. 6(1). A

The next argument of Mr. Gokhale was that even though cl. 8 uses the expression "building of every description howsoever", the real purpose for which the lease was taken by the lessees was to construct structures for residence. In support of his argument he relied on cl. 2(c) of the lease which permits the lessees to take construction loans from prospective tenants of the buildings to be erected by the lessees and urged that since under s. 18(3) the only construction loans permitted are for financing the construction of residential buildings, the purpose of the lease must necessarily be for erecting residential building or buildings only. This argument also cannot be upheld, firstly, because the operation of cl. 2(c) relied on by Mr. Gokhale does not deal with nor is concerned with the purpose for which the land was leased, and secondly, because the question of taking construction loans can arise only if the lessees were to decide to put up building or buildings for residential purposes and not otherwise, as s. 18(3) of the Act permits advances from tenants for constructing such buildings only. Cl. 2(c) in the lease was put in the Indenture to provide for such a contingency and as an exception to the covenant against the lessees mortgaging, charging or assigning the demised land and/or the buildings which may be erected thereon, and not for laying down the purpose for which the land was demised. It is, therefore, neither right nor proper to construe the purpose of a lease by depending upon such an exception to a covenant restricting the lessees from mortgaging, charging or assigning the land or the buildings which might be put up thereon. There is, therefore, no reason to hold that because s. 18(3) permits construction loans in respect of residential buildings only, it must follow that the purpose of the lease must be held to be one for erecting residential buildings. B

In the view that we take that the leased premises are not premises contemplated by s. 6(1). and therefore, Part II of the Act cannot apply, the second question decided by the High Court, namely, that the advance amount of Rs. 10,000/- was not a payment falling under s. 18(1) would not arise. For that reason, the third question also which was in the further alternative need not be gone into. C

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- A** In the result, the appeal is dismissed with costs. The appellant will not be dispossessed of the premises in appeal till November 28, 1969 when he shall hand over to the respondent quiet and vacant possession.

- B** Y.P. *Appeal dismissed.*