THARUMAL AND ANR. A

v.

MASJID HAJUM PHAROSAN VA MADRASSA TALIMUL ISLAM, MIRZA IZSMAIL ROAD, JAIPUR

MARCH 31, 1994 B

[S. MOHAN AND B.L. HANSARISA, JJ.]

Transfer of Property Act, 1882 : Sections 106, 111(g)(h) and 114A—Determination and forfeiture of Lease—Absence of clause as to re-entry in case of breach of payment of rent—Requirement of notice determining C *tenancy complied with—Held it was determination of lease and not forfeiture of lease—Distinction between English Law and Indian Law—Discussed.*

Rajasthan Premises (Control of Rent and Eviction) Act, 1950 : Section 2(3).

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State Government—Notification—Wakfs—Exemption from the provisions of Act—Applicability of the provisions of Act to suit land.

Wakf Act, 1954 : Sections 5(2) and 6(4).

Wakf—Registration—Publication of lists—Effect of. E

Constitution of India, 1950 : Article 136—Appeal—Raising of fresh plea—High Court entertaining fresh plea in second appeal—Supreme Court whether should entertain the plea.

The respondent filed a suit against the appellant claiming vacant F **possession as well as arrears of rent pleading (i) that appellants tenancy had been determined; and (ii) that the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 were not applicable to the suit property since by a Notification the State Government had exempted all the premises owned by Wakfs registered under the Wakfs Act** G **from the operation of the Act. The appellants contested the suit claiming benefits of Section 114-A of the Transfer of Property Act, 1882 on the ground that it was a case of forfeiture of tenancy and not determination of tenancy. The Trial Court granted relief to the appellants under Section 114-A but on appeal the First Appellate Court held that it was really a case of determination of tenancy and, therefore, the appellants were not entitled** H

A to the aforesaid benefit. The appellants preferred second appeal before the High Court, raisig a fresh plea that the wakf in question being Wakf-alal-aulad, the benefit of exemption was not available to the respondent. The High Court dismissed the appeal.

In appeal to this Court it was contended on behalf of the appellants B (1) that they were wrongly debarred from the satutory provisions of Act by the courts below inasmuch as to a Wakf-alal-aulad, exemption from the Act, permitted by Section 2(3), is not available; (2) that Wakf-alal-aulad cannot be said to be either an educational, religious or charitable institute and, as such, benefit of the exemption given by the Notification to C registered wakfs could not have been taken advantage of by the respondent; and (3) that from the notice it would appear that it was the non- payment of rent as agreed upon by the appellants was the cause of action for issuance of notice and as such requirement of clause (g) of Section 111 of Transfer of Property Act was satisfied.

D Dismissing the appeal, this Court

HELD : 1. The question whether the Wakf is a wakf-alal- aulad being essentially a question of fact and there having been even no averment about this in the written statement filed by the appellants and no issue on this E point having, therefore, been framed, it was not open to the appellants to take such a stand for the first time before the High Court. The mere fact that the High Court has examined this aspect and recorded its finding is not enough to require this Court to express its views. The High Court might not have as well addressed itself on this question. [268-C-D]

F 2. The wakf at hand is a registered wakf, as contemplated by Section 5(2) of the wakfs Act, 1954. Therefore, the premises at hand were exempted from the provisions of the Act. Further, in view of the provisions contained in Section 6(4) of the Wakf Act, the list of Wakfs published under Section 5(2) is final and conclusive unless modified as mentioned in the section, G to which effect there is nothing before this Court. [268-E-F]

Board of Muslim Wakfs v. *Radha Krishan,* [1979] 2 S.C.C. 468 and *Fazlul Rabbi Pradhan* v. *State of West Bengal,* [1965] 3 S.C.R. 307, referred to.

H 3.1. The requirements of forfeiture as mentioned in section 111(g) of

the Transfer of Property Act being not satisfied and the notice as given by the respondent to the appellants having stated about determination of tenanacy, the present cannot be taken to be a case of forfeiture. [268-G-H]

3.2. For the first of the three situations mentioned in Section 111(g) to operate the condition has to be one the breach of which had provided the lessor a right to re-enter. In the present case, there is nothing to show that such was the condition of the tenancy. That apart, the notice itself shows that it was clause (h) of Section 111 which was pressed into service, because the requirements of notice of termination as mentioned in Section 106 of the Transfer of Property Act were duly borne in mind, as per which section in case of monthly tenancy, the notice must expire with the 'end of a month of the tenancy'. The perusal of the notice shows that the tenancy at hand was a monthly tenancy as per English calendar and it is because of this that vacant possession was demanded from the end of an English calendar month, stating simultaneously about 'the last date of the month of.....'. These salient features do not leave any doubt that the present was not a case of forfeiture but of determination of tenancy. [269-D-F]

4. Under English Law a distinction is made between a condition and convenant insofar as the requirement of a specific proviso in the lease to re-enter in case of breach of the same is concerned. It is only in case of covenant that the lease must contain proviso for re-entry. No such stipulation is deemed necessary in case of breach of a condition. In the Indian Law, however, no distinction exists between a condition and covenant in this regard. There was no stipulation in the contract at hand containing a clause of re-entry in case of breach of payment of rent. Therefore, the present is not a case of forfeiture, but of determination of tenancy by exercising power under clause (h) of Section 111 of the Act. [269-G-H; 270-B-E]

Peter Alan Basil v. *East Indian Pharmaceutical Works,* A.I.R. (1976) Calcutta 182 and *Merwanji Nanabhoy Merchant* v. *Union of India,* [1979] 4 S.C.C. 734, referred to.

Woodfall's *'Landlord and Tenant',* 1978 Edn. Vol. I p. 836 & 837; Martin Partington's *'Landlord and Tenants'*, 2nd Edn. p. 406 and Evans and Smith's *"The Law of Landlord and Tenant"*, 4th Edn. p. 200, referred to.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1651 of 1990.

From the Judgment and Order dated 11.1.90 of the Rajasthan High Court in R.S.A. No. 104/84.

B R. Saccher, Mrs. Rani Chhabra and Ms. B. Sharma for the Appellants.

S.M. Jain, A. Gupta, M.K. Das, Cap. K.S. Bhati and N. Arula for the Respondent.

C The Judgment of the Court was delivered by

HANSARIA, J. A suit for eviction was filed by the respondent against the appellants in the court of Munsif and Judicial Magistrate, Jaipur, on the averment that the tenancy of the appellants having been determined there have no right to occupy the suit premises. Prayer for vacant possession of the premises as therefore made, alongwith realisation of some arrears of rent, so also damages for the use and occupation of the premises by the appellants on and from 1.8.80. The plaintiff specifically averred that provisions of Rajasthan Premises (Control of Rent and Eviction) Act, 1950, hereinafter the Act, had no application in view of the exemption granted by the State Government vide its notification No. F.20 (14) Rev. 1/76 dated 20.8.1976 by which all the premises owned by Wakfs registered under the Wakfs Act were exempted from the operation of the Act.

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2. The appellants took a stand that the exemption notification was void; and that the present being a case forfeiture of tenancy, distinguished from determination of the same, they were entitled to the benfit of section 114-A of the Transfer of Property Act, 1882.

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3. The learned Munsif did not accept the case of the appellants in so far as the challenge to the exemption notification is concerned, but gave the relief visualised by section 114-A of the Transfer of Property Act. The Munsif, therefore, ordered that in case the appellants would pay all the arrears within 15 days of the judgment they would not be evicted from the premises.

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4. Feeling aggrieved, the respondent preferred an appeal in the court of District Judge, Jaipur, who took the view that the present was really a

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case of determination of tenancy and so the appellants were not entitiled to the aforesaid benefit. This judgment of the District Judge found the appellants before the High court of Rajasthan (Jaipur Bench), where, for the first time a plea was taken that the wakf in question being wakf-alal-aulad, the benefit of the aforesaid exemption was not available. Another point urged was that the present was in fact a case of forfeiture of tenancy and not of determination of the same. The High Court did not accept any of the contentions and so dismissed the second appeal. Feeling aggrieved, this Court has been approached under Article 136.

5. Shri Rajinder Sachhar, learned senior counsel appearing for the appellants, has taken pains to submit that the appellants were wrongly debarred from the salutory provisions of Act by the courts below inasmuch as to a wakf-alal-aulad exemption from the Act permitted by its section 2(3) is not available. The focal point of this submission is that the section empowers the State Government to exempt from all or any of the sections of the Act only those premises which are owned by any "educational, religious or charitable institution, the whole of the income derived from which is utilised for the purposes of that institution". Learned counsel urges that wakf-alal-aulad cannot be said to be either an educational, religious or charitable institute and, as such, benefit of the exemption given by the aforesaid notification to registered wakfs could not have taken advantage of by the respondent.

6. Shri Sachhar has put forward his submission as aforesaid on being pointed out that it was not open to the appellants to challenge the validity of the exmeption notification in the absence of the State being respondent in this appeal. Learned counsel categorically stated that he was not challenging the validity of the notification (though that was the stand taken earlier through out of proceeding), but he is confining his contention to the non-applicability of the exemption to the premises in question. As to the non-applicability, the contention is that the wakf at hand is apparently not an educational or religious institution. At best it could be said to be charitable, which it is not in view of what has been pointed out by this Court in *Fazlul Rabbi Pradhan* v. *State of West Bengal*,[1965] 3 SCR 307, in which the meaning of the expression "charitable" has been explained. Learned counsel further submits that the view taken by the High Court that even wakf-alal-aulad would be a charitable institution is not sustainable in law.

A 7. We do not propose to express any opinion on the aforesaid contention of Shri Sachhar, because it has been brought to our notice by Shri S.M. Jain, learned senior counsel appearing for the respondent, that there was not even a pleading by the appellants that the wakf at hand is wakf-alal-aulad. That this was the position cannot be doubted inasmuch as in the written statement, a copy of which was made available to us by Shri B Jain, the only point taken in this connection was that the wakf at hand was not a registered wakf, as was the averment of the respondent. It is because of this that the issue framed on this part of the list was : "whether the plaintiff-Masjid is a registered society by the Rajasthan Board of Muslim Wakf, Jaipur and the plaintiff has right to file the suit!" The question C whether the wakf with which we are concerned is a wakf-alal-aulad being essentially a question of fact and there having been even no averment about this in the written statement filed by the appellants and no issue on this point having, therefore, been framed, we hold that it was not open to the appellants to take such a stand for the first time before the High Court. D The mere fact that the High Court has examined this aspect and recorded its finding is not enough to require us to express our views. According to us, the High Court might not have as well addressed itself on this question.

8. In view of the above and because of there being nothing to doubt that the wakf at hand is a registered wakf, as would appear from notifica- E tion dated September 23, 1965 issued by the office of Rajasthan Board of Muslim Wakf, Jaipur, as contemplated by section 5(2) of the Wakfs Act, 1954, copy of which was made available to us by Shri Jain for our perusal, we hold that the premises at hand were exempted from the provisions of the Act. May it be stated that in view of what has been provided in section F 6(4) of the Wakf Act, the list of Wakfs published under Section 5(2) is final and conclusive unless modified as mentioned in the section, to which effect there is nothing before us. We may refer in this connection to *Board of Muslim Wakfs* v. *Radha Krishan,* [1979] 2 SCC 468 taking the aforesaid view. We, therefore, reject the first submission of Shri Sachhar.

G 9. In so far as the plea of the present being a case of forfeiture and not of determination of tenancy, we would state that the requirements of forfeiture as mentioned in section 111(g) of the Transfer of Property Act being not satisfied and the notice as given by the respondent to the appellants (Annexure P-I) having stated about determination of tenancy, H the present cannot be taken to be a case of forfeiture. We have said so

because of the three situations visualised by clause (g), it is apparent that it is the first alone which could get attracted—the same being breaking of any express condition which provides that on breach thereof the lessor may re-enter. Shri Sachhar submit that from the notice (Annexure P-I) it would appear that it was the non-payment of rent as agreed upon by the appellants which was the cause of action for issuance of notice and as such this condition is satisfied. To support his submission it is urged that in the suit as filed arrears of rent had also been claimed which would show that the respondent's case was breaking of condition regulating to payment of rent in time.

10. Though a perusal of the notice, which is dated 29.5.80 does show that it mentioned about non-payment of rent, but it also stated about termination of tenancy and demanded vacant possession by 31.7.80 or "the last date of the month of.....". In the suit as filed rent had not been claimed on and from 1.8.80, it was rather damages on account of illegal use and occupation. For the firstof the three situations mentioned in section 111(g) to operate the condition has to be one the breach of which had provided the lessor a right to re-enter. In the present case, there is nothing to show that such was the condition of the tenancy. That apart, the notice itself would show that it was clause (h) of section 111 which was pressed into service, because the requirements of notice of termination as mentioned in section 106 of the Transfer of Property Act were duly borne in mind, as per which section in case of monthly tenancy, the notice must expire with the "end of a month of the tenancy". The perusal of the notice shows that the tenancy at hand was a monthly tenancy as per English calendar and it is because of this that vacant possession was demanded from 31.7.80, the end of an English calender month, stating simultaneously about "the last date of the month of.....". These salient feature do not leave any doubt in our mind that the present was not a case of forfeiture but of determination of tenancy. We, therefore, reject the second contention as well of Shri Sachhar.

11. It would be of interest to state that under English law a distinction is made between a condition and convenant insofar as the requirement of a specific proviso in the lease to re-enter in case of breach of the same is concerned. It is only in case of convenant that the lease must contain proviso for re-entry. No such stipulation is deemed necessary in case of breach of a condition. (See pages 836 and 837 of Woodfall's 'Landlord and

A Tenant', (1978 Edition) Volume-I; Page 406 of Martin Partington's 'Landlord and Tenant' (2nd Edition); and page 200 of Evans and Smiths 'The Law of Landlord and Tenant' (4th Edition). In the Indian Law, however, no distinction exists between a condition and covenant in this regard, as has been stated by a bench of Calcutta High Court speaking through MM Dutt, J., as he then was, in *Peter Alan Basil* v. *East Indian* B *Pharmaceutical Works*, AIR (1976) Calcutta 182. Reference may be made to a decision in this Court in *Merwanji Nanabvhoy Merchant* v. *Union of India*, [1979] (4) SCC 734, in which the landlord had sought for eviction on the ground of damage to the property because of neglect in maintaining the same which was said to be violation of clause 2 (iii) which stated that C the tenant will keep the premises in good condition, as well as for failure to pay required rent. As however, there was no stipulation in the agreement empowering the landlord to re-enter in case of breach of the aforesaid clause, it was held that the vacant possession could be demanded on the ground of determination of tenacy simpliciter, and not, because of the D forfeiture of tenancy.

12. Having seen that in the case at hand there was no stipulation in the contract containing a clause of re-entry in case of breach of payment of rent, it has to be held that the present is not a case of forfeiture, but was of determination of tenancy by exercising power under clause (h) of E Section 111 of the Act.

13. No other point has been urged. The appeal, therefore, stands dismissed. We, however, make no order as to costs. The appellants would get three months time from today to vacate the premises on their furnishing usual undertaking within a period of four weeks.

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T.N.A. Apeeal dismissed.