

(1990) 02 P&H CK 0004

High Court Of Punjab And Haryana At Chandigarh

Case No: E.S.A. No. 1877 of 1987

Chuni Lal

APPELLANT

Vs

Amir Chand

RESPONDENT

Date of Decision: Feb. 27, 1990

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 100, Order 39 Rule 1

Hon'ble Judges: G.R. Majithia, J

Bench: Single Bench

Advocate: Hari Om Sharma, for the Appellant; C.B. Goel, for the Respondent

Final Decision: Dismissed

Judgement

G.R. Majithia, J.

This revision petition is directed against the order of the First Appellate Court which on appeal affirmed that of the executing court dismissing the objections under Order 21 Rule 100 C

2. The facts:

A tabela now described as a shop situated in Purani Sabzi Mandi, Jagadhari was mortgaged by Shri Jagdish Rai, Advocate predecessor-in-interest of the Petitioner and Respondents No. 2 and 3 with Smt Gian Bala. The mortgage was redeemed and a final decree for redemption was passed by the civil court on October 25, 1972. The premises were in possession of Respondent No. 1 Chuni Lal tenant (for short the tenant). In execution of the decree for redemption the tenant was evicted and the possession was delivered to the Petitioner and proforma Respondents No. 2 and 3. The tenant filed an application under Order 21. Rule 100 Code of CPC for restoration of the possession of the property. It was accepted vide order dated April 14, 1976 of Subordinate Judge, Jagadhari. The Petitioner and Respondents No 2 and 3 were directed to restore possession to the tenant. The order was not complied with. The Petitioner and Respondents No. 2 and 3 filed a civil suit for permanent

injunction restraining the tenant from taking possession of the disputed premises. Along with the suit, an application under Order 39, Rules 1, 2 Code of CPC was filed which was dismissed by the trial judge and the order was affirmed on appeal by the First Appellate Court. The Subordinate Judge, Jagadhari passed an order dated December 4, 1979 directing delivery of possession to the tenant after over-ruling the objections of the Petitioner and Respondents No. 2 and 3. The order dated December 4, 1979 was affirmed on appeal by the District Judge, Ambala. The Petitioner having failed to successfully resist the tenant from taking possession of the disputed premises filed objections before the executing court stating that the building on the land was demolished by the Municipal Committee and the tenant was entitled to restoration of possession of the building and not of the vacant land and since the building has been demolished; the tenant was not entitled to restoration of possession of the vacant land. The application was dismissed by the trial judge and the order was affirmed on appeal by the First Appellate Court. Hence this appeal.

3. The only ground urged by the learned Counsel for the Petitioner is that the tenant was entitled to restoration of possession of the building and not the vacant land and since the building has been demolished, he is not entitled to possession of the vacant land and in support, of his submission he relied upon AIR 1948 180 (Privy Council) Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh Vs. Alps Theatre, and Mahadeo Prosad Shaw Vs. Calcutta Dyeing and Cleaning Co.. In Bhan Kumar Chand case (supra) the High Court as a matter of fact found that the village, the possession of which was decreed in favour of the Decree Holder was inextricably mixed up with other villages that after a lapse of more than half a century, it was impossible to find out with reference to any contemporaneous records, as to which lands constituted the village in question and the decree holders were unable to identify the village and the High Court held that the decree holders were not entitled to possession in execution of the decree for possession. The Privy Council, in appeal, agreeing with the finding of fact arrived at by the High Court, dismissed the appeal of the decree holders. The facts of the above case have no applicability to the facts of the instant case. In Commissioner of income tax, Punjab, case (supra), the only question which arose before the apex court was relating to interpretation of Section 10(2)(vi) of the Income Tax Act and the question for answer was "Whether the cost of land is entitled to depreciation under the schedule to the income tax Act alongwith the cost of the building standing thereon?". This ruling has no relevance to the instant case. In Mahadeo Prosad Shaw case (supra) the court dealt with the frustration of contract as embodied in Section 56 of the Contract Act and examined the scope of Section 108 of the Transfer of Property Act vis-a-vis It was found that the provisions of the former section stood substantially incorporated in the latter section. The question before the Bench arose in the following circumstances:

The landlord got an ex-parte decree for possession against the tenant In execution of the ex-parte decree, he obtained possession. The tenant moved an application under Order 9, Rule 13 Code of CPC for setting aside the ex-parte decree and the ex-parte decree was set aside. During the pendency of certain proceedings in the High Court under the orders of the Calcutta Corporation one of the structures which was standing on the demised premises was demolished. The tenant applied for restoration of possession u/s 144 Code of CPC after the ex-parte decree was set aside. The landlord filed objections on the ground that the Corporation demolished one of the structures and there has been a frustration of the contract within the meaning of Section 56 of the Contract Act. The landlord's objections were ruled out by the executing court and the order was upheld on appeal by the High Court. The Calcutta High Court held that the lease of the demised premises has not been frustrated because of demolition of one of the structures and the tenant was entitled to restoration of possession of other portion of the property leased out to him and the extent to which he has been deprived of possession of that portion of the property on which super structure has been demolished, he would be entitled to abatement of rent The question which arose before the Calcutta High Court was entirely different than the one in the instant case.

4. The doctrine of frustration embodied in Section 56 of the Indian Contract Act which renders a contract void by reason of the of performing the act required on account of some event, which the promisor could not prevent, would not apply in the case of a lease The rights of the parties after a lease was granted rest not in contract Though u/s 4 of the Transfer of Property Act, the chapters and sections of the said Act relating to contracts are to be taken as part of the Indian Contract Act yet that does not mean that the provisions of Contract Act are to be read into the Transfer of Property Act The doctrine of frustration cannot apply to a lease of the present nature. Moreover, in this case even if this doctrine had been applicable, the facts do not show that the contract of lease had become impossible of performance The landlord who demolished the premises in compliance with a notice issued by the Municipal Committee could re build the premises in the same form in which they existed before demolition and the rights of the lessor and the lease would then be available with respect to the new premises. Somewhat identical matter arose for determination in [Rahim Bux and Others Vs. Mohammad Shafi](#), wherein it was held as under:

When a leased building is demolished following a notice u/s 263(1) U.P. Municipalities Act, the lease does not become impossible of performance u/s 56 of the Contract Act because the doctrine of frustration which applies to purely contractual obligations and not to contracts creating estates or interests in land which had already accrued, does not apply to it. Further, even if it applies, such an impossibility does not arise since the lessor rights will revive when the building is reconstructed.

5. Resultantly, I hold that the tenant is entitled to restoration of possession not only of the vacant land out with the super-structure raised on it by the landlord as was in existence prior to its demolition. The landlord is directed to raise the super structure on the vacant land as it existed prior to the demolition within two months from today failing which the tenant will raise the superstructure and claim adjustment of the cost of the construction from the landlord by claiming a set off towards rent.

6. For the reasons aforesaid, the appeal is dismissed. No order as to costs.