(1960) 07 CAL CK 0027

Calcutta High Court

Case No: Appeals from Appellate Decree No''s. 901 to 908 of 1955

Jiwanlal and Co. and Others		APPELLANT
	Vs	
Manot and Co., Ltd.		RESPONDENT

Date of Decision: July 4, 1960

Acts Referred:

- Contract Act, 1872 - Section 56
- Transfer of Property Act, 1882 - Section 108, 108(e), 111

Citation: 64 CWN 932

Hon'ble Judges: Chatterjee, J

Bench: Single Bench

Advocate: Prafulla Kumar Roy, Manindra Nath Ghosh and Samarendra Nath Banerjee, for the Appellant;G.P. Kar and B.K. Lal, for the Respondent

Final Decision: Allowed

Judgement

Chatterjee, J.

These appeals are after an order on remand by Mr. Justice Chunder. The appeals are on behalf of the tenants in suits for ejectment. The buildings are partly one-storied and partly two-storied consisting mainly of two rows of godown type rooms with a cart passage running between them from east to west. There is a road on either side--the Strand Road on the one and the Clive Street on the other. The respondents have got a plan sanctioned from the Corporation for building and rebuilding after demolition of the present structure. The judgment of Mr. Justice Chunder before remand is reported in 57 C.W.N., page 802(1) between T.D. Nandi v. Messrs Menot & Co. Ltd. Mr. Justice Chunder by an order at page 806 of the report directed the Court, (i) to go into the questions of comparative advantage and disadvantage as raised in the evidence of the defendants'' engineer on the evidence on record and such further evidence as may be adduced and (ii) to go into the question of time within which the work may be reasonably expected to be completed and, therefore, the two aforesaid questions are the only questions which can be gone into at the

present stage. Mr. Justice Chunder has said that the other points, "except the question of comparative advantage and disadvantage and the question of time", would be final between the parties. I have, therefore, to examine the matter with reference to them. *****

[His Lordship then dealt with certain other facts and proceeded.]

******

The question that was raised in the Courts below in this connection was whether the building can be so constructed as not to disturb the tenants, but the Courts have found, as a matter of fact, that the rebuilding cannot be so constructed. If that is so, the tenants'' disadvantage of being ejected must be compared with the public advantage of extended accommodation. Having considered that, the Courts have found that the advantage in building outweighs the disadvantages of the tenants.

2. The defendants will undoubtedly on ejectment be put to great disadvantages. That was the reason why Chunder, J. sent the matter back era remand and that is the reason why the Courts below have considered with great care and caution whether the building could be constructed without ejecting the tenants. Further evidence was taken. The disadvantages of the tenants are patent. It is said that There is no second place in the city of Calcutta which is so much in the heart of the business centre as this one and for all practical purposes equally good accommodation or similar accommodation is an impossible matter.

3. The only other possible way that remains is to direct the defendants to vacate the premises without passing a decree for ejectment. Mr. Roy for the appellant objected on the ground that after the demolition of the old building the tenancy would come to an end. According to him, the lease would determine by frustration. Mr. Kar was also of the same opinion. If that is the legal position, then the question of vacating the premises even temporarily is of no assistance to the tenants and will do no good to the landlords.

4. We must, therefore, examine the position as to whether the lease would determine as soon as the old building is demolished or, in other words, whether by the demolition there would be frustation of the lease and whether the lease will stand determined by such frustration. I have considered that matter in a recent case (2) in S.M.A. 117/59 between Mahadeo Prosad Shaw v. Calcutta Dyeing & Cleaning Co. in a judgment delivered by myself on June 8, 1960.

5. There it has been held that there may be some difference of opinion in England after the decision in Crickle-wood Property & Investment Trust Ltd. and ors. v. Leightons Investment Trust Ltd. (3) reported in 1945 (1) All E.R. 252 where ''Lord Russel of Killowen and Lord Goddard were of opinion that the doctrine had no application to a lease while Viscount Simon, L.C. and Lord Wright thought that it might apply in rare and exceptional instances.'' I have also come to the conclusion

that, on the basis of the decision (4) in Satyabrata v. Mugneeram reported in 1954 S.C.R. 310, section 56 of the Contract Act would apply to the contracts generally rather than principles of English law. Finally on the basis of a decision of the Supreme Court between Kidar Lall Seal and Another Vs. Hari Lall Seal, , I have found that there being a special law dealing with transfer of property, which is the Transfer of Property Act, the general law, which is the Indian Contract Act, will not apply. The conclusion, therefore, I arrived at was that the entire law of the doctrine of frustration as may be applied to leases is to be found in section 108(e) of the Transfer of Property Act It will not be out of place to refer again to section 108(e) in this connection. The relevant portion is "If, by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void." Therefore, if, by irresistible force, any material part of the property be wholly destroyed, even then the lease shall be void only at the option of the lessee. I have then to consider the meaning of the words ''any material part''. In this case what is going to happen is not merely ''any material part'' but the whole of the building is being destroyed or, in other words, not any one of the material parts is being destroyed but all the material parts of the building are being destroyed. Hence, the question is does it apply when the entire building is destroyed. The section itself uses the words ''wholly destroyed'' and the word ''any'' has been used which may mean all--which may also mean ''a portion of it'' and the option lies with the tenants; so that prima facie even after the building is totally destroyed if the tenant does not exercise his option to terminate the lease, the lease would still be continuing. It has been held in Kunhayen v. Mayan (6) 17 Madras 98 that, where in a coffee plantation all the coffee plants had been absolutely destroyed by fire and the lessee abandoned, the lease terminated as the lessee had abandoned without giving sufficient notice regarding the option. In another case between Siddick Hazi v. Gruel & Co. (7) 35 Bom 333 it has been held that a godown being destroyed wholly but yet the tenant having kept several bags of sugar in the godown the tenancy would still remain or, in other words, even though the words used are ''any mate-part'', it has been considered to include those cases where the entire property had been destroyed. As I have already held in another case, the word ''any'' may be understood in two senses--one in restricted and the other in more comprehensive sense or, in other words, the word ''any'' may mean ''any part of or ''the entire whole''. There is no reason to understand the word in any restricted sense to exclude the entire whole of it; in the two aforesaid cases, it has been considered to include the entire whole.

6. Hence, in my opinion, if the house is destroyed wholly, the lease does not determine unless the lessee so chooses. In this connection I may refer to section 111 of the Transfer of Property Act. That section is the only section which deals with the conditions under which a lease determines. This section does not include frustration as a ground for determination of the lease. Hence, it is clear that the

Legislature never intended that a lease would automatically determine if the building is destroyed. If they had so intended, they could have easily inserted a clause to that effect in section 111. Not having done that, I must consider as if they did not consider that frustration would ipso facto cause determination of a lease. Instead of that, they included the matter u/s 108. That section deals with the rights and liabilities of the lessor and the lessee in the absence of a contract or local usage to the contrary. Therefore, the parties may contract out of section 108 or, in other words, the parties may agree that even by demolition, the lease would not be frustrated. I understand, there has been several cases on the basis of such contract in our High Court, but I have not got any decision before myself. But apart from that, I must come to this finding that the question of frustration has been dealt with in the section dealing generally with the rights and liabilities of the lessor and the lessee and has not been treated as one of the methods for determination of a lease. I, therefore, hold that by the demolition of the entire house the lease would not be destroyed. The reason is that a lease of a premises is not without reference to the land on which it stands and that piece land is not destroyed.

7. In the aforesaid case of (2) S.M.A. 117/59 I have also held that neither the lessee has a right to raise a new structure at his cost on the demolished portion nor can he compel the lessor to build another. The question then remains is for what useful purpose will the tenant, in such a case, would exercise his option not to avoid the lease.

8. That brings me at once to the question for what useful purpose did the Legislature make a provision for avoiding the lease only at the option of the lessee. I am afraid, I cannot say that the Legislature has done it without any purpose or for no useful purpose. The words of the Legislature must be considered to be the true depository of their intent as has been held by the Supreme Court in Darshan Singh v. State of Punjab (8) reported in 1953 S.C.R. 274. I cannot treat that this provision of option to the lessee is a mere surplusage and is of no useful purpose. Such construction should not be made as has been held by the Supreme Court in The State of Bombay Vs. Ali Gulshan, .

9. It is, therefore, the duty of the Court to give effect to the meaning of this provision in the section. The Supreme Court has held that it is the duty of the Courts to give effect to the meaning of an Act when the meaning can be fairly gathered from the words used. (Refer to Shamarao v. Parulekar (10) 1952 S.C.R. page 683).

10. Before I go back to this section I would make some reference to the English law on that point. It cannot be disputed that the entire Transfer of Property Act has been based largely on the English law. I have already considered the difference of opinion on this matter in the House of Lords; but even now the law as generally recognised in England is that a lease is not determined by frustration. The only difference that was made when the Indian Act was enacted in the year 1882 is that in the Indian Act they thought that the lease should be determined at the option of the lessee.

Keeping this in mind, I would just consider two English cases of recent time after the aforesaid decision of the House of Lords.

11. The first case that I consider is between Simper v. Coombs (11) reported in 1948(1) All E.R. 306-a decision of Denning, J. In that case a house was destroyed by bombs during the war and it has been held by Denning, J. as follows:--

The position at common law is plain. She had a contractual tenancy, and that tenancy has never been determined by due notice to quit. It, therefore, continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands.

12. It was the tenancy of premises and the premises was destroyed by bomb. The landlord thereafter re-constructed and Denning, J. held, "The fact that a new house has been erected on the site does not make any alteration to the legal position."

13. I shall next consider another case of the Appeal Court in England. The case is between Denman v. Brise (12) reported in 1949(1) KB. 22. The house was destroyed by enemy action in 1940. The tenant lived elsewhere for 7 years. Thereafter, the landlord reconstructed a new building. The tenant wanted to take possession. The landlord refused. Then the tenant instituted the proceedings in question. It was held by the Court of Appeal that "as there was no evidence of abandonment or surrender of the lease. and as the contractual tenancy had not been determined when the new house became fit for occupation, the tenant on that date became the lawful tenant of it and entitled, as such, to occupy it." These two decisions illustrate the principle of law in England that, if a house is totally destroyed and then rebuilt, the tenant is entitled to occupy it.

14. But in England, it has been restricted only to contractual tenancy but not as yet extended to statutory tenants; because according to the law in England, the statutory tenants are not recognised to have an interest in the property, but it is considered something of a personal nature. So far as our law is concerned, we have not made that distinction. We have held that a tenant, who continues in possession after the termination of the lease by a notice to quit, remains a tenant though not under the terms of the contract but under the statute itself and we have not gone so far as to say that the statute creates merely a personal liability. In my opinion, if the tenancy is not determined, the tenant would be entitled to occupy the house. It cannot be said that the tenancy would automatically determine. I must make it clear that this is not the proper stage to decide all these matters. But as the law on this matter is far from being settled in our country, I do not want to pass a decree, which would be merely infructuous. I have considered the position only to satisfy myself that the decree and the order that I propose to pass will not be an infructuous order as contended by Mr. Roy. The last thing that I have to state is that in the case between (2) Mahadeo Prosad Shaw v. Calcutta Dyeing & Cleaning Co., I have

considered as to how far the English cases would help us. I have held following the decision of the Supreme Court that where there is a statute in our law there is no reason to go to the English law. But where there is no statute I think that English cases are helpful in showing how English Courts have decided cases under similar circumstances. This is also the view expressed by Mr. Justice B. K. Mukherjea of the Supreme Court in (4) Satyabrata v. Mugnee Ram referred to aforesaid.

15. Finally, in my opinion, the landlord-plaintiffs have established a case of building and rebuilding and the tenants undoubtedly will suffer on ejectment; the position, therefore, is that though I hold that the landlords require it for the purpose of building and rebuilding, I do not think it is desirable that the tenants should be ejected. The purpose of the Act is to protect the tenants as long as possible and to eject them only when it is not otherwise possible. The landlords do not require it for their own use and occupation. They want it for the public advantage of increased accommodation. As I have already stated, if the tenants are ejected, then for the time being, far from the problem being solved, it would create difficulties for the public as well as for themselves Hence, in my opinion, the only way to harmonise the rights of the landlord and at the same time to protect the tenants and also to serve best the purpose of the Act is to allow the landlords to rebuild after demolition of the present structure without the tenants being ejected but the tenants must be directed to vacate the premises so that the landlords-plaintiffs may rebuild. By such vacating the premises, the tenants will do all that they are required to do, to help the landlord to demolish the present structure and to rebuild. They would at the same time help the purpose of the Act in allowing larger accommodation to the public in general, but as it is not a case of personal use and occupation of the landlords, I find no necessity to pass a decree for ejectment if the tenant-defendants vacate but in case the tenants do not vacate, there is no other alternative than to direct them to be ejected, because by such obstruction they would not merely obstruct the landlord but also obstruct the purpose of the Act to provide larger accommodation for the public. I, therefore, allow the appeals, set aside the judgments and decrees of the Courts below and direct the tenants to vacate the premises in question within 31st of January, 1961. If the defendants do vacate as directed hereby, the suits will stand dismissed and the appeals will stand allowed without costs throughout. If the defendants do not vacate the premises in question within the time aforesaid, the appeals will stand dismissed with costs throughout.