

## **Begum Para Nasir Khan And Others vs Luiza Matilda Fernandes And Others on 14 September, 1981**

**Equivalent citations: (1982)84BOMLR95, 1981(3)SCALE1456, (1984)2SCC595, 1982(14)UJ48(SC), AIRONLINE 1981 SC 10, 1984 (2) SCC 595, 1982 BOM LR 95, 1982 BOM LR 84 95, 1981 SCC (SUPP) 48, 1982 PUNJ LJ 407**

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**Bench: Baharul Islam, D.A. Desai**

### **JUDGMENT**

D.A. Desai, J.

1. This is a matter in which the appellants have been evicted from the premises in which they were staying, under a decree which on the face of it is an ex parte decree.

2. Husband of the first appellant was the tenant of the premises and unfortunately he died on May 3, 1974 at Amritsar. According to the appellants, widow and minor children of the deceased tenant left for Karachi on February 1, 1975. The suit was filed against the appellants on February 2, 1975 for recovery of arrears of rent and possession. When the suit was filed the only ground on which eviction was sought was that the appellants were in arrears of rent for a period of six months or more and there being no dispute about the standard rent of the premises in view of the provision contained in Section 12(3)(a) of the Bombay Rents, Hotel & Lodging House Rates Control Act No. LVII of 1947 (Rent Act for short) decree for eviction must follow as a matter of course. The writ of summons of the suit after an attempt at service was returned with an endorsement 'left.' It is said that service was effected by sticking a copy of the writ of summons on the premises the subject matter of the suit. Subsequently plaintiff respondent sought an amendment of plaint impleading defendant No. 6. While impleading defendant No. 6 as a defendant to the suit, an amendment to the plaint was sought by which two more grounds for eviction were added. Briefly they were as under:

I. Bona fide personal requirement under Section 13(1)(g). II. Deceased tenant had inducted defendant No. 6 as Sub-tenant.

3. A further attempt to have the writ of summons with a copy of the amended plaint annexed served to the appellants met with the same result, and the same methodology was followed. The suit ultimately ended in an ex parte decree in favour of original plaintiffs. When the appellants came to know of the ex parte decree, they returned to India and moved an application for setting aside the ex parte decree. An appeal against the ex parte decree was preferred but the same failed. The High

Court declined to interfere in a petition under Article 227 of the Constitutions. Hence this appeal by special leave.

4. Mr Tarkunde appearing for the respondents seriously contended that this is not a case in which we should show any indulgence to the appellants; firstly, because they have no defence on merits and secondly, that they are in arrears of rent and the arrears have piled up to a huge amount. Mr. Chatterjee repelled this submission by saying that earlier under the order of the High Court the rent in arrears till the date of the order of the High Court and up to and inclusive of March 31, 1978 amounting to Rs. 26,963. 60 including water charges was deposited in the Court and subsequent to that date the appellants have been depositing in the Court the rent becoming due and payable from month to month. While this assertion is not controverted, by way of abundant caution we propose to direct that the learned Judge of the Small Causes Court before whom the case would come up pursuant to this order must first ascertain whether this averment of deposit is true and if it be so the respondents are at liberty to withdraw the same. If it is not true, he may direct the appellants to deposit rent in arrears within the time considered reasonable by him and provide sanction for breach of such order as deemed proper by him.

5. The question is whether we should sustain the ex parte decree. We are not inclined to examine the contention that there is no defence on merits, because we propose to set aside the ex parte decree and remit the suit for the trial court for disposal according to law. May be that we may be open to a charge of indulgence to a person guilty of negligence. But we cannot overlook the fact that the suit is governed by the Rent Act and in view of the provisions contained in Section 5(11)(c)(i) on the death of a tenant his tenancy would stand transmitted to any member of the tenant's family residing with the tenant at the time of his death or in the absence of any such member, any heir of the deceased tenant as may be decided in default of the agreement by the Court.

6. The deceased-tenant died leaving a widow and three minor children. Without expressing any opinion on the controversy in issue prima facie it appears that the children also inherited the tenancy and were entitled to continue in the premises as tenants. Transmission of tenancy in favour of minor children of the deceased tenant cannot be seriously questioned in the case. By the time the suit was filed the tenant had died and the tenancy had devolved on the heirs or the members of the family under Section 5(11)(c)(i). The minor children were staying with the deceased tenant at the time of his death. Transmission of tenancy right under the Rent Act takes place by operation of law, once the conditions for such transmission are satisfied. Therefore, apart from the widow, minor appellants had inherited the tenancy rights and had thus a considerable stake in the suit.

7. The question then is how the interest of the minors was protected before ex parte decree against them was made. The static soulless adherence to rules brings law into disrepute. The mother was away to a country outside India and the Court paying lip sympathy to the provision of the law appointed the Registrar of the Court to act as guardian a time of minors, whose only merit was to act as a guardian without having any interest in the proceedings. We are told by Mr. Ganpule that he engaged some advocate and this advocate is supposed to have cross-examined the witnesses. From our point of view there is nothing more ludicrous than appointing an advocate to protect the interest of the minors, without giving him aid of any sort.

8. The Court in this country being the guardian of all minors a mere detached observance of law brings it into disrepute and the Court as guardian should have made all efforts for effective participation by minors in the proceedings. Would the Court appointed Registrar as guardian, deposit rent in the Court to save the tenancy? The answer is obviously in the negative. Such adherence to the provisions of the law brings infamy to the whole process of adjudication of dispute involving vital stakes more so when persons under disability such as minors are before the Court. And it is this aspect which compels us to reject some of the weighty submissions of Mr Tarkunde.

9. The minors are entitled to an indulgent consideration so far as procedural lapses are concerned at the hands of the Court. It is not for a moment suggested that no ex parte decree can be made against the minors, but if the minors are represented by a person appointed by virtue of his office having no interest in the minors and if the decree is an ex parte decree, and the service was inefficient albeit formal we would be failing in our duty if we do not set aside an ex parte decree, and remit the case for adjudication on merits. We say no more.

10. We accordingly allow this appeal, set aside the ex parte decree passed by the trial court and affirmed by the superior courts and remit the suit to the trial court with a direction that it must proceed from the stage where the proceedings proceeded ex parte against the present appellants, namely, the widow and the three minOrs. If they have not filed written statement, they should be given time of two weeks to file written statement, and the suit must proceed from stage to stage thereafter.

11. In order to be fair to the respondent-landlords the learned Judge must ascertain whether the rent in arrears was deposited in the Court as herein stated and if not, urgent steps should be taken to get the same deposited and to have it deposited further from month to month. For carrying out this direction, proper steps should be taken by the trial court.

12. We accordingly allow the appeal as herein indicated. In the circumstances, there will be no order as to costs.

13. We direct original records must go forthwith and the suit may be expedited and disposed of as early as possible.