

Miss Maneck Gustedji Burjarji vs Sarafazali Nawabali Mirza on 23 March, 1976

Equivalent citations: AIR1976SC2446, (1977)1SCC227, AIR 1976 SUPREME COURT 2446

Author: P.N. Bhagwati

Bench: A.C. Gupta, P.N. Bhagwati, S. Murtaza Fazal Ali

JUDGMENT

P.N. Bhagwati, J.

1. This appeal by special leave is directed against an order passed by the Bombay High Court disposing of Special Civil Application No. 2936 of 1975 filed by the respondent against the appellant. The facts giving rise to the appeal are a little interesting and a mere narration of them will show how extraordinary is the order made by the High Court which is impugned in the appeal. It must be said in fairness to the learned Counsel appearing on behalf of the respondent that he did not seek to support the order and frankly conceded that it was unsustainable. This was in keeping with the highest traditions of the bar in the country.

2. The appellant is a tenant in respect of Flat No. 5 on the second floor of a building situate in Dadar Parsi Colony in the City of Bombay. The respondent had advertised for accommodation as a paying guest. In response to the advertisement, the appellant contacted the respondent and ultimately as a result of negotiations, an agreement dated 1st June 1972 was entered into between the appellant and the respondent whereby the appellant allowed the respondent to occupy and utilise one bed room together with a bath room and a furnished kitchen in the flat as a paying guest for a period of eleven months commencing from 1st June 1972 on payment of compensation at the rate of Rs. 350/- per month. During the pendency of this agreement, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Act) was amended by the introduction of Section 15A which gave protection against eviction to persons who were in possession of premises as licensees on 1st February 1973 by deeming them to be tenants of the landlords. The respondent seeking to take advantage of this amendment in the Bombay Rent Act, filed a suit in the Court of Small Causes Court, Bombay on 4th April 1973 claiming that he was a deemed tenant in respect of the entire flat and praying that the standard rent of the flat be fixed at Rs. 50/-per month. The respondent also obtained an ex parte injunction from the Small Causes Court on 24th April, 1973 restraining the appellant and her father from taking forcible possession of the flat from the respondent without due process of law or interfering with his possession of the flat. Immediately, as soon as the order of ex parte injunction was served on her, the appellant made an application to the

Small Causes Court and on her application, the ex parte injunction was varied and it was confined only to the portion of the flat which formed subject-matter of the agreement dated 1st June 1972.

3. Since the appellant was restrained from taking possession of the portion of the flat in the occupation of the respondent without due process of law the appellant filed suit No. 3413 of 1973 in the City Civil Court, Bombay on 26th April 1973 for recovering possession on the ground that the respondent was a paying guest and the period of his agreement having come to an end, he was bound to remove himself together with his belongings from the said portion of the flat. The appellant took out a notice of-motion in the suit for an injunction restraining the respondent from interfering with or disturbing the possession of the appellant in respect of the flat or from trespassing upon it, save in respect of the portion which the respondent had been allowed to occupy as a paying guest. On the notice of motion, an ex parte injunction was granted by the City Civil Court and this order of injunction was executed on 4th May 1973 by removing the lock of the respondent on the kitchen. The respondent thereafter moved the City Civil Court for restoration of the possession of the kitchen but his application was rejected by the City Civil Court on 29th April 1974. An appeal preferred by the respondent against this order was also dismissed by the High Court on 17th July 1974. The suit then came up for hearing and two preliminary issues were tried by the City Civil Court, one relating to court-fees and the other relating to jurisdiction. We are not concerned with the issue relating to court-fees and hence we need not pause to consider it. The issue relating to jurisdiction was that since the respondent had taken up the plea that he was a deemed tenant in respect of the flat, the City Civil Court had no jurisdiction to try the suit and the suit fell within the exclusive jurisdiction of the Small Cause Court under Section 28 of the Bombay Rent Act. This preliminary issue was decided against the respondent and it was held that the jurisdiction of the Court was to be decided by reference to the allegations made in the plaint and since the case of the appellant in the plaint was that the respondent was a paying guest, the City Civil Court had jurisdiction to try the suit. The respondent challenged the correctness of this view by preferring an appeal to the High Court. The appeal came up for hearing before Lentin, J., but since there was a divergence of views between two single Judges of the High Court, Lentin, J., referred the appeal to a Division Bench. The Division Bench by a judgment dated 11th February 1975 upheld the view taken by the City Civil Court and holding that, on the allegations in the plaint, the City Civil Court had jurisdiction to entertain the suit, dismissed the appeal.

4. The respondent thereafter took out a notice of motion in the City Civil Court suit on March 4, 1975 praying for stay of that suit under Section 10 of the Civil Procedure Code on the ground that the earlier suit raising the same issue was pending in the Small Cause Court. The City Civil Court rejected the application for stay of the suit and dismissed the notice of motion on 2nd May 1975. This was followed by an appeal, but the appeal was also dismissed by the High Court on 8th July 1975. The City Civil Court thereafter proceeded with the hearing of the suit and ultimately by a judgment dated 2nd August 1975 decreed the suit in favour of the appellant. The City Civil Court took the view that the respondent was a paying guest of the appellant in respect of a portion of the flat and since the period of the agreement under which the respondent was given that portion of the flat as a paying guest expired on 30th March 1973, the respondent was not entitled to continue to occupy or utilise the said portion of the flat and since paying guest is excluded from the operation of Section 15A, the respondent was not entitled to protection under that section. The City Civil Court,

however, granted three months' time to the respondent to prefer an appeal, if he so wished.

5. The respondent could have preferred an appeal to the High Court against the decree passed by the City Civil Court but instead of doing so, the respondent filed Special Civil Application No. 2936 of 1975 in the High Court under Article 227 of the Constitution for quashing and setting aside the decree of the City Civil Court. The main ground on which relief was sought by the respondent was that the City Civil Court had no jurisdiction to try the suit and in passing the decree for eviction, the City Civil Court had usurped the jurisdiction of the Small Cause Court. Immediately on filing the Special Civil Application, the respondent obtained an ex parte order from the Vacation Judge staying the operation of the decree of the City Civil Court, but on application made on behalf of the appellant, the ex parte order was vacated by the Vacation Judge on 8th November 1975. The Vacation Judge pointed out that the Special Civil Application was not maintainable since an adequate alternative legal remedy by way of appeal was open to the respondent. The Special Civil Application thereafter came up for admission before Vaidya, J., and the learned Judge took it up for final hearing within seven days and disposed it of by a judgment dated 18th November 1975. The learned Judge curiously enough did not interfere with the decree passed by the City Civil Court but merely directed stay of execution of that decree until the earlier suit filed by the respondent against the appellant was decided by the Small Cause Court and observed that it should be open to the Small Cause Court to arrive at its own conclusion without being in any, way bound by the decision of the City Civil Court, or in other words, the decision of the City Civil Court should not be regarded as binding on the parties in the adjudication of the case before the Small Cause Court. The order appeared to us to be so patently erroneous that we promptly granted special leave to the appellant and fixed an early date for the hearing of the appeal.

6. It is very difficult to appreciate the reasoning behind the order made by the High Court. It is to say the least an extraordinary order which flies in the face of law and judicial procedure. The respondent had clearly a legal remedy available to him by way of an appeal against the decree of the City Civil Court and this remedy was not only adequate but more comprehensive than the one under Article 227 of the Constitution. Even so, for some inexplicable reasons, the respondent chose to prefer a Special Civil Application under Article 227 of the Constitution and Vaidya, J., entertained the Special Civil Application and granted relief to the respondent casting to the winds the well-settled principle that the High Court does not ordinarily, in exercise of its discretion, entertain a special civil application under Article 227 of the Constitution where an adequate alternative legal remedy is available to the applicant. It is true that this principle is not rigid and inflexible and there can be extraordinary circumstances where despite the existence of an alternative legal remedy, the High Court may interfere in favour of an applicant, but this was certainly not one of such extraordinary cases. It is indeed difficult to see how the learned Judge could entertain a Special Civil Application against a decree passed by a subordinate court when the procedural law allows an appeal against it and that appeal lies to the High Court itself. It must be realised that the jurisdiction under Article 227 of the Constitution is an extraordinary jurisdiction which is to be exercised sparingly and in appropriate cases and it is not to be exercised as if it were an appellate jurisdiction or as if it gave unfettered and unrestricted power to the High Court to do whatever it liked. That apart, it is interesting to note that the order passed by the learned Judge was not an interlocutory order but a final order disposing of the special civil application and by that order the learned Judge

did not set aside the decree passed by the City Civil Court, but merely directed stay of its execution pending the disposal of the Small Cause Court suit. It defies one's comprehension as to how such an order could be made by the learned Judge. It is also difficult to see how the learned Judge could give a direction that the decision of the City Civil Court on the issue whether the respondent was a paying guest would not bind the parties in the adjudication of the Small Cause Court suit. The question whether the parties in the Small Cause Court suit would be bound by the decision of the City Civil Court would be a question which would arise for determination in the Small Cause Court suit and the Small Cause Court would have to determine it in deciding the suit before it. If the decision of the Small Cause Court is erroneous, the aggrieved party would have a right to file an appeal against it and the appellate court would then consider this question and adjudicate upon it. But we fail to understand how the learned Judge could, without any decision having been given by the Small Cause Court and such decision having been brought up before him in appeal or revision, enter upon a consideration of this question and pronounce upon it. The order passed by the learned Judge was clearly erroneous and it must be quashed and set aside and the Special Civil Application must be dismissed. We may make it clear that whenever the Small Cause Court hears the suit it will not take into account any observations made by the learned Judge in the impugned judgment in regard to the question whether the decision of the City Civil Court is binding or not and it will proceed to decide the suit before it in the light of what it considers to be the correct legal position.

7. We therefore set aside the order passed by the High Court and reject the Special Civil Application. On the respondent giving an undertaking to this Court, through his counsel that he will not part with the possession or occupation of any portion of the premises in dispute in favour of any one else or induct any one else in possession or occupation of the same, we direct that the appellant will not execute the decree for eviction passed by the City Civil Court for a period of two weeks from today. The respondent will pay to the appellant costs of this appeal as also costs in the High Court.