# Merwanji Nanabhoy Merchant (Dead) ... vs Union Of India (Uoi) And Ors. on 20 February, 1979

## Equivalent citations: AIR1979SC1309, (1979)4SCC734, AIR 1979 SUPREME COURT 1309, 1979 (4) SCC 734, (1979) 1 RENCJ 572, (1979) 2 RENCJ 400, (1979) 3 MAHLR 187, (1979) 1 RENTLR 689, (1979) 2 RENCR 249

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## Bench: A.P. Sen, R.S. Sarkaria, V.D. Tulzapurkar

JUDGMENT

V.D. Tulzapurkar, J.

1. This appeal by special leave is directed against the judgment and Order dated July 25, 1968 of the Bombay High Court in Special Civil Application No. 426 of 1966, whereby the appellant-landlord's suit seeking eviction of the tenant (respondents) was dismissed by the High Court.

2. The appellant owns the suit property situated at 29A, Burr Road, Kirkee, Poona. It is an extensive property covering about 3.03 acres of land with a main dwelling house, out-houses, garden etc. By an Order dated Dec. 16, 1929, issued by one J.S. Harison, Brigadier, Commanding the Cantonments of Poona and Kirkee, under the Cantonment (House Accommodation) Act (MI) 1923 the said property was requisitioned (appropriated) for the purpose of the residence of Military Officers. Thereupon appellant executed a lease (1st lease) in Feb., 1930 in respect of the said property with the Secretary of State for India for a period of five years on the terms and conditions set out in said lease. On the expiry of the first lease the appellant executed another lease on June 25, 1935 in respect of that property for a period of five years. Thereafter further leases were executed for fresh periods and the last lease was executed on April 21, 1951 (Ex. 70) which was for a period of three years, on the expiry of which the tenancy of the respondent tenant became a monthly tenancy at the rental of Rupees 115/- per month. In all the Leases and particularly in the last lease at Ex. 70 there was as per Clause 2(iii) a covenant on the part of the respondent-tenant to the effect that "he will keep the premises in as good condition as the same are now in (reasonable wear and tear, and destruction or damage by fire, riots, insurrection, act of God or tempest excepted)". According to the appellant, the said covenant was an essential term of the lease which cast an obligation on the tenant to keep the property in tenantable repair and for that purpose to carry out the necessary repairs from time to time but the tenant failed and neglected to do so resulting in deterioration and damage to the property and further the tenant also failed to pay the permitted increases at the rate of Rupees 10.50 n. p. under Section 10-C of the Bombay Rent Act, 1947. Therefore, by a lawyer's notice dated October 21, 1960, the appellant terminated the tenancy and called upon the respondent-tenant to

deliver vacant and peaceful possession of the suit property in the same, condition in which it had been taken by it at the expiry of April, 1961. After satisfying the provisions of Section 80, C. P. C. the appellant filed a suit Regular Civil Suit No. 888 of 1963 for eviction in the Court of Civil Judge, Senior Division, Poona. Mainly the ground for eviction was a breach of the aforesaid essential term of the Lease on the part of the respondent-tenant and the consequent damage to the property. The appellant also claimed that he was entitled to permitted increases under Section 10-C of the Bombay Rent Act which the respondent was unwilling to pay. He there-fore, claimed possession as well as the permitted increases. The suit was resisted by the respondents by raising a twofold contention. First, it was contended that under Clause 2(iii) of the Lease there was no obligation cast on them to carry out any repairs which was the responsibility of the appellant and as such, no term or condition was breached by them entitling the appellant to claim possession and secondly, the deterioration and damage to the property, if any, was attributable to reasonable wear and tear during the past 20 years which was the responsibility of the appellant and, therefore, they were not liable to be evicted. As regards the permitted increases, the respondents did not dispute them and offered to pay the same on the appellant executing a fresh agreement of Lease in their favour as in the past.

3. On an appreciation of the oral and documentary evidence tendered by the parties both the trial Court and the District Court in appeal recorded a finding of fact that the suit property, the outhouses mainly and the main bungalow to a lesser degree, had suffered considerable deterioration and damage and that such deterioration and damage was not on account of natural or reasonable wear and tear but was due to the negligence in the up keep and maintenance of the property on the part of the respondents and in that behalf, in addition to the appellant's evidence, the Courts relied upon the evidence of the respondents witness R. M. Joshi, an Overseer, who virtually admitted that the damage was due to negligence in maintaining the property in good condition. On construction of Clause 2(iii) of the Lease both the lower Courts held that under the said Clause the responsibility to carry out the re-pairs necessary to keep the property in good condition and tenantable repair was on the respondents who had committed a breach thereof resulting in damage to the property entitling the appellant to evict the respondents under Section 12(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In this view of the matter the trial Court passed in appellant's favour a decree for possession, the permitted increases and mesne profits, about which there was no dispute, which was confirmed in appeal by the District Court. The respondents preferred a combined application under Article 227 of the Constitution and Section 115 of the CPC to the High Court challenging the decisions of the lower Courts. On construction of Clause 2(iii) of the Lease the High Court took a contrary view holding that the said Clause was merely a covenant for careful and reasonable use of the property on the part of the tenant and nothing more, a breach whereof entitled the appellant to claim only, damages and not eviction. The High Court further held that both under the Lease and Section 23 of the Bombay Rent Act, 1947 the duty to keep the property in good repairs fell on the appellant-landlord and, therefore, the view of the lower Courts that the appellant was entitled to a decree for eviction for breach of an essential term of the contract (to keep the suit property in repairs) was not sustainable. On behalf of the appellant reliance was alternatively placed upon Section 13(1)(a) of the Bombay Rent Act, 1M7 read with Section 108(o) of the Transfer of Property Act to sustain the decree for eviction but the High Court took the view that since Section 108(o) covered cases of voluntary waste committed by some positive acts of the tenant the same was not attracted to the facts of the instant case. In the result, the High Court set aside the decisions of

both the lower Courts on the point of eviction and dismissed the suit in so far as it related to the prayer for eviction.

4. Counsel for the appellant raised two contentions in support of the appeal. In the first place, he contended that the Bombay Rent Act, 1947 did not apply to properties situated in Cantonment Areas until the Cantonments (Extension of Rent Control Laws) Act (XLVI) 1957 was passed on Dec. 18, 1957 and the relevant notification under Section 3 thereof extending the Bombay Rent Act, 1947 to the Cantonment Areas of Poona and Kirkee had been issued which was done on Dec. 27, 1969 and in the instant case the suit had been filed on September 17, 1962 i.e. before the Bombay Rent Act, 1947 had been so extended. It was. further pointed out that while applying the Bombay Rent Act, 1947 to Poona and Kirkee Cantonments under the notification dated Dec. 27, 1969, Section 50 of the said Act (which map the provisions of the Act applicable to the pending suits) had been excluded and hence the instant suit was not governed by the said Act. It was also pointed out by Counsel that in any case under Clause (c) of the proviso to Section 3 of the Cantonments (Extension of Rent Control Laws) Act (XLVI) 1957, houses within the Cantonment which mad been appropriated by the Central Government on Lease under the Cantonments (House Accommodation.) Act, 1923 (and the suit property had been so appropriated), have keen exempted from then operation of any rent control enactment so extended by a notification under Section 3 of the. Act. For these reasons Counsel for the appellant contended that the Bombay Rent Act, 1947 was not applicable to the suit property and no protection against the eviction under the Bombay Rent Act, 1947 was available to the respondents, and the appellant's suit for eviction of the respondents on the ground of termination of tenancy simpliciter was liable to be decreed and the High Court ought not to have interfered with the decree for eviction passed by the two lower Courts in appellant's favour. Secondly, it was contended that even if the case were to be considered under the provisions of the Bombay Rent Act, 1947, the High Court had clearly misconstrued Clause 2(iii) of the Lease (Ex. 70) as merely amounting to a covenant for careful and reasonable use of the property on the part of the tenant and it ought to have been held that the said Clause imposed an obligation or duty on the tenant to carry out repairs necessary to keep the property in good condition and tenantable repair and since both the lower Courts had recorded a finding that the respondents had failed to observe the aforesaid essential term resulting in considerable deterioration and damage to the property the appellant was entitled to a decree for eviction under the latter part of Section 12(1) of the Bombay Rent Act, 1947. According to Counsel the High Court failed to appreciate that Section 23 of the Bombay Rent Act, 1947 was not attracted in view of Clause 2(iii) of the Lease which cast a duty on the tenant to prevent permissive waste by carrying out repairs necessary to keep the property in good condition and tenantable repair and that such a term was not inconsistent with the provisions of the said Act; in other words, the decree for eviction passed by the two lower Courts under Section 12(1) of the said Act was perfectly justified.

5. On the other band, Counsel for the respondents contended that the appellant should not be allowed to raise a new plea in this Court that the provisions of the Bombay Rent Act, 1947 were not applicable to the facts of the case and no protection under the said Act was available to the respondents, a plea which had not been raised in any of the three Courts below. It was pointed out that the only ground for eviction put forward was a breach of an essential term of the Lease contained in Clause 2(iii) of Ex, 70 resulting in damage to the property entitling the appellant to

eviction under Section 12(1) of the Bombay Rent Act, 1947 and it was never the ease of the appellant that Bombay Rent Act, 1947 being inapplicable the appellant was entitled to eviction on the ground of termination of tenancy simpliciter. Counsel further contended that if the ground for eviction as made out In the plaint by the appellant was to be considered dehors the Bombay Rent Act and on the footing that the Transfer of Property Act was applicable then the appellant would not be entitled to a decree for eviction inasmuch as no power of reentry had been reserved to the appellant-landlord for breach of the term contained in Clause 2(iii) of the lease and In the absence of any power of re-entry reserved to the appellant landlord eviction could not foe Ordered notwithstanding the breach of the term, On construction of Clause 2(iii) of the lease Counsel for the respondents supported the view taken by the High Court and urged that there being no obligation cast on the tenant to carry out any repairs there was no question of respondents having committed any breach by not carrying out the repairs and the prayer for eviction had rightly been rejected by the High Court.

6. It would be desirable to deal with the second contention raised by the Counsel for the appellant first and we will proceed on the footing that the case Is governed by the provisions of Bombay Rent Act, 1947. The main question arising for consideration relates to the proper construction of the term contained in Clause 2(iii) of the Lease (Ex. 70). The said Clause runs thus :

> 2. The Lessee hereby covenants with Lessor:
>
> (i) and (ii) ....
>
> (iii) That he will keep the premises in as good condition as the same are now in (reasonable wear and tear, and destruction or damage by fire, riots, insurrection, act of God or tempest excepted) and (except as aforesaid) deliver them up at the determination of the tenancy to the Lessor....

7. On a plain reading of the afore said Clause it is impossible to accept the High Court's view that it merely amounts to a covenant for careful and reasonable use of the property on the part of the tenant and nothing more. The Clause, in our view, imposes upon the tenant two ob ligations, namely, (a) to keep the property in repair from time to time during the term and (b) to restore it in repair, i.e. in the same good condition as he received it, at the end of the term. The word "keep" occurring in the Clause clearly refers to the state in which the property is to be maintained and obliges the tenant to maintain it in the same condition at all times during the whole term, for, at the determination of the term he is to deliver it up in the same condition in which he found it when he took it on lease. In other words, the Clause clearly imposes an obligation on the tenant to do such repairs as are necessary to keep the property in good condition and tenantable repair. The parenthetical Clause suggests that deterioration or damage directly attributable to reasonable wear and tear, fire, riot, insurrection etc. will, however, be the responsibility of the Lessor. A covenant of this type contained in a Lease has always been construed by judicial decisions as casting a duty on the tenant to prevent permissive waste by carrying out such repairs as are necessary to keep and maintain the property in good condition and tenant-able repair during the whole term and restore it to the Lessor in the same condition at the end of the term. If necessary reference can be made to two

English decisions, namely, Luxmore v. Robson (1818) 1 B & A1d 584; Lurcott v. Wakely & Wheeler, (1911) 1 KB 905, and one Indian decision, namely, Doongersey v. Keshavji Meghji 19 Bom LR 878 :AIR 1917 Bom 34 in that behalf. On proper construction of the Clause, therefore, we are clearly of the view that a duty to keep the property in good condition and tenantable repair was cast on the respondents under the lease.

8. If that be the position, then clearly Section 23(1) of the Bombay Rent Act, 1947, would not be attracted, for, under that provision the duty to keep the premises in good and tenantable repair is cast on the landlord in the absence of an agreement to the contrary by the tenant. Moreover, such a term in the Lease would clearly be consistent with the provisions of the said Act. In these circumstances, since a finding of fact has been recorded by both the lower courts on evidence that the deterioration and damage caused to the suit property was not on account of natural or reasonable wear and tear but was due to the negligence in the up-keep and maintenance of the property on the part of the respondents, the respondents must be held to have committed a breach of the aforesaid term and the appellant would be entitled to recover possession of the property from the respondents under the latter part of Section 12(1) of the Bombay Rent Act, 1947. On this ground alone the Order of the High Court deserves to be set aside.

9. Turning to the first contention raised on behalf of the appellant it is undoubtedly true that the only ground on which eviction was sought by the appellant was a breach of a term contained in Clause 2(iii) of the Lease resulting in damage to the property leased and that the eviction was not sought on the ground of termination of tenancy simpliciter but, in our view, the plea now raised is one purely of law that does not require investigation into or proof of any new facts. It is an admitted fact that prior to the filing of the suit the respondents' tenancy had been duly terminated by a proper notice to quit- a fact which has been averred in the plaint and not put in issue by the respondents and the plea raised is that the suit property being situate in the Cantonment Area of Kirkee the Bombay Rent Act, 1947 did not apply to the tenancy in question and as such the respondents enjoyed no protection of the said Act. This latter aspect has to be deduced from the legal position obtaining in the matter at the relevant time. It is not disputed before us that the suit property is situated in the Cantonment Area of Kirkee, Poona. It is also not disputed that the suit property had been appropriated by the Central Government on Lease after issuance of an Order dated Dec. 16, 1929 under the Cantonment (House Accommodation) Act, 1923, It is also an admitted position that by reason of the relevant notification that was issued on Dec. 27, 1969 under Section 3 of the Cantonments (Extension of Rent Control Laws) Act (XLVI) 1957, that the provisions of the Bombay Rent Act, 1947 excluding Section 50 thereof were extended and applied to the Cantonments of Kirkee and Poona with effect from that date and the instant suit had been filed by the appellant on Sep. 17, 1962 i.e. before the Bombay Rent Act, 1947 had been so extended. On these admitted facts, in our view, the legal position clearly emerges that the respondents did not enjoy the protection of Bombay Rent Act, 1947 and the suit would have to be decided without reference to the provisions of the said Act. This would be so for two reasons : (i) suit had been filed on Sep. 17, 1862 when the Bombay Rent Act, 1947 had not been extended to Kirkee Cantonment and even after the application of the said Act Section 50 of the said Act under which pending suits were covered by that Act had not been made applicable and (ii) in any case by reason of Clause (c) of the proviso to Section 3 of the Act XLVI of 1947 the suit property being appropriated accommodation under the Cantonment

(House Accommodation) Act, 1923 the tenancy thereof was exempt from the operation of the Bombay Rent Act, 1947. It is true, as has been contended for by Counsel for the respondents that if the appellant's rights are to be governed by Transfer of Property Act and not by the Bombay Rent Act, 1947 then a mere breach of Clause 2(iii) of the Lease Ex. 70 would not entitle the appellant to seek eviction, for, admittedly, there is no power of reentry conferred upon the appellant-landlord in the event of such breach but it cannot be disputed that under the T.P. Act the plaintiff would be entitled to seek eviction of the respondents merely on the ground of termination of tenancy simpliciter the respondents being deprived of the protection of the Bombay Rent Act, 1947. On this ground also, in our view, the appellant's prayer for eviction must succeed.

10. In this view of the matter, we are clearly of the view that the impugned judgment and Order of the Bombay High Court in Special Civil Application No. 426 of 1966 cannot be sustained and the same is set aside and the decree for eviction passed by both the lower courts in appellant's favour is restored. The respondents will pay the costs of the appeal to the appellant.