APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Shah.

SATIBAI K. SHEWAKRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* VISHNIBAI KIMATRAI (ORIGINAL PLAINTIFF), RESPONDENT.* 1952 *Sept.* 25

Landlord and tenant—Lease executed in Karachi in respect of property situate at Karachi—Express covenant by tenant to pay rent—Place of payment of rent not mentioned in covenent—Landlord and tenant migrating to Bombay on partition of country—Property vesting in Custodian of Evacuee Property in Pakistan—Suit filed by landlord in Bombay for recovery of arrears of rent—Liability of tenant to pay rent in Bombay—Whether suit is governed by Pakistan law or Indian law.

Plaintiff who was the owner of certain business premises in Karachi demised them to one K. by an Indenture of Lease dated June 21, 1947, executed in Karachi. The rent fixed under the lease was Rs. 400 per month, and the lease contained an express covenant on the part of the lessee to pay the reserved rent. When Karachi became a part of Pakistan, the plaintiff migrated to India and came to live in Bombay. In February 1948, K. also assigned the premises to one A. and took up his residence in Bombay. For six months after that K. recovered rent of the premises from his assignee A., and out of the rent so recovered he paid rent for the first four months to the plaintiff and for the remaining two months to the Custodian of Evacuee Property in Pakistan. The plaintiff having filed a suit in Bombay against K's legal representatives (defendants) for the arrears of rent from June 8, 1948, to September 22, 1949, it was contended first that as the rent was payable in Karachi the Custodian of Evacuee Property in whom according to Pakistan law the property had become vested was the only person entitled to recover the rent, and that at any rate with regard to a sum of Rs. 800 being the rent for two months the defendants were discharged from their liability as they had actually paid that amount to the Custodian:

Held, (*i*) that as the tenant had expressly covenanted to pay rent to the landlord and the covenant did not provide for the place of payment of rent, the obligation upon the tenant was the same as upon an ordinary debtor who has to discharge his debt to the creditor, namely, to find the landlord and discharge his liability under the covenant;

(*ii*) that accordingly the arrears of rent were payable in Bombay and not in Karachi, and therefore, *lex loci contractus,* i. e. the law of Pakistan, had no application;

(*iii*) that *lex situs* which again was the law of Pakistan could not apply because the suit was simply one for money due under a contract and not in respect of immovable property;

(*iv*) that even in respect of the sum of Rs. 800, the Custodian was not entitled under the Indian law to receive the money and give a proper discharge on behalf of the plaintiff;

* First Appeal No. 386 of 1952.

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(v) that, therefore, the suit must be wholly decreed.

Haldane v. *Johnson*,[1] referred to.

Ralli Brothers v. *Compania Naviera Sota Y. Azner*,[2] distinguished.

FIRST APPEAL from the decision of V. S. Bakhale, Judge of the City Civil Court, Bombay.

Suit for money.

Vishnibai (plaintiff) was the owner of certain business premises situated at Karachi. On June 21, 1947, the premises were let out to one K. Shewakram by an Indenture of Lease executed in Karachi. The rent fixed was Rs. 400 per month and there was an express covenant on the part of the lessee that he would pay the rent reserved under the lease.

As a result of the post-partition disturbances, the plaintiff migrated to India and came to live in Bombay. In February 1948, K. Shewakram assigned the premises to Messrs. A. Sattar of Karachi and took his residence in Bombay. Till June 7, 1948, the rent of the premises was paid to the plaintiff every month through K. Shewakram. K. Shewakram died in March 1949 and his legal representatives (defendants) had with them a sum of Rs. 800 out of the arrears of rent recovered from A. Sattar. In May 1949 the defendants paid the said sum of Rs. 800 to the Custodian of Evacuee Property in Pakistan.

On November 25, 1949, the plaintiff filed the present suit against the defendants claiming Rs. 6,775-4-0 as arrears of rent from June 8, 1948 to September 22, 1949, and Rs. 375-4-0 as Municipal and other taxes for 1948-49.

On April 25, 1952, the trial Court decreed the suit.

The defendants appealed to the High Court.

B. A. Chandiramani and *H. G. Advani*, with *Messrs. Cama & Jayakar*, for the appellants.

S. H. Lulla and *C. B. Vadhwa*, for the respondent.

CHAGLA C. J. This appeal arises out of a suit filed by the plaintiff as the landlord of certain premises in Karachi for arrears of rent from June 8, 1948 to September 22, 1949 and for a certain amount paid by her for Municipal and other taxes for the year 1948 and 1949. The suit is very simple in character, but the complications arise by reason of the fact that Karachi ceased to be a part of India and the parties have migrated to this country and are now residing in Bombay.

[1] (1853) 8 Ex. 689.

[2] [1920] 2 K. B. 287.

The facts briefly are that the plaintiff demised the property in suit which is in Karachi, as business premises, to one K. Shewakram by an indenture of lease dated 21st June 1947. The rent fixed under the lease was Rs. 400 per month, and in the lease there is an express covenant on the part of the lessee that he will pay the rent reserved under the lease. The arrears of rent in respect of which this suit is filed is for the period June 8, 1948 to September 22, 1949, and the defence taken by the defendants, who are the heirs of Shewakram, on merits was that Shewakram had assigned these premises to one A. Satar in February 1948 after there were serious troubles in Karachi in January 1948, and further the case of the defendants was that this assignment was made with the consent of the plaintiff. This contention was given up by the defendants in the Court below, and the only contention that was urged was that the property in suit has vested in the Custodian of Evacuee Property in Karachi and that according to the law of Pakistan the only person who is entitled to recover the rent in respect of this property is the Custodian and that the plaintiff has no right to the rents of this property.

Now, we will assume in this appeal that the Pakistan law is as suggested by the defendants and that the property has vested in the Custodian and that according to Pakistan law no person is entitled to recover the rents of this property excepting the Custodian. The question is whether this Pakistan law is an answer which the defendants can give to the plaintiff. The defendants admit that the amount claimed by the plaintiff is due to her as arrears of rent and they admit their liability to pay the amount to the plaintiffs as the landlord. It is not the case of the defendants that this debt has been discharged by them, but what they contend is that by the law of a foreign country the debt has to be discharged not to the creditor of the defendants, but to some other person who by that law has become their creditor. The question that we have to consider is whether there is anything in private international law which justifies the position taken up by the defendants. Mr. Chandiramani's contention is that the indenture of lease being executed in Karachi and the property being situated in Karachi, the rent was payable in Karachi and therefore the contract was to be performed in Karachi, and now that Karachi has become a part of Pakistan the law that should govern the parties is *lex loci contractus*, i.e. the law of Pakistan, and if that law was to be applied the only way the defendants can perform the

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contract, viz. pay the amount of rent, is by paying it to the Custodian and not to the plaintiff. There would be considerable force in his argument if the arrears of rent were payable in Karachi. As we shall presently point out, that contention is not a sound contention. The question is, where does the liability of a tenant arise to pay arrears of rent. There are two positions possible in law. The liability of a tenant may arise by reason of the fact that he is the tenant of an immoveable property and he is liable to pay rent as a tenant, or the liability may arise because he has entered into an express covenant with the landlord to pay rent. Whatever the position may be with regard to the first case, we are now concerned with the second case because, as we pointed out, under the indenture of lease there is an express covenant by Shevakram to pay rent to the plaintiff. When you have an express covenant, the covenant may provide for the place where the rent is to be paid. If there is a provision to that effect then the liability of the tenant would be under the covenant to pay the rent at the place specified in the covenant. But the covenant may not mention any place, in which case (and the authorities on this point are clear), the obligation upon the tenant would be the same as upon an ordinary debtor who has to discharge his debt to the creditor. Under a covenant to pay rent, a tenant is in no higher and better position than a debtor who has got to discharge his money debt to his creditor.

Now, the law is well settled that a debtor has to find his creditor and discharge his debt to him if the contract does not provide for the place of payment, and the same principle of law applies in the case of a tenant who has covenanted to pay rent to his landlord and the covenant does not provide for the place of payment. The obligation is upon the tenant to find the landlord and discharge his liability under the covenant. The principle is clearly stated in Woodfall's law of Landlord and Tenant, 24th Edition, p. 327. The learned author says:

> "Such a covenant (i. e. a covenant to pay rent) (if no particular place of payment be mentioned) is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid and pay or tender him the money, for the simple reason that he has contracted so to do."

To the same effect is the proposition in Halsbury, Vol. VII, p. 196, and this statement of the law is based upon the case of *Maldane* v. *Johnson*,[1]. But Mr. Chandiramani says that

[1] (1853) 8 Ex. 689.

when you look at the case, the case does not support the proposition of law to be found in Woodfall or in Halsbury.

When we turn to that case, that was a case in which a suit was filed by a landlord to recover rent, and the answer given by the tenant was that he had been on the land demised the whole of the day when the rent became due, the landlord was not there, and therefore according to the tenant he was discharged from his obligation to pay rent. The Court rejected this plea of the tenant and pointed out that it is only when the landlord wants to re-enter upon the land on the ground of forfeiture for default of payment of rent that he must establish that the tenant was not on the land ready and willing to pay rent. But when the landlord is suing the tenant on a covenant to pay rent, the duty of the tenant was to find the landlord wherever he was and pay the rent. Baron Martin at p. 696 observes:

> "We are therefore of opinion that a covenant for the payment of rent at the time and in manner as reserved, when no particular place of payment is mentioned, is analogus to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid and pay or tender him the money, and for the simple reason that he has contracted so to do."

Nothing could be clearer than this statement of the law as enunciated by Baron Martin.

Strong reliance has been placed by Mr. Chandiramani on a decision in *Ralli Brothers* v. *Compania Naviera Sota Y. Aznar.*[1] In that case a certain amount was due to the plaintiff under a charterparty. That particular amount was payable in Spain and by a decree of the Spanish Government an amount smaller than the amount fixed under the charterparty could be claimed under a charterparty, and the Court refused to grant to the plaintiff a relief which was inconsistent with the decree passed by the Spanish Government. Mr. Chandiramani says that this case clearly establishes that the English Court gave effect to a foreign law with regard to the payment of a debt. When one carefully considers this decision it is clear that it is distinguishable from the facts before us on two major points. One is that the suit was by a Spanish ship owner claiming under a charterparty. The other was that the contract was to be performed in Spain and not in England. The amount due under the charterparty in respect of which the claim was made by the Spanish ship owner in an English Court was payable

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not in England but in Spain. Mr. Chandiramani would have been on very strong ground indeed if he could have satisfied us that in the present case the arrears of rent claimed by the plaintiff were payable in Pakistan and not in Bombay. If that had been the position it could certainly have been urged by Mr. Chandiramani that if the debt was discharged or affected by a Pakistan law, the debtor was entitled to put forward that defence against his creditor. But if the debt is due in Bombay as we hold it is due, it is difficult to understand how possibly the debtor can take up the contention that "I will not pay my creditor because the law of a foreign country tells me that the debt is not payable to my creditor but is payable to somebody else." That really in a nutshell is the defence of the defendants in this case. They appeal to the law of Pakistan in support of their defence, and while admitting their liability under Indian law to discharge their debt to the creditor, they plead the law of a foreign country in order to ask an Indian Court to hold that the debt of the creditor has been discharged. It is sufficient to state this proposition and the proposition carries its own answer.

The other contention put forward by Mr. Chandiramani is that in any view of the case the law that should be applied is *lex situs* and the *lex situs* in this case is the law of Pakistan. Mr. Chandiramani says that this is a suit in respect of property and when you are dealing with immoveable property parties are governed by the law of the country where the immoveable property is situated. In that bald form the statement of the law is unexceptional, but the question is, is this a suit in respect of property?. A suit for rent on a covenant entered into by the tenant to pay rent is not a suit in respect of immoveable property, but it is a suit for a debt. There is no claim for possession in this suit. This is not a suit for profits arising out of immoveable property. It is simply a suit on a contract, a contract which was entered into between Shevakram and the plaintiff. It is a suit for money due under a contract, and if that is the nature of the suit it is difficult to understand how the *lex situs* can be applicable to this suit.

The other plea raised by the defendants is with regard to a sum of Rs. 800 being the rent for two months. The case of the defendants was that they recovered rent for six months from the person to whom according to them the property had been assigned, and out of the rent for six months they paid the rent

for four months to the plaintiff. The plaintiff admits the receipt of rent for these four months. With regard to the rent for the remaining two months, the case of the defendants was that they paid this amount to the Custodian and therefore they are discharged from their liability to the plaintiff as in this particular case they have actually paid the rent to the Custodian. In our opinion the answer to this contention of the defendants is the same as the answer in respect of their denial of the liability to the plaintiff with regard to the arrears of rent. If the fact that Pakistan law makes the Custodian entitled to recover this rent is no answer to the plaintiff's case, it is equally no answer to the plaintiff's claim if the defendant goes and pays the amount due to the plaintiff to the Custodian. As far as the plaintiff is concerned, the Custodian is a stranger, and just as the plaintiff's debt would not be discharged if the defendant paid the amount to a man in the street, equally so is the plaintiff's claim not discharged because the defendant has chosen to pay the amount to the Custodian who by Pakistan law may be the person entitled to receive the same. As far as this Court is concerned, if a suit on a debt payable in India is governed by the Indian law, then according to our law a debtor can be discharged from his debt to his creditor provided he pays to the creditor or to someone who according to India law is entitled to receive it on behalf of the creditor and give a proper discharge to the debtor. Under our law the Custodian of Property in Pakistan is not entitled to receive the money from the defendants and give a proper discharge on behalf of the creditor.

In our opinion, therefore, the learned Judge below was right in rejecting the contention taken up by the defendants and decreeing the plaintiff's suit. The result is that the appeal fails and must be dismissed with costs.

In C. A. No. 1025 of 1952 the rule is discharged with costs.

Appeal dismissed.

M. W. P.