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VIDYA VATI

v.

DEVI DAS

November 25, 1976

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[P. N. BHAGWATI, A. C. GUPTA AND P. N. SHINGHAL, JJ.]

Code of Civil Procedure—S. 115—O. XLIII r. 1 (s)—Scope of—Obligation to repay a loan and obligation to deliver possession concurrent—Demanding possession before repayment of loan—If permissible

C The appellant and the respondent entered into an agreement by which the appellant advanced money to the respondent and the respondent in lieu of interest thereon gave a portion of his house for residence to the appellant for a period of two years. The other terms were that if after the expiry of the two-year period, the respondent wished to repay the amount, he should give one month's notice in writing; that if after the payment of the sum, the appellant would not vacate the house, she would be liable to pay damages and that if the respondent did not repay the amount *on the expiry of the two-year period,* he would not be entitled to recover damages.

D

The respondent alleged that before the expiry of the two-year period on September 27, 1969, he addressed a notice to the appellant and tendered repayment of the loan which she refused to accept. The respondent's suit for recovery of possession of the premises was decreed *ex-parte* with an order that he should tender payment to the appellant and that if she refused to accept the money, it should be deposited in the court. The appellant, on the other hand, filed a suit for recovery of the loan in which the respondent contended that the E claim was barred by limitation. The respondent filed a review application before the Sub-Judge contending that the order directing deposit of money in the court was clearly an error apparent on the face of the record. Allowing the review application, the Sub-Judge ordered the deletion of the direction for depositing the money in court.

The appellant filed a revision application in the High Court against the order on the review application. The High Court held that since the order allowing the review application was appealable, the revision application was not com- F petent, but on the alternative view that the revision application lay before the High Court, it held (a) that the Sub-Judge had no jurisdiction to impose a condition requiring deposit of the loan money, particularly when the suit for recovery of the money was pending before the same court and (b) since the respondent tendered the money to the appellant, but it was refused, he was entitled to a decree for possession.

Allowing the appeal,

G HELD : (1) Order XLIII r. 1(s) of the Code of Civil Procedure, provides an appeal against an order allowing a review application. Since the order allowing the review application was made by a Sub-Judge, the appeal against it lay to the District Court and not to the High Court and since no appeal lay against the order of the Sub-Judge to the High Court, the revision application could not be rejected as incompetent. [186F]

Under s. 115 C.P.C. a revision application can lie before the High Court H from an order made by a subordinate court only if no appeal lies from that order to the High Court. The words of limitation used in that section, namely, "in which no appeal lies thereto" clearly mean that no appeal must lie to the High Court from the order sought to be revised because an appeal is a much larger remedy than a revision application and if an appeal lies that would afford

sufficient relief and there would be no reason or justification for invoking the revisional jurisdiction. [186D-E] A

(2) The High Court and the Sub Judge were in error in allowing the review application. The direction requiring the respondent to pay the loan to the appellant or to deposit it in the court was a correct and valid direction and was rightly introduced in the original ex-parte decree. The courts below were in error in ordering its deletion. [189 E]

(3) Merely because one party has tendered the amount due and payable by him and such tender has been wrongly refused by the other party does not absolve the first party from its obligation to make payment and where the obligation to make payment is concurrent with the obligation to hand over possession, the claim for recovery of possession must be accompanied by payment or deposit of the amount. [188C] B

Dixon v. *Clark* (1847) 16 LJ CP 237=136 E.R. 919, referred to.

In the instant case, the respondent could not validly tender the amount to the appellant in repayment of the loan until September 27, 1969 and the tender made on August 26, 1969 was clearly invalid. If the respondent did not at any time validly tender payment to the appellant, she was not liable to hand over possession of the premises and no claim for damages for wrongful use could be sustained against her. The respondent was not entitled to possession unless he paid or deposited the money in court in repayment of the loan. The respondent could seek to recover possession of the premises only on condition of making repayment of the loan because the two obligations were mutual and concurrent and were required to be simultaneously performed and one could not get delinked from the reason of the refusal on the appellant's part to accept the tender of money. [188E-H] C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 501 of 1976.

Appeal by Special Leave from the Judgment and Order dated the 28th April, 1975 of the Delhi High Court in Civil Revision No. 186 of 1975. E

Hardayal Hardy, S. K. Bagga, (Mrs.) S. Bagga, (Miss) Yesh Bagga and *K. K. Mittal* for the Appellant.

Bikramjit Nayar, B. P. Maheshwari and *Suresh Sethi* for Respondent. F

The Judgment of the Court was delivered by

BHAGWATI, J.—This is an unfortunate litigation where a widow has been kept out of her monies for over six years by reason of wrong application of law by the courts. Much of the travail of the widow could have been avoided if the courts had taken a commonsense view of the law instead of adopting a rather technical and unimaginative approach. The facts giving rise to this litigation are few and may be briefly stated as follows. G

The respondent is the owner of a residential quarter bearing No. 1/20 situate at Old Rajendra Nagar, New Delhi. He wanted a loan for the purpose of repaying an earlier debt and he, therefore, approached the appellant and as a result of negotiations between them, an agreement dated 27th September, 1967 was entered into H

between the parties. This agreement recited that a sum of Rs. 7500/- was lent and advanced by the appellant to the respondent and it provided that in lieu of interest on his amount of Rs. 7500/-, the respondent would give to the appellant a portion of his residential quarter (hereinafter referred to as the premises) for temporary residence. The agreement went on to say, and we are setting out the precise terms of the agreement since they are material for the decision of the controversy between the parties :

> "On the expiry of two years as stated above the second party shall give one month's notice in writing to the first party for the said room... If after the expiry o ftwo years fixed period, the first party wants to pay the amount he shall give one month's notice in writing to the second party. When the first party *repays* the above stated loan to the second party, then the second party shall vacate the room etc. under temporary residence and give it to the first party.. If the first party *pays* the amount of Rs. 7500/- and the second party does not give possession of the room etc. under her use, then the second party shall be liable to pay Rs. 110/- per month as damages. If the first party does not *pay* the amount of Rs. 7500/- to the second party *on the expiry of the two years period,* the first party will not be entitled to recover damages of Rs. 110/- per month from the second party and the second party shall be entitled to take legal proceedings against the first party—and also if the first party *pays* the amount of Rs. 7500/- and the second party does not give possession, the first party shall be entitled to take the legal proceedings regarding vacation of the room etc. under the use of the second party."

Pursuant to the agreement, the respondent handed over possession of the premises to the appellant and the appellant started occupying the same against interest on the loan of Rs. 7500/- advanced by her to the respondent.

The period of the agreement expired on 27th September, 1969 and according to the terms of the agreement, the respondent could thereafter repay the loan of Rs. 7500/- to the appellant and claim back possession of the premises from her. The case of the respondent was that he addressed a notice dated 26th August, 1969 to the appellant and tendered a sum of Rs. 7500/- to her in repayment of the loan, but the appellant refused to accept the same. The respondent also addressed another notice dated 4th May, 1970 to the appellant but this notice also had no effect on her. The respondent thereupon filed Suit No. 123 of 1973 in the Court of Sub-Judge, 1st Class, Delhi seeking to recover possession of the premises from the appellant. The appellant did not appear to contest the suit and it was decreed *ex parte* by a judgment dated 22nd May, 1973. The learned sub-Judge passed a decree for possession of the premises in favour of the respondent but added the following rider :

"The plaintiff is ordered to tender the amount of Rs. 7500/- to the defendant within a period of 30 days from today in cash. If the defendant refuses to accept the money, it should be deposited in the Court with notice to the defendant within the aforesaid period."

Now, it appears that prior to the filing of this suit by the respondent, the appellant had filed a suit against the respondent for recovery of the loan of Rs. 7500/- advanced by her to the respondent. The respondent had filed his defence to the suit and various grounds were taken by him, one of which was that the claim was barred by limitation. This suit was pending on 22nd May, 1973 when the *ex parte* decree was passed against the appellant.

The respondent had obviously no desire—and perhaps not even capacity—to repay the loan of Rs. 7500/- to the appellant and he, therefore, preferred an application for review under Order XLVII, Rule 1 of the Code of Civil Procedure seeking deletion of the direction given by the learned Sub-Judge requiring him to deposit the sum of Rs. 7500/-. The respondent contended that since the appellant has already filed a suit against him for recovery of the amount of Rs. 7500/- and he was resisting the suit *inter alia* on the ground of limitation, it was not competent to the learned Sub-Judge to give such a direction for deposit of the amount of Rs. 7500/- and the giving of such direction was clearly an error of law apparent on the face of the record. The respondent also claimed review on the ground of discovery of new and important matter in the shape of Suit No. 123 of 1973 filed by the appellant against him. The learned Sub-Judge, by a judgment dated 3rd August, 1973 allowed the review application and held that the direction for depositing the amount of Rs. 7500/- in court should be deleted from the *ex-parte* decree passed against the appellant. The result was that the respondent became entitled to recover possession of the premises from the appellant without paying to the appellant or depositing in court the amount of Rs. 7500/- in repayment of the loan.

Now, unfortunately this order allowing the review application was made by the learned Sub-Judge without issuing notice to the appellant. That was obviously bad and, therefore, on the application of the appellant, the learned Sub-Judge had to set aside the order and rehear the review application. The same order was, however, once again made by the learned Sub-Judge after hearing the appellant and the direction requiring the respondent to deposit the sum of Rs. 7500/- in court was deleted on the ground that such direction nullified the effect of the *ex-parte* decree for possession and forced the respondent to admit the claim of the appellant for repayment of the sum of Rs. 7500/-, which, according to the respondent, was time barred.

The appellant being aggrieved by the order allowing the review application, preferred a revision application to the High Court of Delhi under section 115 of the Code of Civil Procedure. Mr. Justice Avadh Behari, who heard the revision application, took the view that the order allowing the review application was appealable and hence the revision application was not competent, but on the alternative view that the revision application lay before the High Court,

A he proceeded to consider whether the review had been rightly granted and held that the respondent having brought a simple suit for possession, the learned Sub-Judge had no jurisdiction to impose a condition requiring him to deposit the sum of Rs. 7500/-, particularly when the appellant's suit for recovery of the same was pending in that very court and that under the terms of the agreement, all that he was B required to do was to tender the sum of Rs. 7500/- and since that was done by him and the appellant had refused to accept the same, he was entitled to a decree for possession. The learned Judge accordingly dismissed the revision application. That led to the filing of the present appeal with special leave obtained from this Court.

When the hearing of the appeal commenced, a contention of a C preliminary nature was advanced on behalf of the respondent and it was that since the order of the learned Sub-Judge impugned in revision before the High Court was an order allowing the review application, it was appealable under XLIII, rule 1, cl. (s) of the Code of Civil Procedure and hence no revision was competent to the High Court under section 115 of the Code of Civil Procedure and the High Court was right in rejecting the revision application. D Now, there can be no doubt that under section 115 of the Code of Civil Procedure a revision application can lie before the High Court from an order made by a subordinate court only if no appeal lies from that order to the High Court. The words of limitation used in section 115 are "in which no appeal lies thereto" and these words clearly mean that no appeal must lie to the High Court from the order sought to be revised, because an appeal is a much larger remedy E than a revision application and if an appeal lies, that would afford sufficient relief and there would be no reason or justification for invoking the revisional jurisdiction. The question, therefore, here is whether an appeal against the order made by the learned Sub-Judge allowing the review application lay to the High Court. If it did, the revision application would be clearly incompetent. Now Order XLIII, Rule 1, cl. (s) undoubtedly provides an appeal against an F order allowing a review application, but the order allowing the review application in the present case was made by the learned Sub-Judge, and hence an appeal against it lay to the District Court and not to the High Court, and, obviously, since no appeal lay against the order of the learned Sub-Judge to the High Court, the revision application could not be rejected as incompetent. The preliminary contention must, in the circumstances, be decided against the respon- G dent.

That takes us to the merits of the appeal and the question which arises for consideration on merits is whether the direction requiring the respondent to deposit the sum of Rs. 7500/- in court as a condition of recovery of possession of the premises from the appellant was erroneous in law so as to justfy its deletion on review. The H determination of this question turns on the true interpretation of the agreement between the parties. If we turn to the agreement it is clear that the loan of Rs. 7500/- was advanced by the appellant to the respondent for a period of two years and in lieu of interest on

the amount of the loan, the respondent handed over the possession of the premises to the appellant and the appellant was entitled to occupy the same free of rent. We have already set out the relevant portions of the agreement and it appears clearly from those provisions that the respondent was not entitled to repay the amount of the loan and demand recovery of possession of the premises from the appellant before the expiry of the period of two years. It was only on the expiration of the period of two years that the respondent was entitled to repay the amount of the loan and if he wanted to do so, he was required to give one month's notice in writing to the appellant and on such repayment, the appellant was bound to hand over vacant possession of the premises to him. If, despite the repayment of the amount of the loan by the respondent, the appellant failed to hand over vacant possession of the premises to the respondent, she was liable to pay damages at the rate of Rs. 110/- per month. But if for any reason the respondent failed to repay the amount of the loan on the expiry of the period of two years, he could not claim to recover any damages from the appellant. Clearly the obligation of the appellant to hand over vacant possession of the premises to the respondent was concurrent with the obligation of the respondent to repay the amount of loan to the appellant and the respondent could not claim possession of the premises from the appellant without making repayment of the amount of the loan. If the respondent tendered a sum of Rs. 7500/- to the appellant in repayment of the amount of the loan and yet the appellant refused to accept the same, the appellant might incur liability to pay to the respondent damages for wrongful use and occupation of the premises, but the respondent could not say that he was exonerated from the obligation to repay the amount of the loan and was entitled to recover possession of the premises without making repayment of the amount of the loan. The respondent could seek to recover possession of the premises from the appellant only on condition of making repayment of the loan, because the two obligations were mutual and concurrent and were required to be simultaneously performed and one could not get delinked from the other by reason of any refusal on the part of the appellant to accept the tender of Rs. 7500/- from the respondent. We may in this connection refer to the following passage from the judgment in *Dixon* v. *Clark*(1) when it said :

> "In action of debt and assumpsit, the principle of the plea of tender, in our apprehension is, that the defendant has been always ready (toujoure prist) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performances, by refusing to receive it. And, as in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (incore prist) but must be accompanied by a profort in curiem of the money tendered. If the defendant can maintain this plea, although he will not thereby

(1) (1847) 16 L.J. C.P. 237=136 E.R. 919.

A bar the debt (for that would be inconsistent with uncore prist and profort in curiem) yet he will answer the action. in the sense that he will recover judgment for his costs of defence against the plaintiff in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an B answer to the action, it must, we conceive, be dificient in none of the requisite qualities of a good plea in bar.

This decision has been quoted with approval in Leaks on Contracts. 8th Ed. at page 663 and it establishes beyond disputation that merely because the plaintiff or the defendant has tendered the amount due and payable by him and such tender has been wrongly refused by the other party, it does not absolve the first named party C from its obligation to make payment of the amount and where the obligation to make payment of the amount is concurrent with the obligation to hand over possession, the claim for recovery of possession must be accompanied by payment or deposit of the amount. The respondent was, therefore, clearly bound to pay or deposit the amount of loan as a condition of recovery of possession of the premises from the appellant.

D

We may point out that in fact, in the present case, there was no valid tender of the sum of Rs. 7500/- by the respondent to the appellant. The case of the respondent was that he tendered the sum of Rs. 7500/- in cash to the appellant on 26th August, 1969 but the appellant refused to accept the sum. Now, we will assume for the purpose of argument that this case of the respondent is factually E correct and that he did tender the sum of Rs. 7500/- in cash to the appellant on 26th August, 1969, but this was obviously not a valid tender, because under the terms of the agreement the respondent could repay the amount of the loan to the appellant only on the expiry of the period of two years and the date of the agreement being 27th September, 1967, the period of two years expired on 26th September, 1969. The respondent could not validly tender the sum F of Rs. 7500/- to the appellant in repayment of the amount of the loan until 27th September, 1969 and the tender made by him on 26th August, 1969 was clearly invalid. It may be noted that it was not the case of the respondent that he made any fresh tender to the appellant on or after 27th September, 1969 and hence the conclusion must inevitably follow that the respondent did not at any time make a valid tender to the appellant of the sum of Rs. 7500/-. G Now, if the respondent did not at any time validly tender payment of the sum of Rs. 7500/- to the appellant, the appellant obviously did not become liable to hand over possession of the premises to the respondent and *a fortiori* no claim for damages for wrongful use and occupation of the premises could be sustained by the respondent against the appellant. It was pointed out to us on behalf of the respondent that he had already filled suits against the appellant for H damages or compensation for wrongful use and occupation of the premises and one of the suits, namely Suit No. 800 of 1975 had been decreed by the Sub-Judge, 1st Class and Civil Appeal No. 9 of 1975 preferred by the appellant against it had been dismissed by the

Additional District Judge, Delhi on the basis that the respondent had made a valid tender of the sum of Rs. 7500/- to the appellant and since the appellant had refused to accept the same, she was in wrongful use and occupation of the premises from the date of the tender and was, therefore, liable to pay compensation to the respondent from that date. This is true, but it cannot preclude us from laying down what we think to be the correct legal position on a proper interpretation of the agreement between the parties. Moreover, this decision is under appeal before the High Court. But, apart from that, we do not think this decision is correct, because, on the view we have taken, the respondent was not entitled to tender the sum of Rs. 7500/- to the appellant before 27th September, 1969 and even if a tender was made by him on 26th August, 1969 as alleged by him, the appellant was entitled to refuse to accept the same and she did not become liable to hand over vacant possession of the premises to the respondent or to pay compensation to the respondent in respect of her occupation of the premises. It is only if the respondent made a valid tender of the sum of Rs. 7500/- to the appellant on or after 27th September, 1969 that the appellant would be liable to hand over vacant possession of the premises to the respondent and since that did not happen in the present case, there was no obligation on the appellant to deliver possession of the premises to the respondent. The respondent was not entitled to claim possession of the premises from the appellant unless he paid or deposited the sum of Rs. 7500/- in court in repayment of the amount of the loan. The High Court as well as the learned Sub-Judge were, therefore, in error in allowing the review application and ordering that the direction requiring the respondent to pay to the appellant or to deposit in court a sum of Rs. 7500/- in repayment of the amount of the loan should be deleted. It was a correct and valid direction and it was rightly introduced in the original *ex-parte* decree passed by the learned Sub-Judge.

A B C D E

We accordingly allow the appeal, set aside the order allowing the review application passed by the learned Sub-Judge as also the order of the High Court rejecting the revision application. The original *ex-parte* decree for possession together with the direction requiring the respondent to pay or deposit the sum of Rs. 7500/- in court will stand, but since possession of the premises has already been taken over by the respondent in pursuance of the *ex-parte* decree for possession, we direct that the respondent do pay to the appellant the sum of Rs. 7500/- together with interest thereon at the rate of 9 per cent per annum from the date when possession of the premises was taken by the respondent up to the date of payment. The respondent will pay to the appellant costs of the appeal as also costs of the review application before the Sub-Judge and the revision application before the High Court.

F G

P.B.R. *Appeal allowed.*