

(1963) 10 KL CK 0033
In the High Court Of Kerala
Case No : A.S. No. 163 of 1959

Ananthanarayana Iyer

APPELLANT

Vs

Muhammad Kunju and Others

RESPONDENT

Date of Decision : 21-10-1963

Acts Referred:

Transfer of Property Act, 1882 — Section 55(1)(f)

Citation : (1964) KLJ 12

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : S. Bhoothalinga Iyer, for the Appellant; M. Krishnan Nair for 1st Respondent, C.K. Sivasankara Panicker for 2nd Respondent, for the Respondent

Final Decision : Allowed

Judgement

Mathew J

1. The 1st defendant is the appellant. The suit was for recovery of a plot of land with a building thereon with mesne profits and damages. The property belonged to the 1st defendant. He sold it under Ext. A for Rs. 1,500/- on 20-2-1123 to the plaintiff. The plaintiff's case was that at the time of the sale, defendants 2 to 5 were in occupation of the building as tenants, and that the 1st defendant had agreed to give actual possession of the plot and the building to him and as the 1st defendant did not give actual possession he was liable in damages for breach of the covenant to give vacant possession. The 1st defendant contended, that the plaintiff inspected the property before purchasing it, that he knew that there were tenants in possession of the building, that it was with the knowledge that the tenants were in occupation that he purchased the property that his only obligation was to give such possession as the nature of property admits at the time of the sale and that he was not liable for damages for breach of any express or implied covenant. The 2nd defendant contended that the 1st defendant's predecessor-in-interest had agreed to sell 15 cents of land together with the building to him and that he was in occupation of the property by virtue of that

contract. The court below came to the conclusion that the plaintiff was entitled to recover damages from the 1st defendant on the ground that the 1st defendant had the obligation to give khas possession to the plaintiff and that he had not fulfilled that obligation as defendants 2 to 5 continued to be in possession of the building and were taking the income from the land. Therefore the court below passed a decree for recovery of possession in favour of the plaintiff with mensne profits from defendants 1 to 5 at the rate of Rs. 60/- per annum from the date of the plaint upto the date of surrender of possession of the property or for three years from the date of the decree whichever event happened first.

2. The 1st defendant-appellant contended before me that the decree of the court below is wrong on the ground that he had not undertaken to give vacant possession of the land or of the building to the plaintiff. Ext. A would make it clear that the purchaser was put in possession of the property. On the same day as Ext. A plaintiff executed a mortgage in favour of a stranger and in the mortgage deed also it has been stated that the plaintiff was in possession of the property. The main submission on behalf of the 1st defendant was that the plaintiff had inspected the property and the building and had known that tenants were in occupation of the building and the land and therefore the plaintiff was entitled only to get symbolic possession of the land and building. The evidence of the plaintiff is clear that he had notice that tenants were in occupation of the land and building. Counsel for the appellant relied on the ruling reported in *Subba Rao v. Vasudeva Sastry* (A. I. R. 1956 A. P. 113) for the proposition that even in the case of a purchaser of a building if he has notice of the tenancy the seller need give only symbolic possession. In that case it was held by Viswanatha Sastry J. that u/s 55(1)(f) of the T.P. Act, a seller is bound to give, on being so required, to the buyer or his nominee such possession of the property as its nature admits and that possession does not necessarily mean personal occupation but might include a landlord's possession if the property sold is in the occupation of a tenant to the knowledge of the buyer. It was further held that the contract of sale might, however, provide for delivery of vacant possession of the property even though it is in the occupation of a tenant to the knowledge of the buyer.

3. On the other hand counsel for the respondents relied on the ruling reported in *Sashi Bhusan v. Rai Chand* (A. I. R. 1950 Calcutta 333). The observation occurring at page 336 is relevant and is as follows:

On a construction of S. 55 (1) (f), Transfer of Property Act, I am of the opinion that if the property is house (and not a joint property) the possession that its nature ordinarily admits is vacant possession and in the absence of any agreement to the contrary the transfer contemplated is transfer of vacant possession and it is not enough to prove that there was even a tenant in occupation actually to the knowledge of the purchaser. In the facts however of this case no knowledge of the purchaser about the existence of the tenant at the time of execution of the agreement is proved. The word "its nature" in the

section mean in my judgment an incident which is inherent in the property which could be called as its nature. For example if the property is a joint and undivided property the possession can only be as its nature admits and therefore symbolic and not actual physical possession. Again the property might be intangible as for instance the right of easement, the possession which its nature will admit is also necessarily symbolic, and not actual and physical. It is in this sense that the word "nature" has to be construed. Ordinarily therefore in the absence of any contract to the contrary if the agreement is to sell a house in which the seller has the sole and absolute interest the possession contemplated under S. 55 (1) (f). Transfer of Property Act, is in my judgment vacant possession. The decision of Madhavan Nair and Jackson JJ. in Panchapagesa Ayyar v. Arunachala Mudaliar (1932 M. W. Ni 122), supports the view of construction that I have taken.

But it is clear from paragraph 10 of that judgment that the actual decision in the case was that when the buyer has notice of the tenancy, he is not entitled to get actual possession, but only symbolic possession, unless there is a contract to the contrary. On the evidence in that case it was found that the plaintiff had no notice whatever at the time of the execution of the agreement for sale that there were tenants in possession of the property. That case is therefore no authority for the proposition that even if the purchaser has notice of the tenancy he is entitled to get actual physical possession of the property. Counsel for the respondent also relied on the ruling reported in Puran Chand v. Official Liquidator (A. I. R. 1960 Punjab 51) and argued that u/s 55 (1) (f) of the Transfer of Property Act a seller is bound to give the buyer of a house actual physical possession of the house notwithstanding the fact that the buyer has knowledge of the tenancy. No authority to support the proposition has been cited in the case except A. I. R. 1950 Cal. 333 and 1932 M. W. N. 122. I have already dealt with Sashi Bhusan Dey and Others Vs. Rai Chand Bural and Others, . In the case of Panchapagesa Ayyar v. Arunachala Mudaliar (1932 M. W. N. 122) it was held that the buyer of a house is entitled to get actual possession, even though it be in the occupation of a tenant on the date of the sale to the knowledge of the purchaser. It is observed :

There can be no doubt that if the property is a house, the possession that its nature permits is vacant possession, and in the absence of some proviso to the contrary in the agreement, the transfer of vacant possession is intended. "The buyer of a single house fit for residence would generally be buying with that expectation." ".....If Ext. A had run "now in occupation of X" on the authority of Lake v. Dean, it might be held that the buyer could not insist on present occupation. But if nothing of the sort is entered in the deed of agreement, it is not enough to prove that a tenant was actually in occupation when Ext. A was drawn up, to the knowledge of the purchaser.

I am unable to come to the conclusion from this ruling, that even if the purchaser has notice of the tenancy he would be entitled to vacant possession of the house purchased, unless he has expressly contracted for the same. It is

difficult to say what the term "possession" means in this context. Possession itself is a term which is open to a great variety of meaning and delivery of possession as the nature of the property admits may be satisfied by handing over the title deeds when the property is in the occupation of the tenant in the absence of a contract to the contrary. In view of the definite evidence that the plaintiff was aware of the tenancy in respect of the building and of the land, I am inclined to hold on the strength of the ruling in A. I. R. 1956 A. P. 113 that the purchaser was entitled to get only symbolic possession. I hold that the 1st defendant was not liable for damages for breach of any covenant. It is proved in this case that defendants 2 to 5 are in occupation of the building and the finding of the court below is that they were taking the yield from the land. If that be so they are certainly liable to the, plaintiff for the rent of the building and also for the profits taken by them from the land. The court below has estimated rent of the building and the profit from the property at Rs. 60/-. I would therefore confirm the decree of the court below against defendants 2 to 5, but set aside the decree as against the 1st defendant.

4. It was argued for the respondents that there was an oral agreement at the time of the sale deed that the 1st defendant would give vacant possession of the property to the plaintiff. That agreement has not been proved. Therefore it is not necessary to go into the question whether such an agreement would be valid. In the result, I set aside the decree of the court below as against the 1st defendant and confirm the decree in all other respects. The appeal is allowed to this extent. The parties will bear their costs in this court.