

(1952) 10 KL CK 0023
In the High Court Of Kerala
Case No : Second Appeal No. 334 of 1125

Augustine

APPELLANT

Vs

Chandy and Others

RESPONDENT

Date of Decision : 24-10-1952

Acts Referred:

Transfer of Property Act, 1882 — Section 108, 7

Citation : AIR 1952 Ker 462

Hon'ble Judges : Gangadhara Menon, J

Bench : Single Bench

Advocate : T.M. Mahalingom Iyer, for the Appellant; T.P. Poullose, for the Respondent

Judgement

Gangadhara Menon, J.—This Second appeal by the 1st Defendant arises out of a suit for eviction. The Chapra described in the Schedule annexed to the plaint was taken on rent by one Vakry Luiz from the Vadakkumbhagonr Synagogue. For the purpose of his trade 1st Defendant obtained possession, of the Chapra from Luiz. Thereafter on 26-6-1120, 1st Defendant attorned direct and executed Ext. B Koolicharth in favour of the Synagogue. On the allegation that 1st Defendant demolished the Chapra that was leased out to them, and that consequently there was a termination of the lease, the Plaintiffs who are the managers of the Synagogue have brought the suit for eviction of the Defendants and for recovery of the site after removal of the new structure, if any, put up by the 1st Defendant together with the arrears of rent and the value of the demolished Chapra by way of damages. The 1st Defendant while admitting that he is in possession under Ext. B denied the allegation that the Chapra had been demolished by him. He contended that he had only repaired the Chapra as he was entitled to do and that the suit for eviction is not maintainable by virtue of the provisions of Proclamation 4 of 1122 (Cochin). The claim of the Plaintiffs for damages was also repudiated. On the question of arrears of rent he pleaded that it waif brought about by the Plaintiffs' refusal to receive the rent when offered.

2. The courts below gave a decree to the Plaintiffs prayed for on the findings that the 1st Defendant had demolished the Chapra that was rented out and put up a new one, and that the lease does not continue after the demolition of the building rented out.

3. It appears to me that the courts below have failed to draw the correct inference from the facts established by the evidence in the case. That Chapra that was rented out was but a flimsy structure. It had no masonry work whatsoever like basement, foundation or walls. It was but a shed put up on pillars of cocoanut timber with roofing made out of arecanut stem and bamboos and thatched with cadjan leaves. It was a pretty old one too. The evidence is that it was put up some 16 or 17 years before the date of suit. The total cost incurred by the Synagogue in connection with its construction was but Rs. 50 as seen from the accounts produced. It appears that on the date of Ext. B the Synagogue was under the administration of a Receiver appointed by Court and Ext. B was taken in the name of the Receiver on behalf of the Synagogue. In 1122 the 1st Defendant filed Ext. 3 petition before the Court stating that the shed is in a very dilapidated condition and prayed that orders may be passed to repair it properly. The court called for a report from the Receiver. The Receiver filed Ext. 6 report. It shows that that shed was in a very dilapidated condition even then. The Receiver was of the view that it was in such a bad state that it would be a waste of money to repair it. However the court ordered the Receiver to do what he deemed necessary. But nothing appears to have been done by the Receiver. Sometime after on the termination of the suit the Receiver was discharged.

The Synagogue thereafter came into the hands of the Plaintiffs as managers. They too did not do anything to keep the Chapra in a fit condition to be occupied by the tenant. The 1st Defendant swears that he requested the Plaintiffs also to have it properly repaired. But they failed to do anything in the matter. It is in these circumstances that the alleged acts of demolition of the entire structure by the 1st Defendant and of putting up a new one by him are stated to have taken place. According to the 1st Defendant, he had only repaired the Chapra replacing materials which had become totally useless. In the case of a shed like the one in question with materials that would easily decay repair would necessarily involve the pulling down of parts that have decayed and replacing them by good ones. Even the annual thatching involves this process to some extent and where the materials of the roofing have mostly become thoroughly useless as in the present case, it is impossible to repair it without pulling it down. This is all what the 1st Defendant has done as is borne out by his evidence and that of his witnesses. The report of the commissioner who went to the property immediately after the institution of the suit does not go against this. In his evidence as P.W. 2 the commissioner says that the materials rejected were those that were totally useless. The old pillars that had not decayed and all the available good materials out of the roofing were all utilised by the 1st Defendant in the repair work and only bad materials had been replaced by new ones.

4. u/s 108(f) of the Transfer of Property Act, if the lessor neglects to make within a reasonable time after notice any repairs which he is bound to make to the property the lessee may make the same himself and deduct the expenses of such repairs with interest from the rent or otherwise recover it from the lessor. In the light of the evidence in the case there is no doubt that the lessor had notice that the Chapra was in utter despair and required attention. The evidence also shows that the lessee was demanding such repair of the lessors. It is however contended that there is a provision in Ext. B that the lessee should not make any alteration in the Chapra without the consent of the lessor. But does that mean that the lessee is prevented altogether from doing the necessary repair work if the lessor wilfully neglects to do it? Should the lessee, keep quiet and allow the shed in which he is carrying on his business fall down? I do not think so. I am of the view that the provision relied on does not take away the right conferred on the lessee u/s 108(f) of the Transfer of Property Act. It has also to be remembered that under 108(M) of the Act the lessee is bound to keep and on the termination of the lease to restore the property in as good condition as it was at the time when he was put in possession subject to the changes caused by reasonable wear and tear of irresistible force.

5. As observed by Fletcher-Moulton L.J. in - "Lurcott v. Wakely" (1911) 1 KB 905 at p. 918 (A)

repair includes replacement of parts... "Many, and in fact most, repairs imply that some portion of the total fabric is renewed, that new is put in place of old.

How is it possible to do any repair work to a thatched old shed like the present one made of very flimsy materials like bamboo and arecanut stem most of which have decayed without pulling down the roofing and replacing new materials in the place of old and without replacing the pillars that have decayed? I have no doubt that in the case of structures, especially of the nature in question, repair implies renewal and replacement of parts that have decayed. This, it appears to me, is all that the 1st Defendant has done in this case with the old shed. In doing that, I do not see how the lease has determined. When the old shed had been renewed by the lessee the new one is put in the place of the old and all the rights and obligations as per the terms of Ext. B are attracted to it. In the circumstances of this case, I do not think that the act of the 1st Defendant would entail the determination of the lease as contended for by the Plaintiffs. If the renewal of the shed is unauthorised that may have some bearing on the claim of the 1st Defendant for the costs thereof. But that is a question that arises at the time of eviction and if the Defendant could not be evicted in this suit the question does not arise for decision now.

6. If Ext. B lease has not terminated by the so-called demolition of the Chapra as contended for the Plaintiffs then the lease continues and for the eviction of the tenant the Plaintiff's have to apply to the Controller in accordance with the provisions of the Proclamation 4 of 1123 (Cochin) and a suit for the purpose is not, maintainable as is clear from Section 7 of the Proclamation. Therefore, the

prayer of the Plaintiffs to evict the Defendants cannot be granted.

7. The attempt of the Plaintiffs in this case appears to be one calculated to circumvent the provisions of law, as embodied in Proclamation 4 of 1122. They would not repair the shed in time in spite, of the fact that they were aware that it was in quite a dilapidated condition. Evidently they wanted it to go into ruin so that under some pretext they could get the tenant evicted. On account of the wilful neglect of the-Plaintiffs the Defendant was compelled to do the repair work himself and while he was at it the Plaintiffs availed themselves of the situation to rush to the court with the case that since the 1st Defendant has demolished the building rented out, there is no longer any lease and that consequently they are entitled to recover the site. This is indeed a clever and novel method calculated to defeat the rights that are conferred on the tenant by the provisions of Proclamation 4 of 1122. Even if the 1st Defendant demolished the whole Chapra and put up altogether a new one in its place, I do not think that Ext. B lease could be deemed to have terminated for that reason. However, it is unnecessary for me to consider that question here since I am of the view that the 1st Defendant's act does not amount to a demolition or destruction but amounts only to a repair of the Chapra and nothing more.

8. It follows that the Plaintiffs are not entitled to compel the 1st Defendant to remove the structure or to get damages as claimed" to recover the site.

9. There remains only the question of arrears of rent. The 1st Defendant's case is that the rent came into arrears as the Plaintiffs refused to accept it when offered. Whatever that be, he has no objection to grant the Plaintiffs a decree for arrears of rent. Therefore Plaintiffs will get a. decree for past arrears and future rent from date of suit till this date at the rate of Rs. 4/- per mensem with interest at 6 per cent per annum from the due dates. Amounts if any deposited by the 1st Defendant in court will be given credit to.

10. In the result this appeal is allowed as indicated above. The Plaintiffs will get a decree for rent as indicated in para 9 supra. The suit is dismissed in respect of all the other reliefs prayed for. In the circumstances of this case the Plaintiffs will pay the costs of the 1st Defendant in all the courts.