

(1978) 01 OHC CK 0001
In the Orissa High Court
Case No : Second Appeal No. 198 of 1974

Batakala Budhia Patro

APPELLANT

Vs

Durgasi Dandasi Patro and Others

RESPONDENT

Date of Decision : 02-01-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 105, 106, 111, 111(2)

Citation : AIR 1978 Ori 103 : (1978) 45 CLT 648

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : N.V. Ramdas, for the Appellant; Y.S.N. Murthy and P.V. Ramdas, for the Respondent

Final Decision : Dismissed

Judgement

S. Acharya, J.—Defendant No. 1 has preferred this appeal against the reversing decision of the court below.

2. The plaintiff's suit is for eviction of the defendants from the suit house and for realisation of arrear of rent till delivery of possession of the suit house. The plaintiff's case, in short, is that he let out on monthly lease the suit house belonging to him to defendant No. 1 on the Kumar Purnima day of 1965 (10-10-1965) for a period of five years on monthly rent of Rs. 3/-. As defendant No. 1 was a close relation of the plaintiff, no lease deed was executed while letting out the said house. Defendant No. 1 occupied the suit house and regularly paid the agreed rent till Baisakh Purnima of the year 1970, whereafter he defaulted to pay the rent in spite of demands. He also sublet the suit house to defendant No. 2. As the plaintiff did not receive payment of the house rent from defendant No. 1 and as the latter sublet the house to defendant No. 2, the plaintiff by serving a registered notice demanded vacant possession of the suit house. As the arrear rent was not paid and vacant possession of the suit house was not delivered, the plaintiff instituted this suit.

3. Defendant No. 1 alone contested the suit. According to him, the house belongs to him and the plaintiff has no manner of right, title or interest in the same, nor was he ever in possession of the same. He has denied payment of any rent to the plaintiff in respect of the suit house. According to him his father purchased the suit site from the mother of the plaintiff on 15-5-1925 by an unregistered sale deed (Ext. A) for Rs. 16/-and thereafter constructed the suit house on a portion thereof. After the death of his father defendant No. 1 inherited the suit property and he sold Ac.0.02 cents of land with the suit house standing thereon to defendant No. 2 under the registered sale deed (Ext. B) dated 5-6-1970 for Rs. 900/- and delivered possession of the same to defendant No. 2. It is also stated in his written statement that he and his father had also perfected their title to the suit property by adverse possession and that the suit was barred by limitation.

Defendant No. 2 died during the pendency of the suit. His legal representatives, defendants 2 (a) to 2 (c), supported the case of defendant No. 1 in the written statement filed by them. They did not contest the plaintiff's suit in any other manner.

4. The trial court held that the plaintiff's title to the suit house had been lost due to adverse possession of the same by defendant No. 1 and so the plaintiff had no cause of action for the suit.

5. The appellate court has held that the suit house belongs to the plaintiff; he had let out the same to defendant No. 1 on monthly rent as stated in the plaint; Ext. A. on which defendant No. 1 has based his title over the suit property, is not a sale deed but an agreement between the plaintiff's mother and the father of defendant No. 1 to sell the suit property; and that document also has not been proved to be a genuine document. So no title to the suit property passed to the father of defendant No. 1 under that document and defendant No. 1 could not transfer any valid title in the suit property to defendant No. 2 by Ext. B. It also holds that as defendant No. 1 and his father were tenants in the suit house under the plaintiff and it has not been established that the plaintiff lost his title to the suit house on account of adverse possession of the same by defendant No. 1, the plaintiff is entitled to the reliefs prayed for by him in this suit. On the above findings the appellate court set aside the findings of the trial court and decreed the plaintiff's suit.

6. It was at first urged by Mr. Ramdas, the learned counsel for the appellant, that the decision of the appellate court must be deemed to be erroneous in law as in reversing the decision of the trial court it did not repel or meet the reasons given by the trial judge in arriving at his conclusions on those issues. The above submission was made in respect of the findings of fact of the courts below. It is wrong to say that the appellate court in arriving at its conclusions on the different questions raised before it did not at all notice the reasonings and considerations which weighed with the trial judge to arrive at his conclusions on those matters. Apart from that, merely because some of the reasons given by

the trial Judge are not expressly repelled by the lower appellate court, this Court, while exercising jurisdiction u/s 100 C. P. C is not entitled to interfere with the judgment of the lower appellate court on that ground. In the decision reported in (1906) 16 MLJ 272 (PC) the Privy Council has of course observed that it is better that the appellate court, whenever it reverses the judgment of the lower court, comes into close quarters with the judgment of the trial court and meets the reasoning therein. The Privy Council by saying so indicated the requirements of a proper judgment of the first appellate court. But failure to conform to the said standard would not enable this Court in exercise of its jurisdiction u/s 100, C. P. C. to whittle down or set aside a finding of the lower appellate court, and more so a finding of fact, on that score. My above view gets support from the observations made in paragraphs 16 and 17 of the decision in R. Ramachandran Ayyar Vs. Ramalingam Chettiar, .

The findings of fact of the lower appellate court have been arrived at on a proper discussion of the evidence on record and on consideration of the important findings of the trial court, and I do not find any reason to interfere with the same in this second appeal.

7. In this case, the lease in question was an oral lease. In the plaint it is stated that the plaintiff had agreed to let out the suit house to defendant No. 1 for 5 years on a monthly rent of Rs. 3/- per month. An oral lease for more than one year, when accompanied by delivery of possession, is valid for only one year, and the lessee continuing in possession thereafter with the assent of the lessor becomes a monthly tenant thereof by, holding over, (See Alauddin Ahmad Vs. Aziz Ahmad and Others, . Mr. Ramdas, however, made a vain attempt to challenge the finding of fact of the court below that the appellant was a tenant under the plaintiff in the suit house. The said finding has been arrived at on a reasonable discussion and consideration of the relevant evidence on record and I do not see any reason to interfere with the same.

8. Mr. Ramdas at last contended that the suit for eviction of the appellant was bad on account of the invalid notice to quit served by the plaintiff on the appellant, The question regarding the validity of the notice to quit was not raised by defendant No. 1 in his written statement. He also did not raise that question in course of the trial. That question also was not raised by defendant No. 1 in the lower appellate court as is evident from the impugned judgment, and in the memorandum of appeal in this Court there is no mention about this ground. As defect in the notice to quit and the non-maintainability of the suit on the ground of invalidity of the said notice was not pleaded or raised at any previous stage, that ground cannot be allowed to be raised for the first time in this second appeal. B. B. Mitra in, his commentary on Transfer of Property Act, 12th Edn. at page 939 holds the above view, In Batoo Mal Vs. Rameshwar Nath and Others, it has been held that:--

"20. Ordinarily a landlord suing or applying for the eviction of a tenant must plead that the contractual tenancy has been terminated. If the tenant does not

take the plea that the suit or the application is untenable due to the non-termination of the contractual tenancy then he would be either deemed to have admitted the allegation of the landlord by non-traverse or to have waived the benefit of the protection of Section 106 of the Transfer of Property Act."

Their Lordships have further observed that the failure of the tenant to raise the objection regarding the non-compliance with Section 106, Transfer of Property Act at an earlier stage of the litigation would amount to a waiver of the plea, and if the tenant does not raise such a plea before the trial court that plea cannot be raised for the first time in the first appeal, much less in the second appeal.

9. Apart from the above consideration, it is also seen from the impugned judgment and from the materials on record that the notice to quit as given under Ext. 3 was a valid notice. In that notice served by the plaintiff on the appellant it has been clearly mentioned that the tenancy was from Purnima of every month till the day preceding the Purnima of the next month. In Ext. 3 it is specifically mentioned that the said notice to quit was given to the appellant calling upon him to vacate the house by the end of the tenancy month and to deliver vacant possession of the house on the preceding day of the Margasira Purnima of that year, i. e. by the end of 11-42-1970. That notice was dated 9-11-1970 and was received by defendant No. 1 on 12-11-70. A monthly oral tenancy of a house is terminable by 15 days notice expiring with the end of a month of the tenancy.

It was urged by Mr. Ramdas that the month of the tenancy as stated in the said notice was not valid, as tenancy from a Purnima to the day preceding the next Purnima according to the Oriya almanac could not legally be accepted as a month of the tenancy. There is no weight or support for the said submission. There is nothing in Section 106 of the Transfer of Property Act that the month of the tenancy must be in accordance with the Gregorian or the British calendar. The Hindus, Muslims and other sects in India have their own calendars to follow. If the tenancy starts on a Purnima day, then the month of the tenancy in that case would be the month starting from that date and ending with the day preceding the Purnima of the next month. It has been observed in the decision reported in *Bhaiya Punjalal Bhagwanddin Vs. Dave Bhagwatprasad Prabhuprasad*, at p. 126 R. H. C. bottom, that :--

"The tenancy under a lease for a certain period starts from a certain date, be it according to the British calendar or any other calendar. The period of lease, and consequently the tenancy, comes to an end at the expiry of that period according to the calendar followed by the parties in fixing the commencement of the tenancy. A lease, even according to the British calendar, can start from any intermediate date of the calendar month,"

The other observations in that paragraph are not relevant for our purpose.

As the month of the tenancy in this case was from the Purnima of every month to the day preceding the Purnima of the next month, and the notice to quit in this case was served on the appellant more than 15 days prior to the expiry of

the end of the month of the tenancy, it was a valid notice, and I do not see any substance in the above-mentioned contention of Mr. Ramdas.

10. It is also to be noted in this case that defendant No. 1 admittedly executed the sale deed Ext. B in respect of the suit house in favour of defendant No. 2 on 5-6-1970, i. e. on a date prior to 6-1-1971 when this suit was instituted by the plaintiff. In Ext. B defendant No. 1 describes himself as the owner of the property having inherited the same from his father. Therefore defendant No. 1 by executing the sale deed tried to set up a title to the suit house to himself and renounced his character as a lessee of the said house under the plaintiff. So the lessee was exposed to the risk of forfeiting his lease as per Section 111(g)(2) T. P. Act. That fact and the notice to quit (Ext. 3) by the lessor amounted to a forfeiture, as the two factors required u/s 111(g) of the T. p. Act were fulfilled. So, even if the notice to quit for the sake of argument is not found to be a valid notice u/s 106, T. P. Act, defendant No. 1 would come within the this chief of Section 111(g) of the T. P. Act, and institution of this suit on that score cannot be questioned.

11. Mr. Ramdas at last contended that in view of the facts that the plaintiff has not led any evidence to establish the fact that the tenancy in question was from the Purnima of a month to the day preceding the Purnima of the next month and that the parties were following the said Oriya month in respect of this tenancy for all intents and purposes, this case should be remanded to the court below directing that court to give a finding on that aspect of the matter. The above submission is without any weight or force. The month of the tenancy in respect of this case has been stated in the plaint and in Ext. 3. the notice to quit, served by the plaintiff on the appellant. The plaintiff himself has also asserted the said fact in his deposition in the court. The defence put forward by defendant No. 1 is a complete denial of the relationship of landlord and tenant between the plaintiff and himself. The assertion of the plaintiff regarding the month of the tenancy was not sought to be assailed in the hearing of the suit. On the unassailed facts already on record it is clearly established that the month of the tenancy was from a Purnima up to the day preceding the Purnima of the next month. I therefore do not see any reason to remand the case to the court below as desired by Mr. Ramdas.

12. The impugned judgment could not be assailed on any other ground.

13. I, therefore, do not see any merit in this appeal and it is accordingly dismissed with costs.