

(1972) 08 CAL CK 0020
In the Calcutta High Court
Case No : F.A. 179 of 1969

Kamalabala Devi

APPELLANT

Vs

Durgacharan Dutta and Another

RESPONDENT

Date of Decision : 25-08-1972

Acts Referred:

Contract Act, 1872 — Section 23, 5
West Bengal Premises Tenancy Act, 1956 — Section 21

Citation : 77 CWN 870

Hon'ble Judges : A.K. Sinha, J

Bench : Single Bench

Advocate : S.C. Mitter and Amal Kumar Ghoshal, for the Appellant; M.N. Ghosh and Jamini Kumar Banerjee, for the Respondent

Judgement

A.K. Sinha, J.—This appeal arises out of a suit for ejectment filed by the plaintiffs landlord against the defendant tenant for her eviction from the disputed premises. Plaintiffs' case briefly is that the defendant who was holding under a registered lease the disputed premises for five years with option to renew the lease for further five years expiring on 31st January, 1965, at a monthly rental of Rs. 170/- per month according to the English Calendar held over after the expiry of the lease as a tenant but defaulted in payment of rent since the month of August 1966. It is also alleged that the defendant has been using or allowing the premises to be used for immoral and illegal purposes on letting the rooms to several women, for prostitution. In a previous ejectment suit filed by the plaintiffs against the defendant although the second ground for ejectment was established the suit was dismissed as notice of ejectment was found to be invalid. In spite of service of fresh notice of ejectment it is alleged the defendant refused to vacate.

2. The suit was contested by the defendant and in the written statement filed by her, she denied all material allegations of the plaint. She also denied the validity, sufficiency and service of the ejectment notice.

3. Upon the respective pleadings of the parties, substantially three issues were framed on question as to sufficiency and service of the ejectment notice, of default in payment of rent and also using of the premises for illegal and immoral purposes. The trial court on evidence this time found on all the three issues in favour of the plaintiffs and decreed their suit. Identical questions arise for consideration in the present appeal.

4. On the question of validity of notice Mr. Mitter appearing in support of the appeal does not seriously contend that the period of notice was insufficient. What he says is that the endorsement "not claimed" on the registered notice sent to the defendant could not be treated as refusal and therefore, should not be accepted as a good service. Reliance is placed on a Bench decision of this Court (1) Satya Chorone Roquittee Vs. Suresh Chandra Pal and Others, , to show that it is not always the case that whenever a registered letter comes back with the endorsement "not claimed" it would mean refusal and consequently a good service. But this decision was noticed in a latter Bench decision of this. Court in, (2) G. C. Nundy v. J.N. Chatterjee, 70 C.W.N. 676, followed by the trial court, where the same learned Judge P.N. Mookerjee J. who delivered the earlier judgment while laying down that where the defendant was residing and was available at the address to which the notice was sent "the expression "not claimed" must be read as amounting to refusal and in that view it would be a good service on the defendant." has observed, Satya Chorone Roquittee Vs. Suresh Chandra Pal and Others, cited by the appellant, lays down nothing to the contrary." Applying the test indicated in G. C. Nundy's case, therefore, the trial court, I think, was correct in concluding that the registered notice though came back with the endorsement "not claimed" must be accepted as a good service. For, here in the instant case there was no evidence to show that the defendant was away or absent from the disputed premises and there was nobody who could accept the letter on her behalf. In absence of such evidence in the present case the decision in Satya Charan's case (Supra) has no application. This contention, of Mr. Mitter therefore must fail.

5. Now, first ground for ejectment is one of default in payment of rents by the defendant since August 1966. The previous suit was dismissed at a time as found by the trial court, I think rightly, the rent for August 1966 had not then become due. The trial court also found from the series of rent deposit challans (Ext. A-A25) that these deposit of rent from August 1966 upto September 1968 which are not disputed by the plaintiffs were made in time. But inspite of these facts the learned trial court entered into the question of tender of rent for the month of August 1966 if made by the defendant within time but on disbelieving the evidence of the defendant found that the rent for the month of August 1966 was not tendered in time by the defendant and accordingly, held that all the deposits made by the defendant though in time were invalid. In my view, such an approach to the question is erroneous. In this case after the dismissal of the previous suit for ejectment no question of fresh tender by the defendant could arise. It has also been made clear in sub-section 4A of Section 21 of the West

Bengal Premises Tenancy Act that if the tender of rent at the outset for one month is made within time there would be no necessity for tendering rent again for any subsequent month. It, therefore, follows that after the dismissal of the suit there is no necessity in law requiring the defendant to again tender rent for the month of August 1966. In this case, there is no dispute as to the validity or sufficiency of the tender of the earlier rents deposited by the defendant. Therefore, the validity of the deposits from the month of August 1966 could not depend upon the question whether the rent for the month of August, 1966 was validly tendered or not. It is true that the defendant herself said in her evidence that she tendered the rent for the month of August, 1966 within time to the plaintiffs and that, it may be, was disbelieved for sufficient reason by the trial court. But that fact by itself could not create an estoppel against the Statute. For there is no obligation imposed upon the defendant under the statute for further tender of rent by the defendant to the plaintiffs, when the suit stood dismissed. That being the position, the trial court was not right in concluding that the defendant was a defaulter. In the facts and circumstances of this case, since the rents for the disputed period were admittedly deposited within time it must be held that the defendant was not a defaulter.

6. This brings me to the second ground which raises the question whether the defendant is liable to be ejected for using or causing the premises to be used for illegal or immoral purposes.

7. This point was in the earlier suit decided in favour of the plaintiffs. It was held that the premises in dispute was being used for brothel purposes. On this finding, although the earlier suit was dismissed only on the ground of insufficiency or non-service of notice the trial court held that the identical question could, not be gone into and decided over again as it was barred by res judicata. I think the trial court was not right in applying the principle of res judicata to such a case for even though the question was decided between the parties in the earlier suit such a decision was unnecessary as the earlier suit failed on a preliminary point of insufficiency and non-service of notice (See (3) Radha Kanta Das v. Pankajini Devi, ILR 51 Cal 1005, (4) Istak Kamu Musalman Vs. Ranchod Zipru Bhate and Others,). Further, there is no scope for appeal against such a finding as the entire suit was dismissed. It could not be said that the issue was conclusively and finally decided between the parties. It is therefore clear that the decision of the trial court on this aspect of the matter was not correct.

8. Nevertheless, the trial court found as a fact on assessment of evidence that the premises in suit was being used for immoral and illegal purposes. I do not think I can take any view on evidence different from that of the trial court. Although it was said by the defendant that she has introduced, herself being a woman, women tenants in each of the rooms let out by her who were said to have been living in family life the husband or near relations were neither cited as witnesses nor they came forward to support the defendant. On the contrary the

father of the plaintiff who was admittedly looking after the premises and used to realise rents etc. had occasions to go to the premises when he found the women standing on the doors steps to attract visitors. One of the plaintiffs is a medical practitioner in his evidence also had stated that he had occasion to visit the house for treating some of the occupants and found there women to be of questionable character. The defendant herself in the written statement filed at the trial court in the earlier suit where she stated in no uncertain terms that the locality in question was ill-reputed area comprised within the brothel section as recorded in the Police Head Quarters. She also stated that one of the plaintiffs was the owner of the two other premises in the same locality and all these premises including the disputed premises, it was well-known to the plaintiffs, were being let out to tenants who were women of town. This being the nature of evidence there can be little doubt that the defendant has been using or causing the premises to be used for purposes, which must be said in the present context immoral.

9. Even so, Mr. Mitter has contended that the plaintiffs are not entitled to eject the defendant after their purchase as they have allowed the defendant in spite of their knowledge to use the premises or caused it to be used for immoral purposes. It is in evidence, it is said, that the father of the plaintiffs had since been realising rent knowing that the house was being used for prostitutes for their profession and this was also admitted by the one of the plaintiffs, a medical practitioner. Mr. Mitter's argument therefore is that the plaintiffs themselves by their consent or tacit approval having allowed the premises to be used as a brothel no court would assist them in ejecting the tenant on the principle firstly, that any agreement which for illegal and immoral purposes is opposed to public policy and secondly legal action by any party to the agreement having an unlawful intention is not enforceable in a court of law. On the question of public policy Mr. Mitter relies on a decision of the Supreme Court in (5) *Gherulal Parakh Vs. Mahadeodas Maiya and Others*, , and also on a decision of Andhra Pradesh High Court in (6) *Kolaparti Venkatareddi Vs. Kolaparti Peda Venkatachalam*, , to show that any agreement either expressed or implied which is opposed to public policy is void. While there cannot be any dispute that a contract which is opposed to public policy as provided u/s 23 of the Indian Contract Act is invalid, it is difficult to see how these decisions have any application to the facts of the present case. In the Supreme Court case the question was whether the wagering transactions carried on by a partnership firm were void and in considering such question on a review of long line of both Indian and English decisions it was held that though a wagering transactions was void and unenforceable it was not forbidden by law and therefore the object of the collateral agreement was not unlawful u/s 23 of the Contract Act, and further the partnership agreement within the meaning of Section 23 of the Contract Act was not unlawful though its object was to carry on wagering transactions. In the case of the Andhra Pradesh High Court the dispute arose over certain agreements or arrangements arising out of a dispute between two brothers regarding the payment of certain payment

of compensation over their barbar's service which used to be rendered to a certain village. In that context while considering the question of validity of policy u/s 5, A. P. (Andhra area); Hereditary Village Offices Act it was observed following above decision of the Supreme Court that agreements tending to injure the public services were always considered to be opposed to public policy. But at the same time it was also said that public policy did not admit of any definition and it was always variable in nature. Clearly, therefore there being admittedly no such contract these decisions are of no assistance to the appellant in the present case. The question in the instant case is whether having had the knowledge that the defendant has been using the premises for immoral purposes the plaintiffs still could ask for ejectment of the defendants, in a court of law.

10. In support of the second contention Mr. Mitter reads a passage from Cheshire's Law of Contract (7th Edition 332) where it is stated that

any party to the agreement who had the unlawful intention is precluded from suing upon it....The action does not lie because the court will not lend its help to such a plaintiff.

This statement is based upon English decision in (7) Alexander v. Rayson 1935 All. E.R. 185. I will come to this decision later on. It is also stated while commenting on the knowledge about the unlawful purpose of the contract that if after the intended purpose had come to the plaintiffs' knowledge he had let the defendant into possession in accordance with the contract?he could not have recovered the agreed price. This statement as appears is based on a decision in (8) Jennings v. Thorgmorton 27 R.R. 746 . In support of this contention Mr. Mitter also relies on a case of Bombay High Court in (9)Bani Muncharam and another v. Regina Stranger 32 Bombay page 581 and also the decision of Amiya Kumar Mookerji J. in (10) Sm. Parul Bala Chandra and Others Vs. Jamuna Bala Dasi and Others, to show that the plaintiffs having tacitly approved the user of the premises as a brothel or having allowed the premises in spite of their knowledge of use for such purposes they are precluded from suing in court of law for recovery of possession of the disputed premises. I fail to see how this is so.

11. In my view, Jennings v. Throgmorton (supra) has no application to the facts of the present case as there the plaintiffs were fully informed that the defendant occupied the lodgings for the purposes of prostitution and in spite of such information he brought an action to recover the weekly rent for use and occupation of that lodging under weekly tenancy and it was held that he was not entitled to recover rents. It is therefore, clear, in this case the plaintiffs were seeking to enforce a contract though implied by asking the court for recovery of rent and thereby enforcing the contract. In the Bombay case Bani Muncharam v. Regina Stranger (supra), it appears that the plaintiff was relying upon the agreement in respect of the cause of action that were alleged against the defendant and the ground upon which he sought to make her vacate the house and the premises was that she did not pay rent which was marked in that lease. In that context the court held that

since the plaintiff could not make out his case except through, an immoral transaction to which he was the party he must fail.

This case to my mind, has no application, again, to the facts of the present case. Here, in the instant case, clearly, the plaintiffs were not party to any immoral transaction but they seek the assistance of the court in ejecting the defendant on the ground that the lease in question or the contract of tenancy became ineffective and void as the premises were being used for illegal and immoral purposes. It is not a case where the plaintiffs are suing to recover possession on the ground that the conditions embodied in the lease or the tenancy were not fulfilled. It would be pertinent to point out that the learned Judge in the Bombay case followed observations of Tindal C.J. in (11) Gas Light and Coak Co. v. Turnar (1839) 5 Bing N.C. 666, to the effect that the suit for ejectment would lie because it would be impossible for the defendant to plead the illegality of the lease after having pleaded in the action before him that it was void. In fact it would further appear that the plaintiffs in this case were permitted to withdraw the suit and file a fresh suit.

12. For the same reason I think the Calcutta case, Parul Bala Chandra v. Jamuna Bala (supra) is distinguishable from the facts of the present case. In that case the tenant defaulted in payment of rent and the action for ejectment was brought only on the ground of default in payment of rent. In that context the ejectment of the tenant was refused on the ground that the plaintiffs having had the knowledge that the house had been used for immoral purposes they could not sue for possession relying on violation of statutory term of tenancy namely non-payment of rent by the defendant. But where, as here, the plaintiffs were seeking recovery of possession on the ground of ownership not relying on or seeking to enforce the contract of tenancy or any term thereof but on treating the tenancy as illegal or void because of the user of the premises for immoral purposes, the principle embodied in the maxim "*ex turpi causa non oritur actio*" is, I think, not, applicable. In the instant case there cannot be any question of ejectment on the ground of default in payment of rent for it has been found that the defendant is not a defaulter. Even, if it is assumed that the plaintiffs have knowledge or in spite of such knowledge the premises were being used for immoral purposes that fact by itself could not debar the plaintiffs from suing in a court of law for recovery of possession of the disputed property. Anson in his English Law of Contract 21st Edition, page 323 states:?

The policy of law prohibits the enforcement of an illegal contract or of any claims arising out of it, but if he can so frame his action that he is not forced to rely on the illegal agreement he will be permitted to assert the independent right which he may have to property which has been transferred under it. This principle is extremely difficult of application since it is frequently hard to determine whether the plaintiff is relying upon an independent right such as ownership or upon the contractual provisions of the illegal agreement. For example, it seems probable that a landlord can recover premises let to a tenant not on illegal agreements

once the term of years has expired. But it is a matter of doubt whether he could recover them in the mean time under a covenant which provided for forfeiture for non-payment.

13. It appears that this statement is based apart from other authorities on the decision of *Gas, Light and Coak Co. v. Turnar* (Supra) and *Alexander v. Rayson* (Supra) 1936 (1 K.B. 169). The view taken by Tindol C.J. in *Gas Light and Coak Co.*'s case has already been noticed in the Bombay case. There the learned Chief Justice took the view that since the contract opposed to public policy was void in law, a party to contract could recover possession on the right of his ownership but not on the basis of such illegal or void agreement. In *Alexander*'s case on a review of long line of cases it was observed, inter alia, at p. 186 of the Report that:

In view of these various authorities it seems plain that, if the plaintiff had let the flat to the defendant to be used by her for an illegal purpose, he could not have successfully sued her for the rent, but the leasehold interest in the flat purporting to be granted by the lease would nevertheless have been legally vested in her. The result would have been that the defendant would be entitled to remain in possession of the flat without payment of rent until and unless the plaintiff could eject her without having to rely upon the lease or agreement.

14. On a reference to the decision of Tindol C.J. in the same *Gas Light and Coak Co.*'s case it was stated quoting his Lordship's observation that objections to ejectment could not be made effectively that the Court was lending its hand to force a contract which was illegal or void. In fact the point now involved in this case was not the subject-matter of decision in *Alexander*'s case. I think therefore that *Alexander*'s case cited by Mr. Mitter also is of no assistance to him. On the contrary, it lays down that the landlord can recover the premises if he does not rely on the illegal or void contract. Applying the test indicated in the above decisions to the facts of the present case there can be little doubt that the plaintiffs in seeking ejectment of the defendant are not relying on any part of the contract of tenancy, nor even on the basis of the statutory forfeiture of the tenancy for non-payment of rent but on their independent right as owners by reason of the fact that the disputed premises were being used or caused to be used for illegal or immoral purposes.

15. The matter if considered from another aspect would yield the same result. That aspect is that even if the plaintiffs given the tacit approval or allowed the premises, in spite of their knowledge, to be used for immoral purposes such knowledge of approval even if construed an implied contract must be deemed to be void in law as being opposed to the public policy. So the contract in any view cannot be successfully set up as a defence by the defendant to an action for ejectment as in reality the contract has no existence in law.

16. This apart, the law itself has provided for ejectment of a tenant on the ground of the user of the premises for illegal and immoral purposes. This

provision clearly lays down the policy of the law and in my view no party can plead estoppel by setting up of a contract contrary to the provisions of law. This being so the plaintiffs suit for ejectment of the defendant on this ground is perfectly maintainable. The contention raised by Mr. Mitter therefore fails. I come to the same conclusion as reached by the trial court though on additional reasons. In the result this appeal is dismissed and the judgment and decree of the trial court are affirmed. But considering the facts and circumstances of this case I do not make any order as to cost. I also however allow the defendant time to vacate the disputed premises till 31st January, 1973. But this is on condition that the plaintiffs must deposit in the trial court amount of every equivalent to the amount of rent last paid in respect of the disputed premises month by month within the 15th day of each succeeding month during the periods aforesaid.