
(1965) 02 KL CK 0013
In the High Court Of Kerala
Case No : S. A. No. 617 of 1960

Kinhanna Alva

APPELLANT

Vs

Sankar Banta

RESPONDENT

Date of Decision : 02-02-1965

Acts Referred:

Citation : (1965) KLJ 371

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : N. Sundara Iyer, V. R. Venkitakrishnan, for the Appellant; S. Narayanan Potti, N. K. Varkey, for the Respondent

Final Decision : Dismissed

Judgement

S. Velu Pillai, J.—The respondent sued the appellant-second defendant and his deceased mother, the first defendant, for refund of Rs. 1,600/- alleged to have been advanced by him under an edurnudi, Ext. A3, dated the 13th June 1954, as part of a transaction of lease and as the consideration therefore. Under the decree for partition in O.S. 122 of 1949, certain properties were allotted to the share of the appellant and his mother, two of which forming one garden, were said to have been leased to the respondent on the 24th March, 1954. It is the respondent's case, that as the consideration for the lease or premium, the first defendant had then demanded a sum of Rs. 1,600/-which he agreed to pay, on the realisation of an outstanding due to him from one Padmavathi, but that, this failing, he assigned a mortgage right under Ext. A4 on the 27th May, 1954, raised Rs. 1,700/-, and paid Rs. 1,600/- under Ext. A3, but subsequently the appellant trespassed into the properties and his complaint against it proved futile. The first defendant contended that she did not execute an edurnudi as such, that she had not received any sum as alleged and that she is not liable. The appellant was impleaded in order to bind the family. The Munsiff accepted the defense and dismissed the suit, but in appeal the Subordinate Judge gave the respondent a decree. The lower courts have concurrently held, that the first

defendant executed Ext. A3 with knowledge of its contents. These findings rest on sufficient evidence and are not liable to be disturbed in Second Appeal. The case of the 1st defendant when examined as D.W. 2 was, that at the instance of P.Ws. 4 and 5 she simply signed papers on which three or four stamps were affixed, at the residence of the appellant's father-in-law while she was there, but that afterwards, during the police investigation into the complaint of trespass against the appellant, she knew that Ext. A3 had been fabricated. P. W. 4 gave evidence as regards the execution, and P. W. 5 as regards the attestation of Ext. A3 and P. W. 1 the respondent swore to his case. I hold that the first defendant executed Ext. A3, knowing its contents.

2. This finding is sufficient to cast the burden on the first defendant to prove, that she had not received the consideration as recited in Ext. A3. The lease deed, genichit as it is called, was executed by the respondent in favour of the first defendant. The execution of this is recited in Ext. A3 and must be taken to be proved. It may be that the genichit did not recite the proposed payment of Rs. 1,600, but this is of no importance in view of the admission in Ext. A3. The evidence adduced on behalf of the respondent was primarily to prove the execution of Ext. A3. The appellant was not present at the execution of Ext. A3, but this is immaterial, once it is noticed, that the attesor in Ext. A3 was Koragappa Alva, the brother of Akkari Banta, the father-in-law of the appellant. The first defendant admitted that they were all in the best of terms. It is too unreasonable to think, that the first defendant would have executed Ext. A3 without receiving the consideration under it, while acting in the presence of near relations. The story that she came to know the truth about Ext. A3 only during the police investigation is incredible. That the respondent had funds with him for making payment, is apparent from Ext. A4. The first defendant issued a notice Ext. A5 on the 3rd December, 1954, to P. W. 5, stating that the money had been taken by P. W. 5. This at least shows, that her present theory, that she signed merely blank papers and that no payment was made by the respondent under it, is palpably false. If, as stated in Ext. A.5, P. W. 5 had walked away with the amount after the execution of Ext. A.3, the respondent is not to suffer for it. When P. W.5 was examined, this theory seems to have been abandoned, as there was no cross-examination as to it or upon his statement to the contrary in chief examination, either for the first defendant or for the appellant. This is of very great significance. The Munsiff misplaced the burden of proving absence of consideration for Ext. A.3, although he found execution of it to be duly proved. I am of the view, that the appellant and the first defendant have not sustained the burden of proving that the consideration under Ext. A.3 was not received by the first defendant as recited in it. The next question to decide is whether this suit for refund of the premium, for such as it is, advanced under Ext. A.3 is maintainable or not. The Subordinate Judge has held it is, and I think rightly. The lessor had a duty not only to put the lessee in possession of the property, but also to maintain or support his possession. In any case, after putting the lessee in possession, he is not to disturb his possession, for that will amount to a

breach of the covenant of quiet enjoyment which is implied in the lease, to say the least. If he does so, the lessee is entitled to treat the lease as at an end and claim relief on that footing. One relief is The refund of the consideration for the lease, subject to any adjustment that may be called for. Learned counsel for the appellant argued, that the respondent would have been on firm ground in making the claim, if he had not been initially put in possession but not afterwards. The argument implies, that after putting the lessee in possession, the lessor can soon after, say on the next day, trespass into the property and turn the lessee out with immunity and defeat the lessee's claim for refund of the premium. I do not understand the law to be this. The appellant having dispossessed the respondent, the latter has by this suit given up all the rights under the lease and sought refund of the premium. In *Narayan Ramchand v Gokuldas Bholadas* (A. I. R. 1947 Nagpur 48) even where the lessee was disturbed by a third party, his claim for refund of the premium against his lessor was upheld, and a decree was given. The decisions relied on by learned counsel for the appellant do not lay down anything to the contrary. In *Ahammadar Rahaman Chaudhuri v Jaminiranjan Barua* (A. I. R. 1930 Calcutta 385) the lease embodied special contracts in the event of dispossession of the lessee and yet the premium was allowed to be refunded. *Darogha Ibad Ullah Khan v Ram Charan Sah* (53 Indian Cases 140) and *Razzeo Ali v Ram Autar Lal* (52 Indian Cases 836) were cases in which the lessee was not put in possession of the leasehold and was held entitled to recover; but in my view the position cannot be different, where, as stated, the lessor has committed a breach of the covenant and dispossessed the lessee. *V.R. Lakshmanan Chettiar and Another Vs. S.K. Kamarajendara Kadirveluswami Pandian and Another*, was decided on a principle of frustration of contract and has no application. I am, therefore of the opinion, that the suit as framed is maintainable and was rightly decreed by the Subordinate Judge. This Second Appeal is dismissed with costs.