

(1959) 03 CAL CK 0002
In the Calcutta High Court
Case No : Appellate Decree No. 777 of 1953

Kshiboda Moyre Sen and Others	Vs	APPELLANT
Ashutosh Roy and Others		RESPONDENT

Date of Decision : 10-03-1959

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 108, 116

Citation : 63 CWN 565

Hon'ble Judges : Guha Ray, J

Bench : Single Bench

Advocate : Subodh Kumar Bhattacharjee and Chandra Kumar Chatterjee, for the Appellant; Susil Kumar Biswas, for the Respondent

Final Decision : Dismissed

Judgement

Guha Ray, J.—This second appeal by the defendant arises from a suit by the respondents for a permanent injunction against the defendant restraining him from erecting any permanent structure upon the land in suit which admittedly, the defendant holds as a monthly thika tenant under the plaintiffs and also for a mandatory injunction for demolishing that portion of the structure which has been already constructed upon the land without the knowledge and consent of the plaintiffs. The defence was that the defendant had a right to construct a permanent structure upon the suit land; secondly, that he was not erecting a permanent structure at all so that the plaintiffs were not entitled either to a permanent injunction to restrain the defendant from erecting the structure that he was actually erecting or a mandatory injunction for demolishing a portion already constructed. There was a commission for local inspection and the commissioner's report is Ext. 2. This report was marked an exhibit on admission of the parties without the commissioner being examined. The commissioner says that when he went to the place, he found that five labourers including Rajmistries and their assistants were at work and the defendant was supervising their work of construction. Heaps of bricks, sand and cement with other building

materials were also noticed by him near the house in suit. He found a pucca Structure having walls of 5 ins. brick work with cement joinings consisting of two rooms one facing the south and the other facing west, separated by a verandah running from east to west. Then, he gives the measurements of the rooms. He also speaks of an old boundary wall outside the two rooms and also an old house of brick built walls with roof of corrugated iron sheets lying to the west of the room facing south. The eastern wall of this old house is a common wall between the old house and the newly-built room facing south. As regards the extent of the construction, the commissioner's report is that the northern wall of the south-facing room was raised to a height of 8 feet from above the plinth and was fitted with five windows and the eastern wall of the said room had been raised to a height of 5 ft. 9 ins. only and was fitted with two windows. The plinth of the rooms and verandah was 1 ft. 4 ins. from the ground level. No wall has yet been raised on the front side of the said room, i.e. on the southern side. Only two doors have been fitted with bricks of two layers at the bottom and supported by bamboos at the top. The eastern wall of the west-facing room was fitted with two windows, the southern wall was fitted with one window, the western wall was fitted with two windows and a door, and the northern wall had no windows. The eastern wall was raised to the height of 5 ft. 8 ins., the southern wall to a height of 6 ft. 8 ins. the western wall to a height of 4 ft. 2 ins. and the northern wall to a height of 4 ft. 10 ins. On the basis of the commissioner's report, the Trial Court found that a permanent structure was going to be built and, further, that under the terms of the kabuliyat (Ex. 1) which created the tenancy, the defendant was not entitled to put up any permanent structure. On these findings, the learned Trial Court decreed the suit restraining the defendant by a permanent injunction for raising a permanent structure on the suit land and also gave a mandatory injunction directing the demolition of the structure already raised. The learned lower Appellate Court confirmed these findings and the decree. On behalf of the appellant, it is first argued that the kabuliyat (Ex. 1) which created the tenancy was only for a term of three years and when that expired and the tenant held over, the tenancy was governed by the Transfer of Property Act and, therefore, the tenant was entitled to put up any kind of structure he liked as the law permitted. In support of this contention, reliance was placed on Section 116 of the Transfer of Property Act and two decisions namely, *Dasarathi Kumar v. Sarat Chandra Ghosh*, (1) 37 C.W.N. 971 and *Trailakya Nath Roy v. Sarat Ch. Banerji*, (2) 32 Cal. 123. Before dealing with this point, it is necessary to point out that the kabuliyat (Ex. 1) contains a clear stipulation which can be translated as follows:-

In the aforesaid land, I shall not be entitled to have a tank excavated or to have brick-built structures built..... If I do, you will be entitled without notice to take possession after ejecting me.

This kabuliyat is dated 4-3-22 and was for the term of three years. Admittedly, the tenant held over on the expiry of that term. Section 116 of the Transfer of Property Act is in these terms, "If a lessee or under-lessee of property remains in

possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."

2. This section, therefore, confines itself only to the question whether on the expiry of the term of the lease the tenancy will be considered to be one from month to month, or from year to year and lays down that the decisive factor in this matter is the purpose of the tenancy as specified in Section 106. According to Section 106, if the purpose is residential, as in this case, the tenancy will be one from month to month unless, of course, there is something to the contrary: Section 116 of the Transfer of Property Act therefore, has nothing to do with the question whether the tenant is entitled to put up a permanent structure or not and the expression "in the absence of an agreement to the contrary" which occurs in that section cannot be read as being of general application, apart from the terms of that section, in deciding what the rights of the tenant are as regards the erection of structures. As a matter of fact, Section 108 (p.) clearly provides that the lessee must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes. It is, therefore, clear that as far as the Transfer of Property Act is concerned even without the terms of the Kabuliyat (Ex. 1), the defendant has no right to erect a permanent structure without the lessor's consent. The two cases cited were cases merely u/s 116 of the Transfer of Property Act which to my mind has no manner of application to the facts of this case. The first contention, therefore, of the learned Advocate for the appellant seems to me to be clearly untenable

3. The next point argued on behalf of the appellant is that the Thika Tenancy Act applies and, if it does apply, the tenant is entitled to put up any structure under its provisions because Section 2(5) defines a Thika tenant as "one who holds, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at a monthly or any other periodical rates, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose." Thus under the definition, a Thika tenant "is a tenant the land" on which he has either erected a structure or has purchased from somebody else a structure. It appears from the lease (Ex. 1) that there possibly was some sort of a structure on the disputed land already at the time when the lease was executed. The tenant, therefore, might come under the definition of a Thika Tenant under the Calcutta Thika Tenancy Act, 1949 and it is, admittedly, within Calcutta as defined in Clause 11 of Section 3 of the Calcutta Municipal Act. 1923. But then there is nothing in the Thika Tenancy Act to show that the tenant will be entitled to put up a pucca structure. Mr. Bhattacharjee, on behalf of the appellant, lays stress on the word "any" "before the word "structure" in section 2(5), but, that does not mean that the tenant will be entitled to put up a

permanent structure on the land. It merely means that when the tenant has put up a structure on the land he has taken lease of, then, he will satisfy the requirement of the definition of Thika Tenant or, in other words, "any" there stands for "a" and does not mean that the tenant will be entitled to put up any kind of structure. What kind of structure the tenant will be entitled to put up will depend upon the terms of the contract between the parties and also upon the Transfer of Property Act which regulates these things and, as already pointed out, even if there was no contract between the parties, Section 108 (p) would have prevented the tenant from putting up a permanent structure on the land without the landlord's consent. Clearly, therefore, the defendant is not entitled either under the provisions of the Transfer of Property Act or under the provisions of the Thika Tenancy Act to put up a permanent structure on the land. It has been next argued that u/s 10 of the Thika Tenancy Act on determination of the Clancy, the structure, if any, will vest in the landlord so that by putting up a pucca structure, the tenant was actually doing something for the benefit of the landlord. But, if the landlord does not want this benefit, the tenant is not entitled against his will to force it upon him and section 10 of the Thika Tenancy Act does not certainly confer any right on the tenant to put up a pucca structure on the land in question without the landlord's consent.

4. Next, it has been argued that the structure in question is not a pucca structure at all and in support of this Kiron Ch. Roy v. Naimuddin Taluk-dar, (3) 30 Cal 498, has been cited. That was a case u/s 37 of the Revenue Sales Law Act XI of 1859) and as far as one can judge from the judgment "their Lordships held that a tin shed was not a permanent building, but, it does not appear from the report whether the tin shed in question had pucca walls, or merely stood on posts and without pucca walls. That being so, it is impossible to say from that decision that a tin shed like the one which is being constructed on the land in suit was held to be not a permanent building. Even if it were so held, it does not really mean that in every case, the Court is bound to adhere to that view, viz., whether a corrugated iron roof resting on pucca walls constitutes a permanent building or not.

5. In this case both the courts found on the report of the commissioner that it was a permanent building. Of course, the commissioner also was of that opinion, but, even if his opinion is discarded and only the data supplied by him accepted, there is hardly any escape from the conclusion that the building that is being constructed is a permanent building which the defendant has no right to put up on the land.

6. It has finally been argued That the structures are not yet complete and as the commissioner pointed out in his report, some of the walls been constructed up to a height of 8 feet above the plinth which is 1 ft. 4 ins. in height and some other walls have been constructed to lesser heights. This obviously means that the structures are not yet complete and it does not mean that the defendant is not going to complete the structure if he is left a free hand and after he has

completed, different questions are bound to arise, so that if he is allowed to go on completing the structure, the landlord might find himself at a disadvantage in certain respects. That being so, there is no reason at all to hold that the courts below were wrong in decreeing the suit for a permanent injunction to restrain the defendant from putting up a permanent structure and also a mandatory injunction for demolition of the structures already raised.

7. As all the points raised on behalf of the appellant fail, the appeal must be dismissed with costs. Leave to appeal under clause 15 of the Letters Patent is asked for and is refused.