
(1950) 05 CAL CK 0017
In the Calcutta High Court
Case No : A.F.A.D. No. 138 of 1949

Kshitish Chandra Mondal

APPELLANT

Vs

Shiba Rani Debi and Others

RESPONDENT

Date of Decision : 10-05-1950

Acts Referred:

Contract Act, 1872 — Section 56
Transfer of Property Act, 1882 — Section 108

Citation : AIR 1950 Cal 441 : (1951) 2 ILR (Cal) 37

Hon'ble Judges : R.P. Mookerjee, J

Bench : Single Bench

Advocate : Syamacharan Mitra, for the Appellant; Sitaram Banerjee and Arun Kumar Datta, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Mookerjee, J.—This appeal, on behalf of defendant 1, arises out of a suit brought by the plaintiffs for declaration of their title to the disputed land and for recovery of vacant possession after removing a temporary shed erected by the defendant thereon. Only such facts as are relevant and necessary for deciding the limited questions raised in this appeal may be shortly stated.

2. Under the Maharaja of Cossimbazar Nirendra and his brothers held a jama in respect of C. S. plot No. 2122 within the Ranaghat municipality. Subsequently, Nirendra became the sole owner of the leasehold right. The plaintiff's case is that on C. S. plot no. 2122 they had erected certain thatched sheds. The principal defendant was inducted as a monthly tenant of those sheds for a fruit stall. A suit for ejectment had been filed against the defendant after due service of a notice u/s 106, T. P. Act. During the pendency of the suit however there was a fire in the bazar when this particular shed was completely burnt down. Thereafter, the defendant raised another structure on the land in spite of the protest of the plaintiffs. A prayer for injunction in the suit which was then pending was refused and thereupon the said suit was withdrawn with liberty to

institute a fresh suit. Under these circumstances the present suit came to be filed. The plaintiffs allege that the original shed which had been let out to the defendant having been destroyed by fire the contract between the parties was rendered void and the plaintiffs are entitled to re-enter.

3. The defence as set up was of a two-fold nature. It was pleaded that the land on which the structure stood had been let out by the plaintiffs to defendant and the shop room now destroyed had been constructed by the lessee. Alternatively it was stated that if it be held that the original structures had been erected by the lessors and that which had been let out was the room only the lease had not terminated on that shed being burnt down. The plaintiffs were not accordingly entitled to re enter.

4. Both the Courts below have held that the shed which had been burnt down had been erected by the lessors and what had been let out was the shop room only. That the defendant was a tenant in respect of the shop room erected by the plaintiffs is a conclusion which is a finding of fact on a consideration of the evidence in the case. This question cannot be re-agitated in this appeal.

5. The point which requires consideration is whether on the total destruction of the shed, which had been erected by the lessors by the fire, the tenancy had come to an end.

6. Clause (e) of Section 103, T. P. Act provides that:

"If by fire, any material part of the property be wholly destroyed or rendered substantially and permanently unfit, for the purposes for which it was let, the lease shall," in the absence of a contract or local usage to the contrary "at the option of the lessee, be void."

7. It is urged on behalf of the appellant that under this clause an option is given only to the lessee to determine the lease if the conditions stated therein are satisfied. If in spite of the structures being destroyed or rendered permanently unfit, the defendant-tenant elects to continue the tenancy the lessor is not entitled to compel the defendant-tenant to walk out.

8. It is incontestable that this clause makes no reference to the rights, if any, of the lessor if the lessee, in spite of the destruction of the premises elects to pay the rent. In *Kunhaen Haji v. Mayen* 17 Mad. 98 : (4 M. L. J. 21), it was held that on the destruction of the coffee, plants by fire which only had been leased out and abandoned by the tenant the lessor was not entitled to claim rent after such exercise of option by the tenant. This was a case which was covered by the provisions contained in S. 109(e), T. P. Act.

9. This clause does not in terms apply to the facts of the present case where the lessee neither elected to walk out even after total destruction or is willing to suspend payment of rent and to give up possession. No contract or local usage governing the case has been attempted to be proved. On behalf of the lessor, reliance is however placed on the provisions contained in Section 56, Contract

Act. The relevant portion of Section 56 is in the following terms :

"A contract to do an act which after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

10. The Contract Act is complementary to the Transfer of Property Act. There is no conflict between Section 56 of the former Act and Section 108 of the latter Act on the facts of the present case.

We have, therefore, to examine whether Section 56, Contract Act, is attracted at all.

11. Has the performance of the contract between the parties become, after the destruction of the shed, impossible of performance? If a specific subject-matter, assumed by the parties to exist or to continue in existence, is accidentally destroyed the promise made in the contract is discharged. (*Kunjilal v. Durgaprosad* 24 C. W. N. 703 : (A. I. R. 1920 Cal. 1021), *Taylor v. Cladwell* (1863) 3 B. & S 826 : (32 L. J. Q. B. 164) and *Howell v. Coupland* (1876) 1 Q. B. D. 258 : (46 L. J. Q. B. 147).

12. This rule is not attracted where the parties had already contemplated and provided for the particular contingency. In the present case, destruction of the room was not even contemplated by the contracting parties.

13. Whether the doctrine of frustration applies to leases has given rise to a sharp division of opinion in the English Courts. In *Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust Ltd.* 1945 A. C. 221 : (114 L. J. K. B. 110) the Judges were sharply divided.

14. Asquith J. who had heard the case at the first instance *Leighton's Investment Trust Ltd. v. Cricklewood Property and Investment Trust Ltd.* (1943) K. B. 493 495 : (112 L. J. K. B. 438), thought that it could not be disputed that the doctrine of frustration had no application to an ordinary lease and relied upon *Matthey v. Curling* (1922) 2 A. C. 180 : (91 L. J. K. B. 593) *London and Northern States v. Schlesinger* (1916) 1 K. B. 20 : (85 L. J. K. B. 369), *Whitehall Court Ltd. v. Ettlinger* (1920) 1 K. B. 680 : (89 L. J. K. B. 126) and *Swift v. Mackean* (1942) 1 K. B. 376 : (111 L. J. K. B. 185). On appeal this view was affirmed by Mackinnon L. J. in the Court of appeal (1943) K. B. 498. On appeal before the House of Lords, the case was disposed of on a different point. As to the application of the doctrine of frustration to a lease, their Lordships expressed the view that the circumstances of that particular case did not justify such application. Lord Simon L. C. and Lord Wright opined that the doctrine of frustration could be applied to a lease and at any rate *Matthey v. Curling* (1922) 2 A. C. 180 : (91 L. J. K. B. 693) was no authority to the contrary. Lord Russell of Killowen and Lord Goddard took the contrary view. Lord Porter expressed no view on this point.

15. This question came up for further consideration in *Denman v. Brise* (1949) 1

K. B. 22. In view of the divergent opinion, as expressed by the House of Lords in the case above mentioned, the Court preferred to follow their own earlier decisions and left it for the House of Lords at the appropriate time to resolve this problem.

16. In *Denman v. Brise* (1949) 1 K. B. 22 (Supra) we have an instance where the tenant declines to withdraw but the landlord refuses the tenant's claim; the facts are to some extent, similar to those now before me but there is at the same time a difference on a very material point. A house in the occupation of the tenant was bombed out. The tenant accordingly ceased to occupy the premises but there was no evidence of abandonment or surrender of the tenancy. The landlord erected a new structure on the site and when it became fit for occupation, the tenant approached the landlord with a view to occupy it. The tenant was, however, unable to gain possession because the landlord withheld the key. The landlord thereupon purported to determine the contractual tenancy by a notice to quit. The tenant sued for possession. As there was no evidence of abandonment or surrender of the lease before the new premises had been made fit, the tenant on such completion was entitled as such to occupy it.

17. In this state of the law in England it is a matter for consideration whether the doctrine of frustration can be applied to a lease in India.

18. In *Inder Pershad Singh v. Campbell* 7 Cal 474 : (8 C. L. R. 501), a contract had been entered into between the plaintiff and the defendant under which the plaintiff agreed to cultivate indigo for the defendant for a specified number of years in certain specific lands, with respect to the portion of which the plaintiff was a sub-tenant only. During the continuance of the contract, the plaintiff lost possession of those lands as his immediate landlord had failed to pay the rent due from him and had in consequence been ejected by the owner. A Division Bench of this Court held that the prayer of the plaintiff to cancel the contract so far as it related to those lands which had been taken possession of by the owner be terminated (sic?) on the ground that it had become impossible of performance through no negligence on his part.

19. Mookerjee A.C.J. affirming the decision of Rankin J., in *Ezekiel Abraham v. Ramjusroy*: 33 C. L. J. 151 : (A. I. R. 1921 Cal. 305) has explained the circumstances and conditions under which the doctrine of frustration of adventure has become a gloss on the older theory of impossibility of performance, which has been greatly developed under the guise of reading "implied terms" into contract. The rigidity of the rule that an express unconditional contract is not generally dissolved by its performance being or becoming quite impossible in fact, by reason of particular circumstances, has been relaxed, an exception had been engrafted thereon. Whether frustration occurs or not, depends on the nature of the contract in question and on the events which have occurred in a particular case. *Tentsche Overseas Trading Co. Ltd. v. Uganda Sugar Factory Ltd.* AIR 1945 P. C. 144 : (1945) 1 M. L. J. 417.

20 Inder Pershad Singh v. Campbell (7 Cal. 474 : 8 C. L. R. 501) (Supra) is a direct bench decision of this Court in support of the proposition that the doctrine of frustration may be applied to leases.

21 On the finding arrived at by the Courts below that it was only the room which had been let out and that the structures had been completely destroyed the subject-matter of lease is now non-existent. The contract which had been entered into between the lessor and the lessee has now become impossible of performance through no negligence on the part of the lessor. The landlord is entitled to claim that the lease of the room had come to an end by its destruction by fire.

22. There is one other special aspect in this case. Under the lease the tenant was entitled to occupy the shed as such. On its total destruction even if it had been held that the tenant was entitled to continue to occupy the land, if he agreed to pay the rent, no right existed under the arrangement between the parties to authorise the tenant to raise a structure of his own, thus change altogether the character and nature of the tenancy. It was the use of the room only which had been permitted on payment of rent but the tenant had no right to use it as a lease of the land only on which he may have his own structures. Allowing the tenant to raise his own structures in such circumstances will lead to various complications in future. It would further lead to an anomalous position that the defendant tenant who is paying rent for the structures on the land will pay such rent for the structures which belongs to him.

23. This appeal is accordingly dismissed with costs.