
(1979) 03 PAT CK 0011
In the Patna High Court
Case No : A.F.A.D. No. 689 of 1976

Leena Roy Choudhary and Others

APPELLANT

Vs

Most. Indumati Bose and Others

RESPONDENT

Date of Decision : 27-03-1979

Acts Referred:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 — Section 11
Evidence Act, 1872 — Section 91, 92
Transfer of Property Act, 1882 — Section 108

Citation : AIR 1980 Patna 120

Hon'ble Judges : S. Narain, J

Bench : Single Bench

Advocate : S.C. Ghose, K.K. Ghose, Deva Sinha and Abhijit Sinha, for the Appellant; Shree Nandan Pd. Singh, for the Respondent

Final Decision : Dismissed

Judgement

S. Narain, J.—This appeal arises out of a suit for eviction of the defendant from the southern portion of a house called "Bamabas" situate in Mohalla Belabagan in Deoghar town within the district of Santhal Paraganas, The deceased tenant-defendant was the original appellant in this Court. It is not in dispute that the defendant-appellant was a tenant of the plaintiffs in respect of the southern portion of block of the aforesaid house. It appears that formerly the defendant was in possession of a much larger portion of the house. In 1965, the plaintiffs instituted Title Suit No. 121 of 1965 for eviction of the defendant on various grounds and on 15-2-1968, a compromise decree was passed. Under the terms of the compromise decree, the defendant agreed to give up possession of the northern block of the house and to continue in possession of the southern block on a monthly rental of Rs. 30/-with effect from 15 March 1968.

2. According to the plaintiffs, being dissatisfied with the terms of the compromise and taking advantage of the fact that there was no adult male member in the plaintiffs' family, the defendant started harassing them and in April, 1968

without the permission of the plaintiffs-landlords, demolished the side walls of the old kitchen and constructed a new kitchen on the open terrace in front of the passage room and thus committed breach of the terms of the tenancy, converted a window into a door and a door into a window and by those alterations committed acts of waste and damage causing material deterioration to the suit premises entitling the plaintiffs to evict. The plaintiffs also alleged that the defendant had defaulted in payment of rent for the months of May, 1965 to August, 1965. The plaintiffs further alleged that by a registered notice that determined the tenancy, they had asked the defendant to vacate the premises as he has failed to pay the rent due.

3. The defendant denied all these allegations of non-payment of rent and unauthorised constructions or alterations in the building. According to the defendant, the plaintiffs being unable to evict the defendant by the earlier title suit were now making further efforts to evict him on untenable grounds. The defendant also pleaded that in view of the compromise decree, the suit for eviction on the ground of arrears of rent was also barred by *res judicata* and the provisions of Order 2, Rule 2, C. P. C.

4. The 1st Additional Subordinate Judge, Deoghar, who tried the suit held that the plaintiffs had failed to prove non-payment of rent or any act by the tenant causing material deterioration of the leased premises, that as there was no express agreement that the defendant would not construct a kitchen and make minor adjustments in the suit premises and thus there was no breach of any express term of the tenancy and Section 11 (a) of the Bihar Buildinga (Lease. Rent and Eviction) Control Act, 1947, (hereinafter referred as the "Act") was not attracted. He, accordingly dismissed the suit.

5. On appeal by the plaintiffs, the 3rd Additional District Judge held that Section 11 (1) of the Act did not speak of breach of any express term of condition of tenancy, it only spoke of breach of condition of the tenancy. He further held, reversing the findings of the trial Court on the point, that the plaintiffs had proved their case of breach of the conditions "of the tenancy implied in letting out the premises in question by illegal and unauthorised construction inasmuch as the defendant had made unauthorised alterations in the stair-case as also the verandah and had constructed a "Khaparaposh" (kitchen without the permission of the landlord. He further, held that the plaintiffs had also established that the constructions and demolitions alleged by them had made material alterations in the tenanted portion causing deterioration of the building in question.

6. While admitting this appeal, the learned single Judge of this Court framed the substantial question of law which arose in this case thus:

"As to whether a tenant can be evicted from the house merely because he makes a temporary construction without any agreement for the same, although it enures to the benefit or the advantage of the landlord."

The question whether the construction made was temporary or permanent is one

of the questions in controversy in this case. The Appellate Court which has decreed the suit has recorded no specific finding whether the construction made is temporary or permanent. It is conceded that this Court while hearing the appeal finally appear to consider even questions inasmuch as circumstances of the question of law. In my opinion, the question which arises in this case and which ought to be considered is whether on the facts found by the lower Appellate Court, its decree evicting the tenant is tenable in law.

7. I may state at the outset that it is not contended that the tenancy had not been validly determined. The suit for eviction has been decreed on two grounds; (1) that the defendant has made material alterations causing deterioration of the building in question and (2) the defendant has committed breach of the conditions of the tenancy. The grounds on which a tenant can be evicted are specified in Section 11 of the Act. Breach of the conditions of the tenancy is one of the grounds specified in Clause (a) of Section 11 (1) of the Act, and the ground for eviction specified in Clause (b) of Section 11 (1) of the Act is deterioration in the condition of the building owing to acts of waste negligence or default of the tenant. It appears, therefore, that the suit has been decreed on the grounds specified in Clauses (a) and (b) of Section 11 (1). Sri Ghose has impugned both these findings and has urged that even on the facts found for the Appellate Court none of these two grounds are made out. If any of these two grounds are made out, there is no scope for interference by this Court. As in my opinion, the finding of the Court below that the defendant is liable to be evicted for the breach of the conditions of the tenancy is legal it is not necessary to decide whether the finding that the defendant has made material alterations causing the deterioration of the building is legal or not.

8. One of the primary facts on the basis of which the Court below has recorded the finding that there has been a breach of tenancy is that the defendant has unauthorisedly viz. without the sanction of the plaintiff-land lord constructed a kitchen after the commencement of the new Tenancy Act. It is common ground that the premises from which the defendant was sought to be evicted were in his occupation by virtue of the compromise decree passed in Title Suit No. 121 of 1965-67 on 15-2-1968. The terms and conditions of the compromise in accordance with which the compromise decree was passed are the following--vide the certified copy of the compromise petition annexed to the compromise decree (Ext. F):--

"I. That the defendant will vacate entire northern Block and the out-house fully described in Schedule A (I) of the plaint on or before 15th March, 1968, failing which plaintiff will be entitled to evict the defendant from the said northern Block through Court by execution of the decree after the date 15th March, 1968.

II. That the defendant will remain in possession of the entire southern Block premises fully described in the Schedule A (II) of the plaint including the courtyard, bathroom and verandah as a tenant on the monthly rental of Rs. 30/- only (rupees thirty only) with effect from 15-3-1968. The rent of the said block

has been mutually settled at Rs. 30/- since 15-3-1968 only due to the rise in Municipal taxes and costs of the maintenance of the house.

III. That the well and the passage situated in front of the premises up to main road shall remain in common use of the parties, but bathroom attached to the well shall remain in exclusive possession of the plaintiffs,

IV. That the open lands in front of the southern Block of the premises shall remain in exclusive possession of the defendant and the rest of the vacant land shall remain in exclusive possession of the plaintiffs.

V. That the plaintiffs will be entitled to withdraw the amount of rent deposited in Court u/s 11-A of the Bihar Buildings Act, 1947 by the defendant

VI. That the parties shall bear their own costs of this suit."

The document by which the lease was created, therefore, does not contain any term concerning the right of the tenant to make any construction on the leased premises. Admittedly, there is no evidence of any local usage regarding the matter. Section 108 of the T.P. Act, 1882, so far as is relevant, runs as follows:--

"108. Rights and liabilities of lessor and lessee. -- In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to the property leased:!--

(A) x x x x

(B) Rights and liabilities of the lessee

(p) He must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes."

According to Section 108, therefore, in the absence of a contract or local usage to the contrary, one of the conditions of lease of immovable property is that the lessee must not, without the lessor's consent, erect on the leased property any permanent structure except for agricultural purposes. As there is neither a contract nor a local usage to the contrary, one of the conditions governing the lease under which the defendant held, implied by law is that contained in Section 108(p) of the T. P. Act, that is to say, the lessee must not without the lessor's consent erect on the leased property any permanent structure except for agricultural purposes.

9. Sri Ghose, however, contends that the terms and conditions of the lease under which the defendant held are contained in and confined to the terms and conditions of the compromise decree which created the lease under which the defendant holds the leased property and as the compromise decree did not contain any condition prohibiting the lessee from erecting any permanent structure on the leased premises, even if any permanent structure had been

constructed by the defendant, that would not amount to a breach of the conditions of the tenancy. Section 108 of the T. P. Act sets out the covenants which, in the absence of a contract or local usage to the contrary, are implied in every lease governed by the provisions of the Transfer of Property Act. Therefore, in the absence of any contrary provision of the compromise decree which is the contract between the parties, or a local usage to the contrary, the covenant set out in Section 108(p) must be regarded as one of the covenants in the lease or one of the conditions of the tenancy.

10. Sri Ghose contends that in a case where the terms of the lease are contained in a document, Sections 91 and 92 of the Evidence Act prohibit the Court from importing into the lease the covenants or conditions implied in the tenancy by Section 108 of the T. P. Act. In my opinion, this contention is completely misconceived. Section 91 provides: "When the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained." Section 92 provides that "when the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or settlement shall be admitted" for the purpose of contract or for its terms. Sections 91 and 92 do not purport to override the provisions of the T. P. Act or any other law. What they prohibit in certain circumstances is the admission of certain evidence. In holding that the terms of the lease included the terms and conditions implied by Section 108, the Court is not admitting any evidence; it is merely giving effect to the law. Evidence as defined by Section 3 of the Evidence Act means statement of witnesses, that is to say, oral evidence or documents produced for inspection of the Court. A provision of law is neither a statement by a witness, nor a document produced for inspection of the Court. I may incidentally point out that in view of Proviso (5) of Section 92 notwithstanding the prohibition contained in Section 92 of the Evidence Act, any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contract of that description and are not repugnant to or inconsistent with the express terms of the contract, may be proved. It would be absurd to hold that Section 92, though it permits evidence to prove such usage or custom prohibits the Court from applying the provisions of law by which such incidents are annexed to contracts of that description.

11. I may further state that it is obvious from the perusal of the terms of the compromise decree which I have set out already that they do not contain all the terms and conditions of the lease. The compromise decree merely specifies the portion of the building which was to remain in possession or to be used by the lessee and the rent payable therefor. It is silent about the other terms and

conditions of the tenancy. It is well settled that if the document does not record or purport to record all the terms of the contract between the parties, there is nothing in Section 92 of the Evidence Act which prohibits the Court from considering the evidence regarding other terms and conditions of the contract which are not in conflict with the terms and conditions rendered in the contract. See the decision of the Judicial Committee of the Privy Council in *Md. Akbar Khan v. Attar Singh* (AIR 1936 PC 171). The aforesaid contention of Sri Ghosh must, therefore, be overruled. I may further add that it is only out of deference to Sri Ghose that I have considered his argument at some length as it was fit to be stated merely to be rejected. I, therefore, hold that it was one of the terms and conditions of the tenancy that the lessee shall not construct any permanent structure on the leased property without the lessor's consent. If the lessee constructed without the lessor's consent, any permanent structure on the leased premises, he committed breach of the conditions of tenancy for which he is liable to be evicted u/s 11(1)(a) of the Act.

12. Now on the findings of the lower Appellate Court which is the final Court of fact the lessee had constructed the kitchen without the lessor's consent. The crucial question for determination, therefore, is whether the kitchen was a "permanent structure" within the meaning of the expression as used in Section 108 (p), T. P. Act.

13. Now what is a "permanent structure" ? The word "structure" as pointed out by Chatterjee, J. in *Surya Properties P. Ltd. v. B. Nath* (AIR 1965 Cal 403) at pp. 411-412 of the report) must be distinguished from words like "fixture" and "structure" and means "something" which is constructed in the way of being built up as a "building". The question what is a "permanent structure" for the purpose of Clause (p) of Section 108 of the T. P. Act came up for consideration by a Special Bench of the Calcutta High Court in *Abdul Samad Bepari Vs. Manasha Charan Bakshi*, and the answer given by the Special Bench was that the question whether a particular construction is a permanent structure or not depends upon the facts of each case and no hard and fast rule can be laid down with regard to this matter. Their Lordships of the Calcutta High Court, however indicated the different circumstances which must be taken into consideration for the purpose of determining whether or not a particular structure is a permanent structure. The relevant considerations for determining whether the structure is a permanent Structure or not would be, as pointed out by Mookerjee, J. in the aforesaid case "inter alia the nature of the structure or construction in question and the intention with which it is made, and, almost in every case, they would be of, primary and prime importance, the situs, the mode of annexation and the surrounding circumstances for consideration on the above two basic and usually determinant elements." The majority of the other learned Judges constituting the Bench expressed substantially similar views. We should also remember what was pointed by Chatterjee, J. in *Suraya Properties Private Ltd. Vs. Bimalendu Nath Sarkar*, , "the phrase "permanent structure" does not mean "ever lasting". But the word "permanent" has been used to distinguish it from "temporary". The

term..... is a relative one and the relation here is to the period of the lease..... But the meaning of the words "permanent structure" would be that the lessee intended that he would enjoy the structure that he raises as long as he be continuing in possession." It would thus appear that in deciding whether a construction is permanent or temporary two factors are of primary importance namely, the nature of the structure and the intention with which it is made. If the nature of the structure is such that the structure will endure for a long time, i.e, so long as the tenant expects to remain there as a lessee, and the intention of the lessee in constructing the structure is that he shall use it as long as he remains a lessee, the construction will be regarded as a "permanent structure" within the meaning of Section 108(p) of the T. P. Act even though the construction may be capable of removal without causing permanent damage to the leased premises. It is in the light of these principles that we must consider the evidence regarding the nature of kitchen constructed by the defendant.

14. According to the evidence of P. W. 7, one of the plaintiffs and also of other plaintiffs" witnesses which has been accepted, the defendant had demolished the wall near the kitchen and constructed a new kitchen by enclosing the open verandah to the south. It further appears from the evidence of P. W. 7. that the roof of the kitchen was tiled. The defendant's evidence regarding the nature of the structure which is the kitchen is substantially the same. According to the Testimony of the defendant (D. W. 14), the kitchen in the southern block occupied by him was a tiled kitchen adjacent to the staircase on the verandah. He, however, stated that the aforesaid walls of the kitchen were not plastered, the bricks were merely joined together (SIRF TIPKARI KIYA HUA HAI). According to P. W. 7, the kitchen had been constructed by putting up the wall on the open terrace by utilising the bricks obtained by demolishing the wall of the old kitchen. Therefore, on the evidence it is clear that the kitchen was the only kitchen in the portion of the house occupied by the tenant, was adjacent to the house, had brick walls and a tiled roof. There is no evidence about its dimensions. A kitchen with brick walls and tiled roof is a substantial construction which is likely to endure for the term of the "lease even though the brick walls may not have been plastered. If the tiled roof leaks, it can very well be repaired. I have also no doubt that, the intention of the tenant, regard being had to the facts and circumstances of the case, was to use the kitchen as long as he remained the lessee. The Kitchen was not constructed for the purpose of use on a particular special occasion like marriage or feast. It seems that the tenant-defendant constructed the kitchen intending it to use it as kitchen during the term of his tenancy. Even assuming that the mode of annexation of the kitchen was such that it could be dismantled without causing damage to the leased premises, in view of the nature of the construction and the intention of the tenant to use it as a kitchen during the entire term of his tenancy and not merely temporarily, the aforesaid construction must be held to be a "permanent structure" within the meaning of the expression as used in Section 108(p). As it was constructed without the permission of the landlord unauthorisedly and not for agricultural

purposes the tenant-defendant committed breach of conditions of the tenancy in constructing the aforesaid kitchen and, therefore, the suit for eviction was rightly decreed.

15. It is true, as pointed out by Sri Ghose, that the lower Appellate Court has not recorded a specific finding whether the kitchen was a permanent structure or not and that it was its duty to record such a finding. As, however, the question whether the aforesaid kitchen was a permanent structure or not can be decided on the materials on record and it is manifest that the kitchen was a permanent structure within the meaning of expression as used in Section 108(p), T. P. Act. it is expedient in the interest of justice to decide the matter on the basis of the finding arrived at by the Court of Appeal below and I have done so instead of remanding the case for decision of the question.

16. I may also mention that Sri Ghose attempted to argue that the finding of the Court of Appeal below that the construction of the kitchen had been made after the inception of the tenancy was illegal. No such question regarding illegality of the finding has been formulated and having heard Sri Ghose on the point I do not think it is a fit case in which I should consider the question that the aforesaid finding is illegal. The evidence of the plaintiffs' witnesses, if believed, was sufficient for arriving at the finding that the defendant constructed a new kitchen after the compromise decree without the consent of the landlord, even if the site plan and the enlarged photographs (Ext. 5 series) which are urged to be admissible are excluded from consideration. I have, therefore, proceeded on the findings of facts arrived by the lower Appellate Court which is the final Court of facts.

17. In the result, the appeal is without merit and it is accordingly, dismissed with costs.