
(1955) 01 KL CK 0014

In the High Court Of Kerala

Case No : Second Appeal No. 964 of 1951

Manjelly Anthony Ouseph

APPELLANT

Vs

Kuriedadathu Neelakandan Nambudiri

RESPONDENT

Date of Decision : 31-01-1955

Acts Referred:

Transfer of Property Act, 1882 — Section 76, 78

Citation : AIR 1955 Ker 277

Hon'ble Judges : Koshi, C.J.;Kumara Pillai, J

Bench : Division Bench

Advocate : M.V. Paul and M. Narayana Menon, for the Appellant; T.S. Venkiteswara Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Koshi, C.J.—A learned single Judge of this Court before whom the second appeal came up for hearing referred it to a Division Bench as per the following order:

The Second Appeal raises a question of law of considerable importance. The question is whether a landlord can, without suing for eviction of the tenant sue for the value or a tree cut by the tenant from the holding. I think it is desirable that the question is considered by a Division Bench. I, therefore, refer this Second Appeal to a Division Bench.

The two Courts below answered the question in the affirmative and in the second appeal the contention is repeated that the liability of the tenant was only to account for the loss of the tree as and when redemption takes place and not when the tenant is allowed to continue in possession of the holding. The claim was based on the averment that the tenant had cut and removed a jack tree which admittedly belonged to the landlord. The two lower Courts have found that the appellant cut and removed the tree.

2. The demise under which the landlord let the tenant into possession is called a "Panayam" and the tenant has executed an "either" deed, or a counterpart,

thereto. Notwithstanding the label given to the document, the demise would seem to partake of all the important characteristics of a "Kanam" and the landlord therefore brought the suit giving rise to the second appeal only for recovery of the arrears of michavaram and damages on account of the tenant cutting and removing a lack tree.

We are not, however, called upon here to decide whether the demise created an irredeemable tenure or not. The document expressly provides for surrender on demand and it also provides that if michavaram is allowed to fall into arrears, or if trees are out, or the landlord is put to the necessity of bringing a suit against the mortgagee, the amounts that become due under these heads shall be recoverable, personally from the mortgagee, as also charged on his interests in the holding.

The demise is of the year 1102 and it was a renewal of an earlier demise. The mortgagee or the "tenant" as he might be called as that term is defined in the Cochin Tenancy Act (15 of 1113), sold the holding to several persons after splitting the same up into different parcels. Those purchasers were also made parties to the suit and defendant 3, the purchaser of one of the parcels, who was alleged to have cut and removed a jack tree contended "inter alia" that he was not liable to be sued now in damages for the alleged cutting and removal of the tree.

We are not concerned with the contentions relating to other matters or the question whether it was a case of actual cutting and Removal or only of appropriating the timber of a tree which fell down due to oldage. The only point raised in the second appeal by defendant 3 is that except at the time of redemption, the landlord can-not claim the value of the tree which has been found to have been cut and removed by the tenant.

Though he joined issue with the plaintiff as to the value of the tree, that matter is also now concluded by concurrent decisions accepting the plaintiff's claim the true value of the tree came to Rs. 150/-.

3. It is settled law that a "tenant" is at the time of restoring the property to the landlord bound to restore it in as good condition as it was in at the time he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and that when accounts are take at that time he is liable to make good the loss, if any caused by his failure to perform any of the duties imposed upon him by law.

Section 108(m) and the last clause of S. 76, Transfer of Property Act may usefully be referred to in this context. Long before the Transfer of Property Act became law in Cochin - from which part of Travancore-Cochin this case arises - courts in that State had recognised that at the time of the landlord recovering possession he was entitled to claim any loss caused to the property notwithstanding that the injury complained of had been caused more years ago than a suit for damages would lie for.

So long ago as 1893 the Appeal Court of Cochin had recognised this position - see "Anna v. Kunjikavu Numbasthadiri", 2 Select Decisions 134 (A). The appellant's contention is that the landlord's right to recover damages is confined to claim it at the time of the recovery of possession of the holding and not at any time anterior to it.

4. A decision of the Appeal Court of Cochin reported in the same volume had repelled this position. In - "Mathu v. Ittivarah", 2 Select Decisions 164 (R) - the learned Judges observed:

The Judge (referring to the Zilla Judge of Trichur whose decision was under appeal) gives no reason whatever for not entering into the question whether plaintiff should be awarded anything on account of damages for trees cut down. If this be owing to the supposition that plaintiff cannot be entitled to get anything on this account till the term of the lease expires, we must point out that that supposition is wrong.

We consider this to be a correct statement of the law bearing on the subject. It conforms to the view held in other jurisdictions and we have not been referred to any decision or other authority to the "contra".

5. Before we come to the decisions of other High Courts reference may usefully be made to S. 25, Cochin Tenancy Act (15 of 1113). That section sets out the conditions under which a kanam tenant can be evicted. Clause (c) of sub-s. (2) states:

If the kanam tenant intentionally and wilfully commits such acts of waste as are calculated to materially and permanently impair the value and utility of the holding.

and it further provides:

A suit for eviction on the ground stated in Cl. (c) should not be entertained unless the landlord has served a notice on the tenant specifying the particular act of waste complained of, and, when the waste is capable of remedy, requiring the tenant to remedy the same and in any case to pay reasonable compensation for the waste, and the tenant has failed to comply within a reasonable time, with that request.

This would seem to us to be a statutory recognition of the pre-existing law as enunciated in "2 Select Decisions 164 (B)".

6. The question that we have to decide here came up for consideration before a Division Bench of the Calcutta High Court in - "Krishna Das v. Mohendra Chandra", AIR 1921 Cal 62 (C). There it was held that where a landlord claims ejectment of the tenant as well as damages for waste committed upon the property, the claim for damages was maintainable even though the claim for ejectment failed. The right to obtain damages at the time of the recovery of the property, irrespective of the time damages have been caused is a cumulative

remedy. - "Sivachidambara Mudaliar v. Kamatchi Ammal", 33 Mad 71 (D).

That does not operate as a bar to any other remedy which the landlord might have under the general law, that is, for breach of contract or in tort. The decision in - "Mahabir v. Sheo Shankar", AIR 1929 Oudh 124 (E), is another authority for the position. The head-note to that case correctly sets out the sense of the decision and it runs thus:

Where the mortgagee causes loss to the mortgaged property in his possession, the mortgagor can recover damages from him by a separate suit, and need not necessarily cut the same in the accounts which take place at the time of redemption because the word "may" as used in the last clause to S. 78 has not the force of "must".

Mulla cites the last two decisions with approval in his Transfer of Property Act (Edn. 3, p. 514).

7. A quotation from pp. 332 and 333 of Foa's Relationship of Landlord and Tenant (Edn. 6, 1924) may usefully be made here:

A covenant not to commit waste is not, with regard to the measure of damages for its breach, the same thing as a covenant to deliver up title property at the end of the term in the same state as that in which the tenant received it: the true measure of damages for a breach during the term is the diminution in the value of the reversion (less a discount for immediate payment), and not necessarily the sum it would cost to restore the property to its condition before the waste.....

In lieu of, or in addition to, the remedy which the lessor has in damages, he may, in the case of voluntary (but not in that of permissive waste), apply for an injunction to restrain the lessee from its further commission, a remedy which he may enforce also against an under-lessee.....

The fact that the lease contains a covenant to repair and yield up in repair - of which specific performance is not decreed - is immaterial.

8. That the appellant's contention that a suit of the present type for damages will not lie is untenable is clear from the authorities referred to. When the claim for damages is made in a suit for recovery of the land the time factor does not count, but when the action is for damages alone, it must be brought within the time prescribed in that behalf. There is conflict of judicial opinion as to the applicatory provision of the limitation Act for such a suit. The plaintiff in this case brought the action within a week of the cutting of the tree.

No question of limitation therefore arises here and none was raised in any of the Courts though the appellant had a case that the tree had fallen long years before the suit was brought. That, however, has not been accepted by the Courts below. Although there is no specific finding by either Court as to the date of the commission of waste, the pleadings and the evidence in the case make it clear that

the suit was brought within a week of the cutting of the tree.

9. The second appeal fails in the result and we dismiss it with costs.