

(1959) 10 KL CK 0015
In the High Court Of Kerala
Case No : Second Appeal No. 45 of 1956-E

Mohammad Ninave Rawther

APPELLANT

Vs

Neelacandan

RESPONDENT

Date of Decision : 27-10-1959

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : AIR 1960 Ker 216

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : Manuel T. Paikeday, for the Appellant; T.N. Subramonia Iyer and S. Subramonia Iyer, for the Respondent

Final Decision : Allowed

Judgement

S. Velu Pillai, J.

This is a second appeal by the plaintiff, arising out of a suit for the declaration of his title to the suit property which is a building, and for the recovery of possession thereof with arrears of rent and future rent at an enhanced rate. Originally, the suit was laid for the recovery of possession and other reliefs, but on denial by the defendant of the plaintiffs title, and of the lease set up, the suit was converted into one on title, for the reliefs set forth above. The building in question is his southern-most room, which is separated from a row of three or four rooms on the north, by a covered passage or corridor, about 3 1/2" in width. According to the plaintiff, the building was leased to the defendants in Medom 1123 M. E. for a term, of two years, at a monthly rent of Rs. 5. The defendant was alleged to have defaulted in the payment of rent, when the plaintiff issued a notice on the 23rd February, 1951, demanding surrender of the building with arrears of rent, and intimating that in the event of non-compliance he would be charged with future rent at Rs. 15/- a month. The defendant in his reply stated, that the site of the building was originally jungly, that at his request the plaintiff and his father entrusted it to him at a ground rent of Rs. 2 per mensem for him

to build upon, and that he erected the building at his expense. He denied that he had defaulted in the payment of rent or that he could be held liable for enhanced rent.

2. To the amended plaint, the defendant contended that he had taken a perpetual lease of the site and erected a building in the year 1120, find that in the year 1123, he agreed to pay a rent of Rs. 5 per mensem and that in the event of surrender of the building he must be paid its value amounting to Rs. 400. The court of first instance held against the defendant on all the points and decreed the suit; but on appeal the Addl. District Judge) held that the defendant had put up the building and therefore granted a decree to the plaintiff allowing recovery of possession but only on payment of Rs. 200 to the defendant towards the value of the building; future rent at Rs. 5 was also decreed.

3. The important question arising for determination in the appeal is, as to who put up the building. There is no dispute that the plaintiff is the owner of the row of rooms immediately to the north and separated by the passage. The defendant's case was that the land was Jungly, and as he stated in his deposition was infested by wild elephants. It is difficult to believe this case, when only a few feet away the plaintiff had his rooms, all of which were occupied. The defendant in his first written statement had denied the title of the plaintiff, but in the second, set up a case of perpetual lease in his favour. This has been found against, and though that issue does not appear to have been pressed in the lower appellate court, an objection memorandum has been preferred by him in this court, and counsel for the respondent was not able to sustain it. It would also appear, that while the defendant's case, as stated above was that the site of the building was cleared by him. and that he put the building on the land so cleared, his witnesses Dws. 2 and 3 have testified, that there had been a building previously in existence and they differed between themselves only as to the manner of the disappearance of that building. Dw. 2 stated that it was destroyed by fire, while Dw. 3 gave evidence that it was demolished by one Closckaka. The learned Judge explained this discrepancy, stating that Dws. 2 and 3 were not referring to the same point of time as the defendant, but to an anterior period. Ho omitted to note, that the defendant's case was, that, the land had not been previously built upon. Thus, it appears to me, that the case of the defendant and the evidence of his witnesses cannot be accepted. Ext. I relied on by the defendant, which contains a few items of account relating to the construction of the building, is, as the learned Judge pointed out, no account book in any sense of the term and is at best, a memoraduan of a few entries. Other entries in it, Exts. II and III relating to the discharge of rent have been found to be spurious. I have no hesitation in rejecting Ext. I as a fabricated account.

4. The plaintiff examined two witnesses, Pws. 2 and 3, to speak to the broad circumstance, that the building in question had been in existence on the property for a long time, even before the year in Which the defendant said, that he had erected it. This point appears to have escaped the attention of the learned Judge,

for, he proceeded to discredit these witnesses on the ground, that one of them had left the place for Kottayam several years before, and the other was not able to speak to material facts relating to the tenancy in favour of the defendant, and other matters of detail. The husband of Pw. 3 had executed a lease deed. Ext. D in favour of the plaintiff, which bears the date, the 11th Meenom 1112, said to be in the handwriting of Dw. 2, but denied by him to be so. It does appear that the stamp paper for Ext. D was purchased a few days later, and the plaintiff offered the explanation in re-examination, that the date was entered as above on Ext. D only to evidence that the lease commenced from that date. However this be, I am satisfied that the testimony of Pws. 2 and 3 can be relied upon, when they stated, that the building had been in existence previously to the date of the lease in favour of the defendant and was occupied by others.

5. The learned Judge thought that the probabilities are opposed to the case of the plaintiff. The chief circumstance relied on by him was, that there are differences in the materials used for the construction of this building and in the situation and location of the verandahs. The outstanding fact remains, and has been admitted by Dw. 3, that the roof over the building touches the roof over the passage so closely, that no water will leak in through. Dw. 2 differed from him only in thinking, that water might "leak. According to the evidence of the plaintiff and his witnesses, there was only one roof over the entire building comprising all the rooms. The defendant had put up a glass frontage to the room occupied by him, for using it for the purpose of his business as a barber. It is the plaintiff's case, as disclosed by the evidence he has let in, that he had made some improvements in this part of the building previously to the lease in favour of the defendant. I consider that the probabilities are in favour of the plaintiff. The case of the defendant has been shifting from time to time, and as already noticed is discrepant and unacceptable. I therefore agree with the learned Munsiff in holding, that the building was put up by the plaintiff, and not by the defendant.

6. The plaintiff had claimed future rent at Rs. 5 p.m., on the strength of the demand made by him in Ext. IV; the trial court allowed this on the footing, that the claim is fair and reasonable, but on appeal the learned Judge rejected it on the finding, that the building belongs to the defendant. The true principle on which the claim falls to be adjudged, is that the demand for enhanced rent must be deemed to be an offer of a fresh tenancy on revised terms which, if accepted, expressly or impliedly, will generate a new contract in supersession of (the old. It is stated as follows in Halsbury's Laws of England, Third Edition. Vol. 23, p. 523, Article 1174:

"....A notice to quit requiring.....increase of rent if the tenant stays on is not invalid.....A notice so expressed operates as a notice to quit, with an offer to grant or to take a new tenancy as the case may be ."

In the case, Madan Mohan Garg Vs. Bohra Ram Lal cited by counsel for the appellant, a notice to quit was issued, coupled with a demand, that on failure to quit, a higher rent would be charged; the tenant in his reply agreed to quit, and

did not say anything about the demand for enhanced rent. On his continuing in possession after the due date, an implied acceptance of the revised terms was inferred. *Narayanan v. Joseph* 21 Trav LJ 678 also relied on, was a case in which several notices of this description were issued; it was found for a fact that the tenant deliberately refused to surrender the building and to reply to the notices, and treated with absolute indifference the final notice demanding surrender. An implied acceptance of the revised terms was spelled from these circumstances. The third case, *Aseervadam Nadan v. Sivasubramania Nadan* 29 Trav L.T 599 also referred to was decided on the facts and does not require any consideration. In the present case, however, the defendant lost no time in replying to Ext. IV by Ext. VI, in which he not only contested his liability for enhanced rent but also denied the specific arrangement set up by the plaintiff. No acceptance of a fresh tenancy can be Inferred from these circumstances. It follows, that the claim for enhanced rent is unsustainable.

7. It was admitted, that the defendant had fitted glass panes with frames and planks, in front of the building. He is entitled to remove them if it is possible to do so, without causing damage to the rest of the building. Subject to the modification, that the defendant is entitled so to remove the above fittings without causing any damage to the building and to the direction, that future rent shall, be at Rs. 6 p. m. the decree passed by the Munsiff is affirmed, and this Second Appeal is allowed with costs, here and in the lower appellate court. The memorandum of objections is dismissed, but without costs.