
(1969) 08 MP CK 0003
In the Madhya Pradesh High Court
Case No : S.A. No. 366 of 1969

Motilal Bhatia

APPELLANT

Vs

Yusuf Ali and others

RESPONDENT

Date of Decision : 28-08-1969

Acts Referred:

Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 12(1)(n),
12(1)(o)
Transfer of Property Act, 1882 — Section 109

Citation : (1972) J LJ 532

Hon'ble Judges : A.P. Sen, J

Bench : Single Bench

Advocate : J.P. Sanghi, for the Appellant; M.M. Sapre, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Sen, J.—This appeal by the defendant arises out of a suit brought by the plaintiffs for his ejectment from the suit accommodation which is a plot of land, demarcated by letters E F G H and the portion in red in the plaint map and for arrears of rent and mesne profits.

2. The relevant facts, shortly stated, are these. It appears that originally the property bearing plot No. 21, block No. 1, together with the bungalow No. 105 (old) situated thereon, in North Civil Lines, Jabalpur, belonged to one Shiraz Ahmad. After his death, it devolved on his heirs; some of them having migrated to Pakistan, the property was declared to be evacuee property and vested in the Custodian. The defendant's father was allotted the demised portion admeasuring 70 x 70 sq. ft. by the Custodian on a rent of Rs. 5 per month and after his death, the defendant became a tenant thereof. Admittedly, the letting of the plot was for non-residential purposes. Mst. Roshan Raza and some of the other heirs having stayed on, purchased the entire property from the Custodian under the Evacuee Interest Separation Act when it was declared to be a composite property. Thereafter, the rightful owners transferred the same to Ahmad Ali, Gulam Ali and

Sulemanji Jinahbhai, the predecessor-in-title of the plaintiffs. By virtue of a registered release-deed dated 1-10-1967, the plaintiffs 2 and 3, Gulam Ali and Sulemanji have now become the present owners of the entire property including the land in dispute. The defendant, therefore, by operation of law, became their tenant of the demised portion, u/s 109 of the Transfer of Property Act. The defendant has admittedly attorned to them and was paying rent in respect of the land until the lease was determined by the plaintiff's notice, Ex. P-4 dated 29-4-1967 w.e.f., 30-6-1967. The plaintiffs' claim for eviction was based upon section 12(1)(n) and (o) of the Madhya Pradesh Accommodation Control Act, 1961, on the grounds that (1) the plaintiffs 2 and 3 required the demised land for the construction of a house on it, and (2) the defendant had, without the written permission of the landlords, wrongfully encroached upon the land shown in red in the plaint map and has not vacated the same in spite of their written notices in that behalf. The defendant, while admitting that he was a tenant of the demised portion, marked by letters E F G H, denied the alleged encroachment and pleaded that from the very inception he was a tenant of the land in suit i.e., including the red portion in the plaint map. Both the Courts below have found that the plaintiffs have established their grounds for eviction u/s 12(1)(n) and (o) of the Act.

3. First of all, Learned Counsel for the appellant urges that the plaintiffs' suit is barred u/s 12(4) of the Act. The submission proceeds on the assumption that the claim for eviction is in reality on the grounds specified in clause (e) of section 12(1). No such plea was raised in the written statement nor any issue framed as regards maintainability of the suit. It is, however, urged that the plaintiffs 2 and 3, on their own showing, acquired ownership in the property by virtue of the release-deed, dated 1-10-1967 and since they, according to P.W.2 Sulemanji Jinahbhai, want to construct a residential house, their claim falls really u/s 12(1) (e) and, therefore, the suit which was brought on 22-12-1967 was not maintainable, having regard to the terms of section 12(4). That section reads: -

"Where a landlord has acquired any accommodation by transfer, no suit for the eviction of tenant shall be maintainable under subsection (1) on the ground specified in clause (e) or clause (f) thereof, unless a period of one year has elapsed from the date of the acquisition."

On a plain construction of the section, it has no application to a suit for eviction brought on grounds other than those mentioned in section 12(1)(e) or (f).

4. Now, when a plea of demurrer is raised, the Court has to decide the question on the allegations in the plaint itself (See, *Kanhaya Lal v. National Bank of India, Ltd.* ILR (1913) Cal 598 (PC) and *Fatechand v. Wasudeo* and another 34 MPLC 370: ILR 1947 Nag 477). The plaintiffs' claim as laid in the plaint is that they claim eviction on the grounds mentioned in section 12(1)(n) and (o). That being so, the suit was not barred u/s 12(4) of the Act. The statement of P.W.2 Sulemanji Jinahbhai only shows that their need u/s 12(1)(n) is bona fide. Even otherwise, there is no substance in the argument. As already slated, section

12(4) relates to a suit u/s 12(1)(e) or (f). The initial letting by the Custodian to the defendant's father being for a non-residential purpose, clause (e) obviously has no application. Nor does clause (f) apply because the plaintiffs do not require the accommodation for the purpose of continuing or starting any business. The contention that the suit is hit by section 12 (4) of the Act, must, therefore, be rejected.

5. The Learned Counsel then urges that the accommodation in question was not an "open plot", within the meaning of section 12(1)(n). The submission cannot be accepted for various reasons, which I shall presently state.

In the first place, the determination in a case should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. The defendant had nowhere pleaded in the written Statement that the accommodation was not of an open land, but of land together with the super-structure of a hut and, therefore, the claim u/s 12(1)(n) was not maintainable. On the contrary, there is an admission in the pleadings that the lease was in respect of a plot. The plaintiffs in para 1 of the plaint alleged that the defendant's father was a tenant of a portion of the plot appurtenant to bungalow No. 105, measuring 70 x 70 i.e., of 4900 sq. ft. as shown by letters E F G H in the plaint map. There was no denial of this allegation. The defendant in para 1 of the written statement did not dispute the contents of para 1 of the plaint. The parties were, therefore, not at issue as regards the subject matter of lease. The trial of the suit proceeded on the basis that the lease was of a portion of the aforesaid plot. Apart from this, the defendant is now precluded by his conduct from contending that the lease was in respect of land with super-structure of a hut. The plaintiffs in their notices, Exs. P-4, D-3, D-8 and D-9, have throughout asserted that the defendant was a tenant of the portion of a plot measuring 70 x 70 sq. ft. None of these notices was replied to. That is an important factor which must be kept in view in dealing with this aspect.

6. The learned District Judge has rightly found that the lease was in respect of an open land. D.W.1 Motilal admits that his father was allotted open land by the Custodian. He further admits that one of the huts was constructed by his father for his godown for keeping fuel in the course of his trade. The other two huts, he admits, were constructed by him. He states that all the 3 huts were constructed by him or his father with the sanction of the Corporation and the municipal taxes were being paid by him. In his cross-examination, he has also admitted that neither his father nor he had taken permission of the Custodian or of P.W.1 Mst. Roshan Raza, the predecessor-in-title of the plaintiffs or of the plaintiffs. The Learned Counsel however, strenuously argues on the basis of the plaintiff's rent receipt, Ex. D-1 and their notices Exs. P-4 and D-3 that not only rent was charged in respect of the land but also for the hut standing on it and the defendant, by notice u/s 108(sic) of the Transfer of Property Act, was asked to vacate the land and also the hut. From this, the Learned Counsel urges that an inference must be drawn that the plaintiffs were asserting ownership in respect

of the hut in themselves. The argument is fallacious. As held by their Lordships of the Supreme Court in Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others, , mere payment of rent, if any, does not necessarily establish relationship of landlord and tenant. In determining whether such relationship was brought about, what is material is not the use of the word "rent" but whether the parties were ad idem as to the creation of the contractual tenancy. (See, AIR 1949 124 (Federal Court) and Shamacharan Raghubar Prasad v. Sheojee Bhari 1964 JLJ 73 : 1964 MPLJ 502). The Learned Counsel has stressed the inclusion of the word "hut" in the rent receipt Ex. D1, which apparently was inadvertent. In my view, a tenancy cannot be built on such a slender hypothesis. The plaintiffs were not the owners of the huts in question and, therefore, they could not have leased out the same to the defendant. The huts belonged to the defendant and he is free to remove them upon determination of the lease under the rights given to a lessee by section 108(h) of the Transfer of Property Act. A kutchha hut is a "thing attached to the earth" within the meaning of that section and upon eviction a lessee is entitled to remove it.

7. As laid down by their Lordships of the Supreme Court in Krishnapa-suba Rao Kundapur v. Dattatraya AIR 1966 SC 1024, where the tenant at his own cost builds a shed of corrugated iron sheets on portion of the land leased, the subject-matter of the lease is not altered. The structures, therefore, belong to the defendant and was not the subject-matter of the letting. The land only was the subject-matter of the lease. No doubt, in Krishnapasuba Rao's case, the agreement of lease was in writing which reserved a right to the tenant to remove the structure raised by him. Nevertheless, the principle remains the same and the decision of their Lordships in that case would equally apply to this case.

8. The question as regards the subject matter of lease was never in dispute. The defendant came with a definite case that a portion of the land was leased. Now, what is the subject-matter of the letting, is a question of fact. In the absence of a plea, the evidence led by the defendant showing that the lease was in respect of the land along with the huts was inadmissible. (See AIR 1930 57 (Privy Council)). Besides, the parties had proceeded to trial on a definite understanding that the lease was of land and the appellant cannot be permitted to make out a new case which was not pleaded by him (See, Raruha Singh v. Achat Singh and others AIR 1961 SC 1097).

9. The Learned Counsel urges that compound of a bungalow is not an open plot. There can be no quarrel with that because when a bungalow along with the compound is let out, the compound is appurtenant to the bungalow. But, when a portion of a compound is let out, not along with the bungalow the lease is of open land. The Learned Counsel also urges that the word "open" has not been used in the plaint, and therefore the plaintiffs' claim u/s 12(1)(n) does not arise. I am unable to agree with this submission. When the plaint is read as a whole, there is no manner of doubt that the claim is u/s 12(1)(n). The word "land" in paragraph 1 of the plaint must necessarily be read as meaning "open land"

because the land leased formed ? portion of the plot. The Learned Counsel is also not right in suggesting that the determining factor is not the initial letting but the condition of the property leased when the plaintiffs became the lessors by operation of Law. For purposes of section 12(1)(n), what is of significance is the nature of the subject-matter of the original lease. D.W.1 Motilal himself admits-

As stated by their Lordships in Krishnapasuba Rao's case (supra), the tenancy would still be in respect of the open land only and hence section 12(1)(n) would be applicable.

10. The Learned Counsel for the appellant then assails the decree in so far as the plaintiffs are granted relief u/s 12(1)(o). As the learned District Judge rightly points out the requirements of section 12(11) of the Act had not been complied with.

Its language is:-

"No order for the eviction of a tenant shall be made on the ground specified in clause (o) of sub section (1), if the tenant within such time as may be specified in this behalf by the Court vacates the portion or portions of accommodation not let to him and pays to the landlord such amount by way of compensation as it may direct."

Under the terms of the section, no order for eviction of a tenant can be made u/s 12(1)(o) unless the Court specifies a period within which he may vacate the portion encroached upon and pays to the landlord such amount by way of compensation as it may direct. The requirements of section 12(1)(o) are mandatory. The decree for eviction u/s 12(1)(o), therefore, cannot be supported. That, however, is of no avail to the appellant because the decree is also u/s 12(1)(n).

11. The Learned Counsel has also challenged before me the finding reached by the Courts below u/s 12(1)(o), namely, that he had encroached upon the portion shown in red in the plaint map. It was urged that P.W.2 Sulemanji Jinahbhai admits that the plaintiffs' title-deed shows the demised portion. On the strength of this, the Learned Counsel contends that the primary evidence was the sale deed in their favour which the plaintiffs have suppressed and no secondary evidence as regards the dimensions of the demised area was admissible. At any rate, he contends that adverse inference should be drawn against the plaintiffs for withholding this document. Neither contention is well founded. The initial letting was by the Custodian. D.W.1 Motilal admits that his father was allotted the land by the Custodian under an order of allotment That document was in the defendant's custody or power and he should have produced the same. If the Court has to draw an inference, the same must be drawn against the defendant for suppressing the order of allotment. There is ample evidence on record to show that the area leased measured 70 x 70 sq. ft. P.W.1, Roshan Raza has stated that the defendant's father and the defendant after his death, were tenants of land measuring 70 x 70 sq. ft. Besides, the plaintiffs, in their several

notices, have always asserted that it was so. If the lease was in respect of the entire suit land i.e., including the encroached portion shown in red, nothing prevented the defendant from denying the allegation that he had encroached upon land outside the leased area. The learned Judge has reached a finding that the defendant had encroached upon the portion shown in red in plaint map. That finding is based upon a consideration of the evidence and cannot be disturbed in second appeal. But in view of the fact that the requirements of section 12 (11) of the Act had not been complied with, no decree u/s 12(1) (o) could be passed.

12. Relying on the decision of their Lordships of the Privy Council in AIR 1934 58 (Privy Council) , the Learned Counsel for the appellant urges that a suit for ejectment must be by all the joint lessors. He points out that P.W.I. Mst. Roshan Raza states that some portion of the land towards the point "D" belongs to her. On the basis of this he urges that Roshan Raza being a co-lessor was necessary party and in her absence, the suit must fail. In my view, the Learned Counsel, cannot be permitted to urge this ground for the first time in second appeal. There was no plea in the written statement that the suit was bad due to non-joinder of a necessary party. There is no issue framed in that behalf. The question was not raised before the learned District Judge in appeal. The question is a mixed question of fact and law and not a pure question of law. It is urged that the defendant was not aware that Mst. Roshan Raza had interest in the suit land and, therefore, the plea was not taken. u/s 99 of the Code of Civil Procedure, no decree can be reversed nor any case remanded in appeal, on account of any mis-joinder of parties. The expression "mis-joinder" in this section includes "non-joinder". Even assuming that "non-joinder" of a necessary party affects jurisdiction and is not within section 99, nothing prevented the defendant from raising the plea by way of amendment. Even otherwise, there is no substance in the plea. A reading of P.W.1, Mst. Roshan Raza's testimony disposes that the lady despite having transferred the property, still thinks that some part of it belongs to her. Her statement in para 4 is vague and indefinite. She is not certain but vaguely asserts that some portion towards point "D" belongs to her. No doubt, she says in para 5 of her statement that she had made a report to the police against the defendant for having encroached upon the land. But nothing turns on her testimony because her title, if any, had to be borne out from the deed itself and not on her mere assertion. In paragraph 8 she clearly states that the suit land is included in the deed by which she had transferred the property to the plaintiffs' predecessors-in-title. That really concludes the matter. In that view, the suit cannot be dismissed for non-joinder of Mst. Roshan Raza, Even otherwise, the defendant having attorned to the plaintiffs and paid rent in respect of the accommodation to them, is estopped u/s 116 of the Evidence Act from denying their title as landlords (See, AIR 1937 251 (Privy Council)).

13. Lastly, Learned Counsel for the appellant urged that the remedy of the plaintiffs if they wanted to construct a building on the open land, was by way of an application u/s 22 of the Act to the Rent Controlling Authority. There is no substance in that contention. It is obvious from the terms of section 22 that it is

a special provision designed for the splitting up of a lease of a house with a large compound. By that provision, the Rent Controlling Authority is empowered to direct a severance of the lease, determine the rent payable by the tenant in respect of the rest of the accommodation, and after such severance places the landlord in possession of the vacant land. The provision has been made to give incentive to owners of property to invest their money in building of houses, keeping in view the acute paucity of housing accommodation. There is no question of splitting up of any tenancy here. The lease in question was not of a house, but of a plot of land. The contention based upon section 22 of the Act is, therefore, untenable.

14. The result is that the appeal fails and is dismissed with costs. Counsel's fee Rs. 100, if certified.