
(1960) 11 MP CK 0033
In the Madhya Pradesh High Court
Case No : L.P.A. No. 126 of 1958

Munnalal Beharilal Jain and Another

APPELLANT

Vs

Balchand Lachmandas and Others

RESPONDENT

Date of Decision : 30-11-1960

Acts Referred:

Registration Act, 1908 — Section 77
Transfer of Property Act, 1882 — Section 53A

Citation : (1961) J LJ 280 : (1961) MPLJ 221

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : B.L. Seth and S.L. Golchha, for the Appellant; R.S. Dabir and V.S. Dabir, for the Respondent

Final Decision : Allowed

Judgement

K.L. Pandey, J.

This appeal under the Letters Patent is directed against the reversing decree of the learned single Judge by which the plaintiffs' claim for possession of a house and arrears of rent in respect of that house was dismissed.

The main facts of this case, which are no longer in controversy, may be briefly stated. The house in dispute was owned by the two defendants and their father Lachhmandas. They executed in favour of the plaintiffs a sale deed dated 22nd January 1938. Also, on the same date, the two defendants further executed a chitthi by which they undertook to pay to the plaintiffs Rs. 150 as rent of the house for one year and promised to vacate it at the end of that year. It appears that Lachhmandas died subsequently. Since the defendants did not get the sale deed registered, the plaintiffs filed a suit u/s 77 of the Registration Act and obtained a decree directing its registration. Even so, they did not present the sale deed for registration within 30 days of the decree and could not thereafter get it registered as decided finally in *Munnalal v. Pachorilal* 1950 NLJ 266 : ILR 1950 Nag. 805 : AIR 1950 Nag. 105. In the meanwhile, the plaintiff's had filed

Civil Suit No. 70 of 1941 for recovery of arrears of house rent. That claim was compromised but the defendants applied to the Debt Relief Court and secured an order for satisfaction by instalments which they have been paying. The plaintiffs filed another like suit - No. 57-B of 1945-and obtained a decree in terms of a compromise between the parties. Then their suit - No. 6-B of 1950 - was however dismissed in default. Subsequently, by a notice dated 19th February 1951, which the defendants received on 21st February 1951, their tenancy was terminated and they were required to vacate the house by 22nd March 1951 but they continued to be in possession of the house.

In substance, the plaintiffs claimed that, having taken the house from them and also having acknowledged them as landlords, the defendants must vacate the house and pay the arrears of house rent.

In answer, the defendants pleaded inter alia that there was no contract of tenancy and that there was only a temporary arrangement for mutual convenience whereby they agreed to pay Rs. 150 annually to the plaintiffs pending acquisition by them of a valid title to the house. Since the plaintiffs failed to acquire title to the house and the defendants are in possession of that house as owners, the plaintiffs' claim for possession and house rent is unsustainable. The defendants further averred that they never acknowledged the plaintiffs as their landlords and denied that they were precluded from challenging the plaintiffs' title to the house.

The Court of first instance accepted the defence and dismissed the suit. While the first appeal Court reversed that decree, the learned single Judge, taking a different view on most of the questions in controversy, restored the decree of the Court of first instance.

At this stage, it will be convenient to set out the conclusions of the learned single Judge which have been assailed before us:

(i) During the pendency of the second appeal, one of the appealing defendants, Pachorilal died on 3rd January 1957. His personal heirs were his legal representatives and unless they were impleaded as parties within the prescribed time, the appeal would partially abate. Since the limitation for impleading the legal representatives in such a case was 3 years under Article 181 of the Limitation Act, they were directed to be so impleaded; *Abdul Baki v. R.B. Bansilal Abirchand Firm*, Nagpur 1944 NLJ 331 : ILR 1944 Nag. 577 : AIR 1945 Nag 53.

(ii) There was in this case no lease but only an arrangement as pleaded by the defendants.

(iii) The claim is unsustainable when the title does not reside in the plaintiffs.

(iv) The plaintiffs cannot take advantage of the provisions of section 53A of the Transfer of Property Act which is available only as a defence for protecting possession.

(v) In spite of the chitthi dated 22nd January 1938, the decree for arrears of rent and the provisions of section 116 of the Evidence Act, the defendants were not precluded from denying the plaintiffs' title.

The first question which we have to consider is whether, in view of the facts of this case, the appeal abated wholly or partially. In *Abdul Baki v. R.B. Bansilal Abirchand Firm*, Nagpur 1944 NLJ 331 : ILR 1944 Nag. 577 : AIR 1945 Nag 53, all the known legal representatives of a defendant, who had died, were brought on record within limitation. In view of this fact, it was held that there was sufficient compliance with the provisions of Order 22, rule 4, Civil Procedure Code. It is obvious that the facts of that case are distinguishable from those in this case because none of the legal representatives of the appellant Pachorilal was brought or sought to be brought on record within time. The rule of substantial compliance and sufficient representation has no application to a case where none of legal representatives of a dead litigant was brought on record within limitation. As pointed out by Hidayatullah J. (as he then was) and Choudhuri J. in *Lilawatibai v. Gangadhar* 1952 NLJ 421 : ILR 1953 Nag. 116 : AIR 1953 Nag. 12 the provisions of Order 22 of the Code and the procedure therein prescribed are mandatory and must be followed in every case where the lis is sought to be continued in the right of the dead persons by those living. According to their Lordships, the bar of abatement comes into force exactly 90 days after the death of a litigant and if the mandatory provisions of Order 22, rules 3, 4 and 11 have not been invoked, the appeal abates wholly or partly in accordance with the nature of the lis. The learned counsel for the defendants did not endeavour to support the view taken by the learned single Judge or the reasons given by him. He, however, urged on the basis of the well-recognised principle of English law that the defendants were joint tenants, that on the death of one of them, the entire tenancy right devolved on the other by survivorship and that, in this view, it was unnecessary to bring the legal representatives of the deceased on record. The rule of English law that a transfer to a plurality of persons creates a joint tenancy with right of survivorship is unknown to Hindu Law. The Judicial Committee observed in *Jogeshwar Narain Deo v. Ram Chund Dutt* 23 IA 37 at p. 44:-

The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family.

Even if the transferees are members of an undivided family, they will, in the absence of any other indication to the contrary, take as tenants-in-common. It follows that the two defendants, Balchand and Pachorilal, were tenants-in-common and that, when the legal representatives of Pachorilal did not apply within limitation for being brought on record, the appeal abated to the extent of his interest in it.

We will now consider the effect of such abatement on the whole appeal. It will be recalled that the subject-matter of the second appeal was a decree for possession of a house and a specific sum of money on account of arrears of rent.

In so far as the claim in second appeal related to a specific sum of money, there was a joint and several liability and the interest of the deceased appellant could be separated from that of Balchand with the consequence that it would not entail a total failure of the appeal: *Ganeshmull v. Sohanlal* ILR 1955 Nag. 33 : 1955 NLJ 224 : AIR 1956 Nag. 111. It would, however, be different in so far as it related to possession of the house. The decree, which was the subject-matter of appeal before the learned single Judge, entitled the plaintiffs to take possession of the whole house against each defendant. As against one of them it became, as shown, final. If the other were allowed to prosecute his appeal and if he succeeded, the plaintiffs would, as against him, cease to be entitled to take possession of the whole house. It would be seen that the substantial nature of the decree for possession was that it was joint and indivisible without any separate or separable rights set up by the defendants. Further, a successful appeal by the surviving defendants would not only result in two inconsistent or contradictory decrees in one and the same suit but would also effectively prevent the plaintiffs from executing the decree of the first appeal Court even in regard to the interest of Pachorilal. In this situation, we are of opinion that the second appeal, in so far as it related to possession of the house, wholly abated. If any authority is necessary, we may refer to *Lilawatibai v. Gangadhar* 1952 NLJ 421 : ILR 1953 Nag. 116 : AIR 1953 Nag. 12 where their Lordships observed:

Such a conflict must be avoided and is of the essence of Order XXII of the Code of Civil Procedure. It has been held over and over again that where there is a likelihood of a conflict of decrees, the appeal must be treated to have abated in its entirety.

We are quite unable to accept the view of the learned single Judge that there was any arrangement as pleaded by the defendants. This is what they stated in their written statement:

There was no contract of tenancy between them.....That the parties being aware of the above circumstances made a temporary arrangement for their mutual convenience, whereby the defendants agreed to pay Rs. 150 annually to the plaintiffs pending acquisition of a valid title by the latter.

We do not read this as saying that there was a contract of tenancy but, by a contemporaneous oral agreement, the parties stipulated that it would not operate until the plaintiffs acquired a valid title. That being so, the finding of the learned single Judge to that effect must be regarded as one having no foundation in the pleading. That apart, the only witness on the point, Pachorilal D.W. 1 did not support that case and, what is more, there was a finding of the first appeal Court against the arrangement. In this situation, there was no jurisdiction to interfere in second appeal with that finding of fact: *Deity Pattabhiramaswamy v. S. Hanymayya* AIR 1959 SC 57 and *Paras Nath v. Mohani Dasi* AIR 1959 S.C. 1204. We wish to emphasise this aspect of the case because we notice that the view which the learned single Judge took of this matter coloured nearly all his conclusions. The emerging position is that the chitthi dated 22nd January 1938

must be regarded as the repository of all the terms entered into between the parties. A plain reading of that document clearly shows that there was between the parties a contract of tenancy for only one year.

The view that a landlord's claim like the one made in this suit cannot be maintained because he has no title to the house let out by him is clearly untenable. The scope of a suit by a landlord for possession from his tenant, including a tenant holding over, after the determination of the lease envisaged by section 7(xi)(cc) of the Court-fees Act is limited and the Court will not go into the question of title of the landlord as the date of the contract of tenancy, though that question may be considered incidentally for determining, if disputed, whether the contract was made. As we would show in the sequel, even apart from the restricted scope of this suit, it is not open to the defendants to deny that the plaintiffs had title to the house on the date on which they made the contract of tenancy. In our opinion, the question whether the plaintiffs had a valid title to the house on 22nd January 1938 is not material for the purposes of the suit.

The learned counsel for the plaintiffs contended that they were entitled to the benefit of section 53A of the Transfer of Property Act. The consensus of judicial opinion is that it is available only as a defence to protect possession. We may refer only to *Kanhaiyalal v. Jerome D'Costa* 1955 NLJ 710 : AIR 1955 Nag. 302 , *Dammulal Babulal Jain v. Mohammad Bhai Haji Suleman* 1955 NLJ 742 : AIR 1955 Nag. 306, AIR 1940 1 (Privy Council) and *Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons*, . In support of the contrary view, we were referred to three cases including AIR 1944 212 (Oudh) , which was noticed with approval by D.F. Mulla in his commentary on the Transfer of Property Act. We find that the Oudh case was disapproved by a Division Bench of this Court in *Dammulal's case* 1955 NLJ 742 : AIR 1955 Nag. 306. Since this case can be disposed of on other grounds, we do not consider it necessary to pronounce any opinion on the question whether a plaintiff who, in effect, seeks to defend his possession can claim the benefit of section 53A of the Transfer of Property Act.

As we have indicated earlier, the tenancy must be regarded as duly established by the chitthi dated 22nd January 1938 which the defendants executed in favour of the plaintiff. That being so, the provisions of section 116 of the Evidence Act are attracted. The Judicial Committee observed in *Bilas Kunwar v. Desraj Ranjit Singh* AIR 1915 PC 96 : 42 IA 202 at p. 207 as follows:

Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord.

The learned counsel for the defendants contended that they were already in possession, that they were not let into possession by the plaintiffs and that therefore the estoppel u/s 116 of the Evidence Act could not apply. An argument

like this was repelled by the Judicial Committee in AIR 1937 251 (Privy Council) and it was held that a tenant would be estopped whether he was or was not in possession of the property at the time when he took the lease.

It is no doubt true, as pointed out by the Judicial Committee in the last-mentioned case, that the principle of section 116 of the Evidence Act does not apply to disentitle a tenant to dispute the derivative title of one who has since become entitled to the reversion nor does it preclude the tenant from pleading that the title of the original lessor has since come to end. In our view, this postulates subsequent devolution of the title of the lessor by death or passing of title by other modes recognised by law. The underlying principle cannot be used to show that the lessors had no title even when the defendants took the lease. In the instant case, when the plaintiffs gave the lease, they had a defective title. That title, whatever its defects, has not passed to any other person by any process known to law and all that has happened is that the plaintiffs are no longer entitled to cure the defect in their title. That being so, the rule in the case of AIR 1937 251 (Privy Council) is of no assistance to the defendants. This is what their Lordships observed in that case:

What all such persons are precluded from denying is that the lessor had a title at the date of the lease, and there is no exception even for the case where the lease itself discloses the defect of title. [Page 319].

We think, this also answers the further contention that, for want of registration, the plaintiffs did not have a valid title to the house.

We are also of opinion that, in the earlier suit for rent, which was decreed, the existence or non-existence of relationship of landlord and tenant and the nature of tenancy were directly and substantially in issue and the decree in that suit operates as *res judicata* on those two questions: *Sheoram v. Mulchand Bindraj* AIR 1938 Nag. 195 : ILR 1940 Nag. 181. The fact that it was a decree founded on a compromise would not make it the less effective for the purposes of section 11 of the Code of Civil Procedure: *Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and Others*, .

In view of what we have said in the foregoing paragraphs we think that, even apart from the question of abatement of the second appeal, the whole claim must be decreed. The decree of the learned single Judge is, therefore, set aside and the one passed in first appeal is restored. The respondents here shall bear their own costs and pay those of the plaintiffs throughout. Counsel's fee here is Rs. 75.