
(1962) 04 P&H CK 0008

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 132 of 1959

Nihal Chand

APPELLANT

Vs

Natha Singh and others

RESPONDENT

Date of Decision : 09-04-1962

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 12

Citation : (1962) 04 P&H CK 0008

Hon'ble Judges : Shamsheer Bahadur, J

Bench : Single Bench

Advocate : D.N. Awasthy, P.C. Jain and V.C. Mahajan, for the Appellant; F.C. Mital and Ganga Parshad Jain, for the Respondent

Final Decision : Dismissed

Judgement

Shamsheer Bahadur, J.—This is a defendant's appeal arising out of the suit instituted by Natha Singh plaintiff-respondent for recovery of a portion of the shop of which the possession was and still is with the appellant, Nihal Chand. The suit was decreed by the trial Judge on 29th of July, 1958, and the defendant having failed in his appeal before the Additional District Judge, Ludhiana, has now come in second appeal to this Court.

2. The facts giving rise to this litigation which have been set out in my order of 1st of October, 1959 may briefly be recapitulated. Shop No. B-11-406/15 was under the tenancy of Natha Singh plaintiff, the owner being Takia Shah Shuja, paying a rent of Rs. 10/- per mensem. The shop was leased by the Mutwallis Raunqi Shah and Gaimda Shah, to the plaintiff before the partition of 1947. On the migration of the Gadi Nashins to Pakistan Natha Singh came to be recognised as an old tenant under the Custodian of Evacuee Property to whom he continued to pay the rent. On 27th of March, 1951, a partnership deed was executed between the plaintiff Natha Singh and Nihal Chand defendant-appellant, and it was provided, inter alia, that Nihal Chand was to carry on the business of a cloth dealer in the shop and a sum of Rs. 150/- per mensem would be paid to Natha

Singh, the account was to be kept by Nihal Chand who, however, was not given any right to have the shop allotted in his favour. The term of the partnership was fixed for two years but Natha Singh could have the partnership dissolved if there was any default in payment of a sum Rs. 150/- to him by Nihal Chand. The possession of Natha Singh in the shop was affirmed and it was stated that he could continue to have his sign board there. Nihal Chand who was to keep the account of the shop was alone responsible for losses of the firm. The real purpose of the partnership deed was to give a portion of the shop on lease to Nihal Chand who was to carry on the business of a cloth dealer on payment of Rs. 150/per mensem to Natha Singh who was to retain a portion of the shop for continuation of his old business.

3. A suit for dissolution of partnership was brought by Natha Singh on 13th of December, 1951 (the plaint in the case being Exhibit D. 5) and a preliminary decree was made and a local commissioner found that the plaintiff was entitled to a sum of Rs. 937/8/- and this was ultimately reduced to Rs. 900/- by the District Judge by his order of 11th March, 1954, from which no appeal was preferred. Natha Singh then filed a second suit this time for ejection from the shop and for recovery of Rs. 190/- as rent. It was found that there was no relationship of landlord and tenant between Natha Singh and Nihal Chand and the suit was accordingly dismissed on 7th of October, 1955. The plaintiff then felt obliged to bring the present suit for possession on 18th of November, 1955, and as mentioned aforesaid this suit has been decreed by both the Courts below.

4. In the second appeal which came up for hearing before me in the first instance on 1st of October, 1959, it was urged on behalf of Nihal Chand that the trial Court had declined without sufficient reason to frame two essential issues. It so happened that after the institution of the suit one Saidul Rehman was appointed a Mutwalli of the property and Nihal Chand had obtained a lease from him. I took the view that these events having taken place after the institution of the suit and before its decision by the trial Judge, it was imperative for the Court to have adjudicated upon these matters. Accordingly, two issues were framed by me and the case remanded for the reports and findings of the trial Judge and the lower appellate Court. The two additional issues framed by me are:-

- (1) Is Maulvi Said-ul-Rehman the Mutwalli of the property in dispute?
- (2) Has the Mutwalli as the landlord leased the suit premises to Nihal Chand? If so what is its effect on the present suit?

5. Mrs. Harminder Kaur as the trial Judge has reported that Nihal Chand had become a tenant under the Mutwalli and could not be dispossessed by Natha Singh who has forfeited his right by parting with the possession of the shop in dispute. The Additional District Judge, however, differed from the conclusion of Mrs. Harminder Kaur and according to his findings, Nihal Chand though he obtained a lease from the new Mutwalli Saidal-Rehman could not be held entitled to defeat the right of Natha Singh to claim possession of the shop. The plea

raised by Nihal Chand, in his view, did not and could not affect the decree which has been granted by the trial Judge and affirmed in appeal by the lower appellate Court.

6. In effect, therefore, the only surviving question for determination now is whether the lease obtained by Nihal Chand from Saidul Rehman Mutwalli to whom property had been restored by the Custodian could adversely affect the rights of the plaintiff-respondent. The other points on which the suit has been decided in favour of Natha Singh before the order of remand have also been pressed again for reconsideration in a very forceful argument which has been addressed by Mr. Awasthy, the learned counsel for the appellant.

7. It has been contended that the Custodian having acquired the property all subsisting leases came to an end. On the restoration of the property to the Mutwalli the new lease to Nihal Chahd alone is a valid transference of property and must take precedence and priority over the lease in favour of Natha Singh which had been obtained by him from the predecessors in-interest of the present Mutwalli. It is also submitted by Mr. Awasthy that a Mutwalli as stated in section 208 of Mulla's Principles of Mahomedan Law (14th edition), has no power to lease non-agricultural wakf property for a term exceeding one year. This restriction, however, is subject to the condition that the Mutwalli may have been expressly authorised by the deed of wakf to do so or he may have obtained the leave of the Court for so doing.

8. Mr. Mittal, for the respondent, in reply, states that these pleas were never raised in the written statement otherwise he could have shown that the original Mutwalli had been expressly authorised to give a lease for a longer period. Be that as it may, it is next argued on behalf of the respondent that the suit property having admittedly vested in the Custodian the power of cancellation of the lease is governed by section 12 of the Administration of Evacuee Property Act, 1950. Under the provision to sub-section (1) in the case of a lease granted before the 14th day of August, 1947, the Custodian shall not exercise the power of cancellation of lease unless he is satisfied that the lessee-

(a) has sublet, assigned or otherwise parted with the possession of the whole or any part of the property leased to him, or

(b) has used or is using such property for a purpose other than that for which it was leased to him, or

(c) has failed to pay rent in accordance with the terms of the lease.

Thus, the Custodian has not been given any statutory authority to cancel a lease peremptorily and his powers are more or less those which a landlord of a building has to eject his tenant under the provisions of the Rent Restriction Act. It may also be mentioned that though at one stage the lease of Natha Singh was cancelled his right to remain in possession as a tenant was recognised by the Deputy Custodian General (Shri Tara Chand Aggarwal) in his order of 31st of

December, 1956 (Exhibit P. 6). He directed that the tenancy of Natha Singh should be recognised by the Department, this being in accord with the principles of equity and the policy of the Department.

9. The Custodian, under sub-section (3) of section 16 of the Administration of Evacuee Property Act "shall stand absolved of all responsibilities in respect of the property so restored, but such restoration shall not prejudice the rights, if any, in respect of the property which any other person may be entitled to enforce against the person to whom the property has been so restored.

Provided that every lease granted in respect of the property by or on behalf of the Custodian shall have effect against the person to whom restoration is made until such lease is determined by lapse of time or by operation of law.

It is thus, clear that the restoration of the property to the Mutwalli could not prejudicially affect the rights of Natha Singh as a lessee and his ejectment could be enforced only under the provisions of the East Punjab Urban Rent Restriction Act. There is a notification of the Punjab Government dated 12th of September, 1950 (No. 7116-G-50/1,3814), which provides that the urban evacuee property in the State of Punjab would not be subject to the provisions of the East Punjab Urban Rent Restriction Act, 1949. The property having been restored to the Mutwalli, this restriction is no longer applicable and the ejectment can be enforced only under the provisions of the East Punjab Urban Rent Restriction Act.

10. Mr. Mittal also submits and in my opinion rightly that even assuming the validity of the lease in favour of Nihal Chand, section 48 of the Transfer of Property Act protects the prior transfer in favour of Natha Singh. The lease in favour of Natha Singh subsisted at the time when the Mutwalli purports to have transferred the lease-hold rights to Nihal Chand and is still subsisting. The transferor cannot prejudice the rights of the transferee by any subsequent dealing with the property. This principle is embodied in section 48 of the Transfer of Property Act which is in these terms:-

48. Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

11. It is significant to observe that the suit has been brought only in relation to the property which is in occupation of the appellant Nihal Chand. The plaintiff is already in possession of the portion marked green in the site plan where his goods are lying. It is only in respect of the red portion that the suit was brought. Clause 10 of the partnership-deed (Exhibit P. 1) affirms the possession of Natha Singh in a portion of the shop and it is specifically stated therein that his occupation would remain intact.. It is contended by Mr. Mittal that Nihal Chand who is no more than a licensee cannot deny the title of the lessor, this having been so unequivocally admitted in the partnership deed to which he was a party.

It is no answer to say to this contention that the title of Natha Singh was destroyed by the events which happened after the partition, the landlords having migrated to Pakistan. As I have already mentioned, the tenancy of Natha Singh had subsisted and is still subsisting and Nihal Chand is estopped u/s 116 of the Evidence Act from denying this title. This principle also extends to licensees who are similarly estopped. It was held in *Shrimati Devi v. Shri Ram Kishan* (1954) 58 P.L.R. 180, that "a grant under which the grantee takes only the right to use the premises without exclusive possession operates as a licence and not as a lease. If the exclusive right of occupation is given subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence." According to the concurrent finding of fact, the possession of part of the shop has remained with Natha Singh throughout and this is the deciding factor in determining whether the transfer is a lease or a licence. To a similar effect is the ruling of *Amur Nath v. Shrimati Savatri Devi* (1955) 57 P.L.R. 276, where *Falshaw J.* (as the Chief Justice then was) held that the tenant who was carrying on the business of cloth-selling in the rented shop and had allowed a tailor to sit in a portion of the shop, still retained his full rights as the tenant over the whole of the premises leased to him and the occupation of the tailor was that of a licensee. In *Makhan Singh v. Baisakhi Ram Shah* 123 PLR 1919, it was held by *Martineau J.* that a tenant in possession cannot even after the expiration of his lease deny his landlord's title without actually and openly surrendering possession to him. On this principle, Nihal Chand as licensee cannot deny the title of Natha Singh without first surrendering possession of it to him. In my opinion, therefore, the subsequent lease granted by the Mutwalli in favour of Nihal Chand cannot operate to the prejudice of Natha Singh who is entitled to obtain possession of the shop.

12. It remains to discuss the objection to the suit on ground of Order 2, rule 2 of the Code of Civil Procedure. This ground was the subject matter of Issue No. 1 which had been dealt with in the judgment of the trial Court and also of the lower appellate Court. Briefly, the ground of attack is that the plaintiff not having asked for recovery of possession of the disputed shop in the suit for dissolution of partnership, he is now precluded from seeking this redress in a subsequent suit. Now, the simple answer to this is that under the terms of the partnership-deed (Exhibit P. 1), the duration of partnership was for two years. The possession of the shop again was not one of the assets of the partnership. The suit for dissolution of partnership was brought on 17th of December, 1951, before the expiry of the term of two years provided in the partnership deed. The plaintiff was, therefore, not bound to include the possession of the shop in his suit for dissolution of partnership. Both the Courts below, in my opinion, rightly decided this question in favour of the plaintiff.

13. It has last been contended that the suit is also barred under the principle of *res judicata*. This plea which has never been raised before cannot be entertained

for the first time in second appeal.

14. I would accordingly affirm the judgments and decrees of the Courts below and dismiss this appeal with costs. At the request of Mr. Awasthy I grant the appellant Nihal Chand three months to vacate the premises. The possession should be delivered to the respondent on or before the 9th of July 1962.