
(1976) 08 AHC CK 0032
In the Allahabad High Court
Case No : Second Appeal No. 1300 of 1967

Raja Ram

APPELLANT

Vs

Nagar Mahapalika, Kanpur and others

RESPONDENT

Date of Decision : 11-08-1976

Acts Referred:

Specific Relief Act, 1963 — Section 38(1), 41(1)

Citation : (1976) 08 AHC CK 0032

Hon'ble Judges : M.P.Mehrotra, J

Final Decision : Dismissed

Judgement

M. P. Mehrotra, J.

This second appeal arises out of a suit which the plaintiffappellant filed seeking a permanent injunction to restrain defendant No. 1 Nagar Maliapalika from taking forcible possession of quarter No. 2, block No. 61 of S. D. Colony, Shastri Nagar, Kanpur. The suit was brought with allegations that the aforesaid quarter was rented out at Rs. 10/ per month sometime in 1961 by defendant No. 1 Nagar Maliapalika to defendant No. 2 Taliir Alimad. Ever since the very beginning the defendant No. 2 was keeping the plaintiff as his subtenant on a monthly rent of Rs. 10/ with the knowledge of defendant No 1 and with its implied consent. In January 1964, the plaintiff and other subtenants received notices from Nagar Maliapalika, Kanpur regarding their occupation of the quarters. The committee of the Nagar Maliapalika wanted to create direct tenancy with the subtenants. It was alleged that defendant No. 1 was trying to evict the plaintiff forcibly and illegally and hence the suit.

The defendant No. 1 in its written statement contended that the quarter was allotted to defendant No. 2 on Rs. 13.50 per months rent and as certain amenities were not provided in the beginning, a rent of Rs. 10/ per month was charged for such period as the amenities were not provided. The creation of any subtenancy with the implied consent of the answering defendant was denied. It was asserted that the committee wanted to create direct tenancy with those

unauthorised occupants who were dehouseed persons for whom the quarters were really meant. It was contended that the allotment in favour of defendant No. 2 was on the express condition that he will not assign, sublet or transfer his right in part or in whole. It was discovered on 26th December, 1963 that the defendant No. 2 had sublet his quarter to the plaintiff. Raja Ram, the plaintiff, was, therefore, called upon to appear before the committee and since he was not a dehouseed person, he was treated as a trespasser and his illegal occupation was not recognised. It was alleged that the plaintiff being a trespasser, he was not entitled to the equitable relief of injunction and not being a tenant was not entitled to maintain the suit. Certain other points were taken which it is not necessary to notice in this appeal.

The trial court threw the suit and dismissed the same. The trial court gave a finding that the plaintiff had been induced by defendant No. 2 without consent express or implied of the defendant No. 1, Nagar Maliapalika, and that this was against the express terms on the basis of which the quarter was let out to defendant No. 2 by the Nagar Maliapalika. The plaintiff, therefore, was held not entitled to claim any injunction. It seems that in the trial court, in his statement under Order X Rule 2 C. P. C. the plaintiff stated that he was a joint tenant along with defendant No. 2 and not a subtenant of the said defendant. Thereafter, he moved an amendment application for getting the plaint amended but the amendment application was rejected on the ground that the plaintiff could not be allowed to change the nature of his suit in such a drastic manner. It will thus be seen that the plaintiff's stand in the trial court was wholly contradictory and inconsistent. While in the pleadings, he asserted the case of subtenancy, in his statement under Order X Rule 2 C,P.C. he claimed cotenancy rights. The finding of fact recorded by the trial court is that he was neither a subtenant nor a cotenant of the defendant No. 2. The lower appellate court affirmed the findings recorded by the trial court and dismissed the plaintiff's appeal.

In the second appeal, the learned counsel for the appellant has raised a contention that unless the tenant in chief was ejected, the plaintiff could not be evicted, whatever the latter's status might be whether he was a cotenant or a subtenant or a licensee of the defendant No. 2. It is not necessary to examine the validity of that question as we are not dealing with a suit for the eviction of the plaintiff, it is a suit where the plaintiff seeks the equitable relief of injunction against defendant No. 1, The learned counsel has placed reliance on certain authorities which are noted below:

1. M. Kalloppa Setty v. M. V. Lakshminarayan Rao, A.I.R. 1972 S.C. 2299.
2. Rajendra Nath Razdan v. Lalli Devi, 1961 A. L. J. Summary 50.
3. Brigadier K. K. Vertna and another v. Union of India and another, A.I.R. 1954 Bombay 358.
4. Lallu Yeshwant Singh (dead) v. Rao Jagdish Singh and others, A.I.R. 1968 S.C. 620.

5. *Andrappa Big Sankappa v, Narsighro Ramchandra Hebliker and another*, I.L.R. XXIX Bombay Series 213.

In A.I.R, 1972 S.C. 2299 (supra), it has been laid down as under:

"He can, on strength of his possession resist interference from defendant who has no better title than himself and get injunction restraining defendant from disturbing his possession." In 1961 A.L.J. Summary page 50 (supra), it was observed:

"Without determining tenancy his right of reentry does not accrue."

It was a suit for ejectment in which these observations were made. In A.I.R. 1968 S.C. 620, it was laid down as under:

"Under section 82 (3) Qanoon Ryotwari, the right of a khatedar is extinguished if the khatedar keeps in arrears the land revenue of his khata but there is no automatic extinguishment of his right because sec. 137 of Qanoon Ryotwari enables the collector to accept arrears if the khatedar is a good payer (khushdehanda) and there are special reasons beyond his control for not paying the land revenue. Whenever there are arrears of land revenue, the landlord cannot take possession forcibly but has to take action for dispossession under section 137. Section 163 cannot be interpreted to mean that in a proceeding under that section it is not sufficient to determine the question of de facto possession alone but it is also necessary to enquire as to whether this possession is or is not wrongful. Further section 163 of Qanoon Ryotwari clearly provides for suits so the nature described in section 326 of Qanoon Mai. Section 326 is very similar to section 9 of the Specific Relief Act, 1877 and the words "disturbed unlawfully" in section 326 mean "disturbed not in due course of law."

Again it was a suit for possession which the plaintiff had filed claiming that he had been wrongfully dispossessed otherwise than in due course of law.

In A.I.R. 1954 Bombay 358 (supra), the case was examined with reference to section 116 of the Transfer of Property Act i.e. with reference to the right of a tenant whose tenancy stands determined and who holds over without the consent of the landlord. It was observed:

"Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession a juridical and that possession is protected by statute. Under S. 9 of the Specific Relief Act, a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprived him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to court under S. 9 and claim possession against the true owner. Therefore, the law makes a clear and sharp distinction between trespasser and an erstwhile tenant. Whereas the trespasser's possession is never juridical and never protected by law the possession of an erstwhile tenant is juridical and is protected by law. Therefore,

as far as the Indian law is concerned, an erstwhile tenant can never become a trespasser. It may or may not be that in English law in certain circumstances he can become a trespasser and it does seem that the landlord can enter the premises and deprive the erstwhile tenant of his possession, in India a landlord can only eject his erstwhile tenant by recourse to law and by obtaining a decree or ejectment."

In I.L.R. XXIX Bombay Series page 213 (supra), it was laid down as under:

"A tenant holding over after the expiry of the period of tenancy was dispossessed without his consent by the landlord. The tenant then brought a suit for possession against the landlord under section 9 of the Specific Relief Act (1 of 1877). The Subordinate Judge dismissed the suit. The plaintiff (tenant) thereupon applied under the extraordinary jurisdiction (section 623) of the Civil Procedure Code, Act XIV of 1822).

Held: reversing the decree, that the plaintiff (tenant) was not liable to be evicted by the defendant (landlord) proprio motu and that he was entitled to a decree for possession." Sri N. D. Pant, learned counsel for the respondent, supported the judgments of the courts below and placed reliances on the following two cases:

1. Alagi Alamelu Achi v. Ponniali Mudaliar, A.I.R. 1962 Madras 149.
2. Mohd. Wasi and another v. Bachchan Saliib and others, A.I.R. 1955 Allahabad 68.

In A.I.R. 1962 Madras 149 (supra), it was laid down as under.

A person in wrongful possession of property is not entitled to be protected against the lawful owner by an order of injunction. When once a court finds that a plaintiff's possession of property is wrongful such a possession cannot be protected by assistance of court. The fact that if the lawful owner were to institute a suit, he might possibly fail on the ground that he was not in possession within 12 years of suit, can make no difference and cannot be a justification for the issue of an injunction maintaining the wrongful possession of the plaintiff."

In A.I.R. 1955 Allahabad 68 (Supra) which happens to be a Full Bench judgment of this court, it was laid down as under:

"From the absence of the words "the Court may in its discretion" in Ss. 54 and 56, it cannot be argued that an injunction can be granted or refused in accordance with the provisions of these two sections and that it is not a discretionary relief like a declaration under S. 42 of the Act. No doubt the words "the court may in its discretion" are not in Ss. 54 and 56 of the Act but S. 52 of the Act makes it clear that a relief for injunction, temporary or perpetual, is to be granted at the discretion of the court."

Sri S. N. Agrawal, learned counsel for the appellant, has distinguished both these cases.

In my opinion, the cases which lay down that no one can be evicted by force and that even after the determination of their tenancy, the tenants still continue to have a right to continue to be in occupation till such time as they are evicted in due course of law by the landlords will have no Applicability to a suit which is brought for claiming equitable relief of injunction. A person can be evicted only if the plaintiff is entitled in law to seek eviction. No question of equity is involved in such a suit. But when a plaintiff seeks an equitable relief of injunction, then different considerations apply. It is not a mere " question of legal rights and obligations. The courts are entitled to take into consideration the equities of the situation including the conduct of the parties. In my view, therefore, many of the aforesaid cases which have been cited touching on the rights of a person to remain in occupation or to regain possession if he has been wrongfully dispossessed will have no relevance when we have to consider the question of grant of equitable relief of injunction to a plaintiff. A. I. R. 1972 S. C. 2299 (Supra) was undoubtedly a case in which the plaintiff claimed injunction along with declaration. The Court held that the plaintiff had failed to make out his title but the defendant's title also had not been investigated and it was not clear as to who had the superior title to the property in question and the plaintiff was held entitled to get injunction on the basis of his possessory title. The plaintiff had taken possession of the property on the basis of a saled deed and he had been in possession since January, 1947. The defendant, on the other hand, had taken the saled deed from another person who happened to be D. W. 5 in that suit but this saled deed was obtained on 1st December, 1953 and he was undoubtedly not in possession. In this situation, when it was not clear whether the plaintiff or the defendant had the real title in the property, the Supreme Court laid down that the plaintiff could still claim injunction on the basis of his possessory title. I am afraid the facts of the said case are not of much assistance in determining the controversy at hand. The crux of the matter in the present case is whether the plaintiff should be granted the relief which he had claimed bearing in mind that the relief is basically an equitable relief in the discretion of the court. Section 36 of the new Specific Relief Act which corresponds to section 52 of the repealed Specific Relief Act clearly lays down that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. Section 38(1) of the Specific Relief Act lays down:

"Subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication."

This provision makes it clear that the policy of law is that breach of an obligation should be prevented. A plaintiff is entitled to restrain the defendant from committing such a breach of obligation. In the instant case, the lease deed which was executed between the defendants nos. 1 and 2 and which is Ext. A3 clearly lays down in clause 13 that the tenant shall not transfer or sublet either a part or the whole of the subjectmatter of the tenancy. This is a very clear and categorical prohibition and the defendant no. 2 was under a clear obligation not

to act against this provision. It is clear that if the defendant no. 1 lessor had an inkling before the creation of subtenancy that the tenant was contemplating to create one in the demised premises, they the said defendant Nagar Maliapalika could undoubtedly seek a permanent injunction against the defendant no. 2 restraining him from creating a subtenancy or otherwise transferring the demised premises. Such an injunction would have been clearly obtainable under section 38(1) of the new Act.

Now, let us examine the position where the Nagar Maliapalika did not have such an inkling or information about the impending creation of a subtenancy or transfer of the demised premises and come to know about this breach on the part of the tenantinchief subsequently. On coming to know of this breach, the Nagar Maliapalika protests and threatens the subtenant who has been inducted by the tenantinchief in breach of the aforesaid covenant. Can the person so inducted whether he be a subtenant or a licensee but who has undoubtedly been inducted in breach of a clear covenant between the lessor and the lessee, claim that he should be granted the equitable relief of injunction. In my opinion, in such a situation, such a relief could not be granted. Granting of such a relief will really be nullifying the effect of section 38(1), As I said, the Nagar Maliapalika would have been entitled to enforce the obligation on the part of the tenantinchief contained in clause 13 of the lease. Granting an injunction to a person who had been inducted in the breach of that clause will be almost defeating the rights of the Maliapalika flowing from that clause. When a party is itself in the wrong, it should not be granted an equitable relief irrespective of whether the defendant is entitled to act in a particular manner or not. It is not necessary to go to the length of saying that the plaintiff was a trespasser in the instant case. Learned counsel has strenuously contended that the plaintiffappellant could not be treated to be a trespasser and that in any case his status could not be else than that of a licensee. In my opinion, irrespective of the question whether he was a subtenant or cotenant or licensee, the real point is that the plaintiff was there in the breach of the undertaking given by the tenantinchief in clause 13 of the aforesaid lease. Moreover, it is not a case of a licence which has been set up in the plaint. A mere licensee could not come under clause 13 but he will have no right in the demised premises. The plaintiff clearly came to the court with a case of subtenancy and thereafter in his statement under Order X rule 2 C. P. C., he shifted to a case of cotenancy and both these situations undoubtedly would attract the applicability of the said clause 13 and would be violative of the said provision. I am, therefore, of the opinion that irrespective of the question whether the plaintiff could be treated to be a trespasser or not, on the short ground that he could not take advantage of his own wrong by being inducted by the tenantinchief in breach of the conditions contained in the lease, he was rightly refused the discretionary relief of injunction. When the policy of law is as contained in section 38(1) that the court should be of assistance in the enforcement of the obligations legally created, it is not conceivable that this assistance should be extended to those who are

undoubtedly participants in the breach of the obligation arising from the covenant in a written document executed between the parties. In this connection a reference may be made to section 41 (i) of the new Specific Relief Act equivalent to section 56(j) of the old Specific Relief Act which clearly lays down that an injunction cannot be granted when the conduct of the applicant or his agent has been such as to disentitle him to the assistance of the court. This provision of law has been applied in various decided cases such as:

1. Unni v. Nagemmal, 18 Mad. 368.
2. Seeni Chettiar v. Senthannathan Chettiar, 20 Mad. 58.
3. Kazim Husain v. Ram Samp, A. I. R. 1929 All. 877.
4. Basheshwar Nath v. Moga Municipality, A. I. R. 1940 Lah. 69.
5. Karnal Distillery Co. v. Ladli Pd., A. I. R. 1958 Punj. 190 para 81 at p. 208.
6. Haridas Mundhra v. National & Grindlawa Bank, A. I. R. 1963 Cal, 132 paras 29, 30 and 31.

In Keer on Injunctions, 5th Ed. 432 it is stated:

"The conduct of the party who seeks the aid of the court will be taken into consideration upon the application for an injunction."

Two other cases may also be usefully looked into in this connection. In Tituram Mukerji v. Gohan, I. L. R. 32 Calcutta Series 203 it was held that the right to an injunction depends in India upon Statute and is governed by the provisions of the Specific Relief Act (I of 1877). Section 52 of that Act places the grant of an injunction in the discretion of the court a discretion to be exercised, of course, as the discretion of Courts always is. In S. S. V. Kfishan Pillai and others v. Kilasathammal, A.I.R. 1928 Mad. 810 it was laid down:

"In the case of grant of mandatory injunction the decision must depend to a very large extent on the facts of each particular case."

The appeal, therefore, lacks merits and is dismissed but in the circumstances there will be no order as to costs.