

(1956) 09 OHC CK 0012

In the Orissa High Court

Case No : First Appeal No. 4 of 1950

Raja Sri Krishna Chandra Manasingh Harichandan Mardaraj
Bhramarbar Roy and Another

APPELLANT

Vs

National Chemical and Salt Works Ltd.

RESPONDENT

Date of Decision : 03-09-1956

Acts Referred:

Transfer of Property Act, 1882 — Section 111, 114A, 28, 31

Citation : AIR 1957 Ori 35

Hon'ble Judges : P.V.B. Rao, J; Mohapatra, J

Bench : Division Bench

Advocate : Advocate General and G.B. Mohanty, for the Appellant; L.K. Das Gupta and P.C. Chatterji, for the Respondent

Final Decision : Dismissed

Judgement

Mohapatra, J.—This first appeal has been filed by the plaintiff-appellant against the judgment and decree dated 19-9-1949 of Sri K.S.R. Murty, 2nd Additional Subordinate Judge of Puri, arising out of a suit for recovery of possession of the lease-hold property by evicting the defendants therefrom as the lease stands determined and cancelled.

The defendants are Messrs. National Chemical and Salt Works Limited (India), Calcutta. The original plaintiff was the ex-proprietor of Parikud, and the estate of Parikud having vested in the State of Orissa under the provisions of the Orissa Estates Abolition Act, the State of Orissa has been made co-appellant at the appellate stage.

The defendants company had taken out a registered lease for a period of 40 years executed by the original plaintiff (the ex-proprietor of Parikud) on 12-2-1940. The lease was on an annual rental of Rs. 650/-. On the basis of the lease, the defendants obtained right to manufacture salt on the plots locally known as Madhuban and it was specifically provided for in the lease that the

lessees will have full right to make channels, bundhs, platforms and other requirements for the said manufacture of salt and its bye-products and if necessary the tenants of the second part can set up engine, boilers and other machineries for the said manufacturing purposes.

The lessees also had the right to erect buildings and huts for the accommodation of the staff; but nevertheless the lessees had not any right over the minerals. Right of transfer was allowed, but nevertheless it was provided that the transferees would be subjected to the selfsame conditions embodied in the lease. The pertinent clause with which we are concerned in the present suit is as follows:

"In the leasehold property the tenant of the second part of their transferee if any will not do any other business or manufacture of any other kind. Any other business or manufacture taken up without the written consent of the landlord of the first part this lease stands cancelled."

It was further provided that the tenants of the second part would start manufacture of salt or its bye-products within three years of the commencement of the lease, failing which this lease would be automatically cancelled. It would be pertinent to quote another provision which comes almost last in the lease:

"The landlord of the first part cannot and shall not cancel the lease on any ground whatsoever."

The plaintiff's allegation is that the defendants have violated the conditions embodied in the lease by carrying on fish business in the said property and also by letting out the fishery therein. The plaintiff had served A notice (Ext. 2(a)) on the defendants company on 12-10-1944 alleging that as the defendants carried on fish business in the leasehold property, the lease stood automatically cancelled, and the plaintiff called upon the defendants to leave the premises of the leasehold property.

A second notice (Ext. 2) also was served on the defendant on 19-11-1948 on the same allegation that the defendants were carrying on fish business in Madhuban in violation of the terms of the lease and the lease therefore is forfeited and cancelled. The plaintiff in that notice mentioned that the defendants were forbidden to enter upon the land and water of the "leasehold, property. Within a month from this notice the plaintiff filed the suit on 6-12-1948.

2. The defence is a denial of the allegation of fishing or carrying on the business of fish in the leasehold property. They have further taken up the plea that on the basis of the lease they have the right of fishing, but in any event their right of manufacture of salt and its bye-products on the basis of the lease cannot in law be forfeited, nor does the lease stand cancelled.

3. The learned Subordinate Judge has dismissed the suit on the ground that there is no express provision for re-entry in the lease and further that the suit is to fail on account of absence of notice as contemplated u/s 114A(b) of the

Transfer of Property Act. He however found that it did not lie in the mouth of the defendants to say that they were never carrying on any business of fishery. He has based this finding in favour of the plaintiff on Ex. 6 and it is unfortunate that he has not discussed the oral evidence adduced on behalf of the plaintiff and has not given us the benefit of his view in the matter of appreciation of oral evidence. Ex. 6 is a petition by the defendants to the Assistant Collector, Central Excise and Salt, Puri, seeking permission for catching fish. The petition is dated: 23rd June 1947. It is in the form of a letter written by H.K. Chakravarty, General Manager. It would be pertinent to quote the short petition:

""The season for the manufacture of salt at our Gurubai Salt Factory is now over. This is because, the monsoon has set in and there is no hope of getting any further season this year. This is for your information.

Your goodself is aware that we get some revenue every year out of fish from our channels. You kindly gave permission for catching fish as usual for the last few years. We pray that you will kindly permit us to catch fish this year also as soon as possible as the season for catching fish is drawing very near.""

On this petition permission was accorded as is evidenced from Ex. 7, a letter dated 4th July 1947 addressed to the General Manager, National Chemical and Salt Works (India), Limited.

4. I will now take up the oral evidence adduced on behalf of the parties on this question of carrying on the fish business. On this point the plaintiff has examined five witnesses (P. Ws. 2 to 6) and the defendants have examined the only witness D. W. 1, who was the Secretary of the company since 1939. (After discussing the evidence his Lordship proceeded).

On the above analysis of the evidence of the witnesses examined on behalf of the plaintiff, I am not in a position to come to a finding that the plaintiff has been able to prove that the defendants company are responsible for the catching of fish in Madhuban. And particularly in the face of the statement of P. W. 4 that he had not taken permission from any of the employees or the director of the company to catch fish, I am not prepared to accept the evidence as reliable. The witnesses by guess work stated that the fish caught might be worth two, three or four thousand rupees. It is highly improbable that there would not be any document evidencing that Loka Ghadai was granted a lease to fish. Indeed Exs. 6 and 7, that is, the permission sought for by the defendants company for catching fish and the granting of permission, are only prima facie evidence; but they cannot be taken to be positive evidence as to the actual fishing or carrying on fish business.

5. One more important feature which has been overlooked by the learned trial Court is that the evidence ought to be scrutinised from the point of view that the defendants were doing the business of fishing. Mere stray, occasional and spasmodic acts of fishing, even if proved, cannot be taken to mean that the defendants were carrying on a business in fish. In order to incur the liability of

forfeiture, it must be held that they had violated the condition embodied in the lease. Doing a business always connotes a course of conduct where some element of habitually and systematically doing a particular thing is indicated. I will, in this connection, refer to a decision of our Court reported in *Madras Auto Service Ltd. and Others Vs. Assistant Collector, Commercial Taxes*, . There we observed:

"A few stray and occasional cases of sales cannot lead us to find that the petitioners are carrying on business of selling their goods in Orissa. It has further to be found that the petitioners are habitually or systematically selling their goods within the state of Orissa."

Panigrahi, C.J., who was also a party to the judgment, also concurred in this view and observed:

".Business of selling is a well-known legal term connoting habitual selling as distinct from spasmodic or isolated transactions."

There the question whether the petitioners in the *O. J. C.* were carrying on business in Orissa was one of the most important questions to be determined and the observations were pertinent for the purpose of deciding the case. In that case, I had relied upon with respect an observation made by Sir Arthur Wilson in the case of *Lovell & Christmas Ltd. v. Commissioner of Taxes*, 1908 AC 46 (B). It would be worthwhile to quote the passage here again:

"One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income Tax Act, so as to render the profits liable to Income Tax."

The position cannot be over emphasised that in order that the- plaintiff may be allowed the right of re-entry on the cancellation of the lease on account of a forfeiture clause, very strict proof is necessary. In my view, weighing the evidence in the light of our observations in the aforesaid case, it falls far short of having strictly proved the violation of the condition of forfeiture.

6. Indeed the defendants company did not file their account papers to show that in fact they were never carrying on business in fish; and it is contended that from the non-production of the account papers of the defendants company the Court may draw an adverse inference against the defendants. The plaintiff did not call upon the defendants to produce their account papers, and moreover when the onus is very heavy upon the plaintiff to prove the breach of the condition, for the breach of which the plaintiff claims right of re-entry, the non-production cannot serve as a substitute for positive evidence to discharge the heavy onus.

7. As several points of law are raised and discussed at length at the Bar, we only think just and proper that we should give our findings in respect of the position of law raised in the case.

8. The learned Advocate-General, appearing on behalf of the State, puts forth his first contention that the present case is covered by the provisions of Section 31 of the Transfer of Property Act and not by those of Section 111(g) of the T. P. Act. Section 31 reads as follows :

"Subject to the provisions of Section 12 on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.""

The pertinent question to be considered is whether in the lease before us there is a condition superadded that it shall cease to exist in case a specified uncertain event shall happen. The learned Advocate-General argues that:

"Any other business or manufacture taken up without the written consent of the landlord of the first part this lease stands cancelled." is "a specified uncertain event" as contemplated u/s 31 of the Act. Indeed on the face of it the clause "any other business or manufacture"" appears to be too wide, vague and indefinite to be termed as "a specified uncertain event" as contemplated under the section. In this connexion, it would be pertinent to quote the illustrations attached to the section itself :

Illustrations :

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases." In the first illustration, if B cuts down a certain wood the transfer shall cease to have any effect. In the second illustration, the specific uncertain event is "if B shall not go to England within three years"". The illustrations are sufficiently suggestive of the position that a specified event contemplated u/s 31 must be definite and specific and a wide and vague clause of the nature "any other business" cannot be taken to be a specified event. The second clause in the lease before us :

"that the tenant of the second part will start manufacture of salt or its by-products within three years of the commencement of the lease, failing which the lease will be automatically cancelled",

may also be taken to be an illustration of a specified event. We may be inclined to agree if the condition was of the nature that if the lessees carry on business in

fish or business in timber, it may come within the operation of the provisions of Section 31. But the provisions of the lease being to the effect that if the lessees carry on any other business or manufacture, it cannot be taken to be a specified event.

9. Reliance is also placed upon the provisions of Section 111(b) of the T. P. Act. It would be necessary here to quote the relevant portions of the section :

""Section 111. A lease of Immovable property determines,

(a) by efflux of time limited thereby:

(b) where such time is limited conditionally on the happening of some event by the happening of such event:

X X X X

(g) by forfeiture; that is to say,

(1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title, in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease:

X X X X

It is contended on behalf of the appellant that this lease is determined as the time for which lease was granted is limited conditionally on the happening of the event that the lessees carry on any other business. On the face of it, the present case can never come within the language of Clause (b). In the present case, the lessee is for a fixed period of 40 years and it is not a case where the time for which the lease is granted is limited conditionally. On the contrary, the condition is one of defeasance that if the lessees carry on any other business than manufacture of salt or its bye-products the lease shall stand cancelled automatically. This condition has no reference to the time of 40 years for which the lease is granted. Here the time is not limited conditionally; but the clause prima facie appears to be one of forfeiture as contemplated under Clause (g) whereby the landlord will have the right to re-enter subject to the essential requisites contemplated under Clause (g) being satisfied. The present Section 111(g), as it stands, is since the year 1929, the amendment having been introduced by Act 20 of 1929. Prior to this amendment of the year 1929, after the word "re-enter" the words "or the lease shall become void" were there and they have been omitted by the amendment as they were misleading. In spite of there being a clause in the lease that it will be rendered void on the lessees having broken the condition, the lessor had still the option to allow the lease to continue as a valid lease and may not, by any act, give an indication for

determining the lease. These words having been dropped, it is now to be considered by us whether the requisites of Clause (g) have been fulfilled in the present case. It will not be out of place to "quote the condition once more:

"In the leasehold property the tenant of the second-part or their transferee if any will not do any other business or manufacture of any other kind. Any other business or manufacture taken up without the written consent of the landlord of the first part this lease stands cancelled."

As required by Clause (g), the lessee must break an express condition which will bind him and on the breach thereof the lessor will have the right of re-entry. It is contended on behalf of the appellant that an express condition is contained in the lease, that is, any other business or manufacture taken up without the written consent of the landlord; and further the provision ""that the lease stands cancelled" sufficiently complies with the requirement of Clause (g) which provides that on the breach thereof the lessor may re-enter. When the lease stands cancelled, the lessee has no right to be on the leasehold property. By necessary implication the landlord has the right of re-entry. The right of re-entry need not be, it is contended by the learned Advocate-General, in so many express terms. It may be gathered as a matter of inference from the other terms of the deed, or it may arise as being implied in such terms. We are unable to agree with the contention of the Advocate-General. In order to enforce a clause of forfeiture embodied in a statute, it is the settled law that the statute has got to be very strictly construed. A sharp distinction has got to be made between the clause of title and the clause of possession. The word "re-enter", as used in Clause (g), always refers to the fact of possession apart from the question of title. It may be, the lease deed contains a clause that the lessee's title will be extinguished. In my opinion, this is not sufficient for the purpose of enforcing forfeiture as contemplated under Clause (g). It is definitely to be provided that that the lessor will re-enter or resume possession.

We are far from laying down the proposition that in every lease the word "re-enter" must be there in order that the landlord may invoke the provisions of Clause (g). There is no particular form for the clause of re-entry. But we are definitely of the view that the clause or clauses in the lease-deed must sufficiently show that on the breach of the condition the landlord reserves to himself the right of taking over "possession". It may be in the form to resume possession or to take over possession or that the lessee will surrender possession. A particular form, according to us, is not material.

10. We may now discuss a few decisions cited at the Bar. Most of the decisions excepting one were prior to the Amending Act of 1929. We will first take up the case of Nabakumar Datta Vs. Trailokya Nath Bose and Others, . Here the clause ran thus :

"You will enjoy the profits from generation to generation by erecting houses upon the land and dwelling therein. If you fail to dwell upon the land, you will have no

interest in or connexion with the land."

The question for determination was whether such a clause satisfied the condition of Section 111(g) of the T. P. Act. Indeed it was conceded before their Lordships that there was no clause for re-entry in the lease. The question for determination consequently was whether there was an express provision which provided that the lease would become void. Their Lordships opined that there was no such express condition on the breach whereof the lease would become void.

It appears, their Lordships were of the view that it should be expressly stipulated that the lease would become void and the clause "you will have no interest in or connexion with the land" was not sufficient. The case is of importance as laying down another settled view, as was pointed out by Hofroyd, J, in the case of *Doe v. Powell* (1826) 29 RR 253: 108 ER 115 (D) :

"In order to incur and enforce a forfeiture the condition upon which it is to arise must be fully established, as forfeiture is a matter strictum jus. It is the duty of the plaintiff to establish his case strictly that there has been a forfeiture by breach of an express condition."

11. We will next refer to a judgment of Sanderson C.J., and Mukherjee, J., in *Mahomed Reajuddin v. Basuda Sundari* AIR 1918 Cal 164 (E). There the clause ran :

"God forbid, if the said land and bari be not used for dwelling purposes the right under the pattah shall be void."

Sanderson, C. J., observed :

"I doubt very much whether that should be construed to be a reservation of the right of re-entry by the landlord. It does not say so in so many words, and the form in which the right of re-entry is usually inserted is well known, and it might have been inserted if it was intended."

12. The only case after the amendment which was cited before us is that of a Single Judge of the Calcutta High Court reported in *In Re: Srinath Zamindary (In Liqdn.)*, . The relevant clause used in the case before Banerjee, J., was to the effect:

"In case the company goes to liquidation vofuntarily or otherwise, this lease shall cease to be operative and the company shall forthwith make over possession of the abad to the proprietors.""

Here the question was whether the lease contained the clause of re-entry and his Lordship in paragraph 31 of the report clarified the meaning of the word "re-entry" in the following manner;

"The next question is : does the lease provide for re-entry? If there is no provision for re-entry, there is no forfeiture. "Re-entry" means the resuming or retaking that possession which any one has lately foregone. The words in the

proviso are :

"The company shall forthwith make over possession of the land to the proprietors". The lessee is bound to make over possession. There is a duty cast on the lessee to do so. Therefore there is a co-relative right of the lessor to take possession. There is thus a provision of re-entry."

From this decision, even though it is of a Single Judge, we gain support for our view that the word "re-entry" used in the clause refers to the question of "possession", and as we have indicated above, apart from the provision that the lessee will have no title to the property on the breach of an express condition, there must be a forfeiture clause on the question of possession in order that the landlord may take advantage of Clause (g).

13. Mr. Advocate-General strongly relies upon a decision of the Madras High Court, *Mussa Kutti v. Rangachariar*, 8 Ind Gas 309 (Mad) (G)." This is of the year 1910 and it was decided therein :

"If a clause in a lease is so expressed that it can only be read as reserving the right of forfeiture to the landlord in certain circumstances, that, in my opinion, is sufficiently expressed within the meaning of the law."

In our view, this decision does not conflict with the interpretation that we have put upon Section 111(g). The matter would be clarified by reference to the terms of the clause:

"Except for particular reason such as contravening the terms above stated or making default in regard thereto, we should not be evicted from the hills Within the period of the terms and permission should not be given to another man to carry on the works allowed to us."

The words "be evicted" clearly refer to the question of possession and it is in accord with our view that in whichever form it may be, if there is a clause for the landlord to take over possession, apart from cessation of title of the lessee, the condition of Clause (g) is satisfied on the question of re-entry. In the present case, therefore, in our view, the clause being only to the effect that the lease shall stand cancelled, it does not amount to a clause for re-entry. The landlord therefore cannot take advantage of the provision of Clause (g).

14. There is a further difficulty in the way of the plaintiff to succeed. This difficulty is on account of a new provision u/s 114A of the T. P. Act which was introduced by Act XX of 1929. The section runs as follows:

""Where a lease of Immovable property has been determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing;

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach if it is capable of remedy.

"* * * *

In the present case, there was notice as contemplated u/s 111(g). There was no mention in the two notices (Exts. 2 and 2/a) giving the lessees the opportunity of remedying the breach of the condition. The provision of Section 114A regarding further notice requiring the lessee to remedy his breach is mandatory, provided the breach is capable of being remedied. The question to be determined is whether this particular breach, that is, carrying on the business in fish by the defendants, is capable of being remedied otherwise than by eviction of the defendants on forfeiture of the lease.

That is to say, whether the landlord could be sufficiently compensated by money on account of the breach. There is no doubt if any other trespasser would have caught fish and carried on business in the leasehold, the landlord could maintain a suit for damages in a proper Court. We do not see any reason why in this particular case also the landlord could not maintain such a suit for compensation.

The provisions are clear to indicate that if the breach is irreparable or irremediable, no notice u/s 114A is necessary and the landlord is entitled to evict the lessee if the conditions of forfeiture are fulfilled. But if any other remedy is available or the injury is reparable, a notice u/s 114A is compulsory. As we find, the breach can be sufficiently compensated by way of damages, the landlord ought to have given a notice and opportunity to the lessees for compensating him within a reasonable time and such a suit will not be hit by the mischief of Section 114A.

15. In conclusion, therefore, the appeal fails and is dismissed with costs.

P.V.B. Rao, J.

16. I agree.