

(1965) 08 AHC CK 0030
In the Allahabad High Court
Case No : Second Appeal No. 268 of 1961

Smt. A.L. Bose

APPELLANT

Vs

Syed Nayyar Abbas

RESPONDENT

Date of Decision : 31-08-1965

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 111, 114A, 116

Citation : AIR 1967 All 209

Hon'ble Judges : Lakshmi Prasad, J

Bench : Single Bench

Advocate : B.K. Dhaon and M.L. Trivedi, for the Appellant; Kalbe Mustafa, for the Respondent

Final Decision : Partly Allowed

Judgement

Lakshmi Prasad, J.—This is a defendants second appeal arising out of it suit instituted by the respondent for arrears of rent and ejectment.

2. The dispute in this case relates to a ball portion of the house specified at the foot of the plaint. The house was owned by the appellant's father who executed a will in 1941 bequeathing the house in question in equal shares to the appellant and to her brother Wilmol Daniels. On 13th March, 1944. Wilmot Daniels sold his half share in the house to one Afsar Regum and on the same date he executed a rent note in her favour under which he was allowed to continue in possession on payment of Rs. 15/- per month as rent.

In January, 1956 Afsar Begum sold the same to the respondent. Soon after his purchase, he gave a notice dated 17th January, 1956, to Wilmot Daniels demanding Rs. 540/- on account of arrears of rent and adding that in case of default in the payment of the amount demanded the addressee would be liable for ejectment. Thereafter on 30th January, 1956, the respondent gave another notice to Wilmot Daniels purporting to be one u/s 106 of the Transfer of Property Act requiring him to vacate the disputed accommodation by 15th February, 1956.

On 19th February, 1956 the respondent gave a third notice to Wilmot Daniels but there is no evidence to show as to what the contents of that notice were.

It is thereafter that the suit giving rise to this appeal was instituted for arrears of rent and ejectment against Wilmot Daniels. During the pendency of that suit Wilmot Daniels died and was substituted by his sister the present appellant despite some contest put by her that she did not claim under Wilmot Daniels and had a paramount title under the will to the disputed house.

The claim was contested on various pleas including the question of title. The plea regarding title was that Wilmot Daniels held only life estate under the will executed by his father and as such whatever was transferred by him under the sale deed relied on by the respondent came to an end with his death. It was further pleaded in defence that the claim for ejectment was bad in so far as the tenancy on which the suit was based had not been determined according to law.

3. The trial Court went into the question of title and found in favour of the respondent. It further held in favour of the respondent regarding his claim for arrears of rent. On the question whether the tenancy had been determined according to law it found in favour of the appellant. Accordingly, while dismissing the suit for ejectment it decreed the claim of the respondent for joint possession besides giving him a decree for arrears of rent. Aggrieved by this decree the present appellant went in appeal before the District Judge. The appeal was heard by the Civil Judge Lucknow who affirmed the findings recorded by the trial Court and dismissed the appeal. It is in these circumstances that the defendant has come up in second appeal before this Court.

4. The plaintiff-respondent has filed a cross objection against the finding of the two Courts below on the question whether the tenancy has been determined according to law.

5. I have heard the learned counsel for the parties. Shri Dhaon appearing for the appellant has conceded that he has nothing to say against that part of the decree which relates to arrears of rent which has been decreed against the assets of Wilmot Daniels in the hands of the appellant. His sole contention before me has been that the decree for joint possession after a finding that the tenancy did not stand determined according to law should not have been given and cannot be justified.

Learned counsel for the respondent argues that the findings of the Courts below that the tenancy was not determined according to law are erroneous and deserve to be set aside. His first contention is that since Wilmot Daniels held over the accommodation in question after the expiry of the period of lease he was not entitled to any notice. The contention appears to be without any substance. As is abundantly clear from the provisions of Section 116 of the Transfer of Property Act a tenant who holds over, holds the tenancy on monthly basis or yearly basis according to the nature of the tenancy. That being so, Clause (h) of Section 111 of the Transfer of Property Act must apply to his case also for the determination

of his tenancy unless of course the case can by virtue of any special stipulation in the deed of lease be brought under any other clause of Section 111 of the Transfer of Property Act which lays down various modes by which a tenancy can be determined. I, therefore, repel the contention that Wilmot Daniels was not entitled to any notice as required by Section 106 of the Transfer of Property Act for determination of his tenancy in the circumstances of the case.

6. That no valid notice according to law was given has not been disputed before me. Learned counsel, however, argued on the basis of a stipulation in the rent note to the effect that in the event of non-payment of rent for any month the lessee would be entitled to re-enter even within the period of tenancy as stipulated therein that the notice dated 30th January, 1956 may be construed to be one as envisaged by Clause (g) of Section 111 of the Transfer of Property Act. The argument is that because of the said stipulation in the rent note the respondent became entitled to eject Wilmot Daniels on the ground that he had committed default in the payment of rent and all that was necessary in order to determine the tenancy on that basis was to give a notice as required by Clause (g) of Section 111 of the Transfer of Property Act which need not be in any particular form nor give any particular period to the tenant to vacate.

Learned counsel for the appellant relies on Section 114A of the Transfer of Property Act to controvert the contention of respondent's counsel that the notice dated 30th January, 1956 may be treated as one under Clause (g) of Section 111, of the Transfer of Property Act. Learned counsel for the respondents wants me to read Sections 111, 114 and 114A together so as to come to a conclusion that no notice need be given for determining the tenancy on the ground of non-payment of rent if there is a stipulation in the lease for determination of tenancy on non-payment of rent. I am unable to accept the contention. There can be little doubt that the stipulation in the rent note relied on by the learned counsel for the respondent falls within Clause (g) of Section 111 of the Transfer of Property Act. It says:

"(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).....; or (3)... . .; 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:"

The stipulation in the lease that on non-payment of rent by the lessee and lessor shall be entitled to determine the lease clearly falls within Sub-clause (1) of Clause (g) of Section 111 of the Transfer of Property Act reproduced above. That being so, the condition attached to the entire Clause (g) regarding notice being given must attach to the stipulation under consideration. There is nothing in Section 114 of the Transfer of Property Act to dispense with that requirement of notice under Clause (g) of Section 111 of the Transfer of Property Act. The only purpose of Section 114 is to afford a chance to the lessee to get rid of the forfeiture incurred by him on account of non-payment of rent. I fail to see as to how Section 114 of the Transfer of Property Act can be construed in the manner

She learned counsel for the respondent wants it to be done. Section 114A of the Transfer of Property Act is again quite general and is designed to cover all cases in which notice is required to be given under Clause (g) of Section 111 of the Transfer of Property Act. Hence it is obvious that the notice dated 30th January, 1956, which expressly purports to be one u/s 106 of the Transfer of Property Act, can by no means be taken to have been given u/s 111(g) of the Transfer of Property Act. In that view of the matter, the contention of the learned counsel for the respondent that the respondent is entitled to a decree for ejectment because of the forfeiture incurred by Wilmot Daniels by non-payment of rent coupled with the notice dated 30th January, 1956 cannot be accepted.

7. Then it is argued by the learned counsel for the respondent that the notices dated 17th January, 1956 and 30th January, 1956 may be read together in order to find that a 30 days" notice was given to Wilmot Daniels for determining the tenancy as required by law. The argument is somewhat ingenuous and I am unable to appreciate it. As already mentioned notice dated 17th January, 1956 simply says that the addressee would be liable to ejectment in the event of default of payment of rent demanded therein, whereas notice dated 30th January, 1956 which is claimed to be a notice u/s 106 of the Transfer of Property Act calls upon the addressee to vacate the premises by 15th February 1956. There is little substance in the contention and is noted only to be rejected.

8. No other point has been urged in support of the cross objection by the respondent's counsel. I, therefore, conclude that the cross objection must fail and the findings of the two Courts that the respondent is not entitled to a decree for ejectment because it is not proved that he determined the tenancy according to law must be upheld.

9. The only other point that calls for determination is whether the decree for joint possession that has been awarded to the respondent by the Courts below can be sustained. The contention of the learned counsel for the appellant is that after having found that the tenancy was not determined according to law the suit should have been dismissed and there was no occasion to award a decree for joint possession after recording a finding in favour of the respondent on the question of title agitated in the case. In my view the contention is correct and deserves to be upheld. It is well settled that a question of title is foreign to a suit based on a contract of tenancy. The Courts below clearly erred in allowing the question of title being agitated in the present suit which was based on a contract of tenancy simpliciter.

It is rightly pointed out by the learned counsel for the appellant that had the suit been based on title it would have been beyond the pecuniary jurisdiction of the Court of institution since on his own allegation the plaintiff-respondent purchased the disputed property for a sum of Rs. 7,000. That being so, there appears to be little justification for passing a decree for joint possession. In fact, there was and could possibly be no prayer for a joint possession having regard to the nature and frame of the suit. So once it was found that the tenancy had not been

determined according to law the claim for ejectment should have been simply dismissed notwithstanding the findings recorded on question of title which as mentioned above should not have been allowed to be agitated.

Learned counsel for the respondent relies on the case of Prayag Sonar and Another Vs. Motar Singh and Another, in support of the decree for joint possession given by the Courts below. It was a case in which tenancy was created by a Hindu widow on whose death the property was inherited by two reversioners one of whom gave a notice determining the tenancy and then instituted a suit for ejectment impleading the other as a co-defendant. The defendants who were sued as tenants pleaded title in themselves. Their plea on title was found against them The Courts below decreed the claim but in appeal by the tenants it was held by this Court that one of the joint lessors was incompetent to determine the tenancy and as such no decree for ejectment could be passed either from the entire accommodation or from a portion thereof. The learned Judge who decided that case, however, felt that after the plea of title raised by the tenants had been negatived it would not be fair to dismiss the claim and accordingly allowed a decree for joint possession. In my view this case is no authority for a proposition that in a suit based on a contract of tenancy a decree for joint possession can be given if the claim for ejectment has to be dismissed because of the plaintiff's failure to determine the tenancy according to law. As already mentioned question of title is foreign to a suit based on a contract of tenancy and as such it was not necessary to enter into such a question in the instant case and at any rate, a decision on that plea can by no means entitle the respondent to a decree for joint possession. It is only an accident that in the instant case the tenant sued happens to be a co-sharer to the extent of the other half share in the disputed property. Could a decree for joint possession be given had the owner of the other half share been a person other than the tenant sued in the case? Obviously not. I am, therefore unable to up-hold the decree for joint possession that has been given by the Courts below.

10. In the result the appeal is allowed only to this extent that the decree for joint possession given by the Courts below is set aside in other respects the appeal is dismissed. The cross objection is also dismissed. In the circumstances the parties are directed to bear their costs in this Court.