

(1953) 06 CAL CK 0029
In the Calcutta High Court
Case No : A.F.A.D. No. 159 of 1948

Trilochan Nath and Others

APPELLANT

Vs

Kalipada Mallik and Others

RESPONDENT

Date of Decision : 24-06-1953

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : AIR 1954 Cal 243 : (1954) 1 CALLT 271

Hon'ble Judges : Renupada Mukherjee, J

Bench : Single Bench

Advocate : Apurbadhan Mukherjee and Chandra Narayan Laik, for the Appellant; Rishindra Nath Sarkar and Satya Charan Pain, (for Nos. 2 to 6) and Sailendra Nath Banerjee and Dwijendra Nath Das, (for No. 1), for the Respondent

Judgement

Renupada Mukherjee, J.—This appeal arises out of an action for ejectment brought by the plaintiffs appellants against the original defendant respondent from a tank described in the schedule of the plaint. According to the allegations of the plaintiffs settlement of the tank was given to the defendant for rearing and catching fish only at an annual rent which was to be paid in kind, viz. one maund and ten seers of fish. The allegation of the plaintiffs further was that the defendant had no permanent right in the tank, and he had a temporary tenancy right terminable by service of notice to quit, The plaintiffs further alleged that such a notice to quit was served upon the defendant for giving up possession with effect from the 1st Asar 1352 B. S. (15-6-1945), but the defendant did not vacate possession of the tank in spite of service of notice to quit.

2. The suit was contested in the trial court by the original defendant who set up various defences. He pleaded in the first place, that the tank was held by him under a debuttar property owned by Deity Sri Sri Rura Ray, and the plaintiffs had never any personal right in the tank. The defendant further pleaded that he had got a permanent right in the tank not liable to be determined by any service of notice to quit. The defendant also pleaded that lease was taken of the tank by a

remote predecessor of his not only for the purpose of rearing and catching fish, but also for agricultural purposes. The validity and sufficiency of the notice were also questioned by the defendant.

3. The Trial Court dismissed the suit of the plaintiffs on the finding that the defendant has got a permanent right in the tank which is not terminable by service of notice to quit. It was found in the alternative by that Court that in case defendant's claim of permanent right was not sustained, it should be held, in any event, that his tenancy was an annual tenancy held over by successive generations on payment of rent, and such a right was not liable to be determined by fifteen days' notice, as has been sought to be done by the plaintiffs. The contentions of the defendant that the tank was held under a debuttar and that the lease of the tank was taken for agricultural purposes were negatived by the Trial Court. The Trial Court also held that the suit was liable to dismissal on the further ground that the plaintiffs had not shown the date of commencement of the tenancy which was necessary for them to show for the purpose of showing that the notice served was valid in law.

4. Against the above judgment and decree of the Trial Court the plaintiffs preferred an appeal. The Lower Appellate Court set aside some of the finding of the trial court, it definitely ruled out the contention of the defendant that he has got a permanent right in the disputed tank, and held that the defendant was nothing more than a monthly tenant, and his tenancy was liable to be determined by fifteen days' notice in accordance with the provisions of Section 106, T. P. Act. The Lower Appellate Court, however, maintained the decree of dismissal because the time of commencement of the lease in question was not proved by the plaintiffs, and so the plaintiffs failed to show that the notice served upon the defendant was in conformity with the provisions of Section 106, T. P. Act. Against the latter judgment and decree passed by the Lower Appellate Court the plaintiff's have come up in second appeal.

5. In the High Court the appeal is being contested by some added respondents who purport to be transferees of the interest of original defendant Kalipada Mallik.

6. The only point canvassed on behalf of the appellants in this appeal is whether the lower appellate court was, justified in dismissing the plaintiffs' suit on the ground that the time of commencement of the defendant's tenancy was not proved in this particular case. It appears that both the Courts "below, particularly the lower appellate court, dismissed the plaintiffs' suit on the authority of the case reported in -- "Mozam Shaikh v. Annada Prasad Bhadra", AIR 1942 Gal 341 (A). It was urged on behalf of the appellants that both the courts below misapplied the facts of the above case to the facts of the present case in the matter of coming to a conclusion that the notice served upon the defendant was not in consonance with the provisions of Section 106, T. P. Act. The relevant portion of that section runs as follows-

"In the absence of a contract or local law or usage to the contrary, a lease of

immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable, on the part of either lessor or lessee by six months" notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days" notice expiring with the end of a month of the tenancy."

7. After the findings arrived at by the Lower Appellate Court as to the nature and character of defendant's tenancy, the respondents cannot dispute that their right in the disputed tank is terminable by service of fifteen days" notice to quit. Service of notice upon the original defendant was not denied by him. The notice in question was marked Ex. F in the Trial Court. Under this notice the defendant was required to give up possession of the tank at the end of the Bengali month of Jaistha, 1352 B. S. The notice in question with the endorsement of the postal peon would show that clear fifteen days" notice was given to the defendant. There is, therefore, no dispute on the score of the sufficiency of the notice so far as the time factor is concerned. The courts below applied the principle of the case reported in -- "AIR 1942 Gal 341 (A)" on the reasoning that the plaintiffs did not state in the plaint, and they also did not substantiate by evidence, what was the date of the commencement of the tenancy. If that date is not given by the plaintiffs then it is not possible on the part of the court to arrive at a finding as to what is the month of a particular tenancy.

The argument of the courts below seems to have been this. In the absence of any material to show the date of commencement of the tenancy, it is not possible for the court to find with certainty whether the tenancy would end on the last date of the calendar month. No doubt, there is some lacuna in this respect in the plaint as well as in evidence, but then the plaintiffs appended with the plaint the notice which was refused by the defendant in this particular case (Ex. F). From that notice it is clear that the plaintiffs definitely asked the defendant to give up possession of the tank at the end of the Bengali month of Jaistha, and they expressed their intention to take the tank in khas possession with effect from the 1st Asar following. A reading of the notice would not leave any room, either for any doubt or ambiguity, as to what was the month of the tenancy according to the plaintiffs. Evidently the month was from the first day of the Bengali month till the last date. It is to be noticed that the defendant in the written statement did not say that the tenancy commenced not from the first date of the Bengali month but on any other date.

In the case reported in -- Mozam Shaikh Vs. Annada Prasad Bhadra and Another, (A)", the defendant took a definite plea that his tenancy did not expire with the end of either the year of the tenancy or the month of the tenancy. The tenancy which was in dispute in that case was also based upon a kabuliat which was dated the 26th Falgun, 1205 B. S. The notice, however, required the defendant to vacate the land of the tenancy by the end of 30th Ghaitra. The month of the tenancy calculated on the basis of the kabuliat was thus quite different from the

month of the tenancy mentioned in the notice. In these circumstances, it was quite properly held in the above case that in a suit for ejectment it was for the plaintiff to prove the sufficiency of the notice by proving the date of the commencement of the tenancy.

8. In the case with which I am dealing no dispute was raised by the deft, as to what was the month of the tenancy or on which particular day of the month the tenancy had commenced. The fact that the notice which was served upon the tenant was not specifically attacked on this ground and the absence of any lease to show from which particular date of the month the tenancy commenced distinguish the present case from the case reported in-- Mozam Shaikh Vs. Annada Prasad Bhadra and Another, (A)". In my judgment the Courts below were wrong in applying the principles of the above reported case to the facts of the present case. From the fact that the deft, did not traverse in his written statement the right of the plaintiffs to determine the tenancy with effect from the last day of a Bengali month it can safely be presumed that the tenancy which has been found to be a monthly tenancy by the Lower Appellate Court runs from the first day to the last day of a Bengali month, and there is absolutely no material to show that the month of the tenancy should be calculated in a different manner. This being my view, I hold that the Lower Appellate Court should have decreed the suit in favour of the plaintiffs because all other points have been held in their favour.

9. In the result, the appeal must be allowed, and the judgments and decrees to the courts below are hereby set aside and the suit of the plaintiffs is decreed. The plaintiffs appellants will get khas possession of the disputed tank described in the schedule to the plaint upon evicting the respondents therefrom. The plaintiffs appellants will get from the respondents their costs in this Court and in the lower appellate court.

10. Leave to prefer an appeal under Clause 15 of the Letters Patent is asked for and is granted to the respondents.