
(1967) 07 KL CK 0023
In the High Court Of Kerala
Case No : S.A. 627 of 1966

Viswanatha Iyer

APPELLANT

Vs

Kunju Ezhuthassan and Others

RESPONDENT

Date of Decision : 04-07-1967

Acts Referred:

Citation : (1968) KLJ 316

Hon'ble Judges : V. Balakrishna Eradi, J

Bench : Single Bench

Advocate : T.S. Venkateswara Iyer, R.C. Plappily, for the Appellant; K. Chandrasekharan, T. Chandrasekhara Menon, K. Vijayan, N.N. Sugunapalan, Smt. P.K. Ammini, for the Respondent

Judgement

V. Balakrishna Eradi, J.—The appellant herein had instituted a suit O.S.173/63 in the Munsiff's Court, irinjalakuda seeking a permanent injunction restraining the respondents-defendants from quarrying earth from the plaint schedule properties of which they were tenants the appellant and also for recovery of damages in respect of the earth already removed by them unauthorizedly. The defendants contested the suit putting forward the plea that the removal of the earth was really an act of improvement and did not amount to waste in respect of which any injunction or damages could be claimed by the landlord. They denied the plaintiff's allegation that the quarrying of earth had been done by them for the purpose of manufacture of tiles and according to them the earth from the plaint property was totally unfit for the said purpose. They put forward the case that they had deepened the land as an act of reclamation and made the property better-suited for paddy cultivation. On this ground they pleaded that the plaintiff was not entitled to either of the reliefs of injunction or damages claimed in the plaint. The trial court, after a review of all the evidence adduced in the case found that the defendants had dug up and removed quantities of earth from the plaint property which is a paddy field and such removal had the effect of rendering the property unfit for the purpose for which it was let. The Munsiff found that the removal of the earth had been effected by the defendants for the

purpose of manufacture of bricks in their tile factory and that the defendants' case that it was an act of reclamation was totally untrue. The Munsiff was of opinion that the defendants had clearly committed waste on the property and that the plaintiff was entitled to prevent recurrence of such waste. He however, took the view that, in law, a landlord is not entitled during the currency of the lease to claim damages in respect of any act of waste committed on the holding by the tenant and in this view, he felt constrained to disallow the plaintiff's claim for damages. While so disallowing the claim for damages the Munsiff has however recorded a finding that the damages claimed in the plaint are not factually excessive. In the result, the trial court granted the plaintiff only a decree for injunction permanently restraining the defendants from taking up or removing earth from the plaint schedule properties and dismissed the suit in respect of the claim for damages.

2. The plaintiff having appealed to the Subordinate Judge's Court, Irinjalakuda, the learned Subordinate Judge concurred with the trial court in its finding that the defendants had committed waste on the property by digging and removing the earth for purposes of manufacture of bricks. In fact, the learned Subordinate Judge has observed that this action on the part of the defendants constitutes willful and wanton waste which would render the property permanently unfit for paddy cultivation. In regard to the maintainability of a claim for damages during the subsistence of the lease, the lower appellate court concurred with the view of the trial court that such a claim is not maintainable in law while the tenancy is subsisting and on this ground the lower appellate court also disallowed the plaintiff's claim for damages. The decree of the trial court was thus confirmed by the lower appellate court and hence this appeal by the plaintiff.

3. On behalf of the appellant the learned counsel contended that the lessee in this case who had been granted a lease of the land for paddy cultivation did not obtain any right at all in regard to sub-soil and that even as regards the surface soil he had been granted only a right of user and no proprietary interest of any kind. This being so, it is urged, that any action on the part of the lessee which interferes with the landlord's right to the sub-soil or his proprietary interest in the surface soil gives rise to an immediate cause of action to the landlord to recover damages from the tenant, and that the landlord is not bound in law to wait till the termination of the tenancy to have these matters settled as part of the general accounting as between himself and the tenant at the close of the tenancy. In support of the above proposition reliance was placed by counsel on the observations of the Privy Council in *Rajkumar Thakur Giridhari Singh v Megh Lal Panday* I. L. R. 45 Cal. 87; and *Rajah Bejoy Singh v Surendra* AIR 1928 P.C. 234.

4. In *Rajkumar Thakur Giridhari Singh v Megh Lal Panday* ILR 45 Cal. 87 their Lordships have observed at page 93 as follows:

It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does

not in the nature of things and by reason of the user disappear. In order to cause the matter speciality to arise minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased."

In *Rajah Bejoy Singh v Surendra A. I. R. 1928 P.C. 234* the plaintiff who was the zamindar of the land, had sought to restrain the defendants who were his lessees, from making excavations in the leasehold lands for the purpose of making bricks and had also claimed damages from the defendants in respect of the clay already removed by them. The trial court had granted a permanent injunction and had also awarded damages to the plaintiff. This decree was set aside by the High Court and thereupon the plaintiff had taken up the matter in appeal to the Privy Council. The lease granted by the Zamindar was one in perpetuity and one of the contentions raised before the Privy Council was that after the grant of such a lease the landlord had no interest in the land or in the way in which it was used and that his only right was to receive the rent and in default of payment of rent to bring the tenure to sale. On this ground it was contended that the suit for injunction and damages was not maintainable. Their Lordships rejected this argument and held that when a person the owner of land grants a lease in perpetuity, he only carves a subordinate interest out of his own and does not annihilate his interest. On a consideration of all the terms of the lease their Lordships held that in as much as it did not contain any reference to minerals or to the sub-soil or to the rights to excavate for making bricks it must be taken that the lands were not to be put to any use other than that to which they were subject at the time of the lease. In this view, their Lordships held that it could not have been the intention of the parties that the lessee should be to use the lands for the purpose of making bricks. In regard to the defendants' contention that they were entitled to use the lands, the subject of the lease, as they liked, and were at liberty to make excavations for extracting clay for the manufacture of bricks, thereby making the land unfit for cultivation, their Lordships held that the defendants had no such right whatever and that their excavation of the land for taking clay for brick manufacture was unauthorized. Their Lordships, therefore, set aside the decree of the High Court and restored that of the trial court awarding damages to the plaintiff.

5. From the above decisions it is clear that in the absence of any specific provision contained in the terms of demise entitling the lessee of ordinary cultivable land to make use of the sub-soil or to use even the surface soil for purposes other than cultivation, the lessee has no right to excavate the land for minerals or for taking for purposes of brick manufacture and that if he does so, the landlord is entitled to claim both injunction as well as damages against the tenant.

6. The same view has been taken in an earlier decision of the Madras High reported in *Chaladem Tholan v Kakkath Kunhambu ILR 25 Mad) 669* where a Division Bench consisting of Bhashyam Ayyangar and Moore JJ. held that a tenant of lands for the cultivation of paddy has no right to convert to his own use

shells dug up from the land even during the process of proper operations of husbandry or cultivation. In the event of such conversion the landlord is entitled to claim from the tenant the value of the shells so appropriated by him.

7. In *Kusum Kamini Debya Vs. Raja Jagdish Chandra Deo Dhabal Deb and Another*, a similar question arose as to whether the lessee holding land under a zamindar on a permanent lease was entitled to dig up or quarry stones from the land and sell the same as ballast. It was held that even though the lease was permanent the property was leased only for purposes of cultivation and the lessee obtained no proprietary right in the soil. He could not therefore dispose of the soil or anything which could be legitimately considered as part of the soil. The lessee had only a reasonable right of user in the soil and had no proprietary interest therein or anything which formed part of the soil, The surface stones, according to the learned Judges, formed part of the soil and in the absence of any custom conferring on the lessee a right of collection and disposal by him of such surplus sands it was held that the stones could not be sold by the lessee to third parties. A decree or damages was, therefore, awarded to the zamindar in respect of the stones collected and sold by the tenant.

8. In the light of these rulings with which I am in respectful agreement, it has to be held that in the case of a lease of land granted for paddy cultivation, in the absence of any specific provision contained in the demise entitling the lessee to any rights in the sub-soil or a right of disposal over the surface soil apart from mere user thereof, the lessee is not entitled to excavate and remove earth or clay from the land and convert it to his own use or dispose it of by sale.

Any such unauthorized user on his part would give rise to a cause of action for the landlord to claim the reliefs of injunction as well as damages.

9. The view taken by the courts below that even though the excavation of earth by the lessee constitutes a wanton act of waste, the landlord is not entitled in law to claim damages from the tenant during the subsistence of the lease and that his remedy is only to claim restoration of the property to its original condition at the time when the lease is ultimately terminated, does not represent the correct legal position. That damages can be claimed by the landlord in respect of such acts of waste on the part of the tenant even during the subsistence of the tenancy has been held by a Division Bench of the Travancore-Cochin High Court in the decision reported in *Ouseph v Neelakandan Nambudiri* 1958 K. L. T. 519). The same principle is also clearly established by the decision of the Privy Council in *Rajah Bejoy Singh v Surendra A. I. R. 1928 P.C. 234* cited supra and also that of the Patna High Court in *Kusum Karinj v Jagdish Chandra A. I. R. 1941 Pat 13*. In the light of these rulings, the respondents' counsel frankly stated before me that he is not in a position to support the view expressed by the courts below. He however, contended that even though damages may be recoverable the quantum of damages has got to be ascertained not on the basis of a computation of the actual value of the earth excavated and sold by the lessee but only in respect of the diminution in value of the reversionary interest

of the landlord. How the latter is to be ascertained he was not in a position to explain. Reliance was however, placed by him on the observations contained in the decision of the Court of Appeal in *Whitlam v Kershaw* 1885 XVI Q.B. Div 613 where Lord Usher, M.B. has stated thus at page 616:-

The question is whether that is the right mode of measuring the damages in an action of waste by a landlord against his tenant. I confess that at first I was inclined to think that the learned Judge had adopted the right measure of damages, but upon further consideration I have come to the conclusion that he has made a mistake. I think the mistake is this he has treated the implied covenant in the lease not to commit waste as equivalent to, and producing the same result as, a covenant to deliver up the demised property at the end of the term in the same condition as that in which the tenant received it. There is an implied covenant on the part of the tenant not to commit waste, but that is a covenant not to do any act of such a permanent nature as will affect the value of the property. Besides the difference of the time at which the action may be brought, there is a great difference as to the measure of damages between such a covenant and a covenant to restore the property to the same condition as that in which the tenant originally received it. The landlord might have a favorite house on the property which was of great value to him, as a matter of sentiment, though it might not add anything to the pecuniary value of the property. If the house was allowed by the tenant to go to ruin, it would not follow that the landlord's reversion would be injured to the extent of the cost of restoring the house to its original condition. The value of the reversion might be diminished, but the question of how much injured would be a question of value, and the proper way to ascertain the damages would be to ask skilled values to say how much the property has been diminished in value. It would be wrong to say that the reversionary value had necessarily been diminished by the cost of restoring the property to its original condition."

These observations were made in respect of an action brought by the landlord to recover damages for breach of the implied covenant not to commit waste and the distinction that was pointed out was that the measure of damages in such case would not be the same as what it would be in the case of an action for breach of a covenant to restore the property to the landlord in the same condition in which it was let. In the latter case, the landlord would be entitled to the full cost that will have to be incurred in restoring the property back to its original condition while according to the learned Master of the Rolls, in an action for breach of a covenant not to commit waste, it would not be proper to assess the damages with reference to the cost of restoration of the property to its original condition but the damages have to be computed with reference to the diminution in value suffered by the reversionary interest as a result of the waste committed by the tenant. That this principle will have no application to an action for damages for wrongful conversion of the landlord's property is pointed out in the judgment of Bowen, L.J. in the same case at page 617 and 618;-

If the action is regarded as an action of waste-brought, during the continuance of the term, for the injury done to the interest in the premises of the person who is entitled, not to the possession, but to the reversion-the true measure of damages is the injury done to the value of the reversion. If, on the other hand, the action is considered as brought for the wrongful conversion of the earth which, the moment it was detached from the freehold, became upon severance a chattel, belonging in law to reversioner-in this view the proper measure of the damages would be the value of the severed article at the time of severance."

I am of opinion that it is the latter principle that applies to the present case. The plaintiff here has brought this action seeking to recover damages from the defendants for wrongful conversion in that the defendants had unauthorizedly removed large quantities of earth and clay from the plaintiff's land and used it for manufacture in such a case, the measure of damages would be the value of the earth belonging to the landlord which had been unlawfully removed by the tenant.

10. The trial court while rejecting the claim for damages on the ground that damages are not legally recoverable during the subsistence of tenancy, has recorded a finding that the damages claimed in the plaint are not excessive on the facts and circumstances brought out in evidence. This finding has been concurred in by the lower appellate court also. I see no reason to differ from the view taken by the lower courts on the question of quantum of damages and accordingly, I hold that the plaintiff is entitled to recover the amount of Rs. 2,000/- as claimed in the plaint by way of damages from defendants 5 and 6. The lower courts were clearly in error in disallowing damages on the ground that the landlord has no right to claim damages from the tenant in respect of any acts of waste committed by the latter so long as the lease is subsisting. In the result, the Second Appeal is allowed and in modification of the decrees passed by the courts below, the plaintiff is granted a decree for recovery of a sum of Rs. 2,000/- from defendants 5 and 6 with interest at six per cent from the date of plaint in addition to the decree for injunction already passed in his favor by the courts below. The appellant will get his costs in the Second Appeal from the contesting respondents.