
(2007) 03 AHC CK 0230
In the Allahabad High Court

Warron Halliburn and Others

APPELLANT

Vs

The XIIIth Additional District and Sessions Judge and Others

RESPONDENT

Date of Decision : 23-03-2007

Acts Referred:

Trusts Act, 1882 — Section 11, 13, 17, 3, 34

Citation : (2007) 3 AWC 2991

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—This is a tenant's petition. It arises out of SCC Suit No. 343 of 1979 filed by the respondent No. 3 against E.C. Halliburn who died during the pendency of the suit leaving behind him the petitioner Nos. 1,2 and 3 as heirs, for recovery of arrears of rent, damages and ejectment in respect of the part of Bungalow No. 10, General Carriappa Road, Agra. The suit was filed on the pleas inter alia that the defendant-tenant has failed to pay the rent since December 1972 and his tenancy has been terminated by a notice of demand dated 28-8-1974 which was served on him on 29-8-1974. It was further pleaded that the property in question is a trust property and the trust was created by late Hakim Madan Mohan through registered Will dated 22-7-1911. The trust is known as "Thakur Madan Mohan Ji Maharaj" and Sri R.P. Nagar is the president and looking after the affairs of the trust and he has been duly authorised by the other co-trustees, namely, S/Sri Mahesh Chand Agarwal, K.L. Bansal, A.K. Lavania and A.K. Shukla, the duly appointed trustees. Sri R.P. Nagar claimed that he is special power of attorney holder on behalf of the trustees authorising him to institute the present suit. It was further pleaded that the defendant No. 1, C. Halliburn has sublet a portion in the tenanted accommodation to defendant No. 2, Mrs. G. Westcott unauthorisedly without the permission of the landlord.

2. The suit was contested by the defendant by denying the plaint allegations. However, in para-14 of the written statement, it was admitted that the property

in question is a trust property. The plea that the suit is not maintainable in view of Section 48 of the Indian Trusts Act was also raised. It was further pleaded that the defendant No. 1 has not sublet the disputed premises to defendant No. 2 and the defendant No. 2 is in occupation of a portion in her own right due to allotment order in her favour with the permission of the landlord. The plea that the court has no jurisdiction to try the suit was also raised.

3. The parties led evidence in support of their respective cases. The trial court, on the basis of the pleadings of the parties, framed issues and decreed the suit on the findings that there is a relationship of landlord and tenant between the parties, the defendant has admittedly failed to pay any rent since December, 1972 and has also sublet a portion of the tenanted accommodation to defendant No. 2. In other words, both the grounds, namely, "the default in payment" and "subletting" were found favour with the trial court in decreeing the suit. The said decree has been confirmed in Civil Revision No. 41 of 1985.

4. It may be noted here that the alleged sub-tenant i.e. Mrs. G. Westcott also filed a separate revision which was numbered as Civil Revision No. 43 of 1985. Both the revisions were heard together and were disposed of by a common judgment dated 15-7-1991 which is under challenge in the present writ petition.

5. Mrs. G. Westcott had filed a separate writ petition No. 25066 of 1991 against the impugned order passed in her revision No. 43 of 1985. The said writ petition was connected along with the present writ petition by the order dated 5-9-1991. However, the writ petition No. 25066 of 1991 has been dismissed by this Court vide order dated 20-7-2005, for want of prosecution.

6. Sri Ajit Kumar, learned Counsel appearing for the petitioners in the present writ petition mainly submitted that there was no relationship of landlord and tenant between the parties and the suit was not maintainable in view of Section 48 of the Indian Trusts Act and as such, the court below had no jurisdiction to entertain and decide the suit. In other words, he submitted that Sri R.P. Nagar had no authority to institute the suit giving rise to the present writ petition.

7. The question which comes up for consideration before this Court is whether there was any relationship of landlord and tenant between the parties and Sri R.P. Nagar was authorised to institute the suit. The said point has been examined by the courts below in great detail and the findings arrived by them are based on careful consideration of evidence, oral and documentary on record. So far as the question of relationship of landlord and tenant is concerned, there is overwhelming evidence on record to show that there was relationship of landlord and tenant between the parties indisputably. Rent receipts (exhibits No. 4 and 5) were issued and signed by Sri R.P. Nagar in favour of the defendant. Not only this, exhibit No. 6 is a letter written by the defendant addressed to Sri R.P. Nagar asking him to carry out the necessary repairs in the tenanted accommodation. On record, there are two power of attorneys in favour of Sri R.P. Nagar authorising him to manage the trust affairs and realise the rent and file the

present suit. Sri R.P. Nagar was the President of the trust. This fact has been further deposed by P.W.1, Sri M.C. Agarwal, one of the trustees as well as Secretary of the Trust. Contrary to the above evidence, there is no specific evidence on record to show that Sri R.P. Nagar was not competent to institute the suit in question. The findings recorded by the two courts below are based on overwhelming evidence on record and are essentially findings of facts and they do not suffer from any legal infirmity.

8. The learned Counsel for the petitioners very vehemently pressed Section 48 of the Indian Trusts Act to support his contention that the suit, having not been filed on behalf of all the Trustees, is not maintainable. In this regard, he referred to Sections 3, 8, 11, 17, 34, 47, 48, 51 and 55 of the Indian Trusts Act. Before advertng to the legal position, the factual background of the case in this regard be noted.

9. Issue No. 3 was framed by the trial court- as to whether the suit is barred by Section 48 of the Indian Trust Acts. The said issue, as is apparent from the judgment, was not pressed by the defendant before the trial court. It has been categorically recorded in the judgment that this issue was not pressed by the defendant during the course of the arguments. Further, the trial court observed that it is not clear as to how the suit is barred by Section 48 of the Indian Trusts Act. The issue was, therefore, decided in negative i.e. against the defendant.

10. The aforesaid issue was dealt with as question No. 1 by the revisional court. The revisional court, after noticing a judgment of Delhi High Court, reported in Duli Chand v. Mahabir Pershad Trilok Chand Charitable Trust, Delhi AIR 1984 Delhi 145, has taken into account the fact that the other co-trustees had authorised Sri R.P. Nagar to institute the suit, therefore, the suit was maintainable. The said power of attorney in favour of Sri R.P. Nagar is on the record, being paper No. 7C and has been executed by all the other co-trustees. A copy of the said power of attorney has been annexed as Annexure No. 3 to the writ petition. It is titled as "special power of attorney" and it authorises the institution of suit against the defendant with respect to property No. 10 situate at General Carriappa Road, Balloganj, Agra, specifically authorising Sri Nagar to institute the suit "on our behalf and expenses to represent in the suit if implicated as necessary party as plaintiff." It further provides that he shall do all the necessary acts in instituting the suit and such acts shall be deemed to have been done by us and accordingly duly ratified. He was further authorised to collect arrears of rent or mesne profits, etc. The authenticity of the said power of attorney has not been disputed by the defendant. In this factual background, the applicability of Section 48 of the Indian Trusts Act is to be examined. The said section is reproduced below:

48. Co-trustees cannot act singly when there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust, otherwise provides.

11. In *Duli Chand v. Mahabir Pershad Trilok Chand Charitable Trust, Delhi* (Supra) it has been held, after taking into consideration various pronouncements of the Apex Court, that all trustees are the owners of the property and they have to be joined as parties to the suit, but they can execute power of attorney allowing themselves to be represented by some other co-trustee.

12. It is, thus, crystal clear that the co-trustees may authorise the other trustee to represent them. As noted above, in the case on hand, the power of attorney by other trustees is on record authorising Sri R.P. Nagar to institute the suit. In this view of the matter, it is difficult to accept the contention of the learned Counsel for the petitioners that the suit was not maintainable. It appears that while advancing the aforesaid submission, the learned Counsel for the petitioners forgot to notice the very description of the plaintiff as mentioned in the array of the party and the contents of paragraph 1 of the plaint. The description of the plaintiff, as made in the plaint, for the sake of convenience, is reproduced below:

R.P. Nagar son of V.N. Nagar resident of 28/207, Gokul pura Agra President. The Madan Mohan Ji Maharaj Trust and special power of attorney holder on behalf of Shri M.C. Agarwal, K.L. Bansal, A.K. Lavania and A.K. Shukla Trustees of the Madan Mohanji Maharaj Trust Gokulpura, Agra....Plaintiff.

13. In para-1 of the plaint, it has been stated that Shri Mahesh Chand, K.L. Bansal, A.K. Lavania and A.K. Shukla are the duly appointed trustees and the plaintiff is special power of attorney holder on their behalf. The said averment has not been denied in the written statement specifically nor there is any averment in the written statement that besides these persons as mentioned in para-1 of the plaint, there were other trustees. It thus boils down to this that all the trustees authorised Sri R.P. Nagar to institute the suit.

14. At this stage, it is appropriate to notice the decisions relied upon by the learned Counsel for the petitioners to buttress his argument.

15. In *Shanti Vijay & Co., etc. etc. v. Princess Fatima Fouzia and Ors.* AIR 1980 S C 17, only this much has been held that a trustee for sale of trust property, cannot leave the whole conduct of the sale to his co-trustees. The reason for this is that the settlor has entrusted the trust property and its management to all the trustees, and the beneficiaries are entitled to the benefit of their collective wisdom and experience. Relevant portion from the judgment is reproduced below:

27. The law governing the execution of trusts is well settled. In the case of a private trust, where there are more trustees than one, all must join in the execution of the trust. The concurrence of all is in general necessary in a transaction affecting the trust property, and a majority cannot bind the trust estate. In order to bind the trust estate, the act must be the act of all. They constitute one body in the eye of law, and all must act together. This is, of course, subject to any express direction given by the settlor. The judicial Committee in *Man Mohan Das v. Janki Prasad* (1945) 72 I A 39 (PC) quoted a passage from Lewin 's Law of Trusts, 15th end, p. 190, to the effect:

In the case of co-trustees the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the acting trustee but the Court knows no such distinction : all who accept the office are in the eye of the law acting trustees. If any one refuses or be incapable to join, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court. However, the act of one trustee done with the sanction and approval of a co-trustee may be regarded as the act of both. But such sanction or approval must be strictly provided" which in their opinion, contains a correct statement of law applicable in England and that the same doctrine applied to India also. The decision in Man Mohan Das's case has been followed with approval by this Court in Jankirama Iyer v. Neelakanta Iyer (1962) Supp 1 SCR 206.

28. It follows as a necessary corollary, that where there are several trustees they must act unanimously in making a sale or a contract of sale, unless it is provided otherwise by the terms of the deed. In exercising the power of sale, as in the exercise of other powers, a trustee cannot, therefore, properly delegate the performance of the acts which he ought personally perform. Although a trustee may listen to the opinions and wishes of others, he must exercise his own judgment. Thus a trustee for sale of property, cannot leave the whole conduct of the sale to his co-trustees. The reason for this is the settlor has entrusted the trust property and its management to all the trustees, and the beneficiaries are entitled to the benefit of their collective wisdom and experience: Underhill's Law of Trusts and Trustees, 12th Ed., PP. 434, 442-43; Scot on Trusts, Vol. 2, p. 1033.

16. The above pronouncement of law has nothing to do with the authority of a trustee to institute a suit for the recovery of arrears of rent, damages and ejectment of a tenant from the trust property having "special power of attorney" to institute the suit. Such action vitiates if there is any allegation of malafide. In any way, the aforesaid ruling does not advance the case of the petitioners further.

17. The case of L. Janakirama Iyer and Others Vs. P.M. Nilakanta Iyer and Others, is also of no help to the petitioners and is distinguishable on facts. In this case, the Apex Court was considering clause 23 of the trust deed and the question of applicability of Section 48 of the Indian Trusts Act, with reference to the authority of a co-trustee to institute a suit against the tenant, was not at all involved therein even remotely.

18. The case of Kishore Joo v. Guman AIR 1978 All is also not applicable in the facts of the present case. It was not a case under Indian Trusts Act but was with regard to a public or charitable religious endowment. However, the observation made in paragraph-11 of the judgment runs counter to the submission of the learned Counsel for the petitioner wherein it is observed that a trustee in special circumstances may delegate his duties, Such delegation is only permissible where (a) the instrument of trust so provides (b) the delegation is in the regular

course of business or (c) the delegation is necessary or (d) the beneficiary being competent to contract consents to the delegation. The "special power of attorney" being in favour of Shri Nagar institution of suit in that capacity is permissible as the other trustees have delegated their power, in this regard, in favour of Shri Nagar.

19. There is yet another aspect of the case. A co-trustee acts like a co-owner to carry out the objects of the trust for the benefits of the beneficiaries Of the trust. It is now an acknowledged legal position that co-owner can institute a suit for eviction against a tenant, without impleading other co-owners. A co-owner in such suit is acting as agent on behalf of other co-owners, unless the other co-owners expressly dissent with the co-owner (plaintiff). The same principle can be extended in the case of trust also.

20. In Sri Ram Pasricha Vs. Jagannath and Others, it has been held as follows:

Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with the others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place. It is, therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord and co-owner of the premises is not the owner of the premises within the meaning of Section 13(1)(f). It is not necessary to establish that the plaintiff is the only owner of the property for the purpose of Section 13(1)(f) as long as he is a co-owner of the property being at the same time the acknowledged landlord of the defendants.

21. It has been reiterated in Kanta Goel Vs. B.P. Pathak and Others, while dealing with a case arising under the Delhi Rent Control Act. It was a case in which the rent was being paid to one Dass who had let out the premises to the tenant. Upon the death of the former, the rent was being paid to one of the legal representatives who signed the receipts in his name, but on behalf of the estate of the deceased Dass. In this factual background, the Supreme court held that legal representative fell within the definition of "landlord" of the premises for the purposes of the Delhi Rent Control Act.

22. A Full Bench of this Court in Gopal Das and Anr. etc. v. 1st Additional District Judge, Varanasi and Ors. 1987 A L J 494 has, after consideration of the aforesaid pronouncements as well as other pronouncements, held that a release application is maintainable at the instance of co-landlord against the tenant for the release of the tenanted accommodation.

23. The same principle has been reiterated by the Apex Court in its subsequent judgment in Dhannalal Vs. Kalawatibai and Others, In India Umbrella Manufacturing Co. and Others Vs. Bhagabandei Agarwalla (Dead) by Lrs. Smt. Savitri Agarwalla and Others, it has been held that when a co-owner files a suit for eviction of a tenant, it means that he has filed a suit on his own behalf and as agent on other co-owners and the doctrine of agency is attracted. He acts as

agent of other co-owners. The consent of other co-owners is assumed as taken unless it is shown that other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement.

24. In view of the above legal position, it is difficult to accept that a suit on behalf of a co-trustee is not maintainable u/s 48 of the Indian Trusts Act. Section 48 of the Trusts Act shall have no application in respect of a suit instituted by a co-lessee /co-landlord against a tenant for ejectment, keeping in view the definition of "landlord" given under Rent Control Act, reproduced below:

3(j) "landlord", in relation to a building, means a person to whom its rent is or if the building, were let would be, payable, and it includes, except in Clause (g), the agent or attorney, of such person.

25. The rent was being admittedly realised by Sri Nagar being one of the trustees. Not only this, the defendant No. 1 even addressed a letter (exhibit-6) asking Sri Nagar to carry out certain repairs in the tenanted accommodation. The receipt of rent on behalf of the trust and the management of the trust by Sri Nagar is fully established beyond doubt. It, therefore, follows that Sri Nagar is the "landlord" of the property in question.

26. In Trust Shree Laxmi Narain Dev at Barhtal Trust and the Temple under it situate at Barhtal (Gujrat) v. IInd Additional District Judge, Varanasi and Ors. 2003 (2) ARC 730, a similar view, as above, has also been taken, which is binding on me, and I respectfully follow it.

27. The other cases relied by the learned Counsel for the petitioner, namely, (1) Vedakannu Nadar and Others Vs. Nanguneri Taluk Singikulam Annadana Chatram through its huktdars Medai Dalavoi Ranganatha Mudaliar and Others, and (2) Atmaram Rachhodbhai Vs. Gulamhusein Gulam Mohiyaddin and Another, are not applicable and distinguishable on facts and it is not necessary to discuss them in detail.

28. It was then submitted that the findings recorded by the courts below on the question of "sub-tenancy" are vitiated, for the reason that separate suit was instituted against the sub-tenant by the landlord for ejectment. Sri Ajit Kumar, learned Counsel for the petitioners invited the attention of the court towards certified copy of the judgment passed in SCC Revision No. 34 of 2003-Mrs. G. West v. Thakur Madan Mohan Maharaj and Ors. dated 23-8-2006 in support of his contention that a suit has been filed against the sub-tenant which has been dismissed by the aforesaid judgment and the landlord has treated the alleged sub-tenant as his direct tenant.

29. In response, Smt. Anita Tripathi, Advocate learned Counsel for the respondents rightly pointed out that the said argument is mis-leading and has been deliberately made to create unnecessary confusion in the matter. She pointedly demonstrated that Smt. G. West is altogether a different person than that of Mrs. G. Westcott (the sub-tenant in the present case). The said judgment

was filed for a different purpose along with an application in support of the plea that Sri Jagdish Prasad Sharma is not a trustee and, therefore, his name may be deleted from the array of the parties. It so happened that during the pendency of the writ petition, Sri R.P. Nagar, the President of the trust expired. An application to substitute his heir, namely, Kalpana Nagar was filed by the petitioners, being substitution application dated 4-1-2006. Another application was filed by Sri Jagdish Prasad Sharma claiming that he may be substituted being Secretary of the Trust. This Court by the order dated 6-1-2006 allowed the impleadment application filed on behalf of Jagdish Prasad Sharma. The contention of the petitioners was that the suit was not filed on behalf of all the trustees. This question was left open to be decided at the time of final hearing of the writ petition vide order dated 6-1-2006 deciding the substitution application.

30. It has been held above that the suit was filed on behalf of all the trustees through Sri R.P. Nagar who was the President of the Trust.

31. Default in payment of the rent was one of the grounds on which the ejectment of the petitioners was sought for in the light of Section 20(2)(a) of U.P. Act No. 13 of 1972.

32. It is admitted case of the petitioners-tenants that they have not paid any rent since December 1972. A notice of demand and termination of tenancy was served on 29-8-1974. In this view of the matter, the ground for eviction of the petitioners has been made out and the decree of the court below can be sustained on this ground alone.

33. The dismissal of the connected writ petition No. 25066 of 1991, filed by the sub-tenant, also amounts confirm of the findings of the courts below that the petitioners-tenants had sublet the disputed accommodation to the sub-tenant. It is relevant to note here that possession over part of the tenanted accommodation of Smt. G. Westcott is admitted even by the tenants-petitioners. The burden was upon the petitioners-tenants to prove that the alleged sub-tenant is in occupation of the part of the tenanted premises on account of allotment order in her favour. Copy of any such allotment order is not on record of the case. It necessarily follows, apart from other clinching evidence, that the ground of sub-tenancy is fully established in accordance with law.

34. It was also submitted that adverse inference may be drawn for non-examination of Sri R.P. Nagar and the amount deposited can be adjusted towards the arrears of rent etc. This plea admittedly was not urged before the courts below. The Secretary of the Trust, Sri M.C. Agarwal was examined by the plaintiff who proved the default in payment of rent as well as factum of sub-letting.

35. A vague plea, without pointing out any material, was sought to be raised during argument that the petitioners have deposited some amount towards rent. The learned Counsel for the petitioners could not give the necessary particulars to reach to a definite conclusion. The said plea depends upon the facts and in the absence of necessary facts, it cannot be permitted to be raised for the first time

in the writ petition during the course of arguments. The trial court has noticed that the defendant has admitted the default in payment of rent in his oral examination. The petitioners admittedly have not made requisite deposit u/s 20(4) of the Act to get themselves absolved from the eviction proceedings. Besides the arrears of rent, u/s 20(4) of the Act, cost of suit, interest on late payment, counsel fee etc. are required to be deposited on the first date of hearing. In the written statement or at any subsequent stage of the suit, the petitioners have not come forward to say that they have complied with the ingredients of Section 20(4) of the Act. In this view of the matter, there is no substance in the aforesaid plea.

36. A novel argument was raised by the learned Counsel for the petitioners that in view of the pronouncement of Uttaranchal High Court in *Union of India v. District Judge*. 2006 (1) AWC 726, the present suit was not maintainable, keeping in view the provisions of Section 20 of the Act. I fail to appreciate the applicability of the aforesaid judgment in the facts and circumstances of the suit. Section 20 of the Act bars institution of a suit against the tenant for eviction except on the grounds prescribed therein by Sub-section (2) of Section 20 of the Act. The said section has nothing to do with the jurisdiction of a court to entertain the suit. Clauses (a) to (g) of Section 20(2) of the Act enumerate various grounds on which a suit for eviction of a tenant from a building after determination of the tenancy may be instituted. Conceptually jurisdiction of a court to entertain a suit for decision is different from the grounds specified by law on which a relief can be granted to a plaintiff. Clause (a) provides default in payment of rent for not less than four months and failure to pay the same to the landlord within one month from the date of service upon him of a notice as one of the grounds for eviction. Similarly, Clause (e) of the aforesaid Section provides subletting as one of the grounds on which a landlord can seek eviction of his tenant. From a bare reading of the plaint in question, it is apparent that the eviction of the tenants-petitioners was sought on the aforesaid two Clauses (a) and (e) of Section 20(2) of the Act. It necessarily follows that it was not a simple suit for recovery of arrears of rent, mense profits and damages.

37. At the end, the learned Counsel for the petitioners placed reliance upon few decisions for the proposition that the court cannot travel beyond the pleadings of the parties. There is no quarrel to the said proposition. It could not be pointed out by the learned Counsel for the petitioners as to how the courts below have travelled beyond the pleadings of the parties.

38. In view of the above discussions, there is no merit in the writ petition.

39. The eviction suit instituted in the year 1979 was decreed on 8-4-1985 and the said decree was confirmed on 15-7-1991 by revisional court. The petitioners on the strength of the stay order continued to enjoy the disputed property which consists of four big rooms, two small rooms, besides kitchen, bath room and other amenities etc. on a paltry sum of Rs. 60/- per month which was marginally enhanced to Rs. 2,000/- per month by the order dated 12-8-2005, while

restoring the writ petition and recalling the order dismissing it in default. The order sheet shows that inspite of listing of the case peremptorily on dates after dates, the petitioners' counsel failed to appear and thus, the petitioners succeeded in prolonging the litigation to decades.

40. The writ petition is dismissed with costs of Rs. 10,000/- (Rs. Ten thousand only).

41. The petitioners are directed to vacate the disputed premises within a period of 30 days from today. In case the petitioners fail to vacate the disputed premises within the time stipulated above, they shall be liable to pay the damages for the use and occupation of the tenanted accommodation at the rate of Rs. 8,000/- (Rs. Eight Thousand only) per month thereafter till the date of actual vacation of the premises in question. The future damages has been fixed taking into consideration the extent of the disputed accommodation, locality and prevalent market value of such property and the fact that they have enjoyed it for such a long time practically paying no rent.