

L. Hanuman Pershad

Vs

Roop Narain and Another

Civil Appeal No. 1127 of 1966

(S. M. Sikri, I. D. Dua JJ)

21.09.1970

JUDGMENT

SIKRI, J. -

1. This is an appeal by special leave against the judgment of the High Court (Grover and Kapur, JJ.) dismissing an appeal filed under Clause 10 of the Letters Patent against the judgment of Falshaw, J. (as he then was). In order to appreciate the points raised before us, it is necessary to give certain facts.

2. This appeal arises out of a suit filed by Roop Narain respondent before us, against Hanuman Pershad, appellant before us and Bishan Chand another respondent before us. The suit was filed for a declaration that the plaintiff was in adverse possession as an owner for over twelve years of the double storey house Nos. 2171 and 2171/1 as entered in the Register of the Municipal Committee, Delhi and that his adverse possession has ripened into title since long ago and defendant No. 1, Hanuman Pershad, cannot evict the plaintiff from the same in execution of his decree, dated December 15, 1953, against defendant No. 2, Bishan Chand, obtained from the Court of Shri Nathu Ram Sharma, Sub-Judge 1st Class, Delhi and a permanent injunction be issued restraining defendant No. 1 from evicting the plaintiff in execution of that decree. He set out the previous history of the litigation between the parties.

3. It appears that defendant No. 1, Hanuman Pershad, filed a suit against the plaintiff and defendant No. 2 (Suit No. 302 of 27-6-1941) for Rs. 180/- as rent in the Court of Shri Harish Chander Mital, Addl. Judge, small Cause Court, Delhi. In the plaint it was asserted by Hanuman Pershad that Bishan Chand took the aforesaid house on rent from the plaintiff at Rs. 10/- p.m. and got Roop Narain, his real brother, settled in it. Since Bishan Chand took this house on rent and Roop Narain resided in it, both of them have been made parties in the case. In that suit, Roop Narain filed a written statement and stated that he had been in adverse possession of the house in question from the time of his father for a period aggregating to about 35 years. He further stated that he was not a tenant of Bishan Chand or any other person and he did not hold or ever held the house in dispute from or through Bishan Chand nor has Bishan Chand anything to do with the house or with Roop Narain's possession. Bishan Chand also filed a written statement and stated : "This defendant never took the house in question on lease or otherwise from the plaintiff nor has he given it to defendant No. 2. This defendant has nothing to do whatever with the house in question." On 7-5-1942, Shri Harish Chandra Mital, Addl. Judge, Small Cause Court, Delhi, dismissed the suit. We may mention that both Bishan Chand and Roop Narain appeared as witnesses in the case. Bishan Chand supported the written statement he gave but in cross-examination admitted that he did not know who owned the house in dispute and he and defendant No. 2 both owned the neighbouring house in which he as

living and Roop Narain also used a part of that house. Roop Narain stated that he was living in the house in dispute ever since his adoption by Sheo Nath Rai, which took place about 25 years ago. He was then aged 29. He explained the cheque Ex. P.W. 1/1 by saying that this was given by him to Hanuman Pershad as he needed money and it was not bank time and as the plaintiff was a respectable person in his neighbourhood, he got it cashed from him. He admitted in cross-examination that he had no dealings with the plaintiff and added that the plaintiff did not cash the cheques as a regular business. He stated that he cashed the cheque at the house of the plaintiff. He admitted that he never paid house tax for the house in dispute but had been paying tax for the adjoining house in which he and Bishan Chand both lived. The further stated that they both paid house tax which was shared by both.

4. A revision was filed in the High Court and the High Court (Manroe, J.), accepted the revision and observed :

"In my opinion, the learned judge has not appreciated nor attempted to appreciate the evidence. The plaintiff relied on payment of rent from 1932 onwards till the last payment on the 15th of May, 1940. This last payment was made by a cheque drawn by the second defendant. The learned judge has without reason refused to consider the evidence afforded by the plaintiff's books and the oath of his Munim. He has ignored the fact that the defendant No. 2 pleaded adverse possession. He says further that the plaintiff does not appear to know the defendants personally and yet appears to give credence to the defendant statement that the cheque was drawn to repay a loan. In my opinion, the learned judge has entirely ignored the salient facts of the case. Defendant No. 2 who is an occupier by permission of defendant No. 1 is not under any legal liability to pay and so far as the claim is against him, I dismiss the petition. I allow the petition as against defendant No. 1 and grant a decree against him for Rs. 180/- with costs and costs of this petition."

5. The Trial Court in the present case framed the following issues :

1. Whether the plaintiff is the owner of the property in dispute by adverse possession ?
2. Whether the present suit is barred by Section II, C.P. C., or by the principle of res judicata ?
3. Whether the plaintiff is not liable to ejectment from the premises in execution of the decree obtained by defendant No. 1 against defendant No. 2 ?
4. Whether any of the parties is liable to special costs ?

6. The Trial Court, in considering Issue No. 1, independently of the observations of the High Court (Manroe, J.) held that "the defendant No. 1 has been in possession of the suit premises right since 15-11-32 through his tenant Bishan Swarup".

7. He further observed that "where during the continuance of a lease the tenant is dispossessed by a third party who enters into possession of the property, the possession of such third party cannot be adverse to the landlord so long as the lease continues."

He further observed :

"That in the present case lease continued till the date of the ejectment decree, namely,

15th December, 1953. Thus till 15-12-1953 the possession of plaintiff Roop Narain, of the suit premises could not be adverse as against the landlord, namely, present defendant No. 1, in spite of Roop Narain's plea of adverse possession in his written statement dated 30-11-41 and in his statement in Court."

8. In the result he found Issue No. 1 not proved and decided it against the plaintiff. Issue No. 2 was conceded by the defendant's learned advocate. He further held that "Issue No. 3 does not arise in view of his above findings on Issue No. 1".

9. In the result he dismissed the plaintiff's suit and dismissed it with full costs.

The Additional Senior Sub-Judge on appeal held :

"From the previous litigation and the copies of the judgment of the courts Exts. D-93, and D-96, it is established that Bishan Chand was lessee of the house in dispute under Hanuman Pershad. This tenant paid rent of the premises to his landlord from the time the tenancy commenced in the year 1932. The transliterations (sic) of the regularly kept books of account of defendant No. 1, which are marked Exs. D. 27 to D. 91, read with the evidence of their scribe, Budh Sain, a Mukhtar of the Party, go to prove that rents of the property were paid by Bishan Chand from time to time. These payments started soon after the coming into existence of the lease and even two earlier decretal sums were paid. This evidence finds supports from the testimony of Ram Pershad another Mukhtar of the contesting defendant as well and cannot be rejected. Once in the year 1940, the rent of the premises was paid to the landlord by means of a cheque drawn by the present plaintiff (vide Ex. D.W. 1/1 and Ex. D. 93). The various bills, receipts and notices, marked Exs. D. 4 to D. 26 also show that it is Hanuman Pershad who is recorded owner of the property with the Municipal Committee and is assessed "to house tax in respect of this building. On the circumstances set forth above, it must be held that defendant No. 1 was in possession of the premises through his tenant Bishan Chand and the plaintiff's occupation was merely by permission of the tenant".

10. The plaintiff filed a second appeal to the High Court. The learned Single Judge observed :

"That the proposition that the possession of a trespasser of land let out on lease does not become adverse as against the lessor until the termination of the lease is subject to the qualification that at no sage has the trespasser openly set out an adverse title to that of the owner".

11. He further observed "that this is the correct view drives support from the decision in Kishwar Nath Sahai Dev v. Kali Shanker Sahi, (X CWN 343 (1905-6)) a decision of the Division Bench of the Calcutta High Court. In this case it has been held :

"That when there is a current lease and the tenant is dispossessed by a third party, time does not commence to run against the landlord until the expiration of the lease, but when the lease has expired and the tenant is holding over with the landlord's consent, and the possession of such third party is adequate in continuity, in publicity and in extent so as to show that it is possession adverse to landlord, the latter is not precluded from determining the tenancy and suing the trespasser in ejectment and his

right to sue will be barred after twelve years of such possession".

The learned Single Judge held :

"That there could certainly be no better instance of setting up an adverse title than that has taken place in the present case, and on the principles laid down above, it would appear that the possession of the plaintiff has been adverse against the landlord since he filed his written statement in the Small Cause Court in 1941."

12. Hanuman Pershad filed an appeal under the letters Patent. It as contended before the Division Bench that the finding given by the lower appellate Court that Hanuman Pershad was in possession of the premises through his tenant Bishan Chand and the occupation of Roop Narain was merely by the permission of Bishan Chand, was on of fact to be accepted as final for the purpose of second appeal.

The Division Bench, however, held :

"The fact still remains that in spite of Roop Narain asserting hostile title against Hanuman Pershad in 1941 the latter took no steps to obtain possession from him by determining the lease in favour of Bishan Chand which he was certainly entitled to do under Section 3(g) of the Transfer of Property Act. Even the Rent Restriction Laws in force in Delhi at least up to 1947 did not restrict the right of a landlord to maintain an action for ejection where there was denial of title by the tenant. The learned Judge also seems to be right in saying that it has always been a ground on which ejection could be sought even under the Rent Restriction Laws that a tenant has sublet or parted with possession of the premises without the consent of the landlord and this there was not bar to the filing of a suit by Hanuman Pershad at any time after 1942".

13. It seems to us that if the finding of fact given by the learned Additional Senior Sub-Judge is not vitiated, the appeal must succeed. The learned Counsel for the respondent urged that the finding is vitiated because the learned Additional Senior Sub-Judge relied on Ex.D. 93, the judgment of Manroe, J. But it will be noticed that he referred in the same sentence to the cheque and in the context reference to Ex.D. 93, only means reference to the reasoning in it. There is material on the record to support the finding and we are unable to appreciate how it is vitiated.

14. The Additional Senior Sub-Judge held that "Hanuman Pershad was in possession of the premises through his tenant Bishan Chand and the plaintiff's occupation was merely by permission of his tenant". It seems to us that after Manroe, J's judgment, it was necessary that there should have been a fresh assertion of hostile and adverse possession either by Bishan Chand or the plaintiff Roop Narain. None has been proved on the record. On the contrary, Bishan Chand paid rent and allowed Roop Narian to stay in the house till the suit for eviction and arrears of rent brought by Hanuman Pershad was decreed ex parte against Bishan Chand on 15-12-53.

15. The learned Counsel for the respondent said that the fact that Hanuman Pershad did not bring a suit for ejection after both Bishan Chand and Roop Narain asserted hostile title in suit of 1941, shows that the possession of Roop Narain continued to be adverse. In our opinion there is no obligation on a landlord to file such a suit after he has obtained a decree against the real tenant and the real tenant starts paying rent and his licensee brother accedes and allows his brother to pay rent.

It is impossible to believe that Roop Narain did not know that Bishan Chand was paying rent.

16. In the result the appeal is allowed, the judgment and decree of the of the High Court set aside and that of the Senior Sub-Judge restored.

17. In the circumstances the parties will bear their own costs in the High Court and in this Court.

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