CALCUTTA HIGH COURT

Abdul Hashem

Vs.

Balahari Mondal

A.F.O.D. No. 211 of 1947

(R.C. Mitter and Roxbourgh, JJ.)

08.02.1949

JUDGMENT

R.C. Mitter, J.

1. One Maraful Huq was the owner of 9 bighas 11 cottas odd land comprised within premises, which were formerly numbered as Nos. 125, 126, 127, 128 and 130 Tollygunge Circular Road and No. 1 Durgapore Lane. The said premises have now been re-numbered as Nos. 62 Alipore Road and 42 Raja Santosh Road. He died leaving the Plantiff and 'pro forma' Defendant 7 to 18 as his heirs. As a result of a partition between the said heirs which came into effect on 4-3-1944 the said premises fell to the share of the Plantiff alone.

2. On 16-4-1916, one Ramdas Das executed a 'kabuliat' in respect of the said premises in favour of the said Maraful Huq. The lease was for a term of ten years commencing from Pous 1321. Ramdas was already on the greater portion of the lands so demised by virtue of an earlier lease, and had already built a rice mill there. After the expiry of the term of the lease he held over as a yearly tenant. This is accepted before us by both parties. By two successive court-sales the tenancy and the rice mill passed ultimately to one Kalipada Sardar on 12-3-1940, who by a conveyance (Ex. B) dated 24-4-1940, sold his interest in the tenancy and rice mill to Bolohari Mondal, deft. 1 in the suit. The learned Subordinate Judge has found that Bolohari became a yearly tenant under the plff'. and the said 'pro forma Defendant from the time of his purchase, and that finding also has not been challenged before us.

3. While deft. 1 continued to be a tenant a notice of requisition (Ex. D) issued under Rule 75-A, Defence of India Act was served on him on 30-10-1943. The said notice required him to place the land and structure (machinery being excepted) with in 62 Alipore Road, which comprised an area of about 4 bighas at the disposal of the Land Acquisition Collector, Alipore, from the 4th November following up to six months after the termination of the war, unless released earlier,

and the said collector took possession on the 4th November as stated in the notice. The compensation payable under Section 19, Defence of India Act was settled at Rs. 675/- p. m. by agreement between him and Govt. (Ex. A). On a claim being made by the Plantiff to the Collector that he and not deft. 1 was entitled to the whole of the compensation, the Collector directed the money to be kept in revenue deposit and asked the Plantiff to get a declaration from the civil Court. This suit was accordingly filed by him in the 1st Ct. of Subordinate Judge, 24 Parganas, on 20-9-1945. Therein he pRayed for a declaration that he and the 'pro forma' Defendant 7 to 18 (the other heirs of Maraful Huq) were entitled to the whole of the compensation from the date of the requisition till 3-3-1944, and thereafter he alone was entitled to the same. This claim can be sustained, as it is sought to be, only if the requisition had the effect of extinguishing the tenancy, for the tenancy had not been terminated at the relevant time by a notice to quit, or in any other normal way by an act of the landlord. In other words, the Plantiff can succeed only if he can invoke to his aid the doctrine of "frustration of contracts". Accordingly two questions have been argued before us, one a general question, namely, whether that doctrine is at all applicable to a lease or to a case where a contract has already created an estate in land; and the other is a special one, namely, if it is applicable to such a case, whether the requisition as made in this case has the effect of putting an end to the tenancy. On the general question two views have been taken. Both the views have been examined in *'Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust'*[1], where all the earlier cases have been reviewed . We would however have been inclined to take the view that the doctrine does not apply where as a result of a contract an estate is created, but as it is not necessary to decide the point in view of our decision on the second question we do not pursue the matter further.

4. The doctrine of frustration has been defined thus by Lord Simon in *'Cricklewood Property and Investment Trust Ltd. v. Leighton's Trust Ltd.*[2]*'*, "Frustration may be defined as the premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the foot of the agreement and and as entirely beyond what was contemplated by the parties when they entered into the agreement. If therefore the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising frustration does not occur. Neither does it arise when one of the parties has deliberately brought about the supervening event by his own choice. But where it does not arise, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from volition."

5. In the case before us the occurrence was unforeseen and was not contemplated by the parties when the lease was created, not at a time when the tenant was holding over. The first element is present but we are of opinion that the occurrence was not so fundamental as to be regarded in law to strike at the root and destroy the basis of the relationship of landlord and tenant. The

requisition deprived the tenant of part of his possession for a time. He could not in law have personal enjoyment of a part of the demised premises during the period of the requisition but personal enjoyment is not a fundamental characteristic of a tenancy. The observations made by Lord Reading, though for another purpose lends support to this view. In the case of *'Whitehall Court Ltd. v. Ettlinger[3]',* he observed thus : "I can see no reason why the chattel interest which was vested in the tenant by virtue of the two leases was affected merely because he was personally prevented from residing in the flats."

[1](1945) AC 221 [3](1920) 1 KB 680

[2](1945) AC 221

6. Besides, in the case before us the requisition was not expected to last for a very long period of time, and moreover was in respect of less than half the area covered by the tenancy with the result that the tenant was left in possession of the greater part of the tenanted lands. Even when the view has been taken that the doctrine of frustration is applicable to leases it has been recognized that occasions when the doctrine would be effective would be very rare, and practically these cases which were given as illustrations in the judgments of Lord Simon and Lord Wright in 'Cricklewood Investment Trust case', and cases of those types would be the only cases where the doctrine would have the effect of putting an end to the relationship of landlord and tenant. We accordingly answer the second question against the appellant. The result is that this appeal is dismissed with costs to the respondent Balahari Mondal hearing fee ten gold mohurs.

Appeal dismissed.