

CALCUTTA HIGH COURT

Sudhir Kumar Majumdar

Vs.

Dhirendra Nath Biswas

A.F.A.D. No. 471 of 1951

(Bachawat, J.)

05.07.1956

JUDGMENT

Bachawat, J.

1. The Second Appeal arises out of a suit for recovery of khas possession, mesne profits, demolition of the structures built upon the suit property and an injunction. The plaintiffs allege that the defendant No. 1 has no existing interest in the land and that on the 5-8-1948 the defendant No. 1 wrongfully trespassed upon the land and thereafter has constructed some temporary structures thereon. The defendant No. 1 alleges that he has taken settlement of the suit land from the plaintiffs in Magh 1354 B. S. at an annual rent of Rs. 5/- and has thereafter constructed pucca structures with brick walls and tiled roof there on with the knowledge and consent of and without any objection from the plaintiffs. The defendant No. 1 claims that the plaintiffs have no right to eject him and that in the alternative and in case the plaintiffs are found to be entitled to a decree for ejectment, the defendant No. 1 should be given a decree for the sum of Rs. 2500/- by way of compensation for the value of the structures.

2. Both courts have concurrently found that in Magh 1354 B.S. the plaintiffs granted an oral lease of the property to the defendant No. 1 at a yearly rent of Rs. 5/- and that the plaintiffs allowed the defendant No. 1 to raise permanent structures on the land. On this finding both courts have dismissed the plaintiff's suit. This finding is amply supported by the evidence on the record and is not now challenged. I agree with the finding.

3. With regard to the validity of the lease the trial court held that the lease even though invalid as a bemeadi lease was a valid lease for one year and that the suit being brought within one year from Magh 1354 B. S. when the lease was granted, the suit was liable to be dismissed. On the other hand, the lower appellate court held that the plaintiffs having let the land to defendant No. 1 and allowed him to erect pucca structures on the land are not entitled to sue him in ejectment. I am unable to agree either with the trial court or with the lower appellate court on this point.

4. There is no dispute that the plaintiffs are the owners of the land.

5. The oral lease purports to reserve a yearly rent. By Section 107 of the Transfer of Property Act such lease must be made by a registered Instrument.

6. The oral lease having reserved a yearly rent the parties intended that the lease would be from year to year. That intention not being expressed in the proper legal form cannot be given effect to. The Court cannot make a new bargain between the parties and hold that there is a good and valid lease for at least one year; See *Ram Kumar v. Jagadish Chandra*¹ at P. 27 .

7. Leases other than a lease from year to year or for a term exceeding one year or reserving a yearly rent may be made by oral agreement accompanied by delivery of possession.

8. Oral agreement for a lease is to be implied from payment and acceptance of rent. A lease is, therefore, made by possession under a void lease accompanied by payment and acceptance of rent, and such a lease is presumed to be a lease from month to month.

9. The defendant No. 1 did not allege payment and acceptance of rent in the written statement. The plaintiffs in their evidence deny payment of rent. The defendant No. 1 does not produce any rent receipt. None of the courts below have found that rent was paid or accepted. Payment and acceptance of rent by defendant No. 1 is not established in this case. No other circumstances have been proved from which a lease from month to month is to be implied.

10. There is no contract to grant the lease in writing. Clearly Section 53A of the Transfer of Property Act has no application.

11. An oral agreement to grant a lease by itself is no defence to a suit for ejectment. The defendant No. 1 has not brought any suit for specific performance of the oral agreement to grant a lease. Had such a suit been brought in a proper case, the court might specifically enforce the agreement provided the remedy was not barred by the law of limitation and pending the hearing of the suit stay an action for ejectment; see *G.H.C. Ariff v. Jadunath Majumdar*²

12. There is clearly no scope for application of any doctrine of equitable estoppel. The building of the permanent structure is clearly referable only to the oral agreement to grant the lease. Unfortunately for the defendant No. 1 the oral lease is valid. The defendant No. 1 does not establish a case of estoppel merely by proving that he has built permanent structures relying upon an invalid lease. In 58 Ind App 91 Lord Russell explaining and distinguishing *A.H. Forbes v. L.E. Ralii*³ and *Ramsden v. Dyson*⁴ observed:

"Their Lordships have already indicated their opinion that no act was done by the respondent otherwise than under the verbal contract which was then enforceable at his suit. No circumstances exist from which any other contract by the appellant can be implied; and as to estoppel there is no trace of any statement by him upon which any estoppel can be grounded".

¹ AIR 1952 SC 23

³52 Ind App 178

²58 Ind App 91

⁴(1866) 1HL 129

13. The true position, therefore, is that the defendant No. 1 is in possession of the suit land under an invalid lease and such possession has not been followed by payment and acceptance of rent.

14. A tenancy at will is to be implied from permissive occupation under a void lease; see Sir Dinshaw Mulla's Transfer of Property Act, Third Edition, page 631, *Ramchandra v. Syameswari Dasya*⁵,

15. Such a tenancy at will is not a lease; see *Anwarali v. Jamini Lal*⁶ By section 105 of the Transfer of Property Act a lease of immovable property is a transfer of a right to enjoy such property for a consideration either of premium or rent. In this case there is no consideration in the shape of either rent or premium. The tenant-at-will is not liable to pay rent. An agreement for payment of reasonable compensation for use and occupation is implied from the permissive occupation. Such compensation is not rent. The tenancy at will is a license to occupy the property not amounting to an interest in property; see *Yar Mamud Mondal v. Paomocha Sarkar*⁷ *Basdeo Rai v. Dwarka Ram*⁸,

16. The tenant-at-will is not a person who "is or but for a special contract would be liable to pay rent to" the landlord and is, therefore, not a tenant, within the meaning of section 2(5) of the West Bengal Non-Agricultural Tenancy Act. The tenant-at will is, therefore, not protected by the West Bengal Non-Agricultural Tenancy Act.

17. Service of a formal notice to quit is not necessary for the termination of the tenancy at will. The tenancy at will will be terminable at the will of either the landlord or the tenant. The tenancy may be terminated by a demand for possession. Such demand may be express or may be implied from any act inconsistent with the continuance of the tenancy at will; see Foa on Landlord and Tenant, Seventh Edition, p. 576.

18. A demand for possession or anything which amounts to a demand for possession is not only sufficient but also is necessary for the termination of the tenancy at will.

19. In *Deo Nandan Parshad v. Meghu Mahton*⁹ Sir Asutosh Mookerjee observed:

"When possession of land has been acquired by the consent of the owner, such possession cannot ordinarily be deemed wrongful until at least after a demand for possession has been made. * * * If, therefore, the entry was not wrongful in its inception or has not become so subsequently if there is privity between the parties with respect to the premises sought to be recovered, the right of the owner to institute proceedings to dispossess the occupant arises only after a notice to quit has been given or a demand for possession has been made. * * * If, on the other hand, the status of the defendants is that of a mere tenant-at-will, a demand for possession would be sufficient."

20. In *Mr. C.J. Phillips v. Nund Coomar Banerjee*¹⁰ at p. 386 Mr. Justice D. N. Mitter observed:

⁵42 Cal L. J. 71 : AIR 1925 Cal 1171
⁶ AIR 1940 Cal 89

⁷ AIR 1925 Cal 1225
⁸ AIR 1916 All 219

⁹11 Cal WN 225
¹⁰8 Suth WR 385

"It has been found, on the other hand, that this possession was of a permissive character. Under such circumstances, the special respondent's mode of action should have been to

serve the special appellant with a notice to quit the land, and thereby put an end to the permission relied upon by the latter. The special appellant was sued as a mere wrongdoer, but the facts above referred to are sufficient to constitute a complete defence to such an action".

21. In *Radha Kishore Roy v. Sittoo Sirdar*¹¹ Mr. Justice McDonnell ruled:

"In the present case he is treated as a tenant-at will, and is consequently entitled to remain on the lands until his tenancy is put a stop to by a notice to quit. * * * In the present case they have no right to eject without proving that a prior notice has been given".

In the last two cases the expression "notice to quit" must be understood as a demand for possession and not as a formal notice to quit.

22. Even a bare licensee is entitled to a reasonable notice of revocation of the license before the institution of the proceedings; See *Canadian Pacific Railway Co. v. King*¹², In *Ministr of Health v. Bellotti*¹³ Goodard, L. J. observed: The licensor is bound to give a reasonable time, and, if he does not and takes proceedings before the reasonable time has elapsed, he loses his action".

23. In the present case demand for possession is not pleaded in the plaint. There is not an iota of evidence on the record that before the institution of the suit the plaintiffs demanded possession from the defendant. The allegation in the plaint that the defendant No. 1 was requested to pull down the existing structures is denied in the written statement. Even this alleged request is not proved. There is no evidence on the record to show that there was any demand for possession either express or implied before the institution of the suit.

24. The suit for ejectment must, therefore, be dismissed on the ground that the permissive occupation of the land by the defendant No. 1 has not been terminated before the institution of the suit.

25. The judgments of the courts below must be affirmed on the above ground and not on the ground upon which the lower courts rested their decisions.

26. In view of the above finding it is not necessary to decide whether or not an agreement by the plaintiffs to compensate the defendant No. 1 for the value of the structures is to be implied in the circumstances of this case.

27. I pass the following order: The appeal is dismissed with costs. Leave to appeal under Clause 15 of the Letters Patent is prayed for and is refused.

Appeal dismissed.

¹¹24 Suth WR 172

¹³1944-1 KB 298

¹²1931 AC 414: (ATR 1932 PC 108)