BOMBAY HIGH COURT

Maganlal Dulabhdas

Vs

Bhudar Purshottam

(Shah and Fawcett, JJ.)

03.08.1926

JUDGMENT

Shah, J.

1. The plaintiff in this case sued defendant No. 1 to recover possession of a certain shop situated at Nandurbar with Rs. 50 per month as mesne profits. He alleged that he and Bhagvandas, defendant No. 2, were partners and owners of the shop named Maneklal Jagjivandas ; that the tenancy of defendant No. 1 terminated on February 1, 1923 ; that he had given notice to defendant No. 1 on January 13, 1923, to vacate the premises; and that defendant No. 2 was joined as a defendant because he did not join with him in the suit as a plaintiff. Defendant No. 1 pleaded that as a matter of fact there was a written lease for a period of three years from Samvat 1976, and that as a fact the oral tenancy, which was to expire on February 1, 1923, was extended for one year ; that the notice given by the plaintiff alone was not a good notice, and that the plaintiff could not maintain the suit.

2. On the issues framed, the trial Court found that as a fact the tenancy was for a fixed period from February 12, 1922, to February 1, 1923 ; that after the expiration of that period there was no further acceptance of the tenancy on the part of either of the owners, and that no notice from the landlord was necessary. He was of opinion that, after February 1, 1923, defendant No. 1, had no right to hold the property as a tenant, and accordingly decreed the plaintiff's claim for possession, and allowed Rs. 50 per month as rent, from the date of suit till recovery of possession or expiry of three years from the date of the decree. He held that the suit by one of the co-owners was maintainable, and that the claim by the plaintiff, even though defendant No. 2 did not join him in the suit, was good.

3. From the decree that was passed by the trial Court defendant No. 1 appealed. The learned District Judge in effect accepted the facts as found by the trial Court. In fact he says that it was common ground before him that the tenancy was to expire on February 1, 1923, and the receipt

of notice dated January 13, 1923, was not in dispute. The first issue that he framed was whether the plaintiff being one of the two co-owners was entitled either to give notice in his own name or to bring this suit. On that point ho was of opinion that defendant No. 2 was a necessary party, but having refused to join as co-plaintiff, and having been joined as defendant No. 2, the suit was not defective. But the further question which the learned Judge considered was whether the plaintiff was entitled to sue without the consent of the co-owner. He was not satisfied, under the circumstances of the case, that defendant No. 2 was consenting to the plaintiff's claim for possession. Accordingly, applying the rule which has been laid down in several decisions of this Court, to which he has referred, he came to the conclusion that, without the consent of defendant No. 2, the plaintiff could not alone maintain the claim for possession. He also observed in his judgment that the house being joint property of two Hindus it was not possible to give the plaintiff a decree for his own share. He was satisfied on the evidence that defendant No. 1 failed to prove that defendant No. 2 had agreed to his continued occupation of the house. He also held that it was not a case of holding over under Section 116 of the Transfer of Property Act. In the view, however, which he took as to the necessity of defendant No. 2'a consent to the plaintiff's claim for possession, he allowed the appeal, reversed the decree of the trial Court, and dismissed the plaintiff's suit.

4. The plaintiff has appealed from this decree, and it is contended on his behalf that the rule which has boon laid down in the cases, to which I shall presently refer, and upon which the lower appellate Court has relied, does not apply to the present case. It is urged that defendant No. 1 was a tenant for a fixed term, that on the expiry of that term he was not a tenant at all, but merely a tenant on sufferance, that the rule laid down in cases of admitted or proved tenancy at the time of the ejectment or the notice would not apply to the case of a tenant on sufferance, whose position was Similar to that of a trespasser, and that the rule, which has been relied upon by the lower appellate Court, cannot apply to the case of a tenant on sufferance, who holds over after the expiry of the fixed term of the lease without any agreement with the landlord. Mr. Shingne has relied upon *Chandri v. Daji Bhau*[1] and *Shutari v. The Magnesite Syndicate, Ltd*[2].

5. On the other hand, on behalf of respondent No. 1 it is contended that the rule relied upon by the lower appellate Court applies to this case and that the position of the present defendant No. 1 is not in any way different from the position of an ordinary tenant. Mr. Mehta has relied upon the decision in *Gopal Ram Mohuri v. Dhakeswar Pershad Narain Singh*[3].

6. On the facts found by the lower appellate Court, it seems clear that the property was owned in common by two co-owners, the plaintiff and defendant No. 2, and that defendant No. 1 was a tenant for a fixed term which expired on February 1, 1923. He was in possession as a tenant under the common volition of both the co-owners for the fixed term, and on the expiry of the

period he was a tenant on sufferance. It is found by the lower appellate Court that there was no further agreement between him and either of the owners to continue the tenancy, and as a matter of fact, though in law no notice was necessary, a notice was given by the plaintiff on January 13, 1923, intimating to defendant No. 1 that he (defendant No. 1) would be required to vacate the promises on the expiry of the period of tenancy. On these facts, it is quite clear that the position of defendant No. 1 was nothing better than that of a tenant on sufferance as held in Chandri v. Daji Bhau. According to that case the relationship between defendant No. 1 and his original landlords terminated, and defendant No. 1 became a tenant on sufferance. In that case Jenkins C.J. observed as follows (p. 507):-Now it is to my mind clear, that the article deals with those cases where there has been the relationship of landlord and tenant. But in the case of a tenancy at sufferance there is no such relationship. Thus a release to a tenant at sufferance is void, because he hath a possession without privity....A tenant by sufferance is only in by the laches of the owner, so that there is no privity between them.

7. This view of the position of a tenant on, sufferance has been accepted by other High Courts also. See *Madan Mohan Gossain v. Kumar Rameswar Malia*[4] *Vadapalli Narasimham v. Dronamraju Seetharamamurthy*[5] and *Pusa Mal v. Makdum Bakhsh*[6].

8. The question then arises whether the rule enunciated in the judgments of this Court relied upon by the lower appellate Court would apply to a person in that position. The first case relied upon by the lower appellate Court is *Krishnarav Jahagirdar v. Govind Trimbak*[7]. That was a suit brought by one of the two co-sharers to recover land from a tenant not only in the absence of, but against the express desire of, the other co-sharer, and that suit was held not to be maintainable, even though the plaintiff was the manager of the joint estate. On a reference to the judgment, it is quite clear that the defendant there was a tenant. He was not a tenant on sufferance as in the present case but a person between whom and the owners there was a subsisting relationship of landlord and tenant.

9. The second case relied upon by the lower appellate Court is *Balaji Bhikaji Pinge v. Gopal bin Raghu Kuli*[8]. It was held there that one of the several tenants-in-common, joint tenants or coparceners, was not to be at liberty to enhance rent or eject a tenant at his own pleasure. In that case the suit was brought by one of the two joint Khots to recover enhanced rent from a tenant of the Khots ; and the notice of enhancement in that case was signed by the plaintiff alone and not concurred in by the other joint Khot. On those facts it was held by the High Court that the notice given by one of the co-owners was not sufficient in law, and that the plaintiff was not entitled to recover.

10. Similarly in *Balkrishna v. Moro*[9], after a consideration of the cases, it was held that a co-sharer, who is manager, cannot, even with the consent of his co-sharers, maintain a suit by

himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent. In that case also the plaintiff and his co-sharers owned a village as their Jahagir, and the defendant was the holder of the land in question in that village and was their tenant. The case arose on the notice calling upon the defendant to pay enhanced rent at the instance of one of the co-owners.

11. It may be mentioned that the rule accepted in these eases is somewhat different from the English rule on the point, which has been referred to by Mr. Justice Jardine in the case of *Ebrahim Pir Mahomed v. Cursetji Sorabji De Vitre*[10]. But accepting in its entirety the rule which has been accepted in these three cases, to which I have just referred, it seems to me that that rule cannot apply to the case of a tenant on sufferance, when the period of the tenancy has expired, and where after the expiry of the tenancy there has been no fresh privity between him and the original landlords. The reason of the rule which requires one fresh and common volition of co-owners to put an end to that which commenced under their common volition, does not apply to a case where what commenced under a common volition has come to an end and where the person concerned requires a fresh common volition to continue in possession. The case of a person, who is a tenant on sufferance, is akin to the case of a trespasser. It has been held in the case of *Shutari v. Magnesite Syndicate, Ltd*[11]. that one co-owner can maintain an action to eject a trespasser who has been holding over wrongfully. The case of Gopal Ram Mohuri, which has been relied upon on behalf of defendant No. 1, does not favour his contention. On the contrary there are observations in the case which go to show that in the case of a trespasser the rule as to consent of a co-owner being necessary to eject a tenant or to enhance his rent would not apply.

12. I should add a word with reference to the case of *Rudrappa v. Narsingrao*[12] cited on behalf of the respondent, that that was a decision as to the meaning of the expression "duo course of law" as used in Section 9 of the Specific Relief Act, and has nothing to do with the question that arises in the present case.

13. I am, therefore, of opinion, that, under the circumstances, the suit by the plaintiff alone was maintainable against defendant No. 1, and that he could recover possession of the property. It may be pointed out, however, though it should hardly be necessary to do so, that the plaintiff could get possession in the suit not only for himself, but really for the benefit of the co-owners, and it is in that sense that we hold the plaintiff to be entitled to a decree for possession. We are not concerned in this suit with the rights of the co-owners inter se after the plaintiff has obtained possession of the property from defendant No. 1.

14. As regards the amount of compensation to be allowed for the wrongful use and occupation after February 1, 3.923, we think that the amount fixed by the trial Court should be accepted. No suggestion to the contrary has been made in the course of the argument before us. Though it is

not appropriate to call it rent, as stated by the trial Court in the decree, it is really compensation for the wrongful use and occupation by defendant No. 1 after the expiry of the lease.

15. We, therefore, reverse the decree of the lower appellate Court and restore that of the trial Court subject to the variation that instead of the word "rent" the expression should be "mesne profits", with costs in this Court and in the lower appellate Court on defendant No. 1. Original defendant No. 2 should bear his own costs throughout. It may be noted that he did not appear in the trial Court, but he did appear before the lower appellate Court. He has not appeared before us.

Cases Referred.

1(1900) I.L.R. 24 Bom. 504, s.c. 2 Bom. L.R. 491
2(1915) I.L.R. 39 Mad. 501
3(1908) I.L.R. 35 Cal. 807
4(1907) 7 C.L.J. 615
5(1907) I.L.R. 31 Mad. 163
6(1909) I.L.R. 31 All. 514
7(1875) 12 B.H.C. 85
8(1878) I.L.R. 3 Bom. 23
9(1896) I.L.R. 21 Bom. 154
10(1887) I.L.R. 11 Bom. 644
11(1915) I.L.R. 39 Mad. 501
12(1904) I.L.R. 29 Bom. 213, s.c. 7 Bom. L.R. 12