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Court : Allahabad

Decided On : May-09-1979

Reported in : AIR1979All406

Judge : Deoki Nandan, J.

Acts : Transfer of Property Act, 1882 - Sections 111 and 114A

Appeal No. : Second Appeal No. 838 of 1969

Appellant : Smt. Chandrawati Devi and anr.

Respondent : Surendra Pal Singh

Advocate for Def. : Shambhu Prasad, Adv.

Advocate for Pet/Ap. : N.C. Chaudhari, Adv.

Disposition : Appeal allowed

Judgement :

Deoki Nandan, J.

1. This is a plaintiffs' second appeal in a suit for recovery of Rs. 3500/- with pendente lite and future interest thereon.

2. The plaintiffs' case was as follows : The defendant-respondent's grandfather Kunwar Madho Singh was the Zamindar of Village Bankner. He had plotted out some of his land and disposed of all the plots on 99 years lease to different persons. The defendant-respondent came to be the owner of the said property on the death of Kunwar Madho Singh as his heir and legal representative. The defendant-respondent assured the plaintiff-appellants that plot No. 12 of the said plots in village Bankner was in his possession as proprietor, in as much as on account of the breach of the terms of the lease originally granted to one Piyarey Lal, the defendant-respondent's ancestor had resumed his possession over the plot. The plot was not inhabited and believing the assurance given by the defendant-respondent that he had the right to transfer the same, the plaintiff-appellants purchased it on 10th August, 1964 on payment of Rs. 3000/-as consideration for the same. The plaintiff-appellants tried to take possession of the plot of land after the execution and registration of the sale-deed but Smt. Rambha Kumari, who was originally impleaded as defendant No. 2 in the suit, and her relatives obstructed them and did not permit them to enter into possession and later on served a notice dated 10th Sept. 1964 claiming that she was the owner of the plot of land and the plaintiffs did not get any rights under the sale-deed. The plaintiffs thereafter repeatedly requested the defendant-respondent to put them into possession of the plot land but he expressed his inability to do so, and thus the plaintiff could not get possession over the land. The consideration paid by the plaintiffs for the sale had accordingly failed on account of the defendant-respondent's failure to put them into possession of the plot of land sold and the plaintiffs are entitled to recover the sale consideration of Rs. 3000/- along with Rs. 250/- as expenses incurred on the sale and Rs. 250/- as interest at the rate of one percent per mensem from the date of the sale up to the date of the suit as damages. In the suit as originally instituted Smt. Rambha Kumari was impleaded as the second defendant and the relief claimed was firstly for possession over the plot of land and in the alternative for recovery of the amount of Rs. 3500/- with pendente lite and future interest, but by an amendment of the plaint, the name of Smt. Rambha Kumari was deleted from the array of defendants and the relief for possession was also given up and only the relief for recovery of Rupees 3500/- along with pendente lite and future interest against the defendant-respondent

remained.

3. The defendant-respondent contested the suit on the following pleas : The plaintiffs had no cause of action against the defendant-respondent. The plot of land is in the possession of the plaintiffs and even if it was proved that Smt. Rambha Kumari was in possession, the plaintiffs are not entitled to recover the consideration for the sale or damages against the defendant-respondent, inasmuch as the defendant-respondent had not committed any breach of the terms of the sale. Smt. Rambha Kumari was not in possession of the plot of land in suit and even if she claimed any right or interest therein it was not tenable against the proprietary rights in the land, which stood transferred to the plaintiff-appellants and the possession delivered to them by the defendant-respondent. It was further pleaded by the defendant-respondent that his grandfather Kunwar Madho Singh had established a new residential settlement, which was known after him as Madhopuri, on plot No. 66 by dividing the land into building plots out of which plots Nos. 12 and 13 were given on a 99 years lease to one Kunwar Sultan Singh. Similar leases were granted to others in respect of other plots. It was one of the conditions of the leases that the lessee must within three years of the grant of the lease erect at least a boundary wall and in case the lessee failed to do so the lease would be liable to be forfeited and the lessor would be entitled to re-enter into possession without notice and thereafter to use or dispose of the land in any manner he liked, and the lessee would in that event be not entitled to any refund of premium or any amount. Kunwar Sultan Singh did not erect the necessary constructions within three years of the grant of the lease to him, whereupon the lease automatically stood cancelled and the defendant-respondent and his ancestor re-entered into possession of the land and started cultivating it as before. Some other persons had similarly not made construction within three years of the grant of lease of other plots in the said residential settlement and the defendant had under the terms of the lease resumed their plots of land also and sold the same to other persons who had thereafter raised constructions thereon. Plots Nos. 20 and 23 of the said residential settlement were in this manner purchased by Shri Gulab Singh father-in-law of Smt. Rambha Kumari from the defendant-respondent's ancestor and the plaintiff was a tenant in possession of the building thereon and was thus in know of the full facts and had taken the sale only after

being satisfied about defendant-respondent's title, and possession had also been delivered to them by the defendant-respondent. There were existing constructions on the plot of land in suit which belonged to the plaintiffs and the plaintiffs are in peaceful possession thereon. It was then pleaded that the plot of land in suit had never been given by the defendant-respondent to Smt. Rambha Kumari who had no claim of any kind in that land and even if she or her father-in-law Sri Gulab Singh were raising unlawful constructions and were unlawfully interfering with the plaintiffs' possession then in that case the defendant-respondent had no objection to the suit being decreed against Smt. Rambha Kumari, who as noticed above was originally impleaded as the second defendant to the suit and the relief for possession was claimed against her. It was then pleaded that if Smt. Rambha Kumari set up any transfers from the original lessee of the plot of land in suit, the defendant-respondent had no knowledge of the same, and they were all unlawful and not binding on him, as the original lessee had no right to transfer the land or to give possession thereon to Smt. Rambha Kumari, and in any case the only person liable was Smt. Rambha Kumari and not the defendant-respondent, whether in respect of the claim for possession or damages. In the end it was pleaded that the suit against the defendant-respondent was not maintainable.

4. The trial court framed the following issues:--

1. Whether the defendant failed to deliver peaceful possession of the land in dispute to the plaintiffs under the terms of the sale-deed as alleged? If so, whether he is liable to refund the sale consideration together with all other incidental expenses amounting to Rs. 250/- to the plaintiffs as alleged in case he is unable to deliver possession of the land in dispute to the plaintiffs?

2. Whether the plaintiffs are entitled to any interest as claimed? If so, to what amount of interest are the plaintiffs entitled?

3. To what relief, if any, are the plaintiffs entitled?

4. Whether the suit is bad for non-joinder of Smt. Rambha Kumari as a party to the suit as alleged in para 3 of the additional written statement of the defendant?

5. On issue No. 1 the trial court found that possession over the plot of land in suit was not delivered by the defendant-respondent to the plaintiffs, and that consequently the consideration for the sale failed and the sale became void and the defendant-respondent was liable to refund the sale-consideration of Rs. 3000/- along with the sum of Rupees 250/- which was found to have been spent by the plaintiffs in connection with the sale. On issue No. 2, the trial court held that the plaintiffs were entitled to recover interest at 6 per cent per annum instead of one per cent per mensem and accordingly found the plaintiffs entitled to recover Rs. 125/-as interest. On issue No. 4, the trial court held that Smt. Rambha Kumari was not a necessary party to the suit, and on these findings it decreed the suit for recovery of Rs. 3,375/- with pendente lite and future interest at four per cent per annum and costs.

6. On appeal by the defendant-respondent, the lower appellate court formulated the following five points for its determination:

1. Whether or not the defendant had transferable interest on the date of the execution of the sale-deed?

2. Whether or not the plaintiffs were put in possession?

3. Assuming, that the plaintiffs were not put in possession, can the plaintiffs be granted the relief claimed in absence of the cancellation of the sale-deed?

4. Whether, there were any foundations in the land in suit before the execution of the sale-deed? If so, effect?

5. When were the constructions made in the land in suit by Smt. Rambha Kumari and what is effect thereof on the suit?

On the first point the lower appellate court held that the defendant had a transferable and subsisting title in the plots of land in suit on the date of the sale. On issue No. 2. the lower appellate court held that the plaintiffs' case that they were not put in possession of the plot of land in suit was incorrect. On point No. 3, it held that it was for the plaintiffs to protect their interest and they could not hold the defendant liable for anything so long as the title to the plot of land in suit

continued to vest in them, and not having claimed the cancellation of the sale-deed they were not entitled to refund of the sale consideration. On point No. 4, the lower appellate court found that there were no foundations existing on the plot of land in suit before the execution of the sale-deed and even if they existed before the execution of the sale-deed, it could not be held that the foundations had been laid by Kunwar Sultan Singh because the deed of exchange made by him showed that there were no constructions on the land; and, therefore, the existence of foundations does not in any way help the plaintiffs. On point No. 5, the lower appellate court found that raising of constructions by Smt. Rambha Kumari on the plot of land in suit does not entitle the plaintiffs to a decree against the contesting defendant, and the plaintiffs had to thank themselves for deleting the name of Smt. Rambha Kumari from the array of the defendants. In the result the lower appellate court allowed the appeal and dismissed the suit.

7. The first point raised by the learned counsel for the plaintiff-appellants before me was that the defendant-respondent did not have the saleable interest in the land which he had purported to sell to the plaintiffs by the sale-deed in question, and the finding of the lower appellate court on the first point raised by it for determination, is erroneous in law. Now, it cannot be disputed that the defendant-respondent was the owner of the land. It is clear from the pleadings that he had purported to sell a vacant plot of land of the housing scheme named Madhopuri to the plaintiff-appellants, unencumbered with and free from the lease granted in respect thereof by his grandfather Kunwar Madho Singh to Kunwar Sultan Singh. If the lease had been duly determined or could be deemed to have become void in law and the defendant-respondent was in actual possession of the land on the date of the sale, the obstructions raised by Smt. Rambha Kumari could be regarded to be unlawful, and in that situation it could possibly be said for the defendant-respondent that having sold the plot of land in suit to the plaintiff-appellants and having put them in such possession as the nature of the property permitted, it was for the plaintiff appellants to protect their title and possession against a trespasser like Smt. Rambha Kumari. On the other hand if it is found that the lease granted to Kunwar Sultan Singh by the defendant-respondent's grandfather had not been determined and possession over the plot of land in suit had not been resumed by the defendant-respondent in accordance with law, the

obstruction put in by Smt. Rambha Kumari would be lawful and under a valid title from the defendant-respondent, provided, of course, the chain of transfers of the lease of the plot of land in suit from Kunwar Sultan Singh to Smt. Rambha Kumari was duly established; and in such a case the defendant-respondent would be liable to refund the sale-consideration and pay damages for breach of warranty of title and peaceful possession of the property which he had purported to sell to the plaintiff-appellants.

8. All that has been urged on behalf of the defendant-respondent is that on breach of the condition of the lease requiring the lessee to raise construction on the land within three years of the grant of the lease, the lessor had resumed the land. Now the lessor in this case was the defendant-respondent's grandfather. He may have been the Zamindar and may have been a big Zamindar at that time, but he did not enjoy the prerogative of the sovereign or of the government to resume any land belonging to him. The lease was governed by the provisions of the Transfer of Property Act, Under Section 111 of the Transfer of Property Act, a lease of immoveable property determines-

(a) to (d).....

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease, to the lessor by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lassor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor of his transferee gives notice in writing to the lessee of his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

9. Section 114-A of the Transfer of Property Act provides as follows :

'Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, on suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing;

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, underletting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.'

It is nobody's case and there is nothing to show that the lessee Kunwar Sultan Singh or his transferee or assignees ever expressly or impliedly surrendered the lease and the lessor accepted the surrender. The case set up by the defendant-respondent is that his grandfather resumed the land on the breach of the condition requiring the lessee to construct upon the land within three years which entitled the lessor, the defendant-respondent's grandfather, to forfeit the lease and re-enter on the land. The condition of the lease granted to Kunwar Sultan Singh entitling the lessor to forfeit the lease and to re-enter upon the land on breach of the condition to build within three years, has been quoted in paragraph 7 of the defendant-respondent's written statement. It provides for the forfeiture of the lease and gives the lessor the right to re-enter without giving any notice to the lessee. The question is whether the lessor could do so without serving the notice required to be served under Clause (h) of Section 111 or Section 114-A of the Transfer of Property Act. According to Mulla's Transfer of Property Act, Sixth Edition, at pages 754-755 the giving of a notice in writing is, since the amendment of the Act in 1929 an essential condition of forfeiture taking effect in law even if the lease contains a clause to the contrary. The case of Ramniranjan v. Gajadhar (AIR 1960 Pat 525) supports the view. Nothing has been shown to me to displace this position of law.

10. All that the learned counsel for the respondent urged was to rely on a Full Bench decision of the Jammu and Kashmir High Court in Bhagat Rajindar Kumar Sawhney v. State of Jammu and Kashmir (AIR 1960 J&K; 50). That was a case arising on a writ petition against the State of Jammu and Kashmir. The question involved was an interpretation of the words 'liable to resumption' appearing in Rule 25 of the relevant rules. It was held that a lessor while enforcing his right of forfeiture has every right to take possession of the premises provided it is done peaceably and without any actual resistance. The question whether the lease could be determined on entailing forfeiture without serving the required notice under Section 111(g) did not arise in that case. On the facts, that case is clearly distinguishable and does not lay down any proposition of law contrary to what has been stated above about the necessity of serving a notice for determination of a lease under Section 111(g) of the Transfer of Property Act. The defendant-respondent or his predecessor-in-interest did not determine the lease by a notice in writing as required by Section 111(g), on the alleged breach of the condition entailing forfeiture of the lease and entitling him to re-enter. In the absence of such a notice determining the lease, the lease subsists, and that being so the claim of Smt. Rambha Kumari, who claims to be a transferee of the lease-hold in possession of the plot of land in suit, must be upheld as lawful. It follows that the defendant-respondent did not have any right to sell the plot of land with vacant possession and un-encumbered with the lease. The defendant-respondent did not, therefore, have any right to sell that which he purported to sell to the plaintiffs. The consideration paid by them failed. The sale was void.

11. In view of the aforesaid conclusion the other points pale into insignificance. Even if possession is taken to have been formally delivered by the defendant-respondent to the plaintiffs, it was almost immediately thereafter interfered with and obstructed by Smt. Rambha Kumari. Her interference was lawful and in fact successful. Indeed, as found by the trial court there was no actual delivery of possession. The mere recital in the sale-deed of delivery of proprietary possession was neither here nor there. It could at best be construed to be a delivery of formal possession which, in the facts and circumstances of the case proved ineffectual. It has not been held by the lower appellate court that the transfers of the lease-hold under which Smt. Rambha Kumari was claiming were nonexistent. There was a

good reason for the plaintiffs to exempt Smt. Rambha Kumari from the suit and to confine their claim to a refund of the sale-consideration with damages for the expenses thrown away on the sale, and Interest on the money paid, against the defendant-respondent alone as the interference and obstruction by Smt. Rambha Kumari in the plaintiffs' possession was based on a lawful title under the defendant-respondent.

12. In the result the appeal succeeds and is allowed with costs. The judgment and decree of the lower appellate court are set aside. The decree of the trial court is restored and the plaintiffs' suit for recovery of Rs. 3,375/-with pendente lite and future interest at four per cent per annum shall stand decreed with costs throughout.

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