Ram Autar Vs. Savitri Devi

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Court : Allahabad

Decided On : Apr-16-1975

Reported in : AIR1976All515

Judge : S.K. Kaul, J.

Acts : Transfer of Property Act, 1882 - Sections 105 and 106; Evidence Act, 1872 - Sections 114; General Clauses Act, 1897 - Sections 27

Appeal No. : Second Appeal No. 268 of 1972

Appellant : Ram Autar

Respondent : Savitri Devi

Disposition : Appeal dismissed

Judgement :

S.K. Kaul, J.

1. This is a defendant's appeal and it arises out of a suit brought by the plaintiff-respondent for possession by ejectment of the defendant from eight quarters situated in Aliganj, Ward Hassan-ganj, boundaries of which were given in para. 1 of the plaint together with Rupees 720/- as arrears of rent as well as for damages for use and occupation at the rate of Rs. 20/- per month, on which the plaintiff was prepared to pay additional court-fees. The sum and substance of the plaint was

that initially defendant-appellant owned the property in question. He had, however, sold the same to the plaintiff on the basis of a registered sale-deed dated 28th May, 1962. He had, however, taken a Theka of the aforesaid property from the plaintiff on a rent of Rs. 20/- per mensem and one of the terms oE the Theka was that if rent for more than 6 months remained unpaid, the plaintiff would have a right to terminate the Theka and take back possession. The defendant had not paid rent from 23rd April, 1963 and in this way Rs. 1070/-had remained due to the plaintiff, but she was confining her claim to Rs. 720/-only so as to bring it within limitation. A notice demanding the arrears of rent as well as terminating the lease was sent to the defendant on 19th August. 1967, but the same was refused on 23rd August, 1967. On these grounds suit for ejectment and arrears of rent as well as damages for use and occupation, as noted above, was filed. The defendant contested the suit alleging that the property was sold subject to a condition of re-purchase and actually it was only a mortgage. The defendant had agreed to pay Rs. 20/-p. m. as interest of Rs. 2000/- and there was no question of Theka. Receipt of notice was denied. It was also alleged that suit for specific performance was filed by the defendant and as such the present suit was liable to be stayed under Section 10 of the Code of Civil Procedure. The trial court found all the issues in favour of the plaintiff and, therefore, decreed the suit for ejectment as well as for recovery of Rs. 720/- as arrears of rent together with damages future pen-dente lite at the rate of Rs. 20/- per month subject to payment of additional court fees. The defendant went in appeal but remained unsuccessful. He has now come up in second appeal to this Court.

2. I have heard this appeal with the assistance of the learned counsel for the appellant. No one has turned up from the side of the respondent in spite of sufficient notice. It was submitted before me by the learned counsel for the appellant that no suit for ejectment lies inasmuch as no lease was granted to the defendant. At best the defendant who was holding the property could be termed as trespasser and, therefore, a suit on the basis of title could have been filed. In the alternative it was alleged that actually it was a licence and not a lease and the licence was irrevocable. The second point was that notice was not proved and in any case it was not a valid notice.

3. Having heard the arguments of the learned counsel for the appellant, I find that all these submissions have no force. So far as the first submission is concerned the sale-deed Ext. 3 leaves no room for doubt that defendant had sold the property in question to the plaintiff for a sum of Rs. 2000/- and had also delivered possession over the same. Nowhere anything is mentioned in this sale-deed SQ as to make it a mortgage by conditional sale. On the same date a document Ext. 4 was executed in between the parties wherein it was mentioned that after this sale the Theka has been given to the defendant of the aforesaid property with these conditions that the Theka rent would be Rs. 20/- per mensem which has to be paid by the defendant for which a receipt in writing would be issued and for all repairs and payment of taxes the responsibility would be of the lessor. It was then mentioned that if six months Theka rent was not paid, it would be open to the lessor to cancel the Theka and recover possession as well as arrears. The Theka was given for a year. This document as rightly interpreted by the two courts below is a lease. Section 105 of the Transfer of Property Act defines a lease. This document vests in the defendant a right of possession for a certain time. It operates as a conveyance or transfer and it is, therefore, a lease inasmuch as rent payable by the defendant has been fixed. The essential elements of a lease are as follows :--

(1) The parties,

(2) Subject-matter or immovable property,

(3) the demise or partial transfer,

(4) the term or period,

(5) the consideration or rent. Now under the Transfer of Property Act (Section 105) the lessor is called the landlord and the lessee is termed on the basis of English analogy as tenant specially when it is used in opposition to a landlord. An absolute owner who is not incapacitated can grant a lease. Ext. 4 is such a lease and there can be no doubt about it. The term Theka mentioned therein would not improve the case of the defendant. He would still remain lessee. The subject-matter evidently of this lease are the 8 quarters and it is not only 8 quarters but benefits

arising out of such 8 quarters for which possession was given to the defendant. Evidently there is transfer of the immovable property by means of the conveyance because in Ext. 4 it is clearly mentioned that in default it would be open to the lessor to take back possession. Taking back of the possession impliedly shows that possession had been delivered to the defendant on the basis of Theka. The commencement of the lease in the instant case is certain and it was given for one year. The last essential requisite is also specified because the consideration is also mentioned in the Theka and it is Rs. 20/-per mensem In a Calcutta case reported in : AIR1930 Cal739 , Secretary of State for India v. Bhu-palchandra Ray Choudhuri, a Kabuliyat for fixed term in respect of a hat was executed and the executant had bound himself to pay Rs. 190/- annually as land tax (rent) for the land and Rs. 3,260/- as licence fee for realising tolls of the hat, that is, to pay a total Jama of Rs. 3,450/-annually and the control of hat was in executant subject to certain restrictions and reservations. The Calcutta High Court held that such a Kabuliyat was in fact a lease of the land itself with the object of holding a hat thereon, and not a mere licence that the so-called licence fee payable to the grantor was rent and cess was payable on the aggregate amount of Rs 3,450/-. It was further observed that the question whether a transaction is a lease or a licence is not a question of word but one of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

4. In the case before me a perusal of Ext. 4 leaves no room for doubt that it was a lease, though termed loosely as a Theka and as such the relationship between the plaintiff and the defendant was that of a landlord and a tenant. Such a tenancy under Section 106 of the Transfer of Property Act could be terminated on one month's notice. The only condition was that there was a contract between the parties inasmuch as in Ext. 4 it was mentioned that only when there was a default of 6 months in the payment of rent, it would be open to the lessor to terminate the lease and take back possession. In the case before me the rent in default has been of much more than six months and, therefore, even though there was a contract to the contrary mentioned in Ext. 4 regarding termination of tenancy on the basis of one month's notice, this condition was fulfilled inasmuch there was a

default of more than six months in the payment of rent. The point No. 1 has, therefore, no substance.

5. Coming to the second point it is significant to note that in the first appellate court no such point was pressed. Only two points were pressed. It is, therefore, not open for the learned counsel for the appellant to argue about the fsctual aspect of the notice. However, this argument also is of no avail. Notice Ext. 5 is on record which was sent per registered A. D. post to the defendant on a proper address. There is an endorsement to the effect on this notice 'Lene Se Inkar Vapas Hai'. It is signed by Ram Achal. The Full Bench of this Court in Ganga Ram v. Smt. Phulwati : AIR1970 All446 clearly laid down this proposition of law that if a notice is sent by registered post and received back with an endorsement 'refused' made by someone in the post office, presumption under Section 114 of the Indian Evidence Act, can rightly be drawn in favour of the sender. Presumption of such a notice has also to be made under Section 27 of the General Clauses Act. The only thing required is that it should be correctly addressed to the tenant and in such an event when it is returned with an endorsement of 'refusal', it is not even necessary for the plaintiff to prove the endorsement of refusal either by producing the postman or give other evidence, in case where defendant denies receipt of notice. In this case the plaintiff went a step further. She examined Ram Achal, postman, who proved his endorsement. That being so it is not open to the defendant to argue that such a notice which was properly addressed to him was not taken to him and he had not refused to accept the same. It is a valid and composite notice treating the defendant a defaulter and asking him to pay arrears within one month as well as for terminating the tenancy by giving 30 days notice from the receipt of the same.

6. As a result of the discussion, I see no force in this appeal and it is hereby dismissed. But since nobody has turned up from the side of respondent, I make no order as to costs. Stay order dated 23rd May, 1974 is vacated.