

Abdul Rasheed Vs. Bashir Hussain

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Court : Allahabad

Decided On : Jul-11-1972

Reported in : AIR1972All545

Judge : K.B. Asthana, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 108

Appeal No. : Second Appeal No. 277 of 1971

Appellant : Abdul Rasheed

Respondent : Bashir Hussain

Advocate for Def. : B.K. Kakkar and ;S.K. Subedar, Advs.

Advocate for Pet/Ap. : S. Sharafat Ali, Adv.

Disposition : Appeal allowed

Judgement :

K.B. Asthana, J.

1. This is a defendant-tenant's appeal from a concurrent decree evicting him from a shop of which the plaintiff-respondent was the landlord.

2. The undisputed facts are that the defendant was a tenant in a shop of which the plaintiff was landlord on payment of Rs. 7.50 as rent per month. The shop was divided into two portions, a kotha at the back and a sort of gallery in front. The front portion in which the defendant carried on his business fell down. The defendant reconstructed the front portion and brought it into the same shape and form as before. Thereupon the plaintiff served upon the defendant a notice terminating his tenancy and asking him to quit on the expiry of 30 days from the service of the notice. The defendant did not vacate the shop. The plaintiff then filed the suit for eviction and recovery of arrears of rent and damages. In paragraph 4 of the plaint it was pleaded by the plaintiff that the defendant despite instructions to the contrary reconstructed afresh the front portion of the shop which had fallen down, without any permission or authority and besides this the defendant raised certain other new constructions. Then in paragraph 5 of the plaint the plaintiff pleaded that the above said constructions amounted to a material alteration and the plaintiff was entitled to eject the defendant without obtaining permission of the District Magistrate. The defendant in his written statement refuted these allegations of the plaintiff and pleaded that on account of the negligence of the plaintiff the front portion of the shop had fallen down and after taking permission from the plaintiff he reconstructed the front part of the shop and brought it in the same shape as it stood before.

3. On the above pleadings of the parties the main question that arose for determination was whether the constructions made by the defendant in the accommodation let out amounted to material alterations. The plaintiff examined himself as a witness. It was elicited from him that the new constructions raised by the defendant were exactly the same as stood before except that the old constructions were of small bricks while the new constructions were of bigger bricks. It was further elicited from the plaintiff that the accommodation remained the same as before.

4. The learned Munsif held that though the constructions were of the same nature as stood before but they having been raised by the defendant without the consent of the plaintiff in law amounted to material alteration. In this finding the learned Munsif decreed the plaintiff's suit for eviction.

5. On appeal by the defendant, the learned Judge of the Court below observed:

'It is no doubt true as admitted by the respondent the shop in suit has been reconstructed in the same manner as it was before falling down and that its value had also increased, but, this admission of fact cannot be of any assistance to the appellant because the reconstruction by him of the said shop, without written permission of the landlord would be deemed to be a material alteration according to the authorities cited above.'

6. The learned Judge relied upon a decision of a learned Single Judge of the High Court in the case of Kishan Lal v. Ram Haboo, 1970 All LJ 1154. The appeal of the defendant was dismissed.

7. The only question that falls for determination in this appeal is whether the finding of fact to the effect that the front portion of the shop reconstructed by the defendant exactly in the same shape and form as before without the permission of the plaintiff will amount to a material alteration in the accommodation let out. I think the learned Judge of the Court below was in error in holding that the front portion of the shop though having been reconstructed in the same shape and form would amount to material alteration merely because the consent of the plaintiff was not taken by the defendant. To my mind, the prior permission or consent of the plaintiff-landlord will have no bearing on the question whether the constructions made by the defendant-tenant materially altered the accommodation let out. The court below seems to think that any unauthorised construction will amount to material alteration. The plaintiff admitted that the new constructions raised by the defendant in the front portion of the shop were exactly the same in shape and form as the front portion of the shop stood prior to its falling down. I think a mere restoration of the portion by a tenant though involving building operation cannot amount to altering the accommodation let out materially as by such restoration the accommodation would be brought in the same shape and form as let out.

Indeed, the learned counsel for the respondent conceded that on the admissions of the plaintiff he could not raise any tenable argument that the front portion of the shop in its shape and form was altered. He, however, strenuously contended on the strength of an observation of S.N. Singh, J. at page 698 in the case of Sitaram

v. Arya Muni, 1965 All LJ 689, that when the constructions let out stand demolished, the tenant would be materially altering the accommodation let out if he makes constructions of his own without the consent of the landlord. The learned counsel refer-red to Clause (p) of Section 108 of the Transfer of Property Act which, according to him, prohibits erection of any permanent structure by the lessee without the lessor's consent and submitted that raising of an unauthorised construction on a vacant or open land would certainly amount to altering the open piece of land. There is an obvious fallacy in this submission of the learned counsel for the respondent. It is not the plaintiff's case that any lease of open land was given to the defendant. The plaintiff's own case is that it was a shop, that is a building or structure, which was leased out. If a part of the structure in the front portion fell down and the defendant as a lessee did not exercise his option to avoid the lease, the lease continued to subsist and that would be of the shop, a structure divided into front and back portions. On the facts as established by the evidence on record, the front portion of the accommodation let out had fallen down. The back portion remained in the use and occupation of the defendant. I think the defendant was within his rights to repair the fallen down portion and re-erect it. Merely because the defendant did not obtain the prior permission of the plaintiff or the plaintiff did not accord consent to the re-erection or reconstruction, the structure so raised will not amount to materially altering the accommodation since it has been found that the reconstruction restored the front portion of the shop in the same shape and form as it existed prior to its falling down. I think the respondent cannot derive any benefit from the observations of S.N. Singh, J. at page 698 in the case of 1965 All LJ 689 (supra) firstly because these observations are obiter as the determination of that question was not necessary for deciding the appeal. The learned Judge at page 697 when embarking upon the discussion on point No. 5 himself observed as follows:--

'In my view of my decision on points Nos. 2 and 3 it is not necessary to determine this point.'

8. Secondly, on the facts the case before the learned Judge was entirely different. In that case the defendant was a tenant of an Ahata in which some rooms, kitchen and latrine existed. The whole Ahata was acquired by the State Government and

the constructions in the Ahata were demolished. However, the owner of the Ahata questioned the validity of the acquisition by means of a writ in the High Court and the acquisition proceedings were quashed. The State Government then released the Ahata. The defendant then raised constructions in the Ahata. The learned Judge on these facts held that when the land was released by the State Government it was an open piece of land and the lease having subsisted the defendant would be deemed to be a tenant of the open land and by raising constructions thereon he would in law be deemed to have materially altered the accommodation let out. Here in the instant case no question arises of lease of any open land having come into existence at any stage in favour of the defendant. It could not be said that a partial falling down of the accommodation would bring into existence a lease in favour of the defendant of an open land that is of the site on which that part of the accommodation stood.

9. It was then urged on behalf of the plaintiff-respondent by his learned counsel that the plaintiff having pleaded that apart from mere restoration some more constructions were raised and no specific issue having been framed in regard to the further constructions having been raised, the plaintiff was prejudiced and he could not produce proper evidence. I do not find any substance in this argument. Firstly, the plaintiff's pleading in regard to construction in addition to the restoration is vague. No particulars have been given in the plaint. Secondly, the issue framed by the court of first instance, I think, was wide enough to cover that part of the construction also which was alleged to be in addition to the mere restoration. Thirdly, the plaintiff in his statement before the court stated that whole of the reconstruction brought the front portion of the shop in the same shape and form as it stood before falling down. I think, no case has been made out for affording any fresh opportunity to the plaintiff.

10. Lastly, it was urged on behalf of the respondent that use of bigger sized bricks in the construction raised by the defendant amounts to a material alteration as formerly in the construction of the front portion small bricks were used. This submission of the learned counsel is devoid of substance. It is a hollow argument. The shape and form of the accommodation not having been altered, merely the use of bigger sized bricks would not alter the shape and form in a manner so as to

amount to a material alteration in the accommodation more so when the plaintiff admitted in his evidence that no damage has been caused to the accommodation and further it having been elicited from him that in fact the whole accommodation appreciated in value.

11. For the reasons given above, I allow this appeal and set aside the decree of the court below and dismiss the plaintiff's suit, in so far as the relief for eviction and recovery of damages are concerned, with costs throughout.

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