Thomas Vs. Moram Mar Baselious Ougen I, Catholics Metropolitan, Malankara

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SooperKanoon Citation : sooperkanoon.com/718093

Court : Kerala

Decided On : Jan-02-1979

Reported in : AIR1979Ker156

Judge : T. Chandrasekhara Menon, J.

Acts : Transfer of Property Act, 1882 - Sections 4, 108 and 111; Contract Act, 1872 - Sections 56

Appeal No. : Second Appeal No. 708 of 1975

Appellant : Thomas

Respondent : Moram Mar Baselious Ougen I, Catholics Metropolitan, Malankara

Advocate for Pet/Ap. : Panicker and; Poti, Advs.

Disposition : Appeal dismissed

Judgement :

T. Chandrasekhara Menon, J.

1. The first defendant in a suit for arrears of rent, for eviction and recovery of damages as well as for an injunction restraining the first defendant from

constructing any unauthorised structures in the leased property is the appellant. The plaint schedule property and the workshop building therein belong to the plaintiff, Catholics and Metropolitan, Malankara Church. The workshop was entrusted on lease to the first defendant on 1-2-1969 on a monthly rent of Rs. 85/- The first defendant was conducting a Motor-workshop therein. A bus K. L. K. 7475 belonging to the second defendant was brought to the workshop on 5-7-1969 for repairs. According to the plaintiff, the brake and engine of the vehicle were in disorder which fact was well known to the defendants 1 and 2 and their servants. The plaintiff would allege that without taking necessary precautions, care or caution the vehicle when moved in the premises went out of control and hit against the workshop building. The building was completely destroyed. The plaintiff seeks to make liable defendants 1 and 2 jointly and severally for the damages caused to the plaintiff by the alleged carelessness and negligence on their part and on the part of their servants. Though the plaintiff would state that he spent more than Rs. 5000/-for the reconstruction of the building and that he has suffered a loss to that extent, he limits his claim to Rs. 4000/-. He sent a registered notice to defendants 1 and 2 on 14-7-1969. It is the case of the plaintiff that after the receipt of the notice the first defendant has put up a shed without the knowledge of the plaintiff. Therefore he is entitled to get it demolished. The plaintiff has also got a case that the first defendant had defaulted payment of rent from August 1969 and therefore he had claimed arrears of rent together with 6 per cent interest He further claimed a perpetual injunction restraining the first defendant from constructing new buildings and also claimed damages for use and occupation at the rate of Rs. 50/- per month. These reliefs are besides the claim for damages for Rs. 4000/-.

2. In resisting the suit the first defendant had contended that there was no total destruction of the building. He had also denied the construction of any unauthorised structure. What he did was only repair of the roof of the building. The bus was alleged to have been driven by the second defendant's employee at the time the accident happened and not by the first defendant or his employees. The first defendant also denied the forfeiture or termination of the lease as set up by the plaintiff. The construction effected after the accident is alleged to be with the consent of the plaintiff.

3. In the written statement, the second defendant had contended that the accident occurred on account of the neglience of the first defendant's employees and that in any event the plaintiff is entitled to damages only to the extent of Rs. 1500/-. He had also contended that the plaintiff has no cause of action and that the suit was instituted without any bona fides and only to evict the first defendant from the premises.

4. The trial court held that the entire shed was destroyed by the accident and that defendants 1 and 2 were liable for damages jointly and severally. Damages were fixed at Rs. 4000/-, the amount claimed in the plaint. The court held that the lease had not been terminated. The first defendant was directed to remove the shed put up by him. The plaintiff was given a decree by the trial court for recovery of damages of Rs. 4000/- together with interest at 6% from defendants 1 and 2. Eviction of the first defendant as prayed for was disallowed. However, the first defendant was restrained from putting up any structures and further he was directed to remove the structure put up within 30 days from the date of the judgment. Against this decree and judgment the plaintiff filed A. S. 55/1973 to the extent that the decree and judgment of the trial court were against him. Defendants 1 and 2 also filed A. S. 58 of 1973 and A. S. 76 of 1973 respectively as against the reliefs granted against them before the District court of Kottayam.

5. The appellate court held that the building was completely destroyed and that the accident occurred due to the negligence of the first defendant's employees alone. The second defendant was exonerated from liability. The court also held that the first defendant's occupation after destruction of the building was unauthorised and that the plaintiff was entitled to get the first defendant vacated from the premises. The quantum of damages sustained by the plaintiff was fixed at Rs. 1500/-. The plaintiff was also allowed to recover profits at the rate of Rs. 50 per month from the first defendant.

6. In this second appeal by the first defendant what he contends is that there is no total destruction of the building. As per the evidence in the case the court below has grossly misread and misunderstood the same. It is urged that there is no forfeiture or termination of lease as was wrongly held by the court below it is also

contended that assuming that a material portion of the building was destroyed, as the accident did not happen due to any wrongful act or default of the first defendant, the first defendant has the option to continue the lease. According to the appellant, the court below should have held that the first defendant is entitled in law to repair and put up new structure in the place of the old one and carry on his business in the premises. He would also put forward a plea that his continued occupation is not unlawful. He is not a trespasser and is not liable to be evicted. It is also pointed out that the accident happened due to the negligence of the employees of the second defendant and not due to the negligence of the first defendant or his employees. In this respect it is his case that the burden of proving negligence or default or wrongful act on the part of the first defendant is heavily on the plaintiff and he has not discharged the burden. Therefore, the first defendant's liability for damages would not arise in the case,

7. In regard to the question whether the building was completely destroyed or not, a commission had been taken out in the case and the commissioner had filed his report marked as Ex-C1. When the Commissioner visited the spot, the original building was not there. The Commissioner has noted a new construction there. He also pointed out that the bottom portion of the present pillars appeared to be part of the prior construction. But that was only to a height of a few lines of bricks. Above that a fresh construction had been made. The lower court has said that the report of the Commissioner justifies the conclusion that the entire roof of the building and also the original pillars are not now existing at the site and it is evident that the major portion of the old construction had been destroyed. The court then would State that in any case at least the entire roofing and a good portion of the pillars were destroyed and by whatever means it happened, it is established in this case that the old building is not existing now. I have no difficulty in accepting this finding on the facts and circumstances brought out by the evidence in the case. The evidence has been fairly summed up by the lower court. The court then turns to the question as to who is responsible for the destruction of the building and consequently liable for damages.

8. The court below accepted the evidence of D W 4 the second defendant's witness in the matter. The second defendant's case is that the bus was taken to

the workshop on 4-7-1969, that it was left in the custody of the first defendant, that the first defendant and his servants moved the vehicle in the premises of the workshop and caused it to hit against the building thereby causing damage, so much so, the responsibility for the damages lies on the first defendant and his servants, The District Judge also points out that the evidence of DW 4 would support the case that the bus was taken to the workshop on 4-7-1969. The first defendant sent a reply notice in the matter Ex. A-9 where it is stated that the bus was taken to the workshop for repair and when it was moved in the premises it accidentally came into contact with one of the pillars and the pillar was brought down. From this the lower court would say that the only conclusion possible would be that the accident happened while the bus was moved in the premises after it was entrusted with the first defendant by the second defendant Therefore the accident could have happened only when the bus was in the custody of the first defendant and his servants. The second defendant could not have control of the vehicle after its entrustment with the first defendant. On no account can it be said that the accident took place at a time when either the second defendant was or his servants were, present or while they were dealing with the bus. In the light of these conclusions arrived at by the court below which according to me are fully supported by the evidence the first defendant and his servants alone could be made responsible for the accident and the first defendant is liable for the damages.

9. What was strongly contended before me is that in the light of the provisions of Transfer of Property Act the lease should be taken to continue and the first defendant was not liable to be evicted in this suit. Mr. Balakrishnan, the learned counsel for the appellant placed reliance on Section 108 of the Transfer of Property Act which deals with rights and liabilities of lessor and lessee. There is a provision therein to the effect that if by fire, tempest or flood, or violence of an army or of a mob on other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let, the lease shall, at the option of the lessee, be void. A proviso to this part would indicate that if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of his provision. According to Mr. Balakrishnan this would indicate that only the lessee

had got the right of option to treat the lease as void which benefit he cannot avail of if he is responsible for the wrongful act or default resulting in the destruction of the material part of the leasehold. But he would state that the lessor has no right to treat the lease as having come to an end by the destruction of the material part of the leased property.

10. As the learned counsel for the appellant pointed out the doctrine of frustration embodied in Section 56 of the Indian Contract Act which renders a contract void by reason of the impossibility of performing the act required on account of some event which the promissor could not prevent, would not apply in the case of a lease. The rights of the parties after a lease was granted rest not in contract. Though under Section 4 of the T. P. Act, the chapters and sections of the said Act relating to contracts are to be taken as part of Indian Contract Act, that does not mean that the provisions of the Contract Act are to be read into the T. P. Act. See Dhruv Dev v. Harmohinder Singh (AIR 1968 SC 1024). As this decision lays down there is a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract do not invalidate a concluded transfer. By its express terms Section 56 of the Contract Act does not apply to cases in which there is a completed transfer as in the case of a concluded lease. A covenant under a lease to do an act which after the contract is made, becomes impossible or by reason of some event which the promissor could not prevent, unlawful, becomes void, but on that account the transfer of property resulting from the lease granted by the lessor to the lessee is not declared void. Therefore, by the destruction of the building the lease cannot be said to have become void and thus discharged. One must also note from the Supreme Court decision cited supra, that Section 56 of the Contract Act must be considered to be exhaustive of the law relating to frustration of contracts in India and the courts cannot travel outside the terms of that section in the matter.

11. Clause (e) of Section 108 is in the following terms:--

'If by fire, tempest or flood or violence of any army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease

shall, at the option of the lessee, be void:-- Provided that if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision.'

12. As Justice Namboodiripad, if I may say so with respect, rightly pointed out in George v. Varghese (1976 Ker LT 859) it is presumably to avoid a contingency of the lessee being fastened with the liability of payment of rent even if a material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let. that the tenant is conferred an option by Section 108(e) to treat the contract as void. That does not mean that in a case where the subject matter of the lease like the building here is totally destroyed, the tenant is entitled to squat on the ground where the building was situate or construct a new building in its place or require the landlord to put up a new structure.

13. A lease as such could determine only in one of the ways pointed out in Section 111 of the T. P. Act. These ways of determination denote the continued existence of the subject matter of the lease. Under Section 108(e) even if a material part of the subject matter of lease is destroyed or rendered substantially or permanently unfit for the purposes for which it was let out and such injury is not caused by the lessee, the lease though continuing can be treated as void by the lessee and he can thus get rid of his liabilities under the demise. But it would be too much to say on the basis of these decisions that if there is a total destruction of the subject matter of the lease, and that too on account of the wrongful act of the Lessee he can treat the lease as continuing, and either construct the building in the place of the destroyed building -- the subject matter of the lease -- or require the landlord to reconstruct the building. A lease is denned in Section 105 of the T. P. Act as follows:--

'A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.'

14. The lease being a transfer to enjoy the property transferred, with the total destruction of the property the lease cannot be considered as continuing. There cannot be a lease subsisting in regard to a property not in existence. In this case the appellant has not been able to establish that what has been leased out is not only the building but also the land on which the building stood. I express agreement with the following observations of Chatterjee, J., in Mahadeo Prosad v. Calcutta D & C. Co. (AIR 1961 Cal 70 at p. 75) :--

'Having held that the lease has not been frustrated because of demolition of one of the structures and having further held the petitioner tenant is entitled to restitution the question is to which property the tenant may be restituted. I would make it clear that there is no question of restitution with regard to the demolished structure. The structure has been demolished and is not in existence so no question of tenant's option arises with regard to the non-existing properties. The structure was leased out, not the land underlying and after the structure was demolished, the tenant cannot be put in possession of that structure as a matter of fact even if he would like to be so put in possession; he has no right to building on the land another structure nor has he any right to compel the landlord to raise a similar structure for him; he may have some right for abatement of rent but that is not for me to decide. He would be therefore, restituted to possession of other property leased out than the structure demolished.'

In this view I dismiss the second appeal with costs.