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Court : Rajasthan

Decided On : Aug-08-1963

Reported in : AIR1964Raj88

Judge : C.B. Bhargava, J.

Acts : Transfer of Property Act, 1882 - Sections 116; Code of Civil Procedure (CPC) , 1908 - Sections 100 and 101; Evidence Act, 1872 - Sections 114

Appeal No. : Second Appeal No. 286 of 1958

Appellant : Anantmal and ors.

Respondent : Lala and ors.

Advocate for Def. : G.M. Lodha, Adv.

Advocate for Pet/Ap. : D.P. Gupta, Adv.

Disposition : Appeal dismissed

Judgement :

C.B. Bhargava, J.

1. This is a second appeal by the plaintiffs in a suit for recovery of arrears of rent. Plaintiffs who are members of a joint Hindu family, filed the present suit against Lala, Hira and Jawahara sons of jora and Ghisa son of Moti and grandson of Jora

and Mt. Juphi widow of Moti. Jawanara died after the institution of the suit and the suit is being continued against the re-maining defendants.

2. Plaintiffs' case is that Jora usufructuarily mortgaged his agricultural lands with their ancestors on 26th November, 1911 and executed a registered mortgage deed in their favour. On the same day, Jora took back the mortgaged land for cultivation on an annual rental of Rs. 199/8/- for a period of three years. A registered lease deed was also executed by Jora on that very day. Plaintiffs' case further is that Jora during his life time and after his death his sons continued cultivating the land on the same terms and paid rent to them up to smt. 1996. But thereafter, they did not pay any rent and so the present suit for recovery of rent for the years 1943, 1944 and 1945 had been filed. It is in evidence that Jora died in the year 1928.

3. The defendants completely repudiated the plaintiffs' claim. Execution of the mortgage deed and the lease deed by lora in favour of the plaintiffs was denied by the defendants. It was stated that the land belonged to the defendants and a part of it was mortgaged by Jora with Samad Khan from whom the defendants got it re-deemed on payment of Rs. 120/-. They also denied the payment of any rent to the plaintiffs under the lease deed.

4. The trial Court framed as many as ten issues. Issue Nos. 1 and 2 were the material issues and are as under:

5. Issue No. 1:

Did the defendants' father usufructuarily mortgaged! the land in question with the ancestors of the plaintiffs?

6. Issue No. 2:

Did defendants' father execute the rent note dated 26th November, 1911. Is Qabuliyat invalid in law, and did defendants continue to cultivate the land on the same terms and does the relation of landlord and tenant subsist between the parties?

7. The trial Court after recording the evidence of the parties and hearing them found the above two issues against the plaintiffs and held that Exs. P-5 and P-6 i.e., the mortgage deed and the lease deed were never acted upon and the transaction remained only on paper. No clear finding as regards the execution of the document by Jora in favour of the plaintiffs was recorded by the trial Court. Nor does it appear from the judgment that any presumption under Section 90 of the Evidence Act in regard to these deeds was raised by the trial Court. The plaintiffs preferred an appeal against that decree but the learned District Judge also came to the same conclusion and rejected the appeal,

8. In this appeal it has been contended on behalf of the appellants that the finding of the courts Deiow that the mortgage deed and the lease deed were not acted upon, is erroneous. It is urged that after the expiry of the term of the lease i.e., 3 years, Jora and his sons continued in possession of the land and also paid rent for It to the plaintiffs. The plaintiffs and their ancestors also assented to the continuance of the defendants' possession over the land and in such circumstances, the Courts below should have found that the defendants were tenants of the plaintiffs and the same relationship subsisted during the period for which rent was claimed in the suit.

It is urged that though by virtue of Section 117 of the Transfer of Property Act, Section 116 which occurs in Chapter V does not apply to agricultural leases, out as the law laid down in Section 116 is one of equity, Its principles should also apply even to agricultural leases which are not governed by the Transfer of Property Act It is urged that there was positive evidence that Jora and after his death the defendants had been paying rent to the plaintiffs in respect of the land mortgaged with them. It could therefore safely be inferred that the lease was renewed on the same terms as are contains In Ex. P-6.

Alternatively it is urged that in case the payment of rent alleged by the plaintiffs is not held to be provetf still from the conduct of the parties it should be held that the defendants were tenants holding over. It is also contended that the finding of the Courts below about the payment of rent by the defendants to the plaintiffs is incorrect. It is urged that both the Courts did not apply their mind to the entries in

the account books of the plaintiffs with regard to the said payments and we re-wrong in rejecting them on grounds which cannot be supported in law. It is also contended that the plaintiffs-were not allowed to put in documentary evidence consisting of bonds executed by Moti and Lala, sons of Jora, in favour of the plaintiffs wherein they acknowledged their liability to pay rent to the plaintiffs under the lease deed.

9. Learned counsel for the respondents supports the judgment of the Courts below on the grounds mentioned therein.

10. It would be seen that issue No. 1 related to the question of execution of the mortgage deed by the-defendants' father in favour of the ancestors of the plaintiffs. Similarly, first part of issue No. 2 related to the-question of execution of the rent note on 26th November, 1911 by the defendants' father. On behalf of the-plaintiffs, only Anantmal one of the plaintiffs appeared as a witness. He did dot state about the execution of the documents in his presence. No other witness was examined to prove these documents and the plaintiffs-probably relied on the provisions of Section 90 of the Indian Evidence Act.

Before the trial however, the provisions of Section 90 of the Indian Evidence Act were not invoked by the plaintiffs in proof of the execution of the two documents and that is why the judgment of the trial Court does not expressly mention it. But from the tenor of the judgment it appears that the trial Court presumed the due execution of the documents. The finding recorded by the Court is that the documents Exs. P-5 and P-6 were not acted upon and the transaction remained only on a paper. The question of acting upon the document can only arise if the execution is held to be proved and not otherwise.

The learned District Judge also did not give a clear finding on this question. He only discussed the provisions of Section 90 of the Indian Evidence Act ana some cases in that connection, but did not say whether in tile circumstances of the case he presumed the document as having been duly executed and attested and proceeded to examine the question whether the documents were acted upon or not by the parties. The learned Judge then discussed the documentary evidence produced by the parties in order to see whether the relationship of landlord and-

tenant subsisted between them and came to the conclusion agreeing with the trial Court that the documents of mortgage deed and lease deed were never acted upon either by Jora or by his sons.

Though there is no clear finding regarding the execution by Jora of mortgage deed and lease deed in favour of the plaintiffs by the Courts beiow, yet it appears that both the Courts took the execution of these documents as proved keeping in their minds the provisions of Section 90 of the Evidence Act. The execution of these documents by Jora in favour of the plaintiffs has also not been seriously challenged on behalf of the respondents. Therefore I proceed to determine the questions raised in this appeal on the basis that Exs. P-5 and P-6 were executed by Jora in favour of the plaintiffs' ancestors.

It is clear from Ex. P-6 that the land was leased out to Jera for a period of three years and the amount of rent fixed was at Rs. 199/8/-. The rent was payable in two instalments i.e., on Baisakh Sudi 15 and Kartik Sudi 15 of each year. It was also stipulated that after the expiry of three years he could cultivate the land with the consent of the mortgagees. As stated plaintiffs' case was that even after the expiry of three years Jora conti-nued in occupation of the land and also paid rent to the plaintiffs. Further, after the death of Jora his sons also remained in possession and continued paying rent to them. In support of the allegation regarding payment of rent plaintiffs relied on Exs. P-7, P-8, P-9 and P-11 and entry Ex. P-10 which is on the back of the rent note itself. Anantmal plaintiff gave his own statement to prove the fact of payment of rent and the entries in the account books as also Ex. P-10.

On behalf of the respondents mortgage deed alleged to have been executed by Jora in favour of Samad Khan and Nandar Khan dated 22nd February, 1924 and copies of revenue records Exs. D-2 and D-9 were produced in evidence. Defendants also examined several other witnesses including Nandar Khan in support of their pIea.

The trial Court considered the above evidence and remarked that the documents produced by the plaintiffs showed that certain quantity of grain was received by them for some land under mortgage without giving clear details but the entries in the revenue records produced by the defendants did not establish the payment of

rent by the defendants to the plaintiffs. The learned District Judge too considered the plaintiff's evidence and the entries in their account books. After considering the evidence of both parties, the learned Judge characterised the entries made by the plaintiffs in their account books as bogus ones in view of the evidence produced by the defendants which according to the learned Judge was of conclusive nature.

11. The learned counsel for the appellants assailed the above finding of the Courts below on several grounds, it is urged that the first appellate Court was not right in observing that the copies of the revenue records produced by the defendants were of conclusive nature. Simi-larly, the learned District Judge was not right in saying that the entries in the plaintiffs' account books were not corroborated by other evidence. It is pointed out that the plaintiff Anantmal gave his own evidence to prove the fact of payment of rent as well as the entries made in that connection in their account books. Whether Jora and his sons paid rent to the plaintiffs as alleged by them is purely a question of fact. Although some of the grounds given by the Courts below in support of that finding may not be sustainable in law yet the first appel-late Court considered the statement of the plaintiff and the nature of the entries and came to the conclusion that they could not be relied upon.

It is clear that there is neither any entry in the account books of the plaintiffs nor any other documentary evidence prior to Smt. year 1982 to show the payment of rent to the plaintiffs by Jora. Anantmal even did not say that the account books in which the entries Exs. P-7, P-8, P-9 and P-11 appeared were kept in the regular course of business. He did not say that the above entries were made at the proper time i.e., at the time of payments were made. Payments alleged to have been made in Smt. year 1985 to 1993 have not been entered in the account books of the plaintiffs. In view of these infirmities in the evidence of the plaintiffs and the rea-sons given by the first appellate Court, I feel myself bound by that finding in second appeal. It will therefore, have to be taken for the purposes of this case that after the expiry of three years. It has not been established that either Jora or his sons paid any rent of the land in dispute to the plaintiffs.

12. It is next to be seen whether on the other evidence and circumstances it can be held that the relationships of landlord and tenant subsisted between the barries

up-till the year 1945. It is contended that the very fact that Jora and his sons continued in possession of the disputed land for such a long period shows that it was with the assent of the plaintiffs and in such circumstances it should be held that they were tenants holding over and the tenancy was renewed on the same terms as are embodied in Ex. P-6.

The lease in the present case Is for agricultural purposes and Section 117 of the Transfer of Property Act declares that the provisions of Chapter V of the Transfer of Property Act will not apply to such leases except in so far ss the 'State Government' may, by notification published in the 'Official Gazette', declare all or any of such provisions to be so applicable in the case of an or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.' No notification of the State Government to make any provision under this Chapter applicable to agricultural leases has been pointed out.

Now the question is whether Section 116 which occurs in Chapter V can be held to be applicable to agricultural leases. Learned counsel for the appellants in support of his contention relies upon Krishna shetti v. Gilbert Pinto, AIR 1919 Mad 12 and Narayanan Nair v. Kunhan Mannadiar, AIR 1949 Mad 127. In Nara-yanan's case, AIR 1949 Mad 127, two decisions of the Madras High Court i.e., Krishna Shetti's case, AIR 1919 Mad 12 and Umar Pulavar v. Dawood Rowther, AIR 1947 Mad 68 were relied on. In Umar Pulavar's case, AIR 1947 Mad 68, it was held with reference to Section 111(g) of the Transfer of Property Act that:

'Section 111(g) as amended in 1929 embodies a principle of justice, equity and good conscience, and must be held to govern even agricultural leases. Therefore in the case of an agricultural lesse where there is forfeiture by denial of landlord's title, a notice in writing determining the lease was necessary.'

It was further observed that:

'The principle so embodied in the section as a result of this amendment becomes, so to say, a principle at justice, equity and good conscience which must be held to govern even agricultural leases, though under Section 117 of the Act they are exempt from the operation of the chapter.'

Reliance was also plated in that case on the decision of Krishna Shetti's case, AIR 1919 Mad 12, where it was held that:

'The fact that agricultural leases such as this one are excepted from the operation of Sections 105 to 116, T. P. Act does not, in my opinion affect the present question. The Transfer of Property Act was framed by eminent English lawyers to reproduce the rules of Eng-lish law in so far as they are of general application and rest on principle as well as authority, and its provisions are in my opinion binding on us as rules of justice, equity and good conscience.'

These observations came for consideration In Namdeo Lokman v. Narmadabai, AIR 1953 SC 228 and their Lordships of the Supreme Court observed that 'This was too broad a statement to make.' Their Lordships then considered Sections 106, 107, 108, 109, 110 and 111 which occur in this Chapter and observed that:

'The above sections cannot be said to be based on any principle of equity.'

Finally their Lordships observed that:

'The statement that sections 105 to 116 Transfer of Property Act, are founded upon principles of reason and equity cannot be accepted either as correct or precise. Of course, to the extent that those sections of the Act give statutory recognition to principles of justice, equity and good conscience they are applicable also to cases not governed by the Act'

The question is whether Section 116 of the Transfer of Property Act embodies the principles of general application and can be held to bo applicable also to cases not governed by the Act. This section lays down that:

'If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.'

The principle underlying this section is based uponconsideration of equity and justice and in the absenceof anything to the contrary can also be made applicablealso to cases not governed by the Transfer of PropertyAct. Accepting, therefore, the contention of the learnedcounsel that principles underlying section 116 are alsoapplicable to the lease in the present case, the nextquestion is whether Jora and his sons were tenants holdingover within the meaning of Section 116 of the Transfer ofProperty Act. In order that a tenant may bs regardedas holding over, it is necessary to show that after thedetermination of the lease, the lessor or his legal re-presentative accepted rent from the lessee or otherwiseassented to his continuing in possession. As alreadystated plaintiffs have failed to prove that any rent waspaid either by Jora or his sons to the plaintiffs untilJuly, 1948 when the present suit was filed.

13. The other ground is that the plaintiffs assented to the defendants continuing in possession of the disputed land. There is no doubt that after the expiry of the term of the lease Jora and his sons continued in possession of the land but mere continuance of possession after the expiry of the lease without more cannot be regarded as sufficient to prove necessary assent at the landlord under Section 116 of the Transfer of Property Act. Assent of the landlord may be express or impiled and the length of the tenant's possession may be an important circumstance and slight evidence on the part of the landlord in such cases may be sufficient to prove the assent. But in the present case there is no evidence either direct or circumstantial to show the assent of the landlord to the continuance in possession of the tenants. There is no evidence thai the landlord ever demanded rent from the tenants or served them with a notice for paying rent. Therefore, merely because for a period of 35 years Jora and his sons remained in possession of the disputed land and the landlord took no action against them, it cannot be held that the tenants were holding over with the assent of the landlord.

The tenants in the present case ware admittedly the owners of this land and their possession can be accounted for on that ground also. Whether the continuance of possession is with the assent of the landlord is a question of fact depending upon the circumstances of each case. In the present case, I do not find any circumstance to come to the conclusion that possession of the defendants over

the disputed land was with the assent of the plaintiffs. On the other hand these facts that Jora mortgaged part of this land with Samad Khan in 1924, and the plaintiffs never got their names recorded as mortgagees in the revenue records indicates absence of assent on their part. That being so it cannot be held that the relationship of landlord and tenant subsisted between the parties during the years, 1943, 1944 and 1945 for whose rent the present suit was filed.

14. The only question which remains to be examined is whether the trial Court wrongly rejected the documentary evidence which the plaintiffs wanted to put in. It appears that before the framing of issues a fist of documents was submitted in the Court on behalf of the plaintiffs. In that list it was mentioned that some of the documents will be produced in the case at a later stage while some documents were actually put on the record of the case. While the plaintiff. Anantmal was being examined permission of the Court was sought to prove a bond purported to have been executed by Moti and Lala in Savant Year Sawan 1985 which had been mentioned in the list. Objection was raised on behalf of the defendants on the ground that it was being produced at a late stage and was not relevant. The trial Court rejected the document as being irrelevant.

It does not appear from the order of the Court that the plaintiffs wanted to produce any other document besides the bond above referred to. After the parties had concluded their evidence, the defendants applied for putting in certified copies obtained from the revenue records in their evidence. In reply to that application the plaintiffs stated that in case the defendants' documents are admitted in evidence they should also be allowed to put in their own documents. The trial Court admitted the documents produced by the defendants in evidence but rejected the plaintiffs' prayer on the ground that the documents produced by the defendants were public documents while those of the plaintiffs were private documents.

it is not clear from the plaintiffs' application as to which documents they wanted to put in their evidence. Neither any application nor any affidavit was submitted on behalf of the plaintiffs assigning any reason for late production of the documents. Though an objection about rejection of their documents was taken on their behalf in the memo of appeal before the first appellate Court, yet that question does not

seem to have been agitated before that Court because there is no mention of it in the judgment. Had this point been urged before the first appellate Court, it should necessarily have found place in the judgment.

Learned counsel showed me the bond of the year 1985 and urged that it contained an admission of Moti and Lala about their liability for payment of rent under the lease deed in question. It is also urged that the trial Court was completely in error in saying that the document sought to be produced was irrelevant. Whether this document or other documents which the plaintiffs wanted to put in evidence are relevant or not need not be decided, because the plaintiffs did not urge this point before the first appellate Court and in the circumstances must be deemed to have abandoned it Appellants cannot therefore, fee permitted to raise a plea in second appeal which was impliedly abandoned by them in the first appeal.

The present suit is pending since July 1946 and allowing the plaintiffs to put in additional evidence at this stage, would mean the reopening of the whole case again. I, therefore, do not find any force in the contentions raised on behalf of the appellants.

15. This appeal therefore, fails and is hereby dismissed with costs.

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