Nathu and Others Vs Devi Singh and Another

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: July 22, 1965

Acts Referred: Succession Act, 1925 â€" Section 63

Citation: AIR 1966 P&H 266 : (1965) 67 PLR 1135

Hon'ble Judges: Shamsher Bahadur, J; P.D. Sharma, J

Bench: Division Bench

Advocate: R.V.S. Mani, for the Appellant; S.N. Shanker with Mr. Daljit Singh, for the Respondent

Final Decision: Dismissed

Judgement

Shamsher Bahadur, J.
Nathu Singh (defendant 1) as a legatee and five other persons(defendants 2 to 6)as executors were sued by the

plaintiff-respondent Devi Singh for possession of the suit premises consisting of Shop No. 376 situated outside Kucha Ghasi Ram, Chandni

Chowk, Delhi, on the ground that this shop of which Chhote Lal was a tenant under the plaintiff could not have been bequeathed by his will and

consequently the possession of it of Nathu Singh, the first defendant, as legatee and of the other defendants as executors was unlawful. Besides the

decree for possession, a sum of Rs. 1,025/- as mesne profits was also claimed by Devi Singh plaintiff for wrongful use and occupation of the suit

shop by the first defendant. The suit having been decreed by the Subordinate Judge, Delhi, on 15th of June, 1955, for possession and recovery of

Rs. 1,025/-, the defendants have appealed to this Court.

2. By the rent deed executed on 5th May, 1945 (Exhibit P. 1), Chhote Lal Kahar agreed to take on rent the demised shop outside Kucha Ghasi

Ram on a daily rent of Rs. 1/15/6 which was later enhanced to Rs. 2/8/- from the plaintiff. It was covenanted in the first place that the payment of

rent which was on a daily basis would be made regularly and if the rent was not paid for seven days the landlord would be entitled to recover the

entire amount of rent in lump sum together with costs. The second stipulation in this rent note is that the tenant bound himself to keep the demised

premises intact and not to locate anybody in it on rent or without rent and, inter alia, to refrain from doing anything in respect of the property which

is against law. Chhote Lal carried on the business of a pan seller in the shop which being situated in an important part of the city seems to have

attracted good business. During the course of his illness which resulted in his death on 9th July, 1952, Chhote Lal executed a will on 1st of July,

1952 (Exhibit D 3) and according to its fourth clause the first defendant who is stated to have served him well during his lifetime was made an

owner of the goods bardana etc. of the demised shop and a duty was cast on him to pay Rs. 50/- per mensem to Mst. Parbati during her lifetime

for such period as he was running the aforesaid shop. The shop in dispute is not the only property which was bequeathed by the testator Chhote

Lal who left behind no heir. The properties owned by Chhote Lal and bequeathed by this will were nine in all including the shop. The five

defendants, other than Nathu Singh, were made executors and were directed to recover the amount due to the testator and to pay the interest on

the entire amount to Mst. Parbati widow of Chhatar Mal. It is not necessary to (sic) to the other directions in the will and it would suffice to

mention that the first defendant was directed to do business of the said shop in accordance with the wishes of the executors.

3. The principal points on which controversy has hinged relate to the construction of the will and its legal effects and are covered by the following

four issues framed by the trial Court:

1. Whether the late Chhote Lal made a will in favour of defendant No. 1 and bequeathed the tenancy rights in his favour ?

2. If issue No. 1 is proved, could Chhote Lal bequeath the tenancy rights. If not, what is its effect?

3. Whether the plaintiff ever attorned to defendants 2 to 6 as his tenants ?

4. Is the plaintiff entitled to any compensation as mesne profits for the use and occupation of the shop ? If so, at what rate ?

On the first issue, the finding of the learned Judge is that they will had been executed by Chhote Lal though it did not specifically transfer the

tenancy rights of the shop in favour of the first defendant. On the second issue, the answer given by the trial Court is that Chhote Lal had the power

to make a will regarding his tenancy rights and his undertaking in the rent note not to assign the tenancy applied only to transfers inter vivos. It was

further found that the plaintiff had not attorned in favour of the defendant-executors and the issue was decided against the defendants. The fourth

issue which was not disputed has been decided in favour of the plaintiff and the amount found due is in accordance with the claim made. On these

findings, a decree for possession of the suit shop together with recovery of Rs. 1,025/- has been passed in favour of the plaintiff-respondent.

4. It is very strongly contended by Mr. Mani, the learned counsel for the defendant-appellants, that the will has to be read as a whole and the

absence of the specific words that the shop was being bequeathed to the first defendant is not of much importance when we find that this indeed

was the manifest intention of the testator. This proposition cannot be disputed and as observed by Lord Esher. Master of the Rolls, in In re

Harrison Turner v. Hellard (1885) 30 Ch.D. 390:

There is one rule of construction, which to me is a golden rule, viz.. that when a testator has executed a will in solemn form you must assume that

he did not intend to make it a solemn farce,-that he did not intend to die intestate when he has gone through the form of making a will (The will)

may be read in such a way as not to amount to a solemn farce

There can be no doubt that Chhote Lal intended the first defendant to carry on the business of the shop and to construe it narrowly, as has been

urged by Mr. Shiv Narain Shanker, the learned counsel for the plaintiff-respondent, that only the stock-in trade lying in the shop was to pass in the

hands of the first defendant would be to make the legacy indeed illusory especially when the legatee was bound to pay Rs. 50/- per mensem to

Parbati as an allowance. It may be that the omission of the specific words was deliberate in as much as the testator knew of the fetter which had

been placed in the rent note on his power of alienation of the tenancy rights, but on the whole it seems to us that Chhote Lal wanted the tenancy

rights in the shop to be passed on to the first defendant.

5. The execution of the will on which a finding has been given in favour of the first defendant has been challenged by Mr. Shanker. The learned

counsel submits that section 63 of the Indian Succession Act requires the testator to sign or affix his mark to the will in the presence of the attesting

witnesses who in turn shall append their mark or signature in the presence of the testator under clause (c). A brief reference to the evidence would

suffice to show that this essential requirement of clause (c) of section 63 has not been complied with. There were as many as seven attesting

witnesses of the will but mention may be made of the statement made by Munshi Lal D.W. 2 who deposed that the will was brought to him in the

gali in front of Chhote Lal''s house for signatures. He had been to see Chhote Lal but the actual attestation was done by him in the street after he

had left the room of Chhote Lal. According to him, the other witnesses also attested the will in his presence in the street. Amba Parshad D. W. 3,

another attesting witness, says that the will was not only written. In the room of Chhote Lal where it was read over but attestation was also done

there. According to him, the attesting witnesses appended their signatures on the will in the presence of Chhote Lal in his room. This evidence is

obviously unsatisfactory and the essential requirement of due execution does not appear to be satisfactorily established.

6. Mr. Mani in his very forcible argument has pressed that the tenancy of Chhote Lal being contractual could have been made a subject-matter of

will. He has emphasised the distinction between a statutory tenancy which confers only a personal right on the tenant and the tenancy arising from

contract which is assignable. The law on the subject is pithily summarised in R.E. Megarry on the Rent Act (9th edition) at page 182:

It has been said time and lime again that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain

possession of the property. The tenancy has been called nothing more than a status of irrevocability, or a permanency of tenure.....He has a

merely personal right of occupation. The statutory tenancy.....is merely a compendious expression to describe the right of a tenant of protected

premises to remain in possession of those premises, notwithstanding the determination of his contractual interest.

At page 198 of the same treatise it is stated that:

A contractual tenancy is assignable unless the agreement provides to the contrary; it also vests in the trustee in bankruptcy on the bankruptcy of the

tenant and in his personal representatives on his death.....

It is argued on this basis by Mr. Mani that Chhote Lal being in enjoyment of contractual tenancy of the disputed shop could have made a will

transferring his right in it to the first defendant. Mr. Shanker has sought to repel this argument by reference to the provisions of the Delhi and Ajmer

Rent Control Act, 1952, which was enforced in the State of Delhi on 9th of June, 1952, and was applicable to all tenants at the relevant time.

Under sub-section (1) of section 13 of this Act, no decree or order for the recovery of possession of any premises can be passed against any

tenant. There are, however, some provisos to this sub-section and it is important to note that the immunity enjoyed by a tenant under sub-section

(1) shall not apply to a tenant who without obtaining the consent of the landlord has before the commencement of this Act ""sub-let, assigned or

otherwise parted with the possession of the whole or any part of the premises."" In other words, a statute which makes no distinction between a

statutory or a contractual tenant lays down a fetter on the power of the tenant to part with the possession of whole or any part of the demised

premises without the consent of the landlord. According to Mr. Mani, this restriction is applicable only to a tenant in respect of alienations during

his lifetime but on the death of a tenant a contractual tenancy could be bequeathed under the general law. There is nothing to justify such a

construction being placed on the provisions of proviso (c) of sub-section (1) of section 13 of the Delhi and Ajmer Rent Control Act, and it would

indeed be strange that when a tenant is prohibited during his lifetime from making any transfer of the premises under his tenancy is permitted to do

so by the execution of a will to operate after his death. It has also been so held in Ram Dass v. Roop Chand R.F.A. No. 119-D of 1960, decided

by the Bench of Chief Justice and S.B. Capoor, J. on 12th of September, 1964. In that case, the landlord had instituted a suit for possession of

premises in Chandni Chowk on the ground that the tenant who died on 20th of July, 1958, had bequeathed the tenancy rights by a registered will

of 16th of May, 1958. The finding of the trial Court that the legatee under the will of a tenant to whom possession has been transferred without the

consent of the landlord cannot be deemed to be a tenant of the landlord was affirmed in appeal. It is true that in that case there was no lease-deed

in favour of the landlord and the tenant was regarded as a statutory tenant. There is nothing, however, in the provisions of sub-section (1) of

section 13 to show that the bar of transference is to be applied only to statutory tenants. What is hit by proviso (c) is a volitional transfer by a

tenant without the consent of the landlord. If on the death of a person holding contractual tenancy the suit premises come into the hands of the heirs

of the tenant that is not an intentional or volitional transfer and such parting with the possession would not be affected, The case of parting with

possession by will is, however, clearly envisaged in proviso (c) to sub-section (1) of section 13.

7. We also disagree with the trial Judge regarding his finding on the restriction which had been placed on the right of the tenant to transfer his

tenancy in the rent note itself. In our opinion, the testator as a tenant had solemnly covenanted that he would not transfer the tenancy to any one

else during his lifetime. The restrictions, in our opinion, contained in the rent note and clause (c) of proviso to sub-section (1) of section 13

transcend any right which Chhote Lal may have had as the person holding a contractual tenancy to transfer it by testamentary disposition.

8. Mr. Mani was not able to give any effective reply to the argument of Mr. Shanker regarding the disability of Chhote Lal to make a bequest in

favour of the first defendant in view of the restrictions placed by the statute and also the rent note. In the short adjournment granted to him, the

learned counsel merely stated that the Delhi and Ajmer Rent Control Act is unconstitutional and ultra, vires and could not affect the rights of a

tenant under the common law holding a contractor tenancy. This is really no answer to the case set up by the counsel for the plaintiff-respondent.

9. Piecing together our conclusions, we would accordingly hold that though on a fair construction they will did transfer the tenancy rights in favour

of the first defendant, the execution of the testamentary document had not been established"" u/s 63 We are also of the opinion that the trial Court

was not right in holding that Chhote Lal could bequeath his tenancy rights in face'' of the restrictions imposed by the statute and the rent note. In

this view, the decision on the third issue with regard to attornment becomes irrelevant.

10 The result is that the plaintiff''s suit, in our opinion, has been rightly decreed and we would accordingly dismiss this appeal with costs.

P.D. Sharma, J.

11. I agree.