(1927) 04 AHC CK 0022

Allahabad High Court

Case No: None

Bhawani and Others	APPELLANT
Vs	
Chaudhari Mangali Singh	RESPONDENT

Date of Decision: April 6, 1927

Acts Referred:

- Transfer of Property Act, 1882 - Section 58

Citation: AIR 1927 All 567(1) : (1927) ILR (All) 820 : 102 Ind. Cas. 205

Hon'ble Judges: Mukerji, J; Ashworth, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Ashworth, J.

This second appeal arises out of a suit for damages brought by the plaintiffs-appellants in the following circumstances. The plaintiffs on the 6th of July 1921, were in debt to their landholder in respect of the rent due for a certain occupancy holding. They also owed certain other debts. In order to meet these liabilities they executed a document granting to the defendant a right to hold their occupancy holding for a period of five years in consideration of the defendant promising to meet the arrears of rent and the outstanding debts calculated at a sum of Rs. 600 and also in consideration of the defendant paying the annual rent due to the landholder of the plaintiffs. The defendant failed to pay the arrears of rent and, in consequence of this, the landholder sued the plaintiffs for arrears of rent. The plaintiffs were unable to satisfy the decree for arrears in full and consequently they were ejected by their landholder in execution of the decree for arrears. The present claim is for Rs. 1,000 damages which is the estimated value of the occupancy holding.

2. The first Court dismissed the suit on the ground that there was some collusion or negligence on the part of the plaintiffs which would not justify their being awarded

any damages. The lower appellate Court upheld the dismissal of the suit on the two following grounds. It held that there was contributory negligence on the part of the plaintiffs because they could have satisfied the decree for arrears of rent and in that case would not have lost the holding. It also held that the contract on which the plaintiffs sued was one forbidden by the Tenancy Act and void.

3. As to the lower appellate Court''s first reason for dismissal of the suit, namely, contributory negligence, we find it difficult to accept, but in view of our decision on the other question that arises in appeal, it is unnecessary to affirm or disaffirm this finding,

4. The real question in this appeal is whether the grant, transfer or agreement whichever we may call it, on which the suit is based, is void under Sections 20 and 21 of the Tenancy Act (II of 1901). Those sections read with Sections 24 and 25 of the Act in effect provide that the interest of an occupancy tenancy is not transferable otherwise than under a sub-lease for a term not exceeding five years. The document in suit provided for the transferees having a right of occupation for five years of the holding. On the expiry of that date there should be no accounting, but the plaintiffs were entitled to resume the holding. In view of the Privy Council decision Nidha Sah v. Murli Dhar [1903] 25 All. 115 we find it difficult to hold that the transaction amounted to a mortgage. The transaction appears to have been a grant of land for a fixed term free of rent in consideration of a promise to pay certain debts already due and to pay the rent as it became due yearly to the zemindars. We have been shown several decisions which seem to depend on the question whether a transaction was a mortgage or a lease. The question in this case, however, is whether the transaction was a sub-lease within the term of Sections 24 and 25 of the Tenancy Act. It is clear that these sections contemplate the creation of a sub-tenant. A tenant is defined as the person by whom rent is payable. Rent is defined as whatever is in cash or kind to be paid or delivered by a tenant for land held by him. In view of these definitions, and also of the provisions generally of the Tenancy Act, it seems to us that the sub-lease contemplated by Sections 24 and 25 of the Tenancy Act must mean a contract under which the person given the right of occupation is bound, after entering into occupation to pay something in cash or kind to the person granting that right and will not apply where, as in this case, nothing at all is to be paid in cash or kind to the person transferring the right of occupation.

5. The transaction in question was clearly a transfer and for the reasons stated we hold that it was not sub-lease within the meaning of Sections 24 and 25. It follows that it was void and the lower appellate Court was, in our opinion, right in holding that the plaintiffs could not sue on it. For these reasons we dismiss the appeal with costs.

Mukerji, J.

6. I agree with my learned brother that the transaction before us is not one of pure sub-lease which alone is permitted by Sections 24 and 25 of the Tenancy Act. The facts of the case are given in my brother''s judgment. The defendant advanced a sum of Rs. 600, and it was agreed that he was to recoup himself with what he got out of the tenancy, after payment of the zemindar''s rent, in the course of five years of occupancy. On the one hand, it is said that the defendant was to pay himself Rs. 120 a year, the rent which was payable to the principal tenant. On the other hand, it is said that the sum of Rs. 600 advanced was recoverable with interest though none was in terms stipulated for. On one side it is urged that it is a case of sub-lease pure and simple. On the other hand it is said that it is a case of a pure usufructuary mortgage limited for a time.

7. There can be no doubt that the transaction falls entirely within four corners of Section 58 of the Transfer of Property Act and the transaction is one of a pure usufructuary mortgage, It cannot be doubted that in a purely usufructuary mortgage the only security that the mortgagee gets is his possession over the property. He is not entitled to sell the property and if he is dispossessed he can only claim back possession. If that sort of security be good enough to make a mortgage, a transaction in which ''security'' is essential, the present transaction is equally a transaction in which security was furnished in the shape of a tenancy holding. It was argued that the dictum of their Lordships of the Privy Council in Nidha Sah v. Murli Dhar [1903] 25 All. 115 established that a transaction like the present one was not one of mortgage. Their Lordships, however, did not decide anything like that. Their Lordships only indicated what were certain considerations against the transaction before them being held to be a mortgage. The question never specifically arose and was never specifically decided. Their Lordships for the purpose of the decision of the case, called the promisee in the case a mortgagee and decided the suit on the terms into which the parties had entered.

8. In the present case, it is impossible to believe that the defendant was forgoing his interest on the sum of Rs. 600 he had lent, and was simply re-paying himself in small portions, viz., Rs. 120 a year, only the principal amount. As a matter of fact, the yield of the occupancy tenancy must have been enough to cover a proper interest on the sum of Rs. 600 for the first year and proportionately smaller amounts in later years. Whatever, however, may be the precise nature of the transaction I am satisfied, as is my learned brother, that it is not a case of sub-letting within the meaning of Sections 24 and 25 of the Tenancy Act.