(1919) 05 CAL CK 0039

Calcutta High Court

Case No: App. No. 35 of 1918

Sm. Baranashi Dassi		APPELLANT
	Vs	
Papat Velji Rajdev and Others		RESPONDENT

Date of Decision: May 14, 1919

Final Decision: Allowed

Judgement

Sanderson, C.J.

This is an appeal by the Plaintiff against the judgment of Chaudhuri, J., whereby he dismissed the suit. The suit was for a declaration that the Plaintiff is a tenant of the shop room of No. 6/2, Lindsay Street, Calcutta, at the monthly rental of Rs. 150 plus the occupier''s share of the Municipal rates and taxes for four years certain from the 1st April 1914 with an option of a further period of four years and that she is not liable to he ejected from the said premises during the said period; there was a further claim that the Defendant Papat Velji Rajdev should he restrained from executing an order for delivery of possession made by the Court of Small Causes on the 12th January 1918 : damages to the extent of Rs. 1,500 were claimed against all the Defendants.

2. The plaint contained an allegation that in March 1914 it was agreed between the Plaintiff and the Defendants Karat Kumari and H.K. Sil that the Plaintiff should occupy the said shop for four years certain and with an option for a further period of four years as mentioned above, and it was further alleged that the Plaintiff was assured that she would he allowed to occupy the said shop loom at the same rent for 16 years.

3. It was further alleged that it was agreed that a formal lease would be executed whenever required by the Defendants Sarat Kumari and H.K. Sil at any time during the said period of tenancy.

4. The Defendants Nos. 2 and 3 denied the alleged agreement and alleged that the Plaintiff was merely a monthly tenant.

5. The first Defendant was a lessee of the whole house under a lease granted by the Defendants Nos. 2 and 3, and it was alleged that these Defendants had given notice to the Plaintiff to payment to the first Defendant from the 1st of October 1916.

6. On the 12th January 1918 the first Defendant obtained an order in the Small Cause Court against the Plaintiff in this suit for vacation of the premises by the 12th February 1918, and this suit was filed on the 11th February 1918.

7. The Plaintiff had been tenant of the shop in question for many years, it was said since the year 1885 and she had been carrying on a jewellery business, therein under the name of Shambhu and grandsons. She was assisted in her business by her grandsons Haridas Mitter and F.C. Mitter.

8. The evidence of F.C. Mitter was to the effect that the rent was formerly Rs. 85 and that in 1908 it was raised to Rs. 150 : it was alleged that an assurance was then given to the Plaintiff that she would be allowed to enjoy the property for 15 or 16 years without any further enhancement during that period.

9. I think that the allegation in para. 2 of the plaint which seems to suggest that the arrangement as to the 15 or 16 years was made at the interview in March 1914 is obviously a mistake : not only because of the evidence in the case, but also because the arrangement is referred to in the Plaintiff''s letter of the 27th March 1911, which both sides agree was written before the interview which took place a day or two after that letter.

10. The learned Judge, however, seems to have laid considerable stress upon the difference between F.C. Mitter''s evidence in this respect and the statement in the plaint.

11. It seems to me that F.C. Mitter''s evidence is in accordance with the above-mentioned letter, written before the interview, and is continued by it.

12. On the 14th March 1914 the Defendant H.K. Sil wrote a letter to the Plaintiff in the following terms:--

Calcutta 14th March 1914.

Messrs. Shambhu and Grandson.

6/2, Lindsay Street.

Dear Sirs,

Re : 6/2, Lindsay Street

Perhaps you have come to know that I have got the possession of the above premises. Accordingly you are to pay me rent, instead of Shaik Mahomed Safi regularly within the 5th day of every month. I shall be glad if you enter into a lease with me from the 1st day of April 1914. The lease should he at least for 3 years

(three years) certain.

Yours faithfully,

H.K. Sil

13. On the 27th March 1914 the Plaintiff sent a reply as follows:--

Calcutta, 27th March 1914.

To

Babu Harendra Krishna Sil,

83, Upper Chitpore Road,

Calcutta.

Dear Sir,

Re : 6/2, Lindsay Street.

We beg to acknowledge receipt of your letter of the 14th instant and in reply we beg to say that we are extremely glad to note that you have taken khas possession of the premises. We are your oldest tenants and shall therefore be happy always to hold our above shop room which is no doubt separate and separately numbered and to continue our tenancy directly under you. It is needless to say that we shall always be regular in payment of our rent to you every month. We are quite agreeable to and gladly accept and acquiesce in your proposal of a lease from the first of next month with this addition only that the same should be for four years certain with option for another term of four years under the same terms and conditions and at the same rate of rent as at present, namely, Rs. 150 (rupees one hundred and fifty) only rent per month besides occupier''s share of taxes. This will no doubt set our mind at rest for some time at least on the score of our tenancy under the present term and condition.

We hope and consider the above as yucca to be acted upon as desired by you but if at any time hereafter you think it necessary to have formal lease in writing it may be drawn up on the above lines with other usual terms as are generally put in etc., and we shall always be ready to execute the same.

We may remind you that when the last enhancement was made from Rs. 85 (rupees eighty-five.) only to Rs. 150 (rupees one hundred and fifty) only more than 75 per cent. assurance was given to us by you that no enhancement will be made for the next 15 or 16 years.

We are, Dear Sir,

Yours faithfully,

Shambhu and Grandson.

14. From these letters it appears that the Defendant H.K. Sil had got possession of the premises; that the Plaintiff was to pay rent to him instead of M. Safi, to whom the whole of the premises had been leased; and that H.K. Sil was desirous that the Plaintiff should enter into a lease which should be for at least three years certain.

15. It further appears that the Plaintiff was agreeable and accepted the proposal of H.K. Sil as to a lease, with the addition that the lease should be for four years certain with the option of another term of four years.

16. The last paragraph but one of the letter of 27th March 1914 goes to show that the Plaintiff at that time would have been satisfied with this letter as a record of the arrangement which she proposed but expressed herself willing to execute a lease if H.K. Sil at any time thought it necessary to have a formal lease.

17. Both sides agree that a day or two, or two or three days after that letter, H.K. Sil sent his Sircar for the Plaintiff''s grandson F.C. Mitter, who thereupon went to see H.K. Sil and an interview took place.

18. And one of the main questions in this case is what took place at that interview. The learned Judge has accepted the Defendant H.K. Sil''s evidence as to this matter.

19. Before considering the evidence, it is to he noted that before the interview both parties were anxious to have a more definite arrangement. The Defendant H.K. Sil prepared a lease for at least three years; the Plaintiff wanted one for four years and an option for a further period of four years.

20. The Plaintiff would naturally be anxious to have her occupation secured, and the Defendant was anxious that a lease of not less than three years should be entered into. The probability therefore is that unless there was some difficulty which could not be overcome, some arrangement as to a lease would be arrived at when the interview took place.

21. F.C. Mitter''s evidence was to the effect that at the interview H.K. Sil wished to enhance the rent; when the Defendant was asked in cross-examination if he had asked at the interview for higher rent than Rs. 100 his answer was "yes, I might have, I don''t remember" from which I think it may be taken that F.C. Mitter''s evidence on that point is correct.

22. F.C. Mitter then said that he protested against the proponed enhancement and reminded H.K. Sil of his promise not to enhance the rent any further after the last enhancement, made in 1908 when he raised the rent to Rs. 100. This is in accordance with the letter of the 27th March 1914 written only a few days before the interview.

23. H.K. Sil then agreed to the rent remaining at Rs. 150; both sides agreed to this.

24. F.C. Mitter, according to his evidence, then wanted a lease to be executed : the word "he" in line 33 at page 13 of the paper-book, it was agreed at the hearing of

the appeal, should be read as " we," i.e., meaning the Plaintiff and her grandsons, who were carrying on the business.

25. F.C. Mitter wanted the lease to be registered so that although the Plaintiff, when the letter of the 27th March 1914 was written, was content not to have a formal lease, but to rely on the record contained in the letter. F.C. Mitter according to his evidence changed his position at the interview and wanted a lease.

27. Thereupon, according to F.C. Mitter''s evidence, the Defendant. H.K. Sil said that as he was going to be in khas possession of the property and there were women interested in the property there was no necessity to go to the worry and expense of a lease : I gather from his evidence that F.C. Mitter did not press for a lease but was satisfied with H.K. Sil''s assurance that they had nothing to fear from outsiders, and that the terms as to a four years lease and an option for a further term of four years mentioned in the Plaintiff''s letter of 27th March 1914 were agreed to.

28. The Defendants Nos. 2 and 3 in September 1914 granted a lease of the whole of the premises to one S.N. Bose and on the 25th September H.K. Sil wrote to the Plaintiff as follows.

Calcutta, 20th September 1914.

Messrs. Shambhu and Grandson.

Dear sirs,

Please take notice that I have leased premises; Nos. 6, 6A, 6B, Lindsay Street, to Babu Surendra Nath Bose of 17, Brindaban Pal''s Lane from 1st instant for a term of 15 year: all rents payable from that date should be paid to him.

Yours truly,

Horendra Krishna Sil.

29. F.C. Mitter''s evidence was to the effect that this letter was not received until the 12th October 1914 and that on the following day S.N. Bose came to collect the rent.

30. F.C. Mitter said he told S.N. Bose of the arrangement under which the Plaintiff was occupying the shop and showed him the correspondence and told him that if S.N. Bose accepted that arrangement, the Plaintiff would be willing to pay the rent to him, that S.N. Bose said he would make enquiries and let the Plaintiff know : that on the following day S.N. Bose came again and gave the Plaintiff the letter, dated the 14th October 1914, which is as follows:--

Calcutta, 14th October 1914.

Messrs. Shambhu and Grandson.

Dear Sirs,

I agree to the terms of the lease you have with Mr. H.K. Sil. Please therefore pay my Bill of Rs. 150 as you can have no more objection.

Yours truly,

Surendra Nath Bose.

31. S.N. Bose was called as a witness and his evidence corroborates the evidence of F.C. Mitter, but the learned Judge has come to the conclusion that it was not of much value. It appears that S.N. Bose, in his evidence, said that when he went for the rent, "they," by which I suppose he meant the Plaintiff or some one on her behalf, showed him a letter from H.K. Sil authorizing the Plaintiff to hold the shop for four years certain and four years optional. This was clearly incorrect, for there was no such letter, and consequently the learned Judge concluded that his evidence was not of much value. With great respect I cannot go so far as that. It is obvious that S.N. Bose was wrong when he said he had seen the letter from H.K. Sil, but I think this may have been a mistake : if he had been shown the correspondence in 1914, as F.C. Mitter says he was, he may have forgotten the details of the correspondence and the writers of the respective letters, though he may have remembered the substance of the arrangement--he was giving his evidence in 1918, and the occurrence took place in 1914. It is clear that he had not been coached for his evidence, for if he had been informed of the Plaintiff''s case or if he had been shown the correspondence shortly before giving his evidence, he would not have made such an obvious mis-statement. Two points in connection with S.N. Bose''s evidence remain to be mentioned.
32. Firstly.--S.N. Bose said he went to see J.K. Misra, the Defendant''s Manager about the matter.

33. J.K. Misra was called on behalf of the Defendant and when asked about the visit which S.N. Bose had deposed to, he said he did not remember, and had not the faintest recollection; so that S.N. Bose''s evidence on that point remains uncontradicted.

34. Secondly.--There is the letter of the 14th October 1914 in which S.N. Bose said he agreed to the terms of the lease which the Plaintiff had with H.K. Sil.

35. It is to be noted he referred in the letter to a "lease," and it is obvious from the letter that something at all events must have occurred between the Plaintiff and S.N. Bose which led him to believe that the Plaintiff had a lease or something in the nature of a lease from H.K. Sil, something at all events more than a mere monthly tenancy, which the Defendants now allege was all that existed at that time. To meet the difficulty created by this letter, the learned Counsel for the Defendants No. 2 and 3 suggested in the Court of Appeal that the letter might not be genuine, or might not have been written at the time, at which it was supposed to have been written.

36. This suggestion was not raised in the Court of first instance, or put to S.N. Bose when he was in the witness box, and it cannot be accepted in the Court of Appeal.

37. These two facts are material corroboration of the Plaintiff''s case, and in my judgment the evidence of S.N. Bose should not be disregarded.

38. The first witness called on behalf of the Defendants was U.C. Ghosh, the Dewan of H.K. Sil; he used 10 keep the accounts and Cash Book of H.K. Sil, who admitted that he was a faithful servant of 30 years'' standing and a truthful man.

39. F.C. Mitter said that U.C. Ghosh was present at the interview in March 1914. The Defendant H.K. Sil could not remember who were present at the interview.

40. U.C. Ghosh gave evidence to the effect that he was present at the interview and in answer to questions put by the learned Counsel for H.K. Sil he corroborated the Plaintiff''s case.

41. The questions and answers were as follows:--

Q.--Do you know if there was an agreement with the Plaintiff. Baranashi Dassi, in the suit to grant a lease of No. 6/2, Lindsay Street for four years certain and four years optional from 1914?

A.--When we took the house into khas possession we passed a letter requesting Shambhu and Grandsons to come to a definite arrangement with us.

Q.--Was any definite arrangement come to, namely, the arrangement for a lease for four years certain and four years optional from 1914?

A.--Yes, verbal.

42. This was obviously an unexpected answer and the learned Counsel for H.K. Sil asked to be allowed to cross-examine his witness on the ground that he was hostile : the learned Judge disallowed this, and in my judgment, quite rightly. There was no material before the learned Judge to justify him in allowing cross-examination.

43. This witness also confirmed to some extent F.C. Mitter''s evidence as to the arrangement in 1908, in that he said the sum and substance of it was that "they were to continue at a rental of Rs. 150 as they were."

44. The only other witness as to the interview was the Defendant H.K. Sil.

45. In his examination-in-chief in alluding to the interview, he said "he (i.e., F.C. Mitter) said if I was willing to give a lease of the room for four years certain and four years optional then they would be able to take the lease. I said that cannot be. That is all. Fakir and his brother perhaps said they could not enter into a three years'' lease and the negotiations fell through."

46. He was then asked who were present at the meeting, he said he did not remember, he did not remember if U.C. Ghosh was present. He denied specifically

the arrangement about the four years'' lease, and the alleged arrangement made in 1908.

47. He did not remember if Fakir had come to him about the lease to S.N. Bose, or whether the Plaintiff made any complaint after the lease to the first Defendant.

48. In cross-examination he was asked if he ever intended to give to the Plaintiff a lease; in the first instance he denied that, and it was only when the Court drew his attention to the fact that in one of the letters he had proposed a three years'' lease that he said at that time he did intend giving them a lease.

49. He then said his intention was to give a lease for not more than three years, and then, when his letter of March 14th, 1914 was produced to him, which showed his intention was to give a lease for not less than three years, he had no answer to give.

50. In further cross-examination he said he did not remember whether it was proposed at the interview that the Plaintiff should take a four years'' lease; he did not remember the proposal for four years certain and four years optional.

51. He did not remember whether there was any discussion as to the Plaintiff being willing to execute a, formal lease in his favour, and it was suggested by him that the only thing discussed at the interview was rent.

52. I should find it very difficult to accept the Defendant''s evidence, having regard to the nature of it, and his repeated answers to the effect that he did not remember things, which one would think he must have remembered, even if it stood alone and uncontradicted; but in this case the weight of the verbal evidence is greatly in favour of the Plaintiff''s case, and, as already pointed out, it was confirmed in a material extent by one of the Defendants'' witnesses, who was admitted to be an honest and reliable man. It was, however, urged that the case set up by the Plaintiff in this suit had not been raised in the proceedings in the Small Cause Court, and even when the Plaintiff brought a suit against Papat Velji Rajdev, in the High Court in 1917, she did not rely upon the case which she now sets up.

53. Great reliance was placed upon paras. 3 and 4 of the plaint in the 1917 suit which are set out in the learned Judge''s judgment.

54. In reply to this the learned Counsel for the Plaintiff urged that there was nothing more than an agreement for a lease made between the Plaintiff and the Defendants Nos. 2 and 3 and that if it had been pleaded in the Small Cause Court it would have been no defence to the suit for ejectment by Papat Velji Rajdev, and as to the High Court suit in 1917, he pointed out that it was brought against the first Defendant only that in the 1917 suit specific performance of the agreement could not have been claimed; and that indeed it was not desired then to claim specific performance, as H.K. Sil was not then unfriendly : It was urged that the object of the suit was only to stop the Small Cause Court proceedings and that when it was found that the 1917 suit was not sufficient for that purpose and that the Defendant H.K. Sil had become

unfriendly, the only course was to withdraw the 1917 suit and to institute the present suit.

55. It was further argued that para. 6 of the Written Statement of Baranashi Dassi in the Small Cause Court, dated 9th June 1917, referred to the agreement now relied upon.

56. Without deciding the points and assuming, for the sake of argument, that it might have been expected that the agreement now relied upon would have been more specifically referred to in the previous proceedings, the question remains, is this sufficient to counteract the verbal evidence given at the trial, which in my judgment is strongly in favour of the Plaintiff''s case?

57. In my judgment it is not. I have much reluctance in interfering with the decision upon a question of fact of a learned Judge who has seen the witnesses, specially when such question depends largely upon the verbal evidence; in this case, however, practically all the verbal evidence seems to me to be in favour of the Plaintiff''s case (such evidence including one of the Defendants'' witnesses who was present at the interview) with the exception of the evidence of the Defendant : and his evidence, as already mentioned, upon the face of it is such that it seems to me unreliable and therefore with much respect to the learned Judge''s decision, I am unable to agree with it, and in my judgment

58. It has been proved that there was a verbal agreement for a lease.

59. I have had the advantage of reading the judgment about to be delivered by my learned brother, and I agree that there was not an express agreement that a formal lease should be executed. But in my judgment there was an agreement that the monthly tenancy should cease, and that there should be a tenancy for four years certain which was to begin on April 1st, 1911 with the option of a further term of four years as stated in the Plaintiffs letter of the 27th March 1914. This involved an implied agreement to do everything necessary to make the agreement effective in law which would include a right in the Plaintiff to call for a formal lease.

60. A regards the other points which were raised in the appeal I agree with my learned brother''s conclusions and in my judgment this appeal should be allowed with the costs of the suit and appeal, and a decree should be made in terms of paras. (a) and (b) of the prayer.

Woodroffe, J.

61. As regards the facts I have nothing to add. Accepting the evidence given for the Plaintiff on the facts, the first question is as to the character of the transaction of which F.C. Hitter speaks as having transpired with the Defendant H.K. Sil. Was it an agreement to lease or a lease that is a present demise. In the latter case it could only be a demise to operate in future, for the Plaintiff was already a tenant at the time of the interview on 28th or 29th March, and was entitled to retain possession

until the end of March, The negotiations in writing commence with H.K. Sil''s letter of the 14th March asking that the Defendant should enter into a lease with him from the 1st April for at least three years. The Plaintiff replied that she was willing to take a lease but for four years with four years'' option.

62. The rent was to be Rs. 150 as heretofore. There then follows a passage which if it stood alone and had not been followed by the alleged verbal agreement, might be relied on to show that there was present demise and not an agreement for a demise. For the letter runs "we hope and consider that the above was pucca to be acted upon as desired by you but if at any time hereafter you think it necessary to have a formal agreement in writing it may be drawn up on the above lines with usual terms as are generally put in them and we shall always be ready to execute the same." The matter, however, does not rest there. At the interview between Mitter and Sil a question however arose about raising the rent and the Defendant Sil having agreed not to raise it. Muter (apparently for his security) wanted a formal lease to be executed. The position then taken was different from that taken in the preceding letter. Sil said there was no need for a lease as the property would be in hints possession and the parties concerned were ladies. On this Mitter did not press the matter. This is not the same thing as an agreement that there should be no formal lease. The statement in the third paragraph of the plaint that it was agreed that a formal lease should be executed whenever required by the parties during the period of tenancy is incorrect if it be read as meaning that there was an express agreement to this effect but in law that must be taken to have been the agreement between the parties. For if, as I hold, there was no mutual agreement which positively excluded the right to call for a formal lease, and if there was an agreement that the Plaintiff should have the premises on the terms stated and if the law requires as it does, a document and registration then it will also on these facts imply an agreement to do everything which is necessary to make the agreement arrived at in fact effective in law. In my opinion the evidence establishes not an actual demise but an oral agreement to lease.

63. The next question is then whether there can be an oral agreement to lease. It has been so held. Sec. 107 of the Transfer of Property Act refers to leases, that is, actual transfers of property and not to agreements to lease. Under the Registration Act "lease" includes "agreement to lease."

64. It is not necessary to discuss the law as to registration of written agreements for lease or written and unregistered leases, for the agreement before us was a verbal one. It is enough to say that sec. 49 of the Registration Act only provides that no unregistered and registrable document shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property. What is precluded in either case is the affecting of the property.

65. It by no means follows that an agreement to lease, that is, an obligation to transfer, is a transaction affecting the property. However, I need not discuss what,

having regard to the facts and to my finding that an oral agreement for a lease is valid, is unnecessary. Nor is it necessary to determine whether an unregistered document void as a lease may be used to establish an agreement to lease. For the agreement in suit was not, in my opinion, a demise.

66. The next question is as to the effect of possession having been held under the agreement for a lease, for, I hold that possession on and after the 1st April was under the agreement for a lease to which I have referred. It has been held that when in pursuance of an agreement for a lease the intended lessee has taken possession though the requisite document has not been executed, the position is the same as if the document had been executed provided specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined.

67. The question then is might specific performance have been obtained? Nothing is suggested against this except that a suit for such relief would be barred. This however, has not been made out. No time was fixed as the date for performance and it cannot be said that any question of refusal arose until after the appearance of the Defendant No. 1 in October 1916. Before that the Plaintiff had in fact been paying rent and holding possession under the agreement for a lease. But then if is said the third party rights of the Defendant Papat Velji cannot be affected. But this Defendant is a man who has subsequently taken a lease of the house from the landlord against, whom the Plaintiff has established his agreement. If he alleges that he is a transferee for value without notice there must be an issue as to and proof of that allegation. There is in fact none. The Plaintiff was in possession and prima facie this Defendant must be taken to have had knowledge of it and of her rights. I agree therefore that the appeal should be allowed and the decree appealed from reversed and a decree made in terms of prayers (a) and (b) of the Plaint. The Appellant is entitled to her costs of the suit and appeal.