(1928) 07 CAL CK 0057

Calcutta High Court

Case No: None

Kanti Chandra Ghose and Others		APPELLANT
	Vs	
Brojendra Mohan Goswami and Others		RESPONDENT

Date of Decision: July 5, 1928

Acts Referred:

- Registration Act, 1908 - Section 17, 49(c)

Citation: AIR 1929 Cal 186

Hon'ble Judges: Mallik, J; Garlick, J

Bench: Full Bench

Judgement

Garlick, J.

Plaintiffs-appellants agreed to let a piece of garden land to defendant 1 (respondent) for a period of nine years for the making of bricks. A written agreement was executed but not registered. Defendant 1 entered on the land, cleared the jungle and began making bricks. After he had used the land for 15 months, the superior landlord of his lessors sued for a permanent injunction to prevent the use of the land as a brickfield. He obtained a temporary injunction and it was in force for some 15 months and then the zemindar came to terms with the lessors, and recognized their right to use the land as they liked, and the temporary injunction was withdrawn. The plaintiffs in the meantime had filed this suit against defendant 1 for rent of the land and for selami. They claimed rent at the rate of Rs. 20 a bigha and selami at Rs. 100 a bigha for 8 bighas 18 cottas of land. The defence was that by the terms of the written agreement the rent was only Rs. 15 a bigha and the area only 4 1/2 bighas. It was admitted that selami of Rs. 100 a bigha was to be paid, but it was contended that it was not payable until the lessors should execute a formal lease.

2. The written agreement was admitted in evidence by the first Court and marked Ex. B, though it was "not a registered document. The learned Munsif held that it was

an agreement to grant a lease and that the selami agreed on was not payable because the lease had not been executed and that the rent due had been paid. So he dismissed the suit. The plaintiff appealed ''and contended that by the doctrine of part-performance the defendant was liable to pay the selami agreed on since he was enjoying the land. But the learned Subordinate Judge held that the agreement, being unregistered was not admissible in evidence, that oral evidence of the agreement was inadmissible because the contract had been reduced to writing, and that there was, therefore, no evidence on which to found the doctrine of part-performance. He therefore dismissed the appeal.

3. In second appeal to this Court plaintiff cites a number of rulings : Harinath v. Promotho Nath A.1.R. 1921 Cal. 127 Satyendra Nath v. Anil Chandra 14 C.W.N. 65 Upendra v. Umes [1910] 12 C.L.J. 25 Sarat Charan v. Shyam Chand [1912] 39 Cal. 663 Ardesir Bejonji v. Sirdar[1908] 33 Cal. 610 to show that an agreement which, for want of registration is inadmissible to prove a lease may be admissible to prove an agreement which does not affect the land, for example, an agreement to execute a lease on the fulfilment of certain conditions. Respondents on the other hand cite Sanjib Chandra Sanyal Vs. Santosh Kumar Lahiri and Others, : Hemanta Kumari v. Midnapur Zamindari Co. AIR 1919 P.C. 79 ElahiBaksh v. Hukum Baksh [1913] 19 C.L.J. 464 Ghampaklatika v. Nafar Chandra 15 C.W.N. 536 to show that an agreement coupled with delivery of present possession is in fact a lease and cannot be proved unless it is registered. The question we have to decide is therefore whether the document marked Ex. B, ought u/s 17, Registration Act, to have been registered, and if so, whether it could be admitted u/s 49(c), Registration Act, as evidence of a transaction not affecting the land.

4. The recitals of Ex. B are briefly these:

We agree to settle mallik garden with you for nine years at a selami of Rs. 100 per bigha and a rent of Rs. 15 per bigha for the making of bricks, and we have received 201 in ad-Tance. You will now clear the jungle and erect huts and then the land will be measured and the amount of rent and selami will be fixed and all the cosharers will execute a registered leaae within two months and you will give us a kabulyat.

5. The defendant entered on the land in pursuance of this agreement, and not only cleared the jungle, but also made bricks for over a year without any other lease. The document was therefore acted upon as if it were a lease, except that the land was not measured and the rent and selami were not calculated. A Commissioner appointed by the lower Court found that the area of the land was 8 bighas 2 cottas, and not 4 1/2 bighas as stated by the defendant, nor 8 bighas 18 cottas as stated by the plaintiffs. It is clear that the document was an agreement to grant a lease within, two months, after calculation of the area of the land. And it gave the lessee permission to take possession, not for the immediate purpose of making bricks, but for clearing the jungle in order that the land might be mensured. We are therefore of opinion that the document was not a present demise of the land and did not

require to be registered, and was rightly admitted in evidence by the Court of first instance. And'' when the first Court had used it as a defence exhibit and had dismissed the suit because of the terms of the document, it was inequitable to refuse to allow the plaintiff to refer to it in the Court of appeal.

6. The next question is whether the defendant, having made use of the land by virtue of the agreement, is bound by the doctrine of part-performance to pay the selami and rent agreed on. He pleads that the plaintiffs have not performed their part of the agreement since they have not executed a registered patta. Though the plaintiffs have not fully performed their part of the contract, yet the defendant for 15 months enjoyed the full use of the land and made bricks from it. It was not the plaintiffs who stopped his work. It was the superior landlord who obtained the temporary injunction. And as the superior landlord has since acknowledged that he had no right to interfere with the use of the land, the defendants'' remedy for the interruption is against him. We understand that since the withdrawal of the injunction the defendant has been using the land as before. The defendant is therefore enjoying to the full the profits of the land without paying any rent or selami except Rs. 200 or so paid at the beginning of the lease. There has certainly been part-performance of this contract, and it is a contract fit to be specifically enforced. A suit for specific performance was not time barred at the time when this suit was instituted. We have not been given any reason why the land was not measured, by the parties and why a registered lease was not executed. We take it that both parties were equally to blame for these omissions. 6. The lower appellate Court has found that the area leased to the defendant is 8 bighas 2 cottas, and that the amount paid to the plaintiffs by the defendant was 231 in all. We allow the appeal and grant the plaintiffs a decree for rent at 15/a bigha and selami at 100/ a Bigha for 8 bighas 2 cottas of land minus 231/ all ready paid. But the decretal amount will not be payable until the plaintiffs have tendered to the defendant a duly registered lease in terms of the agreement Ex. B. The plaintiffs-appellants will get half costs in all Courts because they wrongly claimed rent at Rs. 20/ a bigha and compensation for cutting down trees.
Mallik, J.

7. I agree.