isabali Tayabali Vs. Mahadu Ekoba

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Court : Mumbai

Decided On : Nov-19-1917

Reported in : AIR1917Bom5; (1918)20BOMLR29; 43Ind.Cas.851

Judge : Basil Scott, Kt. C.J. and ;Batchelor, J.

Appeal No. : Appeal form Order No. 2 of 1917

Appellant : isabali Tayabali

Respondent : Mahadu Ekoba

Disposition : Appeal dismissed

Judgement :

Batchelor, J.

1. The plaintiff sued as a landlord to eject his tenant, the defendant, on the ground that the lease was determined by the defendant's disclaimer of the plaintiff's title. For the defendant it is contended that the plaintiff has no cause of action inasmuch as he had never, before filing the suit, done any act showing his intention to determine the lease. It is admitted that no such act was done by the plaintiff before the institution of the suit, but it is urged that the mere institution of the suit and the assertion in the plaint as to the repudiation of the landlord's title constitute a sufficient manifestation of the plaintiff's intention to determine the lease. The sole question in appeal is whether this argument should be allowed. The point falls to be decided under the Transfer of Property Act, where Clause (g) of Section 111 is the governing provision.

2. For the defendant reliance is placed on Anandamoyee v. Lakhi Chandra Mitra I.L.R. (1906) Cal. 339 which was followed, without further examination of the subject, by the Madras High Court in Venkatramana Bhatta v. Gundaraya I.L.R. (1908) Mad. 403, a case decided under the Transfer of Property Act. This latter case was considered in Padrnanabhaya v. Ranga I.LR. (1910) Mad. 161, which was not governed by the Transfer of Property Act, and the learned Judges, without questioning the correctness of the earlier decision, held that, apart from the provisions of the Transfer of Property Act, the institution of an action on the ground of' forfeiture itself amounted to the manifesting of an intention, to determine the tenancy. We have now to decide whether the case is otherwise where the suit is subject to the Transfer of Property Act.

3. Before discussing that question on its legal merits it will be convenient to notice what exactly was decided in. Anandamoyee's case, which has been accepted as authority for the rule that the landlord's determination to forfeit the; lease must have been shown by some act prior to the institution of the suit. There the plaintiff

Anandamoyee sued in ejectment, and the Court of first appeal dismissed the suit, says the report, ' chiefly on the ground that it was not maintainable in the absence of service of notice on the barber-defendants, but without any finding as to whether the plaintiff did any act, before the institution of the suit for ejectment, declaring her intention to determine the tenancy of the defendants.'Strictly,' therefore, the only question before the Court was whether notice to certain defendants was necessary to the validity of the suit. It is true that the-Court did definitely lay it down that the landlord's intention to forfeit 'must be shown at some time or other antecedent to the institution of the suit,' but that pronouncement was not necessary to the decision of the point then before the Court. As I have said, Venkatramana Bhatta's case carries the-argument no further. We are, therefore, free to determine-the question without the restriction of any decisive authority.

4. Now the only requirement of Section 111(g) of the Transfer of Property Act is that the lessor ' does some act showing his intention to determine the lease.'' Neither in the Calcutta case nor in either of the Madras cases is any special reason given why the lessor's election must be made at some time-prior to the institution of the suit, and if the election has been made at the moment when the suit is instituted, that is, at the moment when the plaint is presented, it seems to me-difficult to find any ground for saying that the cause of action has not completely accrued. It is clear that in England, since the Judicature Acts, the landlord's intention to enforce-the forfeiture is sufficiently mainfested by his bringing an action in ejectment. In Toleman v. Portbury (1871) L.R. 6 Q.B. 245 it was held that by a writ of ejectment there was final and conclusive election to put an end to the tenancy ; and that, as explained by Fry J. in Evans v. Davis (1878) 10 Ch. d. 747 was because ' an action of ejectment is an unequivocal assertion of a right to present possession. It is equivalent to the old entry.' And the same law is laid down in Jones v. Carter (1846) 71 R.R. 800 and in Serjeant v. Nash, Field & Co. (1903) 2 K.B. 304 But if the bringing of the action is equivalent to the old entry in the English Courts, I can see no valid reason why it should not be equivalent to, and constitute, the ' act showing the lessor's intention' which is required by the Indian Statute. And, that act being done and completed when the plaint is presented, it seems to me to follow that at that point of time the lessor's cause of action is complete.

5. This view is, I think, confirmed by reference to other cases of election, where the same principle is involved in different sets of facts. Clough v. The London and North Western Railway Co.(1871) L.R. 7 Ex. 26 was a case where a contract having been induced by fraud,, the party defrauded had, in the words of Mellor J., ' a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property.' And the learned Judge continues : ' The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture... If, by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election.' This is supported by a citation from Bramwell B.'s judgment in Croft-v. Lwmley (1858) 6 H.I.C. 672 from which the following passage may be noticed for our present purposes: ' When a lessee commits a breach of covenant, on which the lessor has a right of re-entry, he may elect to avoid or not to avoid the lease, and he may do so by deed or by word ... if he says he will avoid, or does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it.' These judgments appear to me to establish not only that the-landlord's election may be determined by the mere bringing of his action, but also that the principles applicable to other cases of election are applicable also to the

landlord's election to enforce or to waive the forfeiture. Two other cases in which the same principle is at work in different circumstances may, therefore, appropriately be noticed. In Cory Brothers & Co. v. Owners of Turkish Steamship 'Mecca' (1897) A.C. 286 the question was as to the appropriation of payments made by the debtor to the creditor. The debtor had made no appropriation to any particular items, and the right of application consequently devolved on the creditor. Discussing the question of the time within which the creditor's option must be exercised, Lord Macnaghten says:-' In 1816, when Clayton's case (1816) 1 Mer. 585 was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the civil law, or at any rate, within a reasonable time, whatever that expression in such a connection may be taken to mean. But it has long been held and it is now quite settled that the creditor has the right of election ' up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain.' The second case to which I would refer as illustrating the principle that a party, having an election to prefer one course to another, may declare his election by the institution of a suit, is an Indian case, decided by the Privy Council in 1906, Bijoy Gopal Mukerji v. Krishna Mahishi Debi .There the suit was brought by the reversionary heirs of one Chandra Bhusan Mukerji for a declaration that an ijara granted by his widow was inoperative as against them since the widow's death. Lord Davey, in delivering the judgment of the Board upon the question of the validity of a Hindu widow's alienation, says:-' Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property.' These decisions serve, I think, to show that in our present case the view required by consistency and principle is that, since all that the lessor has to do is ' some act showing his intention to determine the lease,' that act is done when the suit to recover possession of the land is instituted. It is indeed not easy to imagine an act more decisively expressive of an intention to determine the lease.

6. Further confirmation of this opinion seems to be furnished by the consideration that the only requirements demanded by the Act for the determination of a lease are, first, that the tenant claim title in himself, and, secondly, that the lessor do some act showing his intention to determine the lease. It is well known that, at the time when the Transfer of Property Act was enacted, the English Conveyancing and Law of Property Act, 1881 (44 & 45 Vic. c. 41), was prominently in the consideration of the Indian Legislature. Section 14 (1) of the English Act, dealing with forfeiture for breaches of covenant other than non-payment of rent, contains elaborate provision declaring that such for feiture shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the breach and requiring the lessee to remedy it or make compensation, and the lessee fails within a reasonable time either to remedy the breach or to compensate for it. But the Indian Act contains nothing of these restrictions on the enforcement of the forfeiture, and it must be inferred that no such restrictions were intended by the Legislature. It is hardly necessary to add that the Act does empower the Court-see Section 114-to relieve against forfeiture for non-payment of rent in certain circumstances, but with these circumstances we are not now concerned.

7. For these reasons I am of opinion that the question raised in this appeal must be answered in favour of the plaintiff, the lessor. The lower Court's order remitting the suit for decision on its merits must, therefore, be affirmed, this appeal being

dismissed with costs.

Basil Scott, Kt. C.J.

8. I am of the same opinion.