

Latif Ahmad and anr. Vs. Smt. Amtul Rahman and anr.

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Court : Allahabad

Decided On : May-10-1978

Reported in : AIR1978All423

Judge : Deoki Nandan, J.

Acts : Limitation Act, 1908 - Sections 30- Schedule - Articles 51, 109, 113 and 120

Appeal No. : Second Appeal No. 1304 of 1968

Appellant : Latif Ahmad and anr.

Respondent : Smt. Amtul Rahman and anr.

Advocate for Def. : Dhrwa Narain and ;N.A. Kazmi, Advs.

Advocate for Pet/Ap. : H.S. Nigam, Adv.

Disposition : Appeal dismissed

Judgement :

Deoki Nandan, J.

1. This is a defendants' second appeal in a suit for recovery of Rs. 2,235/-. The plaintiff came to the court with the allegations that the first defendant Jeet Ram was the tenant on payment of a rent of Rs. 50/- per month of certain land in the nature of a Gher that the said defendant No. 1 subject the Gher to the second defendant Latif Ahmad without the plaintiff's permission and a suit, being Suit No. 225 of 1959, was instituted by the plaintiff for their ejection and arrears of rent, as well as damages for unlawful use and occupation for the period ending on May 12, 1959. The suit was decreed. The first defendant in the present suit, namely, Jeet Ram, filed an appeal and prayed for the facility of paying the decretal amount in instalments. The second defendant Latif Ahmad also filed an appeal. His case was that he was not a sub-tenant but a tenant of the plaintiff and was accordingly not liable to ejection. Jeet Ram's appeal was allowed but that of Latif Ahmad was dismissed. When the decree was put into execution, one Faiz Mohammad Khan, who has been impleaded as third defendant in the present suit, obstructed the execution of the decree and proceedings were taken under Order 21, Rule 97 of the Civil P. C. which was decided in favour of the plaintiff. Thereupon Faiz Mohammed Khan filed a suit, being Suit No. 41 of 1962, for getting over the order under Order 21, Rule 98 of the Civil P. C. The suit was dismissed. His appeal against that decree was also dismissed.

2. The present suit was filed on May 26, 1965 for recovery of damages for unlawful

use and occupation for the period from 12th May, 1959 to 16th Oct. 1964. The question which was raised in the forefront by the defendants in the present suit was of limitation. According to the plaintiff, the suit was governed by Article 120 of the Indian Limitation Act, 1908 which prescribed a period of 6 years. The learned Munsif held that the suit was governed by Article 113 of the Indian Limitation Act, 1963 which prescribed a limitation of three years only and in this view of the matter decreed the suit for recovery of Rs. 800/- only against the first defendant with proportionate costs, but dismissed the suit as against defendants Nos. 2 and 3. For decreeing the suit only against the first defendant and dismissing it against defendants Nos. 2 and 3, the trial court held that there was a privity of contract only between the plaintiff and the first defendant and on termination of that privity of contract, the first defendant ceased to have any right to retain possession over the land in suit and was under an obligation to deliver back the same to the plaintiff. He alone was thus liable to pay damages to the plaintiff, in the present suit.

3. The plaintiff-respondent and the first defendant Jeet Ram, who is defendant-respondent No. 2 in the second appeal before this Court, appealed to the District Court. Jeet Ram's appeal was dismissed but the appeal of the plaintiff-respondent was allowed and the trial court's decree was modified by decreeing the suit for Rs. 1,635/- and against all the defendants with proportionate costs. It may be stated here that originally the amount for which the suit was decreed by the lower appellate court was Rupees 1,935/-, but later on this figure was substituted by the figure of Rs. 1635/- by an order dated April 23, 1968.

4. Mr. H. S. Nigam, learned counsel for the defendants appellants, that is, defendants Nos. 2 and 3, contended that the claim for the mesne profits for more than 3 years next before the date of the suit was barred by time inasmuch as the proper Article applicable to a claim for mesne profits under the Indian Limitation Act 1908 (hereinafter referred to as the old Act) was Article 109 and the corresponding Article under the Limitation Act, 1963 (hereinafter referred to as the new Act) was Article 51. Now, a reading of the two Articles 109 of the old Act and 51 of the new Act, shows that in order that either of them may apply the profits of immovable property must have been 'wrongfully received by the defendant'. In *Radhey Shyam v. Nanak Ram* (1968 All LJ 687), a Division Bench of this Court held that:

'for the application of Article 109 it is necessary that the defendant should have received profits in respect of property belonging to the plaintiff from somebody else and wrongfully. Therefore, a suit to recover compensation for use and occupation from an ex tenant who remains in possession after the determination of the tenancy with the consent of the landlord is governed by the residuary Article 120, Indian Limitation Act and not Article 109.'

There is no allegation in the plaint that the first defendant Jeet Ram who is respondent No. 2 had received any profits from either of the two defendant-appellants nor is there any such allegation in the written statement of the defendants. There is no evidence either to show that defendant No. 1 received any profits from either of the defendants Nos. 2 and 3 during the period of his wrongful occupation after determination of the tenancy. Indeed a plea to this effect would have been contrary to the defendants' cases on other points. Under the circumstances I am bound to hold that the proper Article applicable to the instant suit was Article 120 of the old Act. The limitation prescribed was 6 years which had not expired when the new Act came into force and the suit having been filed before the expiry of the 6

years period of limitation prescribed by the old Act, it would be within time in view of the savings clause contained in Section 30(a) of the new Act, notwithstanding that the period of limitation prescribed therefor under Article 113 of the new Act is shorter.

5. It was then claimed by Mr. Nigam that no decree could have been passed against either of the defendants Nos. 2 and 3, but he was unable to justify the reasoning adopted by the trial court, namely, on the ground that there was no privity of contract between the plaintiff and the defendants Nos. 2 and 3. In *Zawar Hasan v. Rakhaldas Banerji* (AIR 1956 All 272) it has been held by a learned single Judge of this Court that the right to, recover damages for use and occupation does not arise out of anything contained in the Transfer of Property Act but it is a right under the general law for the recovery by the owner of damages from a person who has used the property. There is no question of any privity of contract in such a case. It is the own case of defendants Nos. 2 and 3 that they were in possession of the property. They have accordingly been rightly held to 'be liable to pay damages decreed by the lower appellate court.

6. In the result the appeal fails and is dismissed with costs.

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