

## **Zawar Hasan And Anr. vs Rakhaldas Banerji And Anr. on 21 November, 1955**

**Equivalent citations: AIR1956ALL272, AIR 1956 ALLAHABAD 272**

### **JUDGMENT**

Kidwai, J.

1. This second appeal arises out of a suit instituted by respondent 1, Rakhal Das. Banerji for the eviction of the appellants and respondent 2 from a house situated in Mirjan Lane in the city of Lucknow. The house was let to respondent 1 Mohammad Abdul Aleem in 1942 at Rs. 23/- per month.

The rent was subsequently raised to Rs. 35/-per month. In October 1950 the owner wrote to his tenant to vacate the house since it was required for the owner's own use and occupation. The tenant failed to vacate and in the meanwhile sub-let the house to the appellants without authority or consent either from his landlord or from the Rent Control and Eviction Officer.

2. In June 1951 the owner returned to Luck-now and gave the tenant as well as the appellants notice to quit the house by 30-9-1951. The tenant paid up all the arrears of rent due upto. 30-9-1951 but the house was not vacated since the appellants continued to be in possession of it. The owner therefore instituted the suit out of which this appeal arises for the eviction of the defendants as well as for damages for use and occupation.

3. The learned Munsif decreed the suit for ejectment against all the defendants and he passed a decree for Rs. 87/8/- for use and occupation at the rate of Rs. 35/- per month against Mohammad Abdul Aleem alone on the ground that it was Mohd. Abdul Aleem alone who was the tenant and that there was no privity of contract between the plaintiff and the appellants.

4. The owner filed an appeal and there was no cross-appeal by any of the defendants in respect of the decree for ejectment. The learned Civil Judge allowed the appeal of the owner inasmuch as he passed a decree for damage's for use and occupation not only against Mohd. Abdul Aleem but also against the appellants. The appellants have come up in second appeal.

5. It has been contended by the learned Advocate for the appellants that a decree for use and occupation can only be passed against an ex-tenant or a person who entered into the possession of the house with the consent of the proprietor.

As has been pointed by the Calcutta High Court in. -- 'Surnomoyee v. Denonath Gir', 9 Cal 908 (A), 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 his property. In that particular case what was claimed in the plaint was ejectment together with rents and cesses.

The learned Judges composing the Bench state that the plaintiff sued all the defendants for rent and for ejectment. The defendants being trespassers no decree for rent could be passed against them. Their Lordships nevertheless held that a decree could be given for mesne profits but that there would be some difficulty with regard to the period after the commencement of the suit.

Eventually, following the decision in a series of their own Court, they held that the plaintiff could get a decree for use and occupation even from trespassers. This case is fully applicable to the facts of the case before me. The plaintiff is clearly entitled to obtain damages from the person or persons who have kept him out of possession of his property. In the present case there can be no doubt that, whatever right they may claim, the appellants have kept the plaintiff out of possession of his property.

If the tenancy had subsisted then of course the plaintiff could not sue anybody but his tenant. The tenancy has, however, terminated by notice and therefore privity of contract does not exist any longer between the plaintiff and his ex-tenant. All the three defendants were thus in the same position and the decree having been passed against them all must be upheld. This appeal, therefore, fails and is dismissed with Costs. The Stay Order dated 22-11-1954 is vacated.