Dau Dayal vs Brij Mohan And Anr. on 11 August, 1950

Equivalent citations: AIR1952ALL344, AIR 1952 ALLAHABAD 344

JUDGMENT

Agarwala, J.

1. This is a defendant's appeal arising out of a suit for recovery of arrears of rent.

2. On 27-9-1932, the defendant usufructuarily mortgaged a house to the plaintiffs respondents. On the same date the defendant executed a qabuliat whereby he promised to pay a sum of Rs. is per month as rent of the house to the mortgagees for a period of 5 years. No lease, as provided under Section 107, T P. Act, signed both by the lessor and the lessee, was executed. The qabuliat was, however, registered- Five years elapsed on 27-9-1937. The defendant did nob vacate the premises nor entered into a fresh agreement. The plaintiffs-respondents then served a notice upon the defendant-appellant to vacate the house. As the defendant did not vacate the house a suit for the ejectment of the defendant was filed on 29 1-1938. In this suit no claim for arrears of rent was included. Then while the ejectment suit was pending, on 19-4-1941 the suit which has given rise to the present appeal, was filed for recovery of rent for the period 27-8.35 to 26-12-38.

3. The defence to the suit was that it was barred by Order. 2 Rule 2 Civil P C., and that the suit for rent for the period prior to 19-4-1938 was bar. red by limitation on the ground that the period of limitation was 3 years. The trial Court held that the suit for rent for the period 27-3-1935 to 28-1 1938 was barred by Order. 2, Rule 2, and the suit for period 28-1-1938 to 19-4-1938 was barred by Article 110, Limitation Act, as being beyond 3 years of the date of the suit. It, therefore, decreed the suit for the period 28-4-38 up to 26-12-38. The defendant submitted to the decree but the plaintiffs appealed.

4. The lower appellate Court held that up to the date of the expiry of 5 years mentioned in the qabuliat, that is up to 26-9-37 the suit was for rent and was, therefore governed by Article 116 and was not barred. Bat it held that the suit for the period after the expiry of the qabuliat, that is, the period 28.9-37 upto 19 4-38 was barred by Article 110, as it was not a suit for rent arising under the registered qabuliat, hat was a suit for compensation for use and occupation, and that the suit for arrears of rent for a portion of this period, namely. 28-9-37 to 28-1-38, (the last date being the date of suit for ejectment) was also barred by Order 2 Rule 2 as in its, opinion, the suit for rent for this period should have been included in the suit for ejectment. In the result, the learned Judge of the lower appellate Court decreed the suit for the period 27-3-85 to 27-9 37. Against this decree the defendant has come up in appeal to this Gourd.

5. In appeal several points have been urged before us. In the first place, it is urged that there being no lease and there being merely a qabuliat executed by the lessee, no relationship of landlord and

tenant came into existence and that the qabuliat was a void document. The argument is that in a ease of this kind when the lessor is him self in possession, he cannot take a lease of the property by merely an oral agreement coupled with delivery of possession because there can be no delivery of possession and that the lease can be effected only by a registered instrument executed by the lessor and the lessee. There being no such document executed, there was no lease and if there was no lease the qabuliat is void under Section 23 Contract Act. In oar opinion, this argument is not sound.

6. No doubt, a lease of an immoveable property from year to year or for any term exceed, ing one year or reserving a yearly rent, can be made only by a registered instrument. All other leases of immoveable property may be made either (a) by a registered instrument or (b) by an oral agreement accompanied by delivery of posseesion. A lease under the Transfer of Property Act must be executed both by the lessor and the lessee. There is a proviso to Section 107, T. P. Act under which the Provincial Government may direct by a notification that leases of immoveable property other than leases from year to year or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by an unregistered instrument or by an oral agreement without delivery of possession The proviso, however, does not apply to the present case and may be omitted from consideration Now the qabuliat, in the present case, is a document executed by the lessee alone. It is therefore, not a lease within the meaning of the Transfer of Property Act. It, therefore, follows that the qabuliat in the present case failed to create a lease, whether for a term exceeding one year or even for a lesser term. It has not been alleged, in the present case, that there was an oral agreement accompanied by delivery of possession and that a lease was created thereby. Therefore, there has been no lease in this case.

7. What was then the legal character of the qabuliat? The qabuliat certainly exhibited contract between the parties to pay a certain amount every month in lieu of the occupation of the house. As it was not a lease, it was a licence. An agreement to allow another person to occupy a house and pay compensation for use and occupation is not prohibited by law. Such a contract is perfectly permissible and cannot be said to be illegal or void on the ground that it defeats the provisions of any law. Under Section 23, Contract Act, such a contract does not defeat the provisions of Section 107, T P. Act, because by its execution the executant does not obtain the rights of a lessee. No interest in immoveable property is created in his favour. He can be ejected at any time in spite of the qabuliat, and the only remedy for a person in possession who is ejected contrary to the terms of the qabuliat is to obtain damages. He cannot obtain possession of the premises. Therefore the execution of the qabuliat does not defeat the provisions of Section 107, T P. Act and Section 23, Contract Act, does not come into operation.

8. The qabuliat then being an agreement between the parties can be looked into and given effect to so far as it can be. Of course, the term that the defendant will remain in occupation for 5 years will naturaly fall to the ground because no interest in land is created by the qabuliat. If the executant of the qabuliat remains in occupation of the premises, he must pay compensation for use and occupation at the rate specified in the qabuliat.

9. It will be noticed that the qabuliat in the present case was a registered one and, therefore, Section 47, Registration Act, read with Section 17(i)(d) and Section 2(7) of the same Act does not come into

play. A lease under the Registration Act, as denned in Section 2(7), includes a qabuliat and an agreement to lease and, therefore, a qabuliat also requires registration under Section 17(1)(d). if it is from year to year, or for any term exceeding one year, or reserving a yearly rent; and if it is not registered it is not admissible in evidence under Section 47 of that Act. If the qabuliat in the present case were not registered, it would not have been admissible to prove the agreement between the parties though it would have been admissible for the collateral purpose of showing the nature of possession of the executant of the qabuliat. If the qabuliat were not admissible in evidence then the oral agreement if any the terms of which were embodied in the qabuliat, could also not have been proved by reason of the provisions of Section 92, Evidence Act. All this difficulty is not to be faced in the present case.

10. The next question urged before us is that the limitation for such a suit is governed by Article 110 and not by Article 116, as the relation of a landlord and a tenant wag not created by the qabuliat in question. Strictly speaking, the suit is not for rent. Therefore, it does not fall under Article 110 at all. The suit is for compensation upon a contract embodied in the qabuliat, and since the qabuliat was registered, the case falls under Article 116 Six years period of limitation was, therefore, applicable,

11. A third point urged before us is that the suit is barred by Order 2, Rule 2, Civil P. C. Order 2 Rule 2 provides :

> "A parson entitled to more than one relief In respect of the same case of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

In order that the subsequent suit be barred by Order. 2, Rule 2, the previous suit must be in respect of the same cause of action. Now in the present case the previous suit was for ejectment and was based upon the cause of action arising out of a notice to quit, or, in other words, the revocation of the licence granted under the qabuliat. The present suit for rent is not based at all upon the revocation I of the licence. It is indeed based upon the promise to pay compensation at a certain rate contained in the qabuliat. The liability to pay could be enforced irrespective of the revocation of the licence, The causes of action in the two suits being different, the present suit could not be said to be barred so far as it related to the period prior to the execution of the licence.

12. The result, therefore, is that we dismiss this appeal with costs.