

## Shiv Dutt And Anr. vs Ghasita And Ors. on 3 December, 1951

**Equivalent citations: AIR1953ALL499, AIR 1953 ALLAHABAD 499**

### JUDGMENT

P.L. Bhargava, J.

1. This is a plaintiffs appeal It arises out of a suit for possession of land and recovery of arrears of rent for a period of six years. The facts are these : On 25-2-1891, a registered 'qabuliat' was executed by the predecessor-in-interest of Phonda, defendant 1, in favour of the plaintiffs' predecessor-in-title & under this 'qabuliat' payment of rent at Rs. 3/- per annum was agreed upon. Defendants 2 to 4 are the sub-tenants of the land on behalf of Phonda. Under the terms of the 'qabuliat' Phonda was entitled to make 'khain' constructions on the land and the value of the constructions was not to exceed Rs. 50/-. It was also provided in the 'qabuliat' that, if at any time the owner of the land desired to obtain back possession over the land, Phonda, would receive Rs. 50/- for the constructions made by him. Phonda took possession of the land and made certain constructions thereon. On 2-5-1945, Phonda executed a sale deed transferring the house, which he had constructed on the land, along with its site, to Ghasita, defendant 5. These facts have not been disputed before me.

2. After the execution of the sale deed by Phonda in favour of Ghasita in 1945, the plaintiffs served a notice for ejectment upon the defendant, apparently on the ground that the execution of the sale deed by Phonda in favour of Ghasita amounted to assertion of his title and denial of their title, which had the effect of determination of the lease by forfeiture. Thereafter, the plaintiffs instituted the suit, which has given rise to this appeal. In the plaint also they alleged that the lease was determined by forfeiture; consequently, the defendants were liable to ejectment. In the alternative, it was alleged, in the plaint that the plaintiffs were also entitled to the relief claimed on the basis of their, title.

3. The suit was contested by Ghasita, defendant 5, alone. The defence put forward by him was that he had purchased only the materials of the house standing on the land in dispute; that the transfer of the proprietary right in the land was never contemplated by the parties to the sale deed; that the lease was not determined by forfeiture; that he was entitled to the benefit of the provisions of Section 114, T. P. Act; that Phonda and after the transfer by him in his favour he was the permanent lessee of the land in dispute and as such he was not liable to ejectment; and that the notice issued by the plaintiffs was invalid.

4. The suit was tried by the Munsif of Mathura, who found that there was no lease; but even if the 'qabuliat' could be any evidence of a lease Phonda was not a permanent lessee of the land in dispute;

that Phonda having transferred the land in suit along with the house the plaintiffs were entitled to determine the lease by forfeiture; that Section 114, T. P. Act has no application to the facts of the present case and that the notice issued by the plaintiffs was valid. In the result, the learned Munsif decreed the suit for ejectment and for recovery of Rs. 18/- as arrears of rent.

5. Ghasita, defendant 5, preferred an appeal against the decision of the trial Court and the learned Civil Judge of Mathura, who heard the appeal, dismissed the suit for ejectment and maintained the decree for recovery of arrears of rent. The findings recorded by the learned Civil Judge were that there has been no suds denial of plaintiffs' title on the part of Phonda or Ghasita, which might entitle the plaintiffs to determine the lease by forfeiture; that the 'qabuliat' affords good evidence of the contract of tenancy, and it shows that there was a permanent lease; and that the notice issued by the plaintiffs was valid but ineffective, inasmuch as Phonda was a permanent lessee.

6. In this appeal by the plaintiffs, the main point which has been raised on behalf of the appellants is that the plaintiffs' case was based upon a 'qabuliat' and not on any lease; that the position of Phonda and his transferee was that of a mere licensee and not of a lessee; and that the rights of a licensee were not transferable and as such the sale by Phonda in favour of Ghasita was invalid and ineffective. In reply to this contention it has been urged on behalf of the contesting respondent, Ghasita, that the plea that Phonda was a mere licensee was never raised in the pleadings; on the other hand the plaintiffs had in their plaint admitted that Phonda was a lessee; and that in a second appeal the plaintiffs were not entitled to set-up an entirely new case.

7. A reference to the pleadings in this case goes to show that the plaintiffs had nowhere admitted in the plaint that Phonda was a lessee although it may be said that they had impliedly recognised his position to be that of a lessee. In the opening paragraphs of the plaint the plaintiffs had merely stated facts, including the fact of the execution of the 'qabuliat'. In para 7 of their plaint, however, they had alleged that by execution of the sale deed Phonda had denied their title and he had asserted his own title, which terminated his rights as a tenant. In the next paragraph of the plaint reference was made to the provisions of Section 111(g), T. P. Act. In order to controvert these allegations it was alleged on behalf of the contesting respondent that the position, of Phonda was really that of a permanent lessee.

8. On the pleadings of the parties the contesting respondent, Ghasita, having denied all the plaint-allegations a question arose whether the relationship of lessor and lessee existed between the plaintiffs on the one hand and Phonda or Ghasita on the other. As far as the 'qabuliat' in concerned, the trial Court rightly observed that the 'qabuliat' was not a lease; and that, as any case, it did not confer upon Phonda the rights of a permanent lessee. The learned Civil Judge was wrong in saying that the 'qabuliat' was good evidence of a lease and that it created a permanent lease. The learned Judge entirely overlooked the relevant provisions of the T. P. Set; and also the terms of the 'qabuliat' itself. (9) Section 105 T. P. Act is in these terms :

"A lease of immoveable property is a transfer of a right to enjoy such property, made  
"for a certain time, express or implied, or in perpetuity, in consideration of a price  
paid or promised, or of money, a share of crops, service or any other thing of value, to

be rendered periodically or on specified occasions to the transferor or by the transferee, who accepts the transfer on such terms."

He such transfer is alleged in this case, and the 'qabuliat' is not such a transfer, and it cannot, therefore, be treated as. a lease. Section 107, T. P. Act lays down that a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made 'only' by a registered instrument. These two sections when considered together clearly show that there must be a transfer, and in the case of a lease from year to year, like the one in this case, a transfer by means of a registered instrument, in order to constitute a valid lease.

10. Learned counsel for the appellants invited my attention to the amendment made in 1929 in Section 107, T. P. Act whereby the following paragraph was added thereto :

"Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee."

This paragraph was added long after the 'qabuliat' in the present case was executed; but apart from it in view of the provisions of Sections 105 and 107, T. P. Act, a document had to be executed by the transferor when making a transfer of immoveable property in the nature of a lease as already stated, there was no such transfer in this case. Consequently, the relationship of lessor and lessee did not come into existence by the execution of the 'qabuliat, and the reference in the plaint to the said 'qabuliat' by the plaintiffs was of no consequence.

11. A reference to the terms of the 'qabuliat' goes to show firstly that Phonda was liable to ejectment in the event of non-payment of rent. Secondly, the 'qabuliat' provided for ejectment at the option of the transferor, and a provision was made for payment of compensation for the constructions made on the land. Thirdly, Phonda was permitted to leave the land at his option and to remove the constructions made thereon lastly, it was agreed that only a 'kham' house would be constructed on the land and the value of the constructions would not exceed Rs. 50. The terms embodied in the 'qabuliat' do not contain any provision that Phonda was to occupy the land permanently. Having regard to the terms on which Phonda was given the land, it is difficult to hold that any permanent rights in the land were granted to Phonda. He was only allowed to hold the land for an unspecified period.

12. It follows, therefore, that in the present case the relationship of lessor and lessee was not created under the 'qabuliat'; and it is not possible to hold that Phonda ever became a permanent lessee of the land in dispute.

13. Now, if the relationship of lessor and lessee did not, in fact, exist between the plaintiffs and Phonda or Ghasita, there was no question of determination of any lease toy forfeiture under Section 111(g), T. P. Act. That being so, the mere allegation in the plaint about forfeiture was of no consequence; and it could not give any cause of action for the suit by the plaintiffs. The plaintiffs, however, claimed, in the alternative, to eject the defendants as trespassers on the basis of their title.

The contesting respondent unsuccessfully resisted this claim on the ground that Phonda was a permanent lessee.

14. On behalf of the appellants it has now been contended that the position of Phonda was that of a bare licensee and as such he was not entitled to transfer by sale of the land in dispute or the constructions made thereon. This case was not set-up in the plaint; but, inasmuch as even a registered 'qabuliat' cannot be considered a lease as defined in Section 105, T. P. Act --'vide, Kedar Nath v. Shankar Lal', AIR 1924 All 514(A); and in the absence of a valid lease the position of a transferee is merely that of a licensee, as pointed out by this Court in --'Anand Sarup v. Taiyab Hasan', AIR 1943 All 279(B), on the facts established in this case, the plea can be raised by the plaintiffs. The defendants, however had had no opportunity to raise their objection to the said plea, in the absence of any clear pleadings. As the position of the contesting respondent in relation to the land in dispute has to be determined and it has also to be decided (1) whether as owners of the land the plaintiffs are entitled to eject him and (2) whether having made the constructions which now stand on the land Phonda or his transferee is entitled to be ejected in this suit, the matter must be reconsidered on the assumption that the position of Phonda was that of a bare licensee.

15. As the case has not been approached from a right angle and the decision of the Court below cannot be supported, in view of the findings recorded above, this appeal must be allowed and the decision of the Court below set aside. Accordingly, the appeal is allowed, the decree passed by the Court below is set aside and the suit is remanded, through the lower appellate Court, to the trial Court for disposal according to law after deciding the following questions :

1. Whether Phonda had any right to transfer the land in dispute.
2. What is the nature and effect of the constructions made on the land in suit? and
3. Whether Ghasita is liable to ejectment from the land in suit.

The costs here and hitherto will abide the ultimate result.