
(1961) 05 CAL CK 0005

In the Calcutta High Court

Case No : Appeal From Original Decree No. 366 of 1959

A.C. Bhattacharjee

APPELLANT

Vs

Arun Krishna Roy and Others

RESPONDENT

Date of Decision : 31-05-1961

Acts Referred:

Citation : 65 CWN 1175

Hon'ble Judges : P.N. Mookerjee, J;N.K. Sen, J

Bench : Division Bench

Advocate : Ranjit Kumar Banerjee, R.P. Bagchi and Sudhangshu Dutta, for the Appellant; Bankim Chandra Banerjee and Gaganendra Krishna Dev for the Respondents 1, 3 and 4, for the Respondent

Final Decision : Allowed

Judgement

P.N. Mookerjee, J.—The appellant before us claims to be the real tenant in respect of the suit premises (Flat No. 3, Eastern Block, Premises No. 192, Upper Circular Road, Calcutta), which tenancy actually stands in the name of his brother-in-law who is respondent No. 2 in this appeal. The plaintiff (respondent No. 1) claiming to be the landlord of the aforesaid tenancy, instituted the present suit on February 28, 1958. The appellant resists the plaintiff's claim for khas possession of the disputed premises, as made in this suit, which was brought upon the allegation, inter alia, that the said respondent No. 2 was the tenant of the same and his tenancy had been duly determined by an appropriate notice to quit and upon the further allegation that he had illegally and unlawfully transferred the suit tenancy to the appellant without his (landlord's) consent. The notice to quit appears to have been duly served in November 1957 purporting to terminate the suit tenancy with the expiry of the month of December 1957, and the said notice not having been complied with, the instant suit was instituted on February 28, 1958. The present appellant was made a party to the suit upon the allegation, inter alia, that he was in occupation of the disputed premises on the strength of the above illegal or unlawful transfer.

2. Both the defendants Nos. 1 and 2 filed written statements, on the same lines, namely, that defendant No. 2 (the present appellant) was the real tenant, the defendant No. 1 (respondent No. 2) being merely his name-lender and denying, necessarily, and, in particular, any transfer of the suit tenancy by defendant No. 1 to defendant No. 2. There were also other defences, which are not material for our present purpose.

3. Defendant No. 1, however, did not appear at the trial and the suit was actually contested by defendant No. 2 but it was eventually decreed by the learned trial Judge. Hence this appeal by defendant No. 2, which is contested by the plaintiff-respondent No. 1 as also by his transferees pendente lite who are the added respondents Nos. 3 and 4.

4. On the above pleadings the main question that arose for decision in the case was whether defendant No. 2 was the real tenant, defendant No. 1 being merely his benamdar for the same. That was the crucial question inasmuch as, if it was answered in the affirmative, the consequence will be whatever its effect be otherwise on the landlords, that the story of transfer will at once fall to the ground. The landlord, unless the transfer was with his knowledge or consent, may not be bound to recognise defendant No. 2 as his tenant but may be entitled to hold defendant No. 1 as such with all necessary consequences, but at the same time, the alleged transfer must be held to be a myth, there being, in the circumstances, no question or scope for it, a transfer, which presupposes passing of title, not being conceivable from a benamdar to a real owner, it being obviously a contradiction in terms. We proceed now to consider this crucial question of benami in the matter of the tenancy in suit.

5. The learned trial Judge has, of course, negatived the story of benami but his approach in the matter and his entire consideration of this question suffer from patent infirmities. He has obviously forgotten that, although the onus to prove benami is on the person, setting up the same, that onus, - particularly in circumstances, as disclosed by the evidence in this case, - will be discharged by slight evidence. He appears also to have laid too much stress on the proof of motive for the benami and has practically concluded that unless the motive is established the case of benami would necessarily fail. Motive, no doubt, is one of the elements, usually taken into consideration in such cases, but it is not such an element that its presence or absence, - or the latter, in particular, - would necessarily be decisive of the matter. Moreover, in the present case, the motive for the benami has, in our opinion, been sufficiently established. It is the landlord's evidence (Vide P.W. 1) that it was the appellant who inspected the premises and arranged the tenancy. It is also practically admitted that it was the appellant's family who were all along in the suit premises, though under the care of his bachelor brother-in-law, defendant No. 1. It further appears to have been amply proved that it was the appellant who all along paid the rent, though in the name of defendant No. 1 who was practically a dependant on him. In such circumstances, the alleged benami appears to have been am proved, though it

may not have been to the knowledge of the landlord who, accordingly, may not be bound to recognise the appellant as the real tenant. But, as we have said above, benami, as aforesaid will be sufficient to disprove the landlord's allegation of transfer of the suit tenancy which might otherwise have disentitled the tenant to any protection under the relevant rent control legislation. In that view, the present suit would fail.

6. The learned trial Judge has strongly relied on two documents, Ext. 2(a) and Ext. A, for supporting his conclusion against the alleged benami. In our opinion, however, these two documents, far from supporting the said conclusion of the learned trial Judge, really go against the same. There are clear allegations of benami in the said two documents and their whole trend and purport tend to support the same. Better from the landlord's point of view is the tenant's application before the Rent Controller (Ext. 2B), to which our particular attention was specifically and pointedly drawn by Mr. Bankim Chandra Banerjee, but even that, read as a whole, does not negative the case of benami, as pleaded by the defendants.

7. For purposes of the rent control proceedings, the show had to be kept up, as, when respondent No. 2 was the ostensible tenant or the tenant on record, the appellant, by himself, could not claim any relief before the Rent Controller or under the said law by setting up his real title. The above application, Ext. 2B, then, and the allegations therein, which might otherwise have gone against the defence story of benami are thus easily explained. We do not think, therefore, that any of the above documents really militate against the said defence story of benami, which, to our mind, has been amply established by the other evidence on record. That being so, the landlord's allegation of transfer would fail, leading to the dismissal of his present suit.

8. It is to be remembered further that even, apart from benami, the onus to prove the alleged transfer is on the landlord and that onus also does not appear to have been discharged. The evidence of the landlord's witness (P.W. 1) clearly shows that the transfer that was alleged was by way of sub-letting. Beyond, however, his uncorroborated testimony and mere word of mouth, there is nothing on the record to support the said story of subletting. It is to be noted here that this allegation was made even before defendant No. 1 had left Calcutta for Bombay and it was immediately and stoutly denied. Then there was a lull until defendant No. 1 left for Bombay and, eventually, the present allegation was made.

9. In this Court, Mr. Bankim Chandra Banerjee, appearing on behalf of the contesting respondents cited certain observations of Greer, L.J. at pages 564-5 of the report in (1) *Skinner v. Geary*, (1931) 2 K.B. 546, and pressed us to hold that, as defendant No. 1 had permanently left the suit premises, leaving defendant No. 2 in occupation thereof, there is a presumption of sub-tenancy or sub-letting. We are, however, unable to assent to any such broad proposition. In the first "place, the said observations are not very clear and. secondly, in the

very same case cited, the other two learned Judges (Scrutton and Slesser, L.JJ.) did not proceed on this footing but relied, mainly, upon the distinctive feature of the English Act that it meant or offered no protection to a non-occupying tenant (vide pp. 561 and 564 and pp. 569-70). That, however, is not the position under our law, that i the Indian counterpart the above Act, with which we are here concerned [Vide, in this connection Krishna Prosad Bose Vs. Sm. Sarajubala Dassi and Another, , (Per Bachawat, J.)]. Apart from that, the present case is also distinguishable on a very material point, namely, that the suit premises here was all along in the occupation of the appellant's family. We do not think, therefore, that Mr. Banerjee's contention can succeed. We do not also think-that Mr. Banerjee is right in his other submission that, unless benami is found,- we have here actually found benami,- the appellant will have no right to maintain, the appeal. In our opinion, the appellant, against whom also the decree for eviction has been passed by the trial court, has a right to appeal from it and to get it set aside On any ground which would defeat the plaintiff's suit. That suit is a suit for ejectment or khas possession and it is well-settled that, in such a suit the plaintiff must succeed on the strength of his own case, that is, on the strength of his own title, namely, title or right to khas possession, and not on any weakness of the defence. In the above view, we would allow this appeal, set aside the judgment and decree of the trial court and dismiss the plaintiff's suit. We would however, direct the parties to bear their own costs throughout.

N.K. Sen, J.

10. I agree.