

(1961) 06 CAL CK 0003
In the Calcutta High Court
Case No : Civil Revision Case No. 1374 of 1960

Banku Behari Mukherjee and Others	APPELLANT
Vs	
Amulya Chandra Ghosh	RESPONDENT

Date of Decision : 13-06-1961

Acts Referred:

Calcutta Thika Tenancy Act, 1949 — Section 3, 5

Citation : 66 CWN 254

Hon'ble Judges : Banerjee, J

Bench : Single Bench

Advocate : Manindra Nath Ghosh and Sourindra Nath Roy Choudhury, for the Appellant; Jitendra Kumar Sen Gupta, Nalini Ranjan Bhattacharya and Dhanesh Chandra Mitra, for the Respondent

Judgement

Banerjee, J.—This Rule arises out of a proceeding for ejectment of a thika tenant, u/s 5 of the Calcutta Thika Tenancy Act, 1949. The ejectment was sought by the landlords on ground No. (vi) of section 3 of the Act, that is to say, that the thika tenant held the land comprised in the holding under a registered lease and the term of the lease had expired. A registered lease was put in evidence (Ext 1). The thika tenant, who is the petitioner in this Rule, filed an objection in the aforesaid proceeding alleging that he had been inducted by the predecessors of the present landlords, but, after their death, the present landlords,

under misrepresentation, fraud and undue influence got a document registered in his favour. The said document was neither read over nor explained nor the contents thereof was ever made known to the defendant (meaning the present petitioner), who is an illiterate person.

2. The thika tenant wanted to adduce evidence to substantiate this case. The Controller, however, thought that the thika tenant could not be permitted to raise this plea in the proceeding u/s 5 of the Act. He, therefore, allowed the application and directed eviction of the thika tenant from the disputed land. The same view was taken by the court which heard the appeal.

3. Against the order made by the appellate court, the thika tenant moved this Court and obtained a Rule, being Civil Revision Case No. 2504 of That Rule came up for hearing before Das Gupta and Guha, JJ. Their Lordships made the Rule absolute and remanded the case to the Controller for rehearing with the following observations:

Clearly, before the landlord could obtain a decree for ejectment on the ground mentioned in his application, he had to show two things-first, that the land was held by the tenant under a registered lease and secondly, that the term of the lease had expired. Prima facie, the production of the registered lease and evidence that the lease covered the lands in question, would be sufficient to establish this fact. If, however, as in the present case, the tenant takes the plea that though the execution of the lease was his physical act, the execution was not his mental act and that the lease had been obtained from him by fraud, misrepresentation and undue influence and he had executed it without understanding the contents thereof, we can see no reason why he should not be allowed to prove that *****

Obviously, the burden of proving that the document was obtained by fraud, undue influence and misrepresentation and that the executant did not understand the context of the lease before he executed the same, would be on the tenant.

4. At the rehearing the Controller again disbelieved the story of fraud, pleaded by the thika tenant, as also the other story that he had obtained settlement from the predecessors of the present landlords. In the view taken, the Controller allowed the application and made the order for eviction of the thika tenant. The thika tenant appealed to the lower appellate court. That court, in agreement with the Controller, disbelieved the story that the thika tenant had obtained settlement from the predecessors of the present landlords. But, in disagreement with the Controller, held that the thika tenant was an illiterate person and the story of explanation of the document to the tenant by Sasadhar Chakravartty (P.W. 1), a practising lawyer, was unacceptable, because that witness was deeply interested in one of the landlords and therefore, the thika tenant was not bound by the terms of the lease (Ext. 1), which he may not have understood. I quote hereinbelow a passage from the judgment of the appellate court in order to show the line of reasonings which weighed with that court:

(a) The appellant being illiterate the onus is upon the petitioners to prove that the contents of the documents were understood by the appellant at the time of execution of the same. On this point petitioners rely upon the evidence of P.W.1 Sasadhar Chakravortty, a practising lawyer. His evidence is that he was engaged for the purpose of preparation of the document both for the appellant and the respondents. His further evidence is that after writing the fair copy of the document he read it over and explained its contents to Amulya viz, the appellant. Now the question is whether I should believe his evidence or not. It is true that he acted as a lawyer for Madan in this very suit and he knew Madan from before.

He admitted that he made tadbir for Madanbabu in a suit filed against him. His evidence read as a whole will leave a clear impression that he was interested in Madanbabu more actively than in Amulya. The very fact that he made tadbir for Madanbabu in another suit and he filed the present application for Madanbabu and Banku will show that he was interested in Madanbabu's affairs in a way which is more than what professional call requires. His association with Madanbabu being of such a nature I should accept his evidence with particular caution specially because Amulya is illiterate and the onus is upon the plaintiff. Sasadhar Chakraborty is no doubt a witness in the document itself, but there is no endorsement in the document itself that it was explained to the appellant Amulya by Sasadhar Babu. There are other attesting witnesses but they were not examined by the respondents. The evidence of Sasadhar Babu that he explained the document properly to Amulya cannot be accepted by me.

(b) Unless it is proved by the respondents that the appellant understood the contents of the document the registered document cannot be relied upon by the respondents.

5. The propriety of the judgment is being disputed before me, at the instance of the landlords petitioners.

6. Mr. Manindra Nath Ghosh, learned Advocate for the petitioners, contended before me that according to the order of remand by Das Gupta and Guha, JJ., in Civil Revision Case No. 2504 of 1955, the burden of proving that the document (Ex. 1) was obtained by fraud, undue influence and misrepresentation and that the executant did not understand the contents of the lease before he executed the same was on the tenant. Forgetful of all that the court of appeal below placed the onus on the landlords-petitioners to prove that the contents of the document (Ext. 1) were understood by the thika tenant and being dissatisfied there held quite wrongly, that the document was non est factum so far as the tenant was concerned.

7. Mr. Jitendra Kumar Sen Gupta, learned Advocate for the tenant-opposite party, tried to repel the argument of Mr. Ghosh by contending that the onus of proving that an illiterate person was bound by a document was always on the person who relied on the document and that onus could only be discharged by proving, by satisfactory evidence, that the illiterate person, who executed the document properly and fully understood or was made to understand the contents thereof. Mr. Sen Gupta further argued that as soon as the tenant-opposite party proved that he was illiterate person, the onus shifted to the landlords to show that he had understood the contents of the document before he executed the same. In support of his contention Mr. Sen Gupta relied on a judgment of the Privy Council, in a case from West Africa, reported in (1) AIR 1937 274 (Privy Council). The case was one of boundary dispute between the Stool of Aowin as plaintiff and the Stool of Upper Wassaw as defendant. The defendant relied on an award by an Arbitrator on the self-same boundary dispute as being a bar to the suit upon the footing of res judicata. The plaintiff attempted to avoid the award

on the plea that the reference to arbitration had been in the English language and had not been properly explained to him when he affixed his mark to it and therefore the award was not binding on him. In giving effect to the plea Lord Russell of Killowen observed :

There is no doubt that, as the document was in English language and the Omanhene knew no English, the onus lay upon Upper Wassaw to establish that the document had in fact been properly explained and interpreted so as to make the Omanhene of Aowen to understand its real import. That is a pure question of fact on which the trial judge found in favour of Aowin and, his finding was affirmed on appeal. *****

Their Lordships do not in the present case feel in any way disposed to reverse, or indeed feel justified in reversing, those concurrent findings, of fact.

8. The proposition argued by Mr. Sen Gupta is much too broad as a proposition of law. It is no doubt true that pardanashin women in this country enjoy some sort of special protection on account of their status. As regards deeds taken from pardanashin women courts have always been careful to see "that the party executing them has been a free agent and duly informed of what she was about." Reference in this connection need be made to (2) 13 M.I.A. 419 (*Geresh Chunder v. Bhuggobutti*), (3) L.R. 8 IndAp 39 (*Sudhist Lal v. Sheobarat Koer*) and (4) L.R. 28 I. A. 71 (*Annoda Mohini Roy Chowdhury v. Bhuban Mohini Debi*). It must further be shown that a document executed by a pardanashin woman was not only read out to her but it must also be shown that it was explained to her or that she understood its conditions and effect. Reference in support of this proposition need be made to (5) L.R. 29 IndAp 127 (*Shambati Koeri v. Jago Bibi*) and to (6) L.R. 41 I A. 23 (*Kali Bakksh Singh and Ram Gopal Singh*). The explanation must include all material points as well as the actual import of the document (*vide Farid-un-Nisa v. Mukhtar Ahmad* (7) L.R 52 IndAp 342). The law throws around a pardanashin woman a special cloak of protection. It demands that the burden of proof shall in such a case rest not with those who attack but on those who found upon the deed. In the case of *Sonia Parshini v Monta Baksha* reported in (8) 59 C.W.N. 147 (notes) *Das Gupta and Debabrata Mookerjee, JJ.* extended the protection enjoyed by pardanashin women to women not strictly Pardanashin, on the line of cases as in *Hodges v. Delhi and London Bank Ltd.*, (9) (L.R. 27 I.A 168) with the following observation:

Such protection, however, cannot be regarded as the exclusive privilege of a pardanashin lady. The pardah with its inhibitions may be an additional feature or element in the case, but the real reason behind the rule is the lack of understanding and appreciation on the part of the illiterate and ignorant woman in the matter of disposition of her property. Thus when the ignorance and illiteracy are proved and it is proved that such a woman has been exposed to the risk of unfair deal, the legal protection has always been extended to her despite the fact that she is not strictly pardanashin.

9. To present to all and sundry illiterate male persons with the special cloak of protection enjoyed by pardanashin women, when they do not compare with pardanashin women in weakness, ignorance and infirmities of the sheltered life lived by such women may not be prudent. The historical background, which entitles Indian pardanashin women to such a cloak of special protection will be wanting in the case of common illiterate male persons, unaccustomed to the sheltered life of pardanashin women and otherwise possessing knowledge of men and things of the world.

10. Now the rule of law is that if a person, either male or female, who executes a deed is misled by the fraud or misrepresentation of the person procuring the execution of the deed, so that he or she does not know what is the instrument to which he or she puts his or her hand, the deed is not his or her deed at all because he or she was neither minded nor intended to execute a document of that character or class. It is easier to defraud or to misrepresent facts to an illiterate person, because he or she cannot read the deed and therefore, does not understand what it contains. Therefore, if an illiterate person either male or female (not inhibited by pardah), who is otherwise wordily-wise, proves that a deed was not at all read out to him or her in a case where he or she is acquainted with the language of the deed or was not properly explained to him or her, where he or she is unacquainted with the language of the deed, and as such alleges that he or she did not know what the deed was about, then the onus no doubt shifts to the person who procures the execution of the deed to prove that the executant knew the contents of the deed or the same was explained to him or her. This is the extent of the protection enjoyed by an illiterate person in relation to a deed executed by him or her and no more than that. The lack of understanding, due to illiteracy makes such a protection eminently reasonable.

11. In the present case, however, there is one circumstance which I cannot ignore. In the order of remand by Das Gupta and Guha, JJ., in Civil Revision Case No. 2504 of 1955 there is a specific direction that the burden of proving (i) that the document was obtained by fraud, undue influence and misrepresentation and (ii) that the executant did not understand the contents of the deed before he executed the same, would be on the thika tenant. Mr. Manindra Nath Ghosh is right in his criticism that forgetful of the aforesaid direction the court of appeal below misplaced the onus on the petitioners landlords. Having had submitted to the order of remand in that form, it is no longer open to the opposite party to contend that the onus would be on the petitioners to prove that he understood the contents of the lease (Ext. 1).

12. Then again, there was evidence in the case that the document (Ext. 1) was explained to the thika tenant by a lawyer, Sasadhar Chakrabartty (P.W. 1). The court of appeal below was reluctant to place reliance on the evidence of P.W. 1 on the ground that he had made "Tadbir" on behalf of one of the landlords in another suit and also because he was the lawyer for the landlords in the proceeding out of which this Rule arises. At the same time the court of appeal

below was not prepared to say that the witness was a witness of falsehood, but observed:

I should not say that he gave intentionally false evidence, his evidence may be from impression. It would not be possible for him to remember what he did with reference to a particular document. Had there been any endorsement in the document itself to that effect I would have believed him. But in the absence of that, the evidence of Sasadhar Babu cannot be accepted in proof of the fact that the contents of the document were properly brought home to the understanding of the appellant.

13. The reason that the evidence of a witness should not be accepted because he is too deeply interested in a particular party and the reason that his evidence is unworthy of acceptance because he may not remember a particular transaction ill fit in together. On the first reason the evidence of a witness becomes incredible because of his disinclination to speak the truth, due to clash of interest, on the second line of reasoning his evidence becomes incredible not on the ground of his disinclination to speak the truth but because of his inability to describe the transaction correctly, on account of forgetfulness caused by lapse of time. By juxtaposing the two reasonings, the court of appeal below made it difficult to understand which of the two reasons really weighed with it. Its second line of reasoning again took away most of the sting in the first line of reasoning. P.W. 1 was definite in his evidence that the thika tenant Amulya, had approached him to draw out the deed of lease and he did draft a lease, as instructed by him. Thereafter, he engrossed the lease on stamp paper and identified the lessee at the registration office. After all that to disbelieve him on the ground that he was unlikely to remember the transaction, evidenced by Ext. 1, was not right without more. But even then, sitting in revision, it would have been difficult for me to interfere with the finding had it not been for the fact that the story of fraud or misrepresentation as pleaded by the thika tenant opposite party was not the story which was sought to be established by evidence. I have already set out what story of fraud was pleaded. I now need refer to the story of fraud and misrepresentation as was sought to be established by the thika tenant in his evidence:

This document (Ext. 1) bears my signature when my wife died in 1352 B.S. my brain became defective and about 4 months after my wife's death Banku and Madan proposed to make a permanent bandobast in my favour. Banku and Madan brought me to Sealdah and asked me to sign my name on a document. I was then taken to a Hakim who asked me if the signature was mine. I admitted that it was my signature. The document was not read over to me. I could not read that document as I only can somehow sign my name. * * * * It is not a fact that I took bandobast for 5 years under that document. The contents of that document were not explained to me.

14. Now the story that he was lured by the prospect of a permanent lease and by fraud he was made to sign a lease for five years only was not the story that was

pleaded.

15. The Supreme Court has now laid down that in cases of fraud the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however strong the language in which they are couched may be (vide (10) 1952 S.C.A. 388 -Bishnudeo Narain v. Seogeni Rai).

16. The thika tenant opposite party was therefore, not entitled to lead evidence to the effect that being assured of a permanent lease he was defrauded to execute a lease for a term. With that evidence out of the picture he must be deemed to be bound by the terms of the lease as executed by him because there is no other evidence to show that the terms of the lease were imposed upon him.

17. That being the position the story of absence of satisfactory explanation of the deed to the opposite party tenant becomes of little consequence. So far as the court below was concerned the absence of explanation of the deed weighed. With that weight taken off little remains for the Court of appeal below to justify it to differ from the Controller.

18. For the two-fold reasons that there was a disregard by the court of appeal below of the order of remand by this Court as to onus of proof of fraud and that the fraud which the court of appeal below took into account was not the fraud that had been pleaded and therefore, should not have been taken note of, I set aside the judgment of the Court of appeal below and restore that of the Controller. This Rule is made absolute with costs, hearing fee being assessed for 3 gold mohurs.