
(1998) 06 CAL CK 0006
In the Calcutta High Court

Case No : Civil Appellate Jurisdiction, S.A. No. 231 of 1989

Bhagirath Agarwalla

APPELLANT

Vs

M/s. French Motor Car Co. Ltd.

RESPONDENT

Date of Decision : 18-06-1998

Acts Referred:

Transfer of Property Act, 1882 — Section 109, 111

Citation : (1998) 3 CALLT 416

Hon'ble Judges : Surya Kumar Tewari, J

Bench : Single Bench

Judgement

S.K. Tiwari, J.—The second appeal arises out of the Judgment passed by District Judge, Jalpaiguri, in O.C. Appeal No. 3 of 1987.

2. The father of the appellant Tarachand Agarwalla let out the premises in suit to respondent on 7.3.59. The lease deed was executed by the respondent in the name of Tarachand Agarwalla. By a letter dated 7.4.77. respondents were informed by Tarachand that in view of the family partition, the premises in suit had fallen to the share of the appellant Bhagirath Agarwalla and in future the respondent should pay rent to him. Accordingly the respondent started paying rent to appellant. All these facts are not in dispute in this appeal.

3. The case of the plaintiff-appellant was that the original lease was granted for a period of 21 years which expired on 31st March, 1980. As per the terms of lease agreement the tenant had option to seek renewal of the lease for a minimum period of 5 years. In spite of service of notice the defendants failed to vacate. The defendants sent a notice for extension of lease for a period of 9 years which was received by the plaintiff on 5.3.80. The said intimation was bad in law because as per the terms of agreement, the intention of the tenant ought to have communicated to landlord one month before the expiry of the lease. Hence a decree for ejectment be passed against the defendants.

4. The defendants contested the suit on the ground that the house in suit did not

belong to joint family but was an exclusive property of Tarachand Agarwalla. The alleged partition was a fictitious transaction and did not create any title in the plaintiff. The appellant was receiving rent only on behalf of Tarachand Agarwalla. Hence he was not a landlord and cannot seek ejectment. That the defendants sent the notice for extension of this lease well in advance. A copy of the notice was received by Tarachand Agarwalla on 28th February, 1980. Since the letter addressed to the appellant was redirected from the shop it reached him on 5.3.80 for no fault of defendants. The defendants also pleaded that by a notice dated 23rd September, 1971 the original landlord Tarachand Agarwalla had terminated their tenancy with effect from 1.10.71. Hence the original lease came to an end and the defendants are tenants holding over.

5. The learned trial court held "that the appellant was the landlord and that the tenancy expired since the tenant never exercised his option within the period stipulated in the lease deed. The suit was accordingly decreed.

6. The defendants preferred an appeal. The learned District Judge held that the tenanted properly did not belong to joint family and the alleged partition was a sham transaction. The learned first appellate court also found that the defendants never acknowledged the plaintiff as landlord. The learned District Judge also held that the lease of the defendants got extended in view option exercised by them. The appeal was allowed and the suit was dismissed.

7. The first point for consideration is whether the learned appellate court was justified in declaring the partition a sham transaction. It has to be borne in mind that in a suit between landlord and tenant the question of title arises only incidentally. It cannot be a subject-matter of dispute, Exhibit-2 is the original partition deed which bears the signature of Tarachand Agarwalla, his wife Dhankadevi and his two sons namely, Bhagirath Agarwalla (plaintiff) and Chandra Prakash Agarwalla. This deed also disclosed that father of Tarachand Agarwalla was late Shri Gunganram Agarwalla. The learned first appellate court has observed that Gunganram Agarwalla was probably alive. It appears that learned Judge had not gone through this deed of partition. This deed of partition discloses that Tarachand Agarwalla was the "Karta" of the Joint family and with the consent of all parties the joint family properties had been partitioned, The learned appellate court was of the view that since one share had been allotted to the wife of Tarachand, the partition on the face of it was bad in law.

8. The learned counsel for the appellant has rightly invited my attention to the case of *Lakshminchand Khajuria v Smt. Ishroo Devi* AIR 1977 SC 1964 where in paragraph 315 of Mulla's Hindu Law (14th Edition) has been cited with approval and it has been laid down that according to Mitakshara law, as prevailing throughout the country (except Madras), when there is a partition between father and son, mother is entitled to a share equal to that of the son. It is no doubt true that while a mother is not a coparcener and cannot demand a partition but if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy

that share separately even from her husband. The same view was propounded by this court in case reported in 1LR 32 (Cal) 234. When plaintiff and his witnesses have proved partition, there was no other material on record to doubt the factum and validity of partition. Even otherwise the apex court in case of Shambhu Prasad Singh v. Mst. Phool Kumari (1971 (2) SC Journal 650) has laid down that a family arrangement is based on an assumption of an anterior title and its acknowledgement. Therefore it is not necessary that there must exist an anterior title sustainable in law in such a person which the order acknowledged.

9. It has been laid down in case of Sahu Madho Das and Others Vs. Mukand Ram and Another, in the following words:--

"It is well settled that compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the Parties and the agreement acknowledges and defines what that title is each party relinquishing of claims to property, house, they had previously asserted to the portion allotted to them respectively". It, therefore, follows that when the family members entered into a family arrangement, it shall be presumed that the property was joint and that they had lawfully entered into an agreement for partition.

10. The learned first appellate court therefore went out of its way in disbelieving the statements that the premises in suit was let out by Tarachand Agarwalla in capacity of Korta of the H.U.F.

11. Now I came to the question of denial to the title of the landlord by the defendants. Exhibit-3 is the letter dated 7th April, 1977 addressed to defendants informing that as per the terms of partition the defendants were required to pay rent to B.R. Agarwalla. Exhibit-3A is the reply sent on behalf of defendants dated 17th June, 1977 when stated that since the original deed was executed in favour of Tarachand Agarwalla they were unable to act on the basis of letter written by plaintiff. Pursuant to this letter. Tarachand Agarwalla, by his teller dated 4th July, 1977 informed as below "..... I have to inform you that as per the partition the property which is you are now occupying belong to B.R. Agarwalla and the remittance may be made in the name B.R. Agarwalla". This was enough intimation to the tenants-appellants for the purpose of attornment. This letter was acknowledged on behalf of the defendants (Exhibit-3C). It has been laid down by three-Judge bench of the apex court in case of Tej Bhan Madan Vs. II Additional District Judge and Others, that even denial of derivative title would amount to denial of title and the tenancy would be liable to be forfeited. The defendants have not pleaded that they were labouring under mistake or ignorance as to material facts affecting the title of person to whom he was attorney. It has been laid down in case of Mohar Singh (Dead) by Lrs. Vs. Devi Charan and Others, that partition of property may not actually amount to transfer but principles of section 109 of the Transfer of Property Act would apply to the cases of allotment of specific property by partition. I, therefore, hold that there was a valid attornment. By denying the appellants' title, even the extended lease of the defendants stood forfeited under clause (g)(ii) of section

111 of the Transfer of Property Act.

12. Now I come to the question of extension of lease. I entirely agree with the learned first appellate court that the defendants validly served notice for extension of lease for 9 years. The said notice was in accordance with the terms of agreement. The letter was sent well in advance but due to change of address of the plaintiff, it could not be delivered to him by 28th February, 1980 for no fault of the defendants.

13. Let us assume that there was no forfeiture of lease. The period of nine years has already elapsed in the year 1989. Thus defendants became liable to be ejected from the disputed premises soon thereafter.

14. The appeal is allowed. The judgment and decree passed by the first appellate court are hereby set aside and one passed by the trial court is hereby restored. The respondents shall pay the costs of the appellant's in this court. Counsel fees to the tune of 100 G.Ms, is allowed.

15. Appeal allowed