

(1973) 05 CAL CK 0021
In the Calcutta High Court
Case No : S.A. No. 569 of 1969

Bhagyalaksmi Dey and Others

APPELLANT

Vs

Nanda Dulal Kundu and Others

RESPONDENT

Date of Decision : 25-05-1973

Acts Referred:

Evidence Act, 1872 — Section 116

Trusts Act, 1882 — Section 82

West Bengal Premises Tenancy Act, 1956 — Section 13(1), 13(1)(f), 17

Citation : 77 CWN 817

Hon'ble Judges : Debiprasad Pal, J

Bench : Single Bench

Advocate : Manindra Nath Ghosh and Amulya Kumar Mukherji, for the Appellant; P.N. Mitter and Nilmoni Goswami, for the Respondent

Judgement

Debiprasad Pal, J.—The plaintiff is the appellant in this second appeal which arises out of the judgment and decree of the learned Additional District Judge, Burdwan, reversing the judgment and decree passed in the suit instituted by the plaintiff for eviction of the defendants from the suit premises on the grounds specified in clauses (i) and (f) respectively of Section 13(1) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the Act). The suit was resisted by the defendants who challenged the grounds for eviction as well as the plaintiffs' ownership of the suit premises. At the trial, in view of the Ordinance amending Section 17 of the Act, the plaintiffs did not agitate the ground of default and the learned Munsif decided this ground against the plaintiffs. The grounds of eviction were confined to the requirement of the premises for the purpose of building and rebuilding as well as the plaintiffs' own occupation. The plaintiff No. 1 and 2 purchased by a registered kobala dated 28th Jaistha, 1367, "Ka" schedule house from its previous owners and plaintiff Nos. 3 and 4 purchased by a registered kobala dated 1st Aswin, 1367, the remaining portion of the house from the previous owners and thus plaintiff Nos. 1 to 4 have become the joint owners of the "Ka" schedule house which is a two storied

building. The defendants allege that they were inducted into the premises long ago by its previous owner Rajlakshmi Shah at a monthly rental of Rs. 25/- and has been paying her the stipulated rent. The defendants allege that they learnt from the notice of the plaintiffs that they have purchased the house, and as they demanded separate rents, defendants deposited rents separately. It is further alleged that the defendants were never tenants of Mira Shah and Dhira Shah, the vendors of the plaintiffs and they have no knowledge that Mira and Dhira got the property from Rajlakshmi. It is therefore contended by the defendants that by the alleged purchase the plaintiffs have not become the owners of the house. The learned Munsif held that in view of the fact that the defendants were continuously paying rents to the plaintiffs who claim to have acquired title in the property by virtue of the kobalas, they were estopped by attornment from disputing plaintiffs' title. He has further held that irrespective of the principle of estoppel, although the defendants have set up title in one Rajlakshmi Shah, who has not been examined, they have not produced a single dakhila granted by her or the hatchitas which are with her. He further came to the view that there was no evidence that since Jaistha, 1367, the defendants were paying rents to any body excepting the plaintiffs. On the question of bonafide requirement, it is alleged by the plaintiffs, that the husbands of the plaintiff Nos. 1 and 2 and father of the plaintiff Nos. 3 and 4 have a statutory shop on the other side of the lane which is run under name and style of "Dey Brothers" and that the said shop was in a tenanted house. It is alleged in the plaint that the landlord of this shop has asked the husband of the plaintiff Nos. 1 and 2 to vacate the premises. The plaintiffs also have alleged that they require the premises for their residential purposes. The learned Munsif found in favour of the plaintiffs on this issue. The suit was therefore decreed by him.

2. On an appeal, the learned Additional District Judge held that the defendants had not been inducted by the plaintiffs and hence could not be estopped in spite of attornment from challenging the plaintiffs' title. The learned District Judge considered the evidence and the materials on record. He found that the name of Rajlakshmi from whom the defendants have taken out the tenancy was in the Municipal Assessment Register and that the plaintiffs after their purchase had their names mutated in her place. It has been found by the lower appellate court that the plaintiffs have failed to prove that the woman, namely, Sadayee from whom they have received the conveyance was the widow of Dukhiram in whose name the settlement record stood. He has further found that the plaintiffs have failed to prove that Dukhiram had a son named Shibaram and that this Shibaram had two daughters named Mira and Dhira. No explanation, according to the learned Additional District Judge was offered for the non-examination of Sadayee, Dhira and Mira. The appellate court therefore on these materials came to the view that the plaintiffs have failed to prove their ownership of the said premises.

3. On the question of reasonable requirement, the appellate court was of the view that a landlord can in view of Clause (f) of Section 13(1) of the Act claim

eviction of the tenancy for his own occupation if he is the owner or for the occupation of any person for whose benefit the premises are held. According to the appellate court a name-lender is not a person who can claim possession as of right. In the present case, on the evidence of the plaintiffs' witnesses, the appellate court proceeded on the footing and in my view rightly, that the persons in whose names the conveyances were effected in respect of the said property were ostensible owners. The appellate court therefore was of the view that a landlord who is not the owner cannot claim eviction of the tenancy on the ground of the real owner's occupation. The suit premises were held for the benefit or use of husbands of the plaintiff Nos. 1 and 2 and father of the plaintiff Nos. 3 and 4. Hence the requirement of the real owners for their own occupation cannot be a ground, according to the appellate court, for eviction when they are not the legal owners of the suit property. On the question of building and rebuilding, the learned appellate court was of the view that the premises were required for their own occupation and it is only for that purpose that the premises have to be built and rebuilt so as to suit their need. In view of the finding that the plaintiffs have no right to occupy, the question of adjusting the premises according to their need by building or rebuilding did not arise. Hence the appellate court did not go into that question. The judgment and decree of the trial court was therefore reversed.

4. On a second appeal before this Court Mr. Ghosh appearing for the plaintiff-appellants contends that the defendants were continuously paying rents to the plaintiffs, who claimed to have acquired title in the property by virtue of the said two kobala and hence were estopped by attornment from challenging the plaintiffs' title. Mr. Mitter appearing for the respondents contends that Section 116 of the Indian Evidence Act which creates an estoppel against a tenant from denying his landlord's title operates in a case where the tenant has been put into possession of the property by the landlord and the tenancy is still continuing. The principle of estoppel embodied in Section 116 of the Evidence, according to him, does not disentitle a tenant to dispute the derivative title of a person who has not put the tenant into possession of the property.

5. The plea of estoppel recognised in Section 116 of the Evidence Act deals with one cardinal and simple estoppel as applicable between a landlord and a tenant. This estoppel in its present form is of comparatively recent development and is founded on the contract or agreement between the parties. The rule embodied in this section means that the tenant during his possession is estopped from denying that the landlord who let him into possession had a title at the time of his entry. This rule rests upon the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however, defective it may be so long as he has not openly restored possession by surrender to his landlord. (1) (*Bilas Kunwar v. Desraj Ranjit Singh*, 42 Indian Appeal 202). The reasons which underly the doctrine of estoppel embodied in Section 116 of the Indian Evidence Act find an useful exposition in the following observations of Martin B in (2) *Cuthbertson v. Irving* (1859) 4 H & N 742 :--

This state of law in reality tends to maintain right and justice and the enforcement of the contract which men entered into with each other (one of the great objects of all laws); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee or his lessor really is? All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it.

Section 116 of the Indian Evidence Act postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title.

6. Section 116 of the Indian Evidence Act does not deal or profess to deal with all kinds of estoppels or occasions of estoppel which may arise between landlord and tenant. (3) (*Krishna Prasad Lal Singh Deo v. Baraboni Coal Concern Ltd.*, 64 I.A. 311). Sir George Rankin in the aforesaid case observed as follows:

Whether during the currency of a term the tenant by attornment to A who claims to have the reversion, or the landlord by acceptance of rent from B who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside Section 116 altogether; and it may well be that, as in English law, the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and in completeness with the case covered by the section.

It is true that the principle underlying Section 116 of the Evidence Act only applies to the title of the landlord who "let the tenant in" as distinct from any other person, claiming to be reversioner, and the principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since becomes entitled to the reversion, though in such cases there may be other grounds of estoppel, e.g., by attornment, acceptance of rent, etc. (3) (*Krishna Prasad Lal Singh Deo v. Baraboni Coal Concern Ltd.*, 64 I.A. 311).

7. "Attornment" in the sense in which the word is used and understood in English law is not a mere agreement in favour of a third party to pay rents, but has been denned as "the act of the tenant" putting one person in the place of another as his landlord. (4) (*Cornish v. Seareel* (1828) 8 B & C 471) per Holroyd, J.

When a person is already in occupation of property, the relation of landlord and tenant may be established between another person and himself by attornment. A tenancy may be created by attornment, which is an acknowledgment by a person in occupation of property that he is the tenant of another person". (See Hill and Redman's Law of Landlord and Tenant, 15th Edition, page 7).

The relationship of landlord and tenant may also be created by attornment. An attornment on the part of a tenant for years is the agreement of the tenant to the establishment of the relation of landlord and tenant between himself and a grantee of the reversion (Woodfall on the Law of Landlord and Tenant, 27th Edition, page 4).

Mr. Mitter relied upon the decision, in the case of (5) Lal Mohomed v. Kallanus (I.L.R.) (11) Cal. 519 in support of the proposition that the plea of estoppel enacted in Section 116 of the Act applies only to cases in which tenants are put into possession of the tenancy by the persons to whom they have attorned, and not to cases in which the tenants have previously been in possession. In the aforesaid case, A, a ryot, being in possession of a certain holding, executed a kabuliat regarding this holding in favour of B (who claimed the land, in which the holding was included, under a derivative title from the last owner), and paid rent to B thereunder. "A" admitted having given the kabuliat, but stated that he had done so under coercion. He also raised the further defence that at the time when the kabuliat was executed "B" had no title to the share claimed by him. Although the story of kabuliat being obtained by coercion was accepted by the learned Munsif. It did not find favour with the Subordinate Judge on appeal. On a second appeal the Division Bench of this Court held that "A" was not estopped by Section 116 from denying the title. Their Lordships pointed out that in that case the defendant was in possession before and all that he did was to give the kabuliat to a person claiming a derivative title from the last owner. According to their Lordships the defendant was entitled to dispute this title if he so wished. This case was considered in a decision of the Division Bench of this Court in the case of (6) Ketu Das Vs. Surendra Nath Sinha and others . Their Lordships observed as follows:

It is one of the first principles of the law of estoppel as applied to the relationship between landlord and tenant that the latter is estopped from denying the title of the former. The rule however applies only to the title of the landlord who let the tenant in. If the tenants did not obtain possession from a person who was only recognised as landlord either by express agreement, or by attornment, or formal acknowledgment by payment of rents, he may always show that his conduct was due to mistake or ignorance of facts relating to title, misrepresentation or fraud.

Their Lordships pointed out that in the earlier decision of (5) Lal Mahomed v. Kallanus no question was raised or decided as to what, if any, limitations there are of the tenant's privilege to deny the title of his lessor after attornment when he was not inducted by such lessor. In my view the decision in the case of (5) Lal Mahomed v. Kallanus is no authority for the broad proposition that a tenant is always competent to show the want of title of his lessor if he was not inducted into the land by such lessor. An attornment is a creature of contract. Hence an attornment or acknowledgment of tenancy under mistake, or coercion or misrepresentation or fraud or other grounds which would invalidate the contract would be sufficient to avoid the plea of estoppel. But unless such a plea is

specifically taken and established to the satisfaction of the court, a person who has attorned to the lessor as a tenant is estopped from denying the landlord's title. In the case of Ketu Das v. Surendra Mohan Sinha as the tenant did not plead that he executed the kobala and paid rents to his landlord on account of ignorance or mistake or misrepresentation, he was not permitted to prove that the plaintiffs were not the true landlords.

8. In the present case the concurrent findings of both the courts is that the defendants had received the intimation about the purchase of the suit property by the plaintiffs and had been paying rents and the defence case is that although the aforesaid purchases were followed by attornment, they were in fact tenants under one Raj Lakshmi and not under the vendors of the plaintiffs. The lower appellate court was of the view that as the defendants had not been inducted by the plaintiffs, they were not estopped in spite of attornment from challenging the plaintiffs' title. The view taken by the lower appellate court cannot be sustained in view of the law stated above. From the pleading it appears that the defendants had not made any allegation that the attornment was made on account of any ignorance of facts, mistake or misrepresentation or fraud. In fact no issue also was raised on this point in view of the fact that no such contention was ever raised. In my view in the absence of any such plea raised by the defendants, they are estopped by attornment from disputing the plaintiffs' title.

9. The Learned Counsel for the appellants next contended that the lower appellate court has erred in law in holding that the plaintiffs cannot claim eviction of the tenants on the ground of the real owners' own occupation. The finding of the lower appellate court is that assuming that the title was conveyed by the two conveyances, being Exts. 6 and 6A, it was conveyed to persons other than those whose names appear on the conveyance as the vendees. It is in evidence that Dharendra Kumar Dey is the husband of plaintiff No. 2, plaintiff No. 1's husband is his elder brother. Plaintiff No. 4 is his son and plaintiff No. 3 is his brother's son. It is in evidence that the suit property was purchased in the names of the plaintiffs who are the ostensible owners and not the real owners. It is also in evidence that the eviction is claimed on the ground of the real owners' own occupation. According to the lower appellate court a name-lender is not a person who can be said to be the owner and as such he cannot claim eviction of the tenant on the ground of the real owner's own occupation. The Learned Counsel for the appellants submitted that u/s 13(1) (f) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the Act) a landlord can claim eviction (i) if he reasonably requires the premises for his own occupation if he is the owner or (ii) if he reasonably requires the premises for the occupation of any person for whose benefit the premises are held. In my view even on the finding of the lower appellate court, the plaintiffs being the ostensible owners, are holding the property for the benefit of the real owners and a suit for eviction will lie if the premises are reasonably required for the occupation of the real owners for whose benefit the premises are held. The Learned Counsel for the respondents relied upon a Division Bench judgment in the case of (7) Carritt

Moran & Co. (P) Ltd. v. Roneo Ltd., ILR (1969) (1) Cal. 347 in support of the proposition that the plaintiffs in order to succeed must prove that they are the owners of the disputed premises. In that case, the plaintiff was only a lessee, though for a long term viz. 66 years and it was held that even a permanent lessee cannot claim to be the owner within the meaning of the aforesaid statutory provision. In that case the requirement pleaded was the requirement for the plaintiff's own occupation and the learned Judge held that in order to claim eviction u/s 13 (1) (f) of the Act the premises reasonably required by the landlord for his own occupation must be owned by him.

10. The aforesaid decision is an authority for the proposition that the lessee, though for a long term, is not the owner within the meaning of Section 13(1) (f) of the Act. This decision in my view is hardly of any assistance to the respondents. In the present case, the legal title to the suit premises vests in the plaintiffs who have purchased the properties by two respective Kobalas referred to earlier. The question, therefore, is who is the "owner" referred to in Section 13(1) (f) of the Act? Is it the person in whom the property vests or is it he who is entitled to the beneficial interest in the property? A property cannot be owned by two persons, each one having independent and exclusive rights over it. In my view, the expression "owner" in Section 13 (1) (f) of the Act refers to the person in whom the title to the property vests and not the person who is entitled to the beneficial interest in the property.

11. The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system has been in our country a common practice which has acquired judicial recognition. The word "benami" is used to denote two classes of transactions which differ from each other in their legal character and incidence. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the Sale Deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transaction which is usually termed as "benami". But the word "Benami" is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter, there is no such, the transferor continuing to retain the title notwithstanding the execution of the Transfer Deed (8) (Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras,). The rule applicable to a benami transaction has a curious resemblance to the doctrine of English Law that the trust of the legal estate results to the man who pays the purchase money. (1) (Bilas Kunwar v. Desraj Ranjit Singh; 42 I.A. 202). But it is well settled that the Indian Law does not recognise any distinction between legal and equitable estate. Under our law there can be but one "owner" and where for example, the property is vested in a trustee, it is the trustee who is the "owner" of the trust property, the right, of the

beneficiary being in a proper case to call upon the trustee to convey to him (9) (Chhatra Rumari Devi v. Mohan Bikram Shah 58 I.A. 279). In the context of the rights of the benamidar to sue in his own name to recover immovable property, the Judicial Committee in (10) Gur Narayan v. Sheolal Singh (46 I.A. 1) defined the status of a benamidar in law thus : ":.....the benamidar has no beneficial interest in the property or business that stands in his name; he represents in fact, the real owner and so far their relative legal position is concerned he is a mere trustee for him.....The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar the present beneficiary is fully affected by the rule of res judicata."

This position is given a statutory recognition in Section 82 of the Indian Trust Act, 1882. In my view u/s 13(1) (f) of the Act, even if the plaintiffs are to be considered as the legal owners and not the real owners, if the premises are reasonably required for the occupation of the real owners, for whose benefit such premises are being held by the ostensible owners that can be a valid ground for eviction.

12. Mr. Mitter next contended that even if his client is estopped by attornment from denying the title to the landlord, it is open to him to contend that the plaintiffs are not the owners of the property for the purpose of satisfying the requirement u/s 13 (1) (f) of the Act. In an appropriate case, as in the case of Carrit Moron & Co. (P) Ltd. v. Roneo Ltd. (vide Supra) where a person may be the landlord but not the legal owner of the property, such questions may arise. But in the present case, the plaintiffs are the landlord by virtue of their title to the property conveyed by the two respective Kobalas and if the defendants are estopped by attornment from challenging the title of the landlord, I fail to see how it is open to them to contest the legal ownership of the plaintiffs in the suit properties which is based on the title conveyed by the said two kobalas.

13. Finally Mr. Mitter, Learned Counsel for the respondents submitted that in view, of the introduction of Clause (ff) in Section 13 (1) of the Act with retrospective effect, there has been no finding by the lower courts as to whether the landlords or such persons for whose benefit the premises are held are not in possession of any reasonably suitable accommodation. In my view this contention of the Learned Counsel for the respondents has considerable force. After the introduction of Clauses (ff) in Section 13(1) of the Act, in a suit for eviction it has to be established (1) that the premises are reasonably required by the landlord for his own occupation if he is the owner or the premises are reasonably required for the occupation of any person for whose benefit the premises are held and (2) the landlord or such person for whose benefit the premises are held is not in possession of any reasonably suitable accommodation. Both the learned Munsif and the lower appellate court had no occasion to consider the second limb of the new Clause (ff). As the said Clause is in operation with retrospective effect, it is necessary to come to a finding as to the existence or otherwise of the second condition viz. whether the landlord or

the person for whose benefit the premises are held is not in possession of any reasonably suitable accommodation. In the result the judgment and decree of the learned Additional District Judge, Second Court Burdwan, is set aside and the case is remitted to the lower appellate court with the direction for arriving at the finding, viz. whether the real owners for whose benefit the plaintiffs are holding the premises in question are not in possession of any reasonably suitable accommodation. The lower appellate court will dispose of the appeal in the light of the principles decided and the parties will be at liberty to adduce fresh materials, if any, on the point on which there has been an order of remand. There will be no order as to costs.