

(1981) 12 CAL CK 0004
In the Calcutta High Court

D.R. Punjab Montgomery Transport Co. and Others	APPELLANT
Vs	
Raghuvanshi Private Ltd. and Others	RESPONDENT

Date of Decision : 03-12-1981

Acts Referred:

Citation : 86 CWN 759

Hon'ble Judges : Ram Krishna Sharma, J;Chittatosh Mookerjee, J

Bench : Division Bench

Advocate : Dipankar Ghosh, Nirmal Mitra, Swapan Garai and Ananda Prosad Ghosh, for the Appellant; H. Dutt, Ganapati Chunder and B. Mallick, for the Respondent

Final Decision : Dismissed

Judgement

1. In the year 1959, D. R. Punjab Montgomery Transport Co. was inducted as a tenant under Raghuvanshi Pvt. Ltd. at a monthly rent of Rs. 1,152/- in respect of five rooms situated in the ground floor of 17, Kashinath Mallick Lane, P.S. Jorasanko, Calcutta. According to the plaintiff-appellants, at the relevant time Sardar Mohidar Singh (since deceased) and his mother were partners of the said firm, D. R. Punjab Montgomery Transport Co. Raghuvanshi Pvt. Ltd, the defendant-respondent No. 1, had instituted Suit No. 1526 of 1964 against the said firm, D. R. Punjab Montgomery Transport Co. in the High Court at Calcutta for eviction on the ground of default in payment of rent. The said suit was decreed on compromise under which, inter alia, the monthly rent was raised to Rs. 1,201/- per month and the said tenant was required to pay the arrears in instalments. In 1967, the then landlord had brought another Ejectment Suit, being Suit No. 1293 of 1967, against the firm, D. R. Punjab Montgomery Transport Co. The same was also settled.

2. On 10th April, 1968, Raghuvanshi Pvt. Ltd. again brought Suit No. 915 of 1968 against D. R. Punjab Montgomery Transport Co., in the High Court at Calcutta for ejectment and mesne profits. On 31st July, 1969 the said Raghuvanshi Pvt. Ltd., had assigned its interests in Premises No. 17, Kashinath

Mallick Lane, Calcutta in favour of the present Respondent Nos. 2 to 13. The said respondents Nos. 2 to 13 were thereupon added as plaintiffs in Suit No. 915 of 1968.

3. On 29th September, 1970, A. N. Sen, J. (as he then was) ex parte decreed the Suit No. 915 of 1968. After the prayer made on behalf of the defendant, D. R. Punjab Montgomery Transport Co., for adjournment was refused and the attorney for the defendant having retired from the case, the learned Judge ex parte decreed and ordered that the defendant do deliver up possession to the plaintiff Nos. 2 to 13 (present respondents Nos. 2 to 13) vacant possession of the five rooms in the ground floor of Premises No. 17, Kashinath Mallick Lane. The learned Judge further passed a decree for a sum of Rs. 8,470/- as arrear rent and also for mesne profits in respect of the said rooms at the rate of Rs. 40.50 per day commencing from 1st day of April, 1968.

4. On 2nd March, 1972 D.R. Montgomery Transport Co. had filed a petition in this Court praying for recording adjustment of the decree dated 22nd September, 1970 passed in Suit No. 915 of 1968 and for certifying the payment made by the defendant firm to the plaintiff's Solicitor. The plaintiffs had opposed the said petition for recording adjustment of the aforesaid decree. Ultimately, D.R. Punjab Montgomery Transport Co. had withdrawn the said petition for recording adjustment and satisfaction of the decree passed in the Suit No. 915 of 1968.

5. On 10th June, 1972, D. R. Punjab Montgomery Transport Co., as plaintiff had instituted Title Suit No. 619 of 1972 in the City Civil Court at Calcutta against the present respondents as the defendants, inter alia, for a declaration that the plaintiff was in possession as a monthly tenant in respect of five rooms in the ground floor of Premises No. 17, Kashinath Mallick Lane at a rent of Rs. 1,213/- per month payable according to English calendar under the defendant Nos. 2 to 13 and for permanent injunction restraining the defendants, their servants, agents and nominees and assigns from disturbing or from interfering with the plaintiff's right and enjoyment of the said five rooms. During the pendency of the suit on 1st February, 1976 the said Mahindar Singh died. Upon an application made by the heirs and legal representatives of the deceased Mohindar Singh, the Court below set aside the abatement of the suit and brought them on record as the plaintiff Nos. 2 to 6 in Title Suit No. 619 of 1972. Further, in the plaint a prayer was inserted for declaration that the ex parte decree passed in Suit No. 915 of 1968 against M/s. D. R. Punjab Montgomery Transport co. was not binding upon the plaintiffs.

6. The plaintiffs, inter alia, pleaded that upon receiving information that on 22nd September, 1970, A. N. Sen, J. had ex parte decreed the Suit No. 915 of 1968, Sardar Mahindar Singh, a partner of the plaintiff in November, 1970 had contacted Vithaldas Bhimji Mansata and also Mr. B. Mallick, Solicitor of the plaintiffs in Suit No. 915 of 1968. The said Mahindar Singh on behalf of the plaintiffs had offered to pay off all arrears of rent by instalments and prayed for accepting the plaintiffs firm as a monthly tenant. The plaintiff further alleged that

the said Vithaldas Bhimji Mansata and B. Mallick had represented to the plaintiff's partners, Mahindar Singh that unless the plaintiff made substantial payment towards arrears of rent, the defendants could not be satisfied as to the bona fides of the plaintiff and could not commit themselves to any final agreement. The plaintiff further pleaded in their plaint that on December 21, 1970 the plaintiff had paid Rs. 20,000/- to Mr. B. Mallick, Solicitor for the defendants and also a further sum of Rs. 2,000/- on account of the costs of the said Suit No. 915 of 1968. On March 4, 1971 the plaintiff paid a further sum of Rs. 9,517.50 to Mr. B. Mallick, Solicitor. The plaintiff in paragraph (14) of the plaint stated that after several discussions ultimately in or about May, 1971 there was a verbal agreement by and between the plaintiff represented by Mahindar Singh and the defendants represented by their Solicitor, B. Mallick and said Vithalbai Bhimji Mansata. It was allegedly agreed that upon payment of all arrears of rent at the rate of Rs. 40.50 per day by December, 1971 and upon payment of rent for January, 1972 in course of the succeeding month, the defendant Nos. 2 to 13 would accept the plaintiff as a monthly tenant of the said five rooms on and from February, 1972 at the enhanced rate of Rs. 1,213.62 per month. Unless and until the plaintiff paid all arrears and also rent for January, 1972 the defendants would issue receipts for payments to be made describing the same as mesne profits, under the decree passed in Suit No. 915 of 1968. The plaintiffs claimed that in pursuance of the said agreement had cleared off all arrears of rent by December, 1971 and also had paid the rent for the month of January, 1972 in course of February, 1972 and, therefore, the plaintiff became a monthly tenant under the defendant Nos. 2 to 13 in respect of the five rooms of the premises at a monthly rent of Rs. 1,231.62. But the defendant Nos. 2 to 13 were purporting to go back upon the said agreement after receiving huge sums of money under the agreement and were threatening to execute the ex parte decree passed in Suit No. 915 of 1968.

7. Raghuvanshi Pvt. Ltd., defendant No. 1, filed a written statement, inter alia, stating that by a deed of assignment dated 31st July, 1969 the said company had assigned its right, title and interest in the suit property to the defendant Nos. 2 to 13 and as such the defendant No. 1 had no longer any right, title and interest in the suit premises. The defendant No. 1 denied that any agreement was arrived at between the plaintiff and the defendants represented by Mr. Vithalbai Bhimji Mansata and Mr. B. Mallick, Solicitor. According to the defendant No. 1 the plaintiff had paid to Mr. B. Mallick the sums in question towards part payment of the arrears of rent and mesne profits payable under the decree passed by this Hon'ble Court. The defendant No. 1 further denied the allegation that there was ever any agreement between the parties to create a new tenancy in favour of the plaintiff in respect of the disputed premises.

8. The defendant Nos. 2 to 13 by a separate written statement also denied the plaintiff's case. They in particular denied that any agreement was entered into by Mr. B. Mallick and Vithalbai Bhimji Mansata on their behalf to grant an alleged tenancy in favour of the original plaintiff, D. R. Punjab Montgomery

Transport co. They further claimed that the said Mr. Mansata and Mr. Mallick had no authority to enter into any contract on behalf of the defendant Nos.2 to 13. According to the defendant Nos. 2 to 13, upon the representation made by Mahindar Singh that peaceful possession would be given by November, 1971, the defendants had stayed their hands subject to the conditions that the original plaintiff would pay and satisfy the mesne profits payable to them under the said decree dated 22nd September, 1970. When the Original plaintiff failed to honour its promise even after February,1971, the defendants had instructed their Solicitor to take steps for recovery of possession.

9. At the time of the final hearing, the plaintiffs did not give any direct evidence that there was an agreement to create a new tenancy in favour of the plaintiff firm in May, 1971. Kuljit Singh, D. W. 1, who was described as the Manager of the plaintiffs deposed that in December, 1970 there was an oral agreement for creation of a new tenancy between late Mahindar Singh and Kuljit Singh, on the one side and Mr. B. Mallick and Mr. Mansata, on the other.

10. The learned Chief Judge, City Civil Court at Calcutta rejected the evidence of P. W. 2, Kuljit Singh that there was a verbal agreement in December, 1970. According to the learned Chief Judge, the said case was not pleaded in the plaint and the correspondence between Mr. S. C. Palit, the plaintiff's Solicitor and Mr. B. Mallick did not show that there was any concluded agreement in December,1970 (vide Exts. 13 and 2a). The learned Chief Judge also did not place any reliance upon the tape-recorded telephonic conversation allegedly between Kuljit Singh, P. W. 2, on the one side and Mr. B. Mallick on the other (vide Ext. 19) or upon the alleged a similar conversion between late Mahindar Singh and Mr. B. Mallick (Ext.19A). According to the learned Chief Judge, the defendants did not prove the time, place and accuracy of the said tape recording and, therefore, it would not be safe to rely upon the tape recorded evidence. The learned Chief Judge also upheld the contention of the defendant Nos. 2 to 13 that the plaintiffs did not prove that Mr. B. Mallick, Solicitor and Mr. Mansata had any authority to represent the defendant Nos. 2 to 13 or that they had any authority to enter into any agreement with the plaintiffs. The learned Chief Judge lastly rejected the contention of the plaintiffs that by withdrawing from Court deposits of rent at the enhanced rate of Rs. 1,231.62 per month, the defendants had become estopped from raising the plea that there was no agreement to create new tenancy in favour of the plaintiffs. The learned Chief Judge, City Civil Court at Calcutta accordingly dismissed the suit.

11. The principal point in this appeal is whether or not really there was any agreement between the parties to create a tenancy in favour of D. R. Montgomery Transport Co. in respect of the disputed rooms. The plaintiff's case was that there was an oral agreement in this behalf between Mahindar Singh on behalf of the said company on one hand and Mr. B. Mallick, Solicitor and Mr. Mansata on behalf of the defendant Nos. 2 to 13, on the other. The plaintiff's further claim was that they had made payment towards mesne profits payable

under the decree passed in Suit No. 915 of 1968 in pursuance of such an agreement to grant a new tenancy in favour of the said D. R. Montgomery Transport Co. Undoubtedly, the burden of proof was upon the plaintiffs to establish their said case of grant of a fresh tenancy by the defendant Nos. 2 to 13.

12. Having given our anxious consideration to the pleadings of the parties, the evidence on record and the submissions of the parties, we are of the view that the plaintiffs have failed to prove their case and the learned Judge of the Court below rightly dismissed their suit. Mahindar Singh, who according to the plaintiffs, was one of the partners of D. R. Montgomery Transport Co. died during the pendency of the case in the trial Court and, therefore, his evidence was not available to the plaintiffs. In order to prove their case of granting a fresh tenancy in respect of the disputed rooms, the plaintiffs relied upon the oral evidence of Kuljit Singh, P. W. 2, who was described as a relation of Mahindar Singh, and also the manager of the said Transport Company. The plaintiffs also placed reliance upon the taperecorded alleged telephonic conversation between Kuljit Singh, P. W. 2 and Mr. B. Mallick, Solicitor and also the alleged conversation between Mahindar Singh and B. Mallick (Exts.19 and 19a), and also the conduct of the parties relating to payment of mesne profits and the decree-holder's Suit No. 915 of 1968 not executing the ejectment decree for a long period. Lastly, the plaintiffs pleaded that by withdrawing monthly damages at the rate of Rs. 1,231.62 deposited by the plaintiffs in Court, the defendants were estopped from denying the plaintiffs' case of a new tenancy at the said rate of rent per month.

13. The plaintiffs have lastly submitted that the defendants having withdrawn from the trial Court rent / mesne profits deposited by the plaintiffs at the rate of Rs. 1,231.62 per month, the defendants were now estopped from denying that there was a new tenancy in favour of the plaintiffs at the said rate of rent. The tenancy hold by the plaintiff firm at a rent of Rs. 1,210/- per month had been extinguished by the ejectment decree dated 22nd September, 1970 in Suit No. 915 of 1968. Before the plaintiffs instituted the instant suit in the City Civil Court, Mr. B. Mallick on behalf of the defendants had granted receipts describing payments made by the plaintiffs as mesne profits and also clearly stipulating that the same were without prejudice to his clients' rights under the said decree dated 22nd September, 1970. After instituting the said suit in the City Civil Court the plaintiffs had prayed for an ad interim injunction to restrain the present defendants from evicting the plaintiffs from the suit premises. After the institution of the suit, the plaintiffs did not deposit any mesne profits due since February, 1972 till a much later date. Initially, the trial court issued show-cause notices and did not grant any separate ad interim order. Thereafter, on 25th August, 1976 the trial court granted ad interim orders on condition the plaintiff deposited Rs. 1,5000/-.

14. On 14th February, 1978 the trial court allowed the plaintiffs' prayer for temporary injunction on condition they deposited Rs. 36,475/- by three

instalments and also would go on depositing current damages from February, 1978. The plaintiffs had complied with the said order for deposit. Subsequently on 10th July, 1978 the defendants filed a petition in the trial court and the said Court by its Order No. 80 dated 7th August, 1978 permitted the defendants to withdraw said amounts deposited by the plaintiffs without prejudice to the right of the parties. The defendants in their said petition had stated that the plaintiffs were liable to pay mesne profits at the rate of Rs. 1,210/- per month. Thereafter, under the order of the Court below the defendants had withdrawn the said amounts deposited by the plaintiffs.

15. Upon these facts the plaintiffs cannot plead estoppel against the defendants. In India estoppels have been treated as rules of evidence and the foundation of the same is representation of a party which has been acted upon by the other party. In this case, the trial court had permitted the defendants to withdraw, without prejudice, monthly damages deposited by the plaintiffs in Court and the defendants themselves did not expressly or impliedly made any representation or misrepresentation to the plaintiffs who had deposited the said monthly damages in fulfillment of the conditions imposed by the Court below while granting temporary injunction in their favour. In other words, the plaintiffs had deposited the said monthly damages in Court in order to obtain an order of temporary injunction in their favour. It was the plaintiffs who had obtained a favourable interlocutory order by making the said deposits which the Court below had later on permitted the defendants to withdraw without prejudice. Therefore, the plaintiffs cannot claim any equity as against the defendants. When the Court below allowed the defendant to withdraw the aforesaid deposits "without prejudice", the defendants could not suffer any detriment by acting in accordance with the said interlocutory order of the Court below. Further, the words "without prejudice" in the order of the trial court imported that the withdrawal of the money shall not have any legal effect on the rights of the parties in the pending suit. The Division Bench of the Patna High Court in (1) Umesh Jha Vs. The State and Another, while considering the effect of acceptance of rent without prejudice by the State observed that the said words "without prejudice" import in to a transaction that the parties have agreed that as between themselves the receipt of money by one hand, its payment by the other shall not by themselves have any legal effect on the rights of the parties but they shall be open to settlement by legal controversy as if the money had not been paid. We respectfully agree with the above statement of law. It may be noted that the Supreme Court in (2) State of Bihar and Another Vs. Umesh Jha, on other points had reversed the decision in Umesh Jha's case (supra), but did not dissent from the view of the Patna High Court regarding the meaning of the words "without prejudice". Mr. Ghosh learned Advocate for the appellant had relied upon the decision of (3) Daintrey Exp., Holt(1893) 116, which dealt only with the admissibility of a letter written "without prejudice" in a bankruptcy proceeding. Therefore, the said decision is not relevant for deciding the controversy before us.

16. Mr. Dutt, learned Advocate appearing on behalf of the respondents has also drawn our attention to the decision of the Supreme Court in (4) Bai Chanchal and Others Vs. Syed Jalaluddin and Others, , where under a decree for eviction the judgment-debtors who were liable to immediate eviction, were allowed to continue in possession for a period of five years from the date of decree in view of granting consent by the decree-holder and the judgment-debtors were required to pay mesne profits at the rate of higher than rate of rent. There was also a clause in the decree that in case of default in payment of mesne profits, the judgment-debtors would be called upon to immediately deliver possession. The Supreme Court held that the said terms of the consent decree neither constituted a new tenancy nor a licence. The aforesaid reported decision is against the contention of the plaintiff-appellants that by paying mesne profits either before or after the institution of the suit in the City Civil Court they had acquired a new tenancy. In the result, we reject the plea of estoppel raised on behalf of the plaintiffs.

For the foregoing reasons, we dismiss this appeal with costs. On the prayer of Mr. Mitra, learned Advocate for the appellants, we stay the operation of the judgment for six weeks.

Sharma, J.

17. I agree.