
(1958) 01 CAL CK 0011
In the Calcutta High Court
Case No : Appellate Decree No. 109 of 1957

Gobinda Bhusan Roy

APPELLANT

Vs

Jnan Chandra Mukherjee

RESPONDENT

Date of Decision : 03-01-1958

Acts Referred:

Bengal Wakf Act, 1934 — Section 53(1), 53(2), 53(3), 53(4), 53(7)

Evidence Act, 1872 — Section 116

West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 — Section 12

Citation : (1959) 1 ILR (Cal) 533

Hon'ble Judges : Law, J; Das Gupta, J

Bench : Division Bench

Advocate : Hemendra Chandra Sen, Hemesh Chandra Sen and Chandi Sadhan Bose, for the Appellant; Jitendra Kumar Sen Gupta, Benoyendra Nath Sen and Debaprosad Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Das Gupta, J.—The premises in suit form part of a wakf which came into existence on May 3, 1940. Dabiruddin Ahmed, who made the wakf by a deed, was himself the first mutwalli. In his capacity as mutwalli, he leased the premises to Radhika Bhussan Roy, who occupied it as a monthly tenant at a rent of Rs. 215 per month. On August 8, 1952, Debiruddin transferred his interest to the present Plaintiffs. He informed the tenants of this transfer by a letter which has been put in evidence and asked them to pay rents henceforth to the transferees. In actual fact, the tenants have been paying rent to the Plaintiffs for a considerable time and recently have been depositing the same in favour of the plaintiffs before the Rent Controller. According to the Plaintiffs, their main purpose in getting this house, in exchange for certain properties they had in the town of Dacca, was to find accommodation for their large family in Calcutta, having had to leave Dacca because of the events after the partition of Bengal. After the transfer, the Plaintiffs gave notice to tenants to quit and thereafter brought the suit for ejectment out of which the present appeal has arisen. The

ground on which to Plaintiffs said, the Defendants were not entitled to the special protection of the West Bengal Premises Rent Control (Temporary Provisions) Act of 1950, against eviction, was that they reasonably required the premises for their own occupation.

2. The Defendants took several objections, the main objection being that there was no relationship of landlord and tenant between them and the Plaintiffs inasmuch as there had been no valid transfer from the mutwalli Dabiruddin Ahmed to the Plaintiffs.

3. The courts below rejected their contention, found that there has been proper service of notice to quit, found also that the landlords reasonably required the premises for their occupation and gave a decree for ejectment.

4. On the Defendants' contention that there was no relationship of landlord and tenant between them and the Plaintiffs because there had been no valid transfer of title, both the courts below held that the Defendants were estopped from challenging the title of the Plaintiffs inasmuch as they had attorned to the Plaintiffs after the transfer and had actually paid rent to them for a considerable time. The appellate court further held that, in any case, the Defendants had failed to show that the Plaintiffs had not good title on the strength of the transfer.

5. The main ground urged before us by Mr. Sen on behalf of the Appellants was that the court below was wrong- in thinking that the Defendants were estopped from challenging the title of the Plaintiffs. He has rightly pointed out that the estoppel u/s 116 of the Evidence Act is not available to the Plaintiffs in this case as the Plaintiffs were not persons who put the Defendants in possession of the premises. As regards estoppel by attornment and payment of rent, Mr. Sen argued that it was open to the Defendants to show, in spite of such payment of rent, that in fact the Plaintiffs had no title and that the payment of rent was made in ignorance of the correct position in law. I do not think there can be any doubt that in spite of the fact of payment of rent by tenants to the persons claiming to be landlords on the strength of title derived from the original landlord, it remains open to the Defendants to show that such payment was made in ignorance of the correct position in law and, in fact, the Plaintiffs have not derived the title as claimed by them. This was laid down by a Full Bench of this Court as early as 1866 in Benay Madhab Ghosh v. Thakoor Doss Mundul (1866) 6. W.R. 71, 75. Sir Barnes Peacock delivering the judgment of the Court observed:

According to the English law, if a man takes land from another as his tenant, he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another believing that- other to be the representative of the person from whom he took the land, he is not estopped in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took.

6. This appears to be the law still and it is open to the Defendants to show that no title was derived, by the Plaintiffs, subject, however, to this that where there has been payment of rent and no case of fraud or misrepresentation is made out, the very fact, that by the payment of rent the Defendant has admitted and acknowledged the person now claiming to be landlord to have actually obtained the title, is prima facie evidence to show that the title was actually derived; and when this is the position, the onus shifts to the Defendant to prove that, in fact, title has not been derived.

7. In the present case, as already stated, payment of rent by the Defendants or their predecessors to the Plaintiffs has been proved and is really not disputed. The Plaintiffs have also put in evidence, the deed of transfer by which they claim to have derived title from the mutwalli Dabiruddin Ahmed. How then can the Defendants try to show that the Plaintiffs have not derived the title. Nothing was clearly pleaded about this in the written statements. The case sought to be made at the trial seems to have been that the transfer was invalid in law inasmuch as there was no notice sent by the mutwalli to the Commissioner of Wakfs as required by Sub-section (2) of Section 53 of the Bengal Wakf Act. The relevant portion of Section 53, Sub-sections (1) and (2) runs thus:

(1) Except as provided in Sub-sections (2), (3) and (4) no transfer by a mutwalli of any immoveable property of a wakf by way of sale, gift,, mortgage or exchange or by way of lease for a term exceeding five years shall be valid without the previous sanction of the Commissioner.

(2) Where such transfer is made under an express power conferred by the Wakf deed, the previous sanction of the Commissioner shall not be necessary, but a notice of the proposed transfer in such form and containing such particulars as may be prescribed by the Board shall be sent by the mutwalli to the Commissioner one month before the transfer is made.

8. It is not necessary to set out Sub-sections (3) and (4) as they are not relevant to the facts of this case. It is proper to mention here that before us Mr. Sen has also tried to persuade us that the transfer has not been made under any express power conferred by the wakf deed within the meaning of Section 53(2) and that the transfer is invalid by reason of the provisions of Section 53(1). We have been taken through the relevant clauses of the wakf deed as it stood after" certain alterations were made in the original deed by a later document which is marked ext. 1(a). The authority to make alterations was recognised by the provisions of Clause (h) of the original deed. There is no scope for doubting the power conferred on the mutwalli by the wakf deed to make the exchange as was done, in this case. It was clearly in view of this that in the court below the Defendants' advisers proceeded on the basis that this was a transfer within the meaning of Section 53(2) of the Bengal Wakf Act. I have no doubt in my mind that the transfer was, in fact, made under the express power conferred by the wakf deed and consequently the previous sanction of the Commissioner, the absence of which would have invalidated a transfer under Sub-section (7) of Section 53 was

not necessary. All that still remained to be done by the mutwalli was the sending of a notice in a form as may be prescribed. For the reasons I have already given, the burden of proving that the sale is invalid being on the Defendants, it was for them to prove that no notice had actually been served. Dabiruddin Ahmed, the mutwalli, has been examined and has said that he did give notice. The mere fact, that the notice has not been produced in court, would not, in my opinion, be sufficient reason to disbelieve him. The court of appeal below has expressed its view that there is no clear indication that any such formal notice was given to the Wakf Commissioner. I do not find, however, that he took into consideration the evidence of Dabiruddin Ahmed where he said "I gave notice". It would, in my opinion, be proper to accept the evidence of Dabiruddin Ahmed and to believe that notice had been sent, but, in any case, I cannot see how one can possibly hold that the Defendants have succeeded in proving that no notice was sent by the mutwalli.

9. Let us assume, however, that no notice was sent. The question arises whether that would have the effect of invalidating the transfer. Mr. Sen argues that unless that be the consequence of the omission to send the notice, the provisions about the sending of notice would be meaningless. In coming to the conclusion about the consequence of omission to give notice as required by Sub-section (2), it is proper to remember that whereas in Sub-section (1), the legislature used the definite words, "no transfer...shall be valid without the previous sanction of the Commissioner", in Sub-section (2), while prescribing the sending by the mutwalli of a notice to the Commissioner, they chose not to use any such language and indeed they said nothing as regards the effect of such omission. It would, in my opinion, be wholly improper to attach to the omission, of a mutwalli to send a notice of transfer to the Commissioner, the effect which the legislature in its wisdom has not thought fit to do. Whether or not any action can be taken by the Commissioner of Wakfs against a mutwalli or against anybody else when a transfer within the meaning of Sub-section (2) of Section 53 has been made but no notice is sent, is not for us to consider here. What is in my opinion, quite clear is that the omission to send such notice can have no effect on the validity of the transfer that has been made.

10. In the facts, therefore, I have come to the conclusion not only that that the Defendants have failed to prove that good title did not pass to the Plaintiffs by the transfer by Dabiruddin Ahmed but the materials on the record justify the conclusion that, in fact, there has been a valid transfer.

11. The next contention raised by Mr. Sen was that the courts below have not taken into consideration the proviso in the "Explanation" to Clause (h) of Sub-section (i) of Section 12 of the Rent Act of 1950. Under this proviso, Where the court thinks that the reasonable requirement of such occupation may be substantially satisfied by evicting the tenant from a part only of the premises and allowing the tenant to continue occupation of the rest and the tenant agrees to such occupation, the court shall pass a decree accordingly...

12. It is worth noticing that in the present case the tenants never raised the plea that the reasonable requirement of the landlord might be substantially satisfied by evicting the tenants from a part only of the premises. It is quite natural that the Defendants would deny the existence of reasonable requirement at all, but if a tenant Defendant wants to take advantage of the proviso, it is, I think, proper for him to raise it as an alternative plea. It is quite open to him to deny that the landlord reasonably requires the premises and at the same time to add that even if there is reasonable requirement, such reasonable requirement may be substantially satisfied by evicting the tenant from a part only of the premises. It is only if such a plea is distinctly raised that the court can allow evidence on this point to be given. While it is true that evidence which will be adduced by the parties to establish or disprove the existence of a reasonable requirement will in many cases, be sufficient for a conclusion on the question whether the requirement may be satisfied by evicting the tenant from a part only of the premises, in most cases however, if and when such a plea is raised, both parties will adduce some more detailed evidence as regards the rooms and whether a proper division of the premises as between the landlord and the tenant is possible. Where, as in the present case, the Defendant did not raise the plea that reasonable requirement of the landlord may be satisfied by evicting him from a part only of the premises in the written statement or in the court of appeal below, it will not be proper for us to allow him to raise the question here. Even however, if it was open to the Appellants to raise this point now, I am clearly of opinion that the evidence, that is already on the record, does not justify the conclusion that the reasonable requirement of the landlord may be substantially satisfied by evicting the tenants from a part of the premises.

13. A point was raised also that the suit is bad inasmuch as Khitish Roy's heirs have not been impleaded as Defendants. It is sufficient to point out that the lease was taken by Radhika Bhusan Roy and Radhika's heirs are on the record, Ksitish's heirs would, therefore, be not only unnecessary but, in my opinion, also improper parties.

14. As all the points raised in this appeal fail, I would dismiss this appeal with costs.

Law, J.

15. I agree.