
(1955) 05 CAL CK 0032
In the Calcutta High Court
Case No : A.F.A.D. No. 40 of 1952

Mobarak Hossein

APPELLANT

Vs

Pundarikakshya Basu and Others

RESPONDENT

Date of Decision : 18-05-1955

Acts Referred:

Citation : AIR 1956 Cal 168

Hon'ble Judges : S.R. Das Gupta, J; Mallick, J

Bench : Division Bench

Advocate : Pramatha Nath Mitra and Nilmani Goswami, for the Appellant; Sarat Chandra Jana, Mrityunjay Dey, (for Nos. 1, 2, 3(1) to 3(5), 4 and 5) and Apurba Charan Mukherjee and Mono Mohan Sinha, (for No. 6), for the Respondent

Judgement

S.K. Das Gupta, J.—This is an appeal arising out of a suit filed by the plaintiff for khas possession on declaration of his title and in the alternative for confirmation of possession in respect of a small plot of land situated in the town of Burdwan.

2. The facts leading up to this appeal are as follows; On 30-1-1936, corresponding to 11th Mash, 1342 B. S. the appellant took a lease for this plot for 10 years from the predecessor-in-interest of the present respondents" Nos. 1 to 5. The lease was for a period of ten years and was to commence from a date On which the plaintiff would be given possession after the eviction of the tenants.

The plaintiff's case is that such possession was obtained on 3-5-1937, that is, 17th Baisak 1344 B. S. The rent was fixed at Rs. 18-8-0 per month, that is to say, Rs. 222/- per year It would be necessary in order to appreciate the questions involved in this appeal to refer to the terms of the said lease. In the earlier part of the said document it is stated that the lessor has given lease for a period of ten years of the land with the structures on it as the lessee has prayed for taking "bando-bust" of the same.

In Clause 2 of the said lease it is mentioned that if the first party, that is, the lessor feels it necessary to take khas possession of the land during the

continence of me said lease, then he is to pay compensation for any structures that may have been built by the lessee deducting therefrom a sum of Rs. 40/- which is fixed by consent of the parties as the value of the existing structures on the said land.

Clause 3 provides that the second party, that is, the lessee will be entitled to rebuild a "Kacha-khero ghar" (non-masonry thatched hut) on the said land and enjoy the same and on the expiry of the said lease he would be entitled to remove the structures so erected by him and shall give possession of the land to the landlord.

If the first party, that is, the lessor, desires to retain house structures, then he shall have to pay the value of the same to the lessee less a sum of Rs. 40/-. In the schedule to the said deed the land with one structure on it is mentioned.

The lease expired according to the plaintiff in the year 1947. The plaintiff's case is that before the expiry of the said lease he had pulled down the hut already existing on the said land and erected his own structures thereon with pucca plinth, wall and thatched roof and he started a restaurant on the said premises.

The plaintiff thereafter put the defendant No. 6 Abdur Rahaman in charge of the said hotel, but the said Abdur Rahaman in collusion with the landlords obtained resettlement of the land from them. On 12-4-1946, corresponding to the 29th Chaitra, 1352 B. S. this suit was filed by the plaintiff against the heirs of the original landlord Sarat Chandra Basu and the defendant No. 6 Abdur Rahaman.

In the plaint the plaintiff claims a declaration of his title on the footing that he was a non-agricultural tenant and he also claimed possession or in the alternative confirmation of possession. The first Court dismissed the suit having held that the plaintiff was not a non-agricultural tenant and that the lease had already expired in 1947. Against that decision there was an appeal.

The appellate Court upheld all the findings of the first Court except that it gave a declaration that the plaintiff had title up to the date of the institution of the suit which was 12-4-1946.

In all other respects the lower appellate Court concurred with the decision of the first Court. Against the said decision of the lower appellate Court the present appeal has been filed. The respondents Nos. 1 to 5 have also filed a Cross-objection challenging the validity of the declaration given by the lower appellate Court.

3. The principal question raised before us in this" appeal by Mr. Mitter, appearing on behalf of the appellant, is whether or not his client is a non-agricultural tenant. According to Mr. Mitter his client comes within the definition of non-agricultural tenant as given in the Act of 1940. "Non-agricultural tenant" is defined in the said Act as follows:

"Non-agricultural tenant" means a tenant who holds under another person, and

is liable to pay rent to such person for, non-agricultural land which, under the terms of any agreement, such tenant is entitled to use for any homestead or residential purpose or for the conduct thereon of any commercial or industrial enterprise or any trade or business, but does not include a tenant who so holds non-agricultural land together with any structure thereon erected or owned by the person under whom such tenant holds or by the superior or predecessor-in-interest of such person."

Mr. Mitter contended before us that his client comes within the said definition of non-agricultural tenant. As for the last portion of the said definition, namely, that a tenant who holds non-agricultural land together with any structure thereon erected or owned by the person under whom such tenant holds or by the superior or predecessor-in-interest of such person is not included in the said definition.

Mr. Mitter contended before us that although his client at the inception of the said tenancy might have taken the land as also the structure existing thereon from the landlord, he had under the lease the right to demolish the said structures and continue as such tenant only in respect of the said land.

In fact such demolition has taken place and a structure belonging to the tenant has been built on the said land. That being so, Mr. Mitter contended that at the present day it cannot be said that his client was holding the land together with any structure belonging to the landlord. He was holding the land with a structure belonging to himself and, therefore, the subsequent portion of the said definition is not applicable to the case of his client.

4. Mr. Jana, on the other hand, contended that in order to determine whether a person is a non-agricultural tenant or not the position of the parties at the inception of the tenancy has to be taken into consideration; in other words, his contention was that if the tenant could not have been a non-agricultural tenant at the inception of the tenancy, he cannot be such a tenant because of any change of circumstances that might have taken place after such tenancy was taken.

5. The first question, therefore, which we have to decide is whether or not Mr, Mitter's client is a non-agricultural tenant. I should mention that this definition as given in the 1940 Act has under-gone some change in 1949 and 1953 Acts, but the substance, has remained the same. The question is whether or not it can be said that Mr. Mitter's client holds any premises erected or owned by the landlord.

The further question is what would be the point of time with reference to which this question has to be determined. In order to determine these questions it would be necessary in the first place to refer to the terms of the lease itself. I have set out the material provisions of the said lease.

It seems to me that what was agreed between the parties was that a certain rent

has to be paid in respect of the land as also for the structure which was standing thereon, but the tenant would be entitled to demolish the structure and build his own. structures, and will hold the land at the same rent at which the tenancy was originally taken: in other words, the effect of the said lease is that although at the inception of the tenancy the tenant was given the land as also his structures which were standing thereon, but the tenant was given the right to demolish the structures and hold the land with his own structures thereon and for this there would be no diminution of rent.

That being the position Mr. Mitter's client even if it be allowed that at the inception of the tenancy he was not a non-agricultural tenant, still from the time when the structures were demolished he became a non-agricultural tenant. In the course of his argument it was put to Mr. Jana as to what was the position of Mr. Mitter's client after the structures were demolished? Was he or was he not a tenant? If he was a tenant, then was he or was he not a tenant who was holding the land only and no structures belonging to the landlord. Mr. Jana was unable to give any satisfactory answer to this question.

In my opinion, at least from the time the structures were demolished Mr. Mitter's client must be held to have been a tenant and a tenant in respect of the land only, as the structures standing thereon were not the structures of the landlord but of his own.

That being so, at least from that time it must be held that he held the land under another person and is liable to pay rent to such person for the land but did not hold any premises or part of any premises owned by such person: in other words, he satisfied the definition of non-agricultural tenant as given in the Acts in question.

We have, therefore, no difficulty in holding that at the material time, i.e., when the suit was instituted, the position of Mr. Mitter's client was, that of a non-agricultural tenant.

6. Having come to the aforesaid conclusion the next thing to be decided is whether or not the matter should be sent back to the lower appellate Court for re-decision of the questions which I shall presently indicate in this judgment. Mr. Jana's contention was that even if we hold that the appellant was a non-agricultural tenant, even then he is not entitled to any relief under the provisions of the Non-Agricultural Tenancy Act of 1949 as amended by the Act of 1953.

He contended, and rightly too, that in the present case we are concerned with the Act of 1949 as amended by the Act of 1953: in other words, the decision in this appeal has to be given in accordance with those Acts. Mr. Jana based his argument on the provisions of the Act of 1949 as amended by the Act of 1953.

He referred to Section 7 Section 8 and Section 9 of the Act of 1949 and contended that Mr. Mitter's client does not come either u/s 7 or u/s 8, but comes u/s 9 and in that event the tenant, even if he holds the land in question as a non-

agricultural tenant shall be liable to be ejected.

The question, therefore, is whether or not Mr. Mitter's client comes u/s 7 or Section 9 of the Act of 1949 as amended by the Act of 1953. Mr. Mitter contended before us that his client comes under Sub-clause (5) of Section 7 material portion of which reads as follows:

"if the landlord has allowed pucca structures to be erected on any non-agricultural land held under a lease in writing for a period specified therein, whether such structures have been erected (a) before the expiration of the said period, or (b) whether such non-agricultural land continues to be held with the express or implied consent of the landlord after the expiration of the said period, during the period such non-agricultural land so continues to be held."

He contended then (i) the tenant holding the non-agricultural land comprised in such tenancy shall not be ejected by his landlord from such land except on the ground that he has used such land in a manner which renders it unfit for use. for the purpose of the tenancy, and there is some evidence in support of his contention, that the landlord allowed pucca structures to be erected on the said land.

This point was not taken and could not be taken in the first Court because at the date when the suit was disposed of by the said Court the Act of 1949 had not come into existence. The said Act was in existence at the date when the lower appellate Court had decided the matter, but the matter was not decided from this point of view and this question was not raised either by the appellant or by the respondents before the said Court.

In such circumstances, Mr. Mitter contended before us, the proper course would be to send the matter back to the lower appellate Court for reconsideration of the appeal in accordance with the provisions of the Act of 1949 as amended by the Act of 1953; in other words, he contended that the matter should be sent back to the lower appellate Court to go into the question as to whether or not the landlord allowed his client to erect pucca structures on the said land before the expiration of the period of the lease.

In our opinion, this contention of Mr. Mitter if sound and should be given effect to. As I said before, at the date when the suit was instituted and at the time when it was disposed of the Act of 1949 had not come into existence. The parties were governed by the provisions of the Act of 1940. There were no such sections in the said Act corresponding to Sections 7 and 9. of the present Act.

That being so, Mr. Mitter's client could not have raised this question, which is a question of fact, in the trial Court or given evidence on such question. Mr. Jana also wants us to decide this appeal in accordance with the provisions of the Act of 1949 as amended by the Act of 1953.

If we are to do that, then we shall have to decide whether Mr. Mitter's client comes u/s 7 or Section 9 of the Act of 1949 as amended by the Act of 1953 and

this is not possible for us to do without coming to a finding on the plea raised by Mr. Mitter before us, namely, that the landlord had allowed his client to raise pucca structures on the land before the expiration of this period.

Therefore, this question has to be decided before we can come to any definite decision in this appeal.

7. In the premises it seems to us that it would be just and proper to remand the case to the lower appellate Court to decide the matter afresh in the light of the provisions of the Act of 1949 as amended by the Act of 1953: in other words, the lower appellate Court has to go into the question as to whether or not Mr. Mitter's client was allowed by the landlord to erect pucca structures on the land in question before the expiration of the period of the said lease and in doing that it would not only proceed on the evidence which is already on the record but will allow the parties to adduce further evidence on this point.

If the lower appellate Court comes to the conclusion that the landlord had allowed such structures to be built, then Mr. Mitter's client would succeed; if not, he would fail.

8. The result therefore, is that we set aside the judgment and decree of the lower appellate Court and send the case back to that Court for re-decision of the appeal in accordance with this judgment and in accordance with law.

9. Respondents Nos. 1 to 5 and respondent No. 6 will be entitled in any event to get the costs of the lower appellate Court. The costs of this appeal will abide by the final result of the matter. (10) No order is necessary on the Cross-objection.

Mallick, J.

11. I agree.