
(2011) 07 CAL CK 0063
In the Calcutta High Court
Case No : S.A. No. 599 of 1993

Nandakishore Birahiwalla

APPELLANT

Vs

Kushiram Agarwalla

RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Bengal General Clauses Act, 1899 — Section 8, 8(C)
Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 — Section 4, 5, 7
General Clauses Act, 1897 — Section 6
Specific Relief Act, 1963 — Section 17

Citation : (2011) 4 CHN 572

Hon'ble Judges : Tapan Kumar Dutt, J

Bench : Single Bench

Advocate : S.P. Roy Choowdhury and Sukumar Bhattacharyya, for the Appellant;

Judgement

Tapan Kumar Dutt, J.—This Court has heard the learned Advocate for the plaintiffs/appellants.

2. The plaintiffs/appellants filed a suit for specific performance of contract. The plaintiffs' case in short was that the defendant/respondent and one Hariram Agarwalla were the joint owners of the suit property each having moiety share in the same. Plaintiffs' further case was that one Basdeo Jhunjhunwalla was the thika tenant and owner of the structures in the suit property and from Basdeo Jhunjhunwalla the original plaintiff purchased the thika tenancy right and also the said structures on 4.3.1975 and the original plaintiff intended to purchase Mokarari Mourasi interest from the defendant and the proforma-defendant in the suit. The defendant/respondent being one of the superior landlords, on his own behalf and on behalf of the proforma-defendant, entered into an agreement for sale of their Mokarari Mourasi interest with the original plaintiff on 8.3.1975 at a certain consideration and deed of agreement was executed to that effect. The defendant/respondent received a certain sum of money from the original plaintiff on the date of the agreement. The plaintiffs' further case was that the defendant/respondent failed to deliver the title deeds to the plaintiff in terms of the

agreement and subsequently the proforma-defendant filed a suit being T.S. No. 10 of 1975 against the defendant/respondent on the ground that the defendant/respondent had no authority to enter into an agreement on behalf of the proforma-defendant (Hariram Agarwalla) but the said suit was disposed of in terms of compromise wherein Hariram Agarwalla agreed to sell his half share to the plaintiff. The plaintiff sent a notice for completion of the transaction but the defendant/respondent did not comply with such request and thus the suit was filed by the original plaintiff.

3. The suit was contested by the defendant/respondent by filing a written statement denying the material allegations made in the plaint but admitted that the plaintiff paid a certain sum of money as earnest money. It was further alleged by the defendant/respondent that the Mokarari Mourasi interest of the land has vested in the State free from all encumbrances and as such the cause of action has abated.

4. The said suit came up for hearing before the learned Trial Court and the learned Trial Court by judgment and decree dated 21st May, 1983 decreed the said suit in part to the effect that the plaintiff got a decree for Rs. 5,550.50 P and interest at the rate of Rs. 6 per cent per annum from the date of execution of the deed, that is, 8.3.1975 till the amount is paid.

5. It appears that the name of the proforma-defendant No.2 was struck off the records and at the time of hearing of the suit the plaintiff wanted to enforce the agreement of specific performance against the defendant/respondent alone. The learned Trial Court found that the defendant/respondent had admitted the agreement for sale dated 8.3.1975 and the fact that he received Rs. 11,101 as earnest money. It was further found by the learned Trial Court that Ext. 4 is the registered sale deed executed by the heirs of Hariram Agarwalla in favour of the plaintiff in respect of his half share and Ext. 6 is the certified copy of the registered sale deed by which the plaintiff purchased the thika tenancy right of Basdeo Jhunhunwalla and Ext. 5 is the registered deed of gift executed by Lakshminarayan Birhiwalla in favour of his sons. The learned Trial Court found that the plaintiffs are, admittedly, the thika tenants in respect of half of the suit property under the defendant/respondent. The learned Trial Court came to the conclusion that in view of section 4 and section 5 of the Calcutta Thika Tenancy (Acquisition and Regulations) Act, 1981 the landlord's interest in the land has vested in the State free from all encumbrances with effect from 2nd November, 1981 and as such the defendant/respondent was no longer the owner of the suit land and, thus, he is not entitled to execute any deed of sale in favour of the plaintiff. The learned Trial Court found that since the defendant has admitted that he took Rs. 11,101/- as earnest money for the entire property half of the said amount was given to the proforma-defendant (Hariram Agarwalla) that plaintiff is entitled to get back Rs. 5,550.50p and interest at the rate of 6 per cent per annum from the date of the execution of the agreement till the payment is made.

6. Challenging the aforesaid judgment and decree passed by the learned Trial

Court the plaintiff filed title appeal No. 194 of 1983 and the defendant/respondent filed title appeal No. 217 of 1983. Both the aforesaid title appeals came up for hearing before the learned Third Court of the Additional District Judge, Howrah who by judgment and decree dated 24th March, 1987 allowed the title appeal No. 194 of 1983 in part by holding that the plaintiffs' prayer for specific performance of contract against the defendant/respondent fails but the plaintiffs' prayer for recovery of the entire earnest money of Rs. 11,101/- is allowed and the defendant/respondent will pay the aforesaid sum to the plaintiffs within three months from the date of the decree failing which the plaintiff will be entitled to execute the decree. The learned Lower Appellate Court dismissed the title appeal No. 217 of 1983 filed by the defendant/respondent. The plaintiffs/appellants have filed the present second appeal challenging the impugned judgment and decree passed by the learned Lower Appellate Court in T.A. 194 of 1983. The learned Lower Appellate Court held that the impugned judgment will govern both the title appeals.

7. The learned Lower Appellate Court found that during the pendency of the suit the said Act of 1981 came into force and the interest of the landlords vested in the State free from all encumbrances and the thika tenant became tenant directly under the State. The learned Lower Appellate Court found that on the date of execution of the agreement for sale the landlord had a good title to the property but owing to the fact that the said Act of 1981 subsequently came into force the landlord cannot deliver any title to the plaintiffs and it is a case where section 17 of the Specific Relief Act applies mutatis and mutandis. The learned Lower Appellate Court found that the plaintiff had lost his right to maintain an action for enforcement of the agreement for sale but there is no bar to pass a decree for refund of the sum of Rs. 11,101/- as the original prayer of the plaintiff has been amended. The learned Lower Appellate Court held that the finding of the learned Trial Court that the proforma-respondent had half share in the earnest money is negated by the evidence adduced by the parties.

8. It appears from the submissions made by the learned Counsel for the plaintiffs/appellants that the heirs of Hariram Agarwalla sold their undivided half share in favour of the plaintiffs/appellants during the pendency of the suit and there is no dispute that the name of the Hariram Agarwal has been struck off from the records.

9. The learned Advocate for the appellant submitted that the agreement for sale is of the year 1975 when the Calcutta Thika Tenancy Act, 1949 was in force and the heirs of Hariram had sold their undivided half-share to the plaintiff/appellants before the said Act of 1981 came into force. The said learned Advocate submitted that under the said Act of 1949 there was no bar against the superior landlords in transferring their right, title and interest in the lands to another person. He submitted that the said Act of 1981 cannot be given a retrospective effect in this regard. The said Act of 1981 came into force during the pendency of the suit and the agreement for sale of the year 1975 came into

existence when the said Act of 1949 was in operation. He submitted that the said Act of 1981 is prospective and the agreement for sale in question came into existence when the said Act of 1949 was in force. The said learned Advocate cited a decision reported at State of Punjab and Others Vs. Bhajan Kaur and Others, Paragraphs 9, 16 and 17 of the said reports are quoted below:

9. A statute is presumed to be prospective unless held to be retrospective, either expressly or by necessary implication. A substantive law is presumed to be prospective. It is one of the facets of rule of law.

Section 92-A of the 1939 Act created a right and a liability on the owner of the vehicle. It is a statutory liability. Per se it is not a tortious liability. Where a right is created by an enactment, in absence of a clear provision in the statute, it is not to be applied retrospectively....

16. Section 6 of the General Clauses Act, therefore, inter alia, saves a right accrued and/or a liability incurred. It does not create a right. When section 6 applies only an existing right is saved thereby. The existing right of a party has to be determined on the basis of the statute which was applicable and not under the new one. If a new Act confers a right, it does so with prospective effect when it comes into force, unless expressly stated otherwise. Section 140 of the 1988 Act does not contain any procedural provision so as to construe it to have retrospective effect. It cannot enlarge any right. Rights of the parties are to be determined on the basis of the law as it then stood, viz., before the new Act come into force.

17. It is now well-settled that a change in the substantive law, as opposed to adjective law, would not affect the pending litigation unless the legislature has enacted otherwise, either expressly or by necessary implication.

10. The said learned Advocate referred to section 6 of the General Clauses Act, 1897 and also to section 8 of the Bengal General Clauses Act, 1899, particularly section 8 (C) of the said Act of 1899 where from it will appear that any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed are not affected. The said Section 8 is quoted below:

8. Effect of repeal.-- Where this Act, or any Bengal Act [or West Bengal Act] made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -

(a) receive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred, in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed

11. The said learned Advocate also submitted that the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 cannot affect the right which has accrued to the plaintiff/appellants under the said agreement for sale.

Reading the reported decision in the Bhajan Kaur's case (supra) and the aforesaid provisions in the General Clauses Act and the Bengal General Clauses Act and also the relevant provisions of the said Act of 1949, the said Act of 1981 and the said Act of 2001, this Court is of the view that the learned Advocate for the plaintiff/appellant is right in his submissions. Both the learned Courts below erred in applying the provisions of sections 4 and 5 of the said Act of 1981 to the facts of this case while rejecting the plaintiffs/appellants' claim for specific performance of contract. The cause of action arose and the suit was filed before the said Act of 1981 came into force. In Bhajan Kaur's case (supra) it was held, inter alia, that the existing right of a party has to be determined on the basis of the statute which was applicable and not under the new one. It was held in the said case that if a new Act confers a right, it does so with prospective effect when it comes into force, unless expressly stated otherwise. It was further held in the said reports that the change in the substantive law, as opposed to adjective law, would not affect the pending litigation unless the legislature has enacted otherwise, either expressly or by necessary implication. The said Act of 1981 came into force on 2nd November, 1981, that is, long after filing of the suit (suit was filed in 1978). Thus, it appears that the learned Courts below erred in refusing the plaintiffs' prayer for specific performance of contract on the ground that the said Act of 1981 came into force during the pendency of the suit.

12. The learned Advocate for the appellants also referred to section 8 of the said Act of 1981 and also section 7 of the said Act of 2001 which provides for payment of compensation in the context of the fact that the heirs and legal representatives of Hariram Agarwalla have sold their undivided half-share in the property in dispute in favour of the plaintiffs/appellants during the pendency of the suit.

13. The said learned Advocate cited a decision reported at Gurucharan Singh Vs. Kamla Singh and Others, and referred to Paragraph 13 of the said reports where from it appears that while considering section 6 of the Bihar Land Reforms Act the Hon'ble Court was pleased to observe that section 6(1) of the said Act contains no inhibition against the Civil Court's power to decide the issue of title and right to possession of the plaintiff and, as a necessary corollary, the claim of

actual possession set up by the defendant nor can section 6(2) of the said Act inferentially interdict the plenary power of the Civil Court.

14. In view of the discussions made above, this Court is of the view that the impugned judgments and decrees passed by the learned Courts below are required to be set aside but the matter requires to be sent back on remand to the learned Trial Court since the State of West Bengal is not a party to the present proceedings. Considering the facts and circumstances of the case this Court is of the view that the State of West Bengal should be brought on record as a party defendant in the suit. Accordingly, the impugned judgments and decrees passed by the learned Courts below are set aside and the matter is sent back on remand to the learned Trial Court for a fresh consideration of the matter in the light of the observations made in this judgment. The learned Trial Court shall allow the plaintiff/appellants to make an appropriate application for adding the State of West Bengal as a party to the suit and if such application is filed the learned Trial Court shall add the State of West Bengal as a party to the suit and thereafter proceed with the suit in accordance with law and try to dispose of the suit as expeditiously as possible.

15. The appeal is thus disposed of.

16. There will be no order as to costs.

17. Urgent Certified Xerox copy of this Judgment, if applied for, be given to the parties on compliance all necessary formalities.