

(1957) 08 GAU CK 0003

In the Gauhati High Court

Case No : Letters Patent Appeals No's. 2 and 3 of 1956

Parameswarlal Agarwalla and Another

APPELLANT

Vs

On the death of Jay Narayan Jalan, his heirs Dalu Ram Jalan
and Another

RESPONDENT

Date of Decision : 07-08-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 116

Citation : (1957) 08 GAU CK 0003

Hon'ble Judges : Sarjoo Prosad, C.J.;Deka, J

Bench : Division Bench

Advocate : S.K. Ghose and P. Chaudhuri, for the Appellant; M. Lahiri, N.M. Lahiri, for the Respondent

Judgement

Sarjoo Prosad, C.J.—These Letters Patent Appeals arise out of the same judgment of Mr. Justice Ram Labhaya, dated 4-5-56, by which he disposed of Second -Appeals Nos. 37 and 38 of 1054. The appeals two, different suits between, the same part relation to the same subject-matter, though different reliefs. Second Appeal No. 37 of Vested to Title Suit No. 58 of 19G2, in which was a prayer for ejectment of the Defendant, while Second Appeal No. 38 of 1954 real Rent. Suit No. 20 of 1952, in which there for arrears of rent due, the two suits were tried and disposed of together in the Courts below. The trial Court dismissed the suits, but the appellate Court decreed. the same. The Second Appeals, therefore, arose out of those judgments. The learned Judge of this Court allowed the appeals and dismissed the suits, but he gave leave to prefer these appeals under the Letters Patent.

2. The facts which are material are these. A certain premises which is the subject-matter of the suits, belonged originally to one Yusufur Rahman. It was in occupation of the Defendants as tenants under him. In 1947, Yusufur Rahman sold the premises to Musst. Lachmi Agarwalini, mother of the Plaintiffs, but the Defendants continued in occupation of the premises as monthly tenants under

Musst. Lachmi, who died in April, 1950, leaving behind the Plaintiffs, her sons, and several daughters.

After her death, the Plaintiffs were mutated in respect of the lands over which the premises stand, It is alleged by the Plaintiffs the Defendant No. 1, representing the Defendants, on the death of Musst. Lachmi, attorned to them and was allowed to continue as a tenant under them. The Defendants as such, continued to was rent to the Plaintiffs until June, 1951, where after they made default in payment of rent.

The Plaintiffs then, after serving a notice to quit on the Defendants, instituted the two suits in question, for ejectment: of the Defendants from the premises, and also for recovery of arrears of rent and compensation. They claimed also that they required the premises for their own bona hide purposes.

3. The Defendants contested the suits on various grounds. They challenged the Plaintiffs' right to sue as landlords. They also denied having defaulted in payment of rent and challenged the validity of tin, notice for eviction. Tho trial Court accepted the Defendants' pleas and dismissed the suits, essentially on the ground that the Plaintiffs were not competent to institute the suits and to recover any arrear rent on behalf of themselves alone. On appeal, the. appellate Court reversed that judgment. The findings of the lower appellate Court have been lucidly summarised in the judgment under appeal as follows:-

(1) That there was an arrangement between the Plaintiffs and the Defendants, under which the Defendants undertook to pay rent to the Plaintiffs;

(2) that the question of title in the case was not material; and (3) that the Defendants were estopped from pleading that the Plaintiffs had no title to the suit lands.

Those findings were evidently findings of fact, but there were several questions raised before the learned Judge in this Court. It was urged: (1) that the Plaintiffs admittedly had no title to the property; (2) that no fresh arrangement of tenancy had been proved; (3) that there was no adornment to the Plaintiffs in place of Musst. Lachmi the deceased and (4) that the Defendants were not at all precluded from pleading that the Plaintiffs had no title" either to recover rent or to eject them. The question as to whether there was any fresh arrangement of tenancy proved between the parties, resulting in an adornment to the Plaintiffs, was entirely a question of fact, and if that question had been properly answered by the learned . Subordinate Judge on appeal, it is difficult for us to appreciate how the other two questions could arise in a suit of this nature.

4. The two points which were urged before the v. learned Subordinate Judge were:

(1) Whether the Plaintiffs were the landlords, and, as such, were competent to sue in ejectment;

and (2) whether they were entitled to recover the arrear rent with respect to the premises in the suit.

The Plaintiffs' case was that after the death of their mother, Musst. Lachmi Agarwalini, the Defendant No. 1 went to their house, which was only about 200 feet away from the premises in suit, and made arrangements to remain in the premises on payment of the previous rent. The Defendants on the contrary, contended that this was false that the Defendant No. 1 was blind at the time of the death of Musst. Lachmi and, therefore, he could never have arranged afresh with the Plaintiffs for staying in the premises in question on agreeing to pay rent to the Plaintiffs.

The Defendants asserted that they knew about the death of Musst. Lachmi for the first time in July, 1951, and that since then they began depositing the rent for the disputed premises in Court. On these contentions, the learned Subordinate Judge postulated the point for his decision as follows:

I shall now proceed to examine first as to whether or not the Defendants accepted the Plaintiffs as their landlords after the death of Musst. Lachmi Agarwalini.

,This proposition of fact clearly arose for determination on the case set up by the parties. He examined the evidence of the Plaintiff Gounsankar Agarwalla on this point, as also the evidence of the Defendant No. 1 when he asserted that he did not know about the death of Musst. Lachmi for a long time until July 1951. He found that he was unable to accept the Defendant No. 1's plea in view of various circumstances to which he referred in his judgment.

He was right in pointing out that the Defendants lived only about 200 feet away and, therefore he could not believe that the Defendant No. 1 did not know about the death of Musst. Lachmi. He was also of the view that the alleged blindness of the Defendant No. 1 in 1950 was an afterthought, and that the blindness, if any, must have occurred very much later.

He also referred to the fact that on the basis of the receipts, Exts. B (1) to B (5), the Defendants paid rent for the premises in question up to June, 1951, although Musst. Lachmi died in April 1950. He further examined several other documents on record which, according to him, unmistakably went to prove that the Plaintiffs were the landlords of the premises in question and had been acknowledged as such by the Defendants.

He refers to Ex 9, dated 12-1-1952, and the reply thereto Ex. 10, and points out that the Defendants never stated in this reply that the Plaintiffs were not their landlords, but, on the other hand they admitted tenancy under the Plaintiffs for the premises in suit. The significant recital in the reply, to which he refers, is as follows:

That my said clients did never fail to pay the house rent as arranged between the parties He rightly inferred from this recital that it was abundantly clear that there

was some arrangement between the Plaintiffs and the Defendant No 1, which belied the case of the Defendant No. 1 that there was no such arrangement. The learned Subordinate Judge also refers to the petition, Ex. 13 under which rents were deposited in Court by the Defendants, expressly admitting the Plaintiffs as owners of the premises in question. Paragraph 1 of Ex. 13, as quoted in his judgment, runs as follows:

That the applicant above-named occupies a shop house owned by the opposite parties at Marwaripatty, Dibrugarh. at a monthly rent of There were various other similar petitions on cord with similar recitals, and they led to the, same inference. The learned Subordinate Judge then considered the argument which apiarists have been advanced on- behalf of the Defendants", namely, that the payment of rent under Exts. B (1) to B (5) was not in the name of the Plaintiffs themselves, but in the name of Musst. Lachmi, The explanation given by the Plaintiffs was that as the name of the mother, "Lachmi". Was suspicious, they allowed that name to continue. in the receipts. The learned Subordinate Judge observed that, whether the explanation was right or wrong, the fact that the name of the mother appeared in the receipts, did not make any difference, because the other evidence which he had already discussed, all led to" the conclusion, from which there was ho escape, that the Defendants accepted the Plaintiffs as their landlords The finding on this point, in my opinion is quite emphatic, and I should think lucid and logical;" yet the learned Judge in this Court has interfered with this finding of fact and taken upon . himself the responsibility of examining the which was amply discussed by the final" Coujjfc. of facts, and, in our view, quite correctly.

Eyen; assuming that the finding of the learned Subordinate Judge was erroneous on that pointing that a different view of the evidence couldjbo taken, if it were open to this Court to that the a view it had to be remembered that, as a Court of Second Appeal, this Court was completely precluded from doing so, when, on the face of it, there was no error of law pointed out by the learned Counsel for the Defendants. _ \$ If, therefore, this finding of the learned Sub ordinate Judge stands as in our opinion the finding has to stand, it being a pure finding of fact, he would be right in observing that no further question of title arose in the case. The suit as framed, depended upon the establishment of the relationship of landlord and tenant between the parties, and if the Plaintiffs had succeeded in establishing that relationship, then any question of title which might arise between the Plaintiffs and some other claimants who were not parties to the suit, would be altogether beyond the scope of the suit.

5. The learned Subordinate Judge was also justified in pointing out that the Defendants having acknowledged the Plaintiffs as their laud; lords, as found by him earlier, they were estopped from challenging the Plaintiffs" title u/s 4 of the Indian Evidence Act. On this question,great deal of argument has been advanced by the learned Advocate General before us who appeal for the Defendants.

He has lifted up his contentions to a higher; plane and he argues that even if the

finding the learned Subordinate Judge on the question adjoined is accepted, under the law it is open to him to contend that the Plaintiffs are not the owners of the property and, as such, have no right to eject the Defendants. Mr. Ghose rightly pointed out that the contention in that form was not placed before the learned Judge whose judgment is on appeal before us.

Indeed the learned Judge proceeded to decide the matter as if the finding on the point, to which we have referred, was open to question before him. But since the learned Advocate General has placed that submission before us, as a pure question of law, it is just as well to deal with the matter. He has in particular, placed reliance upon certain observations of Field J., in "*Lodai Mollah v. Kal Dass Roy*, ILR 8 Cal 238 (A).

In that case, the learned Judge refers to the fact that a suit for arrears of rent raises two questions: (1) whether the relationship of landlord and tenant exists between the Plaintiff and the Defendants; and (2) whether the arrears of rent in claim are due. The first question may have to be decided again in one of the two possible cases: (i) where the Plaintiff has let the Defendant into possession of the land; and (ii) where the Plaintiff claims under a title derived from the person who let the Defendant into possession.

The learned Judge, in dealing with the class of cases where the Plaintiff's title is derivative, fronts to the usual defence which may be available to such a party. He says that the usual ways in which title is derived are— (a) by assignment, including gift, sale, devise, lease; and (b) by inheritance, including adoption amongst Hindus.

Then the learned Judge observes that as between the Defendant and the person from whom Plaintiff's title is derived, the Defendant may make any of the defences which would be open to him against the landlord who let him into occupation; but he may have a further defence; there may be a denial of the facts which constitute the derivation, or denial of the assignment, or of the adoption or of the validity of either; or of the Plaintiff being the heir of the original person from whom he professes to derive title by inheritance.

In our opinion, these observations do not assist the Defendants, because, it is not merely on the basis of a derivative title that the Plaintiffs are claiming in the present case; they are claiming by virtue of a definite attornment by the Defendants. The case would, in our opinion, fall almost under the first category defined by the learned Judge, namely, as if the Defendants were let into occupation of the land by the Plaintiffs.

In such cases, as Field J., recognised, the question of title is confined to the Plaintiff and the Defendant only, and is not concerned with any third party claiming title adversely to the Plaintiff. No such party can properly be made a party to the trial of those questions. The other decision in "*Lai Mahomed v. Kallanus*, 11 LR 11 Cal 519 (B), to which our attention has been drawn, is undoubtedly of some assistance to the learned Counsel.

The that case, the Defendant had executed a TOB Willat favour of the Plaintiff and paid rent the Plaintiff, but he set up the plea that the that had been executed under coercion and, by the same. The purts below disbelieved the Defendant's case and held that although there was some dispute between the Plaintiff and Anr. person as to the title to the property, since the Defendant had attorney to the Plaintiff, he was liable to be sued for rent by the Plaintiff until such time as it Rinlgt be established that somebody else had tatter title. In Second Appeal, it was urged before the learned Judges that by executing the kabuliat in question, the Defendant was not estopped from showing that the Plaintiff had no title, and that the lower appellate Court ought to have allowed the Defendant to prove the title of the persons set up by him, notwithstanding the execution of the Kabuli at in favour of the Plaintiff who claimed under a derivative title. The learned Judges, without assigning - if I may say so With respect - any adequate reason for their decision, observed that the Defendant was not so estopped by S. 116 of the Evidence Act. They thought that the words "at the beginning of the tenancy" in that section could only apply to cases in which the tenants were put into possession of, the tenancy by the person to whom they had attorney, and not to a case like the one before -them, where the tenants had previously been in possession. They also appear to have overlooked the fact that S. 116, Evidence Act, speaks of only one kind of estoppel, and that the general principles of estoppel could still be- applicable to the-case.

On the strength of these observations, the learned Advocate General contends that in the instant case before us, the Defendants being in occupation of the lands from before, were not estopped from questioning the title of the Plaintiffs even though they may have been taken to have attorney to the Plaintiffs We are relieved of examining the correctness of this decision to any great extent in view of certain other decisions, to which we shall presently refer. The above decision came to be noticed with some prominence in "Ketu Das v. Surendra Nath Sinha 7 Cal WN 596 (C).

In dealing with that case, the learned Judges observed that the case was not an authority for the wide proposition which was i put forward before them, namely, that, in spite of at tornment, it was open to the tenant to question the title of the landlord. They pointed out that in the-earlier case of Lal Mahomed (B), (ibid), there was no question raised or decided as to what, if any, limitations there were of the tenant's privilege to deny the title of his lessor after attornment, when he was not inducted by such lessor. The learned Judges proceeded to comment on the earlier case thus:

We do not suppose that the learned Judges intended to lay down that a person in occupation of land may select his rent-receiver and execute a solemn agreement promising to pay him rent and pay him rent for a time with full knowledge that ho had no right to the land and, thereafter at any time decline to pay him rent pleading want of title in him and without attempting to show any other circumstance which would invalidate the contract of tenancy." With due

deference, we are inclined to agree with these observations of the learned Judges.

6. The decision of the Judicial Committee in AIR 1937 251 (Privy Council) supports the line of reasoning that in case of such an attornment, estoppel will operate against the tenant. In that case, their Lordships held that Section 116, Evidence Act, does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant.

It deals with only one kind of estoppel. The j, section postulates that there is a continuing tenancy, that it had its beginning at a given date from a given landlord, and it provides that neither a tenant nor anyone claiming through a tenant, shall be heard to deny that that particular landlord had at that date a title to the property. The words "at the beginning of tenancy" in Section 116, Evidence Act, do not give a ground for the contention that when a person already in possession of land, becomes tenant to Anr. , there is no estoppel against his denying his landlord's title.

It is, therefore, too much to contend that a tenant in possession, if he has in fact attorned to a landlord, would still be entitled to challenge his derivative title, because at the beginning of the tenancy he was not let into occupation by the landlord in question. The beginning of the tenancy in such a case would refer to the beginning of the new tenancy between the tenant and the landlord by virtue of the attornment, and the tenant's occupation of the land thenceforward would be referable to that attornment.

This decision of the Privy Council, therefore, is a clear answer to the contention of the learned Advocate General, that there was no estoppel against the Defendants. Indeed their Lordships referred, in the body of the judgment, to a decision in *John Agabog Vertannes v. GoMer Robinson*, 54 Ind App 276: AIR 1K PC (K), where the Board applied Section 116. Evidence Act, to a case in which it was difficult to say that the tenant had obtained possession from the landlord.

Delivery of possession, for the purpose of creating a lease, must not necessarily be physical delivery of possession at the time of the agreement; but even constructive delivery of possession may be sufficient for the purpose of constituting a lease u/s 107 of the Transfer of Property Act. See "*Mohan Lai v. Ganda Singh* AIR 1343 Lah 127 (FB) (P).

We are, therefore, unable to concede to the argument of the learned Advocate General that, on the facts found in this case, the learned Subordinate Judge was not justified in holding that u/s 116, Evidence Act, the Defendants were estopped from denying the Plaintiffs' title to the disputed premises as their landlords.

7. The finding of the learned Judge in this Court, when he holds: "I have come to the conclusion that no fresh arrangement or agreement between the Plaintiff's and the Defendants has been proved, and that rent was being paid exactly in the same way as it was being paid during the life time of Musst. Lachmi", is

unwarranted, both in fact, and in law.

As I said, in the first place, it was not open to the learned Judge to question the finding of fact; and, in the second place, there is a fallacy in the assumption that the rent was being paid exactly in the same way as it was being paid during the life time of Musst. Lachmi. If it is Correct that the Defendant No. knew about the death of Musst. Lachmi, and that even then he .paid rent to the Plaintiffs and had attorney to them, accepting them as his landlord, then the payment of rent would not be in the same manner as it was made during the life time of Musst. Lachmi.

The conditions of payment are in an entirely different set up. It is trite to say that a finding of fact is sacrosanct in Second Appeal unless vitiated by any error of law; but even then perhaps it may be apposite to refresh our memory with the important dictum of Sir John Wallis in "Secretary of State v. Ramc-swarml Devasthanam Trustee-61 Ind App 103: (AIR, 1934 FO U2) (G), where his-Lordship observed:

The question is mainly one of fact it is well settled that u/s 100 of the Code of Civil Procedure, the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law. "Subsequently to the date of the judgment under appeal, the Board has had occasion to emphasize the fact that this rule is equally applicable to cases such as this, in which the findings of the lower appellate Court are based on inferences drawn from the documents exhibited in evidence.

The inference that there was, in fact, an agreement by the Defendants to the Plaintiffs, was entirely an inference of fact and this inference had been arrived at by the learned Subordinate Judge "after a thorough and sifting examination of the evidence on record. We are unable to agree that the existence of the relationship of landlord and tenant, as pleaded by the Plaintiffs, was an inference of law, nor are we prepared to accept the comment in the judgment of the learned Judge that the finding at which the learned Subordinate Judge had" arrived, was based on presumptions and speculations.

7a. The other contentions which Mr. Lahiri has advanced before us are-CD that the certificate granting leave to appeal under the Letters Patent, does, not disclose any reasons by the learned Judge and, therefore, the certificate is invalid, and the" appeal should not be entertained by this Court.

He argues, upon the analogy of Es. 109 and 110 of the Code of CPC and the corresponding Articles of the Constitution. The analogy, in our opinion, does not hold good in this case. It is to be remembered that the leave was granted by the learned Judge on the date on which he delivered the judgment, & he must have done so with full consciousness of the fact that it was a fit case for appeal under the Letters Patent.

There is no other alternative category under which the learned Judge could,grant

leave. We, therefore, find it unnecessary to review some of the cases which have been cited by the learned Counsel in support of his contention. Here, the only thing which the learned Judge had to consider was whether it was or was not a fit case for appeal, and having delivered judgment, he granted leave on the ground that it was such a case.

Therefore, the contention of the learned Counsel cannot be entertained. In any case, the irregularity in not mentioning any grounds in the certificate, even if there was any, could not affect the competence of the appeal itself, if the learned Judge thought that the Letters Patent appeal could be entertained in the circumstances, and granted leave accordingly.

The other contention of the learned Counsel is that the learned Subordinate Judge did not discuss the evidence on the other points, namely, whether the premises were required bona fide by the Plaintiffs, and whether there was due and proper notice of ejectment served on the Defendants terminating the tenancy. It is, therefore, suggested that the points should be re-investigated.

It is true that the learned Subordinate Judge has not discussed the evidence specifically on those points, but it is quite obvious, on a perusal of his decision, that he had in details considered the evidence and applied his mind to it, before he finally arrived at his conclusion on those points in the penultimate part of his judgment. We, therefore, think that those findings also cannot be challenged before us now.

9. The appeals are, therefore, allowed. The decision of the learned Judge of this Court must be set aside; the judgment and decrees of the learned Subordinate Judge must be restored; and the suits decreed with costs throughout.

10. We allow two months' time to the Defendants to vacate the premises; failing which, the Plaintiffs will be entitled to execute the decrees.

Deka, J.

11. I agree.