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**(2003) 12 CAL CK 0028**  
**In the Calcutta High Court**  
**Case No : S.A. No. 1568 of 1971**

Patal Chandra Chakraborty

APPELLANT

Vs

Pulin Behari Chakaraborty and Others

RESPONDENT

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**Date of Decision :** 12-12-2003

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7, 100, 51  
Evidence Act, 1872 — Section 101  
West Bengal Estates Acquisition Act, 1953 — Section 5

**Citation :** (2004) 3 CALLT 314

**Hon'ble Judges :** Amitava Lala, J

**Bench :** Single Bench

**Advocate :** Ashish Bagchi, Swapna Mondal and Mahendra Prosad Gupta, for the Appellant; Pinaki Ranjan Mitra and Dipankar Chakraborty, for the Respondent

**Final Decision :** Dismissed

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## Judgement

A. Lala, J.—In the Court of first instance the issue Nos. 3 and 4 are as follows :

"3. Are the plaintiffs entitled to get a decree for declaration as prayed for?

4. Are the plaintiffs entitled to get a decree for possession?"

2. These two issues arise out of the subject matter, i.e., declaration of the plaintiffs' right, title and interest in the properties noted in the schedule below and eviction of defendant from schedule B property being part and parcel of schedule A upon declaring the defendant's licence duly revoked. The schedule A is the land and structure butted and bounded by certain premises given in the schedule. Schedule B is the two rooms as fully described in the schedule B therein. According to the plaintiffs, such schedule B is part and parcel of schedule A. Court held that from the evidence it cannot be accepted that schedule in the mortgage deed and schedule in the sale deeds are different. Defendant contended that R.S. record is wrong. Plaintiffs also challenged the R.S. record to the extent that defendant is a licensee in respect of rooms only.

3. According to the Court of first instance, R.S. record to some extent supports the plaintiffs. The defendant challenged the entire R.S. record. The burden of proof lied upon him. There is no satisfactory evidence either oral or documentary on the side of the defendant which rebutted the presumption of the R.S. record. Plaintiffs had not been able to prove that entry in R.S. record so far 14 satak is concerned is wrong. Except the uncorroborated oral testimony of the defendant himself, there is nothing on the record to show that the joint property was purchased out of joint family fund or parties had ancestral property somewhere else. Therefore, the defendant is a licensee in respect of the suit property. Therefore, the plaintiffs are entitled to get a decree for khas possession etc. The first appellate Court held that the defendant had hopelessly failed to prove that the property was purchased from the joint fund or that the property in question was joint Revenue Officer. Long after purchasing this property by Basanta Kumari, the C.S. record of rights was published. From the C.S. record of rights it will appear that the suit property was recorded in the name of Basanta Kumari Debi. The predecessors of the plaintiffs and defendant lived jointly. It suffers another set back if the mortgage deed is taken into consideration. The mortgage is in respect of a different property and there is no mention that their XX ancestors lived jointly in the property which was a joint property. In the circumstances, it is clear that the suit property was the exclusive property of Basanta Kumari Debi from whom the plaintiffs got the same. The learned Munsif relied on the R.S. record of rights and held that the defendant was a licensee under the plaintiffs. It is not the defendant's case that they AIR possessing the suit property as trespasser or a tenant. That being so the defendant must have entered into suit property on the strength of an arrangement and if the plaintiffs' case are considered in the light mentioned above there is no escape from the conclusion that he entered in the suit property as a licensee. The plaintiffs have succeeded in proving that the defendant is possessing the suit property as a licensee under them.

4. Both the concurrent findings are speaking against the appellant-defendant. The appellant-defendant before this Court contained that it is the admitted position that the plaintiff-respondent were not able to prove the title. Further, admittedly the plaintiffs-respondents did not prove the title and so law does not permit the plaintiff-respondents to take possession.

5. The learned counsel appearing for the respondents-plaintiffs relied upon a judgment reported in Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another, . to establish that the dominant intention of the parties is to be gathered from the document, yet all throughout the question had remained a vexed one, having no easy solution and precise mathematical tests. Because ultimately "intention of the parties" is to be inferred to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form. The real test is the intention of the parties whether they intended to create a lease or a licence. If the document creates an interest in the property, it is a lease; but if it only permits another to make use of the property,

of which the legal possession continues with the owner, it is a licence and if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negated the intention to create a lease. Therefore, the whole intention of placing such judgment is that there should be a positive assertion in respect of getting the possession by the plaintiffs-respondents. He further relied upon a judgment reported in *Rajendra Tiwary Vs. Basudeo Prasad and Another*, to say that where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief. Order 7 Rule 7 of the CPC permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted. He also contended that he was occupying the rooms but by virtue of eviction, one, can be evicted from the land in question. The land cannot be separated from the rooms. However, he applied the test of Section 52 of the West Bengal Estates Acquisition Act, 1953 to establish that raiyats or under raiyats were intermediaries and the lands held by them were estates and a person holding under a raiyat or an under raiyat were a raiyat for the purpose of Clauses (c) and (d) of Section 5 of the aforesaid Act which relates to the effect of notification.

6. The learned counsel appearing for the respondents-plaintiffs contended that the Schedule-B is a part of Scheduled property. The suit is meant for declaration and recovery of possession. The claim of the appellant-defendant was that he was a co-sharer of the title. In absence of proof of title what will be the fact of the appellant-defendant i.e. the subject-matter herein. He cited various judgments one after another to consider the same. Firstly, he cited a judgment reported in 1992(1) CHN 42 (*Becharam Das v. Sri Purna Chandra Das*) which is similarly placed in the present case. There it was held that a licence is that permission to stay on a property, either express or implied but for which his stay on the property would be illegal. A validly permitted permission of an immovable property may turn to be a trespass if the possession continues even after the withdrawal of the permission. It is different in nature from the possession of a rank trespasser who forcibly occupies a property knowing that he has no right, title and interest in the property. If a person enters upon a property on a bona fide belief that he has title to the but ultimately it is found that he has no such title, his stay on the property subsequent to such a finding must be deemed to be a trespass. The question is now such a trespasser may be ousted? Therefore, such facts were considered in so many judgments of different High Courts including the Supreme Court and they came to a conclusion that once the plaintiff's title is proved, he has a claim over the property to the exclusion of an unsuccessful claimant of the same, he has preferential claim to possess his own property notwithstanding the relationship attributed to the person interested to oppose his title. This is called the equitable relief of ejectment. Again, a Division Bench judgment of this Court reported in 1992(1) CLJ 174 (*Mrs. Juthika Basu and Ors. v. Lt. Col. A.N. Sharma*) held in a similar line. He also cited another

judgment reported in Chandrabai Pandurang Bidwekar Vs. Nanji Jaywant, wherein it was held that the suit for ejectment of a defendant as trespasser the plaintiff proves his title and the defendant sets up plea of title by way of tenancy under which he seeks to be in occupation of the suit land, it will be for him to establish that title. Unless he does so, the plaintiff by virtue of his title will be entitled to possession of suit land and the defendant must be held to be a trespasser. He also cited another judgment reported in Shri Arjan Dev Vs. Shri Om Parkash, wherein it was held also that the defendant cannot take two contradictory positions which cannot stand together. He cannot say that he has interest in the property as a member of the Joint Hindu Family but at the same time say that he is the owner by way of adverse possession. As noted above, no documentary evidence has been brought on record to show that the defendant ever claimed the suit property to be his exclusive property or advanced any hostile title to that of the plaintiff. Even the four Judges' Bench of the Supreme Court reported in Bhagwati Prasad Vs. Shri Chandramaul, held that by necessary implication it applied the same ratio. In another judgment reported in Bhudan Singh and Another Vs. Nabi Bux and Another, , it was held that in fact the vesting of. the estates and the deemed settlement of some rights in respect of certain classes of lands or buildings included in the estate take place simultaneously, in law as the two must be treated as different transactions: Firstly, there is absolutely a vesting of the estates in the State free of all incumbrances and secondly, it follows the deemed settlement by the State of some rights.

7. However, I do not want to go to that part in the Second Appeal. My entire endeavour is to apply the test whether, the title of the respondent plaintiffs is proved or not. It is not only concurrently held, but also the admitted position is that the appellant-defendant failed to prove the case. Therefore, the only point for consideration by this Court is what should be the outcome of such failure. The judgments, which are cited before this Court, clearly indicate that the respondents-plaintiffs are entitled to take possession. The appellant-defendant cannot get any better interest than the co-sharer in the title which he has failed to prove. Therefore, obviously the respondent-plaintiffs are entitled to such relief. It has been contended by the appellant that there is no such relief prayed to that extent. However, it appears that a tactical prayer to get a decree by making a Schedule - B as part and parcel of Schedule - A is made. According to me, if such prayer is available from the inception and not being protested, they will be entitled to such relief. At this stage, no new case can be directed to make out. Therefore, the totality of the case prescribes dismissal of the appeal. Accordingly, the appeal stands dismissed. Interim order, if any, shall stand vacated. There will be no order as to costs.

8. Let Lower Court Records be sent down to the Court below as expeditiously as possible preferably within a period of one month from this date.

The Court below is entitled to take appropriate steps preferably within a period of three months from the date of getting the Lower Court Records or a copy of the

order, whichever is later.