
(1975) 06 GAU CK 0006

In the Gauhati High Court

Case No : Letters Patent Appeal No. 12 of 1973

Rajballav Paul and others

APPELLANT

Vs

Smt. Kamalarani Dhar and others

RESPONDENT

Date of Decision : 13-06-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35(a)
Transfer of Property Act, 1882 — Section 109

Citation : AIR 1976 Guw 14

Hon'ble Judges : M.C. Pathak, C.J.; D.M. Sen, J

Bench : Division Bench

Advocate : S.K. Ghose, D.K. Sarma and T.N. Phukan, for the Appellant; P. Choudhuri, A.R. Kalita and N. Chakravarty, for the Respondent

Final Decision : Allowed

Judgement

Pathak, C.J.—This Letters Patent Appeal is from the judgment and decree of the learned Single Judge.

2. Defendants Nos. 1, 2 and 3 are the appellants in the Letters Patent Appeal. Plaintiff's-Respondents Nos. 1 and 2 filed Title Suit No. 104 of 1965 in the Court of the Sadar Munsiff, Gauhati against the defendants-appellants and two others for ejectment of the defendants-appellants with the following prayer:

(a) that the Court be pleased to pass a decree for ejectment and eviction of the defendants Nos. 1 to 3 from the D Schedule houses and for recovery of khas and vacant possession of the same by removing the defendants Nos. 1 to 3 and their properties, their families and their servants and employees and their moveables.

(b) that the claim for arrears of rent and compensation amounting to 1,200/- be decreed against the defendant No. 1 with future interest at the rate of Rs. 6/- per cent, per annum on the decretal amounts including the costs of the suit from the date of institution of the suit till realisation;

(c) that the costs of the suit be decreed against the defendant No. 1 and that if

any of the defendants Nos. 2 to 5 contest the claim of the plaintiff's, they are to be made principal defendants and costs of the suit be decreed against them; and

(d) that other reliefs to which the plaintiff's may be legally entitled be also decreed.

3. The case of the plaintiff's briefly is that pro forma defendant No. 4 Gobindalal Saha and one Makhanlal Dhar were joint owners of the properties described in Schedule "A" to the plaint. They amicably partitioned the properties and "B" Schedule land remained in possession of pro forma defendant No. 4 and "C" Schedule land remained in possession of Makhanlal Dhar. The "B" Schedule properties were sold to the plaintiff's by pro forma defendant No. 4 by a registered sale deed dated 13-3-1963 and possession thereof was made over to the plaintiff's. Defendant No. 1 Rajballav Pal was a tenant under pro forma defendant No. 4 with respect to some houses on "B" Schedule land. Defendant No. 1 became the tenant of the plaintiff's by operation of law after the said purchase in respect of the houses described in the Schedule "D" to the plaint. Thus the defendant No. 1 is a monthly tenant under the plaintiff's at a monthly rental of Rs. 30/- according to the English Calendar month. Defendant No. 1 has been in possession of the "D" Schedule houses as a tenant-at-will and he having defaulted in payment of rent for the same has become liable to eviction. Accordingly the plaintiff's served a notice of ejectment on the defendant No. 1 through their advocate terminating the tenancy by the end of 30th June, 1965. The defendant No. 1 did not vacate in compliance with the ejectment notice and hence the plaintiff brought the suit for ejectment and recovery of arrear rent and compensation.

4. Defendants Nos. 1 to 3 put in a joint written statement wherein they denied the allegations made in the plaint. They contended, inter alia, that they were never tenants-at-will in respect of the two dwelling houses and the attached Chali and the cook-shed of Holding No. 28, Ward No. 10 of the Gauhati Municipality at Lokhra Road, Rehabari, Gauhati; that they never paid any monthly rent of Rs. 30/- either to Gobindalal Saha or to anybody else, that Gobindalal Saha was never the owner of these two houses and the attached Chali and the cook-shed; that the sale of the two houses and the attached Chali and the cook-shed in occupation of the defendants to the plaintiff's, if there was any, was illegal, invalid and void; and that Gobindalal Saha has no right, title and interest to transfer the properties described in Schedule "D" to the plaint. In substance, the defendants denied the tenancy claimed by the plaintiff's and they categorically stated that they never held the suit houses as tenants under Gobindalal Saha or under anybody else including the plaintiff's. They, inter alia, challenged the sale, if any of the suit properties by Gobindalal Saha to the plaintiff's. Some other facts were alleged with regard to title over the suit property.

5. On the pleadings of the parties the following issues were framed:

- (1) Whether there is cause of action for this suit?
- (2) Whether the suit is maintainable in present form and manner?
- (3) Whether the suit is bad for nonjoinder and misjoinder of parties?
- (4) Whether the suit is barred by limitation?
- (5) Whether there is improper valuation of the suit and want of proper Court-fee?
- (6) Whether there is proper, valid and legal notice of ejectment served on the defendants and whether the defendants Nos. 2 and 3 are entitled to service of notice of ejectment?
- (7) Whether the defendant No. 1 was a tenant under Gobindalal Saha pro forma defendant No. 4, over the houses in suit?
- (8) Whether the defendant No. 1 is liable for the arrears of rent claimed and whether he is liable to be evicted along with his brothers from the suit houses?
- (9) Whether the defendants Nos. 1 to 3 are protected from eviction under the provisions of the Assam Urban Areas Rent Control Act and of the Assam Non-Agricultural Urban Areas Tenancy Act?
- (10) Whether the defendants Nos. 1 to 3 are purchasers and owners of the suit houses and whether they have any leasehold right over the lands under the suit houses in occupation of the defendant No. 1 along with his brother?
- (11) Whether the plaintiff's are entitled to decree for eviction of the defendants Nos. 1 to 3 and for amounts of rent claimed?
- (12) Whether the defendants are entitled to compensation u/s 35(a) of the CPC and if so to what amount?
- (13) To what relief the parties are entitled?

6. Six witnesses were examined on behalf of the plaintiff's and the defendants also examined six D.W's.

7. The learned Munsiff first took up Issue No. 7 for consideration, which is as under:

Whether the defendant No. 1 was a tenant under Gobindalal Saha pro forma defendant No. 4 over the houses in suit?

Considering the materials on record, the learned Munsiff found that the plaintiff's failed to establish that the defendants were tenants under Gobindalal Saha, pro forma defendant No. 4, through whom the plaintiff's claimed that the defendants were tenants under them.

8. The learned Munsiff then took up Issue No. 8, which is as under:

Whether the defendant No. 1 is liable for the arrears of rent claimed and whether

he is liable to be evicted along with his brothers from the suit houses?

On consideration of the materials on record the learned Munsiff found that the plaintiff's failed to prove their case and Issue No. 8 was also decided against the plaintiff's.

9. Thereafter the other issues were taken up and ultimately the learned Munsiff dismissed the plaintiff's suit, leaving open the Issues Nos. 9 and 10, which are as follows:

(9) Whether the defendants Nos. 1 to 3 are protected from eviction under the provisions of the Assam Urban Areas Rent Control Act and of the Assam Non-Agricultural Urban Areas Tenancy Act?

(10) Whether the defendants Nos. 1 to 3 are purchasers and owners of the suit houses and whether they have any leasehold right over the lands under the suit houses in occupation of the defendant No. 1 along with his brothers?

10. The plaintiff's preferred an appeal before the learned Assistant District Judge No. 2, Gauhati. The learned District Judge set out the points for determination in the appeal before him as follows:

(1) Whether the defendant No. 1 was a tenant under the pro forma defendant No. 4 Gobindalal Saha in respect of the suit houses?

(2) Whether the defendant No. 1 was a tenant of the plaintiff's by operation of law?

(3) Whether the defendants were liable to be ejected as prayed for?

11. On a careful consideration of the evidence, both oral and documentary, adduced by both the parties, the learned Assistant District Judge found that the plaintiff's failed to prove that the defendant No. 1 was a tenant under Gobindalal Shah and he further observed as follows:

Except the mention of the defendant No. 1 to be a tenant under the said Gobindalal in Exts. 2 and 3, there is no other evidence on record in that regard. The above recital in the deeds Exts. 2 and 3 are not surely sufficient to come to a conclusion in favour of the plaintiff's when the defendants were not parties to those deeds. Hence, I am unable to accept in absence of any satisfactory evidence on record that the defendant No. 1 was a tenant under Gobindalal. Thus, the mere fact of transfer of the suit premises by the said Gobindalal in favour of the plaintiff's stating the defendant No. 1 to be a tenant is not enough to hold that he was also a tenant under the plaintiff's by operation of law.

12. The learned Assistant District Judge also in his judgment considered the question whether title could be gone into in a suit for ejectment under the circumstances of the present case and he observed that the present case is a suit for ejectment of the defendants on the allegations that the defendant No. 1 was a tenant under Gobindalal Saha from whom the plaintiff's purchased the suit

houses and the lands and that the defendant No. 1 was a tenant under the plaintiff's by operation of law u/s 109 of the Transfer of Property Act, and that the suit was not definitely based on title and under those circumstances the learned Assistant District Judge says that he could not go into the title of the plaintiff's in the instant case. Having thus held the learned Assistant District Judge dismissed the plaintiff's appeal.

13. Against the judgment and decree of the learned Assistant District Judge, a second appeal was filed before the High Court and that was disposed of by the learned single Judge who by his judgment and order dated 1-6-1973 set aside the decree of the learned Assistant Dist. Judge and remanded the appeal to the Assistant District Judge for disposal of the same on the basis of the plaintiff's title upon the evidence already on record and to decide the other issues framed in the suit including those which were left undecided by the learned Munsiff as redundant in a suit for ejectment. Hence this Letters Patent Appeal.

14. The point that arises for consideration is whether in a suit for ejectment simpliciter where the plaintiff claimed for ejectment of the defendant as a tenant without any prayer for declaration of his title in respect of the suit properties from which ejectment of the defendant is prayed for, the plaintiff having failed to establish the alleged tenancy the Court is required to enter into the question of title of the plaintiff for the purpose of ejectment of the defendant.

15. In the instant case the plaintiff's suit is an ejectment suit simpliciter. The plaintiff's claimed that the defendant No. 1 was a tenant under pro forma defendant No. 4 from whom the plaintiff's purchased the suit properties and, therefore, the defendant No. 1 became a tenant under the plaintiff's by operation of law. In the ejectment suit the plaintiff's only prayed for a decree for ejectment and eviction of the defendants 1 to 3 from the "D" Schedule houses and for recovery of khas and vacant possession and also arrear of rent and compensation. We have quoted hereinabove the prayers made in the plaint. It is not the case of the plaintiff's that their title to the suit properties should be declared or investigated in the case.

16. As many as 13 issues were framed on the pleadings of the parties but there is an issue as to the title of the plaintiff's with respect to the suit properties. Issues Nos. 9 and 10, which relate to the defendants' right to stay on the suit properties, may arise for consideration only if the tenancy is proved. Issue No. 11 does not at all relate to the plaintiff's title to the suit properties. In their written statement the defendants 1 to 3 have categorically denied any tenancy either under pro forma defendant No. 4 Gobindlal Saha or under anybody else including the present plaintiff's. So, when the pleadings were before the Court, the plaintiffs' definite case was that the defendant No. 1 was a tenant under them by operation of law and the defendants' case was that defendant No. 1 was never a tenant either under the vendor of the plaintiff's or under anybody else including the plaintiff's. Having thus denied, the defendants averred that Gobindlal Saha himself had no right title and interest to transfer the properties

described in "D" Schedule to the plaint from which the plaintiff's prayed for eviction of the defendants in the suit. The defendants also laid claim to have purchased the suit houses in occupation of defendant No. 1 along with his brother. On the face of such pleadings on the part of the defendants, the plaintiff's remained content in keeping the suit as an ejectment suit simpliciter and did not consider it necessary to convert it into a suit for declaration of title as well, and no issue with respect to the title of the plaintiff's was framed. Both the parties then adduced evidence and the learned trial court taking it to be an ejectment suit simpliciter, considered Issue No. 7 and the materials on record and found that the plaintiff's failed to prove that the defendant No. 1 was a tenant under Gobindalal Saha, pro forma defendant No. 4, in respect of the two houses in suit and that being so even if there was any purchase by the plaintiff's of the suit properties from the pro forma defendant No. 4, the plaintiff's were not entitled to an ejectment decree against the defendants Nos. 1 to 3, and mainly on that basis the plaintiff's ejectment suit was dismissed by the learned Trial Court. The learned Assistant District Judge also dismissed the plaintiff's appeal, upholding the decree of the learned trial Court.

17. The learned single Judge has mainly relied on the decisions in the cases of Balmakund v. Dalu, ILR(1903) 25 All 498 (FB); Abdul Ghani v. Mt. Babni, (1903) ILR 25 All 256 (FB) and Bhagwati Prasad Vs. Shri Chandramaul, and has set aside the decree of the learned Assistant District Judge and remanded the appeal to the learned Assistant District Judge for disposal of the same on the basis of the plaintiff's title upon the evidence already on record and also to decide all the other issues which had been left undecided by the learned Munsiff as redundant in a suit for ejectment, as these would be very much material if the suit is to be disposed of on the basis of title. In other words, the learned single Judge has converted the ejectment suit simpliciter as brought by the plaintiff's who have not chosen to convert it into a title suit even though there was complete and clear denial of the tenancy, into a title suit and for ejectment on the basis of title.

18. As observed hereinabove, in the instant case we do not find any discussion of evidence on title of the plaintiff's or of the parties in the judgment of the learned Munsiff and it is not known whether the parties took particular care to adduce evidence regarding their respective title, because for all purposes the suit was taken to be an ejectment suit simpliciter.

19. In Balmukund's case (supra) the defendant denied the tenancy and claimed proprietary right by adverse possession. The learned Munsiff though framed only one issue, namely, whether the defendant had rented from the plaintiff a part of the cattle-shed, in question, allowed both the parties to adduce evidence on title and on consideration of the evidence so recorded came to the conclusion that although the plaintiff had failed to prove the lease of part of the cattle-shed to the defendant, there probably had been a lease of some sort, and in any case the cattle-shed belonged to the plaintiff and he was entitled to eject the defendant therefrom and the learned Munsiff accordingly decreed the plaintiff's

claim for ejectment, but not for rent. This judgment and decree of the Munsiff was set aside by the Subordinate Judge and on appeal from the decree of the Subordinate Judge, the Division Bench of the High Court was divided in opinion and therefore, the decree of the Subordinate Judge stood and from that decree Letters Patent appeal was heard by the Full Bench which reversed the decision of the Subordinate Judge and directed the Subordinate Judge to try the issue as to who was the owner of the cattle-shed, the subject-matter of the suit, upon the evidence which is already on the record and to return his finding thereon to the High Court.

In Balmukund's case (1903) ILR 25 All 498 (FB) (supra) it was held-

Even though the plaintiff had failed to make out his case as to the letting, he nevertheless should get a decree on his title unless the defendant could show a better one. The fact that no distinct issue as to the plaintiff's title had been framed could not be construed to the prejudice of the plaintiff inasmuch as the issue had in fact been tried, and it could not be said that the defendant had been in any way taken by surprise.

In that case the evidence as to title was adduced on both sides and the Munsiff came to the conclusion that although the plaintiff had failed to prove the lease of part of the cattle-shed to the defendant, there probably had been a lease of some sort, and in any case the cattle-shed belonged to the plaintiff and he was entitled to eject the defendant therefrom. Thus the issue regarding the ownership of the cattle-shed in question was gone into and decided by the learned Munsiff on the evidence adduced by both the parties. The decision in Balmukund's case (supra) mainly centred round this finding of fact by the learned Munsiff on consideration of the evidence adduced by both the parties. In the instant case, as we have already observed, no evidence as to the title of the plaintiff's with respect to the suit houses has been considered by the learned Munsiff nor does it appear from the judgment that the parties adduced evidence as to their respective title. So, Balmukund's case is clearly distinguishable on facts.

20. In Abdul Ghani's case (1903) ILR 25 All 256 (FB) (supra) it is found that on the pleadings of the parties issues were framed and one of the issues was "whether the plaintiff was the owner of the house in dispute and whether the defendant had been in adverse possession for more than twelve years". Certainly both parties were entitled to adduce evidence on this issue and they did adduce evidence with respect to this issue which related to the plaintiff's ownership of the house in dispute. That being so, this case is also clearly distinguishable on the facts from the case before us.

21. The learned single Judge has observed that Balmukund's case has received approval of the Supreme Court in Bhagwati Prasad Vs. Shri Chandramaul, . But one patent thing that has to be pointed out is that in the case before the Supreme Court (Bhagwati Prasad's case) the defendant admitted that the land

over which the house stood belonged to the plaintiff. But he pleaded that he was to remain in possession of the house until the amount spent by him on the construction was repaid to him by the plaintiff. The plaintiff led evidence about the tenancy set up by him and the defendant led evidence about the agreement on which he relied. Both the pleas were clear and specific and the common basis of both the pleas was that the plaintiff was the owner and the defendant was in possession by his permission. In such a case the relationship between the parties would be either that of a landlord and tenant, or that of an owner of property and a person put into Possession of it by the owner's licence. No other alternative was logically or legitimately possible and on that basis the Supreme Court decided that case.

The following observations of the Supreme Court may be quoted:

There can be no doubt that if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new.

* * * *

But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot override the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general Rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is; did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them had no opportunity to lead evidence in respect of it that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence would introduce considerations of Prejudice, and in doing justice to one party, the Court cannot do injustice to another.

* * * *

Turning then to the pleadings and evidence in this case, there can be little doubt that the defendant knew what he was specifically pleading. He had admitted the title of the plaintiff in regard to the plot and set up a case as to the manner in

which he spent his own money in constructing the house. The plaintiff led evidence about the tenancy set up by him and the defendant led evidence about the agreement on which he relied. Both the pleas are clear and specific and the common basis of both the pleas was that the plaintiff was the owner and the defendant was in possession by his permission. In such a case, the relationship between the parties would be either that of a landlord and tenant, or that of an owner of property and a person put into possession of it by the owner's licence. No other alternative is logically or legitimately possible. When parties led evidence in this case, clearly they were conscious of this position, and so, when the High Court came to the conclusion that the tenancy had not been proved, but the defendant's agreement also had not been established, it clearly followed that the defendant was in possession of the suit premises by the leave and licence of the plaintiff. Once this conclusion was reached, the question as to whether any relief can be granted to the plaintiff or not was a mere matter of law and in deciding this point in favour of the plaintiff, it cannot be said that any prejudice has been caused to the defendant.

Thus, Bhagwati Prasad's case (*supra*) is also clearly distinguishable on the facts from the case before us.

22. In the instant case the plaintiff's clear case was that the defendant No. 1 was a tenant of pro forma defendant No. 4 from whom the plaintiff's purchased the suit houses. The defendants clearly denied any tenancy whatsoever under pro forma defendant No. 4 and they also stated that pro forma defendant No. 4 had no right, title and interest to transfer the suit houses to the plaintiff's. Thereafter they set up the plea of their own ownership of the suit houses. In such circumstances if the plaintiff's chose not to amend the plaint of the ejectment suit simpliciter and to convert it into a title suit for declaration of their title, on the basis of which ejectment was prayed for and no issue as to the title of the plaintiff's is struck and the parties are allowed to adduce evidence on such an issue, it would certainly be to the prejudice of the defendants if the plaintiff's are allowed to convert the ejectment suit into a title suit for declaration of title as well, more particularly when the trial court itself had refused to enter into that question.

In the circumstances we hold that whether in an ejectment suit simpliciter the plaintiff having failed to establish the relationship of landlord and tenant as between himself and the defendant, the plaintiff may be allowed to rely on his ownership for the purpose of eviction of the defendant will depend upon the facts and circumstances of a particular case, the nature of the defence taken by the defendant, the nature of the issue framed on the pleadings of the parties, whether evidence regarding title was adduced specifically by both the parties, whether the issue regarding title was considered by the trial court notwithstanding the fact that there was no issue to that effect and that neither party is prejudiced. Applying this principle and considering all the facts of the case before us, as discussed hereinabove, we find that the learned single Judge

was not correct in setting aside the judgment and decree of the learned Assistant District Judge and in remanding the appeal to him for disposal of the same on the basis of the plaintiff's title upon the evidence already on record and also to decide other issues which were left undecided by the learned Munsiff. The cases on which the learned single Judge has relied upon for his decision are clearly distinguishable on facts and law, as stated therein. The view which we have taken is also supported by a Division Bench decision of this Court in Letters Patent Appeal No. 9 of 1969 (Taufiqur Rahman v. Bewa Elachi Bibi and another) decided on 23-2-1973.

23. The Code of Civil Procedure, 1908 has been in statute book for more than sixty years and the parties are, almost in all cases, represented by qualified lawyers. That being the position, it is not understood why the ejectment suit simpliciter should be allowed to be converted into a title suit in the second appeal stage in this case since the plaintiff's have not cared to convert the ejectment suit simpliciter into a title suit with alternative prayer for declaration on the basis of title failing to prove tenancy when in the written statement the defendants have clearly denied the tenancy as well as plaintiff's ownership of the suit properties from which the defendants are sought to be evicted. To allow the plaintiff's in this case a chance to convert an ejectment suit simpliciter into a title suit at the second appeal stage and that also to be tried from the first appeal stage as has been done in this case would, in our opinion, mean giving premium to plaintiff's gross negligence in prosecuting his case in accordance with law and it would cause prejudice to the defendants Nos. 1 to 3.

24. In the result, the appeal is allowed, the judgment and decree of the learned single Judge are set aside, the decree passed by the learned Subordinate Judge is affirmed and the plaintiff's suit stands dismissed. We, however, make no order as to costs.

D.M. Sen, J.

25. I agree.