

(2005) 02 GAU CK 0017

In the Gauhati High Court

Case No : Regular Second Appeal No. 26 of 1999

Ram Prasad Kumar and Another

APPELLANT

Vs

Suuraj Nath Goala and Others

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 116

Citation : (2005) 2 GLR 679 : (2007) 1 GLT 660 : (2005) 2 GLT 303

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : K.N. Choudhury, P. Bhowmik and B.C. Das, for the Appellant; N. Choudhury and S.C. Keyal, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—This is a defendants' Second Appeal against the judgment and decree of reversal. Initially the suit of the respondents/plaintiffs was dismissed by the learned trial Court on 8.4.1994. The plaintiffs instituted Title Appeal No. 32/1994 challenging the aforementioned judgment and decree of dismissal of the suit and the decree having been reversed by the learned first Appellate Court, this Second Appeal has been filed by the defendants in the suit.

2. The case of the respondents/plaintiffs in the plaint filed, shortly put, is that one Binoy Mazumdar was the owner of the suit land and the predecessor of the defendants, one Satyanarayan Kurmi, had taken the suit land on lease by a registered lease deed dated 5.2.1961, for a period of ten years. According to the plaintiffs, the defendants' predecessor and his brother one Haricharan Kurmi attempted to take forcible possession of the land adjacent to the suit land for which reason Binoy Mazumdar, as the plaintiff, instituted a suit being Title Suit No. 63 of 1984 which was decreed exparte. The exparte decree in the said suit was put to execution in Title Execution Case No. 2 of 1987. While the aforesaid execution case was pending, Sri Binoy Mazumdar, by a registered sale deed dated 18.5.1987 transferred his right, title and interest in the suit land alongwith

other lands to the plaintiffs who are brothers and by virtue of the aforesaid transfer the plaintiffs became the owners of the suit land. According to the plaintiffs, they had got themselves impleaded in the execution proceeding in place of Binoy Mazumdar and as, in the meantime, the predecessor of the defendants Satyanarayan Kurmi had died, on an application filed by the plaintiffs, the defendants were substituted in place of Satyanarayan Kurmi in the Title Execution Case in question.

In the plaint filed it was further averred that the predecessor of the defendants and after his death the defendants are not paying rent in terms of the lease deed and that the defendants had become defaulters. It was further averred that the defendants had violated the terms of the lease and that the suit land was required by the plaintiffs for their bona fide use for starting a new business. In these circumstances a notice dated 24.2.1989 terminating the lease was issued by the plaintiffs and as the defendants in spite of receipt of the said notice had not vacated the land in question, the suit was filed for a decree of eviction against the defendants by demolition of the house and structures standing thereon.

3. The defendants contested the suit by filing a written statement wherein, after denying the averments made in the plaint, the defendants had categorically asserted that the suit land is a part of Bhorakhai Tea Estate, originally owned by M/S Duncan and Company. According to the defendants, Late Satyanarayan Kurmi took settlement of a total area of 14 kathas 5 chataks of land from Duncan and Company which included the suit land. Thereafter, the predecessors-in-interest of the defendants constructed their houses on the suit land and since then they have been residing thereon and carrying on their business. In the written statement filed, the defendants also averred that subsequently, by purchase, Sri Binoy Mazumdar became the owner of Bhorakhai Tea Estate and the predecessors of the contesting defendants. Late Satyanarayan Kurmi, had paid rent to Binoy Mazumdar. However, the suit land including other lands, according to the defendants, was acquired by the Government under the provisions of Assam Fixation of Ceiling on Land Holdings Act, 1956 and thereafter khatians were granted to the predecessors in interest of the defendants. In these circumstances, the defendants contended that the plaintiffs have no locus to file the suit claiming the relief of eviction and that the purchase of the suit land by plaintiffs from Binoy Mazumdar is void, illegal and collusive. On the aforesaid basis the defendants had prayed for dismissal of the suit.

4. The suit of the plaintiffs having been answered by the learned Courts below in the manner already noticed, on consideration of the judgment and decree under appeal and the submissions advanced by Sri K.N. Choudhury, learned senior counsel for the appellants and Sri N. Choudhury, learned counsel appearing for the respondents, this Court is of the view that the following substantial question of law arises in the present case.

"Whether in the facts and circumstances of the present case as proved and

established by the evidence and materials on record, a fresh tenancy u/s 116 of the Transfer of Property Act was created between the plaintiffs and the defendants or their predecessors-in-interest after the determination of the original tenancy between Binoy Mazumdar and the predecessors-in-interest of the defendants, by efflux of time?"

5. Mr. K.N. Choudhury, learned senior counsel for the appellants has argued that the lease in respect of the suit property executed by and between the original owner, i.e. Binoy Mazumdar and the predecessors in interest of the defendants being for a period of 10 years with effect from 5.2.1961, expired on 5.2.1971 by efflux of time. The evidence and materials on record do not disclose that the lease was either renewed or a new tenancy was created by and between the parties after determination of the original lease deed dated 5.2.1961. Though the predecessors in interest of the defendants continued to remain in possession, according to learned counsel for the appellants the respondents-plaintiffs have failed to show that such possession was with the consent of the original landlord. There was, therefore, no relationship of landlord and tenant between the original landlord, i.e., Binoy Mazumdar and the predecessors in interest of the defendants after the determination of the lease in the year 1971. Consequently, on sale of the property made by Binoy Mazumdar to the plaintiffs in the year 1987, the plaintiffs could not have acquired the status of landlords vis-a-vis the defendants on the basis of the sale deeds (Exts-5 and 6) executed by Binoy Mazumdar in favour of the plaintiffs on 18.5.1987. According to the learned counsel, the plaintiffs have also failed to prove and establish that after the sale was made in favour of the plaintiffs, the said plaintiffs had consented to the possession of the defendants over the suit land. As the relationship of landlord and tenant between the parties was not established, the suit of the plaintiffs, according to the learned counsel, was rightly dismissed by the learned trial court and it is the aforesaid conclusion, learned counsel submits, that should be reached by this Court in the facts of the present case. In support of his argument, Mr. Choudhury, learned counsel for the appellants, has placed reliance on an Apex Court judgment in the case of Kewal Chand Mimani (d) by Lrs. Vs. S.K. Sen and Others,

6. Controverting the submissions advanced on behalf of the appellants, Mr. N. Choudhury, learned counsel for the respondents has vehemently contended that it is not the pleaded case of the defendants in the suit that the tenancy between the original owner Binoy Mazumdar and the predecessors-in-interest of the defendants stood determined on the expiry of the period of the lease dated, 5.2.1961 and that no further tenancy was created thereafter. Rather, the specific pleaded case of the defendants is that the suit land, amongst others, was acquired under the provisions of the Ceiling Act and thereafter khatians were granted to the predecessors in interest of the defendants and on that basis the title of the original owner Binoy Mazumdar in respect of the suit land stood extinguished. According to Sri Choudhury, the defendants having failed to prove the aforesaid facts as pleaded and in fact the plaintiffs having succeeded in establishing on the basis of Ext-1, that the khatians granted were subsequently

cancelled, according to Sri Choudhury, proceeding on the basis of the pleaded case of the defendants, a fresh tenancy between the plaintiffs and the defendants must be deemed to have been created by the act of the defendants in holding over possession. Tenancy, therefore, according to learned counsel, must be held to have been proved by the plaintiffs and there being no denial on the part of the defendants with regard to the default in the matter of payment of rent as well as the bona fide requirement of the plaintiffs, an order decreeing the suit of the respondents/plaintiffs must necessarily follow.

7. The arguments advanced on behalf of the respective parties have been duly considered.

The undisputed facts of the case would go to show that after the expiry of the lease deed dated 5.2.1961 there was neither any extension or renewal of the original lease or creation of a fresh tenancy between the original owner Binoy Mazumdar and the predecessors in interest of the defendants. The materials on record have also demonstrated that after the expiry of the period of lease, no rent was tendered either by the predecessors-in-interest of the defendants or the defendants themselves either to the original owner or to the plaintiffs. Another significant fact that is disclosed by the evidence and materials on record is that all along i.e. after expiry of the lease period the predecessors-in-interest of the defendants and, thereafter, the defendants continued to remain in possession of the suit land. There is, however, no evidence to suggest that such possession of either the predecessors in interest of the defendants or the defendants themselves were with the consent and assent of either the original landlord Binoy Mazumdar or the plaintiffs in the suit. In such circumstances, the question that has to be answered by the Court is whether the defendants can be understood to be "tenants holding over". A tenant may retain and continue to be in possession of the leased property after the termination of the lease or on its determination by efflux of time. If such retention of possession is without the consent of the landlord, a tenant is commonly known as a "tenant at sufferance". A tenant in possession with the consent with the landlord is a "tenant holding over" or a "tenant at will". Statutory recognition to the concept of holding over has been accorded by Section 116 of the Transfer of Property Act which contemplates that if a tenant remains in possession after the termination/determination of the lease and the landlord accepts rent from a tenant or otherwise assents to the tenant continuing in possession, the original lease may be deemed to have been renewed either from year to year or from month to month depending on the purpose of the lease as specified in Section 106 of the Transfer of Property Act.

8. A very clear exposition of the principles of law noticed above with regard to the status of "tenants by sufferance" and "tenants holding over" is available in paragraph 8 of a judgment of the Apex Court in the case of R.V. Bhupal Prasad Vs. State of Andhra Pradesh and others, which has been extracted in the judgment of the Apex Court in Kewal Chand Mimani (supra) cited at the Bar. Para 8 of the judgment in Kewal Chand which would succinctly sum of the position

may, therefore, be extracted herein :

"8. Tenant at sufferance is one who comes into possession of land by lawful title, but who holds it by wrong after the termination of the term or expiry of the lease by efflux of time. The tenant at sufferance is, therefore, one who wrongfully continues in possession after the extinction of a lawful title. There is little difference between him and a trespasser. In Mussa's Transfer of Property Act (7th Edn.) at p. 633, the position of tenancy at sufferance has been stated, thus: A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without the consent of the person entitled. A tenancy at sufferance does not create the relationship of landlord and tenant. At p. 769, it is stated regarding the right of a tenant holding over, thus: The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind. If the lessee remains in possession after the determination of the term, the common law rule is that he is a tenant on sufferance. The expression "holding over" is used in the sense of retaining possession. A distinction should be drawn between a tenant continuing in possession after the determination of the lease, without the consent of the landlord and a tenant doing so with the landlord's consent. The former is called a tenant by sufferance in the language of the English law and the latter class of tenants is called a tenant holding over or a tenant at will. The lessee holding over with the consent of the lessor is in a better position than a mere tenant at will. The tenancy on sufferance is converted into a tenancy at will by the assent of the landlord, but the relationship of the landlord and tenant is not established until the rent was paid and accepted. The assent of the landlord to the continuance of the tenancy after the determination of the tenancy would create a new tenancy. The possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical."

9. The retention of possession by a tenant after determination of the lease which gives rise to a legal relationship by a deemed extension of the lease under the provisions of Section 116 of the Transfer of Property Act must, however, be with the consent/assent of the landlord. Section 116 makes it clear that the retention of possession by the tenant must be accompanied by an acceptance of rent from the tenant by the landlord or the landlord must otherwise assent to such possession of the tenant. In other words, the act of holding over must be with the consent of the landlord. Such consent may be readily read in the event the tenant offers rent and the same is accepted by the landlord. Alternatively, Section 116 makes it clear that such consent can also be inferred or implied from the surrounding circumstances. This is made clear from the use of the words "otherwise assents to his continuing in possession" in Section 116 of the Transfer of Property Act. While assent may be inferred or implied, circumstances must

exist on the basis of which such an inference can be legitimately drawn. While it will be unnecessary to even attempt to exhaustively lay down the circumstances in which such an inference can be drawn, it is clear that mere lack of dissent would not amount to assent as contemplated in Section 116 because assent would require something more positive than mere lack of dissent. In the present case, no doubt the defendants/ tenants or their predecessors continued in possession of the suit property after determination of the lease but such possession by itself would not make the defendants or their predecessors "tenants holding over" unless such possession was consented or assented to by the plaintiffs/landlords. In the present case, there is no material on record to enable the Court to hold that the plaintiffs/landlords had consented to the continued possession of the defendants/tenants.

10. The argument advanced on behalf of the respondents in the appeal, i.e., the plaintiffs/landlords is that the defendants did not deny the existence of the tenancy after the expiry of the period of the lease and what was claimed is that they had acquired the status of tenants under the Government on the basis of the khatians issued to them. The defendants had failed to prove the said claim and in fact the plaintiffs had established that the khatians granted to the defendants or their predecessors had been cancelled. In the present case, the failure of the defendants to prove the case pleaded would not automatically establish the case pleaded by the plaintiffs. The tenancy claimed by the plaintiffs being a tenancy by operation of law, i.e., u/s 116 of the Transfer of Property Act, can only be held to be proved upon existence of the basic fact that the retention of possession by the tenants after determination of the original lease was with the assent/consent of the landlord. The aforesaid vital fact not having been proved and established by the evidence and materials on record, the defendants cannot be understood to be "tenants holding over" so as to enable the Court to understand a continuation of the lease by virtue of the provisions of Section 116 of the Transfer of Property Act.

11. The plaintiffs, thus, having failed to prove the tenancy of the defendants under them, no relief could have been granted to the plaintiffs on the basis of the case projected in the suit filed. The entitlement of the plaintiffs to evict the defendants on any other ground that may be available cannot, naturally, be the subject matter of consideration in the present appeal. Consequently, while answering the question of law noted herein above in the negative, I allow this appeal by setting aside the judgment and decree dated 9.2.99 passed by the learned Civil Judge Senior Division No. 1, Cachar, Silchar in Title Appeal No. 32/1994 and restore the judgment and decree dated 8.4.1994 passed by the learned trial Court in Title Suit No. 77/1989. Accordingly, the second appeal stands allowed. No costs.