
(1972) 02 CAL CK 0014
In the Calcutta High Court
Case No : L.P.A. No. 14 of 1969

Sailendra Nath Ghosal

APPELLANT

Vs

Smt. Ena Dutta

RESPONDENT

Date of Decision : 03-02-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 35, 100
Evidence Act, 1872 — Section 110

Citation : AIR 1973 Cal 128 : (1972) 2 ILR (Cal) 703

Hon'ble Judges : M.M. Dutt, J; Arun Kr. Mukherjee, J

Bench : Division Bench

Advocate : S.C. Das Gupta and Himadri Sankar Majumdar, for the Appellant;
R.K. Bhattacharjee and Madan Mohan Ghose, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—This appeal under Clause (15) of the Letters Patent against the judgment of our learned brother Salil Kumar Dutt, J. Is at the instance of the defendant in a suit for ejectment.

2. The plaintiff instituted a suit for ejectment against the defendant on the ground of reasonable requirement of the suit premises. The case of the plaintiff was that the defendant had been a tenant under one Biswanath Mallick in respect of the suit premises which is the ground floor of premises No. 89/A, Garpar Road, Calcutta at a monthly rent of Rs. 28/- payable according to the English Calendar month. The plaintiff purchased the premises no. 89/A, Garpar Road from Its owner for valuable consideration by a registered conveyance dated February 18, 1966. As the plaintiff required the suit premises for her own use and occupation, she determined the tenancy of the defendant by a notice to quit and that the defendant, not having vacated the suit premises in terms of the notice, the suit was instituted by the plaintiff for ejectment of the defendant from the suit premises.

3. The defendant denied that the plaintiff was the owner of the suit premises. It

was alleged by the defendant that the premises No. 89/A. Garpar Road was purchased by the plaintiff's husband and his brothers in the benami of the plaintiff. The defendant contended that the suit was not maintainable at the instance of the plaintiff. The defendant also denied that the plaintiff reasonably required the suit premises for her own use and occupation. It was alleged that the suit was instituted by the plaintiff with the ulterior motive for obtaining higher rent.

4. The trial Court came to the findings that the plaintiff was the owner of the premises and not the benamdar of her husband and his brothers, as alleged by the defendant and that the plaintiff reasonably required the suit premises. Upon these findings. the trial Court decreed the suit. The lower appellate Court took the view that although the defendant failed to prove that the plaintiff was not the benamdar of her husband and his brothers, nevertheless she was not the owner as she was the benamdar of her father. The lower appellate Court, however, found that the plaintiff reasonably required the suit premises. In view of its finding that the plaintiff was not the owner of the suit premises, but was only the benamdar of her father, the lower appellate Court dismissed the suit.

5. Against the judgment and decree of the lower appellate Court the plaintiff preferred an appeal to this Court. It was contended on behalf of the plaintiff that as there was no pleading by the defendant in his written statement that the plaintiff was the benamdar Of her father, no issue was framed and accordingly no evidence was adduced by the plaintiff to disprove the allegation that she was the benamdar of her father. It was submitted that the lower appellate Court was not justified in coming to the finding that the plaintiff was the benamdar of her father without giving the plaintiff an opportunity to adduce evidence on that point. On behalf of the the defendant it was conceded that the lower appellate Court should have afforded an opportunity to the plaintiff to prove that she was not also the benamdar of her father. After considering the Submissions of both parties, our learned brother Salil Kumar Dutt, J. was of the view that the lower appellate Court was clearly in error in considering on its own, the issue on benami on a different aspect at the appellate stage and it also erred In coming to the said finding without affording opportunities to the parties to prove their respective cases. In that view of the matter. Dutt, J. by his judgment dated December 13, 1968 framed en issue to the effect whether the plaintiff was the benamdar of her father in respect of the premises No. 89/A. Garpar Road, Calcutta and made an order under Order 41, Rule 25 of the CPC directing the lower appellate Court to determine the said issue after giving opportunities to both the parties to adduce evidence and to record its findings thereon and the reasons therefore and thereafter, to send to this Court, the records, for the disposal of the second appeal.

6. The lower appellate court after remand, came to the finding, after considering further evidence adduced on behalf of the parties that the plaintiff was not the benamdar of her father, but she was the owner of the premises including the suit

premises. In view of the said finding of the lower appellate court. Dutt. J. dismissed the second appeal and affirmed the decree for ejectment passed by the courts below. Dutt, J., however, granted to the defendant leave to appeal under Clause (15) of the Letters Patent Hence this appeal.

7. Mr. Das Gupta. learned Advocate appearing on behalf of the appellant submitted that Dutt, J. had no jurisdiction to frame an issue on a case not pleaded in the written statement and to direct the lower appellate court to determine the same, under Order 41, Rule 25 of the Code of Civil Procedure, Mr. Das Gupta contended that the order of remand was illegal and should be set aside. He strenuously urged that the finding of the lower appellate court before remand, to the effect that the plaintiff was the benamdar of her father and was not the owner of the premises, was a finding of fact and could not be interfered with by this Court in second appeal. We are unable to accept the contentions of Mr. Das Gupta. The order of remand was made by Dutt. J. as both the parties agreed to the same. The defendant having agreed to the order of remand, is precluded from challenging the same. It is true that this Court cannot interfere with a finding of fact arrived at by the lower appellate court but if the lower appellate court makes out a new case for a party not to be found in his pleading and then arrives at a finding on that new case. that finding will be illegal and must be set aside, notwithstanding that there may be good reasons for that finding. The specific case of the defendant as pleaded in his written statement was that the plaintiff was the benamdar of her husband and his brothers. It was not the case of the defendant that the plaintiff was the benamdar of her father. The lower appellate Court before remand. found that the defendant failed to make out his case as pleaded, but from the evidence he made out a new case for the defendant and held that the plaintiff was the benamdar of her father, without even giving any opportunity to the plaintiff to adduce evidence on that new case. It may be stated, that after remand the plaintiff examined her father who admitted that he purchased the property for the benefit of the plaintiff. In our view. this Court in second appeal could have set aside the finding of the lower appellate court that the plaintiff was the benamdar of her father and could have upheld the decree for ejectment as passed by the trial Court, even without making an order of remand under Order 41, Rule 25. There is, therefore, no substance in these contentions of Mr. Das Gupta.

8. Mr. Das Gupta tried to justify the decision of the lower appellate court before remand, on the ground that even if the finding of the lower appellate court, namely, that the plaintiff was the benamdar of her father was ignored, still the finding of the lower appellate court that the plaintiff was not the owner of the suit premises, was a finding of fact and could not be set aside in second appeal. Mr. Das Gupta further contended that the said finding was necessary to be made as the onus was on the plaintiff to prove that she was the owner of the suit premises. Attractive though the contention is we regret, we are unable to accept the same. The document of purchase stands in the name of the plaintiff. The defendant admitted that the property was purchased in the name of the plaintiff,

but alleged that it was purchased in her benami. In such a case, the plaintiff must be held to have discharged her onus as soon as it was found that the document of purchase was in the name of the plaintiff. It was for the defendant to prove that the apparent state was not the real state and that the plaintiff was really the benamdar of her husband and his brothers. The defendant failed to substantiate the said el-legation. In our view, the court below had no further jurisdiction to enquire whether the plaintiff was really the owner of the suit premises. It is now a well settled principle of law that when the property stands in the name of a person, the presumption is that, he is the owner of the property and anybody who alleges that he is not the owner, must prove the same. The finding of the lower appellate court that the plaintiff was not the owner has no basis. The only reason of the lower appellate court before remand, was that as the plaintiff was the benamdar of her father, she was not the owner of, the suit premises. As soon as the finding of the lower appellate court, namely, that the plaintiff was the benamdar of her father is set aside, it must be held that the plaintiff is the owner of the suit premises. This contention of Mr. Das Gupta is also overruled.

9. Mr. Das Gupta next submitted that the suit having been filed within three years of the purchase of the premises, the same should be dismissed in view of the provisions of Sub-section (3-A) of Section 13 of the West Bengal Premises Tenancy Act, 1956. as amended by the West Bengal Premises (Second Amendment) Act, 1969. read with Section 13 of the Amendment Act. It appears that this contention was raised at an earlier stage of this appeal. On behalf of the respondent, however, it was contended that Sub-section (3-A) of Section 13 in so far as it was retrospective in effect by virtue of Section 13 of the Amendment Act. was ultra vires the provisions of Article 19(1)(f) of the Constitution, on the ground that Sub-section (3-A) sought to put an unreasonable restriction on the fundamental right of the landlords to recover possession of the property from their tenants. This appeal along with some other appeals was heard on this point only namely, as to the vires of Sub-section (3-A), by P. N. Mookerjee and Amiya Kumar Mookerjee. JJ. Their Lordships held that Sub-section (3-A) is so far as it was retrospective in operation was ultra vires Article 19(1)(f) on the ground of unreasonableness. The judgment of their Lordships has since been reported in 74 Cal WN 331. Mr. Das Gupta strenuously urged that although the point was decided in this very appeal at an earlier stage, the entire appeal not having been disposed of. the finding of their Lordships that was made on the question of vires of Sub-section (3-A) was not binding upon the appellant and that the appellant was entitled to again rely on the provisions of Sub-section (3-A) in bar of the suit. On the merits of the point it has been contended by Mr. Das Gupta that the right of reversion of the landlord, namely. the right to recover possession of the property from the tenant, is not a right of property which is a condition precedent to the application of Article 19(1)(f) and consequently, the question as to the infringement of fundamental right does not at all arise and there cannot be any scope for hold-overs that the provision of Sub-section (3-A) offends against

Article 19(1)(f). This is the only contention which has been advanced by Mr. Das Gupta in reply to the contention of the respondent that Sub-section (3-A) in so far as it was retrospective in operation, was violative of Article 19(1)(f).

10. So far as the first contention of Mr, Das Gupta is concerned, namely, that he was entitled to rely on the provisions of Sub-section (3-A) notwithstanding the said judgment of P. N. Mookerjee and Amiya Kumar Mookerji, JJ. holding that Sub-section (3-A) in so far as it was retrospective, was ultra vires Article 19(1)(f) of the Constitution we entertain great doubt about the same. Be that as it may, the point is now covered by our decision in Kalvani Dutt v. Pramila Bale Dassi in F. A. No. 665 of 1962 disposed of on 7-9-1971. In that case we held, that the landlord's right of reversion is a right of property and that Sub-section (3-A) in so far as it was retrospective in operation, sought to put an unreasonable restriction on the fundamental right of the transferee landlords and as such it was ultra vires Article 19(1)(f) read with Clause (5). In view of our said decision, the contention of Mr. Das Gupta is overruled.

11. All the contentions of Mr. Das Gupta fail and consequently, the appeal fails and it is dismissed with cost.

12. Before we part with the case we may dispose of an application made by the appellant u/s 17-E of the West Bengal Premises Tenancy Act, 1956. Mr. Das Gupta has frankly conceded that the application is misconceived and is not maintainable in this Court. He has, however, informed us that his client has made a similar application in the trial court and submitted that the trial court should be directed to dispose of the same on merits. The application u/s 17-E which has been filed in this Court is, therefore, dismissed and as we are not concerned with the application filed in the trial court we are not inclined to give any such direction as prayed for. There will be no order for cost in the application.

Arun K. Mukherjee. J.

13. I agree.