

(1992) 09 CAL CK 0032

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 58 of 1983

Sambhu Charan Hazra

APPELLANT

Vs

Smt. Bandana Laha

RESPONDENT

Date of Decision : 03-09-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1
West Bengal Premises Tenancy Act, 1956 — Section 13(6)

Citation : (1993) 1 CALLT 113

Hon'ble Judges : Jyotirindra Nath Hore, J

Bench : Single Bench

Advocate : Bidyut Banerjee, Chandra Sekhar Das and Shila Sarkar, for the Appellant; S.P. Roy Choudhury and Bulu Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Jyotirindra Nath Hore, J.—This appeal is directed against the judgment and decree passed by the learned Subordinate Judge, First Court, Howrah affirming those of the learned Munsif, 3rd Court, Howrah in T.S. No. 274 of 1976.

2. Plaintiff-respondent instituted the said suit against the appellant- defendant for his eviction from the suit premises. The plaintiff's case was that the defendant was formerly a monthly tenant under Bimal Mallick in respect of one shop room at Premises No. 333, Netaji Subhas Road at a monthly rate of 55/- payable according to English Calendar month. By a registered sale deed dated 8.7.75 the said Bimal Mallick sold a portion of premises No. 333 and 332, Netaji Subhas Road including the tenanted portion to the plaintiff and gave one letter of attornment to the defendant asking him to attorn to the plaintiff as landlord and pay rent to her and the said letter was received by the defendant. But the defendant did not pay rent to the plaintiff and was defaulter from September, 1973 to August, 1976. The defendant also illegally and without knowledge and consent of the landlord sub-divided the said shop room and sublet the same to three persons, namely, Md. Bux, Sri Bankubehari Paul and M/s. S. K. Mukherjee

& Bros. The plaintiff determined the tenancy of the defendant by service of a notice of ejectment asking him to quit, vacate and deliver vacant possession of the suit room to the plaintiff with the expiry of the month of August, 1976 but in spite of the service of the notice the defendant did not vacate the suit-premises.

3. The defendant contested the suit by filing a written statement inter alia on the grounds that the suit was bad for non-joinder of parties and that the plaintiff had no cause of action for the suit. The defence case was that originally the defendant's father Sarat Chandra Hazra was tenant under Kanta Mohan Mallick. On the death of Sarat Chandra Hazra all his sons including the defendant inherited the tenancy right but the landlord for his convenience used to grant rent receipt in the name of the defendant alone but that did not affect the tenancy right of other brothers of defendant. The alleged default in payment of rent was denied. It was alleged that the subtenants as mentioned in the plaint were inducted with knowledge and consent of the original landlord long before the West Bengal Premises Tenancy Act, 1956 came into operation.

4. Upon consideration of the materials on record, the learned Munsif found that the combined notice u/s 106 of the Transfer of Property Act and Section 13(6) of the West Bengal Premises Tenancy Act was only served upon the defendant and the same was legal, valid and sufficient. He held that the defendant was entitled to protection u/s 17(4) of the West Bengal Premises Tenancy Act for compliance with the Court's order under Sections 17(2) and 17(2A) of the West Bengal Premises Tenancy Act. He, however, found that the defendant was liable to be evicted on the ground of unauthorised subletting after the commencement of West Bengal Premises Tenancy Act. He, therefore, passed a decree for ejectment in favour of the plaintiff. The lower appellate Court has held that Bankubehari Paul and Sudhir Kumar Mukherjee & Bros, are pre-Act sub-tenants but Md. Bux was inducted as subtenant without consent of the landlord in writing after the West Bengal Premises Tenancy Act of 1956 came into force. He has also held that the notice is legal, valid and sufficient though it was not addressed to and served on other heirs of the original tenant, since deceased. He has accordingly dismissed the appeal and affirmed the decree passed by the learned Munsif.

5. Mr. Banerjee, learned Advocate for the appellant has urged that the suit is not maintainable in the absence of other heirs of the original tenant and that the learned Judge ought to have held that all the sub-tenants were pre-Act sub-tenants and were, therefore, outside the mischief of section: 13(1) (a) of the West Bengal Premises Tenancy Act, 1956.

6. With regard to the first point urged by Mr. Banerjee some admitted facts may be stated here. The defendant's father Sarat Chandra Hazra was the original tenant and after his death his wife and all his sons including the defendant inherited the tenancy right. By a written letter dated 13.6.60 (Ext. J) the defendant and other heirs of Sarat Chandra Hazra informed the previous landlord K. D. Mallick that they had no objection to the landlord issuing the rent bill in the name of the defendant from June, 1960. Thereafter the defendant paid rents all

along and the landlord granted rent receipts in favour of the defendant alone. Mr. Banerjee has contended that other heirs of Sarat did not surrender their tenancy right by Ext. J and in spite of the said letter they continued as tenants and in their absence the suit is bad for non-joinder of parties. Mr. Roy Choudhury has raised a preliminary objection as to the contention of Mr. Banerjee. It has been urged that the appellant cannot now raise this plea inasmuch as this plea was deliberately given up at the time of trial. In support of his contention he has referred to a Bench decision of this Court in Prem Chand Manik Chand v. Fort Gloster Jute Manufacturing Company Ltd., reported in 64 CWN 103. It has been held that a ground of law, particularly one which goes to the validity of the entire proceeding, can be taken for the first time at any stage but when a party has raised such a ground in the Trial Court and then deliberately has abandoned it, he cannot be allowed to raise it again at the appellate stage. Now, it appears from the Trial Court's judgment that a specific issue as to whether the suit was bad for non-joinder of parties was framed (Issue No. 3) but this issue was not pressed at the time of the hearing. Even before the lower Appellate Court this issue was not pressed. What was urged there is that the notice of ejectment issued in favour of the defendant alone excluding other heirs of Sarat Hazra was invalid. In view of the Bench decision of this Court referred to above it must, therefore, be held that the appellant cannot be allowed to raise this issue which was deliberately abandoned in the Trial Court.

7. Even if the appellant is allowed to raise this plea in this appeal, the same must be rejected on merits in the facts and circumstances of the case. In H.C. Pandey Vs. G.C. Paul, the Supreme Court has held that on the death of the original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereof. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint-tenants. The Supreme Court overruled the decision of the Allahabad High Court in Ramesh Chand Bose Vs. Gopeshwar Pd. Sharma, where it was held that the heirs of the deceased tenant succeeded as tenants-in-common. The Supreme Court has held that the notice served on the defendant alone who paid rent and acted on behalf of all was sufficient. Though the other heirs of the original tenant were not made parties, the Supreme Court restored the judgment and decree for ejectment of the first Appellate Court which suggests that in such circumstances the suit for ejectment was maintainable even without impleading the other heirs of the original tenant. Relying upon the said decision of the Supreme Court a Division Bench of this Court has held in Smt. Sumilita Bhattachatya and Anr. v. Smt. Nila Chatterjee, (1989)2 CLJ 351, that on the death of the original contractual tenant, his legal heirs held the tenancy as joint-tenants and a suit in respect of the joint tenancy by issuing notice determining the tenancy to only one of the heirs of the original tenant and

impleading only one of such heir and leaving aside the other heirs is maintainable because the joint tenancy of the heirs of a deceased tenant is represented by one of the heirs who is also one of the joint-tenants. In *Textile Association (India) Bombay Unit Vs. Balmohan Gopal Kurup and another*, ; *H.C. Pandey Vs. G.C. Paul*, was distinguished. In that case original tenant Gopal Kurup left behind his widow, two sons and daughter. After the death of Gopal Kurup, the appellant landlord filed an eviction suit on the ground of a bona fide requirement and default of payment of rent. In that suit the present respondent No. 1 was not a party. His mother and brother alone were impleaded as parties. The suit was decreed ex parte and possession was recovered by the landlord by execution of decree. Thereafter, respondent No. 1 filed a suit out of which the present appeal arose claiming that he was one of the tenants living in the premises at the time of the death of his father Gopal Kurup and the ex parte decree obtained by the landlord was, therefore, not binding on him. The Trial Court found that he was also one of the tenants who lived along with the father and declared that the ex parte decree was not binding on him. The appeal against the said decree was dismissed. The Supreme Court has held that the decision in *H. C. Pandey's* case (supra) relates to the validity of the notice issued to one of the joint-tenants and the principle stated in that case on the facts obtained was not relevant to the present case. There is a finding in this case that the respondent was as much a tenant as the mother and the other brothers. That being the position ex parte decree for eviction obtained against his mother and brother without impleading him in. that suit has to be set aside. In my opinion, this case is distinguishable and the ratio of the decision is not applicable to the facts of the present case. The facts of the present case are similar to those in *H. C. Pandey's* case (supra). The distinguishing feature in this case is that by Ext. J the appellant-defendant along with other joint-tenants specifically agreed that rent would be paid by the defendant and the rent receipts would be issued in his name alone. Clearly as per agreement among the parties the defendant alone would represent the joint-tenancy and act on behalf of other joint-tenants. The defendant cannot now turn round and say that he does not represent the joint tenancy and that other joint tenants must be impleaded in the suit. As the entire joint tenancy was represented by the defendant as per the specific agreement among the parties the" suit was maintainable against the defendant alone without impleading the other joint-tenants.

8. Let me next deal with the second point raised by Mr. Banerjee, under the provisions of Section 13(1) (a) of the West Bengal Premises Tenancy Act, 1956, a landlord is entitled to eject his tenant "where the tenant..... without the previous consent in writing of the landlord transfers, assigns or sub-lets in whole or in part the premises held by him." It has been held by this Court in *Radharani Dasi v. Angur Bala*, 65 CWN 1119 and also in *Deokaran Nevatia Vs. Renuka Sarkar*, that Section 13(1) (a) of the West Bengal Premises Tenancy Act, 1956 applies only to post-Act sub-tenancies, Mr. Roy Choudhury has contended that in view of the decision of the Supreme Court in *Gappulal v. Thakurji Shriji*

Dwarakadheesji reported in 1969 SC 1291 Section 13(1) (a) is also applicable to pre-Act sub-tenancies. The Supreme Court, while construing the corresponding Section 13(1) (e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 in the case referred to above has held that it is immaterial as to whether the subletting is pre-Act or post-Act, that "the words take within their sweep any subletting which was made in the past and has continued up to the present time", that "it does not matter that the sub-letting was either before or after the Act came into force" and that "all such sublettings are within the purview of clause (e)". It must, however, be pointed out that Section 13(1) (e) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 and Section 13(1) (a) of the West Bengal Premises: Tenancy Act are not in pan materia. Section 13(1) (e) of the Rajasthan Act uses the expression "the tenant has assigned, sublet or otherwise parted" while the relevant expression in Section 13(1) (a) of the West Bengal Act is "the tenant.....transfers, assigns or sublets". As would appear from the observations of the Supreme Court in Gappulal's case (supra) the user of the present perfect tense, namely, "has sublet" has led the Supreme Court to observe in the manner as quoted above and to conclude that the relevant provisions would cover all sub-tenancies, whether pre-Act or post-Act. The relevant provisions of Section 13(1) (a) of the West Bengal Act, however, use the present tense, namely, "sublets" and that, as pointed out by a Division Bench of this Court in Pankajini Ganguli and Others Vs. Ranjit Singh and Others, makes all the difference for which the ratio of the Supreme Court decision in Gappulal would not apply in the construction of the provisions if Section 13(1) (a) of the West Bengal Act and the decisions of this Court in Radharani (supra) and in Deokaran (supra) are still good laws.

9. The lower Appellate Court has, however, found that though the defendant-appellant has been able to prove that Bankubehari Paul and Sudhir Kumar Mukherjee and Bros, are pre-Act sub-tenants, he has failed to prove by any cogent evidence that Md. Bux is pre-Act sub-tenant. On considering all the evidence on record the lower Appellate Court has found that Md. Bux is a post-Act sub-tenant. Though the defendant filed documents to show that Bankubehari Paul and Sudhir Kumar Mukherjee and Bros, were inducted as sub-tenants before 1956, no paper was filed in respect of Md. Bux who is admittedly a sub-tenant to show that he is a pre-Act sub-tenant. The counterfoils of rent receipts were not produced. The alleged consent letter in writing of the landlord was not also produced and no adequate explanation was given for non-production of the same. In the circumstances the lower Appellate Court drew an adverse presumption against the defendant. No document to show that Md. Bux was in possession of a part of the suit-premises before commencement of the West Bengal Premises Tenancy Act was also filed. The concurrent findings that Md. Bux is a post-Act sub-tenant without consent of the landlord in writing do not suffer from any legal infirmity and cannot be said to be perverse. The same cannot, therefore, be called in question in the second appeal. Mr. Banerjee has, however, contended that the plaintiff did not specifically state in the plaint that Md. Bux is

a post-Act sub-tenant and the issue framed with regard to the sub-tenancy is defective inasmuch as it does not relate to the date of the sub-tenancy-whether it was before or after the commencement of the West Bengal Premises Tenancy Act, 1956. The lower Appellate Court has, therefore, erred in law in shifting the onus to the defendant. In support of his contention he has referred to the Bench decision of this Court in *M. Gulamali Abdul Hossain and Co. Vs. Binani Properties Private Ltd. and Others*, In that case, the age of the sub-tenancies was not pleaded. There was no pleading by the defendant that the sub-tenancies were pre-Act ones or by the plaintiff that the sub-tenancies were post-Act ones. There was no issue as to the time when subletting was done. The issue as framed in the case was whether the first defendant without the previous consent in writing sublet. It was observed that it is a question of great importance, namely, the time when the sub-tenancies were created. A party in order to succeed on the ground of sub-letting is to allege that such subletting has been made after the 1956 Act came into existence and when there has been such allegation the party against whom the allegation has been made is to deal with it. The law of pleading requires exactitude. The framing of issues also requires certainty and the law of proof requires "fundamentals of fair play" and giving full opportunities to the parties to deal with the case. Onus to prove will depend on the issues. If there was no issue it could not be said that the onus to prove a particular fact was on the defendant or that the defendant did not discharge that onus. As in that case there was no pleading either by the plaintiff that the sub-tenancies were post-Act ones or by the defendant they are pre-Act ones there was really no issue as to the time when the sub-tenancies were created and it was observed that in such a case no amount of evidence adduced by the parties can be looked into. In my opinion, this case is distinguishable on facts. In this case though in the plaint the plaintiff did not specifically mention the time when the alleged sub-tenancies were created, the defendant while dealing with the averment of unauthorised sub-letting in the plaint specifically pleaded that all the sub-tenancies were created about 50 years before-long before the West Bengal Premises Tenancy Act, 1956 came into operation. So, the defendant raised the specific issue that the sub-tenancies were pre-Act sub-tenancies. He also adduced evidence, both oral and documentary, in support of the said plea. Though a specific issue was not framed as to whether the sub-tenancies were pre-Act or post-Act ones both the parties went to trial with full knowledge that this was an issue in the trial and adduced evidence and advanced arguments and the Court recorded finding on the question. There is, therefore, no question of want of fair play or prejudice in the trial in this respect. The defect in the issue as framed has not, therefore, occasioned any failure of justice and the lower Courts did not commit any error in considering the evidence adduced by the parties and the question whether the sub-tenancies were created before or after the West Bengal Premises Tenancy Act, 1956 came into force. The finding of the lower Appellate Court that the sub-tenancy in favour of Md. Bux was created after the commencement of the West Bengal Premises Tenancy Act without consent of the landlord in writing cannot, therefore, be assailed in the second appeal.

10. In the result, the appeal is dismissed and the judgment and decree of the Court below are affirmed. I do not make any order as to costs in this appeal.