

(2006) 09 GAU CK 0047
In the Gauhati High Court

Shri Surendra Narayan Sukual

APPELLANT

Vs

Hirendra Chandra Chakravorty and Others

RESPONDENT

Date of Decision : 26-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 254, 264

Citation : AIR 2007 Guw 45 : (2006) 4 GLT 432

Hon'ble Judges : Iqbal Ahmed Ansari, J;H.N. Sharma, J;Brojendra Prasad Katakey, J;Anima Hazarika, J;Aftab H. Saikia, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

A.H. Saikia, J.—The instant reference has been placed before the Full Bench by the then Hon"ble the Chief Justice pursuant to an observation made by a Division Bench of this Court on 5-6-2002 while deciding the present Second Appeal in terms of the order of the Apex Court rendered on 10-10-96 in Civil Appeal No. 403/76 which runs as under:

When leave was granted in this case, it was permitted in a manner to raise additional grounds. The ground emerging is that the second proviso to Section 5(1)(a) of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955, as amended by the Act 16 of 1968, escaped to be applied by the High Court. This seemingly is so because the High Court has proceeded to decide the matter primarily on the main provision without resort to any of the two provisions. On the other hand, a Full Bench decision of the Assam High Court in Surendra Chandra Ghosh v. Sashi Prasad Barooah 1971 ALR 370 goes to say that the introduction of the second proviso, afore referred to, is not a valid legislative exercise and therefore, is not part of the law. The correctness of that view has been challenged. We have therefore thought it prudent that the High Court should examine this matter afresh in view of its not having dealt with the matter in this light earlier. We would therefore, allow this appeal, set aside the impugned

order of the High Court and remit the matter back to it for being decided afresh in accordance with law and in the light of the afore-observations. Such of those interim orders, which were operative when the High Court was in seisin of the matter, shall stand revived during the pendency of the appeal before High Court. No costs.

2. However, after passing of the order dated 10-10-96 and before referring the matter to the Full Bench aforesaid, in a petition for Special Leave to Appeal (Civil No. 12750 of 1998), challenging the order dated 2-4-98 passed by a Division Bench of this Court in the related second appeal, the Supreme Court on 19-7-2000 passed the following order:

This is not necessary to wait further regarding the implement of the legal representatives of the deceased party because on a perusal of the impugned order we have noticed that it was an order passed on agreement. It is not an even the final order. The High Court has now to dispose of the second appeal on merits after getting the findings recorded pursuant to the direction issued by the High Court. The SLP, is accordingly dismissed.

3. Thereafter, being dissatisfied with the above order dated 19-7-2000, when an application being I.A. No. 6 in Civil No. 12750/08 was preferred before the Supreme Court for re-calling the order dated 19-2-2000, the Apex Court, being disinclined to pass any such order, on 18-9-2000 ordered as follows:

In the circumstances of this case we do not find any need to recall the order dated 19-7-2000. This I.A. No. 6 is accordingly dismissed.

4. In view of the above noted premises, this second appeal which has been pending since 1966 arising out of a lis between the landlords and tenants has been taken up by this Full Bench for its final resolution in accordance with the Supreme Court's order dated 10-10-96 by way of examination of the correctness of the view taken in the Full Bench of this Court in Surendra Chandra Ghosh v. Sashi Prasad Barooah reported in 1971 Gau 370 wherein the second proviso to Section 5(1)(a) of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955 (for short, "the Act") was held to be repugnant to the provisions of the Transfer of Property Act and the Contract Act and thereby the same was declared constitutionally void under Article 254(1) of the Constitution of India and also on merit in terms of order dated 19-7-2000 rendered by the Apex Court as already noted above.

5. Although the detailed narration of the facts of the instant case is uncalled for as per observations made in the Supreme Court's orders particularly, the order dated 10-10-96, considering the chequered history of the present litigation, it would be necessary and relevant to notice the factual matrix of the case in a narrow compass.

6. In the year 1960 initially the respondents as plaintiffs instituted a suit being T. S. No. 272/1960 against the defendants/appellants herein for getting khas

possession over the land described in the schedule after evicting the defendants therefrom stating inter-alia that the suit land originally was the paternal property of the plaintiffs and the defendant No. 1 took settlement of the suit land for 9 years from 1st Baisakh 1353 B.S. till the last day of Chaitra 1361 B.S. by executing a registered deed of lease in favour of the plaintiffs on annual rent of Rs. 350/-. After the expiry of the terms of lease, the defendant No. 1 did not take any fresh settlement from the plaintiffs who informed the defendants that they would not grant any further settlement. It was further contended that the defendant No. 1 paid Rs. 25/- towards the rent in 1353 B.S. and thereafter no rent was paid despite repeated demands by the plaintiffs. However, defendant No. 1, acting detrimental to the interest of the plaintiffs, had created a charge on the suit land and sold some portion of the suit land to one Simanthini Debi, defendant No. 2, wife of Nripesh Chandra Sarma, who constructed a house on the land. It was pleaded that the defendant No. 1 took the lease as an ejectable tenant and as such they had no authority or power to transfer the suit land or any part thereof as per terms of the deed of lease. Since the plaintiffs required the suit land now for their own use, the present suit was filed.

7. The suit was contested by the defendants. Though the defendant No. 2 was not initially made a party, she was later on impleaded as party to the suit. The case of the defendant No. 1, as reflected in the written statement, was that his grandfather one Lachman Prasad Sukul took settlement of 19 Ks.-10 Ch. of land from the grandfather of the plaintiffs late Hiricharan Chakravorty on 27-3-1907 at an annual rent of Rs. 90/- and he immediately constructed pucca houses thereon. Then Lachman Prasad Sukul, his son, father of defendant No. 1, and then defendant No. 1 himself made some improvement of the existing houses from time to time and accordingly, the defendants agreed to pay increased rent which was fixed at Rs. 350/- annually at the request of the plaintiffs. The defendants also executed the deed of lease on condition to pay the increased rent on 28-6-46, Ext.-8 but he did not surrender any portion of the settled land to the plaintiffs. However the defendants in order to satisfy his creditors sold some portion of the suit land to defendant No. 2 with the consent of the plaintiffs. As such the defendant No. 1 claimed that he was not an ejectable tenant as pleaded by the plaintiffs.

8. On the other hand, defendant No. 2, in her separate written statement, pleaded that her husband Sri Nripesh Ch. Sarma hired the western portion of defendants two storied house about 25 years ago and started Maya Hotel thereon and subsequently he hired another house in connection with hotel business on the opposite side of the road but there was a suit against him by the landlord in respect of the land and the landlord got a decree in that suit for khas possession. However. at that time the defendant No. 1 took Rs. 8,000/- from the husband of the defendant No. 2 against the mortgage of the house let out to him along with the Jote land. Defendant No. 1 could not redeem the mortgage property which was later on sold in execution and the entire fact was very much known to the plaintiff No. 2. Thereafter, the defendant No. 1 proposed to sell the

house already let out along with the Jote land to defendant No. 2's husband who had a talk about the sale with plaintiff No. 2, who gave consent of such purchase when he was a Government Pleader at Silchar at that time and accordingly, the defendant No. 2 purchased the land and house for Rs. 12,571/- from the defendant No. 1. Though defendant No. 2's husband offered to pay rent to the plaintiff No. 2 but later lingered the matter stating that he would give them separate settlement as there was a chance of his getting suit land to his share since their properties were being partitioned. In the meantime, plaintiff No. 2 died and the matter could not be settled. After his death, though defendant No. 2 approached some of the present plaintiffs but they also lingered the matter. The defendant No. 2 pleaded that she spent Rs. 46,500/- for the improvement of the suit land and the house thereon. Many of the plaintiffs noticed such construction of the house from time to time but they never raised any objection. It was further pleaded by the defendant No. 2 that the plaintiffs' suit was not maintainable in view of the provision of the Act.

9. On the basis of the pleadings of the parties, the trial Court i.e. the Sadar Munsiff No. 2. Cachar at Silchar framed as many as 7 issues which are as follows:

- (1) Have the plaintiffs any cause of action ?
- (2) Is the suit barred by principle of estoppel, waiver and acquiescence's ?
- (3) the suit maintainable without serving proper and valid notice ?
- (4) Is the claim for khas possession barred u/s 5 of Assam Non Agricultural Urban Areas Tenancy Act ?
- (5) Are the plaintiffs entitled to evict the added defdt. No. 2 without fully compensating her as regards the cost of constructing the permanent structure ?
- (6) Have the plaintiffs their alleged right to get the S/L in their khas possession ?
- (7) To what relief, if any, are the plaintiffs entitled ?

10. On close examination and consideration of the materials available on record including the evidence adduced by the parties as well as upon hearing the learned Counsel for the parties, the learned Munsiff by his order dated 7-3-64 dismissed the suit holding that the plaintiffs were not entitled to get any relief.

11. Dissatisfied, the trial Court's judgment and decree was carried on appeal through T. A. No. 65/64 before the Court of learned Sub-Judge No. 1, Cachar at Silchar who by his judgment and decree dated 22-11-65, in turn, reversed the Judgment and decree of the trial Court allowing the appeal so preferred by the plaintiffs/respondents herein and decreed the plaintiffs' suit on contest for eviction of the defendants by removing their structures from the suit land and also for khas possession thereon.

12. In deciding the Issue No. 4 i.e. "Is the claim for khas possession barred u/s 5 of the Assam Non-Agricultural Urban Areas Tenancy Act", the appellate Court, on

close perusal of the evidence on record of both sides, held that the construction in question by the defendants was not made within the period of 5 years of the contract of the current lease i.e. fresh lease taken by Ext.-8 executed in 1946 i.e. on 28-6-46 and the tenant making permanent constructions on the land under previous lease was not entitled to get protection from eviction under the Act.

13. Against the above Appellate Court's judgment and decree, the defendants No. 1 and 2 as appellants preferred two separate Second Appeals being S.A. No. 78/66 and S.A. 48/66 respectively before the High Court and a Division Bench of this Court, after hearing both the appeals analogously by its common judgment and order dated 13-11-1972 remanded the matter to the lower appellate Court for deciding the Issue No. 8. being "Whether the defendant No. 1 effect any improvement on the land of the tenancy for which he is entitled to compensation for improvements as contemplated u/s 5(1)(b) of Assam Act XII of 1955 and if so, what will be quantum of such compensation ?," so framed by the High Court, afresh and thereby S.A. No. 78/66 was kept for further hearing awaiting the receipt of the findings of the appellate Court below on the issue No. 8 referred to above but S.A. No. 48/66 preferred by the defendant No. 2 was dismissed.

14. The lower appellate Court in compliance with the above remand order in deciding issue No. 8 after taking and analysing evidence of the parties, by its judgment and order dated 4-6-73 held that no improvement was ever made by the defendant No. 1 i.e. Surendra Narayan Sukul during his time and as such, he was not entitled to get any compensation and accordingly, the matter was returned to the High Court.

15. On receipt of such findings on Issue No. 8, the High Court by its order dated 11-6-74 dismissed the S.A. No. 78/66 opining that the learned appellate Judge correctly decided the Issue No. 8 and thereby confirmed the lower appellate Court's Judgment and consequently the plaintiffs' suit for ejectment and khas possession was decreed.

16. The judgment dated 11-6-74 passed in S.A. No. 78/66 was assailed before the Supreme Court in Civil Appeal No. 403/76 and the Apex Court by order dated 10-10-96, as already quoted above, allowed the appeal by setting aside the above judgment and order and remanded the matter back for the decision of the High Court afresh in accordance with law and also to examine the correctness of Full Bench decision in Surender Chandra Ghosh's case (supra).

17. After such remand, the defendants/appellants filed two applications on 20-3-98 before the High Court introducing new development to the effect inter alia that the plaintiffs/respondents accepted rent of the land in dispute from the defendants/appellants on 30-1-97 and 22-8-97 which amounted to creation of fresh lease. By the first application preferred under Order VI, Rule 17 read with Section 151, C.P.C. they prayed for leave to amend the written statement and the second application was filed under Order 41, Rule 27 read with Section 151, C.P.C. praying for allowing to adduce additional evidence in support of the

contentions made above.

18. Considering the above submissions, this Court by order dated 2-4-98, in course of hearing of the related Second Appeal as per direction of the Apex Court, remanded the case along with those two applications to the learned Civil Judge (Sr. Division), i.e. the appellate Court, who upon receipt of the case records along with two applications, invited objections thereon from the plaintiffs/respondents and after affording opportunity of hearing to both the parties, allowed both the applications. The written statement was amended as prayed for and thereafter the defendants' side adduced evidences. The appellate Judge having considered the arguments canvassed on behalf of the parties and after assessment of evidence on record, by his order dated 20-3-2002 passed in T. A. No. 65/65 came to the findings that the receipts dated 30-1-97 and 22-8-97, being the receipts of payment of rents, were duly proved and the plaintiffs/appellants accepted the rents for the years from 1403 BS to 1406 BS by issuing above two receipts and as such, a fresh tenancy came into existence from 30-1-97 as a result of which the right to eject the defendants/respondents was waived by the plaintiffs/appellants.

19. In the meantime, prior to passing of the order dated 20-3-2002 above referred to, the plaintiffs/respondents herein, being aggrieved by the order dated 2-4-98, preferred SLP (for short, "the SLP") being Civil No. 122750/98 before the Supreme Court which vide order dated 19-7-2000, as already quoted hereinabove, dismissed the SLP. Even the Supreme Court refused to recall the order dated 19-7-2000 by dismissing I.A. No. 6 by its order dated 18-9-2000 noticed above.

20. In the backdrop of the above fait accompli, now let us discuss and decide the cardinal issue raised in this Second Appeal under reference that pertains to the examination of the correctness of Surendra Chandra Ghosh's case (supra). Accordingly, we have heard the learned Counsel representing the rival parties.

21. Before delving upon this key point placed before us, it would be prudent and apt to refer to Section 5(1)(a) of the Act including the second proviso thereto which reads as follows:

5. Protection from eviction:

(1) Notwithstanding anything in any contract or in any law for the time being in force-

(a) Where under the terms of a contract entered into between a landlord and his tenant whether before or after the commencement of this Act, a tenant is entitled to build, and has in pursuance of such terms actually built within the period of five years from the date of such contract, a permanent structure on the land of the tenancy for residential or business purposes, or where a tenant not being so entitled to build, has actually built any such structure on the land of the tenancy or any of the purposes aforesaid with the knowledge and acquiescence

of the landlord, the tenant shall not be evicted by the landlord from the tenancy except on the ground of non-payment of rent;

Provided that where a tenant having built a permanent structure within the period specified above and for any of the purposes mentioned therein, renews the tenancy on expiration of the original contract, he shall always be deemed to have built such permanent structure within the period of five years from the date of the renewed contract;

Provided further that a person having a right, title and interest over a permanent structure by whatever mode of acquisition he may have taken the tenancy from the landlord of the land wherein the said structure stands, shall not be ejected except on the ground of non-payment of rent.

22. Be it may be noted that the second proviso above mentioned was added by Amendment Act, 1968 (Act XVI of 1968).

23. A bare perusal of the above provisions of law including the second proviso would go to show that a tenant, being entitled to build in pursuance of the terms of the contract entered into between a landlord and him, has actually built a permanent structure on the land of the tenancy for residential or business purposes within a period of five years from the date of such contract, shall not be evicted by the landlord from the tenancy except on the ground of non payment of rent. Further a tenant shall not be evicted, if he, not being so entitled to build, has actually built any such structure over the tenancy land with the knowledge and acquiescence of the landlord. With the introduction of second proviso above by way of amendment in 1968, a protection is created in favour of a person providing that he having a right, title and interest over a permanent structure shall not be ejected except on the ground of non-payment of rent.

24. It is to be noticed that this second proviso is applicable to a person other than a tenant because the word "tenant" is not being referred to in the second proviso like Section 5(1)(a) with its first proviso wherein there is specific reference to a "tenant". In other words, the second proviso is not applicable to a tenant who can only claim protection u/s 5(1)(a) as well as under the first proviso.

25. Nevertheless, the Second proviso of Section 5(1)(a) of the Act was struck down by the Full Bench in Surendra Chandra Ghosh's case (supra) holding basically that since the transfer of non-agricultural land was excluded from Entry 18 of the List II and was given a place in entry 6 under List III, by insertion of the Second Proviso to Section 5(1)(a) by virtue of the Amendment Act, 1968, being assented by the Governor without reserving the Act for assent of the President unlike the Principal Act and the first Amendment Act, XXI of 1958 which duly received the assent of the President, the Second Proviso was declared constitutionally void under Article 254(1) of the Constitution of India.

26. The Full Bench of this Court in Surendra Chandra Ghosh's case (supra) in an

enlightened and in-depth discussion on the question of vires of second proviso above, observed in paragraph 12 as follows:

12. We also find that the State Legislature in making the second proviso while dealing with non-agricultural land on which a structure stands is legislating with regard to transfer of interest in such property which is subject to central legislation. It is clear that the State Legislature in dealing with transfer of property, namely leases of immovable property which is the subject-matter of Chapter V of the Transfer of Property Act. Because of the fact that the preamble of the principal Act XII of 1955 states that "it is expedient to regulate in certain receipts the relationship between landlord and tenant in respect of non-agricultural lands in the urban areas of the State of Assam" it cannot be said that the second proviso has been made under Entry-18 of List II. The field of the legislation is clearly and completely under Entries 6 and 7 of the Concurrent List and not under Entry 18 of the State List. Even though the second proviso may also be said to regulate the relationship of landlord and tenant in certain respects, it undoubtedly deals with and effects leases and contracts entered between landlord and tenant of non-agricultural land. Besides, Entries 6 and 7, by excluding agricultural land in both, provide an unmistakable indication that the State Legislature is legislating only under these two Entries while adding the second proviso under the Amendment Act. Transfer of non agricultural property is carefully excluded from Entry 18 of List II and is given a place in Entry 6 under List III. We are, therefore, clearly of opinion that the second proviso of the Amendment Act, 1968 is repugnant to the provisions of the Transfer of Property Act and also of the Contract Act and it being covered completely under Entries 6 and 7 of the Concurrent List is void under Article 264(1)(sic) of the Constitution. Like the principal Act. and the first Amendment Act XXI of 1958, the second proviso could have been saved by the Governor reserving the Act for the consideration of the President and by obtaining his assent to the same. This has not been done, as it is clear that the second Amendment Act, 1968, ex facie, received only the assent of the Governor. The second proviso is, therefore, constitutionally void under Article 254(1) of the Constitution and cannot be called in aid by the appellants in this case....

27. For ready reference, Entries 6 and 7 under the List III-Concurrent List of Seventh Schedule of the Constitution of India may be noticed as under:

6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

28. On the other hand, Entry 18 of List II-State List includes land, that is to say, right in or over the land, tenures including the relation of landlord and tenant, and the collection of rents, transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

29. From a close perusal of the Entries above, it transpires that the transfer of non-agricultural property is meticulously excluded from the Entry 18 under List II-State List and is placed under Entry 6 under List III-Concurrent List and in view of the said Constitutional ordain, the Act and the first Amendment Act, XXI of 1958 received the assent of the President. But the Amendment Act, 1968, in total contrast to the earlier position, was not saved reserving the same for the consideration and assent of the President and received only the assent of the Governor and as such the legislation enacted by the State Legislature from Entry 18 under the List III is obviously hit by Article 254(1) of the Constitution of India.

30. Article 254(1) is, for the sake of convenience, is quoted below:

254. Inconsistency between law made by Parliament and laws made by the Legislatures of States:

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy be void.

31. Having regard to the views and findings recorded in Surendra Chandra Ghosh's case (supra), we are of the considered view that the Full Bench, in pronouncing the verdict in the said judicial authority declaring the Second proviso to be constitutionally void under Article 254(1) of the Constitution, took a correct and justified approach, and we are, therefore, in full agreement with the findings and conclusions arrived at by the Full Bench in Surendra Chandra Ghosh's case (supra). We, accordingly, in unison, uphold the law laid down in Surendra Chandra Ghosh's case (supra) as correct law.

32. At this stage, keeping in view the long pendency of S.A. No. 78/66 arising out of T. S. No. 272/60 filed by the landlords/respondents against the tenant/appellant in the year 1960 and also considering the peculiar factual premises of the instant case, we are also inclined to terminate the S.A. No. 78/66 finally and conclusively in terms of order dated 19-7-2000 rendered by the Supreme Court as already indicated above. Accordingly, entering into the merit of the instant case, we find that the appellate Court vide its order dated 22-11-65, in deciding all the seven issues so framed by the trial Court, came to the definite findings that the tenants/defendants failed to prove their case to the effect that the permanent construction was ever made within five years in terms of fresh lease, Ext-8 dated 28-6-46. However, at the time of hearing of the instant Second Appeals i.e. S.A. No. 78/66 and S.A. No. 48/66 wherein the above judgment of the appellate Court was questioned, this High Court, by its judgment and order dated 13-11-72 felt it necessary to frame an Additional Issue No. 8, as already

mentioned above and accordingly, remanded the matter to the appellate Court to decide the said issue afresh by taking additional evidence, if required, without disturbing the other conclusions arrived at by the appellate Court in favour of the plaintiffs/respondents.

33. Be it noted herein that the High Court in its findings categorically held that the defendant No. 1 could not establish in the instant case that the existing houses were constructed within 5 years from the original lease or subsequent lease and that being the position, no protection from eviction u/s 5 of the Act was available to the defendant No. 1.

34. The appellate Court having received the case on remand from the High Court, after careful consideration of the additional evidence so adduced as directed by the High Court, vide order dated 4-6-73 found that no improvement whatsoever was made by Surendra Narayan Sukul, the defendant No. 1/ appellant and he was, therefore, not entitled to get any compensation and as a result the Issue No. 8 so framed by the High Court was decided in negative and in favour of the respondents Hirendra Chandra Chakravorty and others. With that finding the matter was returned to the High Court for its final decision on merit of the Second Appeal.

35. It is seen that accepting the findings of the appellate Court dated 4-6-73 above, the High Court by order dated 11-6-74 dismissed the S.A. No. 78/66.

36. Given the attending facts and circumstances of this case in its entirety and upon meticulous scanning of the judgments dated 22-11-65 and 4-6-73 rendered by the First Appellate Court as well as the findings arrived at by the Division Bench of this Court in its judgments and orders dated 13-11-72 and 11-6-74 passed in the instant Second Appeal, we are of the considered opinion that in view of the above findings that were basically structured upon the question of facts, no substantial question of law appears to be involved herein and we have, therefore, no hesitation to affirm the views and conclusions recorded in those afore-referred judgments.

37. In view of the above deliberation and scrutiny, this Full Bench also felt that the findings recorded by the appellate Court by its judgment dated 20-3-2002 to the effect that two receipts dated 30-1-97 and 22-8-97 were duly proved as the plaintiffs accepted the rents from the year from 1403 B.S. to 1406 B.S. by issuing those receipts and accordingly fresh tenancy came into existence on 30-1-97 for which the right to eject the defendants was waived by the plaintiffs, shall have no bearing in deciding the instant second appeal on merit.

38. For the foregoing reasons, observations and discussions, we find no merit in this second appeal and the same stands dismissed.

39. Considering the facts and circumstances of the case there shall be no order as to costs.