

(1959) 11 CAL CK 0009
In the Calcutta High Court
Case No : A.F.A.D. No. 984 of 1956

Sm. Jarat Kumari Dassi and Others

APPELLANT

Vs

Shaligram Subhkaran Khemani and Another

RESPONDENT

Date of Decision : 25-11-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Trusts Act, 1882 — Section 44, 76

Citation : AIR 1960 Cal 489 : (1960) 1 CALLT 159 : 64 CWN 488

Hon'ble Judges : P.N. Mookerjee, J;Niyogi, J

Bench : Division Bench

Advocate : Prafulla Kumar Roy and Sudhir Kumar Acharyya, for the Appellant;
Rajendra Bhusan Bakshi, Nikhilchandra Talukdar and Dwijendra Nath Lahiri, for
the Respondent

Final Decision : Allowed

Judgement

P.N. Mookerjee, J.—This appeal arises out of a suit for ejectment, brought by the plaintiff, a Trust Estate, represented by three trustees (who described themselves as plaintiff in the plaint), against the defendants (who are the respondents before us) in respect of the disputed premises Nos. 29 and 29/1, Armenian Street, Calcutta, which were held by the said defendants (respondents) under the aforesaid Trust Estate as tenants. It was the plaintiff's case that, the defendants had defaulted in the payment of rents on, at least, three occasions of two successive months each within a period of 18 months before the institution of the present suit and, accordingly, they were not entitled to the protection of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, which was then in force and which, admittedly governs the present suit. The defendants' tenancy, according to the plaintiff, had been determined by the service of a proper notice to quit, expiring with the last date of November, 1954. The suit was instituted on 4th December, 1954.

2. The suit was contested by the defendants who denied, inter alia, all the

relevant allegations of the plaintiff and contended, in the main, that the notice to quit was neither legal nor sufficient; that there were not the necessary or relevant defaults to disentitle them to the protection of the Rent Control law and, further that the suit was not maintainable at the instance of the three persons who, as trustees and plaintiffs as aforesaid sought to represent the plaintiff Trust Estate.

3. The trial court overruled all the above defences and passed a decree for ejectment, giving the defendants six months' time to vacate the disputed premises and deliver up vacant possession of the same to the plaintiffs (trustees) on condition that

"they (the defendants) went on depositing the rent falling due during the aforesaid period of six months within the 15th of each succeeding month by way of damages"

and that, "in default, the decree would be executable at once."

4. On appeal, the Special Bench of the Small Cause Court, Calcutta, reversed the decision of the learned trial Judge only upon the ground that the suit in question was not maintainable at the instance of the three persons who purported to represent the plaintiff Trust Estate in the suit and the defence to that effect should succeed. The Special Bench, however, maintained the trial court's finding against the defendants on the question of validity and sufficiency of the notice to quit and also on the question of the relevant or necessary defaults under the Rent Control Act, which, according to them also, were sufficient to disentitle the defendants to the protection of that Act.

5. It is against this decision of the learned Special Bench that the present appeal has been filed by the plaintiffs, that is, the three trustees, representing the plaintiff trust-estate, as aforesaid, and the only point which arises for consideration in this appeal is whether, in the present action, the plaintiff Trust Estate was properly and sufficiently represented in law by the three persons, who are the appellants as aforesaid and who, in the plaint, sought to represent the said Estate. The point arises in this way :

6. The Trust in question was created under a deed, described as an

"Indenture made the 14th day of July one thousand nine hundred and forty five between Srimati Jorati Kumari Dassi (therein called the Settlor) of the One Part and the said Jorat Kumari Dassi and Radha Kissors Roy, Madhab Kissors Roy and Mohan Kissors Roy (called the trustees therein) of the Other Part".

In the said deed, after making necessary provisions, whereby the Trust was created and the aforesaid trustees were duly constituted, in Clause 2, it was provided inter alia that

"the said trustees shall, immediately on the execution of these presents, take possession of the Zemindary properties, messuages, lands, hereditaments and

premises and securities, hereby conveyed, and, subject to the provisions hereinafter contained, collect, get in and receive the rents, issues and profits of the said zemindary and of the said lands, messuages, hereditaments and premises and the interest of the said Government Securities as and when the same respectively become payable";

and in two of the following paragraphs, namely, paragraphs 7 and 8, provision was made to the following effect :

"7 : In case of any vacancy amongst the trustees, occasioned by death, resignation or incapacity of any trustee or otherwise, the settlor shall appoint another trustee to fill up the vacancy, such appointment being made out of the members of the family of the said Gour Chand Roy deceased. After the death of the Settlor the power of appointment of new trustees shall vest in the remaining trustees who shall make the appointment out of the members of the family of Gour Chand Roy deceased. Provided, however, that during the life time of the Settlor there shall be four trustees and after her death there shall always be three trustees. If there is a difference of opinion among the trustees, the opinion of the majority shall prevail in all matters provided that, so long as the said settlor will be living, her opinion in all matters, relating to the trust, shall prevail in preference to that of the remaining trustees.

8: If the number of trustees falls below the minimum number of 3 Trustees, and if for any reason the remaining trustee or trustees fail or neglect to appoint or nominate a sufficient number of trustees then the court having jurisdiction will have power to appoint a fit and proper person or persons to act as trustee or trustees to make up the required number. Provided that, in the appointment or nomination of trustees as aforesaid by the remaining trustees or by the Court, preference will be given to the male descendants of the family of Gour Chand Roy deceased if living and competent to act as such trustees."

It is not necessary, for our present purpose, to refer to any of the other provisions of the aforesaid Trust Deed.

7. The original trustees under the deed, as has been sufficiently said above, were four persons, including the settlor Jorat Kumari Dassi, namely, Jorat Kumari Dassi, Radha Kishore Roy, Madhab Kishore Roy and Mohan Kishore Roy, as contemplated by the said deed and as specifically mentioned therein. Before the institution of the present suit, however, it appears, Madhab Kishore died and, in his place, there was no appointment made by the Settlor Jorat Kumari, in terms of and as provided in the first part of the proviso to paragraph or Clause 7 of the aforesaid Trust Deed, and the three remaining trustees, namely, Jorat Kumari, Radha Kishore and Mohan Kishore instituted the present suit as trustees to the suing or plaintiff Trust Estate.

8. The defendants contended that, by reason of the non-filling up of the aforesaid vacancy, the number of trustees, namely, four, which was contemplated under the deed to be the number during the Settlor Jorat Kumari's life time, is

not there and, until and unless that number is available, a suit of the present type could not be instituted on behalf of the plaintiff Trust Estate and the three remaining or surviving trustees, who actually instituted the suit, were not competent either to institute or to maintain it.

9. To this plea of the defendants, the plaintiffs' rejoinder was that this question, whatever be the answer to it on the merits, was no longer open to the defendants to agitate, in view of a prior decision in a former suit inter partes, which was previously brought by the present Trust Estate, represented by (the very same trustees, namely, the three plaintiffs in the present suit, against the selfsame defendants, who are the defendants of this suit, for ejectment and arrears of rent in this Court on its Original Side and which was eventually decreed in favour of the said Trust Estate, represented as aforesaid, without any objection to that representation on the part of the aforesaid defendants. In other words, it was contended, in the first place, on behalf of the plaintiffs that this point was concluded by res judicata or, to be more exact, by constructive res judicata and as such -- and apart from anything else, -- it was no longer available to the defendants to defeat the present suit.

10. In the second place, the plaintiffs contended in answer to the defendants' above objection that, on the merits too, that is, on a proper construction of the Trust Deed in question in terms of and in the light of the relevant provisions of law, -- in particular, Sections 44 and 76 of the Indian Trusts Act, -- the matter should be decided in favour of the plaintiffs and against the defendants' contention. Of the above two answers of the plaintiffs, the first one, namely, res judicata, was accepted by the trial court and, that being sufficient for the purpose, the defendants' plea on the point was overruled by the learned Trial Judge without any consideration of the same on the merits. Neither of the above two answers, however, was accepted by the lower appellate court, which preferred to give effect to the defendants' contention on the point, and it is the propriety of this decision of the lower appellate court which is the immediate subject-matter for our consideration in this appeal.

11. In our opinion, the view of the trial court on the above points at issue was right and that should have been and should be accepted and the decree of the trial court should be restored upon the setting aside and reversal of the view and decision of the learned Special Bench on appeal.

12. On the point of res judicata, constructive though it is, the matter seems to be clear. Having regard to the facts, hereinbefore stated, and about which there is no dispute, it is quite plain that, on the very same representation, the plaintiff Trust Estate got a decree for arrears of rent in a contested proceeding against the same defendants although, it is true also that this particular objection was not actually taken in the suit. That, however, is wholly immaterial. For purposes of constructive res judicata, the test will be whether this point might or ought to have been taken by the defendants to defeat the plaintiff's claim in that suit. That test is clearly satisfied in the present case. If this point had been taken and,

if there were substance in this point or objection, the plaintiff's suit, on the previous occasion, ought to have -- and would have -- failed. There is no question also that, if the defendants had been properly diligent, they might have taken this point and they should have also taken it because it was certainly a defence which was open to them to defeat the plaintiff's suit and it should have been taken for that purpose and, indeed, is required by law -- so far, at least, as the test of *res judicata* is concerned, -- to be taken for that purpose. Clearly, therefore, the question of representation of the Trust Estate by the three persons, who are now the appellants before us, for purposes of a rent suit, that is, for purposes of recovering rents, must be taken or accepted to be valid and concluded as between the present parties by reason of the said previous inter partes decision between them and, if the present plaintiffs were competent to represent the Trust Estate for the said purpose, namely, for recovering rents as aforesaid, they are a fortiori equally competent to maintain the present suit. The bar of *res judicata*, therefore, will be a complete answer to the defendants' objection on this point, namely, for the maintainability of the present suit by the three appellants on behalf of or *in* representing the plaintiff trust estate as trustees as aforesaid.

13. Apart from that, however, we are also clearly of the opinion that, on the merits too, this question should be decided in the appellants' favour. The Trust Deed, it is true, clearly makes provision for four trustees during the Settlor's life time. The Trust Deed also expressly contains specific provision for the filling up of vacancy in place of any of these trustees during the Settlor's lifetime. That, however, does not, in law; necessarily or merely by itself, debar the surviving trustees from representing the Trust Estate, in case there is any vacancy (outstanding vacancy) in the number of trustees. Possibly, there might have been some scope of a plausible argument on this point,--although even as for that, we are hardly convinced,--if the number had fallen below "three", which is stated in paragraph 8, quoted above, to be the minimum number of trustees and so may be regarded as the minimum number under the deed. In the face of that provision, however, it is difficult to contend that the number "four" also would be the minimum and would have similar or the same effect. In the circumstances, in view, particularly, of Sections 44 and 76 of the Indian Trusts Act,--there being, in our opinion, no contrary intention, derivable from the Trust Deed in the present case, as required by the said two sections,--the surviving trustees, in case of death of any of the original trustees, will be quite competent to represent the Trust Estate and the trust property would vest in them except, possibly, where the number falls below what may be taken to be the minimum, namely, "three", under the aforesaid deed. We are not concerned, however, in this case with any such contingency because, at no relevant period of time, the number of trustees has fallen below the said so-called minimum. In the circumstances of this case, therefore, the representation of the plaintiff Trust Estate by the three appellants, who are its surviving trustees, in the present proceeding must be taken to have been perfectly legal, valid and sufficient and fully competent. The view, we are

taking, will be amply supported by, at least, two decisions of the Madras High Court, reported in *Raghavachariar v. Chakrapani Naidu* 1932 MWN 297 and *Krishna Bhatta v. Srinivasa Shambagu* 32 Ind Gas 97: (AIR 1917 Mad 730), (See also *Manikya Rao v. Adenna* AIR 1949 Mad 654, and also by the Allahabad decision, in *Mahant Som Giri Vs. Mahant Ram Ratan Giri and Others*, , and it also receives substantial support from the English decisions in the case of *Warburton v. Sandys* (1845) 60 ER 499, and *Doe v. Godwin*, D and Rule 259, and the following passage in *Lewin on Trusts* (15th Edition (1950) at p. 194) which incorporates and enunciates the principle, 011 which the statute in this country, namely, the Indian Trusts Act, in its two relevant Sections 44 and 76 appears to be based, namely :

"The survivorship of the trust will not be defeated because the settlement contains a power for restoring the original number of trustees by new appointments, unless there be something in the instrument that specially manifests such an intention."

This manifestation of a contrary intention was actually found in one of the cases, cited in *Lewin*, namely, *Foley v. Wontner* (1820) 2 JW 245, and that case accordingly, was taken and treated as an exception to the general rule or principle, as contemplated above. It is also to be remembered that, unless the general rule be accepted, as mentioned above, there will be considerable difficulty in the administration of trust properties, and, if the simple or mere existence of a provision for a particular number of trustees and a provision for filling up vacancies in. their places were" construed as sufficient manifestation of such contrary intention, impossible situations would often be created in practice. "Endeavour should always be made to avoid such impossible situations and, in our view, therefore, Sections 44 and 76 of the Indian Trusts Act should be liberally interpreted and should govern the present case to enable the three plaintiffs to maintain the present suit.

14. In the above view, we hold that the present suit was rightly decreed by the trial Court and its decree should not have been reversed by the learned Special Bench.

15. This appeal should, therefore, be allowed, the decree of the lower appellate Court, namely, the Special Bench of the Calcutta Small Cause Court, should be set aside and that of the learned trial Judge should be restored. The plaintiffs who are the appellants before us, would get a decree for ejectment, as granted by the trial Court, but the defendants-respondents are given six months" time from this date to vacate the disputed premises on the same condition, however, as was imposed by the trial Court, namely, that they must continue to pay or deposit in the trial Court by way of damages or mesne profits, the amount of rent month by month regularly within the 15th of each succeeding month according to the English calendar. In default, the decree for ejectment will be executable forthwith.

16. We would also direct, having regard to the circumstances of this case, that, so far as this Court and the lower appellate Court are concerned, the parties will bear their own costs, but the plaintiffs (appellants) will be entitled to their costs in the trial Court.

Niyogi, J.

17. I agree.