
(2019) 04 CAL CK 0004

In the Calcutta High Court

Case No : Civil Second Appeal (SA) No. 15 Of 1994

Smt. Probha Chowdhury @ Smt. Probha Devi Chowdhury And **APPELLANT**
Ors

Vs

Karabi Ghosh And Ors **RESPONDENT**

Date of Decision : 02-04-2019

Acts Referred:

Transfer Of Property Act, 1882 — Section 108
Code Of Civil Procedure, 1908 — Section 100, Order 41 Rule 11
West Bengal Premises Tenancy Act, 1956 — Section 2(h)

Citation : (2019) 04 CAL CK 0004

Hon'ble Judges : Bibek Chaudhuri, J

Bench : Single Bench

Advocate : Animesh Kanti Ghoshal, Chandramala Mukherjee, Aparupa Ghoshal, Amal Krishna Saha

Final Decision : Dismissed

Judgement

Bibek Chaudhuri, J

1. The Instant Second Appeal is filed by the defendants/appellants against the judgment and decree dated 31st February, 1992 passed by the learned Additional District Judge, 6th Court at Alipore in Title Appeal No.242 of 1987, thereby reversing the judgment and decree of dismissal of the suit dated 28th February, 1987 passed by the learned Assistant District Judge, 8th Court at Alipore in Title Suit No.140 of 1977.

2. The respondents/plaintiffs filed Title Suit No.140 of 1977 for eviction of the defendants/appellants from the suit premises on the grounds of default, committing nuisance and annoyance, violating the provisions of (M), (O) and (P) of Section 108 of Transfer of Property Act and subletting in the 8th Court of the learned Assistant District Judge at Alipore. The original defendant contested the said suit and after trial, the learned trial judge dismissed the suit on contest.

3. The plaintiff/respondent filed an appeal against the judgment and decree of dismissal of the suit before the learned Additional District Judge, 6th Court at Alipore which was registered as Title Appeal No.242 of 1987. The said appeal, however was allowed on contest and a decree for eviction was passed against the defendants/appellants.

4. The said judgment and decree, passed by the First Appellate Court is assailed in the instant Second Appeal.

5. At the time of admission of the appeal for bearing under Order 41 rule 11 of the Code of Civil Procedure, the Division Bench of this Court vide order dated 5th May, 1992 passed the following order:-"this appeal will be heard only on ground No.13 as taken in Memo of Appeal."

6. At the time of hearing of the instant appeal, this court in addition to ground No.13 of Memo of Appeal framed to more grounds as substantial questions of law. The grounds are as follows:-

1. For that the court below did not at all consider that the two important ingredients is to be satisfied before it can be held that a particular premises is sublet by tenant to some other person, that is the subtenant was in exclusive possession and the tenant has no control over them and secondly, the transfer was for valuable consideration.

2. Whether the learned judge in first appellate court erred substantially in law in holding the present occupants of the suit premises as subtenants without considering that they are near relatives of the original tenant, since deceased.

3. Whether the impugned judgment suffers from substantial error in law for non consideration of material evidence on record.

7. Mr. Animesh Kanti Ghoshal, learned Senior Advocate submits that in the trial court the daughter of the original plaintiff had deposed as PW1. PW2 Ramanath Bose was an Engineer Commissioner who locally investigated the premises in suit to ascertain as to whether the original defendant had made substantial additional alteration and damage of the suit premises and submitted a report which was marked as Exhibit-6. PW3, Amullaya Kumar Sarkar was a law clerk and PW4, Praddut Kumar Das was a local resident who deposed on behalf of the plaintiffs/respondents in support of the case of the plaintiffs/respondents.

8. One Ramesh Kumar Podder, on the other hand was examined as DW1 on behalf of the defendant. The original defendant/tenant, since deceased was his father's elder brother's wife. DW2 was the husband of the original defendant/tenant.

9. It is fairly pointed out by Mr. Ghoshal, learned Senior Advocate for appellants that the learned first appellate court allowed the appeal and passed a decree for eviction of the appellants only on the ground of subletting. Other grounds taken by the plaintiffs/respondents for evicting the appellants, viz, grounds of default,

committing nuisance and annoyance and violating the clauses (M), (O) and (P) of Section 108 of Transfer of Property Act were concurrently held by both the courts below to be not proved and no cross appeal was filed by the respondents against such concurrent findings by the courts below. Therefore, the fate of the instant appeal rests on determination of the question as to whether the learned first appellate court had correctly come to the finding against the defendants/appellants that the original tenant had sublet the suit premises in favour of some third persons.

10. Mr. Ghoshal has urged that scope for interference on findings of fact while exercising jurisdiction under Section 100 of the Code of Civil Procedure (here after CPC) is very limited, and reappreciation of evidence is not permissible except where the trial court and/or the first appellate court misdirected themselves in appreciating the question of fact or placed the onus on the wrong party.

11. In *Hero Vinoth vs. Seshammal* reported in (2006) 5 SCC 545, it is observed by the Supreme Court:-

"19.. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence."

12. The general rule is that High Court will not interfere with the findings of fact in Second Appeal. But it is not absolute rule. The exceptions are where (i) The courts below have ignored material evidence or acted on no evidence; (ii) The courts have drawn wrong inferences from proved facts by applying the law erroneously; (iii) The courts have wrongly casts the burden of proof. "Decision passed on no evidence" does not only refer to cases where there is a dearth of evidence, but also refers to any case, where the evidence taken as a whole, is not reasonably capable of supporting the finding.

13. According to Mr. Ghoshal, the first appellate court failed to consider the material evidence adduced by the witnesses on behalf of the original defendant/tenant. With this introduction, he led me to the evidence of DW1 who stated on

oath that on the date of his examination in chief, the original tenant had been residing at Bombay with her husband, Sankarlal Podder. It was in his evidence that the original tenant was inducted in the suit premises towards the end of 1964. The husband of the original tenant had three brothers, namely, Ramnath Podder, Radheshyam Podder and Late Ganeshlal Podder. Before 1964, they used to reside at Barma. In 1964 Sankarlal and his wife came down to Calcutta. Subsequently his other brothers with their respective families came to Calcutta. All of them used to stay at the suit premises in joint mess. DW1 was the son of Late Ganeshlal Podder, deceased brother of the husband of the original tenant. According to Mr. Ghoshal, learned judge in first appellate court failed to consider the most important evidence of DW1 to the effect that the original tenant namely, Mohini Debi Podder, since deceased along with her husband Sankarlal Podder and brothers of their husband with their respective family members used to stay from the very beginning as members of joint family and tenancy was taken in the name of Mohini Debi Podder as Benamder of the joint family. In his examination in chief, Sankarlal Podder who was the husband of original tenant, Mohini Debi also stated in oath that their family comprised of his wife, children and family members of his three brothers who jointly used to reside in the suit premises. Thus, suit premises was taken on rent in the name of Mohini Debi on behalf of joint family and all the members of the said joint family were joint tenants in respect of the suit premises. Even assuming that Mohini Debi and her husband Sankarlal with their children subsequently left for Bombay, the present occupiers being the members of the joint family of Mohini Debi cannot be treated as subtenants in respect of the suit premises.

14. It is further submitted by Mr. Ghoshal, learned Senior Counsel that the challans showing deposit of rent in the trial court were marked as Exhibit-D series during the trial of the suit. The original plaintiff/landlord withdrew rent deposited by DW1, Ramesh Kumar Podder. It is contended by Mr. Ghoshal on withdrawal of rent by the plaintiff/landlord which was deposited by DW1, Ramesh Kumar Podder, the plaintiff admitted him to be a tenant in respect of the suit premises and in such a case, there cannot be any subtenancy in favour of Ramesh Kumar Podder.

15. Mr. Ghoshal has repeatedly urged that in order to prove subtenancy, two ingredients must be established, viz (1) Delivery of exclusive possession of the suit premises by the tenant in favour of the subtenant and (2) Payment of rent by the subtenant in favour of the tenant. On point No.(1) the learned first appellate court failed to appreciate the evidence of DW2, Sankarlal Podder who was the husband of the original tenant to the effect that he occasionally used to stay in the suit premises when he came to Calcutta. Relying on the evidence of DW2, the learned judge in the first appellate court ought to have held that there was no delivery of possession of the suit premises in favour of the alleged subtenant either by the original tenant or by her husband.

16. It is further submitted by Mr. Ghoshal that the plaintiffs/respondents have

hopelessly failed to adduce any evidence to prove the second and most important ingredient of subletting, i.e. payment of rent by the subtenant to the tenant. On the contrary the evidence on record is absolutely clear and unequivocal that rent was being deposited by DW1, Ramesh Kumar Podder on behalf of the original tenant.

17. Mr. Ghoshal, therefore, submits that the impugned judgment and decree passed by the first appellate court is perverse in view of nonconsideration of material evidence on record. It is submitted by Mr. Ghoshal that under such circumstances this court should interfere with the impugned judgment. In support of his contention he refers to a decision of the Supreme Court in the case of Bidhwanti and another vs. Gulab Chand Prasad reported in AIR 1987 SC 1484. In paragraph 11 of the aforesaid report, the Supreme Court held:-

"It is true that in a second appeal a finding on fact even if erroneous will generally not be disturbed but where it is found that the findings is vitiated by application of wrong tests or on the basis of conjectures and assumptions then a High Court will be well within its rights in setting aside in a second appeal a patently erroneous finding in order to render justice to the party affected by the erroneous finding."

18. In Smt. Krishnawati vs. Hans Raj, reported in AIR 1974 SC 280, referred to by the learned Senior Counsel on behalf of the appellants, it was held by the Supreme Court that in a suit for eviction on the ground of subletting, onus is upon the landlord to prove that the alleged subtenant is in exclusive possession of the premises and it was let out by the tenant for valuable consideration. In the instant case, the respondents failed to prove both the ingredients and the decree for eviction on the grounds of subletting should be set aside.

19. Mr. Ghoshal also refers to a decision of Delhi High Court in the case of Vishwa Nath another vs. Chamman Lal Khanna and another reported in AIR 1975 Delhi 117 wherein it has been held that so long as the lessee retains the legal possession of the whole of the premises he does not commit a breach of law against parting with possession by allowing other people to use the same. In the instant case the evidence of Sankarlal Podder, DW2, clearly suggest that he retains control over the possession of the suit premises and he used to stay in the suit premises when he came to Calcutta from Bombay. Mr. Ghoshal also refers to another decision of the Apex Court in the case of Dipak Banerjee vs. Smt. Silabati Chakraborty reported in AIR 1987 SC 2055. In this report also the ingredients of sub-tenancy, namely, delivery of exclusive possession in favour of subtenant by the tenant and payment of rent by the subtenant in favour of tenant were reiterated. The same principle was also followed by this court in R.S Argha vs. Sk. Ainul Hoq reported in 1989(ii) CALLT 25.

20. Mr. Amal Krishna Saha, learned Advocate for the respondents begins his argument inviting my attention to paragraph 4 of the Additional Written Statement filed by the original defendant/tenant, namely, Mohini Debi Podder.

Paragraph 4 of the Additional Written Statement reads such:-

"That the allegations made in paragraph 15(e) are denied being false, frivolous and motivated. It is specifically denied that the defendant has transferred and/or assigned and/or parted with possession of the entire suit premises to two different persons in two portions without any written consent of the plaintiff. The defendant further states that the question of transfer and/or assignment and/or subletting does not arise as the two occupants, namely, Shri Ramesh Kumar Podder and Shri Deoki Nandan Podder are sons the defendant's husband's brother comprising a single unit and are the members of the defendant's family."

21. Then, Mr. Saha refers to the evidence of Karabi Ghosh who was testified in the trial court as PW1. In her examination in chief, she specifically stated that the defendant had been residing at Bombay. She did not reside at suit premises. None of his family members also reside there. Defendant had sublet two flats to two persons, namely, Deoki Nandan Podder and Chandralekha Debi who are in possession of front portion and back portion of the suit premises respectively. At the time of induction of defendant, none of the aforesaid persons lived with her. Ramesh Kumar Podder, son of Chandralekha Debi and Deoki Nandan had been depositing rent in Court. The defendant had sublet the suit premises without consent of the plaintiff. Mr. Saha also takes me to the cross examination of PW1 and it is found that the aforesaid statement of PW1 was not challenged in the cross examination by the defendants/appellants. Referring to a decision of the Division Bench of this court in the case of A.E.G Carapiet vs. A.Y Derderian reported in AIR 1961 Cal 359 it is contended by the learned Counsel for the respondent that if the cross examining advocate fails to cross examine a witness on the statement made by him/her in course of examination in chief, the statement made by the witness in examination in chief is held to be accepted. A party should put his case in course of cross examination of witnesses of the opposite party and such rule is one of essential justice and not merely technical one. On the selfsame point, Mr. Saha also refers to another judgment of the Supreme Court in the case of Muddasani Venkata Narsaiah (D) Th. L.RS vs. Muddasani Sarojani reported in AIR 2016 SC 2250. In the aforesaid decision, it is held by the Supreme Court that if the other side wants to challenge a statement made by a witness in his examination-in-chief, it is his duty, apart from raising it in the pleadings, to cross examine the witness along those lines. If a witness is not cross examined on a particular point by his adversary, it must be assumed that his evidence was originally accepted. In the instant case the defendants/appellants did not cross examine the witness on behalf of the respondent and did not challenge the specific statement of PW1 that the original defendant had sublet the suit premises to Deoki Nandan and Chandralekha Devi Podder who were not her family members. It is also not disputed that the original defendant with her husband and children permanently left the suit premises and had been staying in Bombay.

22. Mr. Saha next draws my attention to the evidence of DW1, Ramesh Kumar

Podder. It is found from his evidence in chief that Sankarlal Podder and his wife Mohini Devi who was the original tenant, came to Calcutta sometimes in 1964. Subsequently other brothers of Sankarlal with their respective families came to Calcutta and started residing in the suit premises with Sankarlal and Mohini Devi Podder. In his cross examination, DW1 stated that he had been depositing rent in court jointly with Deoki Nandan Podder. From his evidence it is clear that Sankarlal, the husband of Mohini Devi, since deceased had been residing permanently in Bombay and during trial of the case he once came to Calcutta to depose in the suit. It is further found from his cross examination that he came to stay in the suit premises after about nine months to one year of induction of Mohini Devi as a tenant in respect of the suit premises.

23. Mr. Saha also refers to the evidence of Sankarlal Podder who deposed in the suit as DW2. In his examination in chief he stated in clear and unequivocal term that he took tenancy in the suit premises in the name of his wife. In his cross examination he stated that his family consists of himself, his wife and two sons. Both the sons of Sankarlal used to stay permanently at Bombay. It is urged by Mr. Saha that the evidence of DW2 has demolished the case of the defendants/appellants to the effect that the present occupants of the suit premises are the members of a joint family and the tenancy was taken in the name of the joint family of Mohini Devi Podder. DW2 also admitted that Chandralekha Devi and Ramesh Kumar Podder have been occupying a portion of the suit premises and Deoki Nandan Podder has been occupying the rest portion of the suit premises exclusively.

24. Referring to a decision of the Supreme Court in Ms. Celina Coelho Percira and other vs. Ulhas Mahabaleshwar Kholkar and others reported in 2010(1) SCC 217, Mr. Saha submits that in order to prove the mischief of subletting as a ground for eviction, two ingredients have to be established, first parting with possession and tenancy or part of it by tenant in favour of a third party with exclusive right of possession and, secondly, that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent. Initial burden of proving subletting is on the landlord. But once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to the tenant to prove the nature of occupation of such third party and that he continues to hold legal possession in tenanted premises.

25. Coming to the instant case, it is urged by Mr. Saha that though the original defendant came with a specific defence that tenancy of the suit premises was taken for the joint family, she hopelessly failed to prove that the family of the original tenant consisted of her husband's brother's sons and their family members. On the contrary, the husband of the original tenant in his evidence as DW2 stated that his family consisted of his wife and two children and all of them were/are residing in Bombay. Thus, it is clearly found that the sons of the brothers of the husband of the original tenant and their family members have

been exclusively occupying the suit premises and the tenant had parted with possession of the said suit premises exclusively to them. In order to substantiate his contention, learned Counsel for the respondents has referred to the decisions of the Supreme Court reported in AIR 1988 SC 396 (Bhoirab Ch. Nandan vs. Ranadhi Ch. Dulla) and AIR 1998 SC 3214 (Mohammedkasam Haji Gulambhai vs. Bakerali Fatehali). In both the decisions, the Supreme Court was pleased to hold that when a tenant parted with possession of the rented accommodation in favour of his brother and son exclusively onus shifts upon the tenant to prove that he did not sublet the suit premises in favour of his brother or son.

26. Section 2(h) of the West Bengal Premises Tenancy Act, 1956 (hereafter as the said Act) defines tenant in following words:-

"Tenant means any person by whom or whose account or behalf the rent of any premises is, but for a special contract would be payable and includes any person continuing in possession after the termination of his tenancy or in the event of such person's death, such of his heirs as were originally residing with him at the time of his death, but does not include any persons against whom any decree or order of eviction has been made by a court of competent jurisdiction."

27. Thus, the heirs of the original tenant who used to reside originally within at the time of his death were regarded as tenants after the death of the original tenant as the right of tenancy is heritable. Admittedly, Mohini Devi Podder, since deceased was the original tenant and in the event of her death, such of her heirs who used to reside with her at the time of death might be treated as tenants within the meaning of section 2(h) of the said Act. However, after the death of the original tenant, none of her heirs of Mohini Devi Podder stayed in the tenanted premises.

28. Essential incident of tenancy is that there must be an agreement, either oral or in writing between landlord and tenant where the landlord delivers possession of the tenanted premises to the tenant in lieu of rent. It is an admitted position in the instant case that Ramesh Kumar Podder used to deposit rent in court. The defendants/appellants could not produce even a single rent receipt to show that the landlord issued rent receipt in the name of any person other than the original tenant, namely, Mohini Devi Podder. Under this backdrop, the issue of subletting is required to be decided.

29. In *M/s Bharat Sales vs. LIC* reported in AIR 1998 SC 1240, it was held by the Supreme Court as follows:-

"Sub-tenancy or subletting comes into existence when the tenant gives up the possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overtacts and transferring possession clandestinely to a person

who is utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the dismissed property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of the property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sublet had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease and sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum covering the period for which the premises is let out or sublet or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the fact of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sublet."

30. In the instant case, it is amply established in course of evidence, especially during cross examination of DW1 and DW2 that the original tenant, namely, Mohini Devi permanently left the suit premises and it is under exclusive possession of one Ramesh Kumar Podder and Deoki Nandan Podder. No evidence is forthcoming that tenancy was given to Ramesh Kumar Podder and Deoki Nandan. The defendants/tenants also failed to prove that the suit premises were taken for residential purpose of joint family members of the original tenant, namely, Mohini Devi, since deceased. On the contrary, specific evidence of DW2 who happened to be the husband of the said Mohini Devi is that his family consisted of his wife and two sons. Mohini Devi, died during the pendency of the suit. The names of husband and two sons of Mohini Devi were substituted as her legal heirs and successors as the substituted defendants. Admittedly, they are not contesting the suit or appeal. They have not come forward to depose either claiming their heritable right of tenancy within the scope of 1956 Act. On the contrary it is amply proved that Ramesh Kumar and Deoki Nandan with their respective family members have been residing in the suit premises. There was no relationship of landlord and tenant at any point of time between the plaintiffs/respondents and the said Ramesh Kumar and Bhairav Nandan. There is also no evidence on record that the heirs of the original tenant who have been substituted in this case ever claimed their heritable right of tenancy in respect of the suit premises. In *Voirab Chandra Nandan (Supra)*, it was held by the Supreme Court that if a brother exclusively occupies the tenanted house and the tenant permanently shifts his residence elsewhere, then it is parting with possession or subletting. The same principle has been laid down by the Apex Court in a subsequent decision in the case of *S.A Venkatamma vs. Jitendra*

P.Bhora reported in (1997) 11 SCC 334.

31. Thus, in view of the decision of the Supreme Court in M/s Bharat Sales (supra), the earlier decision of the Apex Court in Dipak Banerjee (supra) Viswanath (supra) and Smt. Krishnawati are not applicable in the instant case.

32. On careful consideration of the entire evidence on record and having regard to the legal position as it stands now, I have no hesitation to hold that the first appellate court did not commit any illegality in arriving at a decision in favour of the plaintiffs/respondents on the issue of subletting. The appellants have failed to prove that they are members of the family of the original tenant, namely, Mohini Devi Podder, since deceased or that tenancy was taken in the name of Mohini Debi for residential purpose of the sons of brother's of her husband. The evidence on record clearly proves that during her lifetime, Mohini Devi and her husband and children left Calcutta permanently and had been staying in Bombay. The suit premises are in exclusive possession of one Ramesh Kumar Podder and Deoki Nandan who were never considered as tenants by the landlords/respondents. The legal heirs and representatives of Mohini Devi did not come forward to claim their heritable right of tenancy.

33. In view of the above discussion I can safely hold that the original defendant/tenant left the suit premises permanently transferring exclusive possession of the same in favour of one Ramesh Kumar Podder and Deoki Nandan Podder with whom the landlord/respondent had no privity of contract. When the transfer of exclusive possession of suit premises by the tenant in favour of third parties is proved, onus shifts upon the tenants/appellants to prove that such transfer was not in lieu of any compensation or rent. The appellants failed to discharge the said onus. On the contrary evidence of Ramesh Kumar Podder (DW1) shows that he has been depositing the amount equivalent to monthly rent in court on behalf of the tenant.

34. In view of the above discussion, I find no merit in the instant appeal.

35. This second appeal, therefore fails.

36. Accordingly the instant second appeal be and the same is dismissed, without cost.

37. The judgment and decree passed by the first appellant court is hereby affirmed.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.