

(1991) 02 CAL CK 0009
In the Calcutta High Court
Case No : S.A. 444/83

Sri Bhadreswar Pandit and others

APPELLANT

Vs

Smt. Puspa Rani Pandit

RESPONDENT

Date of Decision : 07-02-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 7 Rule 7, 100
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1991 Cal 405

Hon'ble Judges : Amal Kanti Bhattacharji, J

Bench : Single Bench

Advocate : Mr. G.C. Mukherjee and Mr. Prasanta Banerjee, for the Appellant; Mr. Haradhan Banerjee and Mr. Amitava Pain, for the Respondent

Judgement

1. This is a defendant's appeal against a judgment and decree passed by the Sub-Judge, Second Court, Howrah, reversing a decree of dismissal passed by the Munsif, 4th Court, Howrah. The facts of the case is as follows:

2. The plaintiff-respondent filed the suit in the Munsifs Court for evicting the defendant-appellant from the suit property claiming him to be a licensee therein. The plaintiffs case was that the suit property described in Schedule "A" to the plaint originally belonged to one Sankar Kumar Patra who was a thicka tenant by erecting structures thereon. The said Sankar Patra sold his thicka tenancy right in respect of the entire "A" Schedule property to one Satish Chandra Pandit, son of Manmatha Ch. Pandit, by a registered sale deed dated 22-2-67. While in possession of the property the said Satish Ch. Pandit inducted the defendant who is his own brother, there as a licensee. The plaintiff purchased the "B" Schedule property put of the "A" Schedule property from Satish Ch Pandit by a registered deed dated 2-1-79, The defendant was in possession of one room in the "B" Schedule property. According; to the plaintiff the licence given to, the defendant was automatically revoked with the sale of, the "B" Sch. property to him. The plaintiff subsequently served a lawyer's notice on the defendant asking him to

vacate the property and the defendant having failed to vacate the same a suit was filed for his eviction:

3. The defendant contested the suit claiming his right in the property as a co-sharer. According to him his father Manmatha Nath Pandit was the actual purchaser of the "B" Schedule property and he purchased it in the benami of Satish Ch: Pandit with the consent of his other sons and daughter. The defendant, therefore, claimed one eighth share in the property. He denied the plaintiffs claim of granting and revocation of licence and asserted his own right as a co-sharer.

4. The trial court found that the defendant's claim of benami purchase of the property by his father Manmatha Nath Pandit was not proved. It, therefore, held that the plaintiff had proved her title to the property by purchase from Satish Chandra Pandit. The trial court, however, held that the induction of the defendant to the property as a licensee was not proved. The said court, therefore, dismissed the suit. The appellate court concurred with the finding that the plff. had proved her title but disagreed with the trial court that the alleged licence was not proved. The said court believed the plaintiffs claim of licence and decreed the suit.

5. In the appeal before this court the finding regarding the plaintiff-respondent's title to the suit property has not been challenged. The appeal is contested on the point that the respondent's claim of licence on the property has been wrongly decided by the lower appellate court and that it should be reversed as the evidence adduced in this regard was not considered by the appellate court.

6. On behalf of the appellant Shri Gopal Chandra Mukherjee argues that the lower appellate Court's finding that the defendant was a licensee under the plaintiff contrary to the finding of the trial court, actually raises a point of law as the same is not based on an appraisal of the evidence actually adduced in this respect. He cites a decision of Justice. Manoj Kr. Mukherjee of this Court in M/s. Laksmi Narayan Mistanna Pratisthan v. Suresh Ch. Das reported in 1980 (1) CLJ 232 in which his Lordship held that where the lower appellate court overlooked a material piece of evidence the judgment suffers from the infirmity of non-consideration of material evidence on record which is a point of law for which a concurrent finding of fact was liable to be set aside in a second appeal.

7. Mr. Mukherjee also cited the Supreme Court's decision in J.B. Sharma Vs. State of Madhya Pradesh and Another, . In the said case a suit was dismissed in the trial court but on appeal the first appellate court decreed the same. On a second appeal the High Court allowed the appeal and the suit was again dismissed. On an appeal before the Supreme Court the decision of the High Court was challenged on the ground that the finding of the lower appellate court was binding on the High Court in second appeal and that in view of S. 100 of the CPC the High Court had no jurisdiction to re-appraise the evidence and come to a contrary finding. It was held by the Supreme Court that the first appellate court

while recording the finding acted on an assumption not supported by any evidence and that it further failed to consider the entire document on the basis of which the finding was recorded. In that view of the matter the High Court was justified u/S. 100 of the CPC to set aside the finding. Another judgment of the Allahabad High Court Ramesh Chandra and Another Vs. Ram Rakshpal, was also cited on behalf of the appellant. In this case following the observations made by the Supreme Court in Ranuka Singh v. Achal Singh in AIR 1961 SC 1097 the High Court observed in para 45 as follows:

"The position that follows from the above observation is that if the lower appellate court recorded definite findings in the light of oral evidence and surrounding circumstances the High Court cannot interfere in Second Appeal and cannot attempt to reappraise the evidence". But considering the facts of the case under appeal the High Court found that the lower appellate court discarded the entire oral and documentary evidence and based its finding simply on one circumstance appearing in the case. The High Court, therefore thought that it was a proper case where the said court could interfere on a second appeal."

8. All the above decisions tend to emphasize the legal principle that a finding of fact by the lower appellate court, whether concurrent with the lower Court or not, can be reconsidered in suitable cases on second appeal if the finding is on no evidence or non-consideration of proper evidence or omission to consider the entire evidence. In all such cases non-consideration of evidence would be a point of law within the scope of section 100 of the Civil Procedure Code. The point admits of different interpretations and there have actually been divergent interpretations but the ratio decidendi seems to be that in a second appeal evidence on facts can be reappraised in suitable cases to prevent the miscarriage of justice.

9. Shri Haradhan Banerjee on behalf of the respondent tries to uphold the decision of the Lower appellate Court both on facts and law. According to him the lower appellate Court considered the evidence properly and came to its finding on a proper appreciation of the fact and law. According to him the title of the plaintiff having been proved in the trial court and upheld by the appellate court and the same having not been challenged in this appeal the conclusion of the appellate court was inevitable and is well sustained in law. The point developed by Shri Banerjee is what may be termed as equitable relief for ejectment. He cites a few decisions in support of his argument and it may be seen how they fit in the facts and circumstances of the present case.

10. The first decision cited is of the Supreme Court in Bhagwati Prasad Vs. Shri Chandramaul, It was an ejectment suit against the defendant who admitted the title of the plaintiff but claimed the right to stay on the property on the basis of an alleged agreement between the parties that the defendant should be allowed to remain on the property until the amount spent by him for the construction of the property was repaid; The plaintiff's case was that the defendant was a tenant

under him in the suit premises. The cases of both the parties were disbelieved. The High Court in, such circumstances held the view that the defendant was possessing the property with the leave and licence of the plaintiff and allowed a decree of ejectment. The decision of the High Court was upheld by the Supreme Court although there was a strong argument that the High Court's finding was based on a new case not pleaded by any of the parties. It was held that the ownership of the plaintiff having been admitted the defendant was aware of his position and that his relationship with the plaintiff in regard to the property in dispute having not been proved, it must be held that he was a licensee on the property. The ejectment order was not interfered with as no prejudice was caused to the defendant in the face of his knowledge of the true position.

11. In the instant case the defendant's plea of right in the property on the basis of the alleged benami purchase by his father failed in both the courts below. The plaintiffs right by purchase has not been challenged in the second appeal.

12. The next case relied on by Amulya Ratan Mukherjee and Others Vs. Kali Pada Tah and Others, . In this case the plaintiffs sued the defendant for ejectment claiming that the tenancy of some of the defendants having been determined by a notice to quit they became trespassers. The courts below, however, found that they were rank trespassers as the plaintiffs were dispossessed by the relevant defendants. The plaintiffs title was proved and ad valorem court fee having been paid an ejectment decree was passed. The High Court upheld the ejectment decree. The following observations in paragraph 8 of the judgment are relevant :--

"Plaintiffs title has been proved, but the defendants have been proved to be trespassers. By the findings of the court and also by the decree passed the cases of the parties were not prejudiced in any manner, but on the other hand proper justice has been done. Mere ineffective and unsubstantial technicality will not prevent any party from getting" proper decision from the court. No injustice has been done to any of the parties. Ad valorem Court fees were paid. There is no difficulty in passing the decree for declaration of plaintiffs title and for passing a decree for recovery of khas possession of the suit properly by evicting the defendants" Nos. I and 2."

13. The last case cited by Mahabir Ram Vs. Smt. Sita Devi, In this case the plaintiff-respondent filed the suit for eviction against the defendant-appellant claiming him to be a tenant. The plaintiff claimed title on the basis of a registered sale deed executed by the father of the defendant. The courts below held-

- (i) that the plaintiff failed to prove the relationship of landlord and tenant between the parties,
- (ii) that the defendant was in permissive possession of the house in suit, and
- (iii) that the plaintiff had title to the suit house.

On the basis of the above findings the lower appellate Court held that the

plaintiff was entitled to equitable relief for ejectment under O.7, R. 7, C.P.C. The decision was upheld by the High Court.

14. In all the above three cases the title of the plaintiff was proved, but the alleged tenancy of the defendant was not proved. The defendant was, however, in possession claiming some kind of title which was not accepted. In Bhagawati Prasad's case, the defendant did not claim title, but relied on some agreement to stay on the property. This was disbelieved. In all these cases the plaintiff's plea of the defendant's possession was also not believed. The result was the defendant's possession was held to be permissive except in *Amulya Ratan Mukherjee and Others Vs. Kali Pada Tah and Others*, where the defendants were found to be rank trespassers. But in all the above cases the plaintiff's suit was decreed in spite of his case in the pleading. In Bhagwati Prasad's case the Supreme Court analysed a party's pleading vis-a-vis the actual case known between the parties. Where the question of title is involved and the plaintiff has prima facie title, to the knowledge of the defendant, what the defendant is expected to prove is his right to stay on the property in exercise of any right arising out of a transfer of interest, either inter vivos or testamentary, or by adverse possession. If no such transfer of interest is proved, the basis of his possession must be permissive.

15. Mr. Mukherjee on behalf of the appellants argues that the licence alleged by the plaintiff has not been proved and that as such the suit was rightly dismissed by the trial Court. But this argument does not answer the legal position analysed above. He also argues that in the absence of the proof of licence the defendant should be deemed to be in adverse possession and that in that case the question of pecuniary jurisdiction would crop up if the suit was properly valued, but this argument should be considered in the background of the respective pleadings of the parties. The defendant claims his title as a co-sharer on the basis of a benami transaction and evidently he does not claim any adverse possession. He is a brother of the plaintiffs vendor. His right of possession was co-extensive with his brother's right. In other words he comes through his brother and not in exercise of any right against him. If he has any right, he must prove it, if he has none, he must be deemed to be a licensee.

16. In view of the legal position discussed above it is clear that the stand taken by the learned sub-Judge is correct. A licence is that permission to stay on an immovable property without which the stay would be a trespass. Here the defendant is a licensee on the property and his licence was revoked by the plaintiff by the service of a notice as well as by filing the suit. The suit has, therefore, been rightly decreed by the sub-Judge. This appeal therefore, fails and the same be dismissed with costs. Lawyer's fees assessed at five g. ms.

17. Appeal dismissed.