
(2001) 03 CAL CK 0029
In the Calcutta High Court
Case No : Civil Order No. 378 of 1996

Srimati Kamaladevi Gupta

APPELLANT

Vs

Srimati Urmila Gupta

RESPONDENT

Date of Decision : 22-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Evidence Act, 1872 — Section 85
Hindu Succession Act, 1956 — Section 6, 8
Presidency Small Cause Courts Act, 1882 — Section 41

Citation : 106 CWN 1061

Hon'ble Judges : Subhro Kamal Mukherjee, J

Bench : Single Bench

Advocate : Sudhis Dasgupta and Sibashish Ghosh, for the Appellant; Raj Girhi Ram and Ram Nath Prasad, for the Respondent

Judgement

Subhro Kamal Mukherjee, J.—This is an application u/s 115 of the CPC against judgement and order dated December 22, 1995 passed by Shri S.L. Biswas, learned Judge, Third Bench, Presidency Small Cause Court of Calcutta in Suit No. 244 of 1994. By the order impugned the learned Judge dismissed the application u/s 41 of the Presidency Small Cause Courts Act, 1882 filed by the plaintiff/petitioner. Admittedly, petitioner is the mother while the opposite party is the daughter. It is, also, admitted that the mother of the petitioner. Raj Kumari Devi, was the thika tenant in respect of premises-in-suit.

2. The plaintiff/petitioner instituted this proceeding u/s 41 of the said Act for eviction of a licensee on the allegation that she has inherited the property from her mother. Raj Kumari Devi, being the only issue and, thus, became the thika tenant in respect of the suit premises. It is alleged that on February 23, 1993 the opposite party requested for temporary accommodation for six months with effect from March 1993 under leave and licence basis without any licence fees and the petitioner accommodated her daughter, the opposite party, on the assurance that she would vacate the suit premises after the expiry on the month

of August, 1993 and as the opposite party did not vacate, a notice was issued through the learned Advocate for the petitioner followed by filing of the present application u/s 41 of the said Act on June 24, 1994.

3. The opposite party entered appearance in the said proceeding and contested the same by filing a written statement. Her case was that admittedly Raj Kumari Devi was the Thika tenant in respect of the suit premises and the said Raj Kumari Devi, out of her love and affection to the opposite party, allotted on room attached with small kitchen with two doors, attached varandah with right of user of the common privy, bath, guddy, electricity and courtyard etc. to the opposite party and her husband for permanent residence. It was contended that since the rooms under occupation of the defendant/opposite party were allotted by the grandmother, the allegation of granting licence by her mother is concocted by the purpose of the present proceeding. It is, also, contended that the defendant/opposite party has already filed a suit being Title Suit No. 2606 of 1993 in the City Civil Court at Calcutta against the plaintiff/petitioner and others for declaration of her independent right in respect of the suit premises and for permanent injunction and the said suit was pending.

4. The learned judge in the court below by the impugned judgement and order dismissed the suit holding, inter alia, that the plaintiffs case of leave and licence as pleaded in the suit has not been proved by any satisfactory evidence. It was, further, held that as parties to the suit are governed by Mitakshara School of Hindu Law, the defendant is one of the co-sharers and, therefore, it cannot be held that the opposite party has no interest in the suit property. Learned Judge, also, held since the plaint was verified through a constituted attorney of the plaintiff and as the plaintiff has not come forward to give evidence before the court, the plaintiff is not entitled to any order of eviction. The learned judge held that the power of attorney executed-by the plaintiff /petitioner in favour of her - constituted attorney was required to be registered when it has been challenged by the defendant/opposite party.

5. Mr. Sudhis Dasgupta, learned Senior Advocate, appearing for the petitioner, assailed the order impugned and submitted that since Raj Kumari Devi, the mother of the plaintiff/petitioner, was the owner of the suit property, on her death, the property has devolved upon the petitioner u/s 8 of the Hindu Succession Act, 1956. Mr. Dasgupta argued that Section 6 of the Hindu Succession Act, 1956 has no application in this case as there was no existence of any Mitakshara coparcenary property and the property-in-suif was a personal property of Raj Kumari Devi and on her death the property has devolved upon her only heir and legal representative, the petitioner herein. Accordingly, in the submission of Mr. Dasgupta, the learned trial judge was wrong in holding that the defendant/opposite party is a co-sharer in the suit property. Mr Dasgupta has referred to the judgement and decree dated August 26, 1996 passed by the learned Judge, Twelveth Bench, City Civil Court at Calcutta in Title Suit No. 2606 of 1993 being an annexure to the affidavit-in-reply filed by his client wherefrom

it appears that the suit instituted by the defendant/opposite party for assertion of her title in the property-in-suit has been dismissed on contest in favour of this plaintiff/petitioner and on the basis thereof Mr. Dasgupta argued that the defendant/opposite party has no title whatsoever in the property-in-suit. Mr. Dasgupta argued that the learned trial judge went wrong in drawing adverse inference against the plaintiff for her failure to appear before the court in person as not Only the constituted attorney of the plaintiff has deposed, but one of the sons of the plaintiff, Monoj, has, also, deposed as Plaintiffs Witness No. 2. Mr. Dasgupta argued that the findings of the learned trial judge that the power of attorney was required to be registered is illegal and in support of his contention he referred to the case of Syed Abdul Khader Vs. Rami Reddy and Others, . Mr. Dasgupta draws my attention to the provision of Section 41 of the said Act of 1882 and argued that in. view of the admissions by the defendant/opposite party she was inducted in, the suit premises by her grandmother as a licensee and as this petitioner is the legal representative of the licensor, who gave permission to the opposite party. the application u/s 41 of the said Act of 1882 is maintainable at the instance of the petitioner even if she has failed to prove the case of grant of licence as made out in the plaint. Mr, Dasgupta Cited the case of Nand Gopal and Ors. us. Brij Mohan Lal reported in 1966 Allahabad Law Journal 166. On the basis of the said decision Mr. Dasgupta argued that it is well settled in law that a licence does not create interest in the property and is, thus, a matter purely personal between the licensor and the licensee. Therefore, although the original licensor is dead, but it cannot be said that on the death of the original licensor, the licensee remained in possession as a trespasser inasmuch as it must be deemed that implied licence must have been granted in favour of licensee by the person claiming under the original licensor. Mr. Dasgupta cited the case of Terunnanse vs. Tenincmse, reported in 1968 (1) AER 651 and argued that on the death of the original licensor, the plaintiff/petitioner inherited the title and impliedly a new licence was granted on the death of the original licensor in favour of the licensee and there was, in law, a resumption of possession.

6. Mr. Raj Girhi Ram, learned Advocate; for the opposite party, on the other hand, strenuously argued that the order impugned is not assailable in revisional jurisdiction. As the plaintiff/petitioner has failed to prove his story of licence as pleaded in her application u/s 41 of the said Act of 1882, her only remedy is to initiate a proper proceeding for eviction before a proper civil court. However, Mr. Raj Girhi Ram has conceded that his client is not claiming any interest in the property-in-suit. Mr. Raj Girhi Ram, however, submits in order to obtain relief u/s 41 of the said Act Of 1882 it must be found that the application u/s 41 is maintainable and in support of his contention cited the case of K.M. Motwani Vs. Albert Sequeira and Another, Mr. Raj Girhi Ram, also, cited the case of Electric Construction and Equipment Company Ltd. Vs. Jagjit Electric Works, and argued on the basis thereof that since the execution of the power of attorney could not be proved by the plaintiff/petitioner, the suit instituted by the plaintiff/petitioner's constituted attorney on the basis of such power of attorney is not

maintainable. Lastly, Mr. Raj Girhi Ram cited the cases of Bai Hiragauri Vs. Abdul Kadar Mamadji and Another, and the The Municipal Corporation of Delhi Vs. Shri Suresh Chandra Jaipuria and Another, and submitted that no interference by this court with the findings of the learned trial judge is justified overlooking the principles governing interference u/s 115 of the Code of Civil Procedure.

7. After hearing the learned Advocate for the respective parties and upon perusal of the materials on record, I am of the opinion that the order impugned cannot stand a moment's scrutiny.

8. The learned trial judge held that the defendant/opposite party is one of the legal heirs of the original owner of the property as the parties are governed under the provisions of Mitakshara School of Hindu Law; such finding is wholly mis-conceived. Section 6 of the Hindu Succession Act, 1956 has no manner of application in the present case as the provision of the said section is applicable only when a coparcener dies after passing of the Hindu Succession Act, 1956, and, not before, and is attracted only in respect of undivided interest in the coparcenery and not to any other property such as self-acquired property or the separate property of Mitakshara coparcenery. In the absence of any finding that the property-in-suit is a Mitakshara coparcenery property, the learned judge was wrong in coming to the conclusion that on the death of the grand mother, the defendant grand daughter inherited a share in property only because the parties are governed by Mitakshara School of Hindu Law. However, the aforesaid finding has lost its significance in view of dismissal of the suit for declaration of title filed by the defendant/opposite party in the City Civil Court. Moreover, Mr. Raj. Girhi Ram, learned Advocate, for the defendant/opposite party, conceded at the hearing of this revisional application that presently his client is not asserting any title whatsoever in the property-in-suit. The refusal on the part of the learned trial judge to place any reliance upon the unregistered power of attorney executed by the plaintiff in favour of her constituted attorney is totally illegal. In order to attract the provisions of Section 85 of the Evidence Act, 1872 all that is necessary is the power of attorney is to be executed before and authenticated by, inter alia, a notary public. u/s 85 of the said Act. of 1872 the courts shall presume every document purporting to be a power of attorney and to have been executed before, and authenticated by. the authorities specified in the said section, was so executed and authenticated. A copy of power of attorney has been referred to in course of-hearing of this revisional application and it appears therefrom this was executed before and authenticated by a notary public on September 5, 1989. Therefore, the decision cited by Mr. Ram in the case of M/s. Electric Construction and Equipment Company Limited (supra) has no manner of application. On the contrary, the decision of the Supreme Court in the case of Syed Abdul Khader (supra) is clear that a power of attorney is not compulsorily registrable. In this case plaint was verified by the constituted attorney who has been duly empowered to do so. The said attorney has deposed in the suit in support of the plaint case. The plaintiffs son, Manoj Kumar Gupta, deposed as Plaintiffs Witness no. 2 in support of the plaint case. Accordingly, the learned trial

judge was wrong in holding that the application u/s 41 of the said Act of 1882 is not maintainable as the power of attorney was not registered.

9. By the enactment of Section 41 of the said Act of 1882, the legislature has provided that a landlord shall be entitled to pray for a summons being issued against the occupant who has refused to remove himself with his belongings and to handover possession to the landlord. Section 41 of the said Act of 1882 lays down that summon is required to be issued on an application made by the landlord to the effect that the occupant is in possession of the premises and the burden is thrown upon the occupant to show cause as to why an order be not made for his removal. Mr. Radhika Prasad Sanyal in his commentary on Presidency Small Cause Courts Act analysed Section 41 of the said Act as under:

- (a) The matter in dispute must be immovable property.
- (b) It must be with regard to the possession of such immovable property.
- (c) The property must be situate within the jurisdiction of the Small Causes Court.
- (d) The annual rack-rent of the property must not exceed two thousand rupees.
- (e) The applicant, that is one who wants to recover possession must be :
 - i) the owner or land-lord himself who brought in the occupier, or
 - ii) the legal representative or assignee of such owner or land-ford who gave permission to the person against whom the application is made.
- (f) The person to be proceeded against must be :
 - i) a tenant, that is, one that got the premises directly from the owner or the land-lord;
 - ii) an occupier, that is,
 - 1) One who occupies by permission of the owner or the tenant, or
 - 2) One who holds under or by assignment from the tenant or the occupier.
- (g) That the tenancy or permission has been determined or withdrawn.
- (h) That the tenant or the occupier or the person holding through him illegally refuses to deliver up such property.

10. In the case in hand the plaintiff is the legal representative, even assuming that the case of licence as pleaded in the plaint has not been proved, of the owner who admittedly gave permission to the defendant against whom the application is made. Admittedly, the permission has been determined and/or withdrawn and defendant has refused to deliver up such property. Therefore, it cannot be said that the present application u/s 41 of the said Act of 1882 is not maintainable. In view of my finding that the application u/s 41 of the said Act is maintainable, the decision cited by Mr. Ram in the case of K.M. Motwani (supra)

has no application.

11. Assuming that the plaintiff/petitioner has failed to prove the case of licence as pleaded in her plaint, in view of the admitted position that the defendant claims possession on the basis of permission from the original owner, it would be unjust to refer to the plaintiff to a regular suit for recovery of possession holding that the application u/s 41 of the said Act of 1882 is not maintainable when the defendant's suit for assertion of her title has failed. In any view of this matter, the plaintiff has better title than that of the defendant and as such is entitled to recover possession of the property. The licence granted to the defendant was revocable and if not granted by the plaintiff in her own right, the granting of a new licence by the plaintiff after the death of Raj Kumari Devi, the original owner, should be implied; on such renewal of original licence there was, in law, a resumption of possession and the defendant was accordingly estopped from challenging the right of the plaintiff to initiate a proceeding to recover possession. While interpreting Section 116 of the Ceylon Evidence Ordinance, 1896 in the Privy Council in the case of *Terunnanse* (supra) observed as under:

A revocable licence is automatically determined by the death of the licensor or by the assignment of the land over which the licence is exercised. Thus if the licence was not originally granted in 1942 by the appellant in his own right, after the death of the Rev. Gunananda the grant of a new licence must be implied. The respondent argues nevertheless that he did not "come upon" the land by virtue of the new licence but by virtue of that which had expired. In their lordships opinion the reference in the paragraph to the licensee coming on the land does not mean only, or even primarily, a physical entry; it imports a taking of possession under the licence. When a lease or licence is renewed, there is no moment at which the tenant or licensee physically leaves the land and re-enters it. There is none the less a new taking of possession in law.

12. Mr. Ram, lastly, argued that the petitioner is not entitled to invoke the revisional jurisdiction of this court u/s 115 of the Code of Civil Procedure. In my view the learned trial judge acted illegally and with material irregularity and failed to exercise a jurisdiction vested in him by law by dismissing the application u/s 41 of the said Act of 1882. The order impugned suffers from material irregularity as the learned judge has failed to apply proper legal tests while deciding the application filed by the plaintiff. Moreover, in view of my finding that the defendant/opposite party has no title to the property, the order impugned, if allowed to stand, would occasion a failure of justice and cause irreparable loss and injury to the plaintiff against whom it was made inasmuch as the plaintiff has admittedly title in the property and the defendant has none. The plaintiff should not be relegated to a time consuming civil litigation to recover possession.

13. Accordingly, the order impugned is set aside and the revisional application is, thus, allowed. The application u/s 41 of the Presidency Small Cause Courts Act, 1882 filed by the plaintiff/ petitioner in the Presidency Small Causes Court of Calcutta is allowed and a decree for eviction is passed directing the defendant to

quit and vacate the suit premises, fully described in the schedule to the said application, in favour of the plaintiff.

14. Since the defendant is in possession of the suit premises for a considerable period of time, the defendant is given three months" time to vacate the suit premises in favour of the plaintiff. In view of the relationship between the parties, I make no order as to costs in this revisional application. Urgent xerox certified copies be supplied to the parties expeditiously.