

(1956) 03 CAL CK 0016

In the Calcutta High Court

Case No : Civil Revision Case No. 2263 of 1954

Subodh Gopal Bose

APPELLANT

Vs

Burmah Shell Oil Storage and Distributing Co. of India Ltd.

RESPONDENT

Date of Decision : 23-03-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 105, 115
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1957 Cal 67 : 60 CWN 1065

Hon'ble Judges : Guha, J; Das Gupta, J

Bench : Division Bench

Advocate : Atul Chandra Gupta and Joy Gopal Ghose, for the Appellant;
Pannalal Chatterjee, for the Respondent

Judgement

Das Gupta, J.—The petitioner brought the present suit for joint possession of 6-1/2 bighas of land in 18, 18/1, 18/2 and 18/3 Alipore Road, within the Municipality of Calcutta, on the strength of his purchase at a sale for arrears of revenue of Touzi No. 6 of the 24 Parganas Collectorate. These lands, according to the petitioner, appertained to a number of amalgamated touzis, touzis Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 33, 51, 53 and 91. It is averred that the former proprietor of touzi No. 6 was in khas possession of his interest therein and had not let it out to any person; that the defendant's possession of these lands as regards what appertains to touzi No. 6 was an, encumbrance, so that the plaintiff as purchaser at a revenue sale having obtained the interest free from encumbrances was entitled to obtain joint possession thereof with the defendant, who has title to the lands in so far as they appertained to some other touzis. There was also a prayer for mesne profits.

2. The defence inter alia was that the lands do not appertain to touzi No. 6; that the defendant's interest is not annulable in law, that the Mourashi Mekarari tenancy of the defendant was in existence from before the time of the settlement of touzi No. 6. After this written statement was filed and before the suit could

come up for hearing, West Bengal Act 7 of 1950, was enacted by which all the leases of land existing at the date of issue of the notification for sale of an estate for arrears of revenue became un-annullable by the purchaser at the revenue sale, and it was further provided by Section 7 that every suit for ejectment u/s 37 of the old Act 11 of 1859 pending on the date of commencement of Act 7 of 1950 shall abate if the suit could not have been validly instituted, had the Act 7 of 1950 been in operation at the date of institution of the suit. In view of this, an additional written statement was filed by the defendant on 7-10-1950, pleading that even if it be found that the land in suit or any portion thereof appertains to a group of undivided touzis which includes touzi No. 6, the defendant has acquired a right of Mourashi Mokarari tenant in respect of the same, either by grant or by adverse possession and that the suit has abated inasmuch as it could not have been validly instituted had the West Bengal Act 7 of 1950 been in operation at the date of the institution of the suit.

3. The learned Subordinate Judge has, after consideration of the oral & documentary evidence, come to the conclusion that the defendant became a tenant under the former proprietor of touzi No. 6 by adverse possession and so the suit has abated.

4. In the present application the plaintiff contends that the learned Subordinate Judge was in error in thinking that the defendant had become a tenant under the former proprietor and that on account of this error he has; erroneously declined to exercise jurisdiction in the suit and that this error" should be rectified.

5. It is obvious that if the decision that the defendant was a tenant under the former proprietor was erroneous, the suit could have been validly instituted even though Act 7 of 1950 had been in force at the date of the institution of this suit, and so the suit would not abate u/s 7. If on the other hand the defendant became a tenant as found by the Subordinate Judge, the suit could not have been validly instituted in view of the amended Section 37 after the enactment of West Bengal Act 7 of 1950 and the order of abatement should be held to have been rightly passed.

6. A preliminary point was raised on behalf of the defendant that the order passed by the learned Subordinate Judge was in substance an order of dismissal and so an appeal lay against his order. This point is governed by the authority of this Court's decision in Subodh Gopal v. Nilabja Barani Debi, 59 Cal W. N. 1056 (A). We are bound by this authority, with which we respectfully agree, to hold that the order of abatement did not amount to a decree and no appeal lay.

7. It is necessary therefore to consider whether on the materials on the record, the conclusion of the learned Subordinate Judge that the defendant became a tenant under the former proprietor of touzi No. 6, is justified.

8. It has to be mentioned at the outset that at no point of time before the additional written statement was filed in October, 1950--does the defendant or his predecessor appear to have ever asserted or assented that he was a tenant

under the proprietor of touzi No. 6. In the original written statement, as I have already pointed out, he even denied that the land appertained to touzi No. 6. The learned Subordinate Judge has mentioned in his judgment the fact that in the deed by which the defendant purchased the land, it has been stated that part of the lands appertained to touzi No. 6 along with other touzis. I am unable to see how this statement "in the kobala is of any assistance to the defendant to show that he was claiming any right of tenancy under the proprietor of Touzi No. 6. The learned Subordinate judge also" speaks of the absence of any evidence on behalf of the plaintiff to show that at any point of time rent or assessment of rent was demanded from the defendant or from his predecessor in interest in respect of the disputed lands or that there was any refusal to pay it by the defendant or his predecessor-in-interest. I do not see how this can be thought to indicate that a tenancy was being claimed by the defendant, On the contrary, it seems to me that the entire absence of any evidence that the former proprietor of touzi No. 6 ever claimed rent taken with the fact that the defendant and his predecessors were content with the lease taken from the other touzi holders, justifies the conclusion that they had no intention of possessing these lands as tenants of touzi No. 6. The position clearly is that during all these years--said to be 70 years--the defendant and his predecessors were in possession of these lands on the basis of leases obtained either directly from other touzi owners or indirectly from the putnidars under other proprietors. The proprietor of touzi No. 6 did not exercise possession on these lands. That would at most be adverse possession by the owners of the other touzi through the defendant and his predecessors as against the owner of touzi No. 6--adverse possession which would extinguish the right of the former proprietor of touzi No. 6, but such extinction would be of no avail against the purchaser at the revenue sale. The adverse possession of the other touzi owners as against the owners of touzi No. 6 could not possibly bring into existence a relationship of landlord and tenant as between those other proprietors and the" proprietor of touzi No. 6. If the other proprietors were possessing these lands in khas to the exclusion of the proprietor of touzi No. 6 in a manner which would establish adverse possession," clearly no case of tenancy under the proprietor of touzi No. 6 could possibly arise. Is the position altered where the other proprietors instead of possessing the lands in khas are possessing the lands through tenants to the exclusion of the proprietor of touzi No. 6 I can see no reason why this should make a difference. If, it is adverse possession it is adverse possession by the other proprietors against! touzi No. 6 and no case of tenancy under the proprietor of touzi No. 6 of either the other proprietors or the persons through whom they possess arises. It is settled law that when a tenant encroaches on land outside his tenancy but belonging to his landlord he cannot acquire absolute title thereto by the adverse possession but obtains only the right of tenancy under his landlord. It is equally well settled that if a tenant encroaches on, land contiguous to the land of his tenancy but belonging to other landlords, adverse possession by him by such encroachment would not give him an absolute title thereto but only a leasehold interest in these lands under his own landlords. These propositions of law do not however justify

the view that when a tenant of one or more landlords possesses adversely to some other person without assertion of any tenancy right under the other person, he becomes a tenant of this other person.

9. The learned Advocate for the defendant advanced an argument on the basis of Ex. A that the defendant was asserting a tenancy in the land under the owner of touzi No. 6. Exhibit A is the rent receipt granted by one Mahabharat. Reading Mahabharat's evidence and Exhibit A together it is dear that the defendant paid this rent for a tenancy right under the putnidars of some of the other touzis. It is in no way an assertion of tenancy right under touzi No. 6.

10. The learned Subordinate Judge also seems to be of the view that the defendant became a tenant under touzi No. 6 if not by adverse possession, by acquiescence. He appears to rely on a case of Sree-munt Ram Dey v: Kookoor Chand, 15 WR 481 (B). In that case the plaintiff claimed the land as belonging to an estate purchased at a revenue sale by his zemindar" who gave him putni lease of a portion of his zemindary. The Court held that the plaintiff was not entitled to take actual possession of the land in suit, "that inasmuch as Joy Narain (the ancestor of the defendant) was allowed to dig this tank and to remain in possession undisturbed by the former proprietor for upwards of 30 years, if he is to be taken, a tenant at all it must be assumed that he was holding with the acquiescence of the previous proprietor, and this acquiescence must be treated as equivalent to a lease." I am unable to see how the principle in the decision in Sreemunt's case (B) applies to the facts of the present case. The peculiar circumstances of the present case are that the defendant was entitled to possess the land as a lessee under several other proprietors. The mere fact that in such circumstances the proprietor of touzi No. 6 took no steps of demanding rent from him cannot be held to amount to an acquiescence on the part of the proprietor of touzi No. 6 in his becoming a tenant. In my view the facts of the present case do not at all establish a case of acquiescence by the owner of touzi No. 6. It is worth mentioning in this connection that even in the additional written statement no case of tenancy as the result of acquiescence was made. What was stated there was that there was a tenancy by adverse possession or grant. No evidence has been adduced as regards grant and" the case that a tenancy came into existence under the proprietor of touzi No. 6 by adverse possession was not, in my opinion, established on the materials on the record".

11. For all these reasons I have come to the" conclusion that the view taken by the learned Judge that the defendant had become a tenant under "the former proprietor of the touzi is erroneous. His conclusion that the suit abates Was the direct consequence of this error. It must therefore be held that he has erroneously refused to exercise jurisdiction in this case. I would therefore make this Rule absolute, set, aside the order of the learned Subordinate Judge that the suit abates and order that the suit should be disposed of in accordance with law. The petitioner will get his costs from the opposite party here and below.

Guha, J.

12. I agree.