
(1977) 11 CAL CK 0004
In the Calcutta High Court

Case No : Second Appeals No's. 1135 of 1971 and 304 of 1973

Sushil Krishna Roy

APPELLANT

Vs

Narayan Ch. Mukherji

RESPONDENT

Date of Decision : 28-11-1977

Acts Referred:

Transfer of Property Act, 1882 — Section 111

Citation : AIR 1978 Cal 174

Hon'ble Judges : N.C. Mukherji, J

Bench : Single Bench

Advocate : P.N. Mitter, Joy Gopal Ghosh, Ranjit Kr. Banerji and Padmabindu Chatterjee, for the Appellant; Ranjit Kr. Banerji, Padmabindu Chatterjee, P.N. Mitter and Joy Gopal Ghosh, for the Respondent

Judgement

N.C. Mukherji, J.—Both these appeals arise out of the judgment and decree passed by Shri T. B. Ganguly, Additional District Judge, 1st Court at Alipore in Title Appeal No. 860 of 1970 dated 19-2-71, modifying those of Shri B. K. Datta, Munsif, 1st Court, Alipore in Title Suit No. 86 of 1970 dated 10-6-70. S. A. 1135 of 1971 has been filed by the defendant, while as S. A. 304 of 1973 has been filed by the plaintiff against the order of the learned Additional District Judge by which the suit was sent back to the learned Munsif for ascertaining if the plaintiffs requirement can be satisfied by a portion of the suit premises.

2. The facts of the case may, briefly, be stated as follows:--

The defendant was a monthly tenant in the suit premises at a monthly rent of Rs. 92.04 payable according to English calendar. The plaintiff reasonably required the suit premises for his own use and occupation. The defendant contested the suit on the ground that the notice was bad as the same was in respect of a part of the premises. It was also contended that the plaintiff does not reasonably require the suit premises. The learned Munsif decreed the suit. Being aggrieved, the defendant preferred an appeal. The findings of the learned Munsif were upheld by the learned Additional District Judge. But the suit was sent back only

for ascertaining if the plaintiff's requirement could be satisfied by partial eviction. In this case, in view of the decision reported in *B. Banerjee Vs. Smt. Anita Pan*, , an application for amendment of the plaint was made in this court and the same was allowed by an order dated the 18th June, 1976. An additional written statement was filed and an additional issue was also framed to the effect whether the plaintiff is in occupation of any reasonably suitable accommodation any where or any other accommodation which can serve the plaintiff's requirement. Another application was filed for taking "into consideration the changed circumstances. It was ordered by this court on 18-6-76 that the application would be taken up at the time of hearing of the appeal.

3. Mr. Pramotha Nath Mitter, the learned Advocate appearing on behalf of the defendant contends that both the courts below were wrong to find that the notice was legal and valid. The courts below ought to have found that the notice being in respect of a portion of the premises and the defendant's tenancy having comprised of the entire premises was bad and as such the suit ought to have been dismissed, Mr. Mitter, in this connection asserts that both the courts below were wrong to find that the defendant impliedly surrendered his old tenancy and a new relationship was created by the acts of the parties. It is the admitted position that the defendant was a tenant in respect of the entire premises No. 129/1, Bokul Bagan Road under the plaintiff's predecessor-in-interest. It is also the admitted position that the defendant sublet some portions of the premises to different persons and used to realise rent for a considerable period. It is the plaintiff's case that after he purchased the property he served notices on the sub-tenants asking them to pay rent direct to him and since then the sub-tenants have been paying rents direct to him. It is also the plaintiff's case that previously the plaintiff served two ejectment notices on the defendant being Exhibits B and B (2) dated respectively 5-9-66 and 16-12-69. In those notices it was stated specifically that the defendant was a tenant in respect of the part of the premises. The defendant did not reply to those notices. The courts below very much relied on those two notices and also on the fact that the defendant did not take any step against the sub-tenants for realisation of rent though the defendant knew that the plaintiff was realising rent direct from them. The learned court of appeal below finds that the payment of the original rent for a portion of the original tenanted premises after receipt of the notices gives rise to an inference that a new relationship was created between the plaintiff and the defendant in respect of the suit premises. Mr. Mitter submits that this finding is erroneous. The fact that the defendant was going on paying the same rent as he used to pay before goes to show that there was never any implied surrender and the old tenancy continued. From the fact of payment of Rs. 92.04 it cannot be said that a new relationship was created. Mr. Mitter also contends that both the courts below were wrong to find that the conduct of the parties unmistakably goes to establish the creation of a new relationship between the parties and that there was an implied surrender within the meaning of Section 111(f) of the Transfer of Property Act. Mr. Mitter contends that the fact that the plaintiff has

been realising rent direct from the tenants, that the defendant did not take any action against those tenants, that two notices --Exhibits B and B (2)--were served upon the defendant, that the defendant was going on paying Rs. 92.04 as rent cannot lead to the conclusion that there was an implied surrender and a new tenancy was created. Besides the facts mentioned above there is absolutely no evidence of surrender of a part of the tenancy by the defendant. Mr. Mitter also draws my attention to the fact that in the plaint there is no averment about the surrender of a part of the tenancy. The defendant, on the other hand, has explained in the written statement why he did not take any action against the subtenants and why he continued paying the original rent. He also emphatically denies that there was any surrender of the part of the premises in the occupation of the sub-tenant to the plaintiff. In this connection, Mr. Mitter urges that the fact that the defendant is going on paying the same rent establishes that the same tenancy was continuing. The learned court below, according to Mr. Mitter, was wrong to find that there was waiver and acquiescence by the defendant.

4. In support of his contention Mr. Mitter refers to a decision reported in (1899) 26 Ind App 58 (PC) (Lala Beni Ram v. Kundan Lall) and submits that the conduct of the defendant in the present case cannot amount to waiver and acquiescence. Mr. Mitter next relies on a decision reported in Sha Mulchand and Co. Ltd. (In Liquidation) Vs. Jawahar Mills Ltd., . In this case, it has been held that mere waiver, acquiescence or laches may not amount to an abandonment of a right or to an estoppel and in the facts of the present case it cannot be said that the conduct of the defendant was such that it amounted to abandonment of his former tenancy. Mr. Mitter submits that acquiescence is not a question of fact but a legal inference from the facts found, and it is open to the appellant in a second appeal to invite the High Court to consider whether the question of acquiescence has been properly decided by the lower court. In support of his contention Mr. Mitter refers to the observation of Mukherji, J., in a case reported in (1906) 4 Cal LJ 198 (Ananda Chandra Sen v. Parbati Nath Sen).

5. Mr. Ranjit Kumar Banerji, the learned Advocate appearing on behalf of the plaintiff contends that the notice is good inasmuch as similar notices being Exhibits B and B (2) were served earlier, but the defendant did not raise any objection. It is also submitted by Mr. Banerji that for a period of 4 years the plaintiff was realising rent from the subtenants to the knowledge of the defendant. But the defendant did not take any action. Simply because the defendant was paying the original rent it cannot be said that the old tenancy continued. The facts and circumstances of the case clearly prove that there was a go-by to the old tenancy and a new relationship was created between the plaintiff and the defendant by which it was agreed that the plaintiff would realise rents from the sub-tenants and the defendant would go on paying the original rent. Besides the circumstances which have been mentioned already, there is no evidence on record to show that there was ever any agreement between the parties from which it can be said that a new relationship was created. Mr. Banerji relies on the decision reported in Sm. Sailabala Dassee Vs. H.A. Tappassier, ,

which was also relied on by the court of appeal below, in support of his contention that in this case there has been an implied surrender. The facts of the case mentioned above are completely different from the facts of the present case and therefore, has no application. Mr. Banerji also relies on AIR 1936 77 (Privy Council) and also on (1868) LR 3 HL 249 (Lewis H. Evans, Official Manager of the Agriculturists' Cattle Assurance Co. v. Aaron Smalleombe). The principles laid down in those cases do not help much in deciding the issue of the present case, The only point that awaits decision is whether from the fact that the plaintiff in realising rents from the sub-tenants and the defendant is paying the original rent and that the defendant never raised any objection and did not take any action against the sub-tenants it is proved that there was an implied surrender on the part of the defendant of his old tenancy and a new tenancy was created between the plaintiff and the defendant, I do not agree with the courts below when they find that there was implied surrender and a new relationship was created between the parties. The facts enumerated above do not go to establish the case of implied surrender and consequently, there is no question of creation of a new tenancy. In the result, the notice of ejectment which has been served on the defendant cannot be said to be legal and valid and it must be held that the same is bad as it did not describe the defendant's tenancy correctly. In view of my findings above, it is not necessary to pass any order on the application for taking into consideration the subsequent events,

6. In the result, Second Appeal No, 1135 of 1971 is allowed on contest. The suit is dismissed. Consequently Second Appeal No. 304 of 1973 to dismissed on contest. There will be, however, no order for costs in these appeals.

S A. No. 1135 of 1971 allowed; S. A. No. 304 of 1973, dismissed.