
(2019) 11 CAL CK 0101

Calcutta High Court

Case No: Appeal From Decree (APD) No. 85 Of 2018 With Civil Suits (CS) No. 994 Of 1990

Uma Poddar And Anr

APPELLANT

Vs

Jaspal Singh Chandhok
And Ors

RESPONDENT

Date of Decision: Nov. 14, 2019

Acts Referred:

Transfer Of Property Act, 1882 â€” Section 51, 108, 108(h)#Transfer Of Property (Amendment)
Supplementary Act, 1929 â€” Section 56

Citation: (2019) 11 CAL CK 0101

Hon'ble Judges: Soumen Sen, J; Saugata Bhattacharyya, J

Bench: Division Bench

Advocate: Sakya Sen, Amritam Mondal, Aditya Mondal, Malay Kr. Ghosh,, Rahul Karmakar,
Anindita Mukherjee, H. Banerjee

Final Decision: Dismissed

Judgement

The Court: This appeal is directed against a decree dated 3rd July, 2014 at the instance of Uma Poddar, Ravi Poddar and Amit Kumar Poddar

claiming 2/12th share in the property in question. The decree directs division of the property in accordance with the shares declared in the said decree

as also the entitlement of the plaintiff to 10/12th share of the rent collected from the premises. The defendant nos.2 and 3 have preferred a separate

appeal.

The appellant has claimed his right in respect of the property on the basis of same and the similar agreement that was executed by the other co-

owners and co-sharers of the property in question in favour of the plaintiff. If the two co-owners and/or co-sharers, who executed the sale deed in

favour of the plaintiff, claim ownership over the structures, the rest of the co-owners being similarly placed cannot be said to having any interest over

the structures.

The tracing of right over the property and structure by the plaintiff as well as the defendant no.1 are on the basis of the same nature of the agreement.

The sale deed executed in favour of the appellant by two co-owners of the property results in the appellant acquiring 2/12th share in the property. The

other co-owners on same terms have executed sale deed in favour of the plaintiff. The ownership over the structures by the legal heirs of the Lahiris

are accepted by both the appellant and the decree-holder on the basis of the sale deeds executed in their favour.

It is needless to mention that the benefits of the structure, if had gone in favour of the appellants, must also go in favour of the plaintiff. On such

consideration, we feel that the appellants cannot be a party aggrieved as they would be benefited in the event the decree is upheld with regard to the

structure as well.

Mr. Sakya Sen, learned Counsel appearing on behalf of the appellant, has fairly submitted that the appellant is receiving 2/12th share of the rent in

respect of the land, which clearly supports that the legal heirs had title over the said land, otherwise the appellant could not have received such rents

from the defendant nos. 2 and 3. However there was no evidence to show that the rent was only for the land and not for structures. The appellants

are related to the lessees. They tried to espouse the cause of the lessee indirectly by raising an objection with regard to the entitlement of the rent by

the plaintiff in relation to the structure. The admission on denial of the right to the structure by the appellants in this appeal are not material. The right

to the structure after determination of lease by the owners cannot be doubted.

It is an admitted position that the original lease had expired and the defendant nos. 2 and 3 made attempt to seek a specific performance of an alleged

agreement entered into with some of the co-owners in respect of the said property. The said suit was dismissed on merits.

It is relevant to refer to the lease agreement entered into between Nirod Lahiri as lessee and Madan Lal Poddar as the original lessor. Madanlal

Poddar was engaged in business as a dealer in motor cars and accessories. Under the terms of the lease agreement, the lessor gave to the lessee the

land appertaining to the demised premises and the lessee was granted liberty to "erect, construct, set up and fix any buildings, erections, houses,

quarters, structures, sheds, godowns, offices and worships with the previous sanction of the Corporation of Calcutta" for an initial period of fifteen

years along with an option to the lessee to extend the agreement for a further five years. The lessee was also entitled "to erect or build or put up or

permit to be erected or built or put up on the demised premises any new buildings, structures, and sheds and to make or permit to be made any

additions and alterations to and in any building (then) existing and at any time (thereafter) existing as the lessee shall think necessary subject to the

sanction of the Corporation of Calcutta." It was agreed between the parties that all buildings, erections, structures, factory, workshops, godowns and

other fixtures now existing or that may hereafter be built or erected or set up on the demised premises or any part thereof during the continuance of

the term shall belong and shall continue to belong to the lessee. It was also agreed that at the expiration or sooner determination of the lease the lessee

would peacefully and quietly yield and deliver up possession of the demised premises to the lessor except all buildings, erections, sheds, et cetera

erected or to be erected on the demised premises and all additions thereto and all fixtures thereto.

In the recital to the lease deed the rights of the lessee to the structures as owners are recognised. In Clause 4(a), 4(b) and 4(c) the ownership of the

lessee in relation to the structures erected by the lessee during the tenure of the lease with the right to remove, dismantle, and carry away for the use

of the lessee is clearly mentioned. The said Clauses state:-

4. Provided always and it is hereby agreed by and between the parties hereto as follows

a) All buildings erections structures factory workshops godowns and other fixtures now existing or that may hereafter be built or erected or set up

on the demised premises or any part thereof during the continuance of the term hereby granted belong and shall continue to belong to the Lessee;

b) On or before the determination of the tenancy hereby created the lessee shall be at liberty to dislodge dismantle remove take and carry away for

his use all buildings erections bungalows workshops sheds, structures plant, machinery and appliances set up erected or brought in or upon the demised

premises or any part thereof and all fixtures and articles belonging to the lessee within three months from the date of the determination of the term

hereby created without causing any damage to the demised land and after repairing damage, if any, to the demised premises and after having first paid

the rent upto the date of the delivery of possession;

c) The sum of Rupees Four thousand and eight hundred being an equivalent of Sixteen months rent from First day of September One

thousand nine hundred and fifty-one to Thirty-first day of December One thousand nine hundred and fifty-two has been paid by the Lessee to the

Lessor in advance (as the Lessor both hereby acknowledge) and the same shall be appropriated by the Lessor in payment of the rent for Sixteen

months from the First day of September One thousand nine hundred and fifty-one to the Thirty-first day of December One thousand nine hundred

and fifty-two. Rupees Three hundred is also paid by the Lessee to the Lessor as deposit for one month's rent (the receipt whereof is also

hereby acknowledged by the Lessor).

The lease is silent as to the consequences of the lessee failing to remove the structures within three months after the expiry and/or the determination

of the lease. It appears that the defendant no. 3 has created tenancies and the premises are fully occupied. The intention that can be gathered from

the deed of lease unmistakably shows that the lessee would remain the owner of the structures till the determination and would be obliged to remove

and/or dismantle all such structures erected within three months of the date of the determination of the term without causing damage to the demised

land and would be required to pay rent up to the date of delivery of possession. In other words, the lessee would be obliged to compensate the lessor

for the period of three months within which time the lessee would be required to remove all such fixtures, structures, buildings, etc. The defendant no.

3 has admittedly not removed the structures nor paid any occupation charges after the expiry of the lease.

The question arises whether the structures erected in the demised premises as well as rents receivable in respect of such structures would be taken

into consideration for partition amongst the co-sharers. Unlike the English Law the law of this country recognizes ownership of the structure

separately from the owner of the land.

“It is by now well settled that the maxim, what is annexed to the soil goes with the soil, has not been accepted as an absolute rule of law of this

country; see *Tkakoore Chunder Parmanick v. Ramdhone Bhattacharjee* (1866) 6 W.R. 228; *Lala Beni Ram v. Kundan Lal* MANU/PR/0070/1927.

These decisions show that a person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser,

nor would the buildings so constructed vest in the owner of the land by the application of the maxim *quicquid plantatur solo, solo credit*. (In *Bishan Das*

and Ors. Vs. The state of Punjab and ors. AIR 1961 SC 1570)

The various clauses of the lease are consistent with the ownership in the building being with the lessees in which the lessors had no right while the

lease subsisted. In *Narayan Das Khettry v. Jatindra Nath Roy Chowdhury* (1926) 54 I.A. 218 the Privy Council approved the observations of Sir

Barnes Peacock in the case of *Thakoor Chunder Poramanich v. Ramdhone Bhattacharjee* (6 South W.R. 228) to the following “We have not been

able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil

becomes a part of it, and is subjected to the same rights of property as the soil itself.Ã¢â¬â¢

In the case of Vallabhdas Naranji v. Developments officer, Bandra (1918) 56 I.A. 259 the Privy Council once again referred to Sir Barnes

PeacockÃ¢â¬â¢s observation as stated above. The Privy Council also quoted the following observations of Couch, C.J., in the case of Narayan V.

Bholagir (6 Bom. H.C. (A.C.J) 80): Ã¢â¬â¢..... We cannot, however, apply to cases arising in India the doctrine of the English Law as to buildings, viz.,

that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India that the party so building on

anotherÃ¢â¬â¢s land should be allowed to remove the materials.Ã¢â¬â¢

The aforesaid observations have been approved and followed by the HonÃ¢â¬â¢ble High Court in K.A. Dhairyawan and ors. Vs. J.R. Thakur and ors.

AIR 1958 SC 789. It was observed:-

8. Normally, under Section 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and buildings

erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the

same condition as he found it. The ownership, therefore, of the building in this case was not with the lessors but was with the lessees. Under Section

108 of the Transfer of Property Act there was nothing to prevent the lessees contracting to hand over any building or structure erected on the land by

them to the lessors without receiving any compensation.

The aforesaid decisions are clear authority for the proposition that a building can be owned by one man and the land by another in India, and that in a

case where a lessee puts up a building on a vacant plot of land taken on lease by him, although the lessor may be the owner of the land, the building

belongs to the lessee and not to the lessor. Section 108(h) of the Transfer of Property Act also recognises the same principles and the said provision

would apply to cases where there is no agreement to the contrary. It is thus, necessary to consider the provision of the lease deed to ascertain the

intention of the parties. The court in such a situation is not bound to look, merely to the form which the transaction has taken but also entitled and

indeed, bound to consider what is the true nature of the transaction and to give effect to it.

The rent component forms an important factor to understand the transaction. Ownership is nothing more than a bundle of rights in relation to property.

The aggregate of rights constitute absolute ownership.

On the aspect of compensation, the lessee's right is not the same as in English law but courts have consistently followed the principle laid down by

a full Bench of this Court in Paramanick's case (supra). In that case, the full Bench held –

“We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any

bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was

made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil –” the option of taking

the building or allowing the removal of the material, remaining with the owner of the land, in those cases in which the building is not taken down by the

builder during the continuance of any estate he may possess.

In *Ismail Kani Rowthan vs. Nazarali Sahib and Ors.* reported at (1904) ILR 27 Mad 211 the Division Bench of the Madras High Court observed:

“10. The rules laid down by the Transfer of Property Act thus substantially reproduce the law as it stood before the Act. It is, however,

noteworthy that Clause (h) (of Section 108) only provides for the tenant removing, – “during the continuance of the lease, all things which he may

have attached to the land and nothing is said as to the rights of the parties in respect of such things after the determination of the lease, if they have

not been already removed by the tenant. The question may arise whether the tenant forfeits all his rights in such things if he has not so removed them;

and in the absence of any contract on that point, the question will have to be solved with reference to "local usage", whatever may be the

precise sense in which that expression is used in Section 108. According to the customary or common law of the land, as laid down in

Paramanick's case B.L.R. Sup. 595 the option in such cases will be with the lessor either to take the building on paying compensation, or, if he is

unwilling to pay compensation, to allow the tenant to remove the building the measure of compensation (in the former case).

The measure of compensation could be the value of materials (after the building is demolished) "a juristic principle as logical and refined as, in the

great majority of cases, it is advantageous to both parties by obviating injury to either and at the same time preserving the building."

In Dhariyawan (supra) the Supreme Court held that although under Section 108 the lessee has the right to remove the building but by the contract

between the parties the lessee had agreed to hand over the same to the lessor without the right to receive compensation at the end of the lease, the

matter in such a case would be governed by the contract between the parties and since the contract between the parties merely transferred the rights

in the building only while the lease subsisted, it was clear that at the end of the lease the things attached to the earth by the tenants would pass over to

the lessor-owners of land in accordance with the contract. In such a circumstance, it is not necessary that the contract should provide for

compensation to be paid to the lessor. As far back as 1908, it was held by a division Bench of the Madras High Court in Mahomed Meera Usani

Rowthen and Ors. Vs. Nizur Ali Sahib reported at 4 I.C. 1129 that section 108 (h) of the Act only provides for a statutory right to remove the building

but not a statutory right to receive compensation. In Mahomed Meera Usani Rowthen (supra), once the court found that the right to remove the

building existed, the court allowed the lessee to remove the building within a short time frame (in that case, two months).

Applying the principles of Dhariyawan (supra) and Mahomed Meera Usani Rowthen (supra) to the factual circumstances of the present case, it can

be seen that the contract between the parties, that is the lease agreement dated 4th October 1951, expressly provided in Clause 4 (b), which has been

reproduced hereinabove, that the lessee would have to, on or before the determination of the tenancy, dislodge, dismantle, remove, take and carry

away for his use all buildings and erections set up, erected or brought in or upon the demised premises within three months from the date of the

determination of the lease term without causing any damage to the demised land.

Therefore, applying the principle of Dhariyawan (supra), it is clear

that in such a circumstance the contract between the parties would take precedence in determination of the rights of the parties and the contract had

stipulated that the lessee was to remove the building. Further, applying the principle laid down in Mahomed Meera Usani Rowthen (supra), it is clear

that the lessee had the right of removal but that such a right could be circumscribed. In the Mahomed Meera Usani Rowthen (supra) (supra) the court

had granted two months time to remove the building whereas in the present case the parties had agreed, in clause 4(b) of the contract, that the lessee

was to remove the building within three months. Therefore, the natural consequence of such a term in the contract would be that once the three month

period ended and the building was not removed, the lessee would lose the right to remove the building or receive any compensation from the lessor.

In the context of Section 51 of the Transfer of Property Act read with Section 108(h) of the Transfer of Property Act in a concurring judgment

Justice Abdur Rahim observed that the court would infer a contract to pay compensation if the landlord by his conduct encouraged or raised an

expectation in the tenant spending money in making improvements that the latter would not be evicted at all, or at least not without being compensated

for the value of such improvements, and the improvements were in fact made under such expectation. Such a contract is inferred to relieve the tenant

from the fraud of the landlord. The doctrine of equitable estoppels should not be extended as between a landlord and his tenant to a case where all

that can be alleged against the former is that he did not interfere and merely remained passive with the knowledge that the tenant was making

improvements under a mistaken belief that he had a more stable interest in the land than that of a tenant at will or a tenant from year to year. Section

108 only deals with the right of the tenant to remove the fixtures he has placed in the land and S. 51 applies only to the case of a transferee of an

absolute interest in land. If a tenant knowing the extent of his interest in the land in his possession, chooses to spend money upon a title which he must

know would soon come to an end, this is his own folly and he cannot ask the owner of the land to recoup him for such expenditure.

However, all the decisions before 1929 proceeds on the basis of unamended provision of Section 108(h) of the Transfer of Property Act 1882, by the

Amendment Act, 1929 Section 56 of the Amendment Act has amended Section 108(h) of the Transfer of Property Act. The insertion and substitution

made under the Amendment Acts are shown in italic:

“h. The lessee may (even after the determination of the lease) remove, at any time (whilst he is in possession of the property leased, but not

afterwards) all things which he has attached to the earth; provided he leaves the property in the state in which he received it.”

In fact, the phrase “whilst he is in possession of the property leased, but not afterwards” was substituted for during the continuance of the lease.

It means therefore that even after determination of the lease while the lessee is in possession of the property leased would be entitled to remove all

structures after the determination of the lease so long he continues to remain in possession but not afterwards.

The amendment provision came up for consideration in Govinda Prosad Shah and Anr. v. Sreemutty Charusila Dassi reported at AIR 1933 Cal 875

where Chief Justice Rankin speaking on behalf of the Division Bench observed:

Clause (h), S. 108 is intended to be a complete statement of the tenant's right as regards removal of structures, including a case of removal

after termination of tenancy. If the right given by Cl. (h) is exhausted, the tenant cannot have a further right to remove the fixtures, making out his

right by the personal law or by the general rule of equity and good conscience which had prevailed before passing of Transfer of Property Act (1882).

If the tenant does not remove them within a reasonable time after termination of the tenancy, he has no right to remove them or to sue for

compensation.

Thus it makes it clear that the lessee has to remove it within a reasonable time. The full bench of the Patna High Court in *Bastacolla Colliery Co. Ltd.*

vs. *Bandhu Beldar and anr.* reported at AIR 1960 Pat 344 echoed the same principle. It was observed that the provision of law and the

preponderance of authority are against the argument that the lessees are entitled to compensation for structure made by them. However, the lessees

would be entitled to remove their structures and materials on expiration of the lease.

The Division Bench of the Madras High Court in *Sundareswarar Devasthanam v. Marimuthu* reported at AIR 1963 Mad 367 held that both under the

common law as well as under the Transfer of Property Act, the right of a tenant who had put up a superstructure on a lease hold land which was

taken on a terminable lease, will be only to remove the superstructure at the time of delivery of possession on the termination of the lease. There

would be no right to compel the landlord, unless the latter agrees to do so, to pay compensation for unwanted superstructure. The landlord who had

obtained possession of the land cannot be compelled to surrender back the land because the tenant had failed to remove the superstructure at the time

he vacated the property. If it is proved that the landlord had appropriated the materials which formed part of the superstructure, the tenant can only

have the value thereof assessed and recover the same.

In *Angammal vs. Malic Mohamed Syed Aslami Sahib* reported at AIR 1916 Mad 220, the majority judgment it has been reiterated that on the

determination of lease the option is with the lessor either to take the building on payment of compensation or, if he is unwilling to pay compensation to

allow the tenant to remove the building.

The lessor cannot be prevented from using the said land with structures as the lessees had failed to remove such structure within reasonable time.

However, in this appeal, we are not required to decide the issue raised by the lessees as to the entitlement of the plaintiff to realise 10/12th of the rent

for the structure since the respondent nos. 2 and 3 have filed a separate appeal in respect of that portion of decree by which the plaintiff became the

owner of 10/12th share of the premises together with its entitlement of 10/12th share of rent collected from the premises.

In view thereof, the challenge to the decree by the appellant fails.

APD 85 of 2018 stands dismissed. However, there shall be no order as to costs.