

(2009) 09 CAL CK 0013

Calcutta High Court**Case No:** G.A. No. 1782 of 2009, A.P.O. No. 189 of 2009, A.P.O.T. No. 254 of 2009 and C.S. No. 771 of 1981

Ravi Kumar Agarwal

APPELLANT

Vs

Tarun Kumar Ghose and Others

RESPONDENT

Date of Decision: Sept. 16, 2009**Acts Referred:**

- Constitution of India, 1950 - Article 137

Hon'ble Judges: Pinaki Chandra Ghosh, J; I.P. Mukerji, J**Bench:** Division Bench**Advocate:** Anindya Kumar Mitra, Abhrajit Mitra, Debductta Sen, Suman Dutt, Arindam Mukherjee and Navneet Misra, for the Appellant; Ranjan Kumar Deb, Surajit Nath Mitra, Ashish Chakraborty and Suparna Mukherjee, for the Respondent**Final Decision:** Dismissed

Judgement

I.P. Mukerji, J.

There is a premise numbered 2/1, Ho-Chi-Minh Sarani, Calcutta, which is one of the most expensive places in the city. It is here that the appellant Ravi Kumar Agarwal operates. In one portion of this premise he runs four different kinds of businesses. One is a cafe, another a pharmacy by the name of Harrington Blue Print, another a ration shop and the last an enterprise called R.K. Communications.

2. Nobody really knows the exact date and time the appellant started occupying this premise. But by the judgment and order under appeal dated 12th May 2009, he has been directed to hand over vacant possession of the portion occupied by him to the receiver within four months of passing of the order. It has been held in that judgment and order that his induction had been made illegally by the then receiver without obtaining permission of the court. Hence, this appeal by him.

3. This power and practice of the court is well known. When a receiver has been appointed over a property, it is possession by the court. If any person is brought

into the premise by the receiver without authority of the court, the court has summary powers of evicting that person. This law is very clearly stated in Kerr on Receiver and Woodroffe on Receiver. It has also been recognised by the Supreme Court in [Krishna Kumar Khemka Vs. Grindlays Bank P.L.C. and others](#).

4. Now the whole question in the appeal seems to revolve around the time when the appellant was brought into the premise. If he was inducted before the appointment of receiver, then the due process of law to be undertaken before his eviction would be by a regular suit. If his induction was by the receiver without the leave of the court then the summary proceeding in which he was ordered to vacate the premise, would be the due process of law for him.

5. It is more or less certain that he was in the premises on and from 5th March 1985.

6. In the above suit an order was passed on 30th July 1982 appointing a receiver. The order was specific: "learned advocate Mr. Indrajit Sarkar is appointed receiver and is directed to collect the rents or occupation charges from persons in occupation of premises No. 2/1, Ho-Chi-Minh Sarani, Calcutta.... The receiver will pay all outgoings in respect of the said premises out of the rents collected."

7. On 5th March 1985, the appellant was in occupation of the premises and order was passed by this court accepting him as an occupier subject to payment of occupation charges.

8. In August 1997 an application was heard by this court where allegations against the receiver were made that he had been illegally inducting occupiers to the premises. It appears that at the time of disposal of that application the only ground that was urged was that the receiver had left the legal profession and on that ground he be discharged. Accordingly, by 22nd August 1997 an order was passed discharging the receiver, only recording that he had left the profession.

9. Thereafter, personnel of the receiver were changed from time to time.

10. It appears that on 13th July 2007 a report regarding occupancy was filed by the existing receivers.

11. At or about the same time on or about 5th September, 2007 a suit was filed by the appellant before the City Civil Court claiming to be a tenant inducted by the receiver and under the receiver.

12. In March, 2008 this application was filed for his eviction.

13. During the hearing of this application before the Hon"ble First Court the counsel for the appellant submitted before the court that the appellant had been inducted by the joint receivers.

14. Thereafter, an application has been filed by the appellant before the City Civil Court for amendment of the plaint. In the City Civil Court it was also averred in the

plaint that the appellant had been inducted by the joint receivers. Now the amendment sought for is that the appellant was there in the premises as a tenant under the predecessor- in -interest of the plaintiff much before filing of the suit.

15. Now, it is the case of the appellant, a part of it for the first time in appeal that the appellant was in occupation before the appointment of receiver and that in ordering eviction in a summary proceeding by this court by the judgment and order under appeal dated 12th May 2009, the due process of law has not been observed.

16. Both parties have made elaborate submissions which are discussed hereunder.

17. The following submissions have been made before the court.

18. Learned counsel for the appellant has made the following submissions:

(i) The appellant came into possession of the said portion of the premises by purchasing the business of Fulgant & Co., Hari Singh and Gurcharan Singh, prior to appointment of the receiver as lessee or sub lessee. His eviction can only follow a proper decree.

(ii) The order appointing the receiver did not permit the receiver to take possession of the premises. Therefore, the receiver was not custodia legis. Order merely permitted the receiver to collect rents.

(iii) By the order dated 5th March 1985 and thereafter this court permitted the occupation of the appellant upon payment of occupation charges.

(iv) The respondent made an application being G.A. No. 3007 of 1997 where the respondent could have asked for the eviction of the appellant but did not do so. Therefore, there was an estoppel operating, preventing the respondent from taking steps against the appellant. Further the orders passed by the court from time to time operated as constructive res judicata in as much as the respondent could have asked for eviction of the appellant but did not do so.

(v) By such conduct there was acquiescence and approbation by the respondent.

(vi) Even if the appellant is held to be a trespasser due process of law has not been observed, that is, eviction by a regular suit.

(vii) The application where the order under appeal was passed is barred by the laws of limitation.

(viii) Admission made by counsel or made elsewhere can be explained or contradicted and is not conclusive.

(ix) The eviction order passed by the appellant was without observing due process of law. No order can be passed against the appellant without undergoing a regular trial

(x) Lastly, the appellant has been permitted with the acquiescence of the respondent to remain on the premises for so many years and hence cannot be summarily ejected.

19. In support of his submission that a specific order has to be passed for possession of a property by receiver and the appointment of a receiver does not vest possession of the property in him, learned counsel for the appellant has cited [Anthony C. Leo Vs. Nandlal Bal Krishnan and others](#), Kanailal Halan vs. Manoo Bibi and others, 29 CLJ, 424. He further argued that admission is a species of evidence and it can be explained or contradicted citing [Motilal Chimanram Vs. Sarupchand Prithiraj](#), and may not be conclusive citing [Basant Singh Vs. Janki Singh and Others](#), [Delhi Transport Corporation Vs. Shyam Lal](#), and [Sri Swami Krishnanand Govindanand Vs. M.D. Oswal Hosiery \(Registered\)](#), .

20. Regarding the argument made on res judicata and constructive res judicata which includes the argument that there may be res judicata or constructive res judicata in interlocutory proceedings [Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others](#), and [Gulabchand Chhotalal Parikh Vs. State of Bombay \(Now Gujarat\)](#), Satyadhyan Ghosal and others vs. Smt. Deorajin Debi and another, and [Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another](#), and [U.P. State Road Transport Corporation Vs. State of U.P. and Another](#), have been cited.

21. It was further argued that the Limitation Act, particularly Article 137 governed this proceeding and therefore it was hopelessly barred, citing The [The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma](#), .

22. In support of the argument on the principle of estoppel approbation and reprobation he has cited [Hemanta Kumari Devi Vs. Prasanna Kumar Datta](#), and [Thomas John Vs. P. Kochammini Amma and Others, etc.,](#) .

23. Where third party rights have been affected, or where a premise is in occupancy of a trespasser, due process of law has to be resorted to before evicting such persons as laid down in [Anthony C. Leo Vs. Nandlal Bal Krishnan and others](#), and [Ratan Lal Jain and Others Vs. Uma Shankar Vyas and Others](#), . He also cited Indian Oil Corporation Limited vs. Jharna Sarkar & Ors. an unreported decision of the Division Bench of this Court presided over by Ashok Kumar Mathur, CJ & Ashim Kumar Banerjee, J. and decided on 10th February, 2004.

24. On the contrary learned counsel for the respondents made the following submissions:

(i) By the order dated 30th July, 1982 appointing the receiver the property became custodia legis.

(ii) The appellant came into possession after appointment of receiver. He was illegally inducted by the receiver.

(iii) In the City Civil Court plaint, the appellant specifically admitted being inducted by the receiver. Much later after the order under appeal was passed, so an application was made before that court for amendment of the pleadings.

(iv) The delay was explained by submitting that the illegal occupancy of the appellant was highlighted by the report of the receiver filed on 13th July, 2007.

(v) The appellant has always been a mere licensee under the receiver and various occupation charges receipts have been placed to protocol.

25. In such a situation the court is justified in ordering summary eviction and buttresses such contention by citing [Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal](#), Biswanath Kundu vs. Manindra Nath Sadhukhan, 1974(1) CHN 451 and [Spl. Land Acquisition Officer Vs. Dharmaraddi Venkatearaddi Rangannavar](#).

26. The rival contentions have been considered.

27. There is no evidence produced whatsoever to show the presence of the appellant in the premises before the appointment of the receiver on 30th July 1982.

28. It is also equally true that by the order dated 5th March 1985 and thereafter by several orders the court permitted the appellant to stay on the premises upon payment of occupation charges.

29. It is also undisputed that the respondent permitted such occupancy to continue. The attitude of the parties was that the occupiers pay occupation charges to the receiver so that the estate can earn income. This court was invited from time to time to revise occupation charges. In that way this occupation was continued.

30. Since the appellant has not been able to prove any evidence of his presence before the appointment of receiver, there is no doubt left in our minds that he was inducted by the receiver and continued to be in occupation paying occupation charges to the receiver.

31. It is plain from a reading of the order dated 30th July, 1982 that receiver was appointed over the property in question.

32. When a receiver is appointed over a property, it is custodia legis and the receiver is in possession of the property as possession by the court. All occupiers occupy under him. Without the leave of the court he cannot change occupancy. If an occupier has been inducted by the receiver, such occupier is under the control of the court and can be evicted by it any time. Here the receiver had no power to and could not create a lease. The occupation of the appellant was at best a licensee under the receiver. (See [Krishna Kumar Khemka Vs. Grindlays Bank P.L.C. and others](#)). Therefore all the cases on this proposition cited by the appellant, narrated above, do not deal with facts which are even remotely similar to the present case.

33. It is also quite plain on a consideration of the above authorities that when an occupier who is a bare licensee has been brought into the premises by the receiver, such occupier or licensee can be summarily evicted by the court. Our history and practice tells us that this court has always exercised such jurisdiction. In this case an application has been made for eviction to which affidavits have been filed by the appellants and the respondents. Thereafter the application was heard. Such procedure, in our opinion, is due process of law in the above facts and circumstances of the case. We are unable to appreciate how any principle of res judicata or constructive res judicata or approbation or reprobation or estoppel would apply when the court is exercising its jurisdiction over a property which is custodia legis. When such a jurisdiction is being exercised such issues which would bind a particular party will certainly not bind the court. Therefore, all the cases cited in this behalf are quite inapposite. For the same reasons, the law of limitation will not apply. Also because it is a continuing cause of action.

34. Although an admission can be explained or contradicted, if different statements are made at different points of time, the court is entitled to draw its own inference. Here the appellant has certainly tried to take contradictory stands at different points of time. Therefore, in our opinion, the court rightly held that the appellant was an occupier only whose status was that of a mere licensee.

35. However, this court is unable to appreciate the conduct of the respondent in permitting the appellant to remain on the premises for almost twenty five years as an occupier under the receiver. No steps were taken for his eviction.

36. After almost twenty five years, an application was made for eviction and by the judgment and order under appeal the court has evicted the appellant. There is no scope for interference with such order because a licensee is at the will of the court and can be turned out any time. However, eviction without due notice, in the above circumstances would be inequitable and unjust. This occupier who has been permitted to remain on a property for almost twenty five years cannot be ordered to be turned out with four months notice. In these twenty five years he has set up his business which is noted above, arranged his affairs, and earned goodwill.

37. He should be allowed adequate time to vacate the premises and arrange his affairs. In those circumstances we dismiss the appeal but give time to the appellant to vacate the premises by 31st December, 2010. The Appellant will go on paying, till vacation of the premises, the current occupation charges.

38. Till 31st December, 2010 there will be an injunction restraining the respondent from executing the order under appeal. But, if the appellant tries to change the character of the property or parts with or attempts to part with possession or makes default in payment of occupation charges for three months, the injunction would be vacated. Let the appellant file an undertaking to court before the Registrar, Original Side by 22nd September, 2009 giving an undertaking not to part with possession of

the premises, to pay occupation charges till vacation of the premises and to vacate the premises by 31st December, 2010.

39. However, such undertakings would not stand in the way if the appellant is entitled to and advised to file an appeal in the matter.

40. There will be no order as to costs. Liberty to apply.

41. Urgent certified photocopy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Pinaki Chandra Ghosh, J.

42. I agree.