
(1954) 03 CAL CK 0010

Calcutta High Court

Case No: A.F.A.O. No. 29 of 1952

Dilwar Sultan

APPELLANT

Vs

Keshab Chandra
Mukherjee and Others

RESPONDENT

Date of Decision: March 9, 1954

Acts Referred:

- Bengal General Clauses Act, 1899 - Section 8
- Calcutta Thika Tenancy Act, 1949 - Section 28

Citation: AIR 1954 Cal 422

Hon'ble Judges: P.N. Mookerjee, J

Bench: Single Bench

Advocate: Asoke Chandra Sen, for the Appellant; Basanta Kumar Panda, for the Respondent

Judgement

P.N. Mookerjee, J.

This appeal arises out of an application u/s 28, Calcutta Thika Tenancy Act 1949. The application was dismissed by the trial court and the tenant's appeal from the said decision failed before the Subordinate Judge who dismissed it on the merits and also on the ground that no appeal lay from an order rejecting an application u/s 28, Calcutta Thika Tenancy Act, 1949. Hence this Second Appeal by the tenant who has also filed an application in the alternative u/s 115, Civil P. C. for revision of the orders of the two courts below.

2. A preliminary objection has been raised to the maintainability of the second appeal, but in view of the alternative application in revision and the nature of the questions involved in this case, it is not necessary to examine the merits of the said objection.

3. On 15-12-1948 the respondents landlords obtained an ex parte decree for ejectment against the tenant appellant. Before, however, possession could be recovered in execution of the decree the tenant judgment-debtor applied, u/s 28, Thika Tenancy Act,

1949 which had come into force in the meantime, for rescission of the said decree. This application was made on 18-9-1950 and the learned Munsif by his judgment dated the 29th June 1951 dismissed the same on the ground that the applicant was not a "thika tenant" under the Act.

The basis of that finding was that the applicant had failed to prove the "thika system" as required by law. The appeal from that decision was dismissed by the lower appellate court on 8-2-1952. The learned Subordinate Judge held that the learned Munsif's decision was not appealable in law. He also held that the decision of the learned Munsif was right on the merits and the "thika system" not having been proved the applicant was not a "thika tenant" under the Act and the application could not, therefore, succeed.

4. There can be no question that under the law, as it then stood, vide -- "Haran Chandra Dey v. Sm. Charu Bala Dassi" 53 Cal WN 553 (A); -- [Murari M. Mukherjee and Others Vs. Prokash Ch. Chatterjee](#), (B); -- [Sm. Suraj Jan Bibee Vs. Banku Behary Saha](#), (C); -- [Mohammad Mateen Vs. Baijnath Bajoria and Another](#), (D), the decisions of the two Courts below were right on the merits and, if the law had remained as it was, there would have been no scope or occasion for any interference by this Court. The relevant statute, however, has undergone some quick changes in the meantime, the effect whereof requires to be considered in the present case.

5. The appeal to this Court was filed on 18-3-1952 and the alternative revisional application on the 19th. While they remained pending, the Calcutta Thika Tenancy Act, 1949 was amended first by the Amending Ordinance of 1952 and then again by the Amending Act of 1953, and the question is whether in view of these changes of the statute law the appellant has become entitled to any relief.

6. Mr. Sen argues that u/s 5(1) of the Ordinance of 1952, read with the amended definition of "thika tenant" which came along With it, the appellant became entitled to relief u/s 28 of the Act of 1949 and his right in that behalf was not affected by the repeal or omission of the said section or sections by the Amending Act of 1953. He, accordingly, contends that the rejection of his client's application by the two courts below be set aside.

7. On the other hand, the respondents contended that, whatever might have been the position under the Ordinance, the subsequent Amending Act of 1953, by providing in Section 8 that Section 28 of the old Act of 1949 "shall be omitted", has struck at the root of the appellant's claim and, further, that the application must also fail on the ground that the applicant had no locus standi to make the same because of the transfer of his entire interest in the disputed holding sometime before the filing of the said application.

8. I shall take up first the respondents' second objection which relates to the question of "locus standi". The application, as I have already said, was made on 18-9-1950 but, prior to that, the applicant had transferred his entire interest in the disputed holding to one Kumari Dassi by a kobala, dated the 5th May 1950 and registered on the 12th August,

1950. It is, accordingly, urged that, on the day he applied u/s 28 of the Act, he had no interest in the disputed holding and had thus no "locus standi" to make the said application which must necessarily therefore fail.

9. In considering this question of "locus standi" it must be remembered at the outset that the statute in its relevant part merely provides:

"Where "any decree.....for the recovery of possession of any holding from a thika tenant has been made before the commencement of this Act but the possession of such holding has not been recovered from the thika tenant by the execution of such decree".....the Court by which the decree.....was made may, if it is of opinion that the decree.....is not in conformity with any provision of this Act other than Sub-section (1) of Section 5 or Section 27, rescind the decree....."

"Prima facie", the statutory requirements underlined above (here in single quotation) are satisfied in this case and there is nothing in the statutory language to make the section quoted inapplicable merely because the tenant has transferred the holding. Remembering this, I proceed to consider the respondents' argument and it seems to me that, on general principles and in the context of the particular statute, as set out above, there are two obvious answers to that argument.

10. It is true that the applicant had transferred the disputed holding before the filing of the application but it cannot be denied that he was under the liability to make good the transfer and in default to suffer damages. He had also liabilities under the decree e.g., for costs. It thus appears to me that notwithstanding the transfer of the holding he had sufficient interest to entitle him to apply u/s 28 of the Act for rescission of the decree in question.

11. It seems to me further that u/s 28 of the Act the Court can act "suo motu" and no application is necessary to set it in motion. The appellant's application is, therefore, in the nature of an information inviting the Court's attention to certain facts on which it may, if it thinks fit, take action under the section. In this view too no question of locus standi" of the applicant appears to be material.

12. I, accordingly, overrule the second point raised by the respondents.

13. On the other point too the decision must be against the respondents, it is true that they have the decision of Chunder J. -- [Jogai Chamarin Vs. Atul Krishna Laha and Others](#), (E) in their favour. But that decision has since been overruled by a Division Bench of this Court (vide -- [Deorajin Debi and Another Vs. Satyadhyay Ghosal and Others](#), (F)). In this latter case, it was held by Sen J. and myself that in regard to proceedings, pending on the date of the 1952 Ordinance, the rights acquired by a thika tenant u/s 28 of the Thika Tenancy Act 1949 read with the said Amending Ordinance of 1952 had not been taken away by the Amending Act of 1953. We rejected the argument that there was the necessary contrary intention, as required by Section 8 of the Bengal General Clauses

Act, in the proviso to Section 1(2) of this Amending Act which by Section 8, omitted or repealed the old Section 28.

We gave two broad reasons for our view, viz., (1) that, properly read, the proviso, even on its own language, could not affect such proceedings u/s 28 of the Act of 1949 adversely to a thika tenant; in other words, the omission or repeal of the said Section 28 of the old Act of 1949 by Section 8 of the Amending Act of 1953 would not affect such proceedings which would not abate by reason of such repeal but would continue under the Act of 1949 as otherwise amended by the said Amending Act of 1953; and (2) that, in any event, in relation to the above proceedings the proviso would be ambiguous, that is capable of two Interpretations, one favouring the continuance of such proceedings and the other stifling them or causing them to abate and as the former was in consonance with the intention of the Amending Act it was preferable to the other possible construction and ought to be allowed to prevail.

We definitely rejected the view that the proviso could be construed only as envisaging automatic abatement or extinction of all proceedings u/s 28 of the old Act by reason of the omission or repeal of this latter section and we also pointed out that there was nothing in law to prevent us from ascertaining the intention of the Amending Act to resolve the statutory ambiguity or from giving effect to it in the construction of the said proviso.

14. I have heard nothing in this case which even tends to show that we were wrong on the earlier occasion or casts any doubt on the correctness of the view we then expressed. Speaking for myself, I have never claimed infallibility for my views and if a prima facie case is made out for reconsideration I shall never hesitate to lend my helping hand in the matter so that any error committed by me may be suitably rectified in accordance with law. In the annals of this Court instances may be found where Judges have reconsidered their views on particular points of law once they felt convinced that the matter required further consideration.

On occasions they have superseded their own earlier views and overruled themselves. That tradition is worth emulating and never consciously would I allow it to suffer in my hands. If, therefore, I had felt any doubt as to the correctness of our decision in the case of -- [Deorajin Debi and Another Vs. Satyadhyhan Ghosal and Others](#), (F)", I would have referred this case to the Division Bench either to have a re-affirmation of our view by another Bench, of this Court or to have it reversed and the point finally settled by a Pull Bench. I have, however, as I have already said above, no reason to doubt the correctness of that decision. I accordingly, overrule the respondents' second contention.

15. It was not disputed before me that in view of the Amending Act of 1953, the appellant was a "thika tenant". The respondents' decree for ejectment was, therefore, a decree for recovery of possession against a thika tenant as contemplated in Section 28 of the Act of 1949. Admittedly also, the decree was made before the commencement of the said Act and possession had not been recovered from the "thika tenant" in execution thereof.

That being so, the Court by which the decree was made may, if it is of opinion that the decree was not in conformity with any provision of the Calcutta Thika Tenancy Act other than Subsection (1) of Section 5 or Section 27, rescind the decree and that question has now to be considered. It is inevitable, therefore, that this case should go back to the trial court for a determination of the said question and a final decision on such determination in accordance with law.

16. While remanding the case, as above stated, I deem it necessary, in the circumstances of this case, to give one or two general directions. u/s 28 the Court has a discretion in the matter of rescinding a decree. This is indicated by the use of the word "may" by the Legislature. I do not think that that word can properly be construed as "shall" having regard to the scheme and structure of the section and the context in which the word "may" has been used. No doubt the discretion of the Court has to be exercised judicially after taking into consideration all the relevant circumstances but there is no element of compulsion in it. In dealing with this case on remand the trial Court will have regard to this aspect of the matter.

In exercising its discretion u/s 28 of the Act the Court will also take into consideration the legal effect of the transfer made by the appellant in favour of Kumari Dassi in the light of Section 6(e) of the Transfer of Property Act and for that purpose it will add the said transferee as a party to the present proceedings and if she so desires allow her to become a co-applicant so that the rights of the different parties in regard to the-disputed property may be settled once for all and put on a sure and firm footing.

17. I, accordingly, allow this appeal in part, set aside the orders of the two Courts below and send back the case to the trial court for a final decision in accordance with law in the light of the directions given by me and the observations. I have made above.

18. In the circumstances of this case, I direct that the parties will bear their own costs in this Court as also in the two Courts below.

19. In view of the order passed in the appeal, no order is necessary on the alternative application u/s 115 of the Code of Civil Pro-cedure.