

Nurul Huda and Others Vs Smt. Hira Basu and Others

Court: Calcutta High Court

Date of Decision: April 3, 1985

Acts Referred: Civil Procedure Code, 1908 (CPC) " Order 7 Rule 7
West Bengal Premises Tenancy Act, 1956 " Section 13

Citation: AIR 1986 Cal 39

Hon'ble Judges: Sankari Prasad Das Ghosh, J; Ganendra Narayan Ray, J

Bench: Division Bench

Advocate: Bankim Chandra Dutta, Shib Kumar Sarkar, Syed Ataunnabi and J.N. Saha, for the Appellant; Shyama Prasanna Roy Choudhury and Bijan Majumdar, for the Respondent

Final Decision: Dismissed

Judgement

C.N. Ray, J.

This appeal arises out of judgment and decree passed by the learned Judge, 4th Bench, City Civil Court, Calcutta in Title

Suit No. 1412 of 1978. By the aforesaid judgment a decree has been passed for eviction of all the defendants impleaded in the said Title Suit. The

defendants Nos. 3 to 14 have preferred the instant appeal impleading the plaintiff as respondent No. 1 and defendants Nos. 1 and 2 as pro forma

respondents Nos. 2 and 3. The said Title Suit was instituted by the plaintiff respondent No. 1 for eviction of the defendants from the disputed

premises being the back portion of 83, Rafi Ahmed Kidwai Road, Calcutta containing 18 rooms more fully described at schedule to the plaint. The

case of the plaintiff appellant No. 1 is inter alia that one Ranjit Kumar Bose since deceased was the owner of the entire premises No. 83, Rafi

Ahmed Kidwai Road, Calcutta and the said Ranjit Kumar Bose died on 30th June, 1968 after executing a Will whereby he bequeathed the entire

property to his wife, viz., the plaintiff and the said plaintiff was also appointed as sole executrix by the said Will.

2. The plaintiff applied for probate of the said Will in this Court and the said Will was duly probated by this Court and the plaintiff was appointed

as sole executrix of the said will to the estate of deceased Ranjit Kumar Basu. By an indenture of lease dated 12th Aug., 1959 entered into

between the said Ranjit Kumar Basu and one Haji Ansarullah, the said Ranjit Kumar Basu had demised the back portion of the said premises No.

83, Rafi Ahmed Kidwai Road, as described in the schedule to the plaint to the said Haji Ansarullah for a period of 21 years commencing from 1st

Sept., 1959 at a rental of Rs. 211/- per month payable according to English Calendar on the terms and conditions contained in the said indenture

of lease dated 12th August, 1959. A copy of the said lease was annexed to the plaint being Annexure "A". The plaintiff's further case is after the

death of Haji Ansarullah, the defendants Nos. 1 and 2 became his heirs and legal representatives and as such became joint lessees under the

plaintiff on the terms and conditions contained in the said indenture of lease. The lessees had committed various breaches of covenants and the

plaintiff has set out instances of such breach of covenants in various clauses under paragraph 6 of the plaint. The plaintiff has contended that in view

of the said breaches committed by the said defendants Nos. 1 and 2 viz., heirs of Hazi Ansarullah the said lease stood forfeited and the plaintiff got

the right of re-entry to the premises and to recover the same from the possession of the defendants. It is also case of the plaintiff that the plaintiff

determined the said lease by a registered notice sent through her Advocate calling upon the said defendants Nos. 1 and 2 to quit, vacate and

deliver up the vacant and peaceful possession of the said premises on expiry of last date of Sept., 1977. A copy of the said notice dated 10th

August, 1977 has been annexed to the plaint being Annexure "B". The plaintiff has also contended that in spite of such termination of lease, the

defendants Nos. 1 and 2 have failed and neglected to deliver the vacant possession of the said premises and they are continuing as trespassers in

the said premises. It has also been stated by the plaintiff that defendants Nos. 3 to 14 are the sub-tenants and they have been impleaded in the suit

in order to avoid any future complicity of the proceedings and to avoid further litigation. It appears that the plaint was subsequently amended by

incorporating para 8A to the plaint wherein it has been stated that the said registered lease dated 12th August, 1959 made between lessor Ranjit

Kumar Basu since deceased and the said lessee Haji Ansarulla for a period of 21 years commencing from 1st day of Sept., 1959 has been

determined and has come to an end by efflux of time on the first day of Sept., 1980 and as such neither the legal heirs and representatives of the

deceased lessee Haji Ansarullah nor anybody holding under the said Haji Ansarullah has got any right, title, interest or to use, hold and to occupy

the suit premises. It appears that four sets of written statements have been filed. The defendant No. 1 Amina alias Anwara Khatoon has filed a

written statement inter alia denying the material allegations made in the plaint and it has been contended by the said Anwara Khatoon in her written

statement that there is no rent actually or legally due from the defendants and the claim for arrears rent since July, 1964 is illegal and fraudulent. It is

also contended by the said defendant No. 1 that the plaintiff even during the continuance of the said indenture of lease illegally trespassed up to

demised premises and on such re-entry collected monthly rents from the defendant tenant Md. Abbas at the rate of Rs. 30/- per month since

1974. The said defendant No. 1 has also contended that the plaintiff had collected illegally Rs. 362/- each month at the rate of Rs. 22/- from

fourteen tenants of the defendant lessee. In view of such realisation of rent by the plaintiff, the lease agreement was no longer pending and

enforceable. The defendant No. 1 has also contended that the plaintiff by her own illegal action has forfeited her right of re-entry and/or to

determine the said lease. The defendant No. 2 Noorjahan Begum has also filed a written statement and has contended that on the death of said

Haji Ansarulla the defendant No. 1 has inherited the tenancy right. It has also been contended that the defendant No. 2 did not commit any breach

of any of the covenants and as such the question of forfeiture of lease does not arise. The said defendant has also denied the service of any notice

and determination of the lease by the plaintiff. A separate written statement has also been filed by the defendant No. 5 Abdul Aziz and the said

defendant No. 5 has stated that he is neither the tenant under the plaintiff nor under the defendant No. 1. It has been further stated by defendant

No. 5 that his wife is the tenant under the defendant No. 1 and the said wife has been paying rent to the defendant No. 1 regularly and she

possesses the rent receipts for such payment. Defendant No. 5 has also denied that there is any relationship of landlord and tenant between him

and the plaintiff. A joint written statement has been filed on behalf of the defendants Nos. 3, 4, 6 to 14. The said defendants have stated in their

written statement that they are tenants under defendant No. 1 Amina Khatoon and they have been occupying their respective rooms as tenants of

Amina Khatoon on payment of rent to the said defendant No. 1 against receipts granted therefore. The said defendants have also denied the

existence of any relationship of the landlord and tenant between plaintiff and the said defendants and they have categorically stated in their written

statement that they are the tenants under the defendant No. 1. On the pleadings of the parties several issues were framed by the learned Judge

including issues Nos. 2 and 4 to the following effect : --

Issue No. 2 : Did Haji Ansarutlah commit breaches of the covenant in the lease deed dated 12-8-59 as alleged? Is the plaintiff entitled re-entry to

the said premises and recover possession from the defendants?

Issue No. 4 : Has the registered deed of lease dt. 12-8-59 made between Ranjit Kumar Basu and Haji Ansarulla for a period of twenty one years

commencing from 1-9-59 in respect of the suit premises been determined by efflux of time? If so, is the plaintiff entitled to get a decree for

recovery of khas possession of the suit premises?

It may be noted in this connection that in the prayer made by the plaintiff in the plaint no decree for eviction was prayed for against the other

defendants excepting the defendants Nos. 1 and 2 although the plaint was amended incorporating para 8A, the prayer was not amended. It

appears from the exhibits filed in the said suit that the plaintiff had realised rents from 7 tenants in respect of respective rooms under occupation of

such tenants for about four months from April, 1964 to June, 1964. On behalf of the plaintiff, the daughter of the plaintiff got herself examined and

the said witness being P. W. 1 has specifically stated in her deposition that the defendants Nos. 1 and 2 being heirs and legal representative of the

original lessee Haji Ansarullah failed and neglected to pay rent in respect of the said premises and on their request, rents were realised by the

plaintiff for few months from some of the sub-tenants. The plaintiff herself also deposed in the suit and she has also stated in her deposition that

such rents had been realised from some of the sub-tenants for few months at the instance of the defendants Nos. 1 and 2 but plaintiff had never

accepted the said sub-tenants as her direct tenants. It may be noted in this connection that the defendants Nos. 3 to 14 viz. sub-tenants declined to

give any evidence in the suit. The learned Judge after considering respective cases of the parties and evidences adduced in the case has inter alia

come to the findings that there is no evidence of any transfer or assignment of lease adduced on behalf of the plaintiff but there is some evidence of

sub-letting. The learned Judge has further observed that there is contention that some of the subtenants had been inducted even before the time of

the Haji Ansarullah and P. Ws. 1 and 2 have also deposed to that effect. But the learned Judge has not come to any finding as to whether or not

any sub-tenancy was created prior to execution of the indenture of the lease in favour of Haji Ansarullah by the lessor Ranjit Kumar Basu. The

learned Judge has come to the finding that since by efflux of time the lease has come to an end, the defendants Nos. 1 & 2 and also the sub-lessees

viz. the defendants Nos. 3 to 14 are bound by such determination of lease by efflux of time. In that view of the matter, the learned Judge has

decreed the suit on contest with costs against the defendants and it has been directed by the learned Judge that the defendants shall vacate the suit

premises within one month from the date of the judgment, failing which the plaintiff would get khas possession through Court by executing the

decree.

3. As aforesaid, the defendants Nos. 1 and 2 have not preferred any appeal against the said judgment and decree passed by the learned Judge in

the aforesaid title suit but the defendants Nos. 3 to 14 have preferred the instant appeal. Mr. Dutt the learned Counsel appearing for the said

defendants Nos. 3 to 14 viz. the appellants in the instant appeal has contended that the defendants Nos. 3 to 14 do not intend to contend that the

decree for eviction passed against the defendant Nos. 1 and 2 are illegal or not binding on the said defendants. He has, however, contended that in

the facts and circumstances of the case no decree should have been passed by the learned Judge against the present appellants viz., the defendants

Nos. 3 to 14, Mr. Dutt has contended that in the prayer made by the plaintiff in the plaint, no decree for eviction has been prayed for against the

defendants Nos. 3 to 14. He has contended although the plaint was subsequently amended by incorporating para 8A in the plaint, the plaintiff did

not amend the prayer in the plaint seeking for a decree of eviction against defendants Nos. 3 to 14. Mr. Dutt has contended that in the aforesaid

circumstances, the defendants Nos. 3 to 14 did not intend to oppose the prayer for eviction of the defendants Nos. 1 and 2 and hence the said

defendants Nos. 3 to 14 chose not to give any evidence in the suit. Mr. Dutt has submitted that it is an admitted case of the parties that the plaintiff

had realised rents from 7 sub-tenants who are some of the defendants in the instant suit and the plaintiff has granted receipts for such realisation of

rent from the said sub-tenants. He has contended that by such acceptance of rent, the plaintiff has not only approved the continuance of the said

sub-tenants in the demised premises but the plaintiff has also accepted them as direct tenants under the plaintiff. Mr. Dutt has contended that if a

landlord recognises the sub-tenants and accepts rents from sub-tenants directly, then by such payment and acceptance of the rent between the

parties a relationship of landlord and tenant comes into operation and since the landlord has accepted the said defendants Nos. 3 to 14 as direct

tenants and has not also prayed for a decree of eviction against them, the learned Judge was wrong in passing a decree for eviction against

defendants Nos. 3 to 14 along with the defendants Nos. 1 and 2. Mr. Dutt has submitted that the defendants Nos. 3 to 14 viz. the appellants in the

instant appeal have no objection against the decree for eviction passed against defendants Nos. 1 and 2 but the decree passed against defendants

Nos. 3 to 14 should be set aside. He submits that the decree for eviction should be confined only against the defendant Nos. 1 and 2. Mr. Roy

Chowdhury, the learned Counsel appearing for the plaintiff respondent No. 1 has, however, contended that in the written statement filed on behalf

of the defendants Nos. 3 to 14 it has been specifically contended that the said defendants Nos. 3 to 14 are tenants under the said lessees viz. the

heirs of Haji Ansarullah and the said defendants have been paying rents to their landlords viz. the said lessees. In view of such positive statement

made in the written statement, Mr. Roy Chowdhury has contended that it is not permissible for the defendants Nos. 3 to 14 to contend that they

have become direct tenants under the plaintiff by payment of rent and as such no decree for eviction can be passed against the said defendants and

the decree for eviction should be modified by confining the decree for eviction only against defendants Nos. 1 and 2. Mr. Roy Chowdhury has also

contended that although the defendant No. 1 has contended in her written statement that the plaintiff has trespassed into the demised premises and

has collected rents from her tenants directly, the said fact has not been established by the said defendants. Mr. Roy Chowdhury has contended that

the plaintiff and her daughter have deposed categorically that it was only at the instance of the defendants Nos. 1 and 2, the plaintiff had realised

rents from some of the sub-tenants for few months and in no case, the amount realised from such sub-tenants exceeded the amount payable for

any particular month by the said lessees to the plaintiff under the said indenture of lease. Mr. Roy Chowdhury has further contended that the

defendants Nos. 3 to 14 declined to give any evidence in the suit and in view of specific statement made in their written statement that they are the

tenants under the lessee and had been paying rents to the said lessee, the case of the plaintiff should be accepted and the evidence led on behalf of

the plaintiff should also be accepted. Mr. Roy Chowdhury has also contended that in the plaint, specific pleading has been made that the

defendants Nos. 3 to 14 are sub-tenants and they are in occupation of the demised premises under the lessee and the plaintiff is entitled to get a

decree for eviction against all the defendants including the said sub-tenants because of the determination of lease by efflux of time. Mr. Roy

Chowdhury has contended that in view of such specific pleadings and incorporation of para 8A by way of amendment of plaint, the plaintiff is

entitled to get a decree for eviction against all the defendants. He has also submitted that Issue No. 3 has been specifically framed by the learned

Judge for deciding as to whether or not the plaintiff is entitled to get a decree for eviction of the defendants including defendants Nos. 3 to 14.

Mr. Roy Chowdhury has submitted that simply because in the prayer of the plaint specific prayer has not been made for passing a decree for

eviction against the defendants Nos. 3 to 14, it cannot be contended that the Court cannot pass such decree for eviction against the defendants

Nos. 3 to 14. In this connection, Mr. Roy Chowdhury has referred to the provisions of Order 7 Rule 1 and Order 7 Rule 7 of the Civil P. C. Mr.

Roy Chowdhury has contended that the particulars required to be pleaded in the plaint under Rule 1 of Order 7 have been pleaded in the instant

plaint and on the face of such pleading, the Court is quite entitled to pass a decree for eviction against all the defendants. Referring to Rule 7 of

Order 7, Mr. Roy Chowdhury has contended that it shall not be necessary to ask for general or other relief which may always be given as the

Court may think just to the same extent as if it had been asked for. Mr. Roy Chowdhury has submitted that it has been specifically pleaded in the

plaint that the defendants being sub-tenants in the premises in question have been impleaded in order to avoid any multiplicity of proceedings in

future. The plaintiff has also categorically stated that the plaintiff is entitled to get recovery of possession of the demised premises from the said

defendants. In the aforesaid circumstances, the learned Judge is quite justified in passing a decree for eviction against all the defendants and no

exception can be taken by the present appellants against such decree for eviction simply on the score that the plaintiff has not incorporated any

specific prayer for eviction against the defendants Nos. 3 to 14 in the plaint. Mr. Roy Chowdhury has also contended that by the said sub-lease in

favour of defendants Nos. 3 to 14 there has been an assignment of the demised premises by the lessee in favour of the said sub-lessees although

there is no privity of contract between the lessor and the said sub-lessees. In such circumstances the said sub-lessees had a liability to pay rent to

the landlord for the demised premises at least to the extent in their occupation,

4. In this connection, Mr. Roy Chowdhury has referred to a Bench decision of this Court made in the case of Dwijendra Nath Mukherjee Vs.

Promode Kishore Mondal and Others, . It has been held in the said decision that in a covenant of lease running with the land, there is a privity of

estate between the assignee of the lessee and the lessor and such assignee is liable for rent so long as the right exists. Relying on the said decision,

Mr. Roy Chowdhury has contended that in the indenture of lease, there is a covenant running with the land and as such, the tenants of the lessee

namely the sub-tenants being the assignees of the lessee will be bound by the privity of estate between the lessor and the said sub-tenants to pay

rent. Accordingly, the landlord was quite justified in realising rents from them.

5. Mr. Roy Chowdhury has also referred to another Bench Decision of this Court made in the case of Sailendra Nath Bhattacharjee Vs. Bijan Lal

Chakravarty and Others, . It has been held in the said decision that a sub-lessee would be bound by a decree for possession obtained by the

lessor against the lessee, whether the sublease was created before or after the suit, if the eviction is based on a ground which determines sub-lease

also, unless the decree is obtained by fraud or the same is collusively suffered. When the sub-lessee is so bound, he can be ousted in execution of

the decree obtained against his lessor under Order 21. Rule 35 C.P.C., although a sub-lessee was not a party to the suit itself. The fact that the

lessee granted a permanent right to sub-lessee would not avail the latter if in a judgment properly obtained, it is held that a superior interest is not

permanent and has been properly determined. But a decree for possession obtained on a ground which by itself does not annul the sub-lease is not

binding on the sublessee. Relying on the said decision Mr. Roy Chowdhury has contended that even if the said defendants Nos. 3 to 14 would not

have been impleaded, they would have been bound by the decree for eviction passed against their lessors namely the defendant No. 1, the lessee

under the plaintiff. Mr. Roy Chowdhury has also contended that in the instant case the decree for eviction has neither been obtained by collusion

nor on any ground which by itself does not annul the lease. It is the specific case of the plaintiff that the lease stands determined by efflux of time

and as such, the sub-lessees are bound to suffer the decree of eviction along with the lessor. He has, therefore, submitted that the appeal has no

merit whatsoever and should be dismissed.

6. In reply to the aforesaid contention of Mr. Roy Chowdhury, Mr. Dutt appearing for the respondents, has submitted that a sublease in India does

not stand on the same footing as an assignment. Mr. Dutt has contended that until the entire interest of the lessee is transferred in favour of a sub-

lessee, there cannot be any occasion for assignment of interest, Mr. Dutt has contended that so far as the sub-lease is concerned, there is neither

privity of contract nor privity of estate between the head-lessor and the under-lessee. In this connection he has referred to a Bench decision of this

Court made in the case of Akhoy Kumar Chatterjee Vs. Akman Molla and Others . It has been held in the said decision that law is well settled

that there is neither privity of contract nor privity of estate between the head-lessor and under-lessees and hence the under-lessees are not

personally liable to pay rent reserved in the covenant between the head-lessor and the lessee. Mr. Dutt has also referred to a decision of the Privy

Council made in the case of AIR 1930 59 (Privy Council) . The Privy Council after taking into consideration the provision of Sections 105 and

108(j) of the Transfer of Property Act, has come to the finding that under Transfer of Property Act, having regard to Sections 105 and 108(j), an

underlease for the entire residue of the under-lessor's term operates, in the absence of a contract to the contrary, as an underlease, and does not,

as ordinarily under English law, constitute an assignment of the lease. Mr. Dutt has contended that in view of the said decision, the plaintiff cannot

contend that the plaintiff can lawfully realise rent from the subtenants directly without changing the status of sub-tenants. Mr. Dutt has contended

that unfortunately, this aspect has not been taken into consideration by the trial Court and simply because the lease was determined by efflux of

time, the trial Court has passed the decree for eviction against all the defendants ignoring the fact that the defendants Nos. 3 to 14 have been

recognised as direct tenants under the plaintiff and as such no decree for eviction could be passed against them.

7. After considering the respective submissions made by the learned Counsel for the parties it appears to us that although the plaintiff has not

specifically prayed in the plaint for a decree for eviction against defendants Nos. 3 to 14 there is specific pleading that the lease against the

defendants Nos. 1 and 2 stands determined by efflux of time and the plaintiff is therefore entitled to recover possession from the defendants. In our

view, Mr. Roy Chowdhury is justified in his contention that there is no impediment in passing the decree for eviction against the defendants Nos. 3

to 14 even in the absence of any specific prayer for eviction against the said defendants Nos. 3 to 14 in the plaint when the requisite pleadings for

such decree for eviction against the said defendants have been made in the plaint. It however appears to us that the defendants Nos. 3 to 14 being

the sub-tenants, cannot be held to be the assignees of the lessees namely the defendants Nos. 1 and 2 under the said indenture of lease between

Ranjit Kumar Basu and Hazi Ansarullah. Mr. Dutt, in our view, is right in his contention that there is no privity of contract or privity of estate

between a subtenant and the head lessor by which there is any obligation of a sub-tenant to pay rent to the head lessor. But in the facts and

circumstances of the case, we are of the opinion that the plaintiff had realised rents from seven sub-tenants for a few months between April, 1964

to June, 1964 not by treating the said subtenants as per direct tenants but such realisation of rent from them was made at the instance of her lessees

namely the defendants Nos. 1 and 2 to liquidate the arrears of rent payable by such lessees to the plaintiff. The defendants Nos. 3 to 14 in their

written statement have specifically stated that they are the tenants under the said lessees and they are paying rents all along to their landlords against

receipts. The said defendants have also declined to lead any evidence in the suit. In our view, Mr. Dutt is not right in his contention that in view of

the pleadings of the parties and the issues framed by the learned Judge there was no occasion for the defendants Nos. 3 to 14 to depose. There is

a specific pleading that the plaintiff is entitled to recover possession of the demised premises from all the defendants including defendants Nos. 3 to

14 and a specific issue has also been framed to that effect. If the defendants Nos. 3 to 14 had really intended to oppose the said prayer, it was

their duty to lead positive evidence in support of their case of direct tenancy. It appears to us that as the said defendants have specifically admitted

that they are the tenants under the lessees of the plaintiff, there was no occasion for them to give any evidence contrary to such specific pleading

made by them. Needless to say, that even if they had led any evidence contrary to their written statement, such evidence should not have been

accepted. The depositions of the plaintiff and her daughter are in conformity with the written statement filed by the defendants Nos. 3 to 14 and we

are inclined to accept the case of the plaintiff that the plaintiff had never intended to accept the said defendants Nos. 3 to 14 as her direct tenants

and rents for few months from some of such sub-tenants had been realised at the instance of the defendants Nos. 1 and 2 liquidate the arrears of

rent payable by such lessees to the plaintiff. By such realisation of rents, the plaintiff had not accepted the sub-tenants as her direct tenants and the

said sub-tenants also did not pay rent for the purpose of creating a relationship of landlord and tenant between the plaintiff and the said sub-tenants

and the written statement filed on behalf of the defendants Nos. 3 to 14 clearly supports the case of the plaintiff in this regard.

8. In the aforesaid circumstances, we do not find any reason to interfere with the decree passed in the instant suit. This appeal, therefore, fails and

is dismissed.

9. There will be no order as to costs.

Sankari Prasad Das Ghosh, J.

10. I agree.