

Biswanath Paul Choudhury and Another Vs Abdul Quaiyum Azad and Others

Court: Calcutta High Court

Date of Decision: Dec. 12, 2013

Citation: (2014) 1 CALLT 233 : (2014) 2 CHN 437 : (2014) 2 WBLR 523

Hon'ble Judges: Ishan Chandra Das, J; Debasish Kar Gupta, J

Bench: Division Bench

Advocate: Kaustav Chandra Das, Mr. Shaunak Ghosh and Mr. Rajib Mallick, for the Appellant; Shyamal Kumar Das, A. Ghafoor, Ms. Soma Ghosh for the respondent Nos. 1 and 2 and Mr. Kaushik Dey for the respondent No. 3, for the Respondent

Final Decision: Dismissed

Judgement

Debasish Kar Gupta, J.

This appeal is directed against judgment and decree dated February 28, 2007 passed by the learned Judge, 11th

Bench, City Civil Court at Calcutta in Title Suit No. 76 of 1999. By virtue of the judgment and decree, the above suit was dismissed on contest

against respondents/defendant Nos. 1 and 2 and ex parte against the rest.

The plaintiffs/appellants filed the aforesaid suit being Title Suit No. 76 of 1999 in the City Civil Court at Calcutta praying for declaration that the

respondent/defendant Nos. 1 and 2 were trespassers in respect of shop room No. 3, Gate No. 5 on the ground floor at 167, Dharmatalla Street,

P.S. Bowbazar, Calcutta-700072 as also praying for a decree for recovery of possession of the suit premises by evicting the respondent/defendant

Nos. 1 and 2 and the case made out by the appellants were as follows in a nutshell:--

(i) The suit premises being shop room No. 3, Gate No. 5 on the ground floor at 167, Dharmatalla Street, P.S. Bowbazar, Calcutta-700 072

belonged to respondent No. 3. One Subodh Kumar Basu Mullick was the recorded tenant in respect of the suit premises under the respondent

No. 3;

(ii) During continuation of the above tenancy, the aforesaid Subodh Kumar Basu Mullick inducted one Manoranjan Pal Chowdhury as a sub-

tenant in the suit premises who used to carry on his business from the suit premises;

(iii) In course of his work, the aforesaid Manoranjan Pal Chowdhury employed the respondent Nos. 1 and 2 as employees of his business;

(iv) In or about April, 1990, the aforesaid Subodh Kumar Basu Mullick surrendered the tenancy of the suit premises to the landlord, namely, the

respondent No. 3 upon revocation of sub-tenancy granted to the aforesaid Manoranjan Pal Chowdhury.

(v) The aforesaid Manoranjan Pal Chowdhury had also surrendered his right, title and interest in favour of the aforesaid Subodh Kumar Basu

Mullick prior to surrender being made to the landlord, namely, respondent No. 3;

(vi) Upon acceptance of the surrender of tenancy, the respondent No. 3 let out the suit premises in favour of the appellants from the month of

May, 1990, who used to pay monthly rent of Rs. 150/- in respect of the suit premises taking peaceful possession;

(vii) After creation of the above tenancy, the respondent Nos. 1 and 2 approached the appellants for their employment under them since the

appellants were carrying on same business that of the erstwhile tenant of the suit premises. They accepted the above request and allowed the

respondent Nos. 1 and 2 to work under them;

(viii) According to the appellants, the above arrangement continued smoothly since May, 1990. The respondent Nos. 1 and 2 were allowed by the

appellants to stay in the suit premises at night due to heavy work load. The respondent Nos. 1 and 2 were allowed to retain the keys of the suit

premises out of good faith;

(ix) From middle of 1992, the appellants came to know that the respondent Nos. 1 and 2 were carrying on work of similar and same nature being

entrusted to them from outside agency apart from the work assigned to them by the appellants or in other words, the respondent Nos. 1 and 2

were trying to set up a business of their own in the suit premises; Hence the suit.

2. The aforesaid suit was contested by the respondent Nos. 1 and 2 by way of filing written statement denying all the material allegations made in

the plaint and their defence were as follows:--

(i) The suit was not maintainable in law and the same was false, fabricated and manufactured for the purpose of harassing them;

(ii) The appellants had no locus standi to file the suit as they had no right, title and interest over the suit premises and they were in possession of the

suit premises;

(iii) The respondent Nos. 1 and 2 denied the allegation of inducing one Manoranjan Pal Chowdhury in the suit premises by the aforesaid Subodh

Kumar Basu Mullick or that the aforesaid Manoranjan Pal Chowdhury used to carry on business from the suit premises or that they were

employees under him;

(iv) According to the respondent Nos. 1 and 2, the aforesaid Subodh Kumar Basu Mullick and the respondent Nos. 1 and 2 were the joint tenants

in respect of the suit premises at a monthly rental of Rs. 50/- payable according to English calendar month to the respondent No. 3. Though the

aforesaid Subodh Kumar Basu Mullick and the respondent Nos. 1 and 2 used to pay the rent of the suit premises at the proportionate rate of

share to the respondent No. 3, the rent bills were issued in the name of the said Subodh Kumar Basu Mullick according to the mutual

understanding between them;

(v) According to them, the aforesaid Subodh Kumar Basu Mullick stopped running business from the month of January, 1992;

(vi) The respondent Nos. 1 and 2 filed a Title Suit No. 1675 of 1992 in the City Civil Court at Calcutta against Subodh Kumar Basu Mullick and

the respondent No. 3 as Subodh Kumar Basu Mullick in collusion with and in conspiracy of the respondent No. 3 made attempt to surrender the

right, title and interest of the suit premises to the respondent No. 3. The above title suit was decreed on March 13, 2006 ex parte in part against

the aforesaid Subodh Kumar Basu Mullick and the respondent No. 3 and dismissed against the appellants. The aforesaid Subodh Kumar Basu

Mullick and the respondent No. 3 were restrained by a decree of permanent injunction from dispossessing the respondent Nos. 1 and 2 from suit

premises otherwise than in due course of law.

(vii) The defence of the respondent Nos. 1 and 2 was that they were neither tenants nor licensee under the appellants and nor were they ever

inducted by the appellants and so, there was no relationship between the appellants and the respondent Nos. 1 and 2 and as such, the appellants

had no right to evict them. The respondent Nos. 1 and 2 had full and absolute right to occupy the suit premises until and unless anything was done

or any action was taken by the landlord, namely, the respondent No. 3.

3. At the time of hearing of the suit, three witnesses gave evidence in support of the plaint case while one deposed in support of the respondent

Nos. 1 and 2.

4. As recorded hereinabove, by the judgment and decree impugned, the learned Trial Judge dismissed the suit on contest against the appellants

and ex parte against the rest.

5. Being dissatisfied, the appellants come up with the present appeal.

6. It is submitted by Mr. Kaustav Chandra Das, learned Advocate appearing on behalf of the appellants, that the learned Trial Judge failed to

appreciate that the Title Suit No. 1675 of 1992 was disposed of holding that the respondent Nos. 1 and 2 had no title to the suit premises.

According to him, the learned Trial Judge failed to appreciate that creation of valid tenancy in favour of the appellants by the respondent No. 3 in

respect of the suit premises had been proved in the suit. According to him, the rent receipt issued by the respondent No. 3 in favour of the

appellants for the month of May, 1990 was Exhibit 1(a) and the same was sufficient proof of creation of the tenancy under reference in their

favour. According to him, the learned Trial Court failed to hold that the findings of T.S. No. 1675 of 1992 operated as res judicata and, therefore,

the respondent Nos. 1 and 2 were precluded from claiming any title over the suit premises.

7. The aforesaid contentions of Mr. Das are seriously disputed by Mr. Shyamal Kumar Das, learned Advocate appearing on behalf of the

respondent Nos. 1 and 2. According to Mr. Das, delivery of khas possession is a condition precedent for creating tenancy in favour of a lawful

tenant. According to him, the possession was proved before the learned Trial Judge on the basis of challans of rent control, trade licence, receipt

of KMC, letter, Registration Certificate of Shops and Establishment Act and an agreement with the aforesaid Subodh Kumar Basu Mullick in

support of their possession over the suit premises at least from 1965.

8. Mr. Das relied upon the decision of Sukumar Saha Vs. Shyamal Kumar Saha and Others,

9. Having heard the learned Counsel appearing for the respective parties and after considering the impugned judgment and decree, we are of the

view that a lawful tenancy can be created in favour of a person by a landlord only in the event the landlord is capable of giving khas possession of

the tenanted portion in favour of the tenant. It is well-settled principles of law that in the event a particular property is in possession of a trespasser,

without evicting such trespasser, the landlord cannot create a tenancy in respect of the same portion of the property so occupied or in other words,

no tenancy can be lawfully created by a landlord unless he is in a position to deliver actual physical possession of the property in favour of the

tenant. Reference may be made to the decision of Sukumar Saha (supra) and the relevant portions of the above decision are quoted below:--

12. After hearing the learned counsel for the parties and after going through the provisions contained in the Transfer of Property Act as well as the

Specific Relief Act, we are of the view that a lawful tenancy can be created in favour of a person by a lessor only if the lessor is capable of giving

khas possession of the tenanted portion in favour of the lessee. If a particular property is in occupation of a trespasser, without evicting such

trespasser the lessor cannot create a lease over the portion so occupied. Lease is a doctrine of separation of title and possession. A lessor before

grant of a lease enjoys the title over the property as well as the right to immediate possession thereof. The moment such a lessor creates a lease,

the title remains with him but the right to enjoy the property is transferred to the lessee and he is not entitled to enjoy possession thereof by himself

so long the lease continues. Therefore, no tenancy can be lawfully created by a lessor unless he is in a position to deliver actual physical possession

of the property in favour of the tenant. In this case, according to the plaint, Anil Kumar Saha was the tenant but he was not in possession of the

property having already sublet a portion of the property to the plaintiff and the other portion was in occupation of defendant No. 1. Therefore, the

moment Anil Kumar Saha surrendered his tenancy, the landlord could not create a fresh tenancy in favour of plaintiff in respect of the portion

occupied by defendant No. 1, so long the actual possession is not taken from the defendant No. 1.

10. In the suit though the appellants claimed their lawful tenancy over the suit premises on the strength of the rent receipts issued to them by the

respondent No. 3, one of which contained the specific description of the shop room in question, the delivery of khas possession of the suit

premises to them by the respondent No. 3 had not been proved in the suit. The learned Trial Court found that apart from submitting the challans of

Rent Control, trade licence, receipt of KMC, letter, Registration Certificate of Shops and Establishment Act, the respondent Nos. 1 and 2 brought

an agreement with the aforesaid Subodh Kumar Basu Mullick to show that they were in possession of the suit premises with Subodh Kumar Basu

Mullick since 1965.

11. In view of the above, we do not find any merit in this appeal applying the settled principles of law as discussed hereinabove.

12. The position could have been different if the respondent No. 3 either sold away or gifted or exchanged the suit premises or even mortgaged the

same in favour of the appellants. In such a case, the appellants could have been empowered with the title to the suit premises and on the strength of

his own title could evict the respondent Nos. 1 and 2 notwithstanding the fact that they had no possession over the suit premises, provided of

course, the respondent Nos. 1 and 2 had no lawful right to remain in the suit premises.

13. In view of the above, this appeal is dismissed.

14. There will be, however, no order as to costs. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as

expeditiously as possible, upon compliance with the necessary formalities in this regard.

Ishan Chandra Das, J.

I agree.