Palang Khan and Another Vs Abdur Rahaman

Court: Calcutta High Court

Date of Decision: Feb. 28, 1974

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 115, 151, 152, 2
Limitation Act, 1963 â€" Section 5
West Bengal Premises Tenancy Act, 1956 â€" Section 17, 17(1), 17(3), 18(1), 22(1)

Citation: 78 CWN 829

Hon'ble Judges: Chittatosh Mookerjee, J

Bench: Single Bench

Advocate: B. Bhose, Dilip Banerjee and Gouri De, for the Appellant;Qudrat-E. Kabir, for the Respondent

Final Decision: Dismissed

Judgement

Chittatosh Mookerjee, J.
The present appellants were monthly tenants under the respondent Abdur Rehaman in respect of two rooms in

the ground floor of premises No. 18B, Temple Street, P.S. Bowbazar, Calcutta at a rent of Rs. 100.37 paise per month according to English

Calendar. The respondent instituted Ejectment suit No. 294 of 1962 against the present appellants in the City Civil Court at Calcutta for eviction

from two rooms in the ground floor of premises No. 18B, Temple Street.

2. The plaintiff in the said Ejectment suit No. 294 of 1962 alleged that the defendants were defaulters in payment of rent as per Schedule II of the

plaint. According to the plaintiff the tenancy had been terminated by ejectment notice, dated the 17th July, 1961 sent under registered postal cover

which came back undelivered with the remarks left.

3. Din Md. Khan, the defendant No. 2 in the said suit filed a written statement. He denied that the defendants were defaulters. He also disputed

that any ejectment notice was served terminating their tenancy. The defendant No. 1 did not file any written statement.

4. On July 11, 1962, Sri K.K. Mitra, Judge, 6th Bench City Civil Court at Calcutta delivered his judgment in the said ejectment suit. He ordered

that the suit be decreed on contest against the defendant No. 2 and exparte against the defendant No. 1 with cost. The plaintiff would khas

possession of the premises in suit. The defendant was allowed time upto the 31st August, 1963. On the 18th July, 1963, the learned Judge, 6th

Bench, City Civil Court at Calcutta signed the decree as drawn up in the said suit. Although in the cause title of the said decree the names of both

the defendants appeared, in the body of the decree it was recorded ""It is ordered that the suit be decreed on contest against the defendant No. 1

with cost."" The decree as originally drawn did not mention about the defendant No. 2 (i.e. Din Mohd. Khan). The name of Palang Khan however

did not figure either as an appellant or as a respondent. Palang Khan the defendant No. 1 himself also did not prefer any appeal.

5. Din Mohd. Khan however preferred F.A. No. 686 of 1963 against the above judgment and decree passed in Ejectment Suit No. 294 of 1962.

The said appeal came up for final hearing before me.

6. On the 13th April, 1970. when the appeal was placed for judgment, Mrs Archana Sen Gupta, learned Advocate for the appellant Din Md.

Khan stated that she had no instruction in the matter. She filed a copy of a letter written by her to her client. The appeal was accordingly dismissed

for non-prosecution without any order as to costs. On the 7th September, 1970, the plaintiff filed an application u/s 152 of the CPC in the trial

Court praying for amendment of the decree in Ejectment suit No. 294 of 1962. The plaintiff prayed that the name of the defendant No. 1 Palang

Khan be also mentioned in the ordering portion of the decree in accordance with the judgment passed. Notice of the said application was served

upon the defendant.

7. On the 16th March, 1972, the trial Court allowed the said application u/s 152 and granted the prayer for amendment of the decree by inserting

the words" the defendant No. 1 also in the ordering portion of the decree. The defendants (the present appellants) moved an application u/s 115 of

the CPC against the said order No. 45 of the trial Court, dated the 16th March, 1972. Laik, J. summarily rejected the said application u/s 115 of

the Civil Procedure Code.

8. Thereafter the present appellants purported to file the instant appeal against the judgment, dated the 11th July, 1963 and decrees, dated the

18th July, 1963 and the 16th March, 1971 in Ejectment suit No. 294, together with an application u/s 5 of the Limitation Act. Civil Rule No.

2521(F) of 1971 was issued upon the said application. The said Rule was later on made absolute and the appeal was registered Laik, J. while

summarily dismissing the revisional application of the appellants against the order of the trial Court u/s 152 of the CPC did not record any reasons.

After the petitioner unsuccessfully invoked the revisional jurisdiction it would be difficult for the appellant to challenge in this appellate the same

amendment order u/s 152 of the Civil Procedure Code.

9. F.A. 686 of 1963 preferred by Din Md. Khan against the decision of the learned Judge, 6th Bench, City Civil Court, dated the 16th July, 1963,

in ejectment suit No. 294 of 1962 was dismissed for non-prosecution. This Court did not deal judicially with the matter. The learned Advocate for

the respondent rightly pointed out that such dismissal of the appeal was tentament to dismissal for default (vide Ahidhar Ghosh v. The Secretary of

State for India in Council 36 C.W.N. 665; In re : Kayambu Pillai, AIR 1911 Mad. 836 and in In Re: Chunduru Venkata Subrahmaniyam,). The

decision of the Judicial Committee in Chandri Abdul Majid v. Jawhir Lal and others, AIR 1914 P.C. 66 also supports this views. The Judicial

Committee dismissed'' an appeal for non-prosecution. Lord Moulton delivering the opinion observed that the said order of the Privy Council

dismissing the appeal for want of prosecution did not deal judicially with the matter of the Suit and could in no sense be regarded as an order

adopting or confirming the decision appealed from. The same merely recognised authoritatively that the appellant had not complied with the

conditions under which the appeal was open to him, and that therefore he was in the same position as if he has not appealed at all. Accordingly it

was held that in such a case a period of limitation for an application to make absolute a preliminary decree for sale in a mortgage suit u/s 89 of the

Transfer of Property Act was not twelve years under Article 180 of Schedule II of the Limitation Act but three years under Article 179 from the

order of the High Court which was final and had not merged into the order of the Privy Council, because the appeal to the Privy Council was

dismissed for want of prosecution.

10. The decision of the Division Bench of this Court in Chandra Kala Devi and others v. The Central Bank of India Ltd., 62 C.W.N. 881 is clearly

distinguishable on facts. In the instant case, this Court dismissed the appeal preferred by a defendant. Thereafter the decree holder had applied to

the trial Court for amendment of the decree for granting subsequent interest in addition to the interest already allowed by the original decree. The

whole basis of the decision of the Division Bench was that the trial Courts decree had merged in the decree passed by this Court. Therefore, the

original Court ceased to have jurisdiction over it and the order of amendment was made without jurisdiction. In the instant case, the F.A. 686 of

1963 having been dismissed for non-prosecution which has already stated was equivalent to dismissal for default, there was no such merger. In this

connection see the definition of the ''decree'' given in Section 2 of the Civil Procedure Code. An order for dismissal for default has been expressly

excluded from the meaning of the expression ''decree''.

11. Further in Sm. Chandra Kala Devi and others v. Central Hank of India Ltd., (supra). The Division Bench after holding that the trial Court had

become functus officio considered what was to be done in the matter. Their Lordship at page 889 observed that this Court which made the final

order in the original appeal still retained the jurisdiction to amend the decree and in fact this Court was the only Court which can make such an

order of amendment."" Therefore, their Lordships made an order correcting the said mistake and for amendment of decree by providing for

payment of interest up-to-date of the realisation of the principal sum. Therefore, even if the argument of the learned Advocate for the appellant is to

be accepted that the trial Court had no jurisdiction still I would have ordered for amendment of the original decree of the trial court by inserting the

name of Din Md. Khan. But the same is not necessary as in the instance trial court retained jurisdiction in the absence of any merger of the trial

Court"s decree in the order passed in F.A. 686 of 1963.

12. Mr. Bhose, learned Advocate for the appellant at some length submitted before me that the present appeal against the amended decree, dated

the 16th March, 1971 was competent. In this connection Mr. Bose, learned Advocate for the appellant relied upon the decision of this Court in

Aditya Kumar Bhattacharjee v. Abinash Chandra Mukhopadhyay. 34 C.W.N. 1002 and in Sm. Soudamini Das v. Nabalak Mia Bhuiya and

another, 35 C.W.N. 251.

13. In my view, the said question whether appeal lay against the amended decree in the instant case is more or less of academic interest only. Din

Md. Khan had preferred appeal being F.A. 686 of 1963 against the judgment and decree dated the 11th July, 1963, although in the ordering

portion of the decree as originally drawn up presumably through clerical error no order had been recorded as against him. Inspite of the same Din

Md. Khan himself fully understood that the said judgment and the decree had been passed against him and being aggrieved by the same preferred

the previous appeal. Ultimately the said appeal was dismissed for non-prosecution. Palang Khan, the other appellant in the present appeal did not

present any appall against the original judgment and decree, dated the 11th July, 1963. In the memorandum of appeal presented by Din Md. Khan

in F.A. 686 of 1963 Palang Khan did not figure either as co-appellant or as respondent. In such circumstances, the appellants in F.A. 85 of 1972

cannot be permitted to challenge the decree in the ejectment suit in question as originally passed.

14. The amendment of the decree made by the trial Court by its order dated the 16th March, 1972 was made by it in exercise of its power u/s

152 of the Code of the Civil Procedure. The trial court merely corrected a clerical error by inserting the word ''defendant No. 2'' in the ordering

portion of the decree so as to make the judgment and decree consistent. In my view, such corrections of the clerical errors u/s 152 can not be

equated with the amendment of the decrees made in pursuance of the order for review under Order 47 Rule 1 of the Code. In the instant case

there was no fresh adjudication or determination of rights of the parties. But the Court corrected an error committed by itself by omitting to

mention the name of the defendant No. 2 in the ordering portion of the decree. Alternatively, even it the amended the decree to be considered as a

fresh one and hence appealable, the present appeal must be considered to be a limited one. The appellants should be restricted to challenge only

the amended portion of the decree. As already stated, the decree as originally passed was the subject-matter of the previous appeal by one of the

appellants and that appeal was allowed to be dismissed for non-prosecution. The other appellant Palang Khan did not chose to prefer any appeal

against the original decree. The decision of the single Judge of Punjab High Court in Mohammed Ibrahim Ferozi Vs. Mst. Shafqan and Others,

which was relied by the learned Advocate for the appellant also took the same view. In the event it is held that the scope of this appeal is limited to

the amended decree alone then there is hardly any merit in it. As already stated the amendment was in the nature of a correction of the clerical

error committed by the Court itself. Further, the petitioner''s sought to challenge the amendment order by a revisional application in this Court and

the same failed.

15. I also find no merit in the appeal against the ejectment decree. The trial Court upon consideration of the evidence found that the defendant was

a defaulter in payment of rent, for the months of August, September, November, 1960 as the same were deposited beyond the prescribed time.

Thereby the appellant contravended Section 22(1) of the West Bengal Premises Tenancy Act, 1956 and deposit in respect of the said months did

not constitute payment of rents to the plaintiff landlord. Admittedly, the defendant tenants did not deposit in Court in the office of the Rent

Controller or pay to the landlord in terms of the first part of section 18(1) sums equivalent to rent for the period for which they had committed

default. Therefore, they were not entitled to benefits of sub-section (4) of Section 17 of the Act. Mr. Bose drew my attention to the fact that the

trial Court after passing order u/s 17(3) of the Act has subsequently allowed the defendant''s petition u/s 151 and registered the defences of the

defendants. Even if the trial Court did not mention the said fact in its judgment, I do not find thereby any error of law or error of facts was

committed. As already stated, the defendants made default in payment of rent for more than two months. They did not comply with the provisions

of section 17(1) by depositing or paying sums equivalent to rent for the period for which they had made default. Therefore, they were ineligible

from obtaining relief under sub-section (4) of Section 17. Mr. Bose further submitted that in the instant case the ejectment notices sent by the

plaintiff landlord came back with the endorsement ''Left''. In my view, in the facts of this case, the Trial Court did not commit any error by making

a presumption that the notice was properly served. It is true that endorsement "left" upon a registered cover is not decisive as to whether notices

was actually tendered or not to the addressee. The trial Court rightly observed that the defendants themselves did not depose as witnesses. The

trial Court gave cogent reasons why it was of the view that in the facts of this case, such endorsement ''left'' should be treated as due service.

Further, the defendants were joint tenants. The trial Court found that notice was at least served upon one of them, namely, Din Md. Khan. The trial

Court had correctly observed that service upon one of the joint tenants would be sufficient to terminate the tenancy jointly held by the defendants.

In the above view, I find that there is no merit in the appeal.

I accordingly dismissed this Appeal.

There will be no order as to costs.