

(1976) 11 CAL CK 0016

Calcutta High Court

Case No: Civil Rule No. 3922 of 1975

Jagat Enterprises

APPELLANT

Vs

Anup Kumar Daw

RESPONDENT

Date of Decision: Nov. 8, 1976

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 21 Rule 35
- Transfer of Property Act, 1882 - Section 115

Citation: (1976) 2 ILR (Cal) 611

Hon'ble Judges: S.K. Datta, J; H.N. Sen, J

Bench: Division Bench

Advocate: Sakti Nath Mukherjee and Tarun Chatterjee, for the Appellant; G.N. Roy, S. Naik, J.N. Halder and P. Banerjee, for the Respondent

Judgement

S.K. Datta, J.

This Rule is directed against order No. 7 dated September 11, 1975, passed by the learned Judge, Ninth Bench, City Civil Court, Calcutta, in a suit for recovery of possession of the suit premises. By the impugned order the Petitioner's petition under Order 1, Rule 10 of the CPC dismissed. The case in plaint is as follows:

The suit premises being flat No. 3 of 1st floor rear side of 184 Lenin Sarani, Calcutta, hereinafter referred to as the said premises, was taken on lease by Chattar Singh Dugar from Ajoy Krishna Daw on the basis of a registered lease deed dated June 22, 1963, for a period of 22 years commencing from July 1, 1963 and expiring on June 30, 1985. Chattar Singh died leaving the opposite party No. 3 as his heir and legal representative. Ajoy Krishna also died leaving a Will whereby the opposite parties Nos. 1 and 2 were appointed executors and the probate of the said Will was granted in their favour. It was stated that Chattar Singh and/or his heir defaulted in payment of rent and were in heavy arrears in the sum of Rs. 30,600 as per account set out. It was, further, stated that under the lease aforesaid, the lessee was not to assign,

sub-let or part with possession of the premises or part thereof without the written consent of the lessor. In violation of the said terms, the opposite party No. 3 sublet, assigned or transferred possession of the premises to various companies and firms named including the Petitioner without the consent of the opposite parties Nos. 1 and 2 or their predecessor-in-interest. The notice was duly given upon the said opposite party forfeiting the lease and indicating the intention of the lessors to enter the said premises. The said opposite party failed to vacate the premises as required. The present suit was, accordingly, instituted by the opposite parties Nos. 1 and 2 against the opposite party No. 3 for recovery of possession of the suit premises.

2. It appears that an application was filed in the said suit by the Petitioner before us stating that under the terms of the lease Chattar Singh was entitled to use the suit premises for office purpose and also to accommodate therein company or firm in which he himself or his associates were interested without in any way affecting the terms of the said lease. It was further stated that the Petitioner was accommodated on the basis of the right referred to above and Chattar Singh was interested in the Petitioner firm as his relative was a partner therein. Further, after the death of Chattar Singh the Petitioner paid all amount of rent on behalf of his heir and rent upto September 1970 was cleared. Thereafter, though the rent was tendered within the prescribed time the said opposite parties refused to accept the same from the Petitioner. It was, further, stated that the Defendant opposite party No. 3 did not enter appearance in the suit and was acting in collusion with the Plaintiffs to create trouble on account of family dispute. The suit was also fixed for ex parte hearing and in these circumstances the Petitioner made an application for being added as party Defendant to the suit and to contest the same by filing a written statement.

3. This petition was rejected by the impugned order as, according to the learned Judge, the Petitioner was not at all a necessary party in a suit simpliciter for eviction and he could file a separate suit for appropriate relief. The rule is against this order.

4. Mr. Sakti Nath Mukherjee, learned Advocate appearing for the Petitioner, contended that the Petitioner was a necessary party in the suit and accordingly, the trial Court failed to exercise jurisdiction in declining him to be added as a party in the suit. In support he referred to the decision in [South Asia Industries Private Ltd. Vs. S. Sarup Singh and Others](#), . In this case, it appears that the Respondent's predecessor leased the premises to Allen Berry and Co. (Calcutta) Ltd., which company transferred the lease to the Appellant. On the ground that the transfer was made without the consent of the landlord, the Respondent made an application u/s 14(i)(b) of the Delhi Rent Control Act, 1958, to the Controller against the tenant company as also the Appellant for an order for recovery of possession of the premises on the ground that the transfer of lease was without the consent of the landlord. In course of proceedings the tenant company went into liquidation and was subsequently dissolved and its name was struck off from the proceedings. The

Controller thereafter made an order in favour of the landlord for recovery of possession of the premises and this order was affirmed ultimately by the High Court. On appeal to the Supreme Court it was held by the majority judgment that the order for recovery of possession was not only confined to tenant but the order would be binding on all persons in actual possession of the premises in view of Section 25 of the Act. This section provided that the order for recovery of possession would be binding on all person in occupation of the premises". Accordingly, as the assignee was also bound by the order, it was observed by Sarkar J. (as he then was) that the assignee should be a proper party in the proceeding to show that there was such requisite consent to assignment or sub-lease. It was, further, observed that the direct tenant may neglect or be incompetent in his defence or he may even collude with the landlord or he may just not bother. But if the assignee or sub-lessee was entitled to be heard to oppose eviction, it would be unnatural to say that he could not be made parties to the proceedings and in view of Section 25 the eviction order would be binding on him and he would be liable to be condemned unheard. In the concurring judgment Bachawat J. observed that the tenant and the assignee were proper parties to the proceeding for possession.

5. This decision was strongly relied on by Mr. Mukherjee in support of the contention that the Petitioner as sub-lessee was entitled to be made party in the proceedings, particularly when it was alleged that the tenant was colluding with the landlord in suffering a decree by not contesting the suit at all.

6. This decision, in our opinion, does not lay down the broad proposition that in all actions for recovery of possession between the landlord and the lessee or the tenant, the sub-lessee or the subtenant are necessary parties therein. The proposition laid down therein was in the context of the provision of the Delhi Rent Act, 1958 and the sub-lessee's case that he was not a proper party in the proceeding in absence of the tenant was not accepted while the landlord impleaded him as an illegal assignee.

7. In [Jagauram Sahu and Others Vs. Chandulal Agarwala and Others](#) B.K. Mukherjee J. (as he then was) speaking for the Division Bench considered the position of law in our country with reference to the law prevailing in England. In English law, it was absented, the sub-tenant has no right as his interest is annulled with that of the lessor, but if he claims an independent interest in the property against the landlord, he has a right to be added a party to the suit and defend it. In regard to the law in our country it was observed:

If the interest of the subordinate holder is of such a character that it is entirely dependent on that of the superior holder and automatically comes to an end as soon as the superior interest is extinguished, the subordinate holder would be a privy to the judgment obtained against the superior holder even though he was not a party to the action...a sub-lessee would be bound by a decree for possession obtained by the lessor against the lessee, if the eviction is based upon a ground

which determines the under-lease also, unless he succeeds in showing that the judgment was vitiated by fraud or that the lessee collusively suffered the decree to be passed against him. If, however, the decree for possession proceeds on a ground which does not by itself annul the sub-lease, the decree would not be binding on the sub-lessee nor could the sub-lessee be evicted in execution of the decree if he had acquired a statutory right or protection, e.g. under the Bengal Tenancy Act which he could assert against the lessor. Within these limits we think a sub-lessee could be held to be bound by a decree obtained against his lessor and when he is so bound he can undoubtedly be ousted in execution of the decree obtained against his lessor under Order 21 Rule 35 of the Code of Civil Procedure, though he was not made a party to the suit itself.

8. The position, therefore, appears to be as follows:

(i) The decree for possession against the lessee would be binding on the sub-lessee when the interest of the sub-lessee is extinguished along with it i.e. to say, the determination of the lessee's right necessarily extinguished the right of the sub-lessee, (ii) the above proposition will not apply if the interest of the sub-lessee is not annulled by the decree for possession against the lessee and the sub-lessee is entitled to his tenancy, independent of lease or if the sub-lessee acquires the statutory right or protection which he could assert against the lessor, (iii) the sub-lessee will also be entitled to challenge the decree on the ground that it was obtained by fraud or collusion. u/s 115 of the Transfer of Property Act, 1882, the forfeiture of a lease in fraud of the under-lessee, or, where relief against forfeiture is granted does not annul the sub-lease.

9. In such circumstances, it will be open for the sub-lessee to challenge the decree for recovery of possession passed against the lessee in appropriate proceeding. It was so done in the said suit by the sub-lessee where his suit was for declaration of his tenancy right independent of the lessee and for permanent injunction restraining the landlord decree-holder from taking khas possession thereof in execution of the decree against the lessee.

10. It thus appears to us that though under the law the decree for possession against the lessee is binding on the sub-lease created by him, the sub-lessee is entitled to take steps to resist the decree on the above grounds as may be available to him. This right does not mean or imply that the sub-lessee is entitled on his own to be added as a party in the eviction suit against the lessee in his own right when he is not made a party and on his case he has an independent right in respect of his tenancy and is thus not bound by any decree as may be obtained by the landlord in the eviction suit against the lessee or when the decree is obtained in fraud of the sub-lessee.

11. Mr. Mukherjee has drawn our attention to the decision in [Bholanath Chatterjee and Another Vs. Somendra Chandra Nandi and Others](#), in which it was held that in

the suit for recovery of possession it is competent for the Plaintiff to pray for relief against such person as, according to him, may be in possession of the suit premises as illegal assignees, transferees or sub-lessees. In fact, under the various laws governing "premises" tenancies the sub-tenants, who have been recognised as having a lawful right, are necessary parties in the eviction proceedings against the tenant. Under the West Bengal Premises Tenancy Act, 1956, under provisions of Sub-sections (2), (3) and (4) of Section 13 the subtenants mentioned therein are necessary parties in eviction proceedings against the tenants as otherwise the decree against the tenant will not be binding on them.

12. The lease we are concerned with in this proceeding is outside the ambit of the said Act. Even so, if the landlord in such case elects to sue the lessee and according to his case in the plaint, sub-lessees and others in illegal possession of the property through him, such sub-lessees and others may defend their tenancy claiming independent title or statutory protection. But, in a suit for eviction of the lessee the alleged sub-lessee who is not made a party, in our opinion, as already indicated, is not entitled to be impleaded in such suit on his own to assert his alleged independent right or statutory protection as a necessary party. The sub-lessee in such case has his right to assert and defend his right or to challenge the decree as being in fraud of his rights all in other appropriate proceedings to be initiated by him.

13. The Rule, accordingly, fails and is discharged. There will be no order for costs in the circumstances.

H.N. Sen J.

14. I agree.