(1959) 05 CAL CK 0014

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1393 of 1953

Monmatha Nath Mukherjee		APPELLANT
	Vs	
Sm. Banarasi and Others		RESPONDENT

Date of Decision: May 28, 1959

Acts Referred:

- Calcutta Thika Tenancy Act, 1949 - Section 7, 8
- Transfer of Property Act, 1882 - Section 108, 108(p)
- West Bengal Non-Agricultural Tenancy Act, 1949 - Section 6

Citation: 63 CWN 824

Hon'ble Judges: Banerjee, J

Bench: Single Bench

Advocate: Sachindra Chandra Das Gupta and Samarendra Nath Banerjee, for the Appellant;Satindra Nath Roy Choudhury and Bon Behari Mukherjee, for the Respondent

Final Decision: Dismissed

Judgement

Banerjee, J.

This second appeal, at the instance of the plaintiff, comes back to this Court after having had once been remanded by this Court. Plaintiff is the trustee and She-bait of a Debottar estate. Under the Debottar estate, one Ramdayal Bhakat was a tenant in respect of a certain plot of land, measuring about 2 cottahs and 6 chittaks, being part of premises No. 84B, Cossipore Road, within the municipal limits of Calcutta.

2. According to the plaintiff, the defendant Ramdayal Bhakat was a thika monthly tenant, paying a rent of Rs. 5-151- per month. On the land in suit he had a non-permanent structure, built of mud walls on split bamboos and having a corrugated iron sheet roofing. In or about the month of December, 1956, the defendant dismantled the said hut and in its place started raising permanent brick walls upon pucca plinth, without the knowledge and consent of the plaintiff. On coming to know that the defendant had started construction of a permanent nature,

the plaintiff called upon the defendant, in writing, not to proceed with the work and also to demolish the structure so far raised. The notice sent to the defendant, under registered post, came back with the endorsement ''left''. The notice sent through the plaintiff''s Durwan was, however, personally served on the defendant. The notices notwithstanding, the defendant continued the work of construction with re-doubled energy.

3. It was in these circumstances that the plaintiff instituted the suit, out of which this appeal arises, claiming permanent injunction against the defendant restraining him from raising permanent structure on the disputed land and also mandatory injunction for demolition of the structure already raised. The suit was filed on March 4, 1947.

4. During the pendency of the suit Ramdayal Bhakat died and his heirs were substituted in his place.

5. Apart from certain technical objections as to the maintainability of the suit, the main defence of Benarasi, widow of Ramdayal, and Dhurup, minor son of Ramdayal, represented by his mother and guardian, who are respondents Nos. 1 and 2 in this appeal, was that the suit was barred under the principle of waiver, estoppel and acquiescence, because the said Ramdayal had constructed the structure only in place of and in substitution of the old structure, with the knowledge and permission of the plaintiff landlord, who had, at one stage, even encouraged the tenant to build the new structure.

6. The trial court accepted the plaintiff''s case as true and being of the opinion that the permanent structure had been constructed by a thika tenant without the knowledge and consent of the plaintiff landlord, decreed the claim for injunction as made.

7. An appeal to the lower appellate court, at the instance of the defendants, against the decree for injunction failed.

8. The defendants, Benarasi and her minor son, preferred a second appeal to this Court, being S.A. No. 630 of 1949. By his judgment and decree, dated August 19, 1952, Renupada Mukherjee, J. remanded the case to the lower appellate court for being re-heard. I quote below the relevant extract from the judgment of remand:

In the first place, it was contended that the tenancy of the appellants, whatever might be its nature, was still subsisting and the appellants were prepared to remove the structures at their own costs and without claiming any compensation from the plaintiff on the determination of their tenancy, if it were found that they had no right to build any permanent or substantial structure upon the land covered by the tenancy. The question would, therefore, become material as to the time of construction of the structures, viz.. whether the entire work of construction was completed before the institution of the suit or after. The lower appellate court''s

dealing with this matter does not appear to be very satisfactory. * * * * In my judgment, the appeal must be remanded to that Court for a clear and definite finding as to the time when the constructions were completed, and if necessary, the parties should also be allowed to adduce additional evidence on this point. * * * * I may, however, observe that along with the other points that had previously been urged before the Lower Appellate Court, that Court will further decide the following two points:

(1) Whether the construction of the structures was completed before or after the institution of the suit in the Trial Court,

(2) If the structures were completed before the institution of the suit, whether an order for demolition should be made on keeping in view the fact that the tenancy of the appellants has not yet been determined and also the fact that the appellants have undertaken in this Court to remove the structures at their own costs after the determination of the tenancy, if it is determined at any time, without claiming any compensation from the plaintiff.

9. At the hearing after remand the lower appellate court came to the following findings:

(a) "In my opinion the present structure is a permanent one. The said Ramdayal or his heirs have no right to raise any permanent structure on the disputed land as Ramdayal was no more than a thika monthly tenant."

(b) "I am of opinion that from the evidence on record it can be concluded that the major portion of the construction had been completed by the time the suit had been filed as Ex. 7 dated 8-3-48 contains an admission of the plaintiff that the house was then nearing completion."

(c) "In my opinion the plaintiff has shown enough diligence by trying to prevent the defendant from putting up the illegal construction by serving notice on him through his durwan. Hence I do not see how the plaintiff can be held guilty of laches though he has not come on the 18th of January but on the 3rd of March as it is not always possible to come straight off with a suit within the next few days. * * * From the record it cannot be held that the plaintiff was inactive during the time late Ramdayal Bhakat was raising the illegal construction, nor has there been any inordinate delay in bringing the present suit. Hence under ordinary circumstances the plaintiff should get the mandatory injunction."

(d) "Defendants have given an undertaking before the Hon''ble High Court that they would remove the structure at their own costs after the determination of the tenancy, if, it is determined at any time, without claiming any compensation from the plaintiff. If this undertaking had not been given, the balance of convenience would have lain with the plaintiff as he would have run the risk of paying compensation in future to an extent which would make it impossible for him to have

got back 2 cottahs and 6 chittacks of land, for the game would not have been worth the chase. But since the appellants give this undertaking, even after that if the plaintiff is allowed to have mandatory injunction the scale would be tipped in favour of the appellants. As the appellants are willing to provide the very best remedy for the sole evil and injury from which the plaintiff is likely to suffer because of the illegal act of the tenant by their undertaking, so I am of opinion that though otherwise, the plaintiff is entitled to mandatory injunction, in view of this undertaking this injunction should not actually be allowed.

10. In the above view the lower appellate court allowed the appeal and dismissed the claim for mandatory injunction.

11. It is the propriety of the appellate decree which is being disputed before me in this second appeal.

12. There is a cross-objection at the instance of respondents Nos. 1 and 2 against the findings arrived at by the lower appellate court.

13. Mr. Sachindra Chandra Das Gupta, learned Advocate for the appellant, invited my attention to the fact that respondent No. 3, Kailash, a son of Ramdayal, had not appeared before the High Court, when the order of remand was made in S.A. No. 630 of 1949, and therefore there was no undertaking on his behalf. Mr. Das Gupta contended that the undertaking given by the respondent No. 1, widow of Ramdayal, for self and for her minor son, the respondent No. 2 did not bind Kailash. If Kailash was not bound, he would be entitled to claim compensation and in that event the undertaking not to claim compensation in respect of the structures would be of no avail to the plaintiff. I find that there is good deal of substance in this contention of Mr. Das Gupta. The undertaking given by respondent No. 1, Benarasi, for self and as guardian of her minor son, would not bind Kailash. As such the plaintiff is not protected, against the injury to be caused by a larger claim for compensation, by the undertaking as given. The ground which weighed with the lower appellate court in refusing mandatory injunction thus turns out to be no ground at all.

14. In order to ascertain whether Kailash would put things right by joining the other respondents in the matter of undertaking, I adjourned the hearing of the appeal for some time and asked the learned Advocate for the respondents Nos. 1 and 2 to contact Kailash and find out his intention. Mr. Satindra Nath Roy Chowdhury, learned Advocate for the respondents Nos. 1 and 2, stated before me that Kailash was unwilling to give any undertaking.

15. In the aforesaid circumstances I would have allowed this appeal on the simple ground that the undertaking was ineffective. But Mr. Roy Chowdhury, learned Advocate for the respondents Nos. 1 and 2, raised a new point of law in this appeal, which requires careful consideration.

16. Mr. Roy Chowdhury contended that after the filing of the suit on March 4, 1947, the Calcutta Thika Tenancy Act, 1949 came into operation and by the amending Act VI of 1953 the same was made applicable to all pending suits or appeals. The definition of the word "thika tenant" in the aforesaid Act showed that a thika tenant was entitled to put up "any structure" on the land of his tenancy. Mr. Roy Chowdhury, therefore, contended that by raising a pucca or a permanent structure, the tenant in the instant case did nothing wrong and did not render himself liable to be injuncted as prayed for.

17. Section 2(5) of the Calcutta Thika Tenancy Act defines a thika tenant as one "who holds, whether under a written lease or otherwise, land under another person, and is or but for a special contract would be liable to pay rent, at a monthly or at any other periodical rate, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose".

18. The meaning of the words "any structure", as in the aforesaid definition, came up for consideration before Guha Ray, J. in the case of Kshiboda Moyre Sen and Others Vs. Ashutosh Roy and Others, and His Lordship expressed the opinion that there was nothing in the Calcutta Thika Tenancy Act to entitle a thika tenant to put up a pucca structure on the land demised to him. The reasons given by His Lordship in support of the above opinion are hereinbelow quoted:

Thus under the definition, a Thika tenant ''is a tenant of the land'' on which he has either erected a structure or has purchased from sombody else a structure. It appears from the lease (Ext. 1) that there possibly was some sort of a structure on the disputed land already at the time when the lease was executed. The tenant, therefore, might come under the definition of a Thika Tenant under the Calcutta Thika Tenancy Act, 1949 and it is, admittedly, within Calcutta as defined in Clause 11 of Sec. 3 of Calcutta Municipal Act, 1923. But then there is nothing in the Thika Tenancy Act to show that the tenant will be entitled to put up a pucca structure. Mr. Bhattacharyee, on behalf of the appellant, lays stress on the word ''any'' before the word ''structure'' in section 2(5), but, that does not mean that the tenant will be entitled to put up a permanent structure on the land. It merely means that when the tenant has put up a structure on the land he has taken lease of, then, he will satisfy the requirement of the definition of Thika Tenant or, in other words, ''any'' there stands for ''a'' and does not mean that the tenant will be entitled to put up any kind of structure. What kind of structure the tenant will be entitled to put up will depend upon the terms of the contract between the parties and also upon the Transfer of Property Act which regulates these things and. as already pointed out, even if there was no contract between the parties, section 108 (p) would have prevented the tenant from putting up a permanent structure on the land without the landlord''s consent. Clearly, therefore, the defendant is not entitled either under the provisions of the Transfer of Property Act or under the provisions of the Thika Tenancy Act to

put up a permanent structure on the land.

19. Although I respectfully agree with the conclusion made by Guha Ray, J., I do so for reasons of my own. The adjective ''any'' is a word which excludes limitation or qualification and makes the noun, before which it is prefixed, as wide as possible. Thus the word has been regarded as equivalent to and having the force of "every" or "all" (See Crawford on "Statutory Construction", sec. 186 at page 318). That being so, the words ''any structure'' would ordinarily include a pucca structure.

20. Nevertheless, for reasons which I am going to state the words "any structure" used in section 2(5) of the Calcutta Thika Tenancy Act cannot be taken to mean all kinds of structure including a pucca structure.

21. The Calcutta Thika Tenancy Act is a special Act and was enacted, as its preamble shows, "to make better provision relating to the law of landlord and tenant in respect of thika tenancies in Calcutta". The general law regulating the relationship of landlord and tenant, including thika tenant, is contained in Chapter V of the Transfer of Property Act. In section 108 (p) of the Transfer of Property Act there is a prohibition against the lessee raising pucca or permanent structures on the land of the tenancy, without the lessor''s consent.

22. The question is whether section 2(5) of the Calcutta Thika Tenancy Act must prevail over the prohibition contained in section 108 (p) of the Transfer of Property Act.

23. Dealing with the rule of construction applicable to such cases, Crawford in his book on "Statutory Construction" observed as follows:

It is not uncommon to find one statute treating a subject in general terms and another treating only a part of the same subject matter in more minute manner. Where this situation exists, the two Statutes should be read together and harmonized. This is specially true where the two Statutes are in pari materia. In the event of repugnancy, the special Statute should prevail, in the absence of a contrary legislative intent, since specific Statute more clearly evidences the ''legislative intent than the general Statute does (Sec. 230, pp. 429-30). * * * *

The rule which thus allows the Court to resort to Statutes in pari materia finds its justification in the assumption that Statutes relating to the same subject matter were enacted in accord with the same legislative policy; that together they constitute a harmonious and uniform system of law; and that, therefore, in order to maintain the harmony, every Statute treating the same subject matter should be considered. As a result, Statutes in pari materia should not only be considered but also construed to be in harmony with each other in order that each may be fully effective. They are to be construed together (Sec. 231, pp. 433-34).

24. Bearing the above observations in mind, I now propose to look to the scope of the Calcutta Thika Tenancy Act.

25. The Calcutta Thika Tenancy Act is not a complete code. It deals only with some aspects or incidence of thika tenancy. In respect of matters which are not governed by the Calcutta Thika Tenancy Act, the Transfer of Property Act applies. The Calcutta Thika Tenancy Act nowhere provides for the manner of use of the land of the thika tenancy; nor does the Act make provisions for rights and liabilities of the lessor and the lessee in a thika tenancy. Therefore, for those purposes, one has still to look to the provisions of section 108 of the Transfer of Property Act. The provisions contained in section 2(5) of the Calcutta Thika Tenancy Act and those in section 108(p) of the Transfer of Property Act are not necessarily repugnant. It is possible to harmonise the provisions contained in the two sections, if it be held that the expression ''any structure'' in section 2(5) of the Calcutta Thika Tenancy Act means any structure other than the type of structure referred to in section 108 (p) of the Transfer of Property Act, the construction whereof is prohibited under the latter section.

26. A problem, similar to that which I am now considering, cropped up before the House of Lords in the case of Mary Seward v. The owner of the ''Vera Cruz'' (2) (1884) 10 AC 59. The question in that case was whether the Admiralty Court Act 1861, which by section 7 gave to the Court of Admiralty the jurisdiction over any claim for damages done to any ship would give jurisdiction over claims for damages for loss of life under Lord Cambells Act. Holding that it did not, Earl of Selborne, L.C. observed:

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold the earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so.

27. Illustration of an instance where the legislature particularly intended that the limitation as to construction of structures, as in section 108 (p) of the Transfer of Property Act, shall not apply to a particular class of tenants, is to be found in section 6 of the West Bengal Non-Agricultural Tenancy Act, 1949. That Act, enacted for the purpose of making better provision relating to the law of landlord and tenant in respect of certain non-agricultural tenancies in West Bengal made special provisions for the manner of use of non-agricultural land in section 6 of the Act, material portion of which is quoted below:

6(1) * * * *

(2) A tenant holding non-agricultural land comprised in any tenancy to which the provisions of section 7 or section 8 apply shall be entitled-

(a) to erect any structure including any pucca structure;

(b) * * * *

(c) * * * * on such land.

28. There is no such indication, as above, expressed in the Calcutta Thika Tenancy Act. For the reasons given above, I hold that "any structure" in section 2(5) of the Calcutta Thika Tenancy Act, 1949 does not include a permanent structure. That being the position in law, the tenant defendant had no right to construct pucca structures. I have already held that the undertaking given by the tenant to remove the said pucca structure, without claiming any compensation, is ineffective, because of the refusal of Kailash to join with the other respondents in the matter of the undertaking. It appears from the judgment of the lower appellate court that it would have allowed the prayer for mandatory injunction but for the undertaking. Now that the undertaking is found to be ineffective, there is no reason why the prayer for mandatory injunction shall not be allowed.

29. I, therefore, allow this appeal and decree the prayer for mandatory injunction. The tenants respondents must demolish, at their own costs, the permanent structure raised by them on the disputed land within three months from the date of this judgment. In default, the plaintiff appellant shall be entitled to have the permanent structure demolished by process of execution of this decree. In that event the plaintiff appellant shall be entitled to recover the costs of demolition of the structure, as assessed by the lower appellate court, from the tenants defendants in course of execution of this decree.

30. The plaintiff appellant shall be entitled to costs of this appeal.

31. In view of my judgment in the appeal, the cross-objection fails and is dismissed without costs. Leave to appeal under Clause 15 of the Letters Patent is asked for and is refused.