

**(1973) 02 CAL CK 0018****Calcutta High Court****Case No:** None

Amarendra Nath Bhattacharjee

APPELLANT

Vs

Amiya Nath Pyne and Others

RESPONDENT

**Date of Decision:** Feb. 6, 1973**Acts Referred:**

- Evidence Act, 1872 - Section 110, 116
- Specific Relief Act, 1963 - Section 9
- Transfer of Property Act, 1882 - Section 114

**Hon'ble Judges:** Salil Kumar Datta, J**Bench:** Single Bench**Advocate:** Ranjit Kumar Banerjee, Abinash Chandra Bose and Rabindra Kumar De, for the Appellant; Sankar Das Banerjee, Bijoy Kumar Bhose and Miss Alakananda Bhose, for the Respondent**Final Decision:** Dismissed**Judgement**

Mr. Justice Salil Kumar Datta

1. This is an appeal by the defendant against a judgment of affirmance. The suit was instituted on the following allegations. The suit property comprises Premises No. 105, Gopal Lal Tagore Road, P.S. Baranagar, with partly one and partly two storied pucca house, garage, kitchen, mali's room, pucca privy thereon and tank with area measuring about 15 kottahs. The father of the plaintiffs vendor Surendra Pyne as lessor demised to the defendant the suit premises by registered lease for seventeen years commencing from January 1, 1954 to December 31, 1970 on a monthly rent according to English calendar for first ten years at Rs.8/- and thereafter for seven years at Rs.85/- payable by the 10th day of the succeeding month. It was provided in the lease (Exhibit 6) that in the event of default in payment of rent for six months, the lease would stand determined and on being required by the lessor or his heirs or assignees the defendant would peacefully vacate any yield up possession of the

suit premises to the lessor.

2. Surendra died in testate on March 21, 1957 leaving one Sambudas as his sole heir. Thereafter by registered conveyance dated July 20, 1962 (Ext. 9) the plaintiff's purchased the property in suit for valuable consideration with all arrears of rent. The defendant was defaulter in payment of rent since March, 1947 to June, 1959. The lawyer of Sambhu by a notice dated July 13, 1959 called upon the defendant to quit the premises on forfeiture of the lease. This demand was renewed on August 17, 1959 but the defendant failed to give vacant possession of the suit premises and accordingly had been in occupation of the suit premises as a trespasser from 1st September, 1957. It was further stated that the defendant forfeited the benefit of section 114 of the Transfer of Property Act for denying plaintiffs title in the suit premises by his reply to the first notice. On the above allegations the plaintiffs instituted the suit on August 7, 1962 claiming a decree for ejectment, rent and mesne profits.

3. The suit was contested by the defendant who filed a written statement contending, *inter alia*, that the plaintiffs had no right to sue and there were no relationship whatsoever between the parties. It was further stated that the lease was not legal, valid or operative in law and was with "suppressio veri and expressio falsi", willful misrepresentation and wrongful inducement. The document was accordingly not binding on the defendant. It was further stated that the sale to the plaintiffs was a sham and fraudulent transaction. The plaintiff's father had inherited no right, title and interest in the suit premises and the plaintiffs in their turn acquired no title to the property by alleged conveyance. The defendant stated that one Gangamani was the owner of the suit property and she died while in possession thereof some time in February, 1950. The defendant came to possess the suit property since March, 1950 long before the alleged lease and had spent over Rs.20,000/- for repairs. It was stated that the plaintiffs had no right to demand rent or vacant possession nor was the defendant under any obligation to comply with the terms of the notice. It was accordingly submitted that the suit should be dismissed.

4. The learned Munsif on a trial on evidence before him held that u/s 110 of the Indian Evidence Act possession is *prima facie* presumption of ownership and is a good title against all except the true owner entitling the possessor to be maintain the suit for ejectment. Reliance was placed on Woodroff and Amir Ali's Law of Evidence in which it was observed that a person in possession of land without title has an interest in property which is heritable good against all except has an interest in property which is heritable and good against all except the true owner, and capable of being disposed of by deed, will and execution sale. The plaintiffs and their predecessor-in-interest had at least constructive possession of the suit property. The defendant paid rent to Surendra upto February, 1957 acknowledging him as landlord. The presumption u/s 110 can only be rebutted by the rightful owner and Ext. A certified copy of the conveyance dated October 9, 1918 in favour of

Gangamani does not rebut the presumption. It was further held that Gangamani was not the rightful owner and even if she was in absence of any demand from her or on her behalf the presumption of ownership of the plaintiffs was unrebutted. The suit was accordingly maintainable. The defendant was inducted in the suit premises by Surendra in May, 1950 as a monthly tenant and thereafter the lease was executed. The defendant paid rent to Surendra up to February, 1957 and accordingly he was estopped u/s 116 of the Evidence Act from denying the title of Surendra or Sambhu who acquired title by inheritance as also of the plaintiffs who acquired title on the basis of conveyance which was held to be genuine and not a sham transaction. It was further held that the deed of lease was not tainted with fraud or misrepresentation but was a genuine document duly acted upon and the defendant was bound by the terms of the lease. Accordingly the plaintiff was entitled to a decree for possession. The notice was found to be legal and valid and its service was not disputed. The suit was accordingly decreed.

5. An appeal was taken by the defendant and the Appellate Court on a consideration of the materials on records, found that the defendant was inducted in the suit premises by Surendra on the death of Gangamani as a monthly tenant and thereafter demise by the lease took place. The lease was not vitiated by fraud or misrepresentation and the defendant executed the document of his own free will. It was further held that the defendant was estopped from challenging the title of Surendra without surrendering the possession of the tenancy to the rightful landlord. As the derivative title of the plaintiffs and their vendors was established the defendant who had no right to challenge the sale deed, was estopped from challenging the title of Surendra at the commencement of the tenancy u/s 116 of the Evidence Act. In agreement of the trial court it was held that the defendant did not pay rent since 1957 and the lease under its terms stood cancelled. The notice also was held to be legal valid and sufficient while its service was not disputed. The appeal in the circumstances was dismissed.

6. Mr. Ranjit Kumar Banerjee, learned Advocate appearing for the defendant-appellant has raised various contentions assailing the judgment under appeal. It was contended that Surendra was entitled in view of the lease to sue the defendant for ejectment but as he had no titled in the property, on his death no interest devolved on Sambhu and thereafter to the plaintiffs. In the present suit for recovery of possession the plaintiffs must establish their title to the property as has been consistently held in judicial decisions. He referred to several decisions in support of his contentions. In (1) Sevaji v. China Nayana, (1863) 10 MA 151 at page 160 it was held that the plaintiff trying to dispose the present possessor must prove his case clearly and indefeasibly and he must succeed by the strength of his own title and not by the weakness of his opponents. He has also referred to the decision in (2) Rance Shornomoyee v. Watson & Company and Others, (1873) 20 WR 211 in which it was held that in a suit in the nature of ejectment suit, the plaintiff could recover on strength of his own title and unless the land was proved to be the

property of the plaintiff, the latter was not entitled to turn out the defendant and it was immaterial whether the land was the property of the defendant. In (3) Wise v. Ameerunissa, (1879) (7) IA 73 it was held that the plaintiffs entitled to recover on the strength of their previous possession, must bring an action within six months as provided in Act XIV of 1859 and otherwise the plaintiff was not entitled to a decree until and unless he can show better title than the defendant. Again, in (4) Mohima Chunder v. Mahesh Chunder, (1888) 16 IA 23 it was held that when the defendants are in possession the plaintiff's title must be proved and they must recover possession by the strength of their own title. In (5) Ram Chandra Sil v. Ram Nani, AIR 1977 Cal 469 it was held that mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit u/s 9 of the Specific Relief Act. The plaintiff otherwise can succeed only upon proof of title and not merely proof of possession.

7. Mr. Banerjee next contended that the Appellate Court was wrong in holding that in view of section 116 of the Evidence Act the defendant could not challenge the derivative title of Sambhu and thereafter by the plaintiffs who claimed to have been since successively entitled to and acquired the interest of Surendra in the suit property. He referred to the decision in (6) Krishna Prosad Lal Singh Deo v. Barboni Coal Concern Ltd., 41 CWN 1253 (P C) in which it was observed at page 1259 in interpreting section 116 as follows: -

What all such person (lessee, his assignee or sub-lease) are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even in a case where the lease itself discloses the defendant of title. The principle does not apply to disentitle a tenant to dispute the derivative title to one who claims to have since become entitled to the reversion, though in such cases, there may be other grounds of estoppel, as for example, by attornment, acceptance of rents etc..... the principles apply to the title of the landlord who let the tenant in as distinct from any other person claimed to be a reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end.

8. Mr. Banerjee has also referred to Article 459 of Volume 15 of Halsbury's Laws of England, 3rd Edition, in which it is stated that the lessee is not estopped from showing that the lessor had no such title as he could pass to the assignee. According to Mr. Banerjee, as Surendra had no title, as soon as he died there was no inheritable or assignable interest or title in respect of the premises which could be claimed by Sambhu or the plaintiffs and the defendant was entitled to challenge the derivative title claimed by the plaintiffs.

9. Mr. Sankar Das Banerjee, learned Advocate appearing for the plaintiffs-respondents, has contended on the other hand, that the defendant was not entitled to challenge the plaintiff's right to sue, and there is no legal impediment for the decree prayed in the suit. Possessory title which at least Surendra had has been recognized in law as an enforceable claim and such right is

heritable and transferable. He referred to the decision of (7) Musst. Sunder v. Musst. Parbati, 16 IA 186 in which it was held that where Hindu widows are in lawful possession of the property of their deceased husband, they have an estate or interest therein in respect of their possession though under adoption or will a preferable title thereto may exist. He also referred to the decision in (8) Azmir Khan v. Rustom Khan, AIR 1919 All 43 in which it was held that a person in possession of a property had good title against the whole world except the true owner and such title is capable of descending by inheritance to his heirs. In (9) AIR 1943 330 (Oudh) it was held that a possessory title is good against the whole world except the true owner and is transferable. Accordingly, there is no legal bar, according to Mr. S. Banerjee, in Sambhu's inheriting the possessory title of Surendra and assignment by him of the said interest to the plaintiffs.

10. In a recent decision the Supreme Court in (10) Somnath Burman Vs. Dr. S.P. Raju and Another, approved the proposition that prior possession under the Indian law as under the English law is good title against all but true owner. It was observed: -

Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff in an action of ejectment, is sufficient title even if the suit be brought more than six months after the act of dispossession complained of and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person.

It was further observed that possessory's title is good title as against everybody other than the lawful owner. The decision in (11) Ismail Ariff v. Md. Ghouse, 20 IA 99 granting declaration of ownership of the land to the person having possessory title was approved. The Supreme Court did not accept the contention that in a suit for possession the plaintiff cannot succeed unless she proves title to the suit property as well as possession within 12 years and it was held that prior possession is good title against all but true owner.

11. It will thus appear that possessory title as an interest in property has been recognized in our country and being an interest in land it is heritable and assignable as any interest in the property in absence or any express or implied prohibition in law. It will appear that lessor Surendra while seized of his possessory title, parted with the possession of the suit premises in favour of the defendant in terms of the registered lease, held to be a valid document, with effect from January 1, 1954. He had accordingly the possession thereof through his lessee along with his possessory title in the said premises. Surendra died while seized of his possessory title in and constructive possession of the suit properties and all his right, title and interest therein developed in Sambhu his only heir and legal representative on his death. On the expiry of period mentioned in the notices i.e., from September 1, 1957 the defendant became a trespasser in the suit premises. The plaintiffs on basis of their conveyance of July 20, 1962 became clothed with all the rights Sambhu had in the suit premises, and thus became entitle to the possessory title Surendra had through

their vendor Sambhu in the suit premises together with the right khas to possession thereof against all except the true owner. The suit was thus maintainable in law by the plaintiff's claiming possessory title through inheritance and assignment against the defendant who since September 1, 1957 was a trespass in the suit premises.

12. It was contended that the suit was based not on possessory title but on forfeiture putting an end to the contract. In the lease deed the term "lessor" is mentioned as to be deemed to include the lessor's heirs, representatives and assigns. As we have been the interest that Surendra had in the suit property was the possessory interest valid and enforceable against all except true owner. Such interest was also heritable and Sambhu on the death of Surendra became the lessor of the defendant for the time being in terms of the deed of lease. Sambhu's interest again being assignable by a deed of assignment for consideration the plaintiffs became entitled to the possessory interest which Surendra had and later on developed, on his death, on Sambhu. Accordingly the plaintiffs became clothed with all rights of the lessors under the deed of lease and were all entitled to all rights thereunder. Once it is found that the plaintiffs became entitle to all rights of Surendra in respect of those under the lease. The defendant could not challenge the title of Surendra as landlord as also of the plaintiffs as his landlords during the continuance of the tenancy as provided in section 116 of the Evidence Act and also thereafter so long as he had not yielded up the possession of the suit premises to the landlords even after service of notice as was observed in (11) Bilas Kuhwar v. Desraj, 19 CWN 1207 (PC).

13. For all these reasons the appeal was rightly dismissed by the Appellate Court and the appeal in the circumstances must fail and is accordingly dismissed.

There will be no order as to costs. The appellant prays for leave under Clause 15 of Letters Patent. The leave is granted.