

(2013) 09 CAL CK 0089

Calcutta High Court

Case No: C.R. No. 1782 of 1985

Hazarilal Shaw

APPELLANT

Vs

Subal Chandra Ghosh

RESPONDENT

Date of Decision: Sept. 4, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Limitation Act, 1963 - Section 5

Hon'ble Judges: Prasenjit Mandal, J

Bench: Single Bench

Advocate: Gopal Chandra Ghosh, for the Appellant; Subrata Talukdar and Mr. Mayukh Maitra, for the Respondent

Final Decision: Dismissed

Judgement

Prasenjit Mandal, J.

This application is directed against the order dated March 3, 1985 passed by the learned Munsif, 2nd Court, Barasat in Misc. Case No. 13 of 1981 arising out of Title Suit No. 540 of 1987 thereby allowing the misc. case under Order 9 Rule 13 of the C.P.C. The short fact is that the original plaintiff/predecessor-in-interest of the petitioners herein instituted the aforesaid title suit for recovery of possession and other consequential reliefs against the defendant/opposite party herein contending that the defendant is a tenant under him in respect of the suit property. In that suit the defendant/opposite party herein entered an appearance and prayed for time to file a written statement on a number of occasions. Ultimately, he did not contest the suit and so, the suit was decreed ex parte.

2. Thereafter, the original plaintiff instituted an execution proceeding for execution of the decree and at that stage when the writ of delivery of possession was going to be executed, the defendant/opposite party herein resisted, and then he filed an application under Order 9 Rule 13 of the C.P.C. along with an application u/s 5 of the

Limitation Act. The original plaintiff filed a written objection against the said application.

3. Upon analysis of the evidence on record, the learned Trial Judge allowed the application under Order 9 Rule 13 of the C.P.C. and the application u/s 5 of the Limitation Act. Being aggrieved by such orders, this application has been preferred.

4. Now, the question is whether the impugned order should be sustained.

5. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that the matter in dispute relates to the facts that while the plaintiff instituted the suit for eviction against a tenant, the defendant contended that he had mortgaged the property in favour of the plaintiff and the interest accrued thereon had been paid in the manner of showing rent. The defendant also contended that the suit property is the homestead and he has been residing thereon all along and that he did not part with the possession of the same at all.

6. In consideration of the nature of the claim of the parties against each other and on the basis of the evidence on record, the learned Trial Judge has concluded that the defendant has succeeded to prove his case of fraud to the effect that the talks for settlement were held and he was asked not to come to the Court as the plaintiff would withdraw the suit. The learned Trial Judge has accepted such evidence and treated the same as sufficient reasons for not coming to the Court. Accordingly, the learned Trial Judge has allowed the application u/s 5 of the Limitation Act and also the application under Order 9 Rule 13 of the C.P.C. by awarding costs of Rs. 50/- to be paid within the time fixed by him.

7. Mr. Gopal Chandra Ghosh, learned Advocate appearing for the petitioner has submitted that the evidence as tendered by the petitioner of the misc. case is not acceptable on the ground of fraud. The same cannot be believed and as such the findings of the learned Trial Judge should be set aside.

8. Mr. Ghosh has also pointed out the relevant portions of the deposition tendered by P.W. 1. Upon consideration of the evidence on record, I find that there was a friendship between the parties before the alleged transaction. So, the learned Trial Judge has accepted the statement of the P.W. 1. The P.W. 2 is a corroborating witness. The evidence of the O.P.W. 1 is mainly denial of the contention of the p.w. 1.

9. With due respect to Mr. Gopal Chandra Ghosh, I am of the view that this is not at all an appeal but a revision and so, this Court is not in a position to re-appreciate the evidence already on record. It is the clear finding of the learned Trial Judge that the defendant has succeeded in proving his case of fraud on sufficient reasons for his non-appearance. Such findings are based on evidence. So, the findings of the learned Trial Judge, in my view, cannot be described as suffering from perversity. The learned Trial Judge has taken a lenient view in allowing the application under

Order 9 Rule 13 of the C.P.C.

10. In view of the entire scenario of the matter as stated above, I am of the opinion that the impugned order should not be interfered with. Accordingly, the application is dismissed.

11. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.