

(2001) 02 CAL CK 0027

Calcutta High Court

Case No: Decree No. 222 of 1990

Anadi Mohan Rashit and others

APPELLANT

Vs

Nalin Sarker Street U.P. School
and others

RESPONDENT

Date of Decision: Feb. 23, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1

Citation: AIR 2002 Cal 89

Hon'ble Judges: Samaresh Banerjea, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Gopal Chandra Mukherjee, for the Appellant; Amal Baran Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee, J.

Appellants are the landlords of Premises No. 11-A, Nalini Sarkar Street, Calcutta. In the 1950s one Shri Radheshyam Sadhukhan, since deceased, took three rooms on the ground floor at 11-A, Nalini Sarkar Street, Calcutta under three different tenancies from the appellants/landlords. According to Appellants, the said Shri Radheshyam Sadhukhan during his lifetime was staying in one room and the other two rooms were being used by him as coaching class.

2. According to appellants, three ejectment suits were filed for eviction of the said Shri Radheshyam Sadhukhan. The Appellants obtained decree in the said three suits. In fact, the Appellants got possession of one room being the subject-matter of one of three tenancies in which the said Shri Radheshyam Sadhukhan was staying. The Respondents/Plaintiffs claimed to be an aided upper primary school in the said premises being run in the said two rooms being the subject-matter of the other two tenancies. According to Respondents/Plaintiffs, the decree which was obtained by

the Appellants were collusive. In fact, the Respondents made an application for addition of party in those suits which was dismissed by the Court below by an order dated February 24, 1975 filed in ejectment Suit No. 1492 of 1973. According to Respondents, the said ejectment suits were heard and decreed ex parte.

3. After the said application having been dismissed the respondents filed two suits in the Court below belong Title Suit No. 587 of 1975 and subsequently being Title Suit No. 2189 of 1976. The earlier suit was abandoned by the respondent by making an application for non-prosecution which resulted in an order of dismissal for non-prosecution on February 15, 1977.

4. The case of the respondent in the said Title Suit No. 2189 of 1976 is briefly as follows:◆

i. Nalin Sarker Street Upper Primary School (hereinafter referred to as the said school) was originally established in 1905. The said school was being run from the subject premises. Radheshyam Sadhukhan, being the Headmaster of the said school took the tenancy in his own name. Before and after the death of Radheshyam the rent was being paid out of the school fund. The tenancy was, however, continued in the name of Radheshyam.

ii. Disputes started in the year 1970 when Appellants served ejectment notice and filed suit against Shri Radheshyam.

iii. In one of the ejectment suits whose plaint had been exhibited in the instant case, it appears that the appellant filed the ejectment suit against Radheshyam, inter alia, on the ground that there had been a change of user by Radheshyam who started using one of the tenancies for his residential purpose instead of running the said school.

5. According to respondents, although the said ejectment suits have been decreed in favour of the Appellants/Land lords those decrees are not binding upon the school. The present suit has been filed by the respondent, inter alia, claiming for declaration that they are the real tenant under the Appellants/Landlords as well as for the permanent injunction restraining the appellants from interfering with the plaintiffs" possession in respect of the said three rooms.

6. In the written statement, appellants contended that the plaintiff No. 1, being the said school was not in existence when the said tenancy was given to Radheshyam and, in fact, Radheshyam took the said three tenancies in his personal capacity for running a "coaching class, type of school". The Appellants reasonably required the said premises and filed those ejectment suits, inter alia, on the ground of reasonable requirement and obtained decrees in the said suits. It was also contended that there was no collusion in the said ejectment suits. It was also contended that there was never any contractual relationship between the said school and the Appellants. It was also contended that the present suit was not

maintainable as on the self-same cause of action, the earlier suit had been dismissed for non-prosecution without any leave being obtained under Order 23, Rule 1 of the Code of Civil Procedure. The suit was also barred by the principles of *res judicata*. The present suit was heard by the Court below. The said school in their deposition through the then Headmaster reiterated the stand of the respondents in the plaint. The Inspector of Schools, belonging to the Education Department of the State of West Bengal also deposed in favour of the respondents to the effect that the rent of the concerned school was being paid by the Government on the basis of the rent receipts produced by the Headmaster of the school. The appellant No. 2 deposed on behalf of the appellants to the effect that the first tenancy was taken in the year 1935 and subsequently the second and third tenancy were taken with the interval of three years. All the said three tenancies were taken by Radheshyam. The appellants got possession of one room from the heirs of Radheshyam in pursuance of ejectment decree passed in suit No. 994 of 1970.

7. It was deposed on behalf of the appellants that neither they have any correspondence with the School Authority nor Radheshyam ever requested to recognise the said school as tenant. The plaint in the ejectment suit being No. 1492 of 1973 had been tendered as Exhibit No. M-1 by the Appellants.

8. The suit was disposed of by a judgment delivered by the 7th Court of the City Civil Court at Calcutta. The learned Judge of the Court below decreed the said suit, *inter alia*, on the basis of the findings which are as follows: ♦

i. It appears from the record that the earlier suit filed by the respondent was dismissed for non-prosecution on an application made by the respondent on a date when the subsequent suit was pending hence the provision of Order 23, Rule 1 had no application. The learned Judge also held that the provision of Order 2. Rule 2 of the CPC also had no application in the instant case. The learned Judge while holding the said suit as maintainable relied on a decision reported in AIR 1930 Lah 699 (sic).

ii. The learned Judge heavily relied on the plaint filed by the appellants in the ejectment suit wherein it was categorically stated by the appellants that the tenancy was taken by Radheshyam for the purpose of running a school, although the rent receipt was in the name of Radheshyam. Hence the contention of the appellants that the tenancy was taken by Radheshyam in his personal capacity had been rejected by the learned Judge.

iii. The learned Judge on appreciation of the evidence adduced by the respondent was of the view that the rent was all (sic) paid by the said school itself from the school fund. Hence, although, the rent receipt was in the name of Radheshyam, he was a (sic) name lender and the school was the (sic) tenant.

iv. The learned Judge was also of the view that since the school is the real tenant, ejectment decree against Radheshyam was not binding upon the respondent and such ejectment decree did not operate as *res judicata* against the respondents. The

learned Judge was also of the view that since the school was not a party to the said suit the principles of res judicata could not have any application in the instant case.

v. The learned Judge also held that dismissal of the application under Order 1 Rule 10 CPC also would not operate as res judicata against the respondents as the application under Order 1, Rule 10 could not be regarded as suit and, in fact, no issue was raised on the said score.

vi. Ultimately, the suit was decreed by the learned Judge holding that the said school was the real tenant under the appellants and the decrees passed in the ejectment suits were not binding upon the said school and the appellants were restrained by a permanent injunction from interfering with the possession of the said school in the said premises.

9. Being aggrieved by the said decree, the appellants preferred the instant appeal in the Court.

10-11. Mr. Gopal Mukherjee, learned counsel, appearing for the appellants tried to assail the said judgment and decree of the Court below on the following grounds:◆

i. The suit was not maintainable under the provisions of Order 23, Rule 1 of the CPC and/or under Order 2, Rule 2 of the Code of Civil Procedure.

ii. The suit was barred by the principles of res judicata in view of the ejectment decrees passed in the said ejectment suits as well as the judgment and order of dismissal on the application of the said school under Order 1, Rule 10 of the Code of Civil Procedure.

iii. Radheshyam was the real tenant, neither there was any attempt for recognition of the school as a tenant nor the rent receipts were ever made in the name of the school.

iv. There was no privity of contract between the appellants and the respondents,

12. On the question of maintainability of the suit we have carefully examined the judgment of the Court below and the relevant provisions of the Code of Civil Procedure. We feel that Order 23 Rule 1 of CPC contemplates a situation where the plaintiff wants to file a subsequent suit whereas in the instant case there had been already two suits filed on the day when one of them was dismissed for non-prosecution. Sub rule 4 of the rule 1 of the Order 23 clearly bars a plaintiff to file a fresh suit on the self same cause of action without any prior leave being obtained. Hence, such rule has no application in the instant case.

13. Similarly, Order 2 Rule 2 of the CPC bars any future suit in addition to the original suit on the same cause of action without any prior leave being obtained. Such rule provides that any person entitled to more than one relief in respect of same caused of action may file a subsequent suit with prior leave. Such rule has also no application in the instant case. Lastly, the ground of res judicata under S. 11 is also

not applicable since the judgment and order of dismissal in the application under order 1 Rule 10 of the CPC did not decide the issue involved in the suit. Moreover such proceeding was not a "Suit" within the meaning of S. 11 of the Code of Civil Procedure. Hence, we hold that the subsequent suit being Title Suit No. 2189 of 1976 which was heard and disposed of by the Learned Judge was maintainable and we are in total agreement with the decision of the Court below on that score.

14. On the factual score we are also in total agreement with the decision of the Court below. The learned Judge on appreciation of evidence and placing heavy reliance on the plaint filed by the appellants in the ejectment suit held that the appellant themselves contended that the tenancy was given for the purpose of running the school as appears from the copy of the plaint being Exhibit M1. From the copy of the said plaint it would clearly appear that Radhyashyam was a mere name lender of the said school and the said school was a real tenant. In any event the plaintiffs through their wit-nesses including the Government Authority conclusively proved that the school was all along enjoying the said tenancy upon payment of rent out of their own fund. Mr. Mukherjee appearing for the Appellants tried to contend that the averments made in the plaint filed by his client in the ejectment suit should not be looked into which are contrary to the written Statement filed in this suit. Mr. Mukherjee however failed to cite any authority in support of such contention. We are unable to appreciate such submission, in view of the fact that the copy of the plaint in the said ejectment suit was tendered by the appellants themselves. The appellants are therefore estopped from contending contrary to what had been stated in the said plaint.

15. In the result, the appeal fails and is hereby dismissed. In the facts and circumstances there would be no order as to cost.

16. We however make it clear that dismissal of this appeal and the observations made therein by us would not any way preclude the appellants from initiating any appropriate proceedings for ejectment of the said school before the appropriate forum if they are so entitled to in law.