
(1955) 09 CAL CK 0008

Calcutta High Court

Case No: Appeal From Appellate Decree No. 560 of 1950

Kali Charan Malik

APPELLANT

Vs

Hari Nath Chatterjee and Ors

RESPONDENT

Date of Decision: Sept. 1, 1955

Acts Referred:

- Transfer of Property Act, 1882 - Section 107
- West Bengal Non-Agricultural Tenancy Act, 1949 - Section 7, 88, 9, 9(1), 9(1)(a)

Citation: 60 CWN 1092

Hon'ble Judges: S.R. Das Gupta, J; Mallick, J

Bench: Division Bench

Advocate: Bhabesh Chandra Mitter, for the Appellant; Kamjit Mukherji, Sushil K. Banerjee for the Deputy Registrar and Satindra Nath Roy Choudhury, Amicus curiae, for the Respondent

Final Decision: Allowed

Judgement

Mallick, J.

The suit out of which this appeal arises is a suit for ejectment, rent and mesne profits. It is alleged in the plaint that the defendant is a tenant and was inducted on 14th September 1938 corresponding to 1st Baisakh 1345 B.S. This tenancy is evidenced by a registered kabuliyat executed by the defendant in favour of the plaintiff. The period of the lease was for 3 years from 1st Baisakh 1345 B.S. After the expiry of the lease the defendant was holding over till the end of Bhadra 1355 B.S. when by a notice to quit duly served on the defendant the tenancy was determined. The defendant not having complied with the notice to quit, the present suit was instituted.

2. The defence taken in the written statement is that the defendant was in possession as a tenant not from 1st Baisakh 1345 B.S. as alleged but from 1330 B.S. It is alleged that the defendant and his brother one Bankim Malik was in possession

of 5 cottahs of land which includes the land in suit under a kabuliyat executed by Bankim. in favour of the landlord since 1330 B.S. In 1345 B S. there was a partition between the defendant and Bankim whereby the suit land was allotted to the defendant. The defendant thereupon executed a kabuliyat in 1345 B.S. in favour of the plaintiff in respect to the land allotted to him as aforesaid in partition. It is contended therefore that the defendant has been in possession of the suit land for over 12 years and as such he is protected from eviction by Section 7 of the Bengal Non-Agricultural Tenancy Act The validity of the notice to quit and arrears due is also disputed in the written statement.

3. The learned Munsif who heard the suit held in favour of the plaintiff that the defendant was in possession from 1st Baisakh 1345 B.S. and not from 1330 B S. as alleged in the written statement. He negated the defendant's contention that he was a tenant from 1330 B.S He found that the possession of the defendant as tenant was for a period of less than 12 years but more than one year. On such finding he held that the case would be governed not by section 7 but by section 9(1) (a) of the Bengal Non-Agricultural Tenancy Act and the defendant was liable to be ejected. He further found that the notice to quit is valid in law. In the result he passed a decree as prayed by the plaintiff.

4. Against the decision of the learned Munsif an appeal was taken before the learned District Judge. The learned District Judge agreed, with the learned Munsif in his finding that the defendant has been in possession only since 1st of Baisakh 1345 B.S. and not since 1330 B.S. as contended by the defendant. On such finding he confirmed the decision of the learned Munsif as to ejectment. He however reduced the amount of rent decreed by Es. 4/6/-, on the finding that the recovery of this amount was barred by limitation.

5. Against the decision of the learned District Judge the present appeal has been taken by the defendant appellant. There is no cross appeal by the plaintiff landlord.

6. Mr. Bhabesh Chandra Mitter appearing in support of the appeal firstly contended that the Court below was wrong in finding that Section 7 of the Non-Agricultural Tenancy Act would not apply in this case. He contended that the lease of 1330 B.S. evidenced by the kabuliyat granted by Bankim, the elder brother of the defendant should be taken to be a lease in favour of both the brothers, viz.. Bankim and the defendant. The fact that the lease of 1345 B.S. in favour of the defendant is in respect to lands which is exactly half of the land covered by the lease of 1330 B.S. clearly proves that Bankim and the defendant were in possession as lessees under the lease though the lease was in the name of Bankim. Since 1345 B.S. the defendant was in possession of the half share allotted to him on partition and in respect to which the defendant executed the kabuliyat of 1345 B.S Therefore, argued Mr. Mitter, the defendant's period of possession under the lease of 1345 B.S. should be tacked with the period under the lease of 1330 B.S. In that event the period of lease would be much more than 12 years and the defendant is protected

against eviction by Section 7 of the West Bengal Non-Agricultural Tenancy Act. Unfortunately however the concurrent finding of both the courts below is that the defendant appellant has not succeeded in proving his possession prior to 1345 B.S. The evidence tendered by the appellant in support of his case as to possession prior to 1345 B.S. has been held to be unsatisfactory and inconclusive. This finding of fact is binding on us in second appeal and we are bound to decide the appeal on the basis that the defendant has been in possession of the land in suit only from 1345 B.S. If the defendant is in possession since 1345 B.S. i.e., 1935 then the suit having been instituted in 1948, his possession admittedly is for less than 12 years. In our judgment therefore the Courts below was right in finding that section 7 of the West Bengal Non-Agricultural Tenancy Act would not apply to this case. The first point taken by Mr. Mitter is therefore overruled.

7. The second point taken by Mr. Mitter is that the Courts below were wrong in thinking that the present case would be governed by clause (a) of section 9, Sub-Section (1) of the Bengal Non-Agricultural Tenancy Act. His contention is that in the instant case the possession of the defendant at the material date is not under a lease in writing and hence sub-section (1) (b) would apply. If clause (b) is held to be applicable, then the defendant is entitled to six months' notice in writing expiring with the end of a year of tenancy. In the present case notice to quit was served in early Bhadra 1355 B.S. requiring the defendant to quit and vacate by the end of Bhadra 1355 B.S. Hence apart from anything else there has not been six months' notice as required by statute. It follows that if Section 9(1) (b) is held to be applicable, the suit as to ejectment must fail in the absence of six months' notice to quit expiring with the end of a year of tenancy.

8. The question therefore is whether the defendant can be held to be in possession under a lease in writing, i.e., under the kabuliyat granted by the defendant, in 1345 B.S. Clear answer to this question is in the negative. In the first place the kabuliyat of 1345 B.S. being an unilateral document, it can be well contended that u/s 107 of Transfer of Property Act as amended in 1939, such a document cannot be considered to be a "lease". Even assuming that the kabuliyat of 1315 B.S. can be considered to be a lease in writing, that lease expired in 1348 B.S. and thereafter the plaintiff's own case is that the defendant held over till the tenancy was determined by notice to quit in Bhadra 1355 B.S.

9. Hence after the expiry of the lease in 1348 B.S. the tenant having held over with the consent of the landlord, a new tenancy was created and the tenant can no longer be held to be in possession under the kabuliyat of 1345 B.S., even if the kabuliyat be held to be a lease. On the footing that the defendant was a monthly tenant the plaintiff sought to determine the tenancy by serving on the defendant a fortnight's notice to quit. It must therefore be held that the defendant at the material date was not in possession under any lease in writing and hence the instant case would be governed by clause (b) of section 9 (1) of the Bengal Non-Agricultural

Tenancy Act. In that view of the matter, no decree for ejectment can be passed in this present suit in the absence of six months' notice to quit.

10. Mr. Kamjit Mukherjee appearing for the respondent contended that the Act came into force on 5th May 1949. But the tenancy in suit was determined in August, 1948 and suit instituted in September 1948, that is prior to the Act coming into force. He argued that after serving the notice to quit he acquired a vested right to get back possession and that right cannot be affected or taken away by the Act which was subsequently passed, in other words his point is that section 9 of the West Bengal Non-Agricultural Tenancy Act has no retrospective operation. Section 88 of the Bengal Non-Agricultural Tenancy Act however expressly provides that "the provisions of this Act shall have effect in respect of all suits, appeals or proceedings including proceedings in execution for ejectment of a non-agricultural tenant which are pending at the date of the commencement of this Act." Having regard to this express provision that the provision of the Bengal Non-Agricultural Tenancy Act would apply to pending suits, it must be held that section 9 would apply to this case which was pending at the date the Act came into force. In the result this appeal is allowed and the decree for ejectment passed by the learned Additional District Judge is set aside and the suit is dismissed except that the decree for arrears of rent passed by the learned District Judge will stand. Parties will bear their own costs throughout.

S.R. Das Gupta, J.

I agree.