

(2008) 09 CAL CK 0074

Calcutta High Court

Case No: C.O. No"s. 1897 and 1898 of 2008

Maya Rani Sur alias Maya Debi
Sur

APPELLANT

Vs

Sankar Chandra Majumder and
Jaymangal Karmakar

RESPONDENT

Date of Decision: Sept. 30, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2, 2(2)
- Constitution of India, 1950 - Article 221, 227
- Transfer of Property Act, 1882 - Section 106

Citation: (2008) 4 CALLT 233

Hon'ble Judges: Partha Sakha Datta, J

Bench: Single Bench

Advocate: Sibaprasad Ghosh, for the Appellant; Bidyut Banerjee and Shila Sarkar, for the Respondent

Final Decision: Allowed

Judgement

Partha Sakha Datta, J.

The two applications are being disposed of by this common order.

2. The petitioner in both the cases is one Smt. Maya Rani Sur. She instituted Title Suit No. 260 of 2002 against Sankar Chandra Majumder, the opposite party in C.O. No. 1897 of 2008 praying for eviction of the said opposite party and for recovery of khas possession of the suit premises and for damages etc. which is a shop room as described in the schedule to the plaint of Title Suit No. 260 of 2002 on the ground that the tenancy was determined by a notice u/s 106 of the Transfer of Property Act. Many a grounds were advanced in the plaint including the grounds of default, commission of nuisance and annoyance etc., which are not necessary for disposal of the two applications.

3. The learned Trial Court decreed the suit by judgment and decree dated 30th of July, 2007.

4. Being aggrieved with the said judgment and decree the opposite party preferred the appeal before the learned Additional District judge at Barrack pore which was registered as T.A. No. 36 of 2007.

5. The said Maya Rani Sur instituted similar another suit being T. S. No. 263 of 2002 against one Jay Mongal Karmakar, opposite party in CO. No. 1898 of 2008 praying for his eviction of a shop room after determination of tenancy u/s 106 of the Transfer of Property Act and the grounds of eviction are almost the same as were the grounds under the Title Suit No. 262 of 2002 filed against the opposite party in CO. No. 1897 of 2008. This suit was decreed by the learned Trial Court by judgment and decree dated 30th of July, 2007 and against the judgment and decree the opposite party preferred an appeal being Title Appeal No. 35 of 2008.

6. Both the appeals were taken up for hearing by the learned Additional District Judge, Barrackpore. On 28th of April, 2008 the learned Judge in the Court below, as the order reveals, recorded that the learned lawyer for the appellant submitted that the Court below did not provide any opportunity to the appellant to pay the arrears of rent with interest and he was candid in his expression with the concept "pay and stay". It was further submitted before the learned Appellate Court that the appellant had already deposited some amount in the name of the landlord-respondent with the office of the Rent Controller. Then, a calculation was taken up and it was found that in respect of the opposite party in CO. No. 1897 of 2008 a sum of Rs. 21,074.93p was due, while in respect of the other petitioner in CO. No. 1898 of 2008 a sum of Rs. 25,758.25p was due. The learned Court below directed deposit of this amount by 13th of May, 2008 and then directed that the records be put up before him on 13th of May, 2008. On 13th of May, 2008, the learned Court of appeal below was satisfied of such deposits and while giving liberty to the respondent-landlord to withdraw the amounts in both the cases observed that the Title Appeal was thus disposed of.

7. These orders dated 28th of April, 2008 and 13th May, 2008 are the subject matter of challenge in these two applications.

8. Mr. Sibaprasad Ghosh, learned Advocate appearing for the petitioner-respondent submitted that the orders of the learned judge in the Court below are very exceptional in this that he invented a new method of disposal of the appeal unknown to the CPC on the doctrine of "pay and stay" and conceded to the prayer of the appellant that on payment of the arrears amount of rent "stay" should be allowed. It is submitted that on 13th of May, 2008 a petition was filed by the respondent for recalling the order dated 28th of April, 2008 and one Advocate Suparna Bhattacharya, appearing for the respondent submitted that because of the erroneous submission made by the learned Advocate who represented the respondent on 28th of April, 2008 such an order i.e. the order dated 28th of April,

2008 was passed directing for deposit of the amounts but the learned Judge refused to accept the prayer for recalling the order dated 28th April, 2008 on the ground that on 28th of April, 2008 Suparna Bhattacharya was not the advocate present on that day.

9. Mr. Bidyut Kumar Banerjee, learned Senior Advocate appearing for the respondent-opposite party was very frank and candid to say that the orders were bad in law but took the point that the orders are appealable since the learned Court below used the expression "the instant Title Appeal is, thus, disposed of."

10. Whether any relief is available to the petitioner-respondent in these revisional applications is a matter to be examined in the sequel but it cannot be gainsaid that the manner in which the appeals have been disposed of does not stand the test of law and procedure. The order dated 28th of April, 2008 does not reveal who was the learned Counsel for the respondent that was present in the Court on 28th of April, 2008. The order does not reveal that it was submitted before the learned Court of Appeal below by the respondent that the respondent was agreeable to have the appeal disposed of and/or not to proceed with the appeal if the appellant would deposit to the Court or pay to the landlord the arrears amounts of rent and on such deposit of amounts the respondent would be agreeable to let the appellant stay in the premises. It was the appellant who introduced the doctrine of "pay and stay" and engaged in calculation of the amount of course with the help of the lawyer of the respondent and then it was found that certain sums of money were found due on account of arrears of rent in each of the cases.

11. Then, when the learned Court below was satisfied with the deposit of the amount he recorded disposal of the appeal without indicating how the appeal was disposed of and what was the effect of such disposal. It was not mentioned whether the appeal was allowed or appeal was dismissed. It was not mentioned whether the appellant would be evicted from the suit premises or appellant would stay in the suit premises. There is no indication in the orders that the points of appeal or the grounds on which the appeal was presented were at all considered examined and dovetailed. The grounds of appeal as is found from the memorandum of appeal were that the notice u/s 106 of the Transfer of Property Act was not legal, valid and sufficient, that the defendant-appellant was not defaulter, that there was no registered deed of lease governing alleged tenancy between the parties under the Transfer of Property Act, and that the suit was itself not maintainable. These grounds of appeal remained unexamined and yet the appeal was disposed of on the basis of the doctrine of "pay and stay". It reveals that Suparna Bhattacharya submitted before the Court of Appeal below that the order dated 28th of April, 2008 deserved to be recalled. It should have struck to the mind of the learned Judge in the Court below whether the manner in which the appeal was proposed to be disposed of did have the sanction of the law particularly when there was no petition before him by the respondent agreeing to effect compromise with the appellant to

the effect that on the payment of the arrears amount of rent she will not be proceeding with the appeal.

12. The order impugned does not reveal that the respondent at all made any submission that if the arrears of rent was paid the appeal would not be contested, or that the respondent would be agreeable to have the appeal allowed. No compromise petition was at all filed. Only it is found from the order dated 28th of April, 2008 that both the lawyers engaged in calculation but it was not recorded who was the lawyer, or who represented the respondent on 28th of April, 2008. Even if Suparna Bhattacharya was not the authorized Advocate according to the learned Court of Appeal below still then matter was required to be examined particularly when there was no representation on behalf of the respondent in clear terms or in any implied terms that the respondent was agreeable not to proceed with the appeal provided monies were paid and this is not at all evident from the order dated 28th of April, 2008. In the circumstances, when the appeals were not adjudicated upon by a judgment and decree the orders impugned cannot be legally sustained.

13. As to question whether the orders impugned could be said to be an appellate judgment and decree it can be said that the orders impugned are neither judgments, nor decrees. Appeal was preferred from the original decree dated 30th July, 2007 which adjudicated upon as many as five issues by the learned Trial Court. The orders impugned cannot be said to be judgment within the meaning of the expression as is found in Clause (9) of Section 2 of the CPC as it is not a statement given by the judge on the grounds of the original decree appealed against. Nor is it a decree as no decree was at all drawn up. It is not a decree as there was no formal expression of adjudication conclusively determining the rights of the parties with regard to the matters in controversy in the suit. Therefore, the mere expression appeal is thus disposed of does not carry any sense." It does not indicate that the appeal was really disposed of in the manner as provided in the law.

14. Mr. Ghosh, learned Advocate appearing for the respondent-petitioner referred to the decision in Kishore Kumar Khaitan and Anr. v. Praveen Kumar Singh, as reported in (SC); (supple), 2006 (3) CHN 27 where their Lordships of the Supreme Court held that when a question is approached by the Court in an improper manner and is answered by a finding of fact the said finding of fact cannot be said to be one rendered with jurisdiction and it will still be amenable to correction at the hands of the High Court under Article 227 of the Constitution. It is argued that the present applications under Article 227 of the Constitution of India are quite maintainable insofar as the very jurisdiction of the learned Court of Appeal is questioned with regard to the manner of disposal of the appeals. Learned Advocate for the respondent referred to certain decisions of the Court which are as follows:

1. [Surya Dev Rai Vs. Ram Chander Rai and Others,](#)
2. [Maharashtra State Seeds Corpn. Ltd Vs. Haridas and Another,](#)

3. [Smt. Sunanda Kar alias Ratha Vs. Sudip Ratha,](#)
4. [Joydeb Das Vs. Ram Gopal Manna and Others,](#)
5. [Hoogly Co-operative Agriculture and Rural Development Bank Ltd. Vs. Nemai Chandra Ghosh,](#)
6. [Gayatri Banerjee Vs. State of West Bengal and Others,](#)
7. [India Exports House Pvt. Ltd. Vs. J.R. Vohra,](#)
8. [M/s. Indo Imex Agencies \(Pvt.\) Limited Vs. Life Insurance Corporation of India etc.,](#)
9. [Tapan Kumar Mukhoty Vs. Bank of Madura Ltd. and Another,](#)
10. Ashoke Kumar Saraf v. The General Manager, Metro Railway and Anr. 1999(1) CHN 155
11. Ajit Kumar Moitra and Ors. v. Dilip Kumar Sen alias Dilip Sen and Anr. 2005(1) CHN 159
12. [Jai Narayan Pradhan Vs. District Magistrate and Others,](#)
13. Hindustan Laminators Pvt. Ltd. v. Union of India and Ors. 2005(1) CHN 163
14. [Adarsh Mahila Shiksha Pratisthan and Another Vs. Municipal Assessment Tribunal and Others,](#)
15. Manashi Sinha v. State of West Bengal 2000(1) CHN 171
16. Md. Afzal alias Md. Siddique alias Mollah v. Narcotics Control Bureau 2000 (1) CHN 575 : 2000 CC LR 213
17. Coal India Officers' Association v. Union of India and Ors. AIR 1999 Cal 313
18. [The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others,](#)
19. [Union of India and Others Vs. Himmat Singh Chahar,](#)
20. Kumaresh Brambha v. Bani Das and Ors. 1999(2) CLJ 226
21. [Ram and Shyam Company Vs. State of Haryana and Others,](#)
22. [Dr \(Smt.\) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur \(U.P.\) and Others,](#)
23. Adhar Chandra Poria v. Radharani Panja and Anr., (2006) 2 CHN 694
24. [Smt. Ganga Bai Vs. Vijay Kumar and Others,](#)
25. [Workmen of The Straw Board Manufacturing Co. Ltd. Vs. Straw Board Manufacturing Co. Ltd.,](#)

26. [Surya Kumar Das and Others Vs. Ajit Kumar Das and Others,](#)

15. A decision in [Shantilal Kesharmal Gandhi Vs. Prabhakar Balkrishna Mahanubhav,](#) has been referred to by the learned Advocate for the appellant to argue that the learned Appellate Court should have made a proper reappraisal of the pleadings on the evidence before coming to a finding.

16. It has been submitted by the learned Advocate for the petitioner-respondent that even if the orders impugned are to be treated as an appellate order although they cannot be said to be neither judgment nor decree, still then the Court has jurisdiction to convert the same into appeal. Mr. Bidyut Kumar Banerjee, learned senior counsel appearing for the appellant-opposite party affirmed this position and helped the Court in referring it to the Division Bench of this Court in Arjun Das v. Gunendra Nath Basu Mallick AIR 1915 Calcutta 268 and submitted that as no question of limitation or Court fee arises. This Division Bench decision relates to a case of setting aside a sale on the prayer of the petitioner on the ground that he had secured the property by purchase long before the sale was effected on auction in favour of the decree holder against a person - judgment debtor who was dead. The question raised was whether a revisional application was maintainable against an order from which an appeal lies. Their Lordships of this Court held that where no question of limitation or Court fee arises a petition may be treated as a memorandum of appeal if necessary.

17. Since the orders impugned are neither judgments nor decrees and no decree was at all drawn up it cannot be said that the orders are only to be challenged in appeal. The mere expression that the appeals are disposed of does not render the orders to be an appealable decree. When the learned Additional District Judge has no jurisdiction to dispose of the matter in the manner it was done the Court's jurisdiction to correct the error under Article 227 of the Constitution of India can be legitimately invoked. In Tapan Kumar Mukhoty v. Bank of Madura and Anr. (supra) it was held that even if there is an alternative remedy by way of an appeal against a particular order of any Tribunal the aggrieved party may file an application under Article 221 of the Constitution if the order complained of is without jurisdiction or is arbitrary. Such has been the position here.

18. The learned Appellate Court did not examine the appeal on merit. The grounds of appeal as were contained in the memo of appeal were not at all traversed. The orders impugned did not disclose whether the appeals were allowed or dismissed. In Ashoke Kumar Saraf v. The General Manager, Metro Railway and Anr. (supra) it was observed that existence of an alternative remedy of appeal is no bar to revision under Article 227 of the Constitution of India. Where the learned Court below failed to exercise jurisdiction vested in it by law and in the manner as laid down by the law it is but appropriate that the wrong committed by the learned Court should be remedied by the application under Article 227 of the Constitution of India. The Court is under the obligation to ensure that the inferior Court does not act beyond

jurisdiction. Reference may be had to Adarsh Manila Shiksha Pratisthan and Anr. v. Municipal Assessment Tribunal and Ors. (supra). The appropriate decision in the circumstance is Adhar Chandra Poria v. Radha Rani Panja 2006(2) CHN 694 (supra) where a Division Bench of this Court has held that if an order does not conclusively determine the right of the parties the same cannot amount to decree within the meaning of Section 2(2) of the CPC and accordingly, the order cannot be an appealable order.

19. In the circumstances, the applications should be allowed.

20. Thus the applications are allowed. The orders impugned are set aside.

21. Deposit of the amount by the appellants will be without prejudice to the rights and contentions of either of the parties to the appeal. The learned Additional District Judge, Barrackpore will proceed with the hearing of the appeal in accordance with the law.

22. A copy of this order shall be sent to the Additional District and Sessions Judge, Barrackpore for information and necessary action.