(1977) 07 CAL CK 0031

Calcutta High Court

Case No: None

Anath Bandhu Chakraborty and Another		APPELLANT
	Vs	
Ashim Mukherjee		RESPONDENT

Date of Decision: July 11, 1977

Acts Referred:

- Transfer of Property Act, 1882 - Section 108, 108(m)

Hon'ble Judges: Manash Nath Ray, J

Bench: Single Bench

Advocate: Samir Kumar Mukherjee and Nirmal Kumar Manna, for the Appellant;Sakti Nath Mukherjee and Tarun Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Mr. Justice Manash Nath Ray

1. This appeal, at the instance of defendant/appellants, is directed against the decision dated August 23, 1975, made in Title Appeal No. 816 of 1974, by the learned Additional District Judge, 13th Court, Alipore, affirming thereby the decision dated July 23, 1974, made in Title Suit No. 390 of 1967, by the learned Munsif, 2nd Additional Court, Alipore. Those determinations have been made after remand.

2. The plaintiff, initially brought Title Suit No. 277 of 1966 in the Court of the learned Munsif, 4th Court, Alipore, contending that defendant No. 1, Anath Chakravartty, who was a tenant in respect of the Southern portion of premises No. 74, Harish Chatterjee Street, Calcutta (hereinafter referred to as the said premises), had sublet and/or transferred and/or assigned the tenancy, without his knowledge and consent to defendant No. 2, Rajendra Nath Chakravartti. That apart, it was alleged that the said defendant No. 1 was guilty of acts contrary to clauses (m), (o) or (p) of Section 108 of the Transfers of Property Act and furthermore, he has caused damages to the said premises. The suit was alleged to have been filed after duly determining the

tenancy, on service of necessary notice and on the failure and refusal of the said defendant No. 1 to vacate the premises even in spite of such service.

3. The defendants contested the suit by filing a joint written statement wherein it was contended, inter alia, amongst others that they were joint tenants of the said premises, although the tenancy was in the name of defendant No. 1, the defendant No. 1 had not sublet the said premises or any part or portion thereof to the defendant No. 2, the said defendant No. 1 was not a defaulter as alleged and he has not done any act contrary to clauses (m), (o) or (p) of Section 108 of the Transfer of Property Act.

4. On the pleadings as aforesaid the following issues were framed for determination:-

1. Is the defendant No. 1 a defaulter in payment of rent?

2. Has the defendant No. 1 sub-let and/or transferred and/or assigned the tenancy without the plaintiff''s knowledge and consent to defendant No. 2?

3. Has the defendant No. 1 done acts contrary to the provisions of clause (m), (o) or (p) of Section 108 T.P.Act.?

4. Has any notice to quit been served on the defendant No. 1, if so, is the same legal, valid and sufficient?

5. To what relief or reliefs, if any, is the plaintiff entitled?

5. The learned Munsif found the story of subletting by defendant No. 1 to the defendant No. 2 to be correct. It was also found by him that the defendant No. 1 was really a defaulter in payment of rent since June, 1965 and that by refusing the plaintiff to inspect the said premises, he had acted in violation of or contrary to the provisions of Section 108(m) of the Transfer of Property Act. But the allegation of damages as alleged to have been caused by the defendant No. 1, was not accepted. The suit was decreed on other grounds and on appeal (Title Appeal No. 1438 of 1969) by the defendants, those determinations were affirmed and accordingly the appeal was dismissed on March 6, 1970.

6. From such determination, there was a further appeal to this Court (S.A. 1218 of 1970), which was heard and disposed of by M. M. Dutt, J. on May 31, 1973. It has been observed and found by this Court that the defendant No. 1 was not a defaulter and he has not acted or committed any act contrary to the provisions of clauses (m), (o) or (p) of the Transfer of Property Act. Thus Issue Nos. 1 and 3 as aforesaid, were decided in favour of the defendants. But the case was remanded to the learned Munsif for disposal of the suit only on Issue No. 2 and that too after recasting the same in the following manner and form: -

Has the defendant No. 1 sublet and/or transferred and/or assigned the tenancy without plaintiff''s knowledge and consent to defendant No. 2? If so, when?

and it was further directed that in case the said issue is decided and found in favour of the plaintiff and it is found that the subletting has been made after the commencement of the West Bengal Premises Tenancy Act, 1956, the suit should only be decreed and not otherwise. Such remand order was made, as it was submitted by the plaintiff that he should be given a chance for incorporating in the plaint a statement by way of amendment about the time when the subletting was made by the defendant No. 1 and also to lead further evidence on that point. From the order as made in the said S.A. No. 1218 of 1970, it appears that the plaintiff was thus allowed liberty to amend the plaint and parties were given leave to adduce further evidence only the question of the commencement of subletting by the defendant No. 1 in favour of defendant No. 2 and on no other question and the learned Munsif was directed to dispose of the suit on the question of subletting with a corresponding direction that the suit should be decreed if it is found that the subletting was made after the commencement of the West Bengal Premises Tenancy Act, 1956 and to dismiss the same, if no such evidence is available.

7. On such remand, the plaint was duly amended and after such amendment the relevant statements in paragraphs 3, 4 and 5 of the plaint stood as under: -

3. The defendant No. 1 has sub-let in 1962 and/or transferred and/or assigned the tenancy without the plaintiff''s knowledge and consent to one Rajendra Nath Chakravartti, defendant No. 2 herein and defendant No. 1 has parted with possession of the tenancy in favour of defendant No. 2.

4. The defendant No. 1 left the suit premises in 1962 and is now living in his own house at Rajdanga, Haltu, P.O., District 24-Parganas since then and is not in occupation of the premises in suit.

5. Defendant No. 2 aforesaid is in exclusive wrongful occupation of the premises in suit and he has been impleaded in the suit as a defendant in order to avoid future complication and difficulties and so that the Court may pass a decree for ejectment.

On such amendment, additional written statement was filed by the defendants and the relevant statements as it stood thus are:

3. That these defendants categorically deny the allegations made in paragraph 2 of the plaint after amendment that the defendant No. 1 has sublet the suit premises to Defendant No. 2 in 1962. The said allegations are false, frivolous and motivated. In addition to what has been stated by these defendants in the Written Statement already filed these defendants state that Defendant No. 2 is residing in the suit premises since the inception of tenancy and that the defendants are members of a joint family and defendant No. 2 as the head of the family and due to paucity of accommodation in the suit premises the defendant No. 1 has shifted to his newly built house. The question of subletting at any point of time does not and cannot arise at all and hence such allegations are denied.

4. That with regard to the allegations made in paragraph 4 of the plaint after amendment, in addition to what has been stated in the original Written Statement these defendants further state that allegations under reply are false and false to the knowledge of the plaintiff. It is denied in particular that defendant No. 1 has ''left'' the suit premises in 1962. The defendant No. 1 very often comes to the suit premises and he has his possession of the suit premises. All allegations contrary thereto are denied by these defendants.

5. That the allegations made in paragraph 5 of the plaint after amendment are denied as false, frivolous and motivated. It is denied in particular that defendant No. 2 is in ''exclusive'' wrongful occupation of the suit premises as alleged or at all.

After such amendment of the pleadings, fresh evidence was adduced by the parties to the proceedings and on consideration of the same, the learned Munsif, by his decision in T.S. 390 of 1967, found that the plaintiff was successful in proving or establishing that the defendant No. 1 had inducted the defendant No. 2 as a sub-tenant in the year 1962 in respect of the said premises and as such he decreed the suit.

8. On appeal, the findings of the learned Munsif were affirmed by the learned Appellate Court by the determination was made on consideration of the following points:

(1) Whether the sub-tenancy was created before or after coming into force of the West Bengal Premises Tenancy Act, 1956; and

(2) Whether the learned Munsif was justified in decreeing the suit.

9. Mr. Samir Kumar Mukherjee, appearing in support of the appeal contended that the entire determinations by the learned Courts below, specially by the learned Appellate Court, were based on surmise and conjectures and had no relation to the actual facts as led in evidence. That apart, he submitted that the onus to prove subletting and that too on the given date in terms of the remand order and on the pleadings after amendment, was on the plaintiff and such onus has not only been discharged duty, but the same has been wrongly placed on the defendants. It was further argued that the entire approach of the learned Courts below, in fixing the date of creation of the sub-tenancy in 1962 or earlier than that, was wrong and irregular and furthermore, they were wrong in holding so on the face of the admitted fact that the defendant No. 2, who contended to be a joint tenant, was residing in the said premises, since the inception of the tenancy and in fact long prior to 1962. It was further contended by Mr. Mukherjee, relying on the evidence of P.W.1, D.Ws 1 and 2 both prior to and after the remand, that the plaintiff not having succeeded in establishing the fact of subletting the cogent and legal evidence and that too on and from the relevant date, it was further wrong on the learned Courts below to hold and determine that such sub-tenancy was created in 1962 or after the commencement of the Act. Mr. Mukherjee also submitted that since no direct or

definite evidence was available on the point, the learned Courts below should not have made the determinations in the manner as they did and more particularly, as stated hereinbefore, mainly relying on conjectures and surmises. In fact it was submitted that the findings after remand were mainly based on surmise.

10. Mr. Samir Kumar Mukherjee, in his usual fairness submitted that ordinarily questions of fact should not be interfered with in a Second Appeal. But he submitted that such questions of fact should not be brushed aside lightly if the evidence as led and as a whole do not support or justify the conclusions arrived at by the learned Courts below. In support of such contentions, he first relied on the determinations in the case of (1) Madholal Sindhu of Bombay v. Official Assignee of Bombay & Ors., AIR 1950 FC 21, wherein it has been observed that it is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies and like other tribunals he may go wrong on questions of fact, but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the Appeal Court should not lightly interfere with the judgment As stated hereinbefore, after placing the evidence as adduced both before and after remand, Mr. Mukherjee submitted that if the evidence as a whole is considered, then there would be no other way but to hold that the plaintiff failed to establish his case and the onus which vested very heavily on him, was not also discharged.

11. On the question of his submissions that onus in the instant case was on the plaintiff and also on the question of taking into consideration relevant evidence, Mr. Samir Kumar Mukherjee, then relied on the determinations in the case of (2) Sreemanchunder Dey v. Gopaulchunder Chuckorbutty & Ors., 11 MIA 28. In that case, A, purchased a Talook at a sale, in execution of a decree obtained by a judgment-creditor. The Assignee of another judgment-creditor, who had obtained a decree in a separate suit against the estate, brought a suit against the purchaser to set aside the sale, on the ground that the purchase was not bona fide, being made in collusion with the judgment-debtors, and it has been held.

On a review of the evidence, that there was not sufficient evidence to warrant the decree of the High Court at Calcutta that it was a benamee transaction; or that the purchaser was acting as an Agent for the judgment-debtors; and the decree of the Court below reversed.

It has further been held that:

the onus probandi was on the Plaintiff to establish the affirmative issue that the money for the purchase of the Talook was supplied by the judgment-debtors, or a third party for them, and not by the purchaser. Evidence showing circumstances which may create suspicion is not enough to justify the Court making a decree resting on suspicion only.

On appeal to the High Court, that Court, acting under the power conferred by section 355 of the code of Civil Procedure, Act No. VIII of 1959, ex mero motu called

for and examined fresh witnesses and it has been held that :

such power should be cautiously exercised, and the reasons for exercising it recorded or minuted by the High Court on the proceedings as, first, the witnesses may be such as the parties to the suit do not wish to call; and secondly, the new evidence may not be sufficiently extensive to satisfy the ends of justice.

On the question of onus, Mr. Mukherjee lastly relied on the determinations in the case of (3) A.C. Bhattacherjee Vs. Arun Krishna Roy and Others, . The appellant in that case claimed to be the real tenant in respect of the suit premises, although the tenancy of the same was in the name of his brother-in-law, who was Respondent No. 2 in the appeal. The connected suit was for ejectment filed by the landlord Respondent No. 1 on the ground of unlawful transfer of the tenancy by the said real tenant, without his knowledge and consent. The allegation of transfer of tenancy was denied, and it was contended that the appellant defendant No. 2 was the real tenant. The question that arose for consideration on the pleadings of the parties was whether the defendant No. 2 was the real tenant and defendant No. 1 was merely his benamdar in respect of the tenancy in question. The learned Trial Court negatived the story of benami but it has been observed by the High Court that his approach to the question was wrong as the same suffered from patent infirmities. It has been held that motive is one of the elements, usually taken into consideration in deciding the question of benami, but it is not such an element that its presence or absence would necessarily be decisive of the matter. In that case it has further been observed that there would be no presumption of creation of sub tenancy in the context of the statutes even if the tenant has left, leaving the defendant No. 2 in that case viz., the brother-in-law, in occupation of the tenancy.

12. Mr. Saktinath Mukherjee, appearing for the Respondents contended that sub-tenancy was not only duly proved on the basis of the evidence as led, but the same was also established on the basis of probable circumstances, which is also a factor to be duly considered in a case like this and the more so when the tenant and the person in whose favour such sub-tenancy has been created are near relations, viz., cousins in the instant case and all the more so when it is alleged that they were residing together in the premises since the inception of the tenancy. That apart, it was contended by him that the scope of his appeal is very limited. He submitted that the original tenant Defendant No. 1 has sublet the premises to his cousin, the defendant No. 2 is an established fact, since the same has been found and established on facts in all the Courts including this Court in S.A. 1218 of 1970 and as such it was contended by him that now, this Court would not be justified in entering into the question or interfering with such findings. He submitted further that thus this Court, on the basis of the remand order and the evidence as available will have to or can only determine about the date of creation of such sub-tenancy viz., whether the same commenced before or after the incorporation of the Act. It was submitted by him that such sub-tenancy can be inferred and more so in the peculiar

facts and circumstances as in the instant case, when the original tenant has long left the tenancy in 1962 and is residing in his own house elsewhere. It was further submitted by him that to determine whether the occupier is a tenant or licensee, the test would be to consider if the original tenant has retained control over the tenancy. In support of such contentions, reliance was placed on the determinations of the Supreme Court in the case of (4) Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, . In that case in a suit by the landlord for eviction of tenant from hotel building, on the ground of subletting, the landlord discharged the onus by leading evidence showing that occupants were in exclusive possession of apartments for valuable consideration. But the tenant chose not to rebut such prima facie evidence by proving and exhibiting relevant agreements on which apartments were occupied though those documents formed part of his case and it has been observed that the tenants had no right to withhold the documents from scrutiny of Court and in the absence of best evidence of grant the proper inference was that of subletting.

13. It was then submitted by Mr. Saktinath Mukherjee, that when in the instant case, the defence of joint tenancy was put forward and such defence has not been duly proved by any legal evidence, then the presumption u/s 13(1)(a) would be that the tenant had really sublet the premises. In support of such contentions, he relied on the determinations in the case of (5) Harvansh Kumari & Ors. v. J. P. Sehgal Decosta & Anr., 1976 RCJ 496, a decision of the Allahabad High Court, wherein a suit for eviction of a tenant on the ground of subletting, the tenant had set up a positive case of partnership. Such defence was found by the Tribunal as not to have been established and as a result thereof, it has been observed that u/s 14(4) of the Delhi Rent Control Act, 1958 (59 of 1958), the Tribunal was bound to give effect to the legal presumption that the tenant had really sublet the premises. Lastly, and in additions to his submissions on the jurisdiction of this Court to interfere in the appeal, in the facts and circumstances as indicated above, it was submitted by Mr. Saktinath Mukherjee, that subletting having been duly found up to this Court once, the defendant would not be permitted to raise any question against such determination or take any defence contrary thereto. In support of his contentions, Mr. Mukherjee relied on the determinations in the case of (6) Angurbala Dassi Vs. Radharani Dassi and Another, . In that case, the ejectment notice was held to be valid and sufficient by the High Court in a previous judgment between the parties. Then came the later Special Bench decision in the case of (7) Abdul Samad Bepari Vs. Manasha Charan Bakshi, , on the determinations whereof, it was found that the notice in question was not be valid and sufficient for purposes of section 13(6) of the Act of 1956, and as such it was contended, relying on the said Special Bench decision, that since the defect in the notice would go to the root of the Court''s jurisdiction and as such notwithstanding the previous judgment affirming the validity and sufficiency of the notice, the appellant would be entitled to take the point about the defect in the notice and to argue on that. But it has been observed

that after the previous decision of the High Court, affirming the validity and sufficiency of the ejectment notice, it would not be open to the appellant to raise the point over again.

14. It is true that the fact of subletting which has been found as aforesaid and up to this Court once, cannot be reagitated. Thus the question would be that in terms of the remand order, whether the plaintiff, on the evidence as adduced, has been able to establish sub-letting by the defendant No. 1 in favour of defendant No. 2, after the commencement of the Act. On evidence it appears that the defendant No. 1 has left the said premises permanently in 1962 on constructing his own house and the defendant No. 2 is living in the said premises since 1943. The case of the defendants is one of joint tenancy, and there is the evidence that on some occasions the defendant No. 2 has tendered the rent for payment to the plaintiff, although rent receipts were issued in the name of the defendant No. 1. The fact that the defendant No. 1 has left the said premises in 1962 and since then or even prior to that the defendant No. 2 was living there, would not itself prove the fact of sub-letting or commencement thereof after the incorporation of the Act of 1956.

15. In terms of the decision in the cases of Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh (supra), the onus to prove subletting is on the landlord and it has been observed further in the case of (8) Smt. Krishnawati Vs. Shri Hans Raj, , that if the landlord prima facie shows that the occupant who was in exclusive possession of the premises, let out the same or valuable consideration, it would then be for the tenant to rebut such evidence. Thus the evidence of valuable consideration, as has been submitted by Mr. Samir Kumar Mukherjee is the distinguishing feature in the instant case as there is no such evidence available and as such the determinations as made therein which has been referred to in the Associates Hotels'' case (supra), are not applicable in this case and the tenant-defendants thus had no obligation also to rebut the evidence of sub-letting, if any. It was of course contended by Mr. Mukherjee that there was no evidence of sub-letting in the instant case and that fact, considered along with the fact that there was no evidence of valuable consideration for such subletting, would take the present case out of the mischief of the determinations in the case of Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh (supra).

16. It is true that subletting cannot be found out in isolation and as such all relevant facts and circumstances will have to be taken into consideration, before coming to a definite conclusion. In view of the terms of the words as used in the section viz. "sub-lets", subletting would not mean a pre-Act subletting but it would mean a post-Act subletting and that too without the previous consent in writing of the landlord and as stated hereinbefore, such act of subletting is very difficult to find out or establish on direct evidence, at least in a case like this, where the original tenant and the person in whose favour the subletting has been alleged to have done, are near or close relations and the more so when they were residing in the premises in

question long prior to the commencement of subletting is not available or forthcoming, the necessary presumption, from the available circumstantial evidence, will have to be drawn or considered or the relevant probabilities from such evidence, can be deduced for the purpose of coming to the conclusion of subletting. Thus, and in terms of the determination in the case of Harvansh Kumari & Ors. v. J. P. Sehgal Decosta (supra), the Court can act on the basis of presumptions for the purpose of finding out the fact of subletting or whether the same has been established and that too on due consideration of circumstantial evidence as aforesaid. In the plaint after amendment, a statement has at least been incorporated about the fact of subletting in 1962 by the defendant No. 1 to the defendant No. 2. It has also been established on evidence in the instant case that the defendant No. 1 has left the said premises and since 1962, he is reading in his own house elsewhere. The defendants definitely pleaded joint tenancy. But they have not been able to discharge the onus to prove such joint tenancy, when the same was shifted on them in the instant case as the plaintiff succeeded in proving that since 1962 the defendant No. 1 in whose name the tenancy stood, had left the said premises and was residing in his own house. It should also be noted here that all the rent receipts were in the name of the defendant No. 1 and the Rent Control challans also showed him as the tenant. These facts should also be considered as relevant circumstantial evidence in the matter of subletting in this case and also to hold that the tenancy was not join, but the same stood in the name of defendant No. 1. These apart, the conduct of the defendant No. 1 in the instant case should also be considered in the matter of considering whether the tenancy was joint or not. The defendant No. 1 has admittedly left the said premises for the purposes as aforesaid in 1962. When he has left in 1862 and the tenancy as alleged was joint, it is very difficult to visualise why the said defendant No. 1 after he had left the said premises, should write to the plaintiff landlord the letter dated 8th February, 1966 to the effect that though the tenancy was in his name, the defendant No. 2 was no less interested in the same. The language of the letter does not in spite the confidence of holding or to hold the tenancy to be joint and the fact that the plaintiff did never consider the tenancy to be joint, would also appear from his disposition after remand. I am of the view that on consideration of evidence, both before and after remand, the learned Courts below were justified in their conclusions that the tenancy was not joint and if so, the determinations as made by them were not improper, in view of my determinations as above.

17. Thus, the arguments of Mr. Samir Kumar Mukherjee fail, so also the appeal and the same is thus dismissed. There will however be no order for costs.

18. The decisions of the learned Courts below are affirmed.

19. The learned Advocate for the defendants-appellants prays for time of vacates the premises in question. If the defendants-appellants file a written undertaking in this Court within four weeks from date to the effect that they will quit, vacate and

hand over peaceful possession of the premises in question to the plaintiff-respondent, the decree shall not be executed for a period of one year from July 11, 1977 on condition that the defendants-appellants would go on depositing, in the court below, a sum equivalent to rent, month by month, by the 15th of each succeeding month for which rent would become due. In default of any of the payment, decree shall be executable forthwith.