(2014) 08 CAL CK 0067

Calcutta High Court

Case No: F.A. No. 176 of 2010

Biswanath Pal	APPELLANT
Vs	
Satya Prasad Chandra	RESPONDENT

Date of Decision: Aug. 13, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4
- Transfer of Property Act, 1882 - Section 106
- West Bengal Premises Tenancy Act, 1956 - Section 2(h)

Hon'ble Judges: Arijit Banerjee, J; A.K. Banerjee, J

Bench: Division Bench

Advocate: Mahendra Prasad Gupta, Sanjib Das, Kingsuk Mondal, and Srabani Tarafdar, Advocate for the Appellant; Chayan Gupta and Jasojeet Mukherjee, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee

1. This appeal would relate to a judgment and order of eviction that the appellant suffered before the City Civil Court. The facts, if brought within a narrow campus, would depict, one Sudhir Kumar Pal was a tenant in respect of the suit property. Sudhir Kumar Pal died in 1979 leaving him surviving his widow Bina Pani Pal. Bina Pani Pal also died in 1986. Bina Pani Pal had three sons Jagannath Pal, Chandi Charan Pal and Manick Pal. Jagannath Pal died in 1993. However, after the death of Bina Pani Pal, her sons left the premises. According to the landlord, they surrendered the tenancy. The appellant, Biswanath Pal was the nephew of Sudhir Kumar Pal, he claimed to be residing along with the family of Sudhir Kumar Pal. The plaintiff being the respondent herein, filed a suit for eviction against Biswanath Pal and one Jugal Kishore Pal, the brother of Sudhir Kumar Pal. Biswanath Pal along with Jugal Kishore contested the suit. During the pendency of the suit, Jugal Kishore

Pal died, however, his heirs were never brought on record. The plaint would suggest, Bina Pani Pal was a tenant in respect of the premises in question. Since she died without having any heir residing with her, taking advantage of her loneliness, the defendant used to visit occasionally and after her death, they illegally occupied the suit premises without any authority and as such they should be evicted as trespasser. Biswanath Pal deposed, they were a part of the family. Sudhir Kumar Pal had two brothers being Ramkrishna Pal and Jugal Kishore Pal. Although the tenancy was taken in the name of Sudhir Kumar Pal, all three brothers were residing along with their family members in the tenanted premises. The others left from time to time. Biswanath Pal was residing along with his wife and daughter. Since he was a part of the family, he could not be termed as "trespasser". The Learned Judge disbelieved his deposition and decreed the suit. The plaintiff proved the tenancy through the counter foil of the rent receipts showing Bina Pani Pal as a tenant. The plaintiff denied the relationship of Biswanath Pal with Bina Pani Pal. The learned Judge was satisfied with the evidence of the plaintiff to the extent, the defendant had no right title to possess the suit property. Bina Pani Pal had an heir who also left the premises without claiming inheritance as to the tenancy. The learned Judge decreed the suit hence, this appeal that we heard on the above mentioned dates.
CONTENTIONS

2. Mr. Mahendra Prasad Gupta, learned Counsel argued at length. The main contention of the appellant was, the appellant was a part of the original family that took the tenancy in the name of one of their brothers Sudhir Kumar Pal. All the three brothers had been residing with their family members hence, after the death of Bina Pani Pal, Biswanath Pal was entitled to enjoy the tenancy being a part of the family. Mr. Gupta would strenuously contend, he would come within the definition of "tenant" as per Section 2(h) of the West Bengal Premises Tenancy Act 1956.

3. Mr. Gupta would also raise the plea of abatement. According to him, the plaintiff filed the suit against both the defendants. One of the defendants died during the pendency of the suit. Having not applied for recording his death coupled with substitution of his heirs, the suit would abate not only against the deceased defendant but also against the other defendants. To support his contention, he would rely upon the following decisions:

1. Arunadoya Chakrabarty and Others Vs. Mahammad Ali and Others,

2. Hakir Mahamed and Others Vs. Abdul Majid and Others,

3. The State of Madras Vs. Javali Govindappa alias Rindayya Firm and Others,

4. Bira Sethi and Others Vs. Purusottam Misra and Another,

5. Damodar Patra and Others Vs. Kanchan Sahuani and Others,

6. Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another,

7. Netar and Others Vs. Jagta,

8. Kumar Jagdish Chandra Sinha and others Vs. Mrs. Eileen K. Patricia D''Rozarie,

9. Zahirul Islam Vs. Mohd. Usman and Others,

10. Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others,

11. Ramji Gupta and Another Vs. Gopi Krishan Agrawal (D) and Others,

12. Achintya Kumar Saha Vs. Nanee Printers and Others,

13. B.P. Achala Anand Vs. S. Appi Reddy and Another,

14. Biswanath Agarwalla Vs. Sabitri Bera and Others,

15. Jaladi Suguna (deceased) through LRs. Vs. Satya Sai Central Trust and Others,

4. He also contended, the tenancy was hereditary and the first Appellate Court being a Court of fact should take fresh evidence to remove and dispel any doubt that might arise in the mind of the Court. To support such contention, he would rely upon the following decisions:

1. V. Dhanapal Chettiar Vs. Yesodai Ammal,

2. Gian Devi Anand Vs. Jeevan Kumar and Others,

3. Smt. Bachahan Devi and Another Vs. Nagar Nigam, Gorakhpur and Another,

4. H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam,

5. Appearing for the respondent-plaintiff Mr. Chayan Gupta, learned Counsel while opposing the appeal, would contend, the defendant No. 2 did not file Written Statement during his lifetime. Hence, his heirs could not have improved the situation, had they been brought on record. He would refer to paragraph 8 and 11 of the Written Statement appearing at page 20-21 of the paper book where we find, the appellant took the plea of non-joinder of necessary party in absence of heirs of Bina Pani Pal. In paragraph 11, the appellant contended, Chandi Charan Pal and Manick Pal inherited the tenancy. Hence, the suit could not be proceeded with in their absence. Relying on such statement of the appellant, Mr. Chayan Gupta would suggest, having said so, appellant was estopped from contending otherwise that too, at the appellate stage. According to him, the appellant never claimed inheritance, in absence of such assertion, his defence was not tenable. He would refer to Order XXII Rule 4 where procedure was laid down in case of death of any defendant. According to rule, in case of death of a defendant, when right to sue survives, heirs must be brought on record within the time stipulated therein and in case of failure, the suit would abate against him. He would also refer to the order-sheet wherein we find, by an order dated November 18, 2005, the name of Jugal Kishore Pal was struck off and the suit was directed to be proceeded with as against the defendant No. 1. The defendant No. 1 filed a written objection that he

had a right to the suit premises. His contention was rejected. He would also refer to the order dated December 20, 2005 where we find, the appellant did not adduce any evidence to support his defence. Mr. Chayan Gupta would rely upon the following decisions to support his contention:

1. Chandrabai Pandurang Bidwekar Vs. Nanji Jaywant,

2. Juthika Basu and Others Vs. Lt. Col A.N. Sharma,

CASES DISCUSSED, RATIO APPLIED

6. First fifteen decisions that Mr. Mahendra Gupta cited to support his contention, the suit would abate in absence of substitution of the heirs of the defendant No. 2. On a combined reading of all the decisions, it would be clear, those decisions would relate to a case of joint tenancy where right to sue survived and partial eviction, in absence of co-tenant, would not be permissible as the decree could be incapable of being executed. In the case of Zahirul Islam (Supra), the Apex Court observed, the permission to exempt the plaintiff from bringing on record the heirs of the deceased co-tenant, was not automatic. Similarly, the decision in the case of Mithailal Dalsangar Singh (Supra), deals with a case where there was an agreement to sell the suit property entered into by the owners, one of them having died, the suit would abate in case of failure to bring the heirs on record. The consistent view of the Supreme Court in the decisions cited at the bar would settle a proposition of law; where right to sue survives and the heirs of the deceased party are not brought on record any decision in the lis would not be binding upon the heirs. In case, the issue is inseparable when there are more than one party, be it plaintiffs or be it defendants, their rights are joint and inseparable, in absence of one, the lis would become bad for the others too. For example, if there are more than one plaintiff who had a common cause of action against the defendant or defendants and the cause of action is inseparable in absence of one of the plaintiffs or his heirs, as the case may be, the suit would abate. Similarly, when there is a cause of action against a group of defendants and the cause is inseparable, the suit would abate, in absence of one, after his death when his heirs are not brought on record.

7. In the case before us, the plaintiff filed the suit as against Biswanath Pal and Jugal Kishore Pal, inter alia, claiming, they were trespassers. Even if, the cause of action is inseparable, the right to sue would not survive as it is a personal offence that is not heritable. Biswanath Pal and Jugal Kishore Pal jointly trespassed. Jugal Kishore Pal died, his heirs did not continue with such trespass. Hence, the plaintiff was entitled to proceed against Biswanath Pal as if, he solely trespassed into the premises. In a situation when the heirs of Jugal Kishore Pal would approach the Court of law and contend, they were not put on notice and they could not be affected, the question raised by Mr. Mahendra Prasad Gupta, would become germane and the decisions would come to his rescue. So long, the heirs are silent we would not get any support from these decisions to hold in favour of Biswanath Pal. Question would, however,

not arise as we find from the Written Statement, it was a joint one. To that extent, Mr. Chayan Gupta was wrong. After the death of Jugal Kishore Pal, it was the duty of his heirs to come and approach the Court of law to contest the suit. They did not choose to do so.

8. In the case of Biswanath Agarwalla (Supra), the owners filed a suit praying for eviction of the appellant. After service of notice u/s 106 of the Transfer of Property Act, 1982, the appellant denied, he had been a tenant of the then owner and the relationship between landlord and tenant was denied. The appellant would contend, although the plaintiffs had failed to prove the relationship of landlord and tenant the plaintiff would be entitled to a decree for possession on the basis of the general title. The appellate Court held so after rejecting the plea of the occupier on adverse possession. The Apex Court directed suit to be heard afresh by granting leave to the plaintiffs to amend their plaint praying for decree of eviction on the ground of trespass. The present case was filed claiming, the defendants trespassed whereas the defendants claimed, they were tenants. The decision would not be of any help to us. We, however, get some similarity with the present case in the case of Arunadoya Chakraborty (Supra), where the Division Bench of this Court held:

"There is no distinction in principle between the cases of trespassers and of tenants who claim to hold under a title, because all actions in ejectment proceed on the assumption that the plaintiff has title, and hence the right to possession, and that the defendant has none."

9. In the said decision, the Division Bench found, these would be a thin line of distinction between a case of trespass and a case of tenancy. Their Lordships made such observation in the given situation when plaintiff filed suit for recovery of possession on the ground, the original tenant abandoned the tenancy and went to his native place. One of the defendants, against whom the suit was instituted, contested the suit by filing Written Statement. He would contend, the original tenant sold a portion of the land to him and his brothers, since then they were in possession. They contended, since the right of the original tenant was sold to them and they came to possession by dint of such purchase there was no abandonment of tenancy. In such a peculiar situation, the Division Bench observed so. In the present case, the tenancy was in the name of Bina Pani Pal. Biswanath Pal and Jugal Kishore Pal in their Written Statement categorically contended, tenancy was inherited by Jagannath Pal and Manick Pal, they did not come forward to possess the suit premises after the death of Bina Pani Pal. Hence, in absence of Jagannath Pal and Manick Pal, inter alia, claiming inheritance, the claim of Biswanath Pal and Jugal Kishore Pal would be of no consequence and they would be considered as trespassers. The plaintiff rightly termed them as such.

10. The decision in the case of V. Dhanpal Chettiar(Supra), Smt. Gian Devi Anand (Supra) and Mrs. Juthika Basu(Supra) were cited for the proposition, tenancy was heritable. In the case of V. Dhanpal Chettiar(Supra), issue was raised whether a

notice u/s 106 was necessary or not. Considering the fact situation, the Apex Court observed, High Court was right in holding no such notice was required to get an order of eviction. The Apex Court observed so after holding, the occupants did not have any right to occupy the premises. In the case of Smt. Gian Devi Anand (Supra), question arose whether a statutory tenancy was heritable or not. The Apex Court observed, there was no such term, "statutory tenant" in the statute law. Here, the Apex Court considered the definition of "tenant" as per the local law and held, termination of tenancy would not bring about a change of status that would continue to remain even after termination in the tenancy and he would continue to enjoy so unless and until a decree of eviction is passed against him. His heirs would also enjoy the same privilege. In the Single Bench decision of the Bombay High Court in the case of Chandrabai Pandurand Bidwekar(Supra), the Court held, once the defendant failed to prove his title as a tenant, the plaintiff''s title being duly established decree of eviction would be obvious.

ISSUES GERMANE

11. Hearing the parties, two major issues, having dominant factor in the present appeal, would arise:

i) Can the appellant be called as "tenant" within the meaning of Section 2(h)

ii) Has the suit abated as against the appellant as well when the plaintiff did not take any step for recording the death of the other defendant and substitution of his heirs?

12. Section 2(h) would provide as follows:

""tenant" means any person by whom or on whose account or behalf, the rent of any premises is, or but for a special contract would be, payable and includes any person continuing in possession after the termination of his tenancy or in the event of such person''s death, such of his heirs as were ordinarily residing with him at the time of his death but shall not include any person against whom any decree or order for eviction has been made by a Court of competent jurisdiction."

VIEW EXPRESSED

13. Under the old law, a tenant would also include his heirs residing with him. Even if we give full credence to what the appellant would claim, we would still be not in a position to accept him as a tenant in absence of any proof to be the heir of the deceased tenant. Bina Pani Pal died leaving his son Jagannath Pal who also died leaving his widow Gita Rani Pal who died subsequently leaving her surviving Chandi Charan Pal and Manick Pal. Hence, Bina Pani Pal''s natural heirs today, are Chandi Charan Pal and Manick Pal. Biswanath Pal could not come within the definition of first class heir under the Hindu Law of succession. Hence, he did not have any right to claim tenancy by way of inheritance even if he could prove his stay along with Bina Pani Pal. The first issue is thus answered in the negative in favour of the

respondent.

14. Lot was said on the second issue. From the judgment and decree of the Court below, we do not find any such issue being raised in the Memorandum of Appeal. In any event, it was a question of law that we intend to answer.

15. As per the Code of Civil Procedure, there can be joinder of parties on the self-same cause of action. There can also be joinder of causes of action against the same party. It is a case of joinder of parties. The plaintiff filed the suit as against two defendants as trespassers. The Court was satisfied, it was a case of trespass as the defendants did not have any right to claim tenancy. Just now, we have held so. Hence, it is a case of trespass simplicitor. When two persons trespassed into a premises, one having died and his heirs not continuing with such trespass enjoying such illegal possession, it is not necessary for the plaintiff to substitute the heirs of the deceased trespasser. It is ridiculous to suggest, the defendant who died and his heirs not claiming any right over the property, would unnecessarily be burdened with the litigation involving cost and energy.

16. The plaintiff filed the suit at a stage when according to him, two persons had trespassed into his premises. One having died during the pendency he would be entitled to continue the suit against the other. The decisions cited at the bar would relate to joint tenancy where in absence of co-tenant, there could not be any partial eviction against the other. Here, Mr. Gupta faulted in raising such proposition that we answer in the negative as against the appellant and in favour of the respondent.

RESULT

17. The appeal fails and his hereby dismissed. There would be no order as to costs.

Arijit Banerjee, J.

I agree.