

(2014) 07 CAL CK 0090**Calcutta High Court****Case No:** F.M.A. No. 900 of 2011

Tarapada Nandy

APPELLANT

Vs

Shib Kumari Devi

RESPONDENT

Date of Decision: July 14, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 9, Order 41 Rule 27

Citation: (2014) 4 CALLT 213**Hon'ble Judges:** T.K. Dutt, J**Bench:** Single Bench**Advocate:** Biswajit Basu, Ashit Kumar Chakraborty and Snbhajit Panja, Advocate for the Appellant; Pradip Kumar Roy, Advocate for the Respondent**Judgement**

Tapan Kumar Dutt, J.

The plaintiffs/appellants along with another person filed a suit for eviction and mesne profits (T.S. No. 52 of 1996) against the defendants/respondents praying, inter alia, for a decree for eviction and mesne profits in respect of the suit property. The case of the plaintiffs was that the predecessor-in-interest of the defendants, i.e. Agni Singh was a licensee in respect of certain land where the said licensee was allowed to run a brick klin. The plaintiffs further case is that the said Agni Singh died sometime in the year 1985 and the said license automatically terminated and the name of the said Agni Singh was recorded as anumati dakhaldar in the record of rights. The defendants were asked to vacate the suit property but. the defendants did not vacate and hence the said suit.

2. The defendants No. 1 and 2 contested the said suit by filing written statement denying the material allegations made in the plaint and alleged that the said Agni Singh started a brick manufacturing business at Mouza Keota Chinsurah since 1st April, 1946 and the said Agni Singh possessed a good number of plots surrounding the brick field for the said manufacturing business. It was also alleged in the said

written statement that the said Agni Singh took lease from Government of West Bengal of a certain area of land in Touzi No. 2050, 2051, 2052 and 2055 of Hooghly Collectorate at Char Khamarpara, Chinsurah by a registered lease deed dated 19th February, 1960 and the said Agni Singh has been possessing the suit property including his property continuously, peacefully and uninterrupted as of right. It also appears in the written statement that the said defendants took a stand that if it is ascertained that the suit property are of the plaintiffs, then in that case the defendants are entitled to get the suit property by way of adverse possession.

3. It appears that the defendant No. 3 contested the said suit by filing a separate written statement. It appears that the defendant Nos. 1 and 2 are the sons of Late Agni Singh and the defendant No. 3 is the grand son of the said Agni Singh.

4. The said suit, however, came up for final hearing and the learned Trial Court (Learned Munsif, Additional Court, Hooghly) by its judgment and decree dated 30th November, 1996 decreed the said suit by granting a decree for eviction in favour of the plaintiffs and against the defendants from the suit plots more fully described in Schedule "A" of the plaint and the plaintiffs were also granted mesne profit as per schedule "B" for three years and the defendants were directed to deliver up vacant and peaceful possession of the suit plots to the plaintiffs within two months. The learned Trial Court found that the said Agni Singh was in possession of the suit property as a licensee since the inception and, therefore, his possession could never be adverse until he has done some overt act which could have shown that he had acted adversely to the interest of the licensor. The learned Trial Court came to the finding that the defendants have miserably failed to substantiate that they have any vested right, title and interest in the suit property. Learned Trial Court found that the leased property is at Mouza Char Khamarpara and the suit property is within Mouza Keota. The learned Trial Court came to the conclusion that the said Agni Singh died in the year 1985 and the licence was automatically terminated.

5. Challenging the said judgment and decree passed by the learned Trial Court, the defendants preferred Title Appeal No. 3 of 1997 which was placed before the learned 2nd Court of Civil Judge (Senior Division) Hooghly and the said learned First Appellate Court by judgment and decree dated 30th April, 2010 allowed the said appeal and set aside the judgment and decree passed by the learned Trial Court and sent the suit back on remand for fresh trial after giving opportunities to both the sides to tender evidence as well as to make amendment of the plaint and the written statement.

6. Challenging the said judgment and decree passed by the learned 1st Appellate Court the plaintiffs/appellants filed the instant appeal and the instant appeal was admitted for hearing on the following substantial question of law.

"Whether the learned Judge in the lower appellate court substantially erred in law in remanding the suit for fresh trial holding that after pronouncement of the judgment

and decree in Title Suit No. 51 of 2003, the circumstances has changed inasmuch as in such a suit the plaintiff was not a party?"

7. The learned Advocate appearing on behalf of the appellants has submitted that a perusal of the schedule of properties as indicated in the lease deed of 19th December, 1960 would show that the said properties do not tally with the properties described in the schedule of the plaint. He has also referred to the schedule of the plaint. It will appear from the records of this case that the said lease of 1960 was granted by the State of West Bengal in favour of the said Agni Singh for a period of thirty years. The said thirty years expired sometime in the year 1990. However, the State of West Bengal did not renew the lease and as such the heirs of the said Agni Singh filed a suit for specific performance of contract and permanent injunction. It appears that in the said suit the plaintiffs were not parties. However, the said suit was decreed ex-parte and the ex-parte decree was granted in favour of the said heirs of Agni Singh directing that the defendants, i.e. the State authorities should execute and register a deed" of lease in favour of the plaintiffs (heirs of Agni Singh) as per clause 6(d) of Exhibit 23, i.e. the said lease deed of 1963. The schedule of property of the said 1960 lease deed is as follows:

"All that piece and parcel of lands measuring a total area of 6.399 acres in Touzi Nos. 2050, 2051, 2052 and 2055 of Hooghly Collectorate (Char Khamarpara) within P.S. Chinsurah, District Hooghly".

8. Clause 6(d) of the said lease deed of 1960 stipulates that the lessee will have the option of renewal of the lease on the terms and conditions as enumerated but subject to revision of rent in accordance with law for the time being in force. Thus, in terms of clause 6(d) the renewal is supposed to have taken place in respect of the same property which was described in the lease deed of 1960 as indicated above. However, it appears from a copy of the deed of lease dated 19th February 2007 which was executed pursuant to the decree for specific performance in Title Suit No. 51 of 2003, as indicated above that the following was leased out by the State of West Bengal in favour of the said heirs of Agni Singh. The said schedule of property as indicated in the lease deed of 19th February, 2007 is as follows:--

"All that piece and parcel of land measuring a total area of 6.399 acres in Touzi Nos. 2050 to 2055 of Hooghly Collectorate (Char-Khamarpara) comprises of Settlement Dag Nos. 3069, 3131, 3076, 3134, 3229, 5922, 5923, 3226, 3221, 3218, 3229, 3232, 3131, 3153, 3145, 3137, 3127, 3136, 3135, 3134, 3132, 3074, 3227, 3230, 3139, 3153, 3152, 3138, 3142, 3149, 3075, 3144 with other Dags of Mouza Keota, J.L. No. 7, Sheet No. 17 and 18 with P.S. Chinsurah, Dist. Hooghly and being Municipal Holding No. 361/324 and 360/323, mohalla-Mallick Jayanti Bag in Ward No. 2 of the Hooghly-Chinsurah Municipality, and said area is marked by RED border in the map attached hereto."

9. It may be noted here that a copy of the said deed of lease of 2007 is in the lower court records.

10. The learned Advocate for the appellants submitted that it is not understood as to how the description of the schedule property could be changed in the said deed of 2007 from that described in the deed of 1960 when the suit for specific performance for renewal of the lease in respect of the said property described in the deed of 1960.

11. It appears that before the learned lower appellate court the respondents herein filed three applications. One of such applications was an application under Order 41 rule 27 for bringing the said judgment and decree passed in the said Title Suit No. 51 of 2003 on record by way of additional evidence. The other application was also under Order 41 rule 27 for bringing on record the said lease deed of the year 2007 by way of additional evidence. The third application was an application under Order 26 rule 9 of the Code of Civil Procedure for appointment of local investigation Commissioner for repayment of certain properties. It also appears that the appellants had also filed an application under Order 41 rule 27 for bringing the C.S. record of rights relating to certain khatians with Touzi Nos. 2050, 2051, 2052, and 2055 respectively.

12. The learned First Appellate Court took note of the said applications but did not come to any conclusion as to whether such applications were allowed or not. However, the said learned First Appellate Court without going into the merits of the case remanded the said suit, as already noted above. The learned First Appellate Court was of the view that in view of the changed circumstances, particularly after the pronouncement of the judgment and decree in Title Suit No. 51 of 2003 and also after the execution of the lease deed by the Government of West Bengal there is necessity for hearing of the case afresh in the light of evidence likely to be produced by both the parties for the purpose of final determination of controversy between the parties.

13. Learned advocate for the appellants submitted that this was wholly unnecessary and the learned First Appellate Court could have decided the appeal on merits without taking into consideration any of such proposed additional evidence, as the evidence was sufficient to dispose of the appeal on merits.

14. It is not known as to how the description of schedule of properties of the aforesaid lease deed of 2007 could differ from the schedule of properties in the aforesaid lease deed of 1960 when the suit for specific performance of the agreement was brought by the heirs of Agni Singh against the State of West Bengal in view of the provisions of Clause 6(1)(d) of the said deed of lease of the year 1960 which was a matter of renewal. It was only expected that the renewal took place in respect of the same property which was described in the said deed of lease in the year 1960. As noted above the description of schedule of properties in the two lease

deeds are different. It is true that the respondents intended to bring on record the said lease deed of 2007 by way of additional evidence. The same could have been done by the learned lower appellate court by allowing the said lease deed to be brought on record by adducing additional evidence. The learned lower appellate court has sent the suit back on remand giving opportunities to the respondent herein to make application for local investigation. This in view of this court, would lead to fishing out evidence. The learned First Appellate Court having all the powers of the learned Trial Court could have brought the said lease deed of 2007 on record by allowing the defendants in the suit to adduce such lease deed in evidence. This would have enabled the learned lower appellate court to compare the description of the schedule of the property of the two lease deeds. This Court is of the view that the order of remand for a fresh trial, that is a *denovo* trial, ordered by the First Appellate Court was not warranted in the facts and circumstances of the instant case. The learned First Appellate Court made it clear that it did not decide the appeal on merits. This Court is of the view that the order of remand would only allow the defendants to fish out evidence and delay the proceedings.

15. In view of the discussions made above, the impugned judgment and decree passed by the learned First Appellate Court is set aside and the matter is sent back to the learned First Appellate Court to the said court to decide the Title Appeal on merits after allowing the defendants to adduce in evidence the said lease deed of the year 2007 and the judgment and decree passed in the said Title Suit No. 51 of 2003 by way of additional evidence and also the application under Order 41 rule 27 brought by the appellants thereby allowing the appellant to adduce in evidence by way of additional evidence, the said C.S. record of rights. On the basis of the evidence already on record and on the basis of the said additional evidence, if any, the learned First Appellate Court will decide the said Title Appeal on merits and dispose of the same as early as possible.

16. The present First Miscellaneous Appeal stands disposed of and no formal decree need be drawn up.

17. Let the lower Court records be sent back, and a copy of this judgment be communicated, to the learned First Appellate Court by special messenger and the special messenger's cost shall be put in by the appellant within one week from date. There will be no order as to costs.